October 1, 2021

Submitted electronically via https://www.sec.gov/rules/submitcomments.htm

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: **Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice; File Number S7-10-21**

Dear Ms. Countryman,

Fidelity Investments ("Fidelity")[1] appreciates the opportunity to provide comments to the Securities and Exchange Commission ("SEC" or the "Commission") on its request for information and public comment ("Request")[2] on matters related to broker-dealer and investment adviser use of "digital engagement practices" to engage with retail investors through digital platforms and mobile applications. Fidelity has long supported the SEC's overall mission of protecting investors and ensuring they have the information necessary to make informed investment decisions. We view the Request as a helpful first step by the SEC to learn about the ways firms digitally interact with investors who expect their financial services provider to offer an integrated and proactive user experience that keeps pace with technological innovation.

Fidelity strongly believes that technology serves and benefits investors throughout their financial lives. Advances in technology allow financial services firms to provide a more personalized, efficient, and seamless user experience which both informs and engages investors. Consumers of all ages benefit from digital interactions with their financial services provider and are comfortable relying on digital interactions to help manage their financial lives.[3] However, not all digital interactions are the same. Where a financial services provider offers an overly

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[1] Fidelity was founded in 1946 and is one of the world's largest providers of financial services, including investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing, and many other financial products and services to more than 30 million individuals and institutions, as well as through 13,500 financial intermediary firms. Fidelity submits this letter on behalf of Fidelity Brokerage Services LLC, an SEC-registered introducing broker-dealer and FINRA member, and Fidelity Personal and Workplace Advisors LLC, an SEC-registered investment adviser.

[2] *See* Release Nos. 34-92766; IA-5833; File No. S7-10-21 RIN 3235-AN00 (September 1, 2021) ("Request"), available at https://www.sec.gov/rules/other/2021/34-92766.pdf.

[3] *See* Pew Research Center, Mobile Fact Sheet (2019), at https://www.pewresearch.org/internet/fact-sheet/mobile/; Pew Research Center, Internet Broadband Fact Sheet (2019), at https://www.pewresearch.org/internet/factsheet/internet-broadband; Federal Reserve Board, Consumers and Mobile Financial Services (Mar. 2015), at https://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201503.pdf.

gamified interface that entices investors to engage in behavior that not only carries more risk than the investor may realize, but also primarily benefits the financial services provider, such practices run counter to the existing regulatory framework. On the other hand, where a financial service provider uses interactivity with a consumer-centric focus (e.g., to encourage financial literacy and informed financial decision-making and engagement), such practices align with the existing regulatory framework and the overriding objective of consumer protection.[4] Accordingly, we respectfully encourage the Commission to utilize the existing regulatory framework to combat manipulative, unfair and predatory business practices and to not impede the ability of broker-dealers and investment advisers to pursue technological innovations that enhance the customer experience and encourage productive investor behaviors.

Our comments below offer Fidelity's perspective on the evolution and benefits of digital engagement and our view that the current regulatory framework has the flexibility to address these interactions, including that:

- Changes to the existing regulatory framework governing broker-dealers and investment advisers are not necessary to curtail digital engagement practices that harm investors.
- Practices that involve manipulative behavior or are based on conflicted arrangements that are not properly disclosed are violative of existing rules and regulations.
- A regulatory approach that seeks to limit digital innovation would penalize the financial services firms that operate in compliance with the existing regulatory framework, and, more importantly, the retail investors who depend on affordable, digital access for their financial needs.
- Digital interactions that are offered in a responsible manner, consistent with the existing regulatory requirements, are essential to achieving the important policy objectives of helping consumers achieve financial literacy, invest in alignment with personal risk tolerance and objectives, save for retirement, and avoid excessive debt.

I. **THE EVOLUTION OF DIGITAL ENGAGEMENT**

In Fidelity's experience, digital engagement has become a requirement to meet investors where they are.[5] Customers choose to interact with their service providers digitally, and financial

[4] Request at note 5 and accompanying text.

[5] According to the Pew Research Center, as of April 2021, 97% of Americans owned a cellphone of some kind, up from 62% in 2002; the percentage did not deviate for those Americans earning less than $30,000 per year. Of those Americans over 65, 92% owned cellphones. *See* Pew Research Center, Mobile Fact Sheet (2019), at https://www.pewresearch.org/internet/fact-sheet/mobile. The Pew Research Center further reports that, as of early 2021, 85% of Americans say they go online daily. *See* https://www.pewresearch.org/fact-tank/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online.

service providers are no exception.[6] As noted by the then-Chair of the SEC in 2016, digital investment advice holds the "positive potential to give retail investors broader, and more affordable, access to our markets."[7] With the evolution of digital engagement practices ("DEPs"), broker-dealers and investment advisers can more effectively provide investors with the services and information that they want, typically at a lower cost than traditional brokerage and advisory services. DEPs help investors stay connected to their financial lives wherever they are and whenever they choose. However, DEPs have not changed the fundamental financial services provided and the provision of those services continues to be subject to significant regulatory oversight. What has changed is simply the method of delivery, a fact the Commission has recognized since 1995.[8]

There are many benefits to digital engagement practices. DEPs provide self-directed investors with the ability to better educate themselves about basic financial planning, appropriate principles of asset allocation, and the risks and features of investment products and services; as a result, these investors can make financial decisions in a manner that is more consistent with their investment goals and risk tolerance. Fidelity agrees with the Commission that DEPs make

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[6] *See* Investors in the United States–A Report of the National Financial Capability Study, FINRA Investor Education Foundation (2019), at https://www.usfinancialcapability.org/downloads/NFCS_2018_Inv_Survey_Full_Report.pdf (finding "the percentage of investors who prefer paper documents has decreased considerably relative to 2015, while preference for all other methods has increased."); Burham, K., Bogdan, M. & Schrass, D., Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet, 2015, ICI Research Perspective 21, no. 5 (Nov. 2015), at www.ici.org/pdf/per21-05.pdf (A survey by the Investment Company Institute in 2015 found that 91% of U.S. households who own mutual funds had Internet access (up from 68% in 2000), and that there was widespread use among various age groups, education levels and income levels); E-Delivery: Modernizing the Regulatory Communications Framework to Meet Investor Needs for the 21st Century (September 2020), at https://www.sifma.org/wp-content/uploads/2020/09/E-Delivery-Paper.pdf (Industry White Paper stating that financial firms surveyed by SIFMA reported year-over-year increases in electronic delivery adoption each year (without exception) by their clients in the last several years).

[7] Mary Jo White, Chair, US Securities and Exchange Commission, Keynote Address at the SEC-Rock Center on Corporate Governance Silicon Valley Initiative (Mar. 31, 2016), available at https://www.sec.gov/news/speech/chair-white-silicon-valley-initiative-3-31-16.html.

[8] In 1995, the SEC published its first interpretation on the use of electronic media to deliver regulatory communications, "Use of Electronic Media for Delivery Purposes," Securities Act Rel. No. 7233 (Oct. 6, 1995), available at https://www.govinfo.gov/content/pkg/FR-1995-10-13/pdf/95-25391.pdf. This release and the others that followed recognized the power of technology and, specifically, the electronic distribution of information, to "enhance the efficiency of the securities markets by allowing for the rapid dissemination of information to investors and financial markets in a more cost-efficient, widespread, and equitable manner than traditional paper-based methods. *Id.* at 53458. In providing this guidance, however, the SEC also clearly established the principle that the securities laws are technologically neutral. The use of electronic media did not change the substantive provisions of the federal securities laws. In fact, the SEC specifically stated that the guidance set forth in the 1995 release "addresses only the procedural aspects under the federal securities laws of electronic delivery and does not affect the rights and responsibilities of any party under the federal securities laws." *Id.* at 53459. In the 1995 release and in a subsequent release in 1996 extending the same principles to the delivery of required communications under the Advisers Act, the SEC was clear that the "liability provisions of the federal securities laws apply equally to electronic and paper-based media." *Id.* at note 11. *See also* Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information, Investment Advisers Act Rel. No. 1562 (May 9, 1996), available at https://www.govinfo.gov/content/pkg/FR-1996-05-153/pdf/96-12176.pdf.

financial services platforms more accessible to retail investors,[9] but we believe such accessibility goes far beyond trading. DEPs provide financial education that can encourage retail investors to consider their debt when making financial decisions, save more effectively across their financial goals, and engage with their financial service provider for guidance when needed. Technology has made financial education accessible to the investor at their convenience any time and any place. Further, as noted in the Request, DEPs can also encourage retail investors to increase their contributions to retirement accounts and engage in other wealth-building activity.[10] Digital engagement can also support Americans who find themselves increasingly responsible for managing their own retirement savings because of the disappearance of defined benefit plans, deteriorating confidence in the long-term viability of the Social Security system, and concern that Social Security payments will provide insufficient retirement income.[11] Importantly, DEPs can also support those individuals making up over one third of the country's workforce who would like more information regarding how much their savings will produce in retirement and whether they are on track to meet their expected retirement needs.[12] Against this backdrop, DEPs provide an important means in providing the investing public with accessible, low-cost, and reliable support from financial service providers.

DEPs also assist investors to search and filter through large amounts of financial information that would otherwise be delivered in paper format. As Commissioner Peirce stated in 2018: "The amount of paper material that investors receive is voluminous and could result in investors being overwhelmed"[13] and, further, "… the SEC should allow investors to benefit from innovations."[14] We agree, and in our view, the optimum medium for producing streamlined, reader-friendly, interactive education and disclosures is digital.[15] Likewise, registrants and

[9] Request at 8 - 9.
[10] *Id.* at note 5 and accompanying text.
[11] In 1998, 59% of Fortune 500 companies offered new hires a defined benefit plan for retirement; in 2019, only 14% of those companies offered such plans. Brendan McFarland, Retirement Offerings in the Fortune 500: 1998 to 2019, Willis Towers Watson (June 25, 2020), available at https://www.willistowerswatson.com/en-US/Insights/2020/06/retirement-offerings-in-the-fortune-500-1998-2019. Based on a study conducted by the AARP in 2020, two thirds of Americans believe the average monthly Social Security retirement benefit of $1503 per month is too low, and 57% say they are not confident in the future of the Social Security program. *See* Social Security Opinions and Attitudes on its 85th Anniversary (August 14, 2020), available at Social Security Opinions and Attitudes on Its 85th Anniversary (aarp.org). As of January 2021, 33% of the American workforce reported that COVID-19 had negatively impacted their ability to save for retirement, and close to half of all workers reported that debt was a major deterrent to saving. 2021 Retirement Confidence Survey, Employee Benefit Research Institute and Greenwald Research (January 2021), available at https://www.ebri.org/docs/default-source/rcs/2021-rcs/2021-rcs-summary-report.pdf?sfvrsn=bd83a2f_2.
[12] 2021 Retirement Confidence Survey, Employee Benefit Research Institute and Greenwald Research (January 2021), available at https://www.ebri.org/docs/default-source/rcs/2021-rcs/2021-rcs-summary-report.pdf?sfvrsn=bd83a2f_2.
[13] *See* Pickups and Put Downs: Remarks at the Financial Planning Association 2018 Major Firms Symposium, Commissioner Hester M. Peirce, available at https://www.sec.gov/news/speech/speech-peirce-100218.
[14] *Id*.
[15] *See* Letter to Chairman Jay Clayton, U.S. Securities and Exchange Commission, September 8, 2020, from Fidelity Investments, The Charles Schwab Corporation, and BlackRock, Inc. (recommending that the Commission update its prior interpretive guidance and regulations to provide for the broader delivery of regulatory documents to investors through digital means), available at https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/about-fidelity/digital-delivery-letter.pdf.

issuers can update their digital media to incorporate the most recent material information available on a near real-time basis. Moreover, digital technology provides the means for easy access to important disclosures and information that can assist the self-directed investor in understanding financial terms and transactions, in a format that is readily available, wherever and whenever the investor needs it most. Fidelity believes that better technology and design can result in better disclosure, better understanding, and better decisions.

The Commission defines DEPs as consisting of a broad spectrum of activities, including the following nine categories of practices purportedly engaged in by broker-dealers and investment advisers: (i) social networking tools, (ii) games, streaks and other contests with prizes, (iii) points, badges and leaderboards, (iv) notifications, (v) celebrations for trading, (vi) visual cues, (vii) ideas presented at order placement and other curated lists or features, (viii) subscriptions and membership tiers, and (ix) chatbots.[16] The Request includes examples of these practices ranging from games with "slot-machine style" interactive graphics, leaderboards with "scorekeeping" and "digital confetti" celebrating new orders to purchase stock or options, *to* notifications reassuring investors during periods of market volatility and chatbots to respond to investor inquiries about their accounts.[17]

Fidelity strongly believes that not all digital engagement practices are the same. There is a material difference between meeting investors in a digital environment that is informative, customer-centric, and easy to use and presenting digital interfaces that entice investors to speculate or engage in risky financial behavior which benefits the financial services provider. There is nothing inherently wrong with encouraging investors to take action that benefits the investor. Indeed, we believe that motivating unengaged investors to take responsible, informed actions through digital means will leave the investor in a far better place than if they had taken no action at all. However, investor protection issues arise when investors are motivated by a financial services firm to take actions that are risky in light of the individual investor's investment experience and/or risk tolerance, particularly when such actions will have a disproportionate benefit to the firm's revenues or bottom line. For example, intraday trading, sophisticated option strategies and other complex investments are typically used by very experienced investors. Rewarding or encouraging novice investors to engage in these same strategies promotes risky behavior with investors who likely do not fully appreciate the extent of risk involved. Manipulating investors to engage in risky practices, digitally or otherwise, is and always has been contrary to industry standards and applicable regulations.

II. <u>FIDELITY'S EXPERIENCE WITH DIGITAL ENGAGEMENT</u>

Fidelity strives to inform and inspire investors to make educated choices that result in better futures and financial outcomes. Since 1979,[18] Fidelity has been at the forefront of using

[16] Request at 3.
[17] *Id.* at 6-8.
[18] In 1979, Fidelity launched the first voice-activated computer response system to provide price and yield quotes 24 hours a day. Fidelity established the first nationwide electronic funds transfer (EFT) for money market funds in 1981, became the first financial services company to use voice-activated computer answering systems in 1983, began offering computerized trading in 1984, and, in 1995, became the first mutual fund company to launch an

ever-evolving technology in our pursuit of creating an improved, more engaging, and intuitive investor experience. Fidelity sees digital engagement as a broad and important undertaking that involves first understanding the needs and requirements of a diverse investor and customer base and then determining how best to meet those needs. We believe that our focus on customer needs has led to increased investor satisfaction and to digital being our customers' channel of choice.[19]

In support of our investors, Fidelity utilizes digital messaging to deliver service communications, such as potential fraud alerts, appointment reminders, and other important messages. For those investors who have consented to electronic delivery, regulatory communications, such as trade confirmations and revised account profiles, will also be delivered digitally. In addition, we use digital messaging to provide informational and educational materials and personalized insights that remind investors to, for example, review their asset mix, investment strategy, beneficiaries, and other important account features to ensure they reflect the investor's current situation and financial goals.

Within our personal and workplace investing businesses, Fidelity offers investors the ability to digitally manage their financial life with capabilities including access to investment news, credit card management, financial wellness assistance, and financial education across topics like budgeting, debt, college savings, and investments. Through our websites and mobile applications, our retail customers can access educational webcasts, webinars, and videos regarding a variety of subjects, including market events, personal finance, investment products, and investment strategies. Using digital messaging, we encourage our retail customers to plan for their future, helping them to track their progress towards their retirement goal and to consider a variety of actions that may lead them closer to that important goal. Fidelity believes that such digital engagement practices will be key to increasing the retirement savings across America.

Moreover, Fidelity offers its retail investors a selection of digital planning and investment analysis tools, as well as capabilities for digital investing. These tools are particularly valuable to our self-directed investors who can engage via Fidelity's websites or mobile applications to explore, for example, asset allocation strategies, diversification, and goal-based planning. In addition, we offer screening and other tools to assist investors in evaluating securities for investment and, for some customers, digital investment advisory services are available. Investors can also elect to receive a variety of alerts, including messaging regarding account balances, capital gain distributions, or money movement, and customizable requests for delivery of certain

internet home page. In 2005, Fidelity introduced Fidelity Labs, an online usability testing environment that makes it possible for customers, prospects, and employees to participate in testing Fidelity's most innovative offerings. An award-winning online educational curriculum was launched on Fidelity.com in 2006 to bring trading concepts and opinion from industry experts to the average investor. In 2010, Fidelity introduced its first mobile brokerage application, an application that has evolved over time to keep pace with mobile technology enhancements. Fidelity launched its first online retirement planning experience for workplace participants in 2012, quickly expanding its suite of holistic planning and guidance tools for the benefit of its broader retail audience in 2014. Finally, in 2016, Fidelity began offering Fidelity Go®, an affordable, digital advisory solution that combines a professionally managed account with a digital planning dashboard.

[19] Within Fidelity's workplace investing business, 92% of those plan participants who engaged with Fidelity during the period February to July 2021started their interaction journey through mobile and/or web digital experiences.

commentary and reports or other information regarding securities, each as selected by the investor.

In addition to providing mobile and web-based engagement opportunities for investors, Fidelity provides traditional, in-person support in many locations and also offers 24/7 telephone support. Representatives are available to answer service questions or to re-direct the caller to the appropriate support person if they are unable to assist; licensed individuals can provide guidance and/or advice, as appropriate. Investors can also access live support through our online chat function, which is staffed by licensed individuals. Finally, Fidelity's virtual assistant, available on our websites and mobile applications, is designed to be responsive to investors' inquiries and can provide a variety of standardized replies based on an investor's search terms; replies include educational information, navigational guidance, or general instructions. By providing both traditional and digital engagement options for our retail investors to choose from, and to use interchangeably should they desire, Fidelity believes that investors can easily and efficiently obtain the support they need wherever or whenever they choose to engage.

III. REGULATORY CONSIDERATION FOR DEPs

While the Request queries whether additional regulation should attach to digital interactions, Fidelity believes the lens through which the SEC should consider these practices is no different than is considered for any other interaction between investors and their financial providers under existing regulations. Fidelity does not believe a new regulatory structure should be imposed solely because interactions are being conducted *digitally*. Rather than a radical departure, digital engagement reflects the technological evolution of traditional brokerage and advisory services and thus fits entirely within the existing regulatory framework governing broker-dealers and investment advisers.[20] History has demonstrated that the Commission's existing framework is a flexible, principle-based and technologically neutral regulatory regime that has previously accommodated technological change, innovation in products and services, and evolving business models.[21]

Fidelity fully agrees with the SEC that broker-dealers and investment advisers today must comply with "extensive obligations … that are designed to promote conduct that, among other things, protects investors from abusive practices."[22] There is no pass on these specific obligations[23] simply because a firm's services are delivered digitally.[24] In addition, broad anti-fraud provisions within the federal securities laws and regulations prohibit manipulative or deceptive conduct.[25] Broker-dealers must at all times "deal fairly with their customers and observe high standards of commercial honor and just and equitable principles of trade,"[26] while

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[20] Request at 27 – 42. *See also* FINRA Report, Report on Digital Investment Advice (March 2016), available at https://www.finra.org/sites/default/files/digital-investment-advice-report.pdf.
[21] *See supra* note 8 and accompanying text.
[22] Request at 27.
[23] *Id*. at 28 - 42.
[24] *Id*. at note 19.
[25] *Id*. at note 18 and accompanying text.
[26] *Id*. at note 20 and accompanying text.

investment advisers, as fiduciaries, owe their clients at all times a duty of care and a duty of loyalty.[27] Finally, under Regulation Best Interest, when making a recommendation to a retail investor regarding a security or an investment strategy involving securities (including an account type recommendation), a broker-dealer must act in such investor's best interest, and not place its interests ahead of the investor's.[28]

Industry-wide compliance with these existing obligations has resulted in financial services being provided in accordance with a robust, consumer protection framework. Manipulative and deceptive conduct is a violation of applicable regulations whether done through telephone, paper documents, or a digital platform. False and misleading statements similarly violate regulations irrespective of whether delivered through a website or U.S. mail. Fidelity agrees that certain types of DEPs could inappropriately incite investors to take actions against their best interests. In those situations, the Commission has in its arsenal the ability to investigate and, as appropriate, curtail such practices.

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Fidelity would be pleased to provide further information, participate in any direct outreach efforts the Commission undertakes, or respond to questions the Commission may have about our comments.

Sincerely,

David Forman
Chief Legal Officer
Fidelity Brokerage Services LLC

cc: The Honorable Gary Gensler, Chairman
The Honorable Allison H. Lee, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Caroline Crenshaw, Commissioner

[27] *Id*. at notes 62 - 65 and accompanying text.
[28] *Id*. at note 30 and accompanying text.