RAYMOND JAMES®

October 9, 2023

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

Re: *Rel. Nos. 34-97990, IA-6353; File No. S7-12-23*
Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers

Dear Ms. Countryman:

On behalf of Raymond James Financial, Inc. and its subsidiary broker-dealers, investment advisers, and related companies ("Raymond James" or "the firm"), I appreciate this opportunity to provide comments on the above-referenced proposal by the Securities and Exchange Commission ("Commission") to adopt new regulations under the Securities and Exchange Act of 1934 ("Exchange Act") and the Investment Advisers Act of 1940 ("Advisers Act").[1]

We join in the comments filed by the Securities Industry and Financial Markets Association ("SIFMA") and other commenters who have criticized the breadth of the proposal, its vagueness, its faulty economic analysis, and its arbitrary nature. We also agree with the letter filed by industry associations and trade groups on August 15, 2023, which noted that the 60-day comment period does not allow "the time needed to identify potential consequences and offer alternatives" in order to "enhanc[e] the Commission's ability to engage in more informed and effective rulemaking."[2]

We write separately to emphasize the following points and to urge the Commission to withdraw the Proposal.

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Investment advisers and broker-dealers are already subject to comprehensive laws and regulations that govern their advice, communications and interactions with investors. Investment advisers are subject to the fiduciary standards of the Advisers Act. When an investment adviser gives advice to a client, that advice must be in that client's best interest, and any conflicts must be

[1] Raymond James is a bank holding company and financial holding company subject to supervision, examination and regulation by the Board of Governors of the Federal Reserve System. The firm is the parent company for two broker-dealers, Raymond James & Associates, Inc. and Raymond James Financial Services, Inc., and SEC-registered investment advisers, including Raymond James Financial Services Advisors, Inc.

[2] Comment Letter dated August 15, 2023 submitted by the U.S. Chamber of Commerce, the American Council of Life Insurers, and fourteen other trade associations. Further, given the rushed deadline for the industry to gather, analyze, and submit data, we do not believe that information or comments submitted in connection with this Proposal could be relied upon in any future re-proposals or other initiatives.

disclosed. Investment advisers are subject to numerous laws and regulations meant to ensure that their communications with potential clients are fair, balanced, not misleading, and not conflicted.

For their part, broker-dealers were historically subject to a suitability standard. However, after numerous analyses and studies, Regulation Best Interest was adopted in 2019. Now, a broker-dealer's recommendations to a retail customer must be in the customer's best interest, the broker-dealer may not place its own interests before the recipient's, and conflicts must be disclosed. Under an array of federal and state laws and regulations, as well as self-regulatory organization rules, a broker-dealer's communications with customers and potential customers must be fair, balanced, and provide a sound basis for investors to evaluate the facts.

The proposal would effectively supersede these legal and regulatory systems with the adoption of a vaguely worded regulation that is far broader than it appears at first glance. While the title of the Notice of Proposed Rulemaking ("NPRM") refers to "predictive data analytics," the text of the proposed rule aims at far more. The proposal would require investment advisers and broker-dealers to (a) search their companies for 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," (b) find any conflicts "associated with" any of these things that place the interests of the firm before those of investors (not just customers or clients), and (c) eliminate or "neutralize" any such conflicts before their use.[3]

Thus, any *model* or similar thing that is *analytical* and that *optimizes for* any *investment-related behaviors* or *investment-related outcomes* would be deemed a "covered technology," even if it is not "technological" as that word is usually understood. And a "covered technology," in turn, could not be used if it was somehow "associated" with a proscribed conflict of interest, no matter how prominently the conflict was disclosed.[4]

But at a broker-dealer or investment adviser, *all systems* are geared toward predicting, guiding, forecasting, and directing investor outcomes and behaviors.[5] The broad definition of a "covered technology," would apply to every aspect of Raymond James' business operations, even to mundane systems like electronic reminders for customers to consider rebalancing, excel spreadsheets, or greeting card generators meant to create goodwill. The requirement to eliminate or neutralize conflicts from these systems before they may be used is inconsistent with, and would

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[3] These terms are either defined or interpreted in the NPRM in ways that are inconsistent with how they are usually understood. For example, the word "neutralize" is not defined in the proffered rule text. The NPRM indicates that a conflict could not be "neutralized" by disclosure, but this runs counter to the term's ordinary meaning and settled principles of law. The NPRM provides little other guidance, other than to state that when a firm seeks to "neutralize," it "may …be helpful" (88 Fed. Reg. at 53977, n. 149) to conduct "A/B Testing" which, in turn, "refers to running a learning model on two different datasets with a single change between the two … ." 88 Fed. Reg. at 53967, n. 74. It all seems so needlessly complex when a firm could just inform clients about fees and costs.

[4] 88 Fed. Reg. at 53967. Ironically, the definition of a "covered technology" in the proposal is so broad that it would cover the aforementioned A/B testing software.

[5] It could be argued that a broker-dealer or investment adviser as an organization *is itself* a system or "analytical … model or similar method or process that optimizes for, predicts, guides, forecasts, or directs investment-related behaviors or outcomes."

apparently override Regulation Best Interest and Advisors Act fiduciary standards, which recognize that conflicts of interest may be addressed by disclosure.

The compliance program imposed by the proposed rules would also create enormous new burdens that are not justified by the evidence. The proposal is apparently motivated by concerns, especially as voiced in the press, about new investing platforms that use "design elements, features, or communications that nudge, prompt, cue, solicit, or influence investment-related behaviors or outcomes."[6] Yet the potential harms that the Commission describes are all speculative, and the sole example of a case provided in the NPRM involves a disclosure failure.[7] This seems a thin justification for requiring every investment firm in the country to audit all systems to hunt for potential conflicts, delay implementation of new systems pending such audits, hire consultants, document and record every change, redo the process for every new system, and then review the mandated compliance program every year.[8]

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At bottom, the Commission's proposal appears to be motivated by concerns that investors will make decisions based on emotions rather than logic. However, we believe that investors are capable of making their own decisions. We join other commenters in urging the Commission to withdraw this proposal and affirm the current regulatory and legal framework that provides for investment advice and recommendations in the client's best interests, and disclosure to support informed investing.

We appreciate this opportunity to provide our comments on the proposal. We hope that they prove useful. If the Commission, or any of the Staff have any questions, please do not hesitate to contact me.

Sincerely,

Jonathan N. Santelli
Executive Vice President & General Counsel
Raymond James Financial, Inc.

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[6] 88 Fed. Reg. at 53972.

[7] 88 Fed. Reg. at 53968, citing *In re. Charles Schwab & Co., Inc.,* SEC Rel. 34-95087 (June 13, 2022) (settled order).

[8] The short comment period and massive scope of the proposal has not allowed firms to create estimates, but expenses on a par with the implementation of the Sarbanes Oxley Act of 2002 would not surprise.

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