STARK&STARK
ATTORNEYS AT LAW

Investment Advisor Compliance Update

A complimentary service to our clients.

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1. Update on the New CFP® Code of Ethics and Standards of Conduct

In a recent update, we provided information about the new Code of Ethics and Standards of Conduct ("Code and Standards") which was approved by the Certified Financial Planner Board's Board of Directors on March 29, 2018. The new Code and Standards, which sets forth the ethical standards for CFP® professionals, replaces the CFP® Board's current *Terminology, Code of Ethics, Rules of Conduct and Financial Planning Practice Standards*. The new standards take effect on October 1, 2019.

The Code and Standards, which can be found on the CFP® website, www.cfp.net, contain a number of changes, including an "expansion of the application of the fiduciary standard that requires CFP® Professionals to act in the best interest of the client at all times when providing financial advice." That is, the new standards will call upon certified planners to act in the best interest of their clients when performing in any advisory capacity. The current fiduciary standard is more focused on the application of a fiduciary duty when the certified planner is furnishing comprehensive planning services.

The CFP® Board of Standards is working with the new Standards Resources Commission to hold educational forums for CFP® Certificants and the public on the *Code and Standards*. The Forums will be held at locations across the country throughout the remainder of 2018 and in 2019. These forums provide both an opportunity for CFP® Certificants to learn more about the new rules and a sounding board to offer feedback to the CFP® Board staff. The CFP® Board also announced that pre-approved continuing education programs that address the Code and Standards will be available by this October. CFP® professionals will be able to use this training to help familiarize themselves with the Code and Standards.

The CFP® Board also publishes monthly Board Reports that contain helpful updates on the new rules. The most recent August edition contains useful information on managing and disclosing conflicts of interest in line with the new guidance.

Stark & Stark will continue to keep CFP® professionals advised on the latest developments with regard to the implementation of the Code and Standards.

2. Division of Investment Management Withdraws No-Action Letters Surrounding Proxy Voting Services

The Division of Investment Management recently withdrew two no-action letters, which have been widely followed by the industry and allow advisers to rely on voting recommendations from independent proxy advisory firms. Many advisers have routinely relied on proxy advisory firms to avoid the substantial time and costs they might incur in undertaking an analysis of each and every proxy matter during proxy season.

The staff of the Securities and Exchange Commission will be hosting an upcoming roundtable this fall to hear from investors, issuers, and other market participants about whether its proxy rules should be refined. The roundtable will cover topics including the voting process, retail shareholder participation, shareholder proposals, and the role of

proxy advisory firms. As a result of this roundtable, we expect that the SEC will amend or enhance its prior guidance about investment advisers' responsibilities in voting client proxies and retaining proxy advisory firms.

If your firm currently has the authority to vote client proxies, you should focus on voting proxies in your clients' best interests unless and until there is further guidance issued by the SEC or its staff. We will continue to monitor these regulatory changes and we will send additional updates as information becomes available.

If you wish to discuss this alert or your policies and procedures regarding proxy voting, please feel free to contact Max Schatzow at (609) 219-7450 or address your questions with the attorney that you regularly discuss legal and compliance issues.

3. GDPR Regulatory Update and FAQ on Sharing Information with Third Parties

Regulatory Update

Since the European Union's ("EU") General Data Protection Regulation ("GDPR") has gone into effect on May 25, 2018, the regulatory landscape of data privacy management has continued to evolve. With respect to the GDPR, many firms are still in process of working towards compliance as industry trends are beginning to take practical effect. As of the date of this article, EU regulators have not instituted any enforcement actions nor produced any guidance as it applies to financial services firms complying with GDPR.

FAQs Concerning the Sharing of Personal Data with Third Parties

As a practical matter, we would like to take this time to address some frequently asked questions by our clients as it pertains to sharing information with third parties and what compliance controls the firm should have in place to address the sharing of personal data with third party organizations. Please see the below responses as it applies to investment advisory firms that do not have an EU presence but possess EU-based clients:

What is the difference between a "controllers" and "processors"?

The GDPR defines a "controller" as the entity and/or organization that determines the purposes and means of processing personal data. A "processor" is defined as the entity and/or organization responsible for processing personal data on behalf of a controller.

What are processors legal requirements under the GDPR?

Under the GDPR, processors are subject to specific legal obligations, such as the requirement to maintain records of the personal data they collect and their processing activities. Processors are also liable for any breaches of such personal data if the processor is found to be responsible for the breach.

The GDPR's jurisdictional scope is expansive and applies to processors based in the EU as well as processors that are based outside of the EU that offer goods or services to individuals that reside in the EU.

How does the distinction of a controller and processor apply in the investment advisory space?

As this would apply to the investment advisory space, the investment adviser is a controller because the investment adviser establishes the client relationship, collects the client's personal data (as defined under the GDPR), and is the decision maker on how the client's personal data is disseminated in connection to the providing the client investment management services. Generally speaking, each third-party entity and/or organization that an investment adviser shares EU personal data with to process on a firm's behalf is a processor.

For example, under the GDPR, a cloud-based service provider is a processor because the cloud-based service provider only stores personal data pursuant to the instructions of the investment adviser and does not independently process or manipulate that personal data.

Is a processing addendum required when a controller shares personal data with a third party?

In general, the GDPR requires that controllers, and relevant third parties with whom controllers share personal data with, amend their current agreements with a Data Processing Addendum ("DPA") in order to memorialize certain representations and obligations as required under the GDPR.

As the industry continues to develop, we have observed that there are currently two variations of this agreement in the investment advisory space, a controller-controller agreement and a controller-processor agreement. Accordingly, the form of this addendum in the investment advisory space will hinge upon whether or not the relevant third party organization engages in a certain level of independent decision making to process the client personal data that extends beyond the investment adviser's processing instructions.

What kinds of provisions are generally required in third party processing addendums?

The GDPR has a minimum of thirteen provisions that must be included in a DPA. These provisions include:

1. A description of the processing activity including the subject matter, duration, nature and purpose of the processing activity; as well as the type and categories of the personal data being processed;[1]
2. The processing activity instructions;[2]
3. Confidentiality provisions;[3]
4. Identification and implementation of processor's security measures and controls;[4]
5. Authorization for the processor to use subcontractors to process personal data;[5]
6. Identification of obligations that may be inherited by subcontractors to process the personal data;[6]
7. Liability of subcontractors;[7]
8. Procedures connected to responding to data subject requests;[8]
9. Representations by the processor to cooperate with the controller in the event of a data breach;[9]
10. Representations by the processor to cooperate with the controller in performing data protection impact assessments ("DPIA") (as applicable);[10]
11. Controls and representations concerning the return or deletion of personal data;[11]
12. Controllers audit rights; and,[12]
13. Controls governing cross-border transfers of personal data.[13]

As the GDPR regulatory framework continues to evolve, we will update you concerning any new developments.

Please contact Melissa Cefalu at (609) 219-7455 or mcefalu@stark-stark.com to discuss the application of the GDPR to your firm's data privacy management practices and how your firm can become compliant.

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[1] GDPR Art. 23(3).
[2] GDPR Art. 28(3)(a).
[3] GDPR Art. 28(3)(b).
[4] GDPR Art. 28(1); GDPR Art. 28(3)(c); GDPR Art. 32(1).
[5] GDPR Art. 32(1); Art. 32(1).
[6] GDPR Art. 28(3)(d); Art. 28(4).
[7] GDPR Art. 28(3)(d).
[8] GDPR Art. 28(3)(e); GDPR Art. 12 – 23.
[9] GDPR Art. 28(3)(f); GDPR Art. 33 – 34.
[10] GDPR Art. 28(3)(f); GDPR Art. (35); GDPR Art. 35-36.
[11] GDPR Art. 28(3)(g).
[12] GDPR Art. 28(3)(h).
[13] GDPR Art. 28(3)(h); GDPR Art. 46.:

4. On the Horizon – California Consumer Privacy Act May Trigger GDPR-Like Obligations for Registered Investment Advisers

The California Consumer Privacy Act of 2018 (the "CCPA"), was enacted on June 28th, and is slated to go into effect on January 1, 2020.

As currently drafted, the CCPA would apply to companies including registered investment advisory firms if they do business in California, have a role in determining the means and purposes of the processing "personal information,"

and: (a) have annual gross revenues exceeding $25,000,000; (b) annually process the "personal information" of 50,000 or more California residents, households, or "devices"; or (c) derive at least half of their gross revenue from the sale of "personal information."

The CCPA defines "personal information" broadly to include: "information that identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household." That would include: IP addresses; email addresses; purchasing or consumer histories or tendencies; web browsing and web search history; geolocation data; audio, visual, or thermal information; professional or employment information; and education information.

The CCPA also defines "device" broadly to mean "any physical object that is capable of connecting to the Internet, directly or indirectly, or to another device." Notably, the definition is not currently limited to devices located in California or owned by California residents.

The anticipated requirements under the CCPA are similar to the obligations imposed with respect to residents of the European Union and European Economic Area under the General Data Protection Regulation ("GDPR"). The CCPA will essentially allow consumers to access and control how their personal information is collected and used, including: the right to obtain a record of the personal information collected; the right to delete the personal information once it is no longer needed; and the right to opt-out of any personal information.

The California Attorney General is required to "solicit broad public participation to adopt regulations to further the purposes of" the CCPA. Based on that, we anticipate that compliance obligations under the CCPA could significantly change before the 2020 effective date. We will therefore continue to track the CCPA and provide updates. However, we do not suggest taking any major action such as preparing new policies, notices, or contract amendments based on CCPA compliance until we get closer to the effective date.

In the meantime, it could be helpful for firms that are concerned with their anticipated obligations under the CCPA to identify the scope of "personal information" they collect, especially from California residents and households, and how they share that "personal information" with third-parties.

5. "Web-Accessibility" Suits Continue to Rise Under the Americans With Disabilities Act

Over the last several years "web-accessibility" lawsuits have been on the rise. It remains an extremely divided issue among federal courts, with most of the litigation concentrated in New York and Florida. Fortunately, while these types of suits have been brought against some large financial institutions, we have not yet seen it affect an independent, registered investment adviser yet.

Title III of the Americans with Disabilities Act ("ADA") has always charged proprietors with ensuring their places of "public accommodation" (i.e. your physical offices open to the public at large) are equally accessible to all members of the public who are disabled. Examples of equal accessibility might mean having handicap parking spaces, installing ramps, widening doors or affixing braille signs. When enacting the ADA, Congress charged the Department of Justice ("DOJ") with issuing regulations under Title III, and with providing guidance concerning public accommodations and accessibility. To date, the DOJ has not yet issued regulations setting forth the specific accessibility requirements imposed upon websites by Title III. Despite the absence of regulation, some federal courts have broadly interpreted the scope of Title III to include websites as places of "public accommodation." Accordingly, in these jurisdictions websites should be equally accessible to all users—including disabled persons.

For websites, equal accessibility means providing webpage-content enabled and organized for use with a blind or visually impaired individual's screen reader. A screen reader is software or hardware program that allows blind or visually impaired users to access a website through a speech synthesizer or braille display. The screen reader "tabs" through content and hyperlinks and reads them out loud.

Many federal courts finding that websites are places of "public accommodation" have suggested that the Web Content Accessibility Guidelines (WCAG) 2.0 Level AA are an adequate standard for website accessibility. Published by the World Wide Web Consortium's (W3C) Web Accessibility Initiative (WAI), these guidelines are

designed to ensure a website can be easily used by people with different disabilities using different kinds of assistive technology. The consortium is made up of experts from around the world, and the guidelines are already widely used today. If an investment adviser or broker-dealer is seeking to avoid this type of litigation, it should reasonably inquire about these standards with their information technology professionals and consultants.

Stark & Stark will be monitoring the law in this area and alert our clients if this trend continues or whether the DOJ releases any guidance on web accessibility. Feel free to raise any questions that you may have with your regular attorney contact at Stark & Stark.

6: Service Offering: Outsourced Compliance Services

As you are already aware, Stark & Stark, PC has assisted countless investment advisers with regulatory, legal and compliance matters over the past thirty plus years. We have assisted our clients with registration issues, preparing policies and procedures, interpreting and advising on new rules and regulations, avoiding and defending litigation, and serving as counselors. We look forward to continuing to be able to serve our clients in this manner for countless more years to come.

We have historically been reluctant to provide outsourced compliance services for several reasons, but chief among them was our belief that an investment adviser must own its compliance program. We have received numerous inquiries over approximately the last five years from clients and prospective clients to see if we could assist them with carrying out certain routine and required elements of their compliance program.

After continued discussions with these clients, building out the essential infrastructure and hiring the necessary personnel, we began successfully offering these services to a small subset of clients about three years ago. These efforts are running smoothly and we believe our clients are happy with our services. We have now stood by several of our outsourced compliance clients through examinations conducted by the U.S. Securities and Exchange Commission and withstood their scrutiny.

We are now in a position to make these additional outsourced compliance services available to all of our clients.

We remind clients and future investment adviser seeking out our services, that there is no one-size fits all program or approach to compliance. We tailor the scope of our services to each client depending upon their specific needs. As such, we will customize our engagement to fit your specific needs and won't force you to pay for services that are not required or that can easily be performed in-house.

Some of the services that we currently perform for clients include:

- Review and maintain Form ADV;
- Prepare and submit Forms U-4 and U-5;
- Prepare and update policies and procedure manual;
- Conduct email review;
- Determine requirements for and submit state notice filings;
- Prepare and submit Form 13F, 13H and Schedules 13D/G;
- Conduct advertising reviews;
- Assist with performing annual reviews of the firm's policies and procedures;
- Conduct annual compliance meetings with firm employees;
- Conduct branch office reviews; and
- Engage in monthly compliance calls.

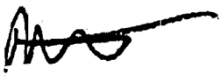
We have waited until now to announce this quasi-new offering, because we wanted to make sure that it would live up to our client's expectations and our high standards. We would be happy to discuss this offering with you and look forward to helping our clients with their additional compliance needs.

Please contact Tom Giachetti via email at tgiachetti@stark-stark.com if you would like to discuss this service.

7. Time to Update Policies and Procedures

It is important make sure that Your Policies and Procedures remain current.

Recommended Actions: If you have not updated your Policies and Procedures in the last 6-12 months (or longer), now is the time to do so. Please contact cpike@stark-stark.com or jcanela@stark-stark.com to begin the process of bringing your Policies and Procedures up-to-date.



Thomas D. Giachetti, Esq.
(609) 895-7255
tgiachetti@stark-stark.com

Brian A. Carlis, Esq.
(609) 895-7313
bcarlis@stark-stark.com

Cary Kvitka, Esq.
(609) 219-7434
ckvitka@stark-stark.com

Stephen A. Galletto, Esq.
(609) 895-7394
sgalletto@stark-stark.com

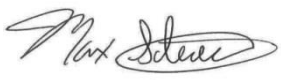
Daniel Sheridan, Esq.
(609) 945-7616
dsheridan@stark-stark.com

Scott Unger, Esq.
(609) 219-7417
sunger@stark-stark.com

Jeffrey A. Lang, Esq.
(609) 219-7452
jlang@stark-stark.com

Tara Speer, Esq.
(609) 945-7609
tspeer@stark-stark.com

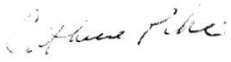
Melissa Cefalu, Esq.
(609) 219-7455
mcefalu@stark-stark.com



Max Schatzow, Esq.
(609) 219-7450
mschatzow@stark-stark.com

Seamus O'Brien, Esq.
(609) 895-7280
sobrien@stark-stark.com

Ryan Walter, Esq.
(609) 895-7392
rwalter@stark-stark.com



Catherine Pike, Paralegal
(609) 219-7439
cpike@stark-stark.com

Janet Canela, Paralegal
(609) 791-7037
jcanela@stark-stark.com

Janice Sedes, Paralegal
(609) 895-7302
jsedes@stark-stark.com