Social Media Guidance and Compliance Update for Community Banks
The Informed Banker: A Harland Clarke Speaker Series

Presenter: Christine Ahlgren, Harland Clarke Payment Solutions
Presenter: Denyete Depierro, Vice President & Senior Counsel, ABA Center of Payments and Cybersecurity

Jeb: Good day, and welcome to Harland Clarke's Speaker Series. Today's topic is Social Media Guidance and Compliance Update for Community Banks. This audio cast is being recorded, and you will be sent a link for playback next week. If you have questions, please use the chat box located in the webinar control panel. Your questions are private and are only seen by the presenters. I'd now like to turn over to our host, Christine Ahlgren of Harland Clarke Payment Solutions. Christine, you have the call.

Christine: Thank you, Jeb. We're very excited to continue our Harland Clarke Informed Banker Audio Series today where we hope to answer all the questions you have and those you didn't know to ask on Social Media Compliance for Community Financial Institutions. This monthly series, which is exclusive to Harland Clarke clients, is designed to connect you with industry experts who will share their insights on the topics you have told us you want to hear about. For today, we received decisive feedback that navigating the social media landscape within a financial services industry was of a keen interest to you.

Denyette Depierro, Vice President & Senior Counsel for the Center of Payments and Cybersecurity at the American Bankers Association is here today to provide you with the tools you'll need to more effectively navigate the social media space within the confines of the many regulatory bodies governing this activity. Denyette will leave plenty of time for questions and answers at the end of the presentation, but feel free to type any questions you may have into the chat box on your screen at any time. We'll get to as many questions as we can and are allotted 30 minutes.

I hope that after today's call, you'll be able to take a couple of minutes to fill out the post-program survey we'll be emailing you. This will help us determine the best topics for the next two sessions of the Informed Bankers Series which are scheduled for August 11th and September 8th, which are both Thursdays at 2 o'clockEastern. We'll gather all your feedback and announce the topic for our August call within the next couple of weeks.

With that, I'm pleased to formally introduce today's speaker, Denyette Depierro. Denyette joined the American Bankers Association in March of 2008. Prior to joining ABA, she was the Legislative Counsel at the Independent Community Bankers of America, or ICBA, in Washington, DC and the California Independent Bankers in Newport Beach, California. Denyette received her JD and Masters from the Pepperdine School of Law where she was a Fellow Abastras Institute for Dispute Resolutions. She also received a BA from the University of California, Santa Barbara, and was a European Union Fellow at the University of Pujda in Pudja, Italy in Development Economics. At ABA, Denyette focused upon the regulation of cybersecurity, privacy, data security, and emerging trends in banking, including technology, virtual currencies, and social media. Welcome, Denyette. Before we get started --

Denyette: Thank you.

Christine: You're welcome. Before Denyette gets started, we'd like to take just a moment to understand where you all stand in your social media journeys. Jeb, if you would put up the polling question for the change of view; great. Just take a look at this polling question on your screen and tell us how does your bank fare in the social media stage? Do you have no presence at all, or, have you been active in one or more social channels already,? or, Aare you planning on initiating that activity within the next 12 months? You can just choose one of the answers in that panel in front of you, that'd be fantastic. Just so you know, all the answers are anonymous. Jeb will show us the tallies when it's ready.

Wow, it looks like they have a lot of people that are actually using social media channels, which is fantastic. That makes Denyette's job just a little bit easier. With that, I think it makes sense, Denyette, for us to start this conversation addressing the regulatory environment that's shaping the opportunities and the limitations for financial institutions and the social media channels. First questions is which federal regulators examine social media use by banks"?

Denyette: Thank you, Christine. This is actually probably one of my most popular questions I receive. I think one of the unfortunate things – if the – in knowing that – what I love about having to – been able to do that survey early is it kind of lets me know what our audience looks like, and one of ABA's primary criticisms of the FFIEC guidance that came out in 2013, which gives some of the overview – the risk management framework for social media, but it was very focused on FDIC's, Fed and OCC regulations, and there are a lot of other regulatory financial services regulators, and even in some cases, nonfinancial services regulators, that do have regulations that cover the interaction between be it a company or a financial services company and advertising, and the public. If you were to read a strict read of the FFIEC's guidance, would make you think that none of those other agencies exist, and the only agencies, the only regulations you need be aware of when it comes to how do you behave on a social media platform as a bank, it would make you think that it's only those three regulators, and honestly, maybe only your regulator you had to worry about, and that's not technically correct.

I always like to remind banks that there is the SEC ,and FINRA, as well as the CFTC. Now with the SEC, if you have a bank that is publicly traded or registered with the SEC, then you need to be concerned about what you're saying on social channels about your economic performance. If there are restrictions, like your quarterly financial reports, that those can only be released on certain dates and only on certain channels, normally by fax or some kind of a media release. You need to be careful that you're not revealing additional information on social channels outside of that kind of quarterly quiet period. That's one of those times where we definitely want to be careful about what is your -- if your chairman, your CEO, members of your board, your senior executives wants to be tweeting, they absolutely can be. They can have a private Twitter channel. Some CEO's have done great work reaching out to the community individually, but you need to be very careful about what they are saying.

What I don't want a board member to do is walk out of a board meeting saying, "Hey, we're having the best returns we've had in three years," and they're, again, publicly traded institutions and they're revealing what could be kind of insider information outside that quarterly reporting period. You have to be very careful if you're a publicly trading bank. What if the SEC said about your communications, about your economic performance to the public, and you're making sure that that is not happening on a social channel.

Again, if you have a bank holding company structure with subsidiaries or affiliates, broker dealers, registered advisors, there are, again, restrictions on how those individuals can communicate with the public, how they can advertise, how they can talk about their track record as a trusted advisor, and you need, again, be careful about how you are. Number one, be aware that those restrictions exist, and number two, are you allowing the individuals to interact on a social channel. Some banks are absolutely allowing employees to interact on social channels as a form of kind of personal marketing, so if you have a lending officer, there are some banks that do have a lending officer with a personal page to see those interactions. There are some banks that say nobody's allowed to have those interactions. There's no right or wrong answer. Obviously, one activity is more risky, and you have to determine as an institution can you manage that risk.

The other one to be aware of is CSPV and the FTC. when it comes to UDAAP and false advertising. CSPV obviously has authority, bank-specific authority, for banks over 10 billion, for banks under 10 billion; they write a lot of those regulations. They're obviously very focused on UDAAP and any kind of false advertising that's facing consumers. The FTC actually has similar authorities that's not necessarily specific to banks, but again, if you have nonbank facilities or subs in a bank holding company, there's a significant instance or incident, the FTC could still get involved. They do actually have a prohibition on – the FTC has a general prohibition on companies that are promoting their own products but not revealing that it's an employee who's making those claims or a user; in a sense means, if there is a Yelp ad and one of your employees went onto that the Yelp ad and wanted to say a Yelp review, and an employee of your bank wants to go onto Yelp and say what a – not – but a Yelp review, and an employee of your bank wanted to go onto Yelp and say what a fantastic bank you are,. they can actually do that, but they need to reveal that they are a paid employee of the institution. “I work here and I think this bank is great.” To just make a claim about a product that you were employed by that product producer is actually a violation of the FTC rules. One would also argue that from a reputation perspective, if you have employees making claims about your institution and not revealing that they're employees, from a reputation perspective, that could have an impact.

That's where I always like to make sure that banks understand that, yes, there's the FFIEC guidance, there's the advertising rules with the Fed, the FDIC, and the OCC, but there’s a lot of other issues about content and your outreach to the public that banks need to be aware of when they’re thinking about what do they want to have posted on their social channels, as well as who should be posting. That’s my initial disclaimer as to who is your regulator. It’s a much more complicated answer than one would expect.

Christine: Yeah, that’s a lot to think about at once, isn’t it, Denyette? With all this evolution in media, the way things are changing, technology is evolving so rapidly, what happens to those old rules for TV, and print, and radio? Do those apply? Do they change? What’s happened with that?

Denyette: That is another very good question, and one that we really wrestled with when the FFIEC, the initial proposal, came out, even the quiet conversations we were having with the agencies before the guidance came out, which was we have all of these rules and regulations about advertising, and those rules and regulations were really created with an advertising geography that was print, radio, and TV. There was no real contemplation of what we have now with this digital media. As we all well know, you really can’t even develop a social media advertising policy because what you’re able to do on Facebook, because of your ability to customize and the number of characters you can use, is very different than what you can do on Twitter, which is different than what you can do on Instagram. The level of customization, and your ability, and how much information you can get out in one post, is very different. Trying to apply these old rules and these old restrictions and closure requirements into new media is extremely difficult.

There is a general principle, and we heard this from a number of the regulators, that banks need to be using their reasonable judgment. That doesn't give a whole lot of comfort, but there is some bandwidth that you have to look at these old rules; you have to look at the digital technology. It's not even the digital technology that you have, but the actual restrictions of that particular page, and those restrictions are going to be ever-changing. As we well know, we had Myspace and we had Friendster, and those have gone by the wayside; nobody uses those anymore. We have Facebook, which just in recent days was actually surpassed by Pokémon Go as the most-downloaded, most-used digital platform at the moment, although Pokémon Go is not necessarily a social media channel.

Just to give you a sense of the trajectory that we're seeing is the channels that we're using now are not going to be the channels we're using in five years. In the channels that you're using now, the parameters of how you use those channels is going to be changing over the next five years. Even now, Snapchat has surpassed Twitter, the idea being that you're going to be having to use a certain amount of reasonable judgment to translate these old rules onto new media. I very much suggest that means not that you ignore the old rules, but that you get to be very familiar with those old rules, and then you need to be able to make the argument both to yourself as well as to your regulator and to your examiner that we understand the rule means X, the digital platform that we're using has these restrictions, and this is how we're having to apply those old rules to new media to try to make this work. That may also mean there may be certain forms of advertising that you can use on one channel that you can't advertise on other channels because maybe you can't make those disclosures work.

This is not necessarily a Band-Aid to say the rules don't fit, so we can do anything; it's about having a more nuanced idea about how the rules fit and which channels may be more appropriate for some products and services than others. It is messy. We did ask the agencies to actually instead of coming out with the FFIEC guidance that gave this very broad, vague overview of how social would work within a regulated framework to actually go back and change those individual rules where there was a problem, or to remove or somehow create more nuanced applications, something like the one-click rule, perhaps even like the Equal Housing Lender logo, and they opted not to do that.

We are stuck with this reasonable judgment in what can be a very strict framework that you're subject to in examination, and it gets very messy. I wish the answers were cleaner than that, but they really aren't at this point, and I don't see the agencies make a whole lot of change. With the OCC taking on this innovation project, we may see more willingness from them to look at digital, generally speaking, both mobile and digital payments and digital advertising, in a new way, and maybe give us some more nuanced regulation, but that is not their priority right now. Advertising on social media is not the agency's priority right now. I wish there were better answers than that.

Christine: Clearly there's still a little bit of soup going on in terms of how this is going to work and the best judgment component to this, which is important. Maybe we should shift to something a little more fun. What about lotteries, giveaways, and prize-linked savings accounts? I know there's this growing interest in these prize-linked, or PLS, savings accounts. Can you explain for us the difference between those bank lotteries and raffles, and what's prohibited and what isn't? What do banks do here in this space?

Denyette: Again, it's a fairly convoluted issue. I only included this into a session about social media because there's a lot of interest on how do I promote – I'm going to use the term sweepstakes and giveaways, which may be permissible, versus lotteries and raffles, versus I want to be sure that I'm promoting what's hot and happening in the community, which may be some kind of lottery or raffle, and how does social fit into the prohibition on lotteries and raffles, especially when we recently had legislation that allows certain kinds of lotteries and raffles. Let me give you a little bit of background historically. It might make a little bit of sense.

Way back in the day, I'm talking the 1800s and 1900s, you could actually walk into a bank, and you had your $5 salary from having worked that week, and you could actually make the choice – the bank would actually sell something like Powerball at the teller window, so you could either take your $5 and put it into a savings account, a certificate of deposit, and it be there next week, or you could buy a Powerball ticket, give your entire $5 to the bank, and they put your name into this fund, and you may or may not win. There was this equivalency between what we will consider a real savings account and playing Powerball.

What the agencies did is they prohibited banks from offering those kinds of lotteries in the bank at the teller because of this concern about the equivalency between savings and playing the lotto. That's really where the heart of this comes form. It seems like a strange rule into your realize in the past somebody at the bank was making a really poor decision, and probably making ridiculous profits off of it, especially if you consider the large number of immigrants we were getting at that time, low literacy, low financial education. Why not go to Vegas and/or save my $5?

With that, there's three things you need to realize. A number of banks have very conservative positions when it comes to lotteries and raffles for reasons outside of regulation. I've spoken to a number of bank compliance officers, even bank CEOs, who do not want to be involved in lotteries and raffles because they do not want to have to pick and choose between which kid's Little League team of which teller is going to get supported by the bank. They don't want to have to pick and choose between community events and community charities as to which they will or will not support. That is a bank policy about your community involvement, and even maybe an HR issue. That is not necessarily stipulated in the regulations.

This is where, again, I oftentimes tell people you need to refamiliarize yourself with what is in the regulations, which may in fact have evolved differently than where your bank policy and procedures are, even if your bank policies and procedures are 20 years old. Oftentimes, what happens is, and the OCC in particular has a number of interpretive letters on this, that there's a bit more flexibility on how a bank can participate in lotteries and raffles than many banks anticipate. You can donate an item to a community lottery. You can be listed as the donor of that item in materials. You can sponsor generally a community event. As a sponsor of that community event, maybe your bank name has been listed on materials that they sponsor, and those materials offered also advertise a raffle. That's actually allowable.

The concern is that the bank is not taking an affirmative action to advertise. Again, you do not want to be advertising your participation in those events on your social page, but if that event wanted to advertise your participation, that's different. This is kind of this arms-length difference there. If you do have any kind of sweepstakes giveaway, there can be no fee, and it has to be open to the public. Going back to that earlier example I gave of playing Powerball at the teller window, you don't want to have any kind of transaction for funds. In legal terms, we call this consideration. No transfer of money, no transfer of credit.

Consideration, also, many times is considered the obligation to become a bank customer. It has to be totally free and open to the public. You can't advertise. There cannot be any advance of money or credit, or any obligation to become a customer. You want to avoid any kind of game of chance. If you had a game of skill, in some instances even a bank sponsorship of a 5K race where there's a person who was an obvious winner, and maybe there's money given to the first, second, and third winners, that is not a lottery. Even though it does say in the language something about competitions or compete, they really were focused on their game of chance.

The other thing you need to be concerned about if you're doing any kind of lottery, or even a giveaway or a sweepstakes, and I've seen a number of banks want to do these things on a social channel, they want to do have a prize for the best Christmas display, the ugly dog contest, and these kinds of things. Be very concerned about your reputation risks. Give close attention to what your rules of engagement are and what are the rules for that competition. You need to closely follow and manage the comments that are coming in.

I saw one instance of a Christmas light display contest that was supposed to be just a friendly local contest in a local town that got pretty ugly. The bank needs to be in there managing that contest, and if they needed to, to terminate the contest if there was a violation of those rules of engagement. You can't just throw this out there and assume people are going to be well-mannered. Have clear instructions, clear rules, and always maintain your ability to step in and terminate the contest or in some other way keep your hands on it because your reputation could be at risk.

The other piece of it is the PLS, which is the prize-linked savings accounts. There was actually a federal law in December of 2014 and some of 2015 that allowed this exception to lotteries. That is actually a prize-linked savings account allows, in a sense – they're all slightly different, and I would encourage people on the call to go online and just Google prize-linked savings accounts or savings raffles. Some of them call them a savings lottery. Just see what's available in your town. Credit unions and banks have been doing this for a while. It actually started as a credit union test program, another credit union first.

The prizes are anything from monthly, quarterly, to annual. They can be $75 for a minimum. Every time you put $10 into your account, you get a chance to win up to $75 maybe monthly; it's $200 quarterly. Some of the annual prizes can be quite large. I saw one that was a trip to Europe. I saw others that were dollars, so significant but not necessarily life-changing, nothing that would harm the safety and soundness of your institution.

There's a growing interest in those types of accounts, and they are allowed. The federal law that passed was called The American Savings Promotion Act. It was not necessarily well-advertised. If you see a competitor in your area who is offering these, that is a legal product, and it exists as an exception to the usual prohibition on lotteries.

Christine: So, Denyette, a lot to cover in a short time. We have five minutes left, and we have a number of questions. I do want to just give you a moment to talk about analytics and flow reports. I think it's important to talk to this group about why marketing analytics are so important and reviewing the effectiveness of the social media and customer engagement components.

Denyette: Sure. I wanted to touch on this briefly, and luckily it's briefly because we only do have five minutes left. There is an obligation under the FFIEC guidance to have reporting to your board as to the success and efficiency of your social media campaign. This, again, was are you basing your social media strategy.

When many banks started using social, social was its own stand-alone thing. Now most banks have brought social into their communications and general marketing strategy as just another channel. Now you have TV, radio, print, and social, or TV, radio, print, and digital. It's just another avenue for the same advertising that you've been doing, but it is important to develop some analytics so you can tell your board that what you're doing is successful.

Social media can be time-intensive and it can be resource-intensive. It used to be, at one point in time, there wasn't a lot of analytics available. Now what we're seeing is there is free analytics oftentimes available. I would say first develop a strategy where you actually have a metric of your success. At the beginning of the year, are you going to focus on new followers? Are you looking at click-throughs, product leads versus close, engagement, number of comments, sentiment?

Just because your bank is getting mentioned, is your bank getting mentioned in a positive way? That's the sentiment metric. Are you looking at your demographics? Are you pulling in different people than you were pulling in before? Are they responsive to your products and your surveys? Really give some thought about what is your metric of success beyond just did we get more thumbs up.

The other thing is, too, there are a number of free tools available. Hootsuite has some tools. None of these are an ABA endorsement. I just want to point you to a couple places. Hootsuite, Social Mention, which is basically a sentiment follower, and there's a number of products that are now available for free that you can use to assist these analytics as you're making these annual board reports. There's a number of paid products that also have built into their system some kind of an analytic, as well. I would really use those.

Again, I think a really important piece a lot of banks are starting to look at is part of your social strategy is determining what is your metric of success and building that into your strategy so you have some goals beyond just did we get a thumbs up. Really start your year with some defined goals that you could review, and a better determination of which of your strategies are successful, and where you want to spend your resources and your focus.

Christine: Thank you. I think we have time for a question or two. Is there any specific policy or guideline on video marketing? I don't think we talked about that specifically.

Denyette: On video marketing?

Christine: Yeah.

Denyette: Okay. I am not aware of a specific video. YouTube, for the most part, and if you look at the FFIEC guidance, YouTube is considered another form of social marketing. There is no expectation of a separate policy. Obviously, because it is a very different medium, how you're going to use it, what is going to be acceptable content – and I would say, too, go onto YouTube and do a search just for the term bank. There are a number of banks that are actively using YouTube in very different ways.

I've seen a spoofy funny video that was promoting a bank product, and I've seen some very serious CEO YouTube video the community explaining a local economic issue, especially during the crisis, giving some comforting as to what was happening in the local housing market. You can use YouTube that is very effective, great content, and you can use it. Banks don't have to always be so serious. There was actually one bank that did a series of not only the ALS Ice Bucket Challenge, but the Harlem Shake, and the Harlem Shake in a bank lobby might have been one of the funniest things I saw last year. I would spend some time with that. See what you can do that's different and entertaining. I'm not aware of a specific policy. There's nothing different to say about video.

Christine: That's great. Thank you so much, Denyette. You'll see that Denyette supplied us with some additional resources. There are links that she's provided to give all of you folks additional content and education around social media opportunities and restrictions. We're going to be sending out an email as a follow-up to this meeting and will drive you to that site where we'll have all of those links and resources listed for you. Thank you again, Denyette, for your valuable insight, and thanks to all the participants who made it a priority to be with us today. Thank you, and we hope to see you on our August session. Have a great afternoon.

Jeb: This concludes today's Harland Clarke audiocast. Thanks for attending, and watch for future audiocasts coming in email invites near you.

