

KITCES IAR ETHICS CE DAY

Complying With the RIA Marketing Rule While Leveraging Testimonials & Endorsements



Chris Stanley
Founding Principal
Beach Street Legal LLC



1

Agenda

- 01** Brief Background of the SEC's Marketing Rule
- 02** Testimonials & Endorsements
- 03** Third-Party Ratings
- 04** Practical Examples & Open Questions



2

Brief Background of the SEC's Marketing Rule

Compliance Date: November 4, 2022 (after an 18-month transition period)

- Applicable to SEC-registered investment advisers
 - States may or may not defer to the SEC marketing rule

Big Takeaways:

- Redefines what constitutes an “advertisement” that is subject to the rule
- Establishes 7 general prohibitions
- Permits third-party ratings
- Codifies prior No-Action Letters re: performance advertising; withdraws prior No-Action Letters and associated guidance
- Requires additional Form ADV Part 1 disclosure
- Rescinds the Cash Solicitation Rule

Brief Background of the SEC's Marketing Rule

Hyperlinked Resources:

- [Press Release/Fact Sheet](#)
- [Investment Adviser Marketing – SEC Rule 206\(4\)-1](#)
- [Adopting Release](#)
- [Marketing Compliance Frequently-Asked Questions](#)

Testimonials & Endorsements

Testimonials: a statement by a *current client*

- about such client's experience with an RIA; or
- that solicits or refers prospective or current clients to an RIA

Endorsement: a statement by *someone other than a current client*

- about such person's experience with an RIA;
- that solicits or refers prospective or current clients to an RIA; or
- that indicates approval, support, or recommendation of an RIA

Rule Requirements:

- Disclosures (client or non-client, compensation provided, conflicts of interest)
- RIA oversight and compliance (due diligence and written agreement)
- No ineligible persons (for compensated testimonials/endorsements)

Testimonials & Endorsements

What *isn't* captured by the rule?

- Unadopted and unentangled third-party content
 - Commentary, likes, shares, and endorsements on social media
 - Reviews on Google Reviews
 - Online screen-scrape directories
 - Edits to remove profanity, defamatory or offensive statements, threatening language, viruses or other harmful components, spam, unlawful content, or materials that infringe on IP rights, or editing to correct a factual error

Testimonials & Endorsements

What *is* captured by the rule?

- Adopted and entangled third-party content
 - Re-sharing/excerpting commentary, likes, shares, and endorsements
 - Incorporating Google Reviews into an existing advertisement
 - Creating/editing an online directory profile
- Compensated testimonials and endorsements

What *may be* captured by the rule?

- Solicited, uncompensated testimonials
 - Passive, broad-based requests vs. actionable targeted requests

Testimonials & Endorsements

Solicitor Arrangements → Compensated Endorsements by “Promoters”

- Perform “ineligible person” due diligence on potential promoters
- Enter into a written agreement with the promoter
- Draft promoter disclosures to be provided to solicited/referred clients
- Perform periodic compliance oversight of promoters
- Don’t forget that most states require compensated solicitors/promoters to be registered as IARs

Testimonials & Endorsements

Specific Rule Requirements

Disclosures	
Who	By the RIA or the promoter
When	At the time of the testimonial/endorsement
What (Clear/Prominent)	That the promoter is a client or non-client That compensation was provided Statement of material conflicts of interest
What (via Cross-Reference)	Material terms of compensation Description of the material conflicts of interest

Testimonials & Endorsements

Specific Rule Requirements

- Oversight and compliance
 - Reasonable basis for believing the testimonial or endorsement is compliance
 - Written agreement describing the scope of activities and compensation
- “Ineligible persons” cannot be compensated for testimonials or endorsements
 - Subject to a “disqualifying Commission action”
 - An SEC opinion or order barring, suspending, or prohibiting the person from acting in any capacity under the Federal securities laws)
 - Have experienced a “disqualifying event”
 - Certain felony or misdemeanor convictions, certain SEC, CFTC, or SRO final orders, certain court-issued orders, judgments or decrees, and certain SEC cease-and-desist orders

Testimonials & Endorsements

- Review/revise compliance policies and procedures
- Form ADV Part 1, Item 5.L
 - *Do any of your advertisements include testimonials, endorsements, or third-party ratings?*
 - *If yes to any of the above, do you directly or indirectly pay compensation in connection with such testimonials, endorsements, or third-party ratings?*
- Review/revise legacy solicitor agreements

Third-Party Ratings

- Rating or ranking of an adviser by an unrelated person that provides such ratings or rankings in the ordinary course of its business
 - E.g.: 5-Star Wealth Manager, Investopedia Top 100, Barron's Top 100, etc.
- Rule Requirements
 - Due Diligence
 - Reasonable basis for believing the questionnaire or survey used makes it equally easy for a respondent to provide positive or negative responses; not designed to produce a predetermined result

Third-Party Ratings

- Rule Requirements
 - Disclosure (clear and prominent)
 - The date on which the rating was given;
 - The period of time upon which the rating was based;
 - The identity of the third party that created and tabulated the rating;
 - If applicable, that the adviser provided compensation in connection with obtaining or using the third-party rating
- Remember the 7 general prohibitions
 - E.g., rating/ranking based solely on assets under management

Practical Examples & Open Questions

Scenario 1

Preexisting, unsolicited Google Reviews reside on an unclaimed Google Business Profile.

Not an advertisement, not subject to the rule

Scenario 2

Preexisting, unsolicited Google Reviews reside on an unclaimed google Business Profile. One review contains defamatory and factually incorrect information. You report the review for removal.

Not an advertisement, not subject to the rule

Scenario 3

Preexisting, unsolicited Google Reviews reside on an unclaimed Google Business Profile. You claim and start managing the Google Business Profile by adding your own content.

Likely adoption/entanglement, subject to the rule

Practical Examples & Open Questions

Scenario 4

You excerpt certain preexisting, unsolicited Google Reviews and re-post them on your own website.

Adoption/entanglement, subject to the rule

Scenario 5

You send a blast email to all clients asking that they share their honest feedback by posting a Google Review. You have not claimed/do not manage your Google Business Profile and do not further excerpt any Google Reviews on your own website.

Potentially no adoption/entanglement, not subject to the rule

Scenario 6

You send an email to all clients asking that they share their honest feedback by posting a Google Review but provide them suggested language to use in their review.

Adoption/entanglement, subject to the rule

Practical Examples & Open Questions

Scenario 7

You send an email to your top 5 clients, who also happen to be family members or close personal friends, asking that they share their honest feedback by posting a Google Review. You have not claimed / do not manage your Google Business Profile and do not further excerpt any Google Reviews on your own website.

Likely adoption/entanglement, subject to the rule

Scenario 8

You respond to certain preexisting, unsolicited Google Reviews by simply writing "Thank you" or "I appreciate the feedback" or clicking the "thumbs up" button.

Likely adoption/entanglement, subject to the rule

Scenario 9

On your website, you add a snippet that reads "Proud recipient of countless 5-star reviews on Google Reviews", accompanied by the Google logo and five yellow stars. Your Google Business Profile has 3 5-star reviews and 25 1-star reviews.

Misleading; would fail the 7 general prohibitions

Concluding Remarks

- Does this meet the definition of "advertisement"?
- Does this satisfy the 7 general prohibitions?
- Have you adopted/entangled yourself with third-party content?
- Have you satisfied the disclosure, oversight, and (if applicable) written agreement and disqualification elements of the rule?
- Have you updated your Form ADV Part 1, compliance and procedures, and solicitor/promoter agreements?



**Want to
connect with
this presenter?**

Chris Stanley

Website: beachstreetlegal.com

Twitter: [@beachstreetesq](https://twitter.com/beachstreetesq)

LinkedIn: [company/beachstreetlegal](https://www.linkedin.com/company/beachstreetlegal)

YouTube: [@beachstreetlegal](https://www.youtube.com/@beachstreetlegal)