

Social Media in E-Mail Campaigns

Key Legal Issues

The following is a brief summary of key legal issues that may arise for e-mail campaigns that incorporate social media aspects. In some cases, the issues discussed may relate to legal risks for the campaign's service provider. In other cases, the issues may relate to risks for the campaign's sponsor, although the service provider may be able to spot these issues and raise them with the sponsor. Please note that the following information is general in nature; you may wish to consult with legal counsel to discuss any specific circumstances.

Online Agreements: Best Practices

- Almost all social media platforms use online agreements to govern access to their service, such as a Terms of Use for consumers and API terms for developers. A company should be aware of the online agreements that it enters, and the terms and restrictions contained in those agreements. Employees should be trained to recognize when an online agreement is presented, and to consult a representative of the legal department or another responsible individual before accepting the agreement.
- If a company is acting as a service provider for another company, it is possible that some online agreements accepted by the service provider could be binding on the client company. A service provider should develop policies and procedures to keep its clients informed of any such agreements encountered by the service provider in the course of performing its duties.

Online Agreements: Sample Restrictions

- If an e-mail campaign will involve the use of data or functionality from a social media platform, the sponsor and the service provider should confirm that such use is consistent with the platform's online agreements. The following are examples of potentially applicable restrictions from Facebook's terms.
- Facebook Data Restrictions. For any data received from Facebook, a company must obtain explicit consent from the user who provided such data to Facebook before the company uses it for any purpose other than displaying it back to the user on the company's Facebook app. In addition, a company must not transfer any data received from Facebook to (or use such data in connection with) any ad network, ad exchange, data broker, or other advertising or monetization related toolset, even if the user consents to such transfer or use. Further, a company must not use any user-related data received from Facebook in any advertising creative, even if the user consents to such use.
- Facebook Plugin Restrictions. A company cannot sell or purchase placement of a Facebook plugin such as the "Like" button, and an e-mail campaign cannot incentivize users to Like any Facebook Page other than a Page belonging to the campaign (i.e., Brand A's campaign cannot encourage a user to Like a Page belonging to Brand B). An e-mail campaign is also prohibited from incentivizing

the use of Facebook's "social channels" — for example, a campaign cannot offer a reward for posting a message on a user's Wall.

Consider Potential Endorsement Issues

- The Federal Trade Commission's endorsement guides address certain circumstances under which an endorsement may be deceptive. An e-mail campaign may raise such endorsement issues if, among other things, the campaign offers recipients an incentive (such as a coupon code) for posting a positive message, such as a Tweet, about the company or its products on social media. If a campaign appears to raise such issues, the sponsor should consider whether it is necessary for the users to include a disclaimer (such as "#ad") on the incentivized social media message.

Use of User-Generated Social Media Content

- An e-mail campaign may encourage recipients to interact with the sponsor through social media. Consider whether the sponsor is obtaining the necessary rights to use the social media content generated by these recipients, especially if the sponsor wishes to use the content for further promotional purposes.
- Often, a social media platform's online agreements will clarify how a company can and cannot use user-generated content posted to the platform. (For example, Twitter typically provides a broad — but not all-encompassing — right to use content posted on Twitter, whereas Instagram typically does not provide such rights.) If possible, a sponsor will want to obtain these rights directly from the users, and this process often begins with the sponsor's initial e-mail campaign communication.
- For example, if an e-mail campaign encourages recipients to post content using the sponsor's promotional hashtag, the sponsor may want the right to display such tagged content on the promotion's website. At a minimum, the e-mail campaign should inform recipients that the use of the hashtag will constitute permission for the sponsor to use the tagged content, including for promotional purposes. The e-mail campaign could also include a link to a short registration process, where the user would click a button to indicate his or her acceptance of the complete rules for participation. The ideal approach will depend on the specific social media platforms involved, and the sponsor's desired use of the social media content.

Social Media Accounts

- If a sponsor's e-mail campaign will involve the use of social media, the service provider and the sponsor may wish to confirm that any applicable social media accounts are the property of the sponsor or its vendors (such as its ad agency) and not the personal property of an employee. In addition, such social media accounts should use two-factor authentication (if available) for additional security.