October 8, 2023
Filed Electronically
Vanessa A. Countryman
Secretary, Securities and Exchange Commission
100 F. Street NE
Washington, DC 20549-1090
File Number: S7-12-23

Re: *Proposed Rule – Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers*

Dear Ms. Countryman:

Thank you for the opportunity to provide comment on the proposed rulemaking for Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers ("Proposed Rule"). Empower administers approximately $1.4 trillion in assets for more than 18 million investors[1] and is the nation's second-largest retirement plan provider by total participants. Empower serves all segments of the employer-sponsored retirement plan market: government 457 plans; Taft-Hartley plans; small, mid-size, and large corporate 401(k) clients; nonprofit 403(b) entities; private-label recordkeeping clients; and IRA customers. Empower is also a leading financial service provider for many taxable investment accounts.

Empower applauds the U.S. Securities and Exchange Commission ("Commission") in their ongoing and continual efforts to effectively regulate the securities industry. Regulation Best Interest is an example of this commonsense rulemaking which has served investors well over the last few years.

However, we believe the breadth of the Proposed Rule could prevent investors from accessing beneficial investment education tools and create an unnecessarily complex and burdensome compliance regime for broker-dealers and investment advisers. These impacts will fundamentally

[1] As of June 30, 2023. Information refers to all retirement business of Empower Annuity Insurance Company of America (EAIC) and its subsidiaries, including Empower Retirement, LLC; Empower Life & Annuity Insurance Company of New York (ELAINY); and Empower Annuity Insurance Company (EIC), marketed under the Empower brand.

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change how firms interact with investors and could potentially reduce investor savings. Given these significant impacts, the Commission should withdraw the Proposed Rule. However, if the Commission chooses to finalize the Proposed Rule, it should significantly narrow the definitions to exclude non-recommendations in order to preserve use of essential investment education tools.

EXECUTIVE SUMMARY

Empower's comments are summarized below:

- **The Proposed Rule's definitions are overly broad and have the potential to reduce valuable non-recommendation investor education tools and therefore definitions in the Proposed Rule should be narrowed.**
- **The Proposed Rule potentially conflicts with U.S. Department of Labor rules and regulations under ERISA.**
- **The Proposed Rule establishes a Byzantine compliance regime.**
- **The Commission lacks statutory authority.**

I. The Proposed Rule's definitions are overly broad and have the potential to reduce valuable non-recommendation investor education tools and therefore definitions in the Proposed Rule should be narrowed.

The Proposed Rule seeks to apply a conflict of interest analysis specifically tailored to technological engagements between firms and investors. In structuring the Proposed Rule to apply to the use of covered technology rather than conduct, the Commission seeks to apply a standard-of-conduct regime to non-recommendations that is more burdensome than what recommendations and advice are subject to today. This expansion would represent a fundamental paradigm shift for broker-dealers and investment advisers, would unjustifiably impact traditional education tools often used by retirement participants, and consequently may cause many of these helpful tools to become unavailable.

a. Broad definitions and the implication for investment education

The Proposed Rule defines "investor interaction" broadly to include "…engaging or communicating with an investor, including by exercising discretion with respect to an investor's account; providing information to an investor; or soliciting an investor; except that the term does not apply to interactions solely for purposes of meeting legal or regulatory obligations or providing clerical, ministerial, or general administrative support."[2]

[2] 88 Fed. Reg. 54022; 54023 (August 9, 2023)

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"Covered technology" is also broadly defined in the Proposed Regulation to cover any "analytical, technological, or computational function, algorithm, model, correlation matrix, or similar method or process that optimizes for, predicts, guides, forecasts, or directs investment-related behaviors or outcomes."[3]

Taken together, the definitions of "covered technology" and "investor interaction" and the accompanying interpretations thereof in the preamble can be construed to mean that practically *any* investor interaction conducted through a covered technology that *may* prompt an investor to make an investment decision which results in the use of the firm's product or services would be covered under the Proposed Rule. For example, the use of a retirement savings modeling tool by 401(k) plan participants made available on the website of the broker-dealer or its affiliate may result in the participant contributing more to their 401(k) plan account in addition to receiving 100% of their employer's matching contribution. This would presumably be covered under the Proposed Rule because additional contributions to the 401(k) plan could result in additional purchases of mutual funds made available by the broker-dealer firm. While this common scenario can benefit a firm, the intent of these tools is to increase savings for investors.

The Commission clearly intends for the expansive definitions of "covered technology" and "investor interactions" to cover non-recommendations. Specifically, the Commission notes "The proposed definition of investor interaction would include interactions that have generally been viewed as outside the scope of 'recommendations' for broker-dealers."[4] Further, the Commission states "…the proposed definition would capture firm communications that may not rise to the level of a recommendation, yet are nonetheless designed to, or have the effect of, guiding or directing investors to take an investment-related action."[5]

To the extent the kind of interaction with a 401(k) participant described above is covered under the Proposed Rule, it stands to reason that the Proposed Rule would also cover common investment educational investment tools like asset allocation models, retirement plan and IRA savings modeling and projection tools, financial wellness tools, account type selection tools (e.g., pretax versus Roth contributions), and other interactions that are structured as helpful engagements to assess retirement readiness, for example, and are not made available for the purpose of driving particular behavior or calling investors to action to the benefit of the provider.

[3] 88 Fed. Reg. 54021-54022; 54023 (August 9, 2023)
[4] 88 Fed. Reg. 53975 (August 9, 2023)
[5] *Id.*

This scope represents a vast expansion of Commission regulatory authority. This expansion will ultimately chill use of common investment education tools due to the Proposed Rule's prescriptive rules.

b. When a conflict of interest analysis is applied to the mere use of investor education technology, the technology implicitly becomes a de facto recommendation subject to more prescriptive rules than those to which recommendations or investment advice provided without technology are subject.

The Commission implicitly equates any use of an investor engagement using covered technology with a recommendation under Regulation Best Interest or investment advice under the Investment Advisers Act of 1940 (the "Advisers Act"). In the proposing release to Regulation Best Interest, the Commission states that there is no bright line rule to define a recommendation but "determining whether a broker-dealer has made a recommendation, factors that have historically been considered in the context of broker-dealer suitability obligations, include 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."[6] The Commission goes on to state that "excluded communications would include providing general investor education (e.g., a brochure discussing asset allocation strategies) or limited investment analysis tools (e.g., a retirement savings calculator).[7]

We note that the Adopting Release of the final Regulation Best Interest Rule did not change this interpretation.

For investment advisers, the definition of "Investment Adviser" is centrally based on advice being a call-to-action: "person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities…"[8]

With respect to recommendations or advice, the Commission establishes requirements for both broker-dealers and investment advisers related to conflicts of interest. Conflicts of interest are best defined in Regulation Best Interest, and in the Commission's 2019 interpretation regarding standards of conduct for investment advisers, as an interest that might incline a broker-dealer or investment

[6] 83 Feb. Reg. 21593 (May 9, 2018)
[7] *Id*
[8] 15 U.S. Code Section 80b-2(a)(11)

adviser, or an associated person of the firm to — consciously or unconsciously — make a recommendation or render advice that is not disinterested.[9]

In the Proposed Rule, the Commission characterizes many common non-recommendation investment interactions through covered technology as calls-to-action. "These platforms often utilize game-like features such as points, rewards, badges, leaderboards, interactive interfaces, push notifications, and other methods to encourage users to engage in trading activities."[10] The Commission also includes non-recommendation technologies that target investors with notifications or use other methods to influence investor behavior. "Given the advances in covered technologies and DEPs, these non-recommendation interactions have the potential to influence investor behavior and place the firm's or associated person's interest ahead of investors' interest."[11]

In effect, the Commission deems traditional non-recommendations delivered through covered technology as constituting "calls-to-action" which are already regulated through Regulation Best Interest and the Advisers Act. However, the Commission curiously seeks to apply a more encompassing definition of conflicts of interest — and more prescriptive remedy to resolve the conflicts — as opposed to what currently applies in Regulation Best Interest and the Advisers Act.

While Regulation Best Interest, for example, treats conflicts of interest as those interests which influence future calls-to-action, the conflict of interest definition in the Proposed Rule exists merely if a firm *uses* covered technology that "optimizes for, predicts, guides, forecasts, or directs investment-related behavior or outcomes."[12] Additionally, in instances where a firm (or natural person associated with a firm) engages in an investor interaction whereby the interests of the adviser are placed ahead of the investor, the conflict of interest must be either eliminated or neutralized.

Neutralization is a stark shift from Regulation Best Interest, where a broker-dealer is required to identify and mitigate conflicts, and the Advisers Act, which requires investment advisers to eliminate or fully disclose conflicts of interest.

The Commission acknowledges that the Proposed Rule creates a more stringent regime for non-recommendations than exists today even for recommendations or investment advice. In analyzing whether the Proposed Rule should only apply to non-recommendations, the Commission states that "…this alternative would result in non-recommendation interactions being subject to more prescriptive

[9] 84 Fed. Reg. 33492 (July 12, 2019); *See* "Commission Interpretation Regarding Standard of Conduct for Investment Advisers," Investment Advisers Act Release No. 5248, 84 FR 33670 (June 5, 2019) ("Fiduciary Interpretation")
[10] 88 Fed. Reg. 54006 (August 9, 2023)
[11] *Id.*
[12] 88 Fed. Reg. 54022; 54023 (August 9, 2023)

requirements, and more documentation pursuant to the policies and procedures and recordkeeping elements of the proposal, than recommendation interactions…"[13]

In effect, by including non-recommendations within the scope of this Proposed Rule, the Commission has created the perception that many technology investor education tools that have traditionally not been considered 'calls-to-action' for purposes of applying a conflict of interest analysis are not only calls-to-action but represent more problematic engagements than those engagements solely covered under Regulation Best Interest and the Advisers Act.

The Commission concluded in the adopting release to Regulation Best Interest that "Regulation Best Interest should not stifle investment education as a means to encourage financial wellness, or otherwise restrict broker-dealers from disseminating information about, for example, retirement plans, and the approach we are taking to what is or is not considered a 'recommendation' achieves this goal."[14]

We agree with the Commission's assertion that causing investor education to become subject to the same requirements as a recommendation will chill these valuable investor education services. However, based on the analysis above, the Commission has completely reversed course on this conclusion without providing an adequate explanation as to why.

The Commission should not seek to regulate investor education under this Proposed Rule without a thorough and comprehensive analysis of the impacts.

c. Specific impact of the Proposed Rule to investor education tools

The impact of this potential chilling of investor education is best illustrated by applying the Proposed Rule to existing interactions. Retirement income tools and associated asset allocation tools are two examples of non-recommendation investor education which are intended to help retirement investors interact with their accounts and educate themselves about savings and investments in a general manner. They are not designed to nudge an investor in any particular direction.

However, the Proposed Rule does not distinguish between an intention and a result.

[13] 88 Fed. Reg. 54013 (August 9, 2023)
[14] 84 Fed. Reg. 33338 (July 12, 2019)

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Example:

- Participant A in ABC Retirement Plan currently contributes $10,000 into their 401(k) plan.
- ABC Retirement Plan Sponsor has contracted with Broker-Dealer C to offer an educational tool that projects potential lifetime income (lifetime income tool) and an asset allocation tool to model investing scenarios for its participants (together “investor education tools”).
- Broker-dealer earns compensation in the form of an asset-based fee on all plan assets in ABC Retirement Plan and revenue share from certain mutual funds within the ABC Retirement Plan.
- Participant A could contribute up to the 2023 deferral rate of $22,500.
- Participant A could receive additional matching contributions from the employer if the participant increases their 401(k) contribution.
- Participant A wants to retire at 65 with a certain lifetime income.
- Based on Participant A’s current 401(k) contribution and return of investment, a lifetime income tool indicates that Participant A is 60% of the way toward that goal.
- Participant A models the investor education tools to help determine how the participant may be able to achieve their desired retirement goals.
- Neither investor education tool provides a specific investment recommendation.
- Based on the interaction with the tool, Participant A increases their 401(k) contribution to $22,500, thereby increasing their employer’s 401(k) match.
- In addition, Participant A also reallocates across 401(k) plan investments.

In this scenario, Participant A’s mere use of the investor education tools represents an investor interaction using covered technology under the Proposed Rule. Because Participant A’s actions lead to a scenario where Broker-Dealer C could earn additional revenue, the Proposed Rule would classify this as a conflict of interest. “Consideration of *any* firm interest would be sufficient for a conflict of interest to exist under the proposed conflicts rules…,”[15] but the Commission goes on to state that “the consideration of a firm’s interest, on its own, would not necessarily require that the firm eliminate, or neutralize the effect of, the conflict of interest.”[16]

To help make this second determination, the Commission states, “If the firm determines that in selecting the investment ideas, the algorithm used for selecting the investment ideas does not place the firm’s interests ahead of investors’ interests —because, for example, it does not give more prominence to the investments that provide revenue to the firm than those that do not and no one investment is being recommended — it could reasonably determine that the conflict of interest

[15] 88 Fed. Reg. 53985 (August 9, 2023)
[16] *Id*.

created by the algorithm considering the revenue does not require elimination or neutralization under the proposed conflicts rules."[17]

Ultimately, our concern about the Proposed Rule applying to non-recommendations is twofold. First, as analyzed in Section I.b. of our letter, by applying any conflict of interest analysis to a non-recommendation (in this example, the two investor education tools), the tools are essentially classified as a form of a conflicted recommendation. The implications of this designation alone are problematic because plan sponsors may perceive the tools as inherently biased and will consequently not use them in their plans.

The second concern is that to the extent the tool is used, the firm's analysis of whether and how the conflict of interest needs to be eliminated or neutralized under the Proposed Rule is entirely unclear in this scenario based on the discussion in the Proposed Rule and because neutralization is not a concept that has historical precedent in securities law or Commission enforcement. The risk of potentially violating the Proposed Rule by either making an incorrect determination that an investor education tool does not place the interests of the firm ahead of the investor or not clearly understanding how to neutralize the tool for compliance is high given potential regulatory fines. Consequently, the only clear method to comply under the Proposed Rule is to eliminate the tool.

This potential implication of eliminating investor education tools is significant. According to a recent benchmarking survey conducted by plansponsor.com, a majority of plan sponsors surveyed provide formal financial education/guidance to participants with respect to savings strategies, budgeting tools, financial markets, and investing basics.[18] The reason these investor education tools are popular with plan sponsors is because they increase savings. A recent study by BlackRock and Human Interest revealed that "When workers are provided access to retirement tools, the data showed their savings rates are substantially higher."[19]

Empower, like many retirement providers, offers investor education tools to millions of participants. Between January 1 through September 28 of this year, there were nearly 1 billion interactions just with Empower's lifetime income analysis tool. These interactions ranged from gauging how close an individual is to reaching their stated retirement income goal to running calculations related to Social

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[17] 88 Fed. Reg. 53984 (August 9, 2023)
[18] Source: 2023 PLANSPONSOR Industry Reports/2022 PLANSPONSOR Defined Contribution Survey. Data as of 12/31/22
[19] Blackrock. (2023, September 13). *Lack of Access Is a Crucial Factor to Preventing Retirement Savings*. Lack of access prevents retirement savings | BlackRock. https://www.blackrock.com/us/individual/insights/retirement/lack-of-retirement-tool-access

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Security payments and healthcare cost estimations and modeling impacts to retirement age, contribution rates, and investment performance.

Participant A potentially losing access to these tools does not happen in a vacuum. Participant A represents millions of Americans that may be impacted. Therefore, the costs of eliminating these and other investor education tools are difficult to calculate but significant.

The implication of bias and the uncertainty of compliance may cause firms to simply eliminate investor education tools, like lifetime income calculations and asset allocation tools. This could deprive hard-working 401(k) participants of tools that help them save for retirement.

d. The economic analysis fails to adequately address the implications of non-recommendations

The consequence of treating many investor education materials as conflicted engagements is not adequately analyzed in the economic analysis of the Proposed Rule. The Commission makes a number of speculative assertions that justify the rulemaking.[20] These speculative statements make an evaluation of the costs and benefit of the Proposed Rule very difficult. While the Commission acknowledges that this rule applies to non-recommendations, it does not apply extensive commentary to the economic analysis of extending a conflict of interest regime to conduct that has never previously been subject to any conflict of interest standards. The lack of this discussion is extremely problematic given the implications described above.

The Commission correctly states that the Proposed Rule "could also cause some firms to avoid using certain covered technologies in investor interactions, even if the technologies did not create any

[20] "First, the use of covered technology in investor interactions *can* entail conflicts of interest related to the principal-agent problem between firms and investors, and second, the use of complex and opaque technologies *can potentially* create events that can harm investors." (emphasis added) – 88 Fed. Reg. 53998 (August 9, 2023).

"Similarly, firms *can* encourage investors to use more services, or increase transactions, *potentially* placing the firm's interest over investors' interests. These conflicts of interest are exacerbated by firms' use of certain covered technologies because the technologies that firms use *may* be complex and opaque to investors, who *may not* have the knowledge or time to understand how firms' use of these technologies *may* generate conflicts of interest in their interactions with investors. If these conflicts of interest were left unaddressed, investors *could* be harmed by less efficient investment strategies." (emphasis added) – 88 Fed. Reg. 53998 (August 9, 2023)

"The use of these technologies *can* generate conflicts of interest if firms use these technologies to suggest or nudge users to trade more frequently on their platform, or to invest in products that are more profitable for the firm but expose investors to higher costs or risks, against investors' interests." (emphasis added) – 88 Fed. Reg. 54002 (August 9, 2023)

conflicts of interest."[21] The Commission provides an example of a firm opting to not "…use an automated investment advice technology because of the costs associated with complying with the proposed rules and amendments."[22]

While we agree with this statement, it grossly understates the costs to investors based on the popularity of investor education tools as analyzed above. The Commission bases the cost impact to investors as firms raising costs and passing those costs to investors because the firm cannot deploy the use of the technology. Many of the potentially impacted education tools are free to the investor as a way to help them understand the general benefits of investing and saving. And while some of those tools may eventually lead to a firm obtaining new business, many times that is not the case. Consequently, for many free tools, firms will be incurring substantial new regulatory costs for small economic value to them. In addition to the other potential implications raised in Section I.c. above, this also may cause the firm to eliminate many investment education tools.

Additionally, we note that the Commission bases its rulemaking in large part on the Commission's Request for Information of Broker-Dealer and Registered Investment Adviser Digital Engagement Practices.[23] However, the Commission failed to ask specific questions related to the impact of expanding a conflict of interest analysis to traditional non-recommendations. Instead, the Commission asked a series of broad, open-ended questions that culminate in seeking input on the following: "To the extent commentators recommend any modifications to existing regulations or new regulations, what economic costs and benefits do commentators believe would result from their recommendations? Please provide or identify any relevant data and other information."[24] However, we cannot locate extensive discussion in either the preamble or the economic analysis of the Proposed Rule which addresses commentor feedback on this question as it relates to new regulations focused on non-recommendations in digital engagements.

We believe the Proposed Rule cannot be finalized in its current form unless this analysis is conducted.

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[21] 88 Fed. Reg. 54010 (August 9, 2023)

[22] *Id.*

[23] *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* - 86 Fed. Reg. 49067-49087 (September 1, 2021)

[24] 86 Fed. Reg. 49079; 49085 (September 1, 2021)

e. The Commission should narrow the key definitions to exclude non-recommendations

Because non-recommendations have historically not been subject to a conflict of interest regime or the considerable costs of investors losing investment education, we believe that non-recommendations should be excluded altogether to the extent the Commission proceeds with a Final Rule. We propose making the following adjustments to key definitions to preserve investor education:

> "*Covered technology* means a technological function or algorithm that directs investment-related behaviors or outcomes to a specific investment or service."

This revised definition would align the <u>*use*</u> of covered technology with the *conduct* of a broker-dealer in providing a recommendation or an investment adviser when providing investment advice.

Additionally, the definition of "investor interaction" should be revised to specifically tie covered technology interactions to conduct that has historically been considered a call-to-action.

> "*Investor interaction* means engaging or communicating with an investor, including by exercising discretion with respect to an investor's account, that prompts or directs an investor to make a specific securities transaction or investment strategy involving securities. This would not include providing information to an investor, interactions for purposes of meeting legal or regulatory obligations, or providing ministerial or general administrative support. Solicitations would not be considered investor interactions unless combined with a specific securities transaction or investment strategy involving securities."

While we believe the Commission should withdraw the Proposed Rule altogether, it is paramount that any final rule should significantly scale back the definitions to remove non-recommendations so current investor education tools are preserved.

II. The Proposed Rule potentially conflicts with U.S. Department of Labor rules and regulations under ERISA.

The Proposed Rule potentially conflicts with U. S. Department of Labor ("DOL") rules and regulations under the Employee Retirement Income Security Act of 1974 ("ERISA") and will materially impact services provided to employer-sponsored retirement plans by financial institutions. ERISA generally prohibits financial institutions as "parties-in-interest" from providing services to employer-sponsored retirement plans. To resolve this limitation and the potential conflicts of interest, the DOL, since 1974, has issued a long list of rules, regulations, and exemptions that allow financial institutions to provide both educational and advisory services to employer-sponsored plans and their participants subject to

various requirements, conditions, and disclosures. To provide those services, financial institutions have developed systems and processes that will now likely fall under the definition of a "Covered Technology" subject to the Proposed Rule. If the Proposed Rule goes into effect as currently drafted, the result will likely be that, although such educational and advisory services are allowed under DOL rules and regulations, such services will need to be eliminated under a final SEC rule. Below are two examples.

1. ERISA Regulation §2509.96-1 – Participant Investment Education

ERISA Regulation §2509.96-1 ("96-1") covers the providing of investment education to participants in employer-sponsored retirement plans subject to ERISA. In 96-1, the DOL provides that certain categories of information and materials, including software and interactive tools, do not constitute the rendering of investment advice under ERISA. In particular, the DOL provides that interactive investment materials which provide the participant the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income are not investment advice under ERISA. The DOL recently reaffirmed this guidance in the preamble to its 2020 investment advice rule (Prohibited Transaction Exemption 2020-02) by stating that 96-1 provides financial institutions with *a clear roadmap for determining when they are, and are not*, ERISA fiduciaries.[25] Since the issuance of 96-1 in 1996, many financial institutions have developed and made available to plan participants a variety of sophisticated and highly utilized retirement income and savings planning tools. Unfortunately, under the Proposed Rule, such educational tools appear to fall under the definition of Covered Technology, and the likely result will be financial institutions "eliminating" retirement participant access to much-needed retirement income, asset allocation, and savings tools.

2. Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees

For interactions involving investment advice, Prohibited Transaction Exemption 2020-02 ("PTE 2020-02") allows financial institutions to provide investment advice to plan participants that would otherwise be prohibited under ERISA's conflict of interest provisions. PTE 2020-02 requires financial institutions to act as an ERISA fiduciary and in participants' best interest and to provide specific disclosures to participants when providing advice. In response to PTE 2020-02, many financial institutions developed systems, processes, and algorithms to provide advice to participants that comply with PTE 2020-02. Although these advice systems, processes, and algorithms comply with ERISA's fiduciary requirements and PTE 2020-02, they will likely violate the Proposed Rule's conflict of interest restrictions and need to be eliminated.

[25] 85 Fed. Reg. 82804; 82828 (December 18, 2020)

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We strongly suggest that the Commission review the Proposed Rule with the DOL's Employee Benefits Securities Administration to determine the impact the Proposed Rule may have on DOL rules and regulations and the services provided by financial institutions to employer-sponsored retirement plans.

III. The Proposed Rule establishes a Byzantine compliance regime.

a. The Proposed Rule introduces a number of practical compliance issues

The Proposed Rule creates a Byzantine compliance regime that duplicates many aspects of existing compliance requirements of Regulation Best Interest and the Investment Advisers Act. Broker-dealers and investment advisers have established robust compliance regimes aimed at addressing the conflict of interest requirements of Regulation Best Interest and the Advisers Act. Layering in a separate, more prescriptive conflict of interest analysis that at times — but not entirely — overlaps with other regimes will cause unnecessary complexity, increase costs, and add confusion to the marketplace.

Broker-dealers and investment advisers are both required to identify, analyze, and mitigate and/or disclose conflicts of interest at both firm and representative levels. In order to comply, firms would have to establish a three-tier compliance program.

- **<u>Tier 1:</u>** The first tier would consist of two tracks — one for investor interactions using covered technology and another for investor interactions not involving covered technology. Interactions not involving covered technology would then require analysis under either Regulation Best Interest or the Advisers Act, as applicable.

- **<u>Tier 2:</u>** The second tier would require an analysis of whether an investor interaction using covered technology is a recommendation (for broker-dealers) or investment advice (for investment advisers). The second-tier compliance program would then need to conduct a bifurcated, parallel conflict of interest analysis using two different conflict of interest definitions.

- **<u>Tier 3:</u>** The third tier would require an entirely separate — and new — conflict of interest analysis just for investor interactions involving covered technologies that are not non-recommendations. Because non-recommendations have previously never been subject to a conflict of interest analysis, this would be an entirely new compliance program.

This three-tier compliance program does not even represent the full complexity of the compliance regime as it represents only Commission rulemaking and not the compliance responsibilities of other

ERISA rules related to investment recommendations and advice or state insurance and securities law and regulations.

The “tier 2” compliance regime represents the most convoluted aspect. As stated previously, the Proposed Rule defines conflicts of interests when a broker-dealer or an investment adviser merely considers an interest of the firm or an associated person of the firm when using covered technology. Whereas, a conflict of interest under Regulation Best Interest and the Advisers Act is interest that might incline a broker-dealer or investment adviser, or an associated person of the firm to — consciously or unconsciously — make a recommendation or render advice that is not disinterested.

It is unclear how these two definitions of conflict of interest would be addressed at the same time when an investor interaction covered by the Proposed Rule also is considered a recommendation. Take, for example, the registered representative of a broker-dealer who is authorized to make investment recommendations to 401(k) participants using a computer program to help establish the recommendation. Presumably, the registered representative’s use of covered technology in the investor interaction would trigger the obligations of both the Proposed Rule and Regulation Best Interest.

401(k) plans offer a range of eligible investment options. Many of those investment options can pay revenue share to broker-dealers. If the covered technology produces a recommendation which allocates a participant’s 401(k) assets into a growth fund that pays a broker-dealer 12b-1 fees, this would presumably qualify as a conflict of interest under the Proposed Rule because the covered technology takes into consideration a fund that pays the broker-dealer revenue-share payments. Logically, because the broker-dealer is potentially earning additional revenue, it would stand to reason that a broker-dealer would conclude that this conflict of interest places the interest of the broker-dealer ahead of the interest of the investor. The Commission appears to indicate it agrees with this assessment in the release of the Proposed Rule.[26]

The Commission provides some guidance about how a conflict of interest can be neutralized.[27]

[26] “For example, a firm that determined covered technology used in investor interactions favored investments where its receipt of revenue sharing payments placed the firm’s interests ahead of investors’ interests could eliminate the conflict, among other methods, by ending revenue sharing arrangements or by ensuring that its covered technologies do not consider investments that pay it revenue sharing payments.” 88 Fed. Reg. 53986 (August 9, 2023).

[27] “For instance, the firm could neutralize the effect of the conflict of interest by sufficiently increasing the weights given to factors, such as cost to the investor or risk-adjusted returns (including, in each case, comparisons to funds sponsored or advised by other firms), to provide a counterweight that prevents any consideration of the firm’s own interests from resulting in an investor interaction that places the firm’s interests ahead of investors’ interests.” 88 Fed. Reg. 53986 (August 9, 2023)

Additionally, in this example, this interaction would also be subject to the requirements of Regulation Best Interest, and therefore the recommendation would need to be evaluated under the conflict of interest analysis of that rule. In this scenario, the broker-dealer would need to determine if the interest might incline the broker-dealer or registered rep to make a recommendation that is not disinterested. Similar to the conflict of interest analysis in the Proposed Rule, the fact that the broker-dealer is earning revenue-share payments would presumably be a conflict of interest under Regulation Best Interest as well.

The Commission confirms that both rules must be applied and that complying with one rule may assist in complying with the other rule. "For example, if a broker-dealer uses covered technology to make a recommendation to a retail customer, and the broker-dealer eliminates, or neutralizes the effect of, any firm-and associated person-level conflicts of interest under the proposed conflicts rule, it could help address compliance with certain aspects of Reg BI's Conflict of Interest Obligation."[28] The Commission makes a similar statement about the Advisers Act.[29]

But the Commission provides no specifics about how to apply the analysis. Is the Commission indicating that neutralizing a conflict of interest under the Proposed Rule automatically meets the Conflict of Interest Obligation under Regulation Best Interest and the requirements of the Advisers Act? If not, how are firms expected to meet both rules for the same interaction? Is there a possibility of neutralizing a conflict of interest under the Proposed Rule that then would need to be mitigated and/or disclosed?

The practical effect of this Proposed Rule is that it creates a compliance regime that becomes a labyrinth of if/then exercises to determine which Commission rules apply to which interactions and occasional applications of both at the same time. This is inconsistent with the Commission's stated goal during Regulation Best Interest rulemaking to simplify compliance. "We further believe that, through the establishment of a standard of conduct for broker-dealers under the Exchange Act, this proposed approach would foster greater clarity, certainty, and efficiency with respect to broker-dealer standards of conduct. In addition, by drawing from principles that have developed under other regulatory regimes, we seek to establish greater consistency in the level of protection provided across the spectrum of registered investment advice and ease compliance with Regulation Best Interest where these other overlapping regulatory regimes are also applicable."[30]

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[28] 88 Fed. Reg. 53988 (August 9, 2023)

[29] "Where an adviser uses covered technology in an investor interaction, compliance with the proposed conflicts rules' requirement that conflicts of interest be eliminated or their effect neutralized could also help the adviser satisfy its fiduciary duty." 88 Fed. Reg. 53988 (August 9, 2023)

[30] 83 Fed. Reg. 21576 (May 9, 2018)

The Proposed Rule clearly cuts against this rulemaking objective.

b. The Commission fails to address why disclosure is insufficient

The Proposed Rule eliminates the option for firms to meet their best interest obligations by disclosing or mitigating conflicts, as allowed under the Standards of Conduct. The Commission justifies this by claiming that conflicts can replicate rapidly, and disclosure would not suffice. However, it does not adequately explain why timely disclosure would not be effective, especially in cases involving conflicts related to future technology use. The Commission ultimately concludes that, given the inherent complexity and opacity of these technologies and their potential for widespread use, conflicts of interest should not be managed through traditional methods such as disclosure and consent. Instead, the Commission suggests that these conflicts should be eliminated or their effects neutralized. This approach represents a departure from established federal securities laws and the Commission's own disclosure regulations, which have traditionally relied on disclosure to enable informed investor consent, allowing investors to make informed choices about conflicts.

The Commission asserts, without adequate explanation, that investment advisers cannot fully and fairly disclose conflicts arising from the use of covered technologies to obtain informed consent. This assertion is particularly relevant since the Proposed Rule encompasses conflicts related to foreseeable future technology use. However, the Commission does not sufficiently clarify its argument regarding why clear and timely disclosure would be insufficient in addressing conflicts that might emerge in the reasonable future. This argument contradicts well-established SEC and FINRA rules, which emphasize disclosure as the appropriate response when conflicts of interest arise.

In fact, Sections 211(h) of the Advisers Act and section 15(l) of the Exchange Act explicitly instruct the SEC to facilitate the provision of "simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers," including material conflicts. Instead of advancing straightforward disclosures, the Proposed Rule diverges from this disclosure framework and proposes a new conflict-resolution approach that deviates from statutory language, legislative intent, and the Commission's prior positions in the standards of conduct for financial firms.

Additionally, as stated earlier, the term "neutralization" introduced in the Proposed Rule lacks a historical basis in federal securities laws and appears to override the current Standards of Conduct. The Proposed Rule requires the elimination of conflicts, which may not be feasible and could regress broker-dealers and investment advisers to outdated practices.

In summary, the Proposed Rule introduces several conflicts and uncertainties that require clarification and alignment with existing regulations, statutory authority, and industry practices.

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IV. The Commission lacks statutory authority.

The Proposed Rule is based on an unprecedented interpretation of the Dodd-Frank Act, attempting to justify Commission's rulemaking beyond the scope intended by Congress. The Commission references sections 211(h) of the Advisers Act and 15(l) of the Exchange Act, both of which were enacted under Section 913(g) of the Dodd-Frank Act, as the basis for its proposed rulemaking.[31] Dodd-Frank Act Section 913 primarily addressed the differing duties of broker-dealers and investment advisers, authorizing the Commission to establish a harmonized standard of conduct for them when offering investment advice to retail investors. However, it did not grant the Commission unrestricted authority to introduce broad new rules governing the conduct of broker-dealers and advisers.

The expansive nature of the Proposed Rule and the attempt to restrict various activities are not substantiated by the statutory provisions the Commission relies on for its authority. The Commission fails to provide a thorough analysis of its mandate to promulgate these rules under sections 211(h) and 15(l). These sections do not independently empower the Commission to create rules; rather, they should be interpreted in the context of their enactment.

Section 913 primarily focuses on standards of care for broker-dealers and investment advisers regarding advice to retail customers. Section 913(g), titled "Authority to Establish a Fiduciary Duty for Brokers and Dealers," introduced amendments to the Advisers Act (Section 211(g)) and the Exchange Act (Section 15(k)), granting the Commission authority to establish a unified standard of conduct for these entities.

Furthermore, Section 913(g) also introduced amendments to the Advisers Act and the Exchange Act, specifically Section 211(h) and Section 15(l), which the Commission is relying on for the Proposed Rules. However, Sections 211(h) and 15(l) were not standalone grants of rulemaking authority; they were enacted as part of Section 913(g). Their purpose is to authorize the Commission to engage in supplementary related rulemaking to enforce a harmonized standard of conduct, which the Commission has not yet implemented. The Proposed Rule does not align with this intent. The Commission's interpretation of relying on sections 211(h) and 15(l) individually to support the Proposed Rule implies that the Commission believes it has the authority to extensively regulate the actions of investment advisers and broker-dealers, which seems contrary to the intention Section 211(h) and Section 15(l), respectively.

[31] Sections 211(h) and 15(l) provide that the Commission shall "examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors." 15 U.S.C. § 80b-11(h).

Lastly, the Proposed Rule also conflicts with the SEC's Investment Adviser Marketing Rule by altering the definition of an "advertisement" without proper notice and comment under the Administrative Procedure Act (APA), causing uncertainty for investment advisers.[32] Under the Marketing Rule, an "advertisement" is defined as "any direct or indirect communication an investment adviser makes to more than one person…that offers investment advisory services."[33] As a result of the Proposed Rule's broad definition of "investor interaction," which covers "…any advertisements…that offer or promote services or that seek to obtain or retain one of more investors," the Proposed Rule would significantly expand the existing definition of an "advertisement," for investment advisers, to apply to one-on-one interactions, even if investment advice or investment advisory services are not involved.[34]

CONCLUSION

Investing can be confusing and overwhelming for many investors. The answer for some investors is to hire a financial professional. However, for many investors, hiring a financial professional is not within their means. Investor technology often services to bridge that gap as it both simplifies and democratizes investing. Currently investors have the ability to seek ongoing investment advice; receive point-in-time broker recommendations; interact with investor education tools computers, smart phones, and other technologies; or participate in traditional face-to-face engagements. Given the financial limitations of many investors that could benefit from traditional face-to-face advice engagements, technology in the financial sector should be embraced and proliferated rather than hindered.

We appreciate and respect the Commission's continuing balancing act of promulgating regulations that foster business innovation but also protect investors. This is not an easy task, but, historically, the Commission has generally struck the right balance in regulating investment advice through the Advisers Act and recommendations in Regulation Best Interest.

However, the Proposed Rule throws this delicate regulatory balance askew. Specifically, the Proposed Rule will not only add unnecessary layers of additional regulation and compliance obligations to investment advice and recommendations but it will chill investment education by regulating non-recommendations through more prescriptive rules than those currently in force under in the Advisers Act and Regulation Best Interest.

Investor education - often offered through retirement plans using technology - is a fundamental aspect of modern investing as it allows investors to learn about investing without being directed into any

[32]5 U.S.C. § 553.
[33] 17 C.F.R. § 275.206(4)-1.
[34] 88 Fed. Reg. 53988 (August 9, 2023).

specific investment strategy. However, the Proposed Rule upends this concept and seeks to characterize these technology engagements as automatically biased by applying a conflict of interest analysis. To address these conflicts, the Commission has introduced a new concept of "neutralizing" when a conflict cannot be eliminated. Neutralization has no historical basis in securities laws, or in Commission enforcement, and is unprecedented in regulating investor education. This misguided overregulation will almost certainly lead to the elimination, or significant reduction, of education engagements involving covered technology. This is not only problematic for general investors, but would also seemingly conflict with accepted practices in ERISA for retirement participants.

Because of these impacts, we believe the Commission should withdraw the Proposed Rule. If the Commission chooses to finalize it, its definitions should be narrowed so current investor-education engagement options are preserved.

Thank you for your consideration.

Sincerely,

Edmund F. Murphy, III
President & CEO
Empower