

## Insights

# 'FINFLUENCERS' BEWARE – FCA CONSULTS ON NEW SOCIAL MEDIA FINANCIAL PROMOTIONS GUIDANCE

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## SUMMARY

The FCA is continuing to crack down on firms and 'finfluencers' using social media for non-compliant and illegal financial promotions and this week has announced plans to update its existing guidance on social media and customer communications, with a focus on preventing consumer harm.

In this article, we take a look at the latest rules and guidance in this space and the steps the FCA is taking to make sure it is in touch with the latest online behaviours.

On 17 July 2023, the UK's Financial Conduct Authority (FCA) published a consultation on proposed guidance titled 'Financial promotions on social media' (GC23/2) (the "Guidance Consultation"). The proposed guidance follows a campaign that the FCA ran earlier in the year, jointly with the Advertising Standards Authority, which warned 'finfluencers' of the risks of promoting financial products illegally.

The FCA's proposed guidance aims to clarify what is expected of firms when they are using social media channels to market their products. The current guidance (FG 15/4) was issued in 2015 and is no longer considered fit for purpose given the changing nature of the products available (e.g. TikTok, Twitch) and the development in how social media is now used.

So, what is the FCA so concerned about? The Guidance Consultation states that there has been a substantial rise in influencers being used by firms to promote their financial products and services on social media platforms, whilst often having little knowledge of what they are promoting. In turn, this has resulted in large numbers of illegal or non-compliant financial promotions which may be leading to consumer harm.

Investment and credit products are now routinely being offered by 'finfluencers' on their social media platforms. Promoting a regulated financial product or service without the approval of an FCA authorised person and providing financial advice without authorisation may be criminal offences.

The FCA is also particularly concerned about the rise in young consumers turning to social media for investment information. It believes that social media is “*becoming progressively more influential in driving behaviour*”. The proposed guidance specifically addresses social media influencers who are using their platforms to target younger users and potentially misleading them to invest in products they do not understand. We’ve seen the ASA already engaged in enforcement activities against misleading financial promotions, as well as the ICO regulating how consumers can be contacted for direct marketing purposes by regulated firms, with this development illustrating the joined up regulatory approach of the [Digital Regulation Cooperation Forum](#), which includes the FCA and the ICO.

## KEY TAKEAWAYS

Here are the key points raised in the Guidance Consultation:

### "TECHNOLOGY NEUTRAL"

The financial promotions rules are intended to be “*technology neutral*” - this means that the rules are designed to apply across all channels used to advertise to consumers, including the requirement that mandatory information, such as risk warnings, is prominently displayed. The Guidance Consultation reminds firms that any inducement to engage in an investment activity is capable of being a financial promotion, regardless of the social media platform being used, and including private or invitation-only channels such as Telegram and Discord.

Crucially, the design features of different platforms must not obscure the visibility of, or otherwise undermine the prominence and effectiveness of, risk warnings and other important or required statements in relation to certain products. The proposed guidance contains clear examples.

### REGULATORY PERIMETER GUIDANCE

An unauthorised person or influencer communicating a financial promotion, without both approval from an authorised person and an applicable exemption, will fall within scope of the financial promotions rules. Significantly, the FCA has also clarified that the application of the financial promotion regime to social media is unaffected by whether the influenced was financially compensated for any specific post.

### AFFILIATE MARKETING AND OVERSEAS FIRMS

The proposed guidance suggests that overseas firms that use social media to communicate financial promotions to UK consumers are also caught by the rules. The FCA is focused on the harm that can be caused where UK consumers interact with financial promotions, which appear to be from an FCA regulated firm, but are then directed to a non-UK entity. Firms should be routinely monitoring affiliates using their links, and should use mitigating strategies to avoid this harm such as separate social media profiles (UK-only) and geo-location techniques.

## HIGH-RISK INVESTMENTS

The financial promotions rules for high-risk investments (HRIs) and the firms approving them were recently strengthened by rules published by the FCA in August 2022 (PS22/10). There is now a higher burden on firms who approve the communications of influencers on social media in relation to HRIs. They must actively ensure that any communication they approve continues, throughout its lifetime, to comply with the requirements under section 21 of the Financial Services and Markets Act 2000. The FCA has also reminded firms that certain investments are banned from being mass-marketed to retail investors (such as speculative 'mini bonds').

## UNSOLICITED PROMOTIONS

The Guidance Consultation reminds firms of the legal requirements that apply to marketing through electronic media, including the Privacy and Electronic Communications Regulations 2003 and the Information Commissioner's Office Direct marketing guidance. It clarifies that where firms wish to follow up social media promotions with 'real-time' promotions, being a 'follower' or 'liking' a page does not constitute an existing client relationship for these purposes.

## CONSUMER DUTY

The Consumer Duty, which comes into force at the end of this month, will impose higher standards on regulated financial services firms, requiring them to deliver good outcomes for retail customers. The Guidance Consultation confirms that the Consumer Duty will apply both to firms communicating financial promotions and to those approving financial promotions on behalf of unauthorised third parties. Such firms will need to pay particular attention to the rules on monitoring and governance and the consumer understanding outcome (i.e. firms are required to deliver communications that meet their customers' needs and are likely to be understood to enable them to make informed decisions).

In the same week as the issuance of the Guidance Consultation, the FCA published a letter, sent jointly with the Information Commissioner's Office to the UK Finance and Building Societies Association. The letter clarifies that, while UK data protection law (in particular the Privacy and Electronic Communications Regulations (PECR)) allows consumers the right to opt out of receiving direct marketing materials (which preference must be respected by the firm), firms are not prohibited from providing communications to consumers when required to do so by the regulator. For example, under the Consumer Duty, firms should use their communications to support good retail customer outcomes. This means that even where consumers have opted out of direct marketing, firms will be expected to update them if there are better products available, for example with a better interest rate. Firms will need to steer a careful line, since the ICO's guidance indicates that a regulatory communication is also capable of being direct marketing for the purposes of the PECR. Much will depend on the context and content of the communication - a more neutral tone is less likely to be direct marketing than where a message actively promotes an initiative.

## **TIMELINE FOR THE PROPOSED GUIDANCE**

The FCA is aiming to have its social media guidance finalised later this year at which point the current guidance will be retired. Views and comments on the draft guidance can be submitted until 11 September 2023.

### **RELATED PRACTICE AREAS**

- Financial Regulation Compliance & Investigations
- Technology Transactions

## MEET THE TEAM



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