

BUSINESS CONTINUITY PLANS (“BCP”)

A Business Continuity Plan, or sometimes referred to as Disaster Recovery Plan, sets forth processes and procedures for a firm and its employees to rely on in order to maintain the business operations during time of suspension. To help the RIA be prepared to restore operations smoothly and efficiently should an event occur and disrupt operations, either internal (i.e., power outage, IT failure) or external (i.e., winter storm, tornado, pandemic); a BCP takes into consideration the risks that the RIA may face and creates business continuity strategies to mitigate those risks. We recommend a review of your current Plan and tailor specifics to cover some of the areas mentioned below.

- CCO TIP: A SAMPLE CHECKLIST IS INCLUDED IN THIS MONTH'S CCO TOOLS TO ASSIST IN DOCUMENTATION OF THE RECOMMENDED ANNUAL REVIEW.**

MAINTENANCE, PROTECTION, RECOVERY AND BACKUP OF KEY SYSTEMS AND DATA:

The organization should identify and prioritize those systems that most heavily influence their business and have a process in place to be able to readily access all necessary information.

- CCO TIP: CONSIDER MAINTAINING A MASTER LIST SYSTEMS NEEDED TO CONDUCT BUSINESS.**

ALTERNATIVE LOCATIONS:

When the physical location of the business is compromised, there should be an offsite location where all critical company data is accessible, as well as consideration of offsite (remote) access.

- CCO TIP: MAINTAIN CURRENT LIST OF ALTERNATIVE LOCATIONS TO OPERATE BUSINESS IN CASE OF DISRUPTION.**

COMMUNICATION – INTERNAL AND EXTERNAL:

The RIA should be able to communicate protocol for the employees' relaying their role in the plan. Not only should the protocol be communicated before, but also be conveyed during a disaster. Clients and third parties should be informed regarding how business operations will continue, the frequency and sources of information as well as when normal business operations will commence.

- CCO TIP: MAINTAIN CALLING TREE FOR INTERNAL COMMUNICATIONS AS WELL AS PROTOCOL FOR COMMUNICATING EXTERNALLY TO CLIENTS AND VENDORS IN CASE OF DISRUPTION OF BUSINESS.**

IDENTIFY THIRD PARTIES YOUR OPERATIONS RELY UPON:

Most RIAs depended on multiple third-party service providers, whether they be administrative, legal, accounting, transaction/broker, payroll, etc. RIAs should identify third-party providers, understand third party roles in their organization, and discern the effect the BCP will have on those third-party providers to ensure the RIA can maintain its ability to continue operations of the company. RIAs should understand their data governance protocols, where their information lives, what information leaves their four walls and how that data can be recovered, if necessary.

- CCO TIP: MAINTAIN MASTER LIST OF THIRD-PARTY VENDORS USED FOR BUSINESS OPERATIONS AND REVIEW THEIR BCP. WHAT HAPPENS TO YOUR FIRM IF THEY CAN'T OPERATE?**

MARKETING MATERIALS APPROVAL PROCESS

Each piece of a firm's marketing will need to comply with the seven general prohibitions and include the necessary disclosures in light of the type of advertisement utilized. *The necessary disclosures require both attention to the content of the disclosure and the format of the disclosure (e.g., the disclosure must be made in a certain format and cannot simply be linked to or footnoted).* This month, CRP is providing sample Marketing Review checklists to assist with the review of marketing in the following areas:

- General advertisements**
- Testimonial or endorsement**
- Third-party rating/ranking**
- Marketing using performance (Contact CRP)**

BELOW ARE SEVEN TIPS TO ASSIST IN TRAINING OF PERSONNEL TASKED WITH REVIEWING ADVERTISEMENTS:

1) Does the advertisement contain a statement about the firm provided by a client or a non-client (even indirectly, e.g., the adviser references the third-party statement)?

- NO**, the piece is a general advertisement. Submit to compliance for review of the general prohibitions using *General Advertising Checklist*.
- YES**, include a clear and prominent disclosure that the statement was made by a current client (testimonial) or non-client (endorsement)

2) Is the person providing the testimonial/endorsement an employee or other affiliate of the adviser?

- NO**, move on to next step of review using *Testimonials and Endorsements Checklist*.
- YES**, provided the affiliation between the firm and such person is readily apparent to or disclosed to the client or investor at the time the testimonial/endorsement is distributed and documented by the adviser, then the employee/affiliate testimonials and endorsements are not subject to the disclosure requirement or written agreement requirements. (*Subject to the disqualification and general adviser oversight requirements*)

3) Does the firm provide compensation over \$1,000 for the statement?

(Compensation includes both direct and indirect cash and non-cash compensation, including checks, directed brokerage, awards, gift cards, and reduced advisory fees).

- NO**, move on to next step of review using *Testimonials and Endorsements Checklist*.
- YES**, disclose material terms of compensation arrangement and ensure that the firm has a written compensation agreement between the party making the statement and the firm. Refer to Sample Promotor Agreement (*June TMIC*).

4) Are there any other material conflicts of interest between the person making the statement and the firm?

(Situations that may be material conflicts of interest include friends and family of the adviser and vendors with financial interests in the adviser.)

- NO**, move on to the next step of review using *Testimonials and Endorsements Checklist*.
- YES**, provide a brief, clear and prominent disclosure of any material conflicts of interest on the part of the person giving the testimonial or endorsement resulting from their relationship with the adviser.

5) Is the person providing the paid testimonial or endorsement an ineligible person at time the testimonial or endorsement was given?

Under the Marketing Rule, an “ineligible person” is a person who is subject to an SEC opinion or order barring, suspending, or prohibiting the person from acting in any capacity under the federal securities laws or to any one of many enumerated “disqualifying events.” The definition extends to employees, officers, directors, general partners, and elected managers of an ineligible person. The Marketing Rule includes a ten-year lookback period across all “disqualifying events,” which aligns with disciplinary disclosure reporting on Form ADV Part 1A.

- NO**, submit the marketing piece to compliance for approval using the *Testimonials and Endorsements Checklist*.
- YES**, firm cannot use the testimonial/endorsement.

6) Does the third-party rating or award meet the following requirements?

- Firm must have a reasonable basis** for believing that any questionnaire or survey used in preparation is structured to make it equally easy for a participant to provide favorable and unfavorable responses, and is not designed or prepared to produce any predetermined result

AND

- Advertisement must clearly and prominently disclose the:**
 - **Date on which the rating was given** and the **period upon which the rating was based**.
 - **Identity of the third-party** that created and tabulated the rating; and
 - If applicable, that **compensation has been provided directly or indirectly** by the adviser in connection with obtaining or using the third-party rating.

7) Has compliance confirmed the following?

Disclosures will be delivered at the time the statement is disseminated and are clear and prominent (this may mean getting creative with clear and prominent disclosure requirements on social media!)

- For written pieces:** must be at least as prominent as the statement and appear close to the associated statement.
- For video clips or audio recordings:** provide disclosures in a written format when disseminated, as a banner framing the video or have the disclosures read aloud during the recorded statement.
- To oversee compliance, the firm should:**
 - implement a process to provide promoters with disclosures,
 - review promoter activity and/or
 - include requirements in their written agreements for the use of disclosures

LET'S REVIEW THE 7 GENERAL PROHIBITIONS UNDER THE NEW MARKETING RULE AND PRACTICAL EXAMPLES:

Does the marketing piece:

- Includes any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading.**

Example: An undisclosed relationship or compensation agreement between the firm and the party giving the testimonial, endorsement, or third-party rating. It should be obvious from the testimonial the person giving the statement. Readers are able to come to their conclusions. The same is true regarding business partners, employees, other family members, and key vendors.

- Includes a material statement of fact that the adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the SEC.**

Example: Making a statement that the particular strategy beats its benchmark without keeping the requisite information that supports the statement in your files. Or stating that your firm's Chief Investment Officer is considered "world-renowned" expert investing in digital assets. Do you have the back-up to substantiate the claim!

- Includes information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser.**

Example: Making a statement that the investment adviser's strategies have never had quarter with negative returns. The statement could be technically correct, but if the adviser has only been in business since 2020 could potentially create an erroneous inference that the client's principal is safe or risk-free.

- Discuss any potential benefits to clients or investors connected with or resulting from the investment adviser's services or methods of operation without providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits.**

Example: Selecting the firm's best strategies in its marketing materials and hiding the poorly performing strategies from view. Alternatively, showing the strategies' positive performance but burying the disclosures 60 pages into the pitchbook.

- Includes a reference to specific investment advice provided by the investment adviser where such investment advice is not presented in a manner that is fair and balanced.**

Example: Distributing an advertisement to clients that references the great call the firm made on a stock but failing to include the other securities the firm thought had hit bottom, and which underperformed significantly.

- Includes or excludes performance results, or presents performance time periods, that is not fair and balanced.**

Example: A fact sheet that depicts performance that, for some reason, only depicts strategy performance depicting the firm's performance in a good light. The 1-, 5-, and 10-year mandatory time periods fixes many of these problems, but the classic examples we see are frequently characterized by "weird" timeframes.

- Is materially false or misleading. This is a catchall category that tries to capture "bad" marketing!**

Example: Hiding the necessary disclosures from the client. For example, in a video recording, not permitting the clients to review the disclosures or providing them in a format that is impossible to read (e.g., size 5 font, or in light yellow coloring on a white webpage).