

CRP SCHEDULE TO IMPLEMENT THE INVESTMENT ADVISER MARKETING RULE

As we have seen over the last month in our publications, the new Marketing Rule is complex and has several new items and disclosures to comply with. CRP is breaking down the implementation over several educational resources, including May, June, and July TMIC and TMR. In this educational resource, we will focus on **Books and Records, Implementation, and Policies and Procedures**.

- ☑ Reviewing the definition and prohibitions of the New Marketing Rule under the act (*highlighted in May 2022 TMIC*)
- ☑ Adopting, replacing, and implementing new requirements of using Third-Party Ratings and Performance Information (*highlighted in May 2022 TMR*)
- ☑ Adopting, replacing, and implementing new requirements of using Testimonials, and Endorsements (*highlighted in June 2022 TMIC*)
- ☑ **Amendments to firm's books and records, implementation, and adoption of policies and procedures** (*highlighted in this month's TMR*)

BOOKS AND RECORDS

Investment advisers must make and keep record of all "advertisements" they disseminate, subject to alternative methods of compliance for oral advertisements, including oral testimonials and oral endorsements.

This requirement **amends the current recordkeeping rule of requiring advisers to retain advertisements sent to ten or more persons to advertisements sent to more than one person**. The SEC indicated that this recordkeeping enhancement is intended to support the SEC staff's enforcement and examination function.

Let's look at a sample list of books and records that are required to be maintained:

- **Oral advertisements** such as radio show recordings and podcasts
- **Testimonial and/or endorsement rationale** for with the Marketing Rule's due diligence requirement
- Copies of **any questionnaire or survey used for determining a third-party rating** used in Marketing
- Communications **relating to the performance or rate of return** of any portfolios
 - Accounts, books, internal working papers, and other documents necessary to **form the basis for or demonstrate the calculation of the performance or rate of return** of any portfolios
- **Records supporting hypothetical performance** to include copies of all information provided or offered pursuant to the hypothetical performance provisions of the Marketing Rule
- Records of who the **"intended audience" is pursuant to the hypothetical performance** and model fee provisions of the Marketing Rule
- Documentation of **communications relating to predecessor performance**

Q. INVESTMENT ADVISERS FREQUENTLY SEND ADVERTISEMENTS VIA EMAIL. ARE EMAIL ARCHIVES AN ACCEPTABLE METHOD OF COMPLYING WITH THE RECORDKEEPING REQUIREMENTS?

A. Yes. The Adopting Release expressly states that it would be **permissible for an adviser to store records using email archives** (including in cloud storage or with a third-party vendor), provided that the adviser can promptly produce records in accordance with the recordkeeping rule and SEC guidance.

IMPLEMENTATION OF MARKETING RULE

ADV PART 1 UPDATES: Implementation for the new Marketing Rule not only includes updates to your firm's Policies and Procedures, but requires updates in a **new subsection L entitled "Marketing Activities" to Item 5 of Part 1A** of Form ADV. This subsection requires an adviser to answer "Yes/No" questions regarding certain of the marketing activities they engage in. In the Adopting Release, the SEC stated that this Form ADV amendment is intended to enhance the data available to support the SEC staff's enforcement and examination functions.

Q. WHEN WILL AN INVESTMENT ADVISER BE REQUIRED TO UPDATE THE INFORMATION REQUIRED BY NEW ITEM 5.L?

A. Annually. Because subsection 5.L is included under Item 5 of Form ADV, advisers will be required to update responses to these questions in their annual updating amendment only. Additionally, advisers will not be responsible for filing a Form ADV that includes responses to new Item 5.L until the next annual updating amendment filed after the compliance date of the Marketing Rule (or after the adviser adopts compliance with the rule, for early adopters). Consequently, most advisers with December 31 fiscal year-ends will not complete the new Item 5.L until their annual update filed in March 2023.

Q. WHAT ARE THE DRAWBACKS OF ADOPTING THE MARKETING RULE BEFORE THE COMPLIANCE DATE?

A. In considering whether to comply with the Marketing Rule before the compliance date, advisers should weigh both the benefits and pitfalls of complying with the rule. While the Marketing Rule presents many favorable provisions for investment advisers, such as the opportunity to present specific investment advice, third-party ratings, and layered disclosure, it also introduces many complexities and new burdens. Many provisions of the Marketing Rule will require advisers to enact new policies and procedures; the aggregate burden of preparing and implementing these policies and procedures will be substantial. Additionally, the Marketing Rule will require education and training for advisory personnel, and it may also require additional staffing and/or adjustments to reporting lines. Finally, the SEC may provide additional guidance on the Marketing Rule during the transition period that would need to be considered.

ADV PART 2A – ITEM 14 UPDATES: For firms who have disclosed a current *solicitor relationship* under Item 14 of the Part 2A Brochure, language will need to be adjusted for the newly adopted term "promotor".

Consider the following Sample language for use of Promotors: *Affiliated or unaffiliated persons ("promoters") may, from time to time, refer, solicit, or introduce clients to our Firm. Our Firm may compensate certain promoters consistent with the requirements of applicable law and regulation, including the Advisers Act as well as applicable state/local laws and regulations. We may pay a promoter a recurring fee, a one-time fee or a portion of the advisory fees or revenues that we earn for managing client or investor assets referred to us by the promoter. The costs of such referral fees are typically paid entirely by our Firm and do not result in any additional charges to the client or investor.*

FORM CRS UPDATES: For firms who have disclosed a current *solicitor relationship* in Form CRS, language will need to be adjusted for the newly adopted term "promotor".

Consider the following Sample language for use of Promotors: *Our Firm utilizes promoters and pays (direct or non-direct) compensation to independent third parties for the referral of clients to our Firm.*

AGREEMENT UPDATE (if Applicable): For firms who have disclosed use of promoters, language will need to be added to the Agreements.

Consider the following Sample language for use of Promoters: *If Client was introduced to Adviser through a promoter ("Promoter"), Adviser may pay that Promoter a fee in accordance with Rule 206(4)-1 of the Investment Advisers Act of 1940 and applicable state law. The fee will be paid solely from the compensation of Adviser fee as defined in this Agreement and will not result in any additional charge to Client. Promoter is compensated to refer Client to Adviser in accordance with the approved practices of Adviser, distribute to Client all required disclosures, review and complete all necessary forms, acknowledgements, and applications with Client, obtain all appropriate Client signatures, and provide continuing contact to Client concerning investment advisory services of Adviser. Promoter does not have authority to accept investment advisory agreements on behalf of Adviser, to collect or receive payment in Promoter's own name for any investment advisory agreement nor provide investment advice or manage assets on behalf of Adviser. All investment advisory agreements related to services provided by Adviser are subject to acceptance by Adviser. If Client was introduced to Adviser through Promoter, Client hereby acknowledges receipt, as applicable, of Promoter's Disclosure Statement which disclosed the terms of the promoter arrangement between Adviser and Promoter and the compensation to be received by Promoter from Adviser.*

POLICIES AND PROCEDURES: The new Marketing Rule replaces the current advertising and cash solicitation rules. This month we provide the sample policies and procedures. These sample policies and procedures will need tailoring to what aspects of the rule your firm will implement. It's important to take time to customize the language. The SEC will review your policies for consistency in the ADV reporting and actual use of your marketing materials. Our Draft Policies and Procedures are sent via pdf. We encourage firms to work with CRP on the implementation date and additions to your Manual. Several sections are affected throughout the Manual and suggested edits will be provided in our next publication for areas of where the current language should be deleted.

CRP IMPLEMENTATION ASSISTANCE

Complete the Marketing Rule implementation Checklist on the following page and schedule time with CRP to work through what may apply to your firm. CRP can assist your firm and tailoring your Compliance program to what policies will be addressed and updates to ADV for best efforts implementation before November 4, 2022.

Note: Several firms may will pick and choose what they will want to use in advertisements - testimonials, endorsements, performance, third party ratings or elect to use promoters. Contrary, some firms may elect NOT to use any of the in their advertising and communications. The new Marketing Rule still affects firms electing NOT to advertise the aforementioned. Policies and procedures need to be updated to your current Manual and tailored accordingly.

MARKETING RULE IMPLEMENTATION CHECKLIST

Let's work through the implementation checklist to address and document next steps!

- DATE OF RULE IMPLEMENTATION FOR FIRM** _____ **ESTIMATED DATE**
When does your Firm look to implement the new Marketing Rule? It will take some time for all the tasks below so plan accordingly.
- CCO TRAINING** _____ **DATE COMPLETED**
Have the Compliance team reviewed educational materials regarding the new Rule including CRP's TMIC and TMR (May, June, July)?
- REVIEW CURRENT ADVERTISEMENTS** _____ **DATE COMPLETED**
Review current Pitch books, RFP responses, Newspaper or magazine ads, Website, social media, Brochures, and other written collateral (but not ADV brochures), Radio/TV/podcasts
- REVIEW CURRENT THIRD-PARTY RATING/RANKINGS USED** _____ **DATE COMPLETED**
Review use of all third party ratings used in current advertising and ensure updated disclosure are being used.
- CREATE LIST OF ALL SOLICITOR AGREEMENTS** _____ **DATE COMPLETED**
Review all current arrangements:
 - Cash solicitation arrangements under existing Rule 206(4)-3
 - Unpaid or non-cash referral arrangements
 - Internal sales efforts (sales by adviser's employees or affiliates)
 - Directed brokerage arrangements
 - "Refer-a-friend" programs
- UPDATE DOCUMENTS TO PROMOTOR (IF APPLICABLE)** _____ **DATE COMPLETED**
Review suggested language in this TMR to tailor as needed. Reference to Promoter is used in Part 2A and Form CRS. Add additional language to Investment Management Agreement (if applicable). Repaper all Solicitor Agreements to new Promotor Agreements. (Updated Promotor Agreement was provided in the June This Month in Compliance)
- UPDATES TO ADV PART 1 QUESTIONS**
Firms will complete the new Item 5.L questions with the annual update filed in first quarter 2023.
- TAILOR MARKETING COMPLIANCE POLICIES AND PROCEDURES** _____ **DATE COMPLETED**
Use CRP suggested updates to Marketing Rule Policies and Procedures, tailor as needed to what your firm is adopting use of and remove old Rule references.
- REVIEW AND REVISE DISCLOSURES USED ON MARKETING** _____ **DATE COMPLETED**
Review disclosures used on Testimonials, Endorsements, Third Party Ratings, Performance, General newsletters or social media content, Website Content
- AMEND COMPOSITE AND PERFORMANCE METHODOLOGIES** _____ **DATE COMPLETED**
Review disclosures used on Performance Advertising (if applicable)
- CONDUCT IAR TRAINING FOR MARKETING RULE** _____ **DATE COMPLETED**
CRP will provide a PowerPoint for firm training in the July 15 TMR.