

EXPERT ANALYSIS

The Future of Social Media Use by Financial Institutions

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Social media is revolutionizing financial institutions' relations with consumers, but the laws governing these interactions are not keeping up. Regulations created before the social media era have not been updated to address newly arising issues and concerns. As a first step, the Federal Financial Institutions Examination Council released "Social Media: Consumer Compliance Risk Management Guidance"¹ in January, with final recommendations that may be released before the end of the year.

The FFIEC guidance does not create new regulations, but its purpose is clear: Financial institutions should create strong social media risk-management programs or face potential compliance and reputational risks in the near future. The FFIEC guidance addresses only *federal* statutes and regulations, not *state* laws, some of which constrain social media more tightly and impose harsher penalties, as evidenced by a California lawsuit (now dismissed) alleging violation of the California Online Privacy Protection Act related to the failure of an airline's mobile application to conspicuously post a privacy policy.² With or without further federal guidance, additional lawsuits at the state level will result from the rapid growth of social media, and some of these will target financial institutions, an industry that is now beginning to embrace social media.

Undoubtedly, both federal and state officials will eventually regulate social media in some manner, but uncertainty remains about their possible approaches. Moreover, different sectors of the economy may become subject to different rules, and the various supervisory agencies may take different tacks. For example, financial regulators, still reeling after years of legislative and regulatory upheaval in the post-Dodd-Frank era, may try to avoid the rulemaking process and create policy through enforcement actions. The Securities and Exchange Commission took this approach when it recently stated it would allow public companies to use social media to disseminate material information — simultaneously avoiding the formal rulemaking process and establishing permitted uses of social media.³

Carl Pry, senior director of Trelia Risk Advisors, an advisory firm that addresses the regulatory, strategic and operational issues confronting financial services firms, concurs. He says that for the near future, enforcement actions or threatened enforcement, as opposed to regulations, will determine what does and does not pass muster when financial institutions use social media.

WHY IS SOCIAL MEDIA IMPORTANT?

Social media is an integral part of the customer outreach programs of financial institutions. However, unlike traditional customer outreach, social media is dynamic: Consumers and financial institutions both create content, forming a two-way conversation. This approach allows social media to mutually benefit consumers and banks because two-way conversation is more robust

and potentially more meaningful to participants and may promote both customer loyalty and institutional responsiveness. But the downside for financial institutions is that legal compliance becomes more complex.

WHAT EXACTLY IS SOCIAL MEDIA?

The FFIEC defines social media as “a form of interactive online communication in which users can generate and share content through text, images, audio and/or video.” Social media takes many forms, including micro-blogging sites (e.g., Facebook and Twitter); forums, blogs, customer review websites and bulletin boards (e.g., Yelp); photo and video sites (e.g., Pinterest and YouTube); professional networking sites (e.g., LinkedIn) and virtual worlds (e.g., Second Life).

These examples are not exhaustive. For example, the FFIEC guidance does not address whether third-party sharing sites (Google Docs, Dropbox, etc.) are social media. The definition (“generate and share content through text”) is broad enough that it could encompass such services. One commenter to the guidance notes that this overly broad definition “could lead to requirements that institutions cannot, because of the changing and expanding nature of social media, comply with.”⁴

FFIEC GUIDANCE

As stated above, the FFIEC guidance does not create new requirements. One of its authors, Elizabeth Khalil of the Federal Deposit Insurance Corp., stated as much in June when she said, “It doesn’t create any new obligations or burdens.”⁵ It is simply designed as guidance to encourage financial institutions to comply with existing laws. Indeed, Khalil said financial institutions actually asked for regulatory input for their social media programs. Moreover, Khalil observed that the guidance was not a response to problems or issues involving banks’ social media programs, or an attempt to discourage banks from using social media.

Compliance and legal risks

The FFIEC distinguishes compliance and legal risks according to category and addresses existing laws within each category:

- Deposit and lending
- Payment systems
- Bank Secrecy Act/anti-money- laundering programs
- Community Reinvestment Act
- Privacy

The laws governing the categories above were not created with social media in mind; this makes compliance problematic. For instance, small screens, character limits and other format constraints of social media platforms complicate the task of making required consumer disclosures. Financial institutions looking for additional guidance on disclosures can look to the Federal Trade Commission’s recently updated Dot Com Disclosures,⁶ but significant implementation questions remain.

The FFIEC’s guidance omits mention of certain key laws with social media implications. Both the Communications Decency Act and the Digital Millennium Copyright Act contain restrictions affecting social media. A financial institution may open itself to liability simply by editing what the consumer writes on its social media pages or forums.

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Reputational risk

The guidance addresses reputational risk, which is defined as “the risk arising from negative public opinion.” The FFIEC breaks down reputational risk into the following categories:

- Fraud and brand identity
- Third-party concerns
- Privacy, consumer complaints and inquiries
- Employee use of social media sites

Fraud and brand identity

Financial institutions spend significant amounts of time and money creating brand identity. Social media, however, gives malicious users the ability to upend brand identity (e.g., by “brandjacking”). Since the FFIEC released the guidance, the websites and social media accounts of several prominent non-financial entities have been hacked. Financial institutions must adopt policies to detect and rapidly respond to fraudulent uses of their brands.

Third-party concerns

It is recommended that financial institutions regularly monitor the information they place on social media. However, as a practical matter, they may be unable to perform reasonable due diligence on social media providers. Providers may not consent to or cooperate with financial institutions in any desired monitoring process. Moreover, consumers may blame financial institutions for changes to terms imposed by third-party providers. Notwithstanding these potential problems, the guidance urges financial institutions to monitor social media providers for any changes to how content is displayed or data are collected and shared.

Privacy

Social media presents consumers with two somewhat contradictory problems: they are concerned with how their personal data are collected and used, yet they worry about “missing out” if they do not participate in social media. Financial institutions may be unable to control how social media platforms use the information they collect from customers, who may blame their financial institutions for inappropriate use or unauthorized disclosure of personal data.

Consumer complaints and inquiries

Financial institutions should have procedures for monitoring consumer complaints posted to non-affiliated social media sites and for considering whether and how to respond to consumer comments, including both legitimate and misleading complaints. Given the FFIEC’s broad definition of “social media,” as one commenter noted, this guidance could be deemed to mean “the institution must monitor the entirety of the Internet for complaints, inquiries and feedback.”⁷ It is not an exaggeration to suggest that this effort might be characterized as “mission impossible.” In addition, record-keeping requirements, although not limited to consumer complaints, could add compliance concerns because of the transient nature of much of social media.

Employee use of social media sites

Financial institutions should have appropriate policies to address employee participation in social media. These policies can range from ensuring that employees do not reach out to consumers without permission (potentially violating various advertising or disclosure laws) to providing guidelines for what information employees may post or display on their personal social media pages (since, for example, disclosing too much information on LinkedIn may enable hackers

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to identify those employees with the greatest access to private consumer information or may directly violate privacy regulations).⁸ Development of such policies by financial institutions will require consideration of First Amendment and freedom-of-expression issues and should involve a review of a range of laws designed to protect employees in the workplace.

Drafting a risk management program

The FFIEC expects every financial institution to create a risk management program that assesses and manages risks associated with its social media activities. The extent of a financial institution's social media activity, from active to nonexistent, determines the program's scope.

First, the risk management program should include a clearly defined governance structure, including direction from the board of directors or senior management regarding how and whether social media contributes to the financial institution's goals. Next, the governance structure needs to establish controls and ongoing risk assessment of social media activities.

The financial institution should create policies and procedures for using and monitoring social media. Drafting these can be complex because they must be clear and relevant to the particular service areas within the financial institution. For example, public relations and consumer complaint departments might require different policies because their goals and the laws they must comply with differ.

The risk management program should include "a due diligence process for selecting and managing third-party service provider relationships in connection with social media." However, the financial institution will not be able to conduct traditional due diligence such as auditing. Social media third-party providers have their own terms of use and privacy policies, some of which frequently change.

Finally, the risk management program should also include the following:

- An employee training program
- Social media monitoring processes
- Audit and compliance functions
- Parameters for evaluating whether the program is achieving its stated objectives.

CONCLUSION

Social media is fast becoming a vital part of the strategy of financial institutions to reach consumers, both new and old. Banks are justifiably concerned about adapting their compliance efforts to this emerging medium. Time will tell whether social media's longevity will rival its initial popularity. In the meantime, as one commenter on the FFIEC guidance noted, financial institutions do not want to be tasked with "[s]pending time and resources on determining the appropriate compliance for a medium that may dissolve and disappear in a matter of weeks or months."⁹

Even with the FFIEC's guidance, financial institutions now operate in the dark vis-à-vis social media outreach. When building their social media compliance programs, proactive institutions should consider not only the FFIEC guidance but also the many other laws with social media implications and broader legal principles such as freedom of expression. Review of enforcement actions and regulatory sanctions on financial institutions in the social media context can also help companies tailor their programs to minimize exposure to these risks.

NOTES

- ¹ Social Media: Consumer Compliance Risk Management Guidance, 78 Fed. Reg. 4848 (proposed Jan. 23, 2013), available at <http://www.ffiec.gov/press/Doc/FFIEC%20social%20media%20guidelines%20FR%20Notice.pdf>.
- ² *People v. Delta Air Lines Inc.*, No. CGC-12-526741, 2013 WL 1951360 (Cal. Super. Ct., S.F. County May 9, 2013), available at <http://www.infobytesblog.com/wp-content/uploads/2013/05/San-Fran-Supp-Ct-Delta-Dismissal-5-9-13.pdf>.
- ³ Netflix Inc. & Reed Hastings, Exchange Act Release No. 69,279, 2013 WL 5138514 (Apr. 2, 2013), available at <http://www.sec.gov/litigation/investreport/34-69279.pdf>.
- ⁴ Comment from Kelly McNamara Corley, Discover Financial Services, DFS Social Media Comments, Mar. 27, 2013, available at <http://www.regulations.gov/#!documentDetail;D=FFIEC-2013-0001-0064>.
- ⁵ Penny Crossman, *Author of FFIEC's Social Media Guidance Rebutts Objections*, AM. BANKER, June 11, 2013, available at http://www.americanbanker.com/issues/178_112/author-of-ffiecs-social-media-guidance-rebutts-objections-1059760-1.html.
- ⁶ FTC, Dot Com Disclosures (March 2013), available at <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.
- ⁷ Comment from Kelly McNamara Corley, Discover Financial Services, DFS Social Media Comments, Mar. 27, 2013, available at <http://www.regulations.gov/#!documentDetail;D=FFIEC-2013-0001-0064>.
- ⁸ Cyveillance, *FFIEC Proposes Social Media Guidelines*, June 7, 2013, available at <https://blog.cyveillance.com/legal/ffiec-proposes-social-media-guidelines>.
- ⁹ Comment from Brady Johnson, Randolph-Brooks Federal Credit Union, Proposed Social Media Guidance, Mar. 27, 2013, available at <http://www.regulations.gov/#!documentDetail;D=FFIEC-2013-0001-0075>.



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