CCO TASK SUPPORT

Please be sure to check your SmartRIA CCO portal to keep up with your monthly Compliance tasks.
Please contact the following for:

- **Task Related Questions:** Nancy Harry: nharry@thecomplianceresource.com
  Stacie Craddock: scraddock@thecomplianceresource.com
  Sara Sparks: ssparks@thecomplianceresource.com
- **Login & Portal Requests:** Sara Sparks: ssparks@thecomplianceresource.com

CCO TOOLS INCLUDED THIS MONTH:

- **CCO Checklist** – Complete the attached CCO Checklist for the month of July 2022.
- **CCO Implementation Checklist** – Begin completing the attached CCO Implementation Checklist for the New Marketing Rule.
- **Sample Disclosure Language** – to tailor for use in Advertising Materials (New marketing Rule implementation).
- **Risk Matrix 2022** – Sent on June 1. During June, July, August – the Risk Matrix review will be part of the CCO Tasks.

NEW MARKETING RULE SUMMARY AND NEXT STEPS

**As a reminder, the effective date of the New Marketing Rule was May 4, 2021,
and the upcoming compliance date is November 4, 2022.**

Over the last few months, our publications have educated firms on what the updated rule entails and how changes will affect firms. As a recap, the new rule implements several significant changes and updates pertaining to investment adviser marketing, which include but are not limited to:

- Revised definition of advertisement and new definitions of various other related terms.
- Removal of the prohibition on testimonials and past specific recommendations.
- Addition of general marketing and advertising prohibitions.
- Requirement for specific types of disclosures.
- Standardization of the method for calculating and showing performance.
- Prohibition on the use of hypothetical performance, except in limited circumstances.

To be ready for the mandatory compliance date in November, CRP has provided the "Implementation Checklist" (also published in June's TMR) to assist firms with next steps. Throughout the 3rd Quarter, CRP will continue to remind folks of the impending compliance date to ensure your firm is ready. Let's review 3 of the action items for Rule implementation:

☑ **REVIEW THE NEW MARKETING RULE AND DETERMINE ITS APPLICABILITY TO YOUR FIRM** – Familiarize your firm's compliance team with the new Rule. This month, CRP has included a copy of the Final Marketing Rule. Beware it's long and our series of articles over the last few months was meant to create the general framework and highlights from the Rule.

- **CCO TOOL: Copy of the Final Rule provided as attachment this month.**
- **CCO GUIDANCE: Retain a copy in your Marketing folder as a good resource in your firm's Compliance files** (including other relevant industry articles, TMIC & TMR). Who knows, an examiner might even ask if you have a copy of the new Rule on file when examined!

☑ **UPDATE POLICIES AND PROCEDURES WITH CRP DRAFT LANGUAGE –** Sample Policies and Procedures were provided last Month in June's TMR. Customization of this language is required to identify what your firm will or will not allow in its advertising. We encourage firms who are adopting policies to allow for some of the new concepts to be used in advertising to reach out to CRP to assist with complying with all areas of implementation (updates to ADV, tailoring of language, appropriate disclosure samples).

- **CCO TOOL: Copy of Sample Policies and Procedures provided this month**
- **CCO GUIDANCE: Revise your firm's current policies and procedures to address the new regulations and implement control steps to ensure compliance.** We know the SEC will always look for updated language and customization when it comes to examinations.

☐ **DEVELOP A PLAN TO PROVIDE TRAINING ON NEW REGULATIONS TO FIRM PERSONNEL –** CRP will provide a sample presentation to assist with your firm's training in our next TMR. Copies of what materials are used to train employees relating a firm's compliance program have shown up on a recent SEC exam request. Be sure to take the time to provide some guidance on what your firm will and will not allow when it comes to marketing clients and prospective clients!

- **CCO TOOL: Stay tuned for July 15th TMR – will include a PowerPoint Training for IARs**
- **CCO GUIDANCE: Once the revised policies and procedures have been completed, distribute and train employees on new regulations and how they impact the firm.**

NEW ADVERTISING RULE FOR STATES - ATTENTION STATE REGISTERED FIRMS: All 50 states, as well as the District of Columbia, Puerto Rico, the Virgin Islands, and other U.S. territories, regulate investment advisors under their own set of state statutes and regulations. Most states have modeled their statutes and regulations after the Uniform Securities Act and NASAA Model Rules. About half the states have implemented statutes and rules that do not reference the Advisers Act or SEC Rules. However, the other states do have statutes and rules that directly reference either Rule 206(4)-1 or Rule 206(4)-3, or both. State registered investment advisers whose home state requires them to adhere to Rule 206(4)-1 or Rule 206(4)-3 now find themselves in a quandary — which rules are they required to follow, the old Advertising Rule and Cash Solicitation Rule or the new Marketing Rule? Are testimonials and endorsements now fully authorized? Will the states amend the statutes and rules prior to or after November 2022? How are books and records affected? It's a safe bet to state that all state registered investment advisors will be affected by the changes to Rule 206(4)-1 or the rescission of Rule 206(4)-3. Don't wait until November to be ready – work with CRP to update and work towards implementation.

PRACTICAL SOLUTIONS FOR INVESTMENT ADVISERS IN THE NEW ERA OF MARKETING

In today's era, firms are utilizing websites, social media platforms, Google Ads, podcasts, YouTube videos, and "influencers" to promote their services. It's no wonder the SEC had to act on updating the Advertising Rules. Each year, there are new marketing channels that can be leveraged by firms through social media, and nothing is as powerful as testimonials, endorsements, and performance data to market to clients and ultimately engage prospective clients. To comply:

ALWAYS BE ABLE TO PROVE WHAT YOU HAVE AND HAVE NOT DONE!

This is where recordkeeping and archiving become so important to firms. How can you prove you didn't alter a post or that you didn't delete a comment or a "like" without defensible archives? It is more important than ever that firms maintain comprehensive records of website and social media content—including all versions of a webpage or social post. In other words, if a post has been edited or a comment has been deleted, the original content needs to be contained within the firm's archives.

If reviews from sites like Yelp or Google Reviews are used in marketing materials, it is best to capture and archive your own copies of this content. And when working with social media influencers, their posts should be collected and archived to prove compliance. Fortunately, firms can utilize third party vendors that can archive this content.

How are Advisers going to make sure they keep within the lines of the new Rule? Here are a few pointers for reviewing your current advertising materials:

- **ENSURE YOUR FIRM'S CONTENT IS FAIR AND BALANCED.** To prove your performance data or hypothetical data, your firm will need records of information that was included in the performance calculation.
- **CONSIDER THE USE OF SOCIAL MEDIA CHANNELS.** However, understand what constitutes adoption and entanglement. For example, if there is a comment or post that your firm "likes" or comments on, the firm has essentially said that your firm agrees with the content. It's therefore your firm's responsibility to ensure the content is accurate and fair.
- **ALTERED, EDITED OR HIDDEN CONTENT ESSENTIALLY BECOMES YOUR FIRM'S CONTENT.** The firm will not be able to distance from content the firm adopted if it contravenes the rules. However, if content is edited and complies with the rules, there is no problem. So, editing a social post, or liking or sharing a social post, is completely fine, if it adheres to the rules.
- **GOOGLE OR YELP REVIEWS CAN BE USED – PROVIDED THE CONTENT IS FAIR AND ACCURATE.** If the firm does not comment, like, or in any way alter third-party content, it is not the firm's responsibility to oversee or archive the posts - even if the comment has been left on the website, social media channel, or third-party website.
- **"INFLUENCERS" REMAIN AN IMPORTANT MARKETING TOOL**. Use of these "influencers" is also fine under the rules, with a few exceptions. If the "influencer" contravenes the rules and is endorsed or compensated by the firm, the firm is also liable. Is the "influencer" compensated? If so, disclosure is required. The rule supports the use of these channels, but its goal is to ensure that untrue, misleading, or unfair content is not disseminated.

CCO Considerations:

- ***What archiving solution/system do you have in place?***
- ***Who at your firm is reviewing social media posts, re-posts, and Google Reviews?***
- ***Is there a process for reviewing comments and noting any negative comments on third party sites?***
- ***Are there marketing relationships to be reviewed where compensation is offered?***

REQUIREMENT FOR SPECIFIC TYPES OF DISCLOSURES

The New Marketing Rule mandates that specific disclosures be made when an advisory firm disseminates any testimonials, endorsements, or third-party rating. Such disclosures must be provided in a "clear and prominent" manner and at the time of dissemination.

Testimonials and endorsements speak to an investment firm's capabilities and expertise and are given by a person who is not an employee of the firm. Remember there are key distinctions between the two and these are highlighted in the new rule:

- **TESTIMONIALS**: Share personal experiences with a firm and are written by ***current or former clients, affiliates, or by private fund investors.***
- **ENDORSEMENTS:** Statements of support or approval written by people ***who are not current clients, affiliates, or private fund investors.***

Under the new rule, both testimonials and endorsements are only allowed in advertisements if they meet specific conditions around disclosures, oversight, written agreements, and disqualifications.

DISCLOSURE - disclosures should be prominently displayed and include the following information:

- If the statement was *given by an investor, current client, or another person*
- *If any compensation (cash or non-cash) was given* in exchange for the endorsement or testimonial
- Any *conflicts of interest* between the person offering the endorsement and the firm
- Firms must also *disclose the terms of compensation* and the details regarding any conflicts of interest.

This Month, we are providing a sample of what we believe will be the most commonly used disclosure for **a non-paid testimonial:**

The testimonials, statements and opinions presented on our website are applicable to the individuals depicted. Client experiences and performance will vary and may not be representative of the experience of others. These testimonials are from current clients and are voluntarily provided. Individuals were not paid, nor were these individuals provided with free services or any other benefits in exchange for said statements. The testimonials are representative of client experiences, but the exact experience will be unique and individual to each client.

OVERSIGHT AND WRITTEN AGREEMENT - A written agreement with a promoter must be in place unless the promoter is an affiliate or receives $1,000 or less from the firm during the previous twelve months.

DISQUALIFICATION - Financial services firms are expressly prohibited from compensating ineligible people for an endorsement or testimonial. The disqualification rule states that if the adviser knows, or should reasonably know, that the person giving the endorsement or testimonial is an ineligible person, then it is given in bad faith. The goal is for no "bad actors" to receive compensation for promotions.

Please note the disclosures provided above will need to be tailored accordingly based on the criteria listed above regarding client vs. non-client, compensated vs non-compensated, and material conflicts. SEE ATTACHED FOR SAMPLE DISCLOSURES.

USE OF THIRD-PARTY CONTENT

Third-party content is used to populate newsletters, social media posts and presentations.

Q. How will this content and process be reviewed by the SEC?

A. To address this …. it's worth reviewing the SEC's exact wording of the rule in this regard:

"Whether content posted by third parties on an adviser's own website or social media page would be attributed to the investment adviser also depends on the facts and circumstances surrounding the adviser's involvement. For example, permitting all third parties to post public commentary to the adviser's website or social media page would not, by itself, render such content attributable to the adviser, so long as the adviser does not selectively delete or alter the comments or their presentation and is not involved in the preparation of the content. We believe such treatment of third-party content on the adviser's own website or social media page is appropriate even if the adviser has the ability to influence the commentary but does not exercise this authority. For example, if the social media platform allows the investment adviser to sort the third-party content in such a way that more favorable content appears more prominently, but the investment adviser does not actually do such sorting, then the ability to sort content would not, by itself, render such content attributable to the adviser.

"In addition, if an adviser merely permits the use of "like," "share," or "endorse" features on a third-party website or social media platform, we will not interpret the adviser's permission as implicating the final rule. Conversely, if the investment adviser takes affirmative steps to involve itself in the preparation or presentation of the comments, to endorse or approve the comments, or to edit posted comments, those comments would be attributed to the adviser. This would apply to the affirmative steps an adviser takes both on its own website or social media pages, as well as on third-party websites. For example, if an adviser substantively modifies the presentation of comments posted by others by deleting or suppressing negative comments or prioritizing the display of positive comments, then we would attribute the comments to the adviser (i.e., the communication would be an indirect statement of the adviser) because the adviser would have modified third-party comments with the goal of marketing its advisory business. However, as discussed above, we would not view an adviser's merely editing profane, unlawful, or other such content according to a neutral pre-existing policy as the adviser adopting the content."

These new definitions of what counts as an advertisement are making it essential for firms to check all content for compliance. Here are a few specific areas that firms should consider creating new protocols for:

- **WEBCASTS AND SLIDE SHOWS**: Oral recordings and scripted oral material are now considered advertisements. These scripts should therefore go through a compliance checking procedure. Do you have an approval process in place?
- **SOCIAL MEDIA POSTS:** Social media policies must be up to date and reflect current guidelines based on some of the criteria outlined above.
- **THIRD-PARTY MATERIAL:** All third-party ratings should be reviewed for compliance and firms must understand the Marketing Rule when reviewing draft material. Retain records of all rating surveys and questionnaires. Compliance should have a review process these types of aware/rating submissions to ensure accuracy and reporting of firm data is consistent and not misleading.
- **TESTIMONIALS AND ENDORSEMENTS:** Create a clear process that covers disclosure, oversight and written agreement, and disqualifications to ensure all testimonials and endorsements are compliant. Keep records of all communications, particularly because marketing material often passes through multiple sets of hands.

ATTACHED ARE SAMPLE DISCLOSURES FOR PERFORMANCE ADVERTISING, THIRD PARTY RATINGS AND TESTIMONIALS. REFER TO THE ATTACHED REFERENCE TOOL BUT REMEMBER CUSTOMIZATION IS REQUIRED BASED ON THE CRITERIA OUTLINED IN THE RULE.

ANNUAL RISK ASSESSMENT

A risk assessment has become a standard document request for regulators and goes a long way in describing and developing your compliance program. CRP has developed a template that will assist in your firm's risk assessment and will help highlight review areas for your firm. The Risk Matrix template included this month, breaks down critical compliance topics required within your firm, and we highly recommend that you complete a full assessment. This is an annual assessment, and ins intended to create an opportunity for the firm to review current procedures, review processes, and revise and implement new sections of the Compliance Manual from the previous year, if necessary.

While working through each topic, please list all current controls in place to help mitigate risk to your firm. If you identify an area of medium to high risk to your firm, you will be expected by regulators to address those risks and conflicts with policies and procedures. CRP is here to assist in helping to revise and further tailor your firm's policies and procedures.

After you have completed the full assessment, and remediated highlighted risk areas, please retain a copy in your RISK ASSESSMENT file. This will show up on your next SEC Exam!