

SOCIAL MEDIA COMPLIANCE ISSUES

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Introduction

Most of us have watched a video on YouTube, been invited to join LinkedIn and have at least heard of Twitter. FORC has a wildly active web forum, and rumor is that we will soon start posting pictures from FORC cocktail reception after-parties on FORC's FaceBook page.

Social media encompasses a variety of different mediums, but in essence it is a participatory relationship rather than simply a billboard on the web. Web 2.0 is interaction.¹ What does social media mean to the insurance industry? Is it a vehicle for advertising, solicitation or consumer services? Or is it an opportunity to publicly document certain communications that can be the foundation for regulatory violations or civil liability?

Social media lends itself more to a conversational and reactionary dialog to create community - the general public is not receptive to delayed or "over-lawyered" messages. It may be that pace of social media, not the actual laws and regulations, which make compliance difficult.

In the end, compliance concerns will still most likely focus on what is said, not where it is said in social media. However, social media may give rise to more opportunities for misinterpretation, reliance and ultimately, regulatory action or liability. Is it better to simply choose to stay out of certain web mediums, or can strategies be implemented to assure regulatory compliance?

Solicitation Issues

What activity rises to the level of solicitation, and when does it occur? This of course is elemental in determining if one must be a licensed agent. In Georgia, "[s]olicit' means attempting to sell insurance or asking or urging a person to apply for a particular kind of insurance from a particular company."² Most jurisdictions have the exact or similar language. Georgia also has specific regulations on life insurance solicitation.³

I performed a forty-eight state research project for an agency that related to the interpretation of the definition of "solicitation." The client is very savvy with regard to the capabilities of the Internet and technology and has a very unique model for solicitation and sales. Because of the unique model, it is difficult to describe exactly when the solicitation and the sale occurs. Each state varied not only in its ability and willingness to respond to my inquiries, but also in how it analyzed the solicitation issue.

Some jurisdictions take the position that simply making someone aware of the fact that certain insurance is available from a specific company does not rise to the level of "attempting to sell" or "urging a person to apply for" insurance. Other jurisdictions conclude that oral comments communicating such information require one to be licensed as an agent. Still others allow an unlicensed individual to provide a pamphlet with such information, and certain others allow pamphlets to be placed in plain view, but the unlicensed individual cannot physically give them to a potential insured.

Among the continuum of solicitation definitions, where does a "Tweet" fit in? If an unlicensed individual

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sends a message stating that Carrier A offers homeowners insurance, is that a solicitation? If Carrier B sponsors a blog on private passenger automobile coverage, and an employee of Carrier B answers questions about the type of coverage available from Carrier B, must the employee be licensed? If a license is required, how would Carrier B determine the jurisdiction of the poster that is a guest on the blog? If someone is an insurance agent in Second Life,⁴ do they need to be a licensed agent in order to advertise there for actual sales?

Advertising Material

Georgia requires that direct response advertising by an insurer for individual and group accident and sickness or life insurance be approved for use by the Commissioner of Insurance.⁵ In addition, Georgia requires carriers offering variable life insurance to "file all variable life insurance sales material, advertising material, and descriptive literature thirty (30) business days prior to use with the Commissioner."⁶ A carrier that seeks to use social media to advertise for direct response or for variable life insurance products in Georgia would need to work closely with the Georgia Insurance Department before beginning any type of interactive campaign. An interactive campaign that requires a filing or month-long delay for each response will not be very engaging for consumers.

Georgia has detailed regulations concerning advertising of life insurance and annuity contracts.⁷ Such regulations define advertisement as "verbal, printed, written or other material or communication of any type from any source which is designed to create or has the effect of creating public interest in life insurance, annuities or in an insurer . . . [or] agent . . . or induces or tends to induce the public to purchase, increase, modify, reinstate, surrender or retain a policy." ⁸

The Georgia definition of advertisement appears to encompass all facets of social media. Therefore, if a life insurance company is going to use Twitter, it may be prudent to either confirm there will not be any Tweets to Georgia residents or that the Tweet is compliant with the relevant Georgia laws and regulations.

Consumer Services

A carrier that desires to operate social media for existing insureds, such as a forum or blog, must take steps to assure that privacy compliance matters are addressed. In addition, procedures for promptly taking discussions offline for direct follow-up should be established. A generic coverage or claim question should not be allowed to devolve in a public manner. Lack of a deliberative response to a general question could later be used as a basis for an allegation of a violation under unfair claims settlement practices law. ⁹

Recommended Strategy for Compliance

a. *Understand the Operation of the Social Medium.* Twitter allows one to broadcast short messages to a large group. Because there can be no more than 140 characters in a Twitter message, it does not lend itself to complex communication. Podcasts are one-way messages and can provide a vehicle for more in depth information - the President of a carrier can speak directly to policyholders.

A blog can provide for in depth discussion, but it can also result in a dialog that varies significantly from the original post topic or question. Confusion and misinformation can appear, and the lack of a consistent and frequent moderator will likely cause the blog itself to be a failure. It is important to understand the operation of the specific social media so that a responsive and complete compliance process can be created.

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b. *Be Prepared - Consumers Will Participate and Expect Transparency and Responsiveness.* If the social media is interactive, participants will expect transparency and responsiveness. Responses prepared by committee will often be diluted and delayed. For certain social media, the format of information for anticipated contingencies can be vetted and ready for distribution ahead of time.

One must decide what the appropriate forum is relative to the compliance resources that will be available. Is the medium simply to be used to spread a brand name and heighten public awareness, or is it meant to be a resource for existing insureds? The amount of oversight, and process for review and response, must be calculated to be responsive to the expectations of the users. Compliance staff and social media staff should be involved in creating a prompt, and effective, internal compliance communication system.

For a forum to be viewed as responsive and trustworthy, a response to a post cannot take a week to prepare. It may be better not to enable certain types of communications with proposed and existing insureds if one will not have the resources to make the interaction a meaningful one.

c. *Contact the Relevant Insurance Department.* As we have all experienced, each state may have different interpretations of the exact same law or regulation. Social media in the universe of Web 2.0 is not likely addressed in any state insurance code. However, the analysis is still likely to be on what is said, not where it is said (i.e. FaceBook, Second Life, etc.), and Insurance Departments may provide guidance for anticipated social media projects.

Endnotes

1. Web 1.0 is a general reference for early, generally static websites. Web 2.0 is a reference to interactive websites.
2. O.C.G.A. § 33-23-1 (a)(15)
3. Georgia Insurance Regulations Chapter 120-2-31-.01 to 08.
4. Second Life is a virtual world where 1.4 million "residents" have occupations, earn currency, acquire real estate and have assets. Advertisers can use the website to create brand awareness for enterprises in real life. In 2005, Wells Fargo bought "Stagecoach Island" in Second Life. www.secondlife.com
www.wellsfargo.com/stagecoachisland
5. O.C.G.A. § 33-6-4 (b) (13) (C).
6. Georgia Insurance Regulations Chapter 120-2-32-.04 (4).
7. Georgia Insurance Regulations Chapters 120-2-11-.01 to 14.
8. Georgia Insurance Regulations Chapter 120-2-11-.03 (4).
9. O.C.G.A. §§ 33-6-30 to 37.