The 5-Star Moment for Financial Advisors and the 800-Pound Go(ogle)rilla

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After 60 years of regulatory prohibition, the SEC makes it clear in the new Marketing Rule they believe financial advisors must be held to a higher standard than professionals in other industries when it comes to promoting their services with testimonials and online reviews.

At the same time, Google is generally recognized by advisors and consumers alike as the most prominent source of online reviews to appear in search results. But whether there's a clear path forward for advisors to compliantly incorporate Google reviews into their marketing efforts is the elephant in the room we're tackling in this article.

Just the Facts (and Circumstances) About Google Reviews

Naturally, general review sites like Google weren't designed to incorporate the disclosure requirements prescribed just last year by the SEC in the Marketing Rule. And in its position as the 800-pound gorilla of online search, it can't be assumed or expected Google will modify its review platform anytime soon.

Without additional guidance from the SEC, advisors interested in asking clients to leave a review on Google must weigh the regulatory risk and determine if steps can be taken to satisfy compliance obligations with clear and prominent disclosures to help consumers make more informed and educated hiring decisions.

To better evaluate the situation at hand, let's look at three scenarios for financial advisors to grow their business with Google reviews that have been circulating on social media in recent months.

Scenario 1: Curated Testimonials Published on an Advisor's Website with a Link to Google Reviews

A financial advisor's website is a great place to include testimonials. And the Marketing Rule makes it clear that selectively promoting just a subset of (rather than all) testimonials is acceptable under certain conditions. Specifically, the SEC Marketing Rule adopting release states:

> *"We do not believe that the general prohibition requires an adviser to present an equal number of negative testimonials alongside positive testimonials in an advertisement, or balance endorsements with negative statements in order to avoid giving rise to a misleading inference, as certain commenters suggested. Rather, the general prohibition requires the adviser to consider the context and totality of information presented such that it would not reasonably be likely to cause any misleading implication or inference. General disclaimer language (e.g., "these results may not be typical of all investors") would not be sufficient to overcome this general prohibition. However, one approach that we believe would generally be consistent with the general prohibitions would be for an adviser to include a disclaimer that the testimonial provided was not representative, and then provide a link to, or other means of accessing (such as oral directions to go to the relevant parts of an adviser's website), all or a representative sample of the testimonials about the adviser."*

Some in the industry are suggesting that curated reviews displayed on an advisor's website linked to the advisor's Google reviews can serve as the 'representative sample of the testimonials about the adviser' to satisfy compliance requirements.

But the Marketing Rule also states that:

> *"... an adviser's hyperlink to third-party content that the adviser knows or has reason to know contains an untrue statement of material fact or materially misleading information would also be fraudulent or deceptive under section 206 of the Act and other applicable anti-fraud provisions."*

Accordingly, advisors linking to their reviews on Google must ensure every Google review written about them doesn't violate these anti-fraud provisions. If just one review contains an untrue or misleading statement, even if unintentional, regulatory risk could be considerably escalated.

Scenario 2: Google Reviews Embedded on an Advisor's Website

Another use case being discussed is the ability for financial advisors to use a widget that embeds all their Google reviews on their website. If you're unsure what this means, think about an advisor's website as their physical office and the widget as a pop-up shop displaying their Google reviews in the reception area.

While this scenario isn't explicitly addressed by the SEC, the Marketing Rule includes a section titled 'Adoption and Entanglement' to determine when third party information 'may be attributable to an adviser', thus triggering the prohibitions and disclosure requirements.

Specifically, the Marketing Rule states:

> *"Depending on the particular facts and circumstances, third-party information also may be attributable to an adviser under the first prong of the final rule. For example, an adviser may distribute information generated by a third party or a third party could include information about an adviser's investment advisory services in the third party's materials. In these scenarios, whether the third-party information is attributable to the adviser will require an analysis of the facts and circumstances to determine (i) whether the adviser has explicitly or implicitly endorsed or approved the information after its publication (adoption) or (ii) the extent to which the adviser has involved itself in the preparation of the information (entanglement). An adviser "adopts" third-party information when it explicitly or implicitly endorses or approves the information. ... An adviser is liable for such third-party content under the marketing rule just as it would be liable for content it produced itself."*

The concepts of 'adoption' and 'entanglement' are not new, as the SEC first introduced these terms beginning in 2000 (SEC Interpretation: Use of Electronic Media) and subsequently reinforced the terms in 2008 staff guidance (Commission Guidance on the Use of Company Websites).

Specifically, the 2000 SEC Interpretation states:

> *"Whether third-party information is attributable to an issuer depends upon whether the issuer has involved itself in the preparation of the information or explicitly or implicitly endorsed or approved the information. In the case of issuer liability for statements by third parties such as analysts, the courts and we have referred to the first line of inquiry as the "entanglement" theory and the second as the "adoption" theory.*
>
> *In the case of hyperlinked information, liability under the "entanglement" theory would depend upon an issuer's level of pre-publication involvement in the preparation of the information. In contrast, liability under the "adoption" theory would depend upon whether, after its publication, an issuer, explicitly or implicitly, endorses or approves the hyperlinked information.*

Applying the concept of 'adoption' as described in the 2000 SEC Interpretation to our scenario of an advisor including a Google widget displaying their reviews on their website, it's clear the advisor (at a minimum) implicitly endorses the hyperlinked information through its proactive actions to embed the widget displaying Google reviews on its website. (And arguably, a facts and circumstances analysis would likely find the endorsement to be explicit when published and promoted on a website page intended primarily for prospective clients).

Scenario 3: "Gotcha" Scenarios

Beyond the two examples above, financial advisors also need to watch out for gotcha scenarios where the best of intentions can still go awry.

Let's say you're a financial advisor with written policies and procedures clearly indicating you don't offer cash or non-cash compensation for reviews. The morning after a client appreciation dinner you wake up to a new 5-star review from a client who enjoyed the evening.

While your policy says one thing, when the SEC conducts a review, their assessment of the *facts and circumstances* may conclude otherwise. Specifically, the SEC states:

> *"We believe the timing of compensation relative to an endorsement or testimonial is relevant in determining whether an adviser is providing compensation for the testimonial or endorsement. In addition, we believe that there will be a mutual understanding of a 'quid pro quo', whether explicit or inferred based on facts and circumstances, for most compensated endorsements or Testimonials. However, we decline to draw bright lines around either the timing of the compensation or the establishment of a mutual understanding. We believe such bright lines would unnecessarily limit the final rule and would encourage advisers to structure their arrangements to avoid application of the rule in situations where it would otherwise apply. In addition, we believe that in many cases compensation will be in connection with testimonials and endorsements."*

If financial advisors only direct clients to write reviews on their own website or a third-party online review platform compatible with the Marketing Rule, this new 5-star review will likely be written on one of these platforms and can be updated with the required *clear and prominent* disclosures to reflect the incidental non-cash compensation received by the client on the day they wrote their review.

And in this scenario if the review is instead written and published on Google, it's much more likely the SEC's assessment of the facts and circumstances will concur that while the dinner very likely influenced the timing of the review, it wasn't suggested by the financial advisor to write the review on a platform where disclosures couldn't be added when records show a consistent pattern of the advisor only asking for reviews on SEC-compliant review platforms.

On the other hand, if an advisor has a history of asking clients to write reviews on Google and this same scenario occurs, the SEC's assessment of the facts and circumstances could determine the advisor is complicit in soliciting reviews on a platform incompatible with the Marketing Rule. This puts the advisor in a no-win situation, unable to add disclosures to the review on Google addressing the non-cash compensation as incidental or otherwise.

Will FINRA Precedence Influence SEC Guidance?

While testimonials are new territory for SEC registered firms, FINRA Rule 2210 and subsequent FINRA notices speak directly to the topic of testimonials on platforms like Google for broker-

dealers and representatives, providing us with regulatory precedence the SEC may consider as an input when developing their own stance.

Specifically, in FINRA Regulatory Notice 17-18 addressing testimonials and endorsements for broker-dealers and representatives, **Q8** is a question that would be ideal if it could be answered on the SEC Marketing Compliance FAQ page as it pertains to rule 206(4)1 and RIAs/IARs.

> *Here's the question and accompanying FINRA response excerpted from the Notice:*
>
> ***Q8**: Social networking websites may allow individuals who have connected to another user on the network to give an opinion of, or provide comments regarding, the user's professional capabilities. If the user is a registered representative who has established a business-related site on the social network that is supervised and retained by the broker-dealer, are these opinions or comments considered testimonials for purposes of FINRA's communications rule?*
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> FINRA's response (**bold** emphasis mine):
>
> ***A**: FINRA does not regard **unsolicited** third-party opinions or comments posted on a social network to be communications of the broker-dealer or the representative for purposes of Rule 2210, including the requirements related to testimonials in paragraph (d)(6).*
>
> *Rule 2210(d)(6), Testimonials, states that:*
>
> *(A) If any testimonial in a communication concerns a technical aspect of investing, the person making the testimonial must have the knowledge and experience to form a valid opinion.*
> *(B) Retail communications or correspondence providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:*
> *(i) The fact that the testimonial may not be representative of the experience of other customers.*
> *(ii) The fact that the testimonial is no guarantee of future performance or success.*
> *(iii) If more than $100 in value is paid for the testimonial, the fact that it is a paid testimonial.*

FINRA makes it clear in its response that unsolicited testimonials on sites like Google are not considered communications of the firm subject to oversight and disclosure requirements. Through inference, on the other hand, it's clear solicited testimonials on such platforms do.

Accordingly, many in the industry are awaiting explicit guidance from the SEC to address this topic for RIAs and IARs as well.

A Possible (Compliant) Path Forward for Advisors to Use *Google Reviews*?

While we await additional guidance or possible enforcement actions from the SEC, several RIAs and IARs will choose to proceed with Google Reviews and test the waters.

In these circumstances, it may be impossible to put the genie back in the bottle, but it's worth considering how RIAs and their compliance teams can demonstrate a good-faith effort towards compliance with the *spirit* of the Marketing Rule to lessen the likelihood or severity of potential penalties in the future.

For example, Google does permit owners of businesses to respond to reviews which affords an opportunity for advisors to proactively monitor for new reviews and promptly use the response

functionality to include the *clear and prominent* disclosures stipulated in the Marketing Rule, with a hyperlink to a dedicated page on the firm's website, for example, where additional disclosures could be published.

Commercial software applications popular within industries where online reviews have been commonplace for years (e.g. Yext Reviews) are readily available to RIAs with minimal cost, offering an ability to effectively monitor for new reviews and respond promptly with supplemental disclosures.

Of course, if the SEC provides guidance that the act of soliciting reviews on sites like Google *does not* in itself result in reviews being considered a testimonial or endorsement subject to the Marketing Rule provisions, the irony is that the act of *responding* to a Google review is generally regarded in the compliance world as *entanglement*, thus triggering the Marketing Rule's disclosure requirements and prohibitions.

Where Do We Go from Here?

The SEC makes it clear in the Marketing Rule its intention is for testimonials and endorsements to provide important disclosures that help consumers make more informed and educated decisions when selecting an investment adviser. Ideally, additional guidance from the SEC specific to mainstream review platforms like Google will be forthcoming to address scenarios like those presented in this article.

If the SEC provides guidance that the act of soliciting a review on a platform like Google does not itself trigger the Marketing Rule disclosure requirements and prohibitions, we'll very likely see a proliferation of testimonials and endorsements collected on these platforms without any accompanying disclosures provided by advisors in the form of a response, especially since the act of responding significantly increases the risk of entanglement.

Or the SEC could choose to acknowledge the ability for advisors to respond to reviews on sites like Google as an acceptable solution for providing clear and prominent disclosures with links to additional disclosures.

Finally, the SEC could provide guidance that sites like Google aren't compatible with the new rule, leading to the likely proliferation of industry-specific review platforms designed to accommodate Marketing Rule provisions. Just as industry-specific review websites have thrived among other trust-based professions (e.g. doctors and lawyers), these types of platforms designed with SEC compliance in mind, along with testimonials collected and published in a compliant manner on advisor websites, offer a workable solution and clear path forward if Google is deemed off-limits.

In Conclusion

The first impression of financial advisors for many of the next generation of investors will be the reviews they read online. The SEC deserves credit for crafting a principles-based rule that offers a blueprint for financial advisors to modernize their marketing plans and meet the expectations of today's consumers.

But for the blueprint to truly be effective, additional SEC guidance is needed to equip industry stakeholders with clarity in the areas discussed in this article. With this additional guidance and if the SEC blueprint is followed, financial advisors will succeed in attracting new clients in a compliant manner and strengthening their reputation in the process. ■