

# COMPLIANCE ALERT



## The New Marketing Rule

### In this Edition:

An email with a muffin recipe to more than 10 people is what I'd hear from the next office as Ashleigh would be providing new CCO training. A very black and white approach to advertising had been the focus in the past, looking more at the number of people receiving the message rather than the message itself. The new rule takes a more principles-based approach. Some of the highlights are below. First proposed in 2019, passed in 2020 and now enforced this month, the NMR changes the definition of advertisement. The general definition includes two prongs:

New Marketing Rule (NMR)

FY22 SEC Enforcement Takeaway

Email Review Tips

K-9 Corner



*“First, the definition includes any direct or indirect communication an investment adviser makes that: (i) offers the investment adviser’s investment advisory services with regard to securities to prospective clients or private fund investors, or (ii) offers new investment advisory services with regard to securities to current clients or private fund investors. The first prong of the definition excludes most one-on-one communications and contains certain other exclusions.*

*Second, the definition generally includes any endorsement or testimonial for which an adviser provides cash and non-cash compensation directly or indirectly (e.g., directed brokerage, awards or other prizes, and reduced advisory fees).”*

There is a list of general prohibitions, but rather than list them, to sum them up, you cannot be misleading.

You can use testimonials and endorsements with stipulations.

You may also use third party ratings as long as there are certain criteria met and you provide clear and prominent disclosures.

Furthermore, there were updates to performance prohibitions, which frankly make sense for disclosure purposes from a transparency standpoint. For example, the rule prohibits including gross performance unless the advertisement also presents net performance. Also, you cannot cherry-pick information.

There is also part of the ADV Part 1, which is now asking the status of your advertising. What do you have? Inquiring SEC staff wants to know.

What are your next steps?

1. Manual. For starters, remember the golden rule of compliance! You're out of compliance unless you're following your OWN policies and procedures. The first step is to make sure you have your manual updated to fit these new regulations if you have not done so already.
2. What's an ad? There is a lot of nuances here. If you're not sure if it's an ad, call us.
3. You need an annual advertising file and a way to track the CCO's approval. The best way in the digital world is a log.

If you are unsure if your firm is ready to deal with the new marketing rule, please call us and let us know. 🗨️

## SEC Recovers \$6.4 BILLION From Enforcement Actions

### Take-away from the Commission's FY22 Enforcement Results

The Securities and Exchange Commission reported 760 total enforcement actions in the fiscal year of 2022, in their press release on November 15, 2022. Overall, this was a 9% increase over last year. 39% of the actions were against issuers who were either allegedly delinquent in making required filings with the SEC; or "follow-on" administrative proceedings seeking to bar or suspend individuals from certain functions in the securities markets based on criminal convictions, civil injunctions, or other orders.

*"The SEC's stand-alone enforcement actions in fiscal year 2022 ran the gamut of conduct, from "first-of-their-kind" actions to cases charging traditional securities law violations.*

*Money ordered in SEC actions, comprising civil penalties, disgorgement, and pre-judgment interest, totaled \$6.439 billion, the most on record in SEC history and up from \$3.852 billion in fiscal year 2021."*



What were some of the key findings and some take-aways (as they relate to Investment Advisers)?

Recordkeeping Issues. There was "wide-spread and longstanding failures to maintain and preserve work-related text message communications on employee devices. The SEC made \$1.235 billion in penalties.

**Take-away:** Once you mix business with personal, your personal is their business. All communication is subject to recordkeeping. I know it is 2022. Either have two devices or talk to your tech consultant.

Insider Trading: Nine individuals were charged in connection with three alleged insider trader schemes, which yielded the SEC roughly \$6.8 million. All three actions originated from the Analysis and Detection Center of the Division's Market Abuse Unit, using data analytics that detect suspicious trading patterns, and all involved parallel criminal charges filed by the U.S. Attorney's Office for the Southern District of New York.

**Take-away:** Unless you look nice in orange...hard pass.

Crypto: In 2022, the Crypto market is still the bee in the regulator’s bonnet and as such, this past May they added 20 new positions to the renamed Cyber Unit, which is now “Crypto Asset and Cyber Unit”.

**Take-away:** I’ll just directly quote them... “Staff across the Division continued to investigate potential misconduct in this area, leading to significant enforcement”. If you dabble in Crypto, you are naturally high risk, like the swimming with sharks kind.



Cybersecurity and Compliance: Significant enforcement was brought against very large firms for having insufficient policies and procedures.

**Take-away:** As the SEC has directed previously, Cybersecurity should be scaled to the size and the risk factors of the firm. Nonetheless, scaled doesn’t mean do nothing. If you have your clients’ PII (personal identifiable information), you have a responsibility to protect it.

Failure to disclose or misleading disclosures: Throughout the various other areas of what the

staff found issues, the running theme can be summed up with improper, absent, misleading, or fraudulent disclosures. There was cherry-picking, failing to disclose conflicts, false statements etc.

For example, ESG: this area is becoming more of an issue to many investors. To test it, the division applies principle concerning materiality, accuracy of disclosures, and fiduciary duty, as codified in federal statutes, regulations, and case law. For example, charges were brought against a robo-adviser who marketed itself as providing advisory services compliant with Islamic, or Shari’ah law, but failed to adopt and implement written policies and procedures addressing how it would assure Shari’ah compliance on an ongoing basis.

**Take-away:** If you say you’re going to do it, do it. That’s really a rule. They are not kidding. As the kids say, “For super cereal!”

**The secret to a successful exam and to avoid enforcement**

On a positive note, the Division recognize “meaningful cooperation”. There were a few firms who provided “tangible cooperation that yield meaningful benefits”. These firms, whether it was because of self-reporting or other cooperation, penalties were reduced.

A difficult CCO and disorganization is a quick ticket to enforcement. However, if you’re prompt with your response and work with them to get them what they need, as the old saying goes, you catch more flies with honey. Exam readiness is also key, which is why the annual review has become such an important SEC requirement.

C.Y.A. Cover your assets! Don’t donate them to the SEC next year. 🐞



## You've Got Mail...and it's been read

Email reviews are a topic that comes up quite a bit. Why is it important? What are we looking for? Is it really a rule?

First, it is not a rule to review it, however, it is a rule to archive it. However, there is an assumption you're reviewing emails. It's important because it helps to prove that a CCO has fulfilled their duty to supervise. Supervising in this method enables the CCO to monitor and catch instances of noncompliance.

### What are some of the things to look for?

1. Are you archiving emails properly and according to policies.
2. Are employees using emails against policies (i.e., for personal reasons)
3. Are employees emailing PII to clients
4. Were complaints not addressed
5. Inappropriate use of social media
6. Forwarding confidential information to personal email

### How do we look for these things?

Not all email archives are created equally. Selecting a vendor appropriate to your needs is key. If you have 1-3 people to supervise, aim to save. Anything more than that, you'll want to upgrade on features that will allow you better search and filter criteria. Software such as Smarsh or Global Relay will save you frustration in the long run because they are more intuitive and have better search features. You can also add their lexicons or build in your own. Just remember to "clear your flags" if you're using the lexicon method.

Also, remember to document your review! Some vendors will enable you to easily print a report, while others not so much. And, if it is not documented, it didn't happen! Get credit for your work.

### Can't I outsource Email Reviews?

Yes! It is boring and time consuming to read through emails. You've got many better things to do. It's a simple add-on service we can provide. If you would like us to do your Email Reviews, let us know! 🐾

### Contact us:

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## K-9 Corner

Team Swayze welcomes Ruby who was adopted by Ryan, the Oakes Family.



She is pictured above happily accepted by her sister, Frankie, and clearly living her best life as a beach babe. Best of luck, Ruby!

Also joining the pack through Lisa Lafond byway of adoption are an adorable pair of



brothers from the same litter! Meet these young comedians, Augie (black) and Archie (brown). Lisa will never be bored with these two!!

