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[redacted]

October 1, 2021

Via E-Mail

Secretary
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 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

Dear Secretary:

We are submitting this comment letter on behalf of the Committee of Annuity Insurers (the "Committee"), in response to a request (the "Request") issued by the Securities and Exchange Commission (the "SEC") soliciting information and public comment on matters related to: (1) broker-dealer and investment adviser use of digital engagement practices (DEPs), including behavioral prompts, differential marketing, game-like features (i.e., “gamification”), and other design elements or features designed to engage with retail investors on digital platforms (e.g., websites, portals and applications or “apps”), as well as the analytical and technological tools and methods used in connection with these digital engagement practices; and (2) investment adviser use of technology to develop and provide investment advice.[1] The Committee appreciates the opportunity to submit these comments to the SEC in response to the Request.

Background

According to the Request, broker-dealers and investment advisers employ a variety of digital engagement practices when interacting with retail investors through digital platforms, which may include: (1) social networking tools; (2) games, streaks and other contests with prizes; (3) points, badges, and leaderboards; (4) notifications; (5) celebrations for trading; (6) visual cues; (7) ideas presented at order placement and other curated lists or features; (8) subscriptions and membership tiers; and (9) chatbots. The SEC is publishing the Request related to the use and development of DEPs by firms on their digital platforms in order to: (1) assist the SEC and its staff in better understanding and assessing the market practices associated with the use of DEPs by firms, including the extent to which firms use DEPs, the types of DEPs most frequently used, the tools and methods used to develop and implement DEPs, and information pertaining to retail investor engagement with DEPs; (2) provide a forum for market participants and other interested parties to share their perspectives on the use of DEPs and the related tools and methods, including potential benefits to retail investors and potential investor protection concerns; and (3) facilitate an assessment by the SEC and its staff of existing regulations and consideration of whether regulatory action may be needed to further the SEC’s mission in connection with firms’ use of DEPs and related tools and methods. The SEC is also publishing the Request to assist the SEC and its staff in better understanding the nature of analytical tools and other technology used by investment advisers to develop and provide investment advice to

[1] The Request is posted at https://www.sec.gov/rules/other/2021/34-92766.pdf.

clients, including: (1) oversight of the analytical tools and other technology; (2) how investment advisers and clients benefit from analytical tools and other technology; (3) potential risks to investment advisers, clients, and the markets more generally in connection with this technology; and (4) whether regulatory action may be needed.

COMMITTEE COMMENTS

The Committee would like to take this opportunity to provide the SEC with an overview of the primary manner in which Committee members provide brokerage services, as well as comments in response to specific questions raised in the Request.

The Primary Manner in Which our Members Provide Services. The Committee is a coalition of life insurance companies formed in 1981 to address legislative and regulatory issues relevant to the annuity industry and to participate in the development of federal policy with respect to securities, regulatory and tax issues affecting annuities. The Committee's current 31 member companies represent approximately 80% of the annuity business in the United States. Most of the Committee's members have affiliated broker-dealers ("Affiliated Firms") that distribute and/or sell registered insurance products. In addition, the registered insurance products of Committee members are also distributed through unaffiliated broker-dealers as a result of selling agreements with those firms ("Unaffiliated Firms"). A list of the Committee's member companies is available on the Committee's website at www.annuity-insurers.org/about-the-committee/.

The Request asks about the types of DEPs broker-dealers use (or in the future expect to use). Generally, Affiliated Firms and Unaffiliated Firms (together, "Firms") engage financial professionals to sell registered insurance products. These financial professionals are the primary channel for communicating with and obtaining information about Firms' brokerage customers. For example, financial professionals are responsible for working with retail customers to obtain information about their investment objectives, time horizon, and risk tolerance, among other things. Financial professionals utilize the information that they know about a customer to provide recommendations, which may be supplemented by the financial professional's use of digital tools from time to time. Neither Committee members' nor Affiliated Firms typically use DEPs with a view to causing customers to buy or sell products or other securities. Committee members do not control or typically limit the DEP's available for use through Unaffiliated Firms to the extent that they do not impact the marketing of registered insurance products. Due to the nature of registered insurance products as long term investments that are generally sold through discussions between financial professionals and potential customers, the use of certain DEP's, such as gamification, are not consistent with the traditional method of marketing those products.

Compliance with Regulation Best Interest. The Request also asks how broker-dealers approach compliance relating to their use of DEPs and the related tools and methods, in order to ensure compliance with Regulation Best Interest ("Reg BI") and other obligations under federal securities laws and regulations. Further, the Request states that the use of DEPs by broker-dealers may, depending on the relevant facts and circumstances, constitute a recommendation for purposes of Reg BI. More specifically, the Request asks: (1) whether broker-dealers consider the observable impacts of DEPs when determining if they are making "recommendations" for purposes of Reg BI; (2) how the fact that a DEP might impact the behavior of a statistically significant number of retail investors affects this determination; and (3) what statistical concepts, tools, and quantitative thresholds do broker-dealers use in making this determination. In addition, the Request asks whether there are there particular types of DEPs that broker-dealers avoid using because they would be recommendations, and what broker-dealers are doing to ensure that the DEPs they adopt comply with Reg BI, where applicable.

These questions suggest the SEC may consider additional rules or guidance to provide a modernized framework as to what constitutes a "recommendation" for purposes of Reg BI. However, when adopting Reg BI, the SEC stated that "the determination of whether a broker-dealer has made a recommendation that triggers application of Regulation Best Interest should

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turn on the facts and circumstances of the particular situation and therefore, whether a recommendation has taken place is not susceptible to a bright line definition."[2] The SEC provided a number of factors that should be considered when determining whether a recommendation has taken place, including "whether the communication 'reasonably could be viewed as a "call to action"' and 'reasonably would influence an investor to trade a particular security or group of securities.'"[3] The SEC added that "[t]he more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a 'recommendation.'"[4] The Reg BI adopting release also notes that "what constitutes a recommendation is highly fact-specific" and "[b]eing more prescriptive could result in a definition that is over inclusive, under inclusive, or both."[5] Given the SEC's and FINRA's existing guidance in connection with Reg BI, the Committee urges the SEC to be very deliberate in providing any additional guidance on this topic. As the SEC suggests, any guidance on whether a DEP constitutes a recommendation for purposes of Reg BI would need to be highly fact-specific, and therefore limited in its application.

CONCLUSION

The Committee appreciates the opportunity to provide these comments on the Notice. Please do not hesitate to contact Clifford Kirsch ([redacted] or [redacted]), Eric Arnold ([redacted]), or Michael Koffler ([redacted]) with any questions regarding these comments.

Respectfully submitted,

Eversheds Sutherland (US) LLP

FOR THE COMMITTEE OF ANNUITY INSURERS

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[2] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318, 33335 (July 12, 2019), https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12164.pdf.
[3] Id (citing NASD Notice to Members 01–23, Online Suitability—Suitability Rules and Online Communications (Apr. 2001); Notice of Filing Proposed Rule Change to Adopt FINRA Rule 2090 (Know Your Customer) and FINRA Rule 2111 (Suitability) in the Consolidated FINRA Rulebook, Exchange Act Release No. 62718 (Aug. 13, 2010), 75 FR 51310 (Aug. 19, 2010), as amended, Exchange Act Release No. 67218A (Aug. 20, 2010), 75 FR 52562 (Aug. 26, 2010) (discussing what it means to make a ''recommendation'')).
[4] Id.
[5] Id.