

# THIS MONTH'S RESOURCE: SEC New Marketing Rule ADV Amendments, Recordkeeping, & Updates to Business Continuity Plans

## SEC'S MODERNIZED MARKETING RULE FOR INVESTMENT ADVISERS

Our monthly publication series continues to work through the new Marketing Rule, which went into effect on May 4, 2021. As a reminder, firms are not subject to full compliance of the Rule until November 2022. Compliance with the rule must be 100%. Advisers are not allowed to select one part of the rule without coming into compliance with the entire rule. This month we look at the ADV Amendments and Recordkeeping.

### ADV AMENDMENT

In connection with adopting the Marketing Rule, the SEC amended Item 5 of Form ADV Part 1A to elicit additional information regarding an investment adviser's marketing practices to help facilitate inspection and enforcement by the SEC. New subsection L requires an adviser to address separately whether its advertisements include testimonials, endorsements, and third-party ratings and to state whether any of its advertisements include hypothetical performance and predecessor performance.

Advisers filing Form ADV after an 18-month transition period from the effective date of the Marketing Rule will be required to complete the amended form. However, advisers will be required to update responses to these questions in their annual updating amendment only. As a result, an adviser will only be responsible for filing an amended Form ADV that includes responses to the amended questions in Item 5 in its next annual updating amendment that is filed after the 18-month transition period.

For advisers with a fiscal year that ends on December 31, the new Item 5.L. will need to be completed for the annual amendment due by the end of March 2023.

✓ **CCO NOTE:** NEW ADV PART 1 REPORTING WILL REPORT IF YOUR FIRM IS COMPLYING WITH THE NEW RULE.

### RECORDKEEPING

The books and records requirements of Rule 204-2 (the "Recordkeeping Rule") under the Advisers Act were amended to reflect the changes brought by the Marketing Rule. Under the revised Recordkeeping Rule, investment advisers must make and keep records of all advertisements they disseminate, including oral advertisements. Among other things, the Recordkeeping Rule has been expanded to require advisers to retain records of all advertisements disseminated to one or more persons, information provided in connection with advertising hypothetical performance, records relating to third-party surveys and questionnaires, and additional records relating to performance advertisements.

✓ **CCO TIP:** CONTINUE TO DOCUMENT THE REVIEW/APPROVAL OF ADVERTISING MATERIALS AND BE PREPARED TO DEMONSTRATE COMPLIANCE OVERSIGHT, RECORDKEEPING, AND PERFORMANCE CALCULATIONS.

*CRP will be providing SAMPLE Policies & Procedures with language incorporating the new Marketing Rule in Q3 2021- Stay tuned!*

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## BUSINESS CONTINUITY PLAN UPDATES

We have all felt some measure of changing plans brought about by COVID-19. For the majority of us, the virus has only meant small changes like having to remember to wear a mask when going out for errands, delay in holiday gatherings, and engaging in video calls instead of holding in-person meetings. However, what happens when our current plan does not match the unexpected and unplanned reality? We review our strategy and change the game plan based on our past experience. What lessons can be learned in a pandemic and how do we update our plan moving forward?

BCPs are not a static set of rules, but rather living documents within an organization. They should continually be adapted to reflect new information on the state of the world and until recently, business continuity planning has typically focused on natural disasters; blizzards, flooding, hurricanes, tornados, earthquakes, fires, power outages, acts of terrorism, and outright war that posed a significant risk to continued operations. And now, we need to add pandemics to that list!

In times of crisis, it's essential to know which elements of business are mission-critical in times of significant business disruptions ("SBD"). Critical processes such as trading, client communications, and supervision are all necessary to keep firms operational. Annually, firms must review and follow (as well as modify as necessary) their BCPs. In furtherance of this fiduciary obligation, the SEC has been clear that it expects an adviser to have developed, maintained, and reviewed the firm's business continuity plan as part of its policies and procedures. As noted in SmartRIA/CCO Scorecard - May is our reminder month.

As part of our annual BCP review, has your firm adequately disclosed, confirmed, and reviewed:

- the **process for data back-up and recovery** (hard copy and electronic); In addition, as the firm correctly describes how your firm will recover data in the event of a significant business disruption.
- updated contact information** for all mission-critical systems;
- that firm **operations are all functioning as anticipated under their BCPs**, even if such functions are occurring remotely: (e.g., investing, trading, investor relations, compliance, required recordkeeping).
- updated contact information for all staff** (including emergency contact information) and service providers? Firms need to be able to quickly adapt and ensure that communications with employees, clients, and investors are accurate and complete;
- provided guidance to clients to assure prompt access to their funds and securities** in the event that the firm determines that it is unable to continue business as usual.
- the **listed locations of all of your offices**, registered and unregistered, and state the means of transportation that employees may use to reach that facility.
- listed alternate physical location** of employees;
- described the alternate means of communications** that your firm will use to communicate with its regulators.

Furthermore, the firm has:

- modified the current BCP to ensure it expressly addresses pandemics or similar health issues?** For BCPs that do not specifically mention pandemics already, now is the time to add procedures for pandemics, epidemics, outbreaks, and similar health-related issues reasonably likely to impact operations;
- reviewed the firm's cloud-based systems?** This process demonstrates supervision and also reduces the risk of inadequate security around mobile device management, cybersecurity, data flow, multiple wireless connections, and more;
- performed annual cyber-security training?** Remind all employees that bad actors will take advantage of this outbreak and that appropriate verifications must be made before clicking on links, sending documents, and, of course, transferring funds or securities.
- sample reviewed firm contracts?** Firms should review the termination, indemnification language to have a complete understanding of what can happen if the firm or a counterparty cannot perform due to the current crisis.

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While the situations we recently have faced create new challenges, however, the basic framework to respond to these challenges remains unchanged. Setting a culture of compliance requires ongoing vigilance, continued monitoring of regulatory developments, and agile responses to changing developments. Thorough documentation of your efforts to protect clients is critical. Firms should assume that the SEC and other regulators will take note and examine how the firm has navigated the recent adversity.

Ultimately, the key to the success of the pre or post Business Continuity plan— especially when everything else is unpredictable—will be having clear communications and shared expectations with all who have a stake in the business: clients, shareholders, management, and employees.