Social Media and Implications Related to Insurance Operations

By

Richard J. Fidei, Esq. and Timothy F. Stanfield, Esq.

Technology and internet connectivity, including social media, have saturated our society over the last decade. Social media allows multiple users to openly exchange real-time information through internet platforms. Social media platforms are ever evolving and have revolutionized communications and commerce on a global scale.

The insurance and financial services industries have recognized social media's power and have leveraged this media to reach the world with one click of the button. There is endless potential for establishing channeled communications with thousands of consumers and potential customers to promote greater brand awareness and overall consumer satisfaction. While the possibilities are staggering, there is little doubt that new strategies and innovations will be implemented before the ink on this article is dry.

Social media has demonstrated usefulness for insurance carriers and producers, as well as consumers. Carriers and producers can interact with existing and potential clients on a regular basis, allowing them to build trust with their customer base. Feedback from current insureds can be used to create strategies to attract new insureds and information about products, services and benefits can be freely exchanged. Social media is also used to provide information to policyholders during times of need and to enhance one's community profile through charitable and civic undertakings. Carriers and producers also use social media platforms to communicate with other insurance carriers, trades and professionals. Consumers use social media to share insurance information with other consumers, make recommendations, provide feedback, and register complaints, all of which may be individually useful or more broadly harvested as representative of community thought.

For the insurance industry, the primary benefit of social media is as an advertising and marketing tool. Although regulatory standards may not seem to neatly coalesce with the far reaching, instantaneous world of social media, many, if not most, communications posted on social media platforms may trigger the application of compliance issues with existing regulations relating to insurance communications.

Currently, forty-five states have extended their advertising laws and regulations to include advertisements posted on the internet. In states that expressly regulate internet advertisements, social media posts meeting the definition of an advertisement will be regulated as such. Additionally, the Federal Trade Commission (FTC), the Financial Industry Regulatory Authority (FINRA) and the National Association of Insurance Commissioners (NAIC) have all issued white papers, rules and advisory opinions on the use of social media. All three organizations concur that licensees engaged in social media activity must ensure postings are compliant with the applicable jurisdiction's statutes and regulations pertaining to communications with consumers.

The Social Media Working Group (SMWG) of the NAIC Market Regulation and Consumer Affairs Committee prepared a white paper focused upon regulatory and compliance issues associated with the use of social media. This white paper was adopted by the Executive Committee and Plenary of the NAIC on August 14, 2012. The white paper was intended to provide guidance on some of the key issues to consider with the use of social media in the insurance industry.

The SMWG white paper states that a licensee's policies, procedures and controls relating to social media usage must comply with existing statutes and regulations pertaining to issues such as advertising, marketing, record retention, consumer privacy and consumer complaints. The NAIC also recommends that policies related to social media be communicated to a carrier's appointed producers. (National Association of Insurance Commissioners, *The Use of Social Media in Insurance*, 4 (Dec. 20, 2011)). The NAIC relied upon guidance previously issued by FINRA, which is an independent regulator of U.S. securities firms, including those that offer financial products and services, such as annuities.

The most unique characteristic of social media discussed by the NAIC and FINRA related to the differentiation of static and interactive content and a licensee's responsibility for content posted by third parties. The collaborative nature of social media platforms lends itself to the posting of both static and interactive content. Content that remains posted until it is changed by the original author or an authorized third party is generally defined as static content. This is similar to traditional forms of advertising, such as print, radio or television content. Due to the similarities with traditional forms of advertising, postings of static content generally need to comply with all insurance statutes and rules applicable to the type of communication represented. For example, the New York Insurance Department previously issued a Circular Letter stating that the maintenance of a passive website containing specific information or advertisements relating to insurance products or services does not constitute a solicitation under New York law, but may trigger laws and regulations relating to advertisements or other regulated communications. (N.Y. Ins. Dept. Circular Letter No. 5 (Feb. 1, 2001)).

Absent fraud, it is generally not difficult to establish responsibility for a communication in a paper based world. However, postings of interactive content over the internet are more difficult to address. Generally, interactive content is a real time social media post involving more than one party and often includes third party posts, links and content. (National Association of Insurance Commissioners, *The Use of Social Media in Insurance*, 4 (Dec. 20, 2011)). The medium and instantaneous nature of the interplay involving interactive postings do not lend themselves to compliance with certain standards that may involve internal company pre-approval or regulatory pre-filing or pre-approval requirements. The SMWG encouraged insurance regulators and compliance professionals to take a more nuanced, highly fact specific approach to analyzing whether interactive postings are subject to current insurance regulations.

Generally, third party posts, whether authored by customers or non-associated persons or entities, will not be attributable to an insurer or producer. However, there are situations where an insurer or producer will be held responsible for third party posts.

Both the NAIC and FINRA have recognized scenarios where a licensee may be responsible for the social media posts of a third party under the "adoption" and "entanglement" theories. If a licensee is involved in the preparation of the content of a third party post, the "entanglement" theory will attribute the post to the licensee, who will be responsible for its content. As an example, an insurance carrier may be responsible for a social media posting of a producer that includes content prepared by the carrier.

Third party content explicitly or implicitly endorsed by a licensee may be attributable to the licensee under the "adoption" theory. FINRA has issued guidance providing that a license will be responsible if a third party posts a link on the licensee's social media platform to other websites the licensee knows or has reason to know contains false or misleading information. According to FINRA, by failing to remove the link the licensee is implicitly endorsing and adopting the information on the linked website. (FINRA, *Guidance on Social Media*). The NAIC did not specifically follow this standard in its white paper. Interestingly, the Communications Decency Act of 1996 (CDA) states no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. (47 U.S.C. § 230(c)(1) (2006 & Supp. 2012)). It is unclear how the concepts of the CDA may be applied to a scenario involving insurance licensees.

Of course, it is imperative that all posts be accurate and timely. The NAIC and FINRA concur that posts determined to be the responsibility of a licensee must comply with existing regulations, including, those related to unfair and deceptive trade practices, advertisements, referrals, recommendations, testimonials, claims and records maintenance. FINRA provides a limited exemption from preapproval requirements for communications with consumers for participation in online interactive forums, which FINRA considers a public appearance.

The FTC advises careful analysis of the relationship between the poster of a potential endorsement on a social media platform and the licensee. (FTC, *Guidelines Concerning the Use of Testimonials in Advertising,* Federal Register Vol 74, No 198 (Oct. 15, 2009)). If the relationship between the poster and the licensee to which the post was directed is such that the post can be considered sponsored, then the post will be considered an endorsement. This carries various disclosure requirements that may not otherwise apply.

Licensees must also be aware of state and federal privacy laws when communicating through social media. The Gramm-Leach-Bliley Act (GLBA) imposes restrictions on the use of "nonpublic personal information" (NPI) by "financial institutions," including insurers. NPI is any "personally identifiable financial information" that is collected about consumers in connection with providing an insurance or financial product or service. (Gramm–Leach–Bliley Financial Modernization Act §§

501-509, 15 U.S.C. §§ 6801-09 (2012)). Examples of NPI include, an individual's name, address, income, Social Security number, account numbers and payment history. All precautions must be taken to ensure that a consumer's NPI is protected when a licensee is utilizing social media.

Insurance carriers are now investigating potential fraud by combing social media platforms for content including inculpatory evidence on relevant issues, such as claimant or plaintiff physical activities in workers' compensation or third party liability cases. Due to extra-contractual liability exposure for non-uniform claims handling practices, insurers should create standard protocols for the use of social media in claims investigations. In another context, the question has been raised as to whether a carrier may use false identities, or other surreptitious methods, when seeking information about a claimant through a social media platform. Minnesota specifically prohibits insurers and insurance agents from obtaining information relating to an insurance transaction by pretending to be someone else. (MINN. STAT. § 72A.493 (2012)). In an intuitive sense, this type of activity also implicates other insurance regulations, such as prohibitions against false, deceptive or misleading trade practices.

Some of the nuiances involved in the potential application of regulatory standards to the use of social media by licensees have been less obvious than the commercial potential of social media. However, the possibility of regulatory action related to a licensee's use of social media platforms should not be ignored. All available guidance advises licensees to treat social media posts no different than paper-based communications and apply the appropriate laws and regulations applicable to the content of the message. Licensees will need to independently analyze the benefits, utility and specific uses of social media and identify the unique risks associated with their use of this pervasive, interactive business tool.

ABOUT THE AUTHORS

Richard Fidei, a Partner with Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb, leads the Firm's Insurance Regulatory Law Division. He represents insurance and reinsurance companies, brokers and other related entities in a broad spectrum of regulatory, transactional and corporate matters.

A member of the Florida and Pennsylvania Bars, he serves as national General Counsel to the Association of Insurance Compliance Professionals and as President of its Gulf States Chapter. Mr. Fidei is also a member of the Federation of Regulatory Counsel. He is an experienced legal instructor and lecturer and is a frequent national speaker at insurance and reinsurance conferences. Mr. Fidei may be reached at (954) 332-1758 and rfidei@cftlaw.com.

Timothy Fordham Stanfield is an Associate in Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb's Lobbying and Governmental Consulting and Insurance Regulatory Law Divisions.

Based in the Firm's Tallahassee office, Mr. Stanfield represents clients in legislative advocacy and governmental affairs. Mr. Stanfield has testified before the Florida Legislature and various State Executive Agencies, and has handled successful administrative rule challenges.

A member of the Florida Bar, Mr. Stanfield previously held the position of Assistant General Counsel to the Florida League of Cities. Mr. Stanfield may be reached at (850) 577-0398 and tstanfield@cftlaw.com.