

Marketing: Ethics, Responsibilities and Disclosures

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PRIVATE WEALTH
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Discussion Topics

- **Ethics versus Compliance**
 - Is there a difference?
 - Striking the right balance
- **Responsibilities – Avoid “Us versus Them”**
 - Common Structure – the Lone Ranger
 - Common Goal
 - Getting Others Involved
- **Disclosures**
 - New SEC Marketing Rule
 - Fair and Balanced
 - Developing your Checklist

Ethics versus Compliance

- **Compliance**: Often defined as following the laws and rules that apply to your company's business
- **Ethics**: Goes beyond what the law requires – will often hear people describe it as applying a “higher standard”
- While not interchangeable – Ethics and Compliance are complimentary
 - If we act under the elements of ethical behavior of truth, respect, and integrity, compliance should follow...**But**
 - There are times when laws and regulations demand more than what is ethically required
- **Challenge of the Fraud Triangle**

Ethics versus Compliance – The Fraud Triangle

Opportunity

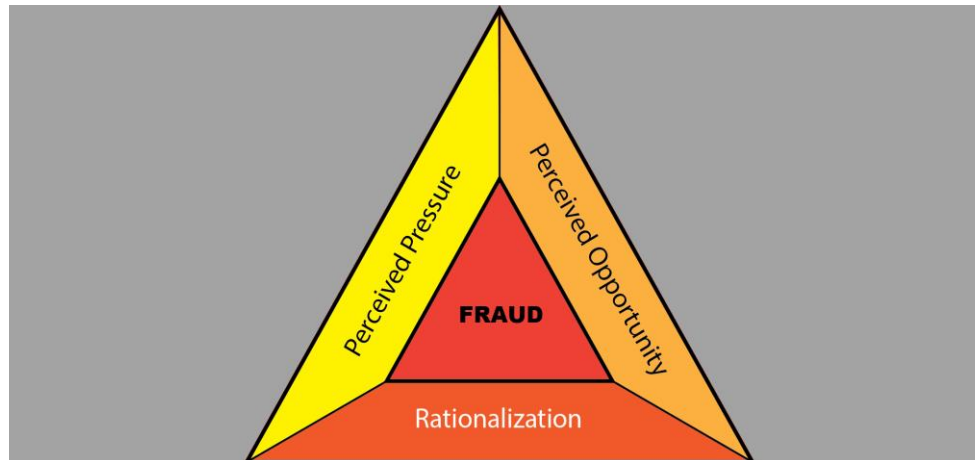
- Strong Compliance Program can reduce opportunity for misconduct
- Rules must be clear and accessible
- Testing and review

Pressure

- Is pressure to perform balanced by expectation to perform with integrity
- “Get it done – I don’t care how”
- Organizational Structure

Rationalization

- Does the company have a strong “values-based” system in place
- Watch out for –
 - Good for the company
 - Other firms do it
 - No “visible” harm



-Finding the right balance: (1) Ethics should focus on reducing an employee’s ability to rationalize misconduct, (2) Compliance should focus on shrinking the opportunity for misconduct; and (3) Leadership should focus on reducing unhealthy pressure to perform at all costs

The original theory of the Fraud Triangle was first developed by Donald Cressey in 1953.

Responsibilities-

- Oversight Structure

- How is your firm structured?

- Is one person (often just one compliance officer) responsible for all aspects of marketing review and control?
 - What resources/support does this person have in place?
 - Do business points of contact in Marketing/Sales understand regulatory framework of your business?

- What are the service level expectations?

- Does this create unyielding friction between Marketing and Compliance?
 - What role does the business unit serve with respect to review/oversight?

Avoid “Us versus Them” approach!!!

Responsibilities- continued

- Rethink the process
 - Develop a shared goal– *To produce dynamic marketing materials that are compliant in a manner that is collaborative and workable from a work/life balance for all involved*
 - Outline roles and responsibilities
 - Develop agreed upon service level arrangements
 - Not everything should be urgent/rush
 - Frequent meetings between Compliance and Marketing
 - What is working, what isn't, and what is on the horizon
- How to reduce Compliance's day-to-day involvement
 - Roles: Marketing versus Compliance
 - Ownership of the material
 - Pre-approved Marketing Material Library

Pre-Approved Marketing Material Library

- Create “library” of pre-approved materials
 - Full compliance review
 - Ready for use by business teams
 - Only updates to data/dates
 - If new ideas added, requires new review by Compliance
 - Establish good control over “editors” of materials
 - Records and sample testing
- Benefits
 - Speed to market
 - Added capacity by Compliance to address “rush” matters
 - Added flexibility of business users: self-service model
- Start small, add to the library as Marketing team becomes educated consumers

Disclosures

- New SEC Marketing Rule

- First touch to the Advertising Rule since 1961
- Effective Date: May 4, 2021
- Compliance Date: November 4, 2022
 - Note: Early compliance is permitted, but partial compliance is not
- Combines old Advertising and Cash Solicitation Rules into one combined Rule – 206(4)-1
 - No longer a patchwork of regulation via No-Action letters and interpretations
- Highlights of New Rule:
 - Expanded definition of Advertisement (incorporates all forms of communications)
 - Inclusion of use of testimonials and endorsements
 - Performance Advertising- Requires net performance accompany gross performance in any advertisement
 - Inclusion of Private Funds into definition of Advertisement
 - Firms need to spend time reviewing current policies and procedures to address rule changes
 - Especially around use of Hypothetical Performance
 - Disclosures: New rule does not include specific separate standards for “retail” and “non-retail” clients, but it does refer to “the amount and type of information” that would be appropriate for such clients

Disclosures

NEW SEC Marketing Rule - continued

- Replacement of *per se* prohibitions of current rule with more principles-based general prohibitions – 7 total
 - (1) Material misstatements or material omissions
 - (2) Facts that cannot be substantiated upon SEC demand
 - (3) Materially misleading to a reasonable investor
 - (4) Discussions of investment benefits that are not fair and balanced
 - (5) References to specific investment advice that are not fair and balanced
 - (6) Performance presentations that are not fair and balanced
 - (7) Otherwise materially misleading

Disclosures

NEW SEC Marketing Rule - continued

- **Fair and Balanced**

- Providing fair and balanced treatment of any material risks or material limitations associated with the potential benefits
 - Replaced SEC original proposal of “clearly and prominently”
 - More closely aligned with FINRA 2210
- Use of “layered” disclosure to achieve fair and balanced presentation
 - Mix of direct disclosures/examples within the four corners of advertisement and hyperlinks to additional content that discusses additional benefits and additional risks of the adviser’s services
 - CAUTION – Be careful not to only include “upside” in advertisement and use hyperlink to disclose material risks/limitations.

- **Striking the Right Balance**

- Requires true partnership among business and Compliance – Think back to Fraud Triangle
 - How do you reduce pressure and rationalization from the process
 - Open dialogue – ask for examples, be willing to share new insights
 - Create good structure and “checklists” to build solid review structure

Disclosures

Marketing Materials Approval Form (Sample pdf form below):

- Having a standardized “control” sheet aids in the submission and review process
 - Improves quality of submitted content by business teams
 - Aids Compliance team’s ability to better understand scope/purpose of submitted materials
 - Supports tracking/control process

Marketing Materials Approval Form

Name of Piece: _____
Date of Intended Use: _____ Date Needed (if different): _____

Type of Piece (Check one of following)	Intended Audience (Check all that apply)	Client Type	Intended Use (Check one of following)
<input type="checkbox"/> Presentation Book <input type="checkbox"/> RFP/Questionnaire <input type="checkbox"/> Market Commentary <input type="checkbox"/> Portfolio Analysis <input type="checkbox"/> Article Reprint <input type="checkbox"/> Advertisement <input type="checkbox"/> Other _____	<input type="checkbox"/> Consultant <input type="checkbox"/> Existing Client <input type="checkbox"/> Prospect	<input type="checkbox"/> Institutional <input type="checkbox"/> Individual/ Retail	<input type="checkbox"/> One-on-One Meeting <input type="checkbox"/> General Distribution/ Mailing <input type="checkbox"/> Website <input type="checkbox"/> Other _____

Department(s) Using the Piece: _____

Contact Person: _____ Extension: _____

Supporting Back-up attached? ☐ Yes ☐ No Explain: _____

Submitted by: _____ Extension: _____

Date Submitted to Compliance: _____

Please check all that apply:
☐ The piece was previously produced. If so, highlight changes on revised piece and include date of prior piece.
☐ Piece includes performance figures not previously approved (approval by performance group required before submitting to Compliance)
☐ Piece contains new chart/graph/concept. Please highlight or describe: _____

Performance Group Only: (Note: Only required if performance data has not yet been reviewed/approved)

Approved performance figures in piece (sign): _____ Date: _____

Compliance Department Use:
Approved as submitted (sign): _____ Date: _____
Are revisions required? ☐ If yes, date that comments were provided to preparer of piece: _____

Approved as revised (sign): _____ Date: _____
Date of final approval by Compliance to begin use of piece: Date: _____

Distribution prior to obtaining Compliance approval is not permitted under [] Procedures.

Please note: Compliance will attempt to make initial comments within [] days of receipt, however, certain pieces will require more time for review.



Disclosures

Developing your Checklist:

- Depending upon your firm's resources and skill levels, either provide a checklist to production personnel to use or simply maintain as a tool for your own use during review process.
- Topical Areas-
 - Testimonials
 - Ratings
 - Past Recommendations
 - Use of Graphs/Charts/Formulas
 - Performance
 - Actual
 - Model
 - Net v. Gross
 - Hypothetical Back-tested
 - Article reprints
 - Social Media/Websites

Include list of questions and “yes/no” sub-screens for each topical area – Think NASA's “Go/ No Go” Checklist

Disclosures

Sample Topical Checklist - Testimonials*

☐ The Advertisement does not contain testimonials of any kind (if “checked”, skip remainder of section)

The Advertisement contains testimonials and meets the following conditions:

☐ The Advertisement includes a bona fide, unbiased third-party report (if “checked”, skip remainder of section)

OR

☐ The Advertisement includes a client survey conducted by an unbiased third-party service provider and the survey results meet all the following conditions:

☐ The results represent a valid sample

☐ The results do not involve subjective analysis

☐ Positive or negative results are not favored

☐ The results are otherwise consistent with regulatory requirements

☐ The Advertisement includes a (full or partial) list of advisory clients and all the following conditions have been met:

☐ Each client named has consented to the Adviser’s use of their name in the Advertisement

☐ The Adviser has not use performance-based criteria to determine which clients to include in the list

☐ The list includes a statement disclosing the objective criteria used to determine which clients to include on the list

☐ The list includes the following disclaimer: *“It is not known whether the listed clients approve or disapprove of the Adviser or the advisory services.”*

*Sample Testimonial checklist from Advisor Solutions Group 02/09

Questions?

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