STRIVE

October 10, 2023

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

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

RE: Strive Asset Management, LLC Comments to "Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers" (File No. S7-12-23)

Dear Ms. Countryman,

Strive Asset Management, LLC submits the following response to the Securities and Exchange Commission's proposed rule, "Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers."[1] We appreciate the opportunity to share our feedback and your consideration of our perspective.

Strive Asset Management, LLC is an Ohio-based asset management firm whose mission is to maximize value for our clients by leading companies to focus on excellence, rather than pursue stakeholder capitalism or social and political goals unattenuated from their core business.[2] As a new, rapidly growing asset manager and emerging competitor among market leaders, we write this letter with a vested interest in the proposed rule, particularly because Strive is a registered investment advisor. Strive appreciates the spirit of the proposed rule's intent to protect American investors, as our own mandate is to restore free market capitalism through shareholder primacy. We do, however, wish to submit a dissenting position towards the heavily restrictive nature of the proposed rule.

Our concerns fall broadly into two categories: that the proposed rule is deeply problematic as a matter of policy, and that it is likely unconstitutional as a matter of First Amendment law. Each concern is discussed in turn below.

[1] See SEC Proposed Rule, available at https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf (hereinafter "Proposal" or "proposed rule").
[2] More information about Strive is available at www.strive.com.

STRIVE

I. The Proposed Rule Is Deeply Flawed

In Strive's view, the proposed rule is deeply flawed. The proposed rule, by its terms, severely restricts what and how broker-dealers and investment advisors[3] are allowed to communicate with their clients, effectively censoring any messages that (1) contain any information that was generated, in whole or in part, through artificial intelligence or other widely used computer or computational algorithms, or (2) are disseminated via technology like push notifications or chatbots—regardless of whether the investor has actively requested such information and regardless of what disclosures an investment advisor includes. More specifically, investment advisors are strictly prohibited from disseminating any such messages unless they first (1) test and conduct an audit of the technology used to generate or disseminate the message to determine any possible conflicts of interest, including potentially reviewing the underlying source code owned and controlled by third parties, (2) determine whether any possible conflict of interest could put the advisor's interest above the client now or in the future, and (3) "[e]liminate, or neutralize the effect of, any [such] conflict of interest." The rule also requires investment advisors to create an audit trail documenting every step of this process, to be reevaluated and recompleted at least annually.

As the proposal recognizes at times, **these requirements are so onerous that they effectively bar investment advisors from communicating with their clients** using much of the technology covered by the rule. And barring this technology is anti-innovative, anti-competitive, and anti-investor.

Our analysis of this public policy issue is therefore broken into three parts. First, we highlight how the proposed rule will harm innovation, competition, and investors, including by seeking to trade investor autonomy for robust regulatory oversight, undermining free market principles. Second, we explore the breathtaking reach of the proposed rule, which would sweep in technology used in virtually every communication an investment advisor has with their client. Third, we discuss the onerous nature of complying with the rule, and why, in many cases, it acts as a de facto bar on certain types of communications and technologies, further harming investors' ability to receive full and fair information from their advisers.

a. The Proposed Rule Will Harm Investors, Competition, and Innovation

i. The Proposed Rule Will Harm Investors

Strive's primary concern with the rule is that it will hurt investors: Because consumer decisions could be influenced by firms' engagement activities, and those efforts could involve AI-created content, the Commission has decided that consumers should be deprived of their free will altogether. As Commissioner Hester Peirce points out in her statement against the proposed rule, "[the Commission] appears to assume that AI is so complex it needs special rules." She counters, "Aren't humans even more complex?"[4] The proposed rule assumes that investors will blindly accept AI-generated information and

[3] Strive understands that the proposed rule applies to both broker-dealers and investment advisors in largely the same way. For simplicity, however, and because Strive is an investment advisor, we will refer only to "investment advisors" in the remainder of our comment, although our concerns apply equally to both.

[4] Peirce, "Through the Looking Glass."

be victimized by firms that prioritize their own gain over the interests of consumers. However, such a notion ignores the fact that broker-dealers and investment advisers are already bound to strict fiduciary duties, including the requirement that they disclose any potential conflicts of interest, as mandated by existing SEC regulations.

Moreover, considering our information-driven age and the burgeoning socially-mobilized investment movement, how could investors possibly be better served by weakened access to market choice? What the proposal condemns as the "gamification of trading" in actuality represents a democratization of investing, supplying retail investors with real-time access to markets and accessible educational material. This movement has radically increased free-market participation and improved accessibility to global financial markets beyond the arenas of institutional investors and elites. To impose the roadblocks put forth in the proposal would stymie the very financial opportunities that the Commission promises to foster for ordinary entrepreneurs and investors across America.

Further, the proposed rule will likely lead to perverse results. Of course, the rule will not deprive investors from using AI to make investment decisions. Such AI is already available and widely discussed on social media platforms including Reddit's Wall Street Bets.[5] Yahoo Finance published an article in May entitled "7 Stock Picks That AI Predicts Will Make You Rich."[6] Danelfin advertises itself as an "AI-powered stocks analytics platform" and publishes the "Top 25 stocks with the highest probability of beating the market short-term."[7] **The horse has already left the barn: Retail investors are already using AI to invest.** As such, the effect of the proposed rule will not be to protect investors from dangerous, AI-tinged investment advice, but to prevent them from being able to meaningfully discuss it with the only person actually charged with looking out for their best financial interest—namely, their investment advisor.

A hypothetical may underscore this concern. Let us say that an investor gets an alert from an AI stock-picking website they signed up for that the U.S. tech sector is going to tank. They call their investment advisor to see if they agree with that assessment, as the investor is inclined to sell all of their U.S. tech holdings immediately. The investment advisor thinks that the AI stock program's prediction is terrible and tries to convince their client otherwise by pointing to traditional analyses. The investor is unconvinced. The investment advisor also knows, perhaps from doing research for their own portfolio, that the particular AI stock-picking program their client is using is terrible, and there are four other AI stock picking programs that have proven much more reliable. All four other programs predict U.S. tech will outperform. The investment advisor considers this information material, particularly because they know that their client sincerely believes (rightly or wrongly) that AI generated stock-picking is much more accurate than humans. The investment advisor is nonetheless barred from being able to share this material information with their client, because the information was generated using a black box algorithm used by the other four stock picking programs. In such circumstances, the proposed rule is likely to force investment advisors to breach their fiduciary duties of candor and loyalty to their clients by muzzling their ability to provide full, truthful, and unbiased advice.

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[5] u/Chrrix, "AI Stock Recommendations," r/wallstreetbets, Reddit, December 2022, https://www.reddit.com/r/wallstreetbets/comments/zo4c6u/ai_stock_recommendations/.
[6] Omar Ibne Ehsan, "7 Stocks AI Predicts Will Make You Rich," Yahoo Finance, May 3, 2023, https://finance.yahoo.com/news/7-stocks-ai-predicts-rich-160937425.html.
[7] "Top US Stocks," Danelfin, https://danelfin.com/top-us-stocks.

The rule also does not prevent others from using AI models to predict returns and market trends and optimize their investment decisions as a result. Large institutional investors, for example, have large teams of in-house analysts that are free to incorporate AI into their investment decisions.[8] Venture capital firms are using AI to consider deals.[9] And private equity firms are increasingly using AI to identify potential public companies to take private, as well.[10] These same financial tools, however, will be stripped from investment advisors' toolboxes when they provide advice to individual investors, meaning that advisors will be forced to contribute to an informational asymmetry that allows large institutional investors and private equity to take advantage of AI-powered insights that retail investors are forbidden to see (or, at least, obtain professional investment advice about).

Such a result is not only unfair, but also sows the kind of distrust that retail investors often have in capital markets generally—that the rules are designed to give an edge to Wall Street and the 1 Percent to allow them to get ahead with better information, faster trades, and better technology. The Commission's role should be to equalize this playing field, not tilting the scales further in favor of elites.

In short, rulemaking that attempts to control current technology, while also allotting the Commission unbounded authority to regulate future developments, will not in any way advance investors' best interests. There currently exist sufficient safeguards that obligate brokers and advisers to disclose conflicts and risks and prioritize their clients, and the increasing use of PDA and PDA-like technologies does not affect these firms' fiduciary duties.

ii. The Proposed Rule Is Anti-Innovative And Hostile Towards Technology

The Commission's website describes a key part of its mission as "providing companies and entrepreneurs with a variety of avenues to access America's capital markets to help them create jobs, develop life-changing innovations and technology, and provide financial opportunities for those who invest in them."[11] Furthermore, it is directly stated in the proposal text that the rule is "intended to be technology neutral."[12] Nevertheless, given the extent to which the proposal opposes technological advancements—past, present, and future—the proposed rule is antithetical to the Commission's objective to develop "life-changing innovation and technology."

The proposed rule states that it is "designed to prevent firms' conflicts of interest from harming investors while allowing continued technological innovation in the industry";[13] but the inevitable impact on targeted institutions leaves little room for innovation: Organizations will be reluctant to adopt new technologies, and for companies that do, their implementation efforts will be burdened by the newly imposed restrictions. In either scenario, the proposed rule will hamper institutions' ability to provide

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[8] Amy Resnik, "How Will AI Change Institutional Investing?", Chief Investment Officer, September 1, 2023, https://www.ai-cio.com/news/how-will-ai-change-institutional-investing/.

[9] Ray Zhou, "The Impact Of AI In Private Capital," *Forbes*, August 15, 2023, https://www.forbes.com/sites/forbestechcouncil/2023/08/15/the-impact-of-ai-in-private-capital/.

[10] Dylan Thomas, "Private Equity Firms Take Tentative Steps Adopting AI for Their Own Use," S&P Global Market Intelligence, August 28. 2023, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/private-equity-firms-take-tentative-steps-adopting-ai-for-their-own-use-77215381.

[11] "Mission," Securities and Exchange Commission, https://www.sec.gov/about/mission.

[12] Proposal, 39.

[13] Proposal, 42.

retail investors with the most useful and cost-effective resources and advice. If the Commission shares our belief that continuous innovation enables businesses to adapt to the evolving demands of the free market, this proposal—which discourages technologically-advanced investment solutions, supposedly to allay conflict-of-interest concerns already covered in the existing regulatory regime—stands in direct contrast to that conviction.

The recurring theme in this proposed rule is that innovations in artificial intelligence have rapidly shifted the technology landscape of financial services. One could make the case that emerging technologies will require additional regulation and scrutiny in order to protect the end consumer, perhaps through additional disclosures or even by obtaining affirmative informed consent, but there must first be consensus on which technologies are actually being regulated and why. The extremely broad and onerous regulation proposed here takes the opposite approach and will thus serve only to stifle innovation.

iii. The Proposed Rule Is Anti-Competitive

In addition, this proposal would create an anti-competitive landscape in the financial services industry that will harm not only existing small to medium size broker-dealers and investment advisors but also punish the individual investor, who would face limited investment options due to slowed entrepreneurship in the space.

Notably, **innovation and technological development provides a unique opportunity to level the playing field for new entrants** and smaller investment advisory firms. That is not only because large players are the only ones likely to have sufficient resources to comply with the new rules, but because they are also the ones who can afford the much more expensive process of communicating with their clients the old-fashioned way—by fielding huge teams that provide individualized, one-on-one phone calls and meetings for investors. But not all investors want or are able to afford such individualized attention, and so rendering this model the only one available to investment advisors will serve only to further entrench large players' position in the market and harm investors who would benefit from increased competition and market choice.

b. The Proposed Rule Is Vastly Overbroad

Strive's concerns are compounded by the fact that the proposed rule is vastly overbroad. The proposed rule defines "covered technology" as "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."

As other commentators[14] and the dissenting Commissioners[15] have explained, this definition is so broad that it captures not only AI technology, but also benign, everyday tools that firms have been using for decades, including spreadsheets, valuation tools, spell check, and even electronic calculators. Spell check, after all, is nothing more than an algorithm, and one that is used in nearly all communications intended to direct or guide investment-related behavior. And electronic calculators, almost by definition, use computational functions that investment advisors use to provide information to their clients.

Further, the breadth and ambiguity of the term "covered technology" means that the proposed rule may also sweep in "search engines and other general purpose [AI or machine learning] technologies that are not designed with functionality that is likely to give rise to a conflict of interest, but could, at least in theory, be used in a way that would be put the interests of the firm ahead of investors."[16]

Google, for example, is an algorithm-driven and increasingly AI-enabled tool that investment advisors routinely use to research and share information with clients related to their investments and market developments.[17] And a firm's use could theoretically give rise to conflicts of interest if, for example, Google's black box search engine and ad platforms tend to promote stories to an investment advisor that are favorable to the firms' funds (perhaps because the investment advisor has historically clicked on those results more frequently) or that are otherwise biased in some unknown way. Even autocomplete is powered by machine learning, meaning that firms that allow investment advisors to communicate with clients via text will now have to attempt to audit this third-party software or bar employees from using it.[18]

Accordingly, **the proposed rule does not demonstrate a sound understanding of the myriad types of technologies firms use**, which renders the rule extremely overbroad. That is true even, and perhaps particularly, within the proposed rule's discussion of predictive data analytics or "PDA" technology that is purportedly at the center of the Commission's concerns. For example, the proposal claims to address "PDA" and "PDA-like" technologies, and yet it also makes frequent mention of AI, machine learning, and

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[14] For example, see Ken D. Kumayama et al., "SEC Proposes New Conflicts of Interest Rule for Use of AI by Broker-Dealers and Investment Advisers," Skadden Arps, August 10, 2023, https://www.skadden.com/insights/publications/2023/08/sec-proposes-new-conflicts; "SEC Proposes AI Rules for Broker-Dealers and Advisers after Chair's Warnings," Baker Hostetler, August 8, 2023. https://www.bakerlaw.com/insights/sec-proposes-ai-rules-for-broker-dealers-and-advisers-after-chairs-warnings/.

[15] Mark T. Uyeda, "Statement on the Proposals Re: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers," Securities and Exchange Commission, July 26, 2023, https://www.sec.gov/news/statement/uyeda-statement-predictive-data-analytics-072623; Hester Peirce, "Through the Looking Glass," Securities and Exchange Commission, July 26, 2023, https://www.sec.gov/news/statement/peirce-statement-predictive-data-analytics-072623.

[16] See Kumayama, "SEC Proposes New Conflicts."

[17] Daniel Baek, "How Google Uses AI (Artificial Intelligence) in Search," SEO.ai, February 3, 2012, https://seo.ai/blog/google-ai-artificial-intelligence; Justin Burr, "9 Ways We Use AI in Our Products," Google, January 19, 2023, https://blog.google/technology/ai/9-ways-we-use-ai-in-our-products/.

[18] Benj Edwards, "Apple Avoids 'AI' Hype at WWDC Keynote by Baking ML into Products," Ars Technica, June 6, 2023, https://arstechnica.com/information-technology/2023/06/at-apples-wwdc-keynote-ai-never-came-up-by-name-but-it-was-there/.

natural language processing (NLP).[19] These technologies cannot be referenced interchangeably: PDA and machine learning are separate subsets of AI, and NLP is a further subset of machine learning which forms the basis for technologies such as chatbots. Although there is some overlap between them, the conflation of these concepts suggests a lack of understanding of the unique challenges and opportunities involved in their respective applications. Any rule that seeks to address potential conflicts of interest caused by "covered technologies" requires a proper understanding of said technologies, so that any regulation is appropriately tailored to target the technology that is actually of significant concern and in a way that is likely to address or mitigate those issues. Instead, the rule purports to be "technology neutral" by painting virtually every technology used by investment advisors—simple and complex, old and new, routine and novel, off the shelf and bespoke—with the same, heavy-handed regulatory brush, to everyone's detriment.[20]

c. The Proposed Rule Is Unduly Burdensome, Often Amounting To An Outright Ban

There is little question that the proposal is onerous to comply with, often to the point of impossibility. Each step of the proposed rule—from identifying all hypothetical, hidden conflicts of interest, to eliminating them, to documenting the process—will create insurmountable barriers for investment advisors seeking to provide the best possible advice to their clients using cutting edge (or even everyday) technology.

i. Identifying Hypothetical Conflicts Of Interest Will Prove Burdensome If Not Impossible

In order to determine conflicts of interest, the proposal outlines an initial review process that does "not mandate a particular means by which a firm is required to evaluate its particular use or potential use of a covered technology or identify a conflict of interest associated with that use or potential use."[21] Rather, the evaluation of potential conflicts of interest and the neutralization or elimination of the threats therein is left to the discretion of the investment advisor, provided that their process is "sufficient for the firm to identify the conflicts of interest that are associated with how the technology has operated in the past."[22] Although assessing potential conflicts of interest on a case-by-case basis may initially seem sensible for such a broadly applied rule, it essentially shifts the burden to investment advisors to figure out how to ensure with 100 percent certainty that there are no possible conflicts of interest involved in the use or *potential use* of covered technology—an onerous if not impossible task.

Indeed, in many cases, **such an undertaking is impossible not merely in the cost-prohibitive sense, but in the we-actually-have-no-way-of-doing-it sense**. Nearly all of the covered technology—from artificial intelligence to chatbots to Google algorithms to the predictive text used in Microsoft Word and text messages—is created at least in part by third parties. And the precise mechanisms by which these technologies work are fiercely guarded as trade secrets by the companies who created them, source code most of all.

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[19] Proposal, 41.
[20] Proposal, 39.
[21] Proposal, 61.
[22] Proposal, 62.

To its credit, the Commission appears to recognize this issue, but its proposed solution is no solution at all.[23] In response to this concern, the Commission states only that if source code is unavailable, it "could" be enough for the firm to use documentation from the technology provider instead; but this is allowed only if the documentation is "sufficiently detailed as to how the technology works" and the firm undertakes additional testing to "discover whether there is any undocumented functionality that could be associated with a conflict of interest." Conversely, if the technology provider is unable or unwilling to provide a sufficiently "detailed" explanation as to how the technology works, then a firm is prohibited from using it to communicate with clients regardless of whether there is even an iota of evidence suggesting that use of the technology may harm investors.

It is unlikely that such "detailed" explanations will be forthcoming. Google, for example, famously "refuses to explain how its algorithms work to avoid manipulation by bad faith third-party actors."[24] And chatbot developers likely consider the precise ways in which their language models work to be a trade secret, one that they are wary to disclose.[25] The same is likely true of free, widely used programs that turn hyperlinked footnotes into proper APA or Chicago-style references.[26] To our knowledge, such programs rarely, if ever, release their source code or provide detailed explanations of how they work. Given this reality, coupled with the breadth of the definition of "covered technology" outlined above, Google, chatbots, and citation formatting software will all become effectively off-limits for investment advisors.

The same is true of black box algorithms, whether developed in-house or licensed from a third party. By design, these systems do not explain (or perhaps even know) what specific factors they are using to generate their outputs. In this way, they are much more common to how humans make judgements: They assess a sample set of information in a holistic way, detect complex patterns, and then apply what they have learned to a new situation (i.e., to write text or make a prediction).

When it comes to black box algorithms, the regulation is essentially an absolute bar. The proposed rule makes clear that it applies to such algorithms and recognizes that "firms that use such covered technologies likely may not meet the requirements of paragraph (b) of the proposed conflicts rules."[27] The only "exception" is if the algorithm can be changed to incorporate "explainability" features—in other words, if the black box algorithm is no longer a black box. The results of this rule would be that black box algorithms like Google, Grammarly, and ChatGPT would be wholly unavailable to investment advisors, even if an advisor were using ChatGPT to, for example, revise an introduction email to use a more formal tone, or the marketing department were using Grammarly or Google Bard to help with copyediting or bounce around potential ideas.

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[23] Proposal, 64-65.

[24] Emma Lurie and Eni Mustafaraj, "Opening Up the Black Box: Auditing Google's Top Stories Algorithm," in *Proceedings of The Thirty-Second International Florida Artificial Intelligence Research Society Conference*, *Sarasota, FL*, May 20, 2019, https://par.nsf.gov/servlets/purl/10101277, p. 376.

[25] "How Does Chat-GPT Work," Patent, PC (blog), January 3, 2023, https://www.patentpc.com/blog/how-does-chat-gpt-work.

[26] For example, see Scribbr Citation Generator, https://www.scribbr.com/citation/generator/chicago/.

[27] Proposal, 66.

But a black box system's inability (or developer's unwillingness) to explain why the system reached the outcome that it did should not render this technology off limits. Doctors, for example, are increasingly incorporating black box algorithms into medical and treatment decisions, even if the algorithm cannot explain what factors it considered (just as doctors sometimes prescribe medications, like Lithium, without understanding why they work).[28] Those, of course, are decisions where a patient's life or death could be at stake, not merely the health of someone's investment account. Yet a doctor is free to predict breast cancer risk by feeding a mammogram into a black box algorithm, while an investment advisor would be forbidden by the government to feed a client's investment objectives into a similar algorithm (or, at least, forbidden from sharing the results)—even if (1) the results of the black box have been validated as a reliable way to predict, for example, market volatility, or likely portfolio performance, or some other metric the investor cares about; (2) the investment advisor has specifically disclosed that the output was generated by a black box algorithm that cannot be explained and may thus hypothetically consider some indecipherable, unintended conflict of interest; and (3) the client has provided his informed consent, has agreed to use the information generated from the black box as just one factor in his overall investment strategy, and has specifically requested the information be provided to him.

This is not logical. **If the inherently unexplainable nature of black box reasoning does not render the technology too dangerous for doctors to incorporate into medical advice, it should not render it too dangerous for investment advisors to incorporate into investment advice.** Unexplainability should not be an absolute bar.

ii. Eliminating Or Neutralizing Conflicts Will Prove Burdensome To Impossible

The next step of the proposed rule requires firms not just to identify or disclose conflicts, but to eliminate or neutralize any conflict of interest that puts the firms' interests ahead of the investor. This step will prove equally if not more burdensome than the first. Critically, this rule goes far beyond the Commission's typical disclosure requirements, mandating firms eliminate or neutralize any identified conflict.

The proposal again recognizes that such requirements will likely be insurmountable for many third party and black box programs. Even if it were somehow possible for an investment advisor to gain access to source code or other sufficiently detailed technical information to assess potential, unintended conflicts of interest in such technology, it would surely be impossible for an investment advisor to convince Microsoft or Apple or Google or Grammarly or ChatGPT to revise their software to eliminate bias that might hypothetically favor the firm.

Even technology developed and deployed in-house will be overburdened by the rule. Chatbots, push notifications, interactive websites, and other investor-facing technologies would be rendered significantly more expensive and challenging to implement. Even a simple web-based tool asking a client a series of questions to gauge their risk appetite and make recommendations would have to undergo

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[28] Emad A. Rakha et al., "Current and Future Applications of Artificial Intelligence in Pathology: A Clinical Perspective," *Journal of Clinical Pathology* 74, no. 7 (2020): 409-14, https://doi.org/10.1136/jclinpath-2020-206908.

testing, auditing, conflict elimination, written documentation, and other compliance requirements, likely rendering it cost-prohibitive for all but the largest firms. The proposed rule provides little to no clarity on how, as a practical matter, firms would be able to comply with these requirements, likely because it will be impossible in many instances to do so.

iii. The Documentation Requirements Will Prove Burdensome, Increasing The Costs Of Using New And Everyday Technology Alike

The rule's extensive documentation requirements will further burden investment advisors hoping to use technology to better communicate with clients. The rule also includes additional amendments to the Exchange and Advisers Acts regarding enhanced record-keeping.[29] Any firm using one or more of the aforementioned covered technologies in investor interactions must draft and maintain policies that identify a potential conflict of interest and present a strategy for neutralizing or eliminating said conflict. Additionally, the proposed rule would require further review and written documentation of the same regarding each and every policy and procedure designed to comply with this rule.[30]

Together with the all-encompassing nature of the term "covered technology" in this proposal, such requirements pose an immense burden on firms. To remain compliant, they would need to dramatically increase the hours spent documenting existing covered technologies and any other technologies that may be implemented. **For small to medium-sized firms, having to perform such a mammoth task could be the pivotal factor in decisions to continue to use existing technologies or adopt new ones**, even when doing so would improve the firm's ability to deliver value for the end consumer. Only the largest of the investment advisory firms will have the scale, personnel, and capital required to create the stipulated audit trail for their technology landscape.

As a rapidly growing asset management firm operating in a highly competitive environment, Strive has a vested interest in preventing rules that hamper our ability to efficiently drive maximum value creation for our clients. It is with this perspective that we respectfully request the Commission decline to enact the proposed rule for the policy reasons discussed above.

II. The Proposed Rule Is Unconstitutional

The proposed rule is also unconstitutional: On its face, it plainly violates investment advisors', broker-dealers', and their clients' free speech rights under the First Amendment. As explained above, and further detailed below, the proposed rule impermissibly censors huge swaths of information that, in many cases, investors have actively sought out by signing up for newsletters, notifications about their investments, robo-advisory services, and more. For this additional reason, the Commission should not enact the proposed rule.

[29] Proposal, 41.
[30] Proposal, 113.

a. The Proposed Rule Targets And Censors Pure Speech

There is little doubt that the proposed rule targets pure speech, as it is directed at regulating and controlling "investor interactions," which are expressly defined as any "communicating" between an investment advisor and his client.

And the application of the rule would lead to vast amounts of censorship, much of it being content-based. For example, under the proposed rule, investment advisors would not be able to:

- send newsletters with market updates, if the marketing team used a chat bot to develop ideas, or if the research team used AI to predict future trends, or, potentially, if the editing team used spell check;
- share their views on the relative strengths and weaknesses of third-party AI, chatbots, and automated investment advice programs already available on the internet—at least assuming that those views were informed by actually using the programs themselves or the investment advisor sought to include any results from such AI programs;
- provide information about what stocks and sectors AI predicts will do well and poorly, even though other investors and members of the public—large institutional investors with in-house analyst teams, private equity firms, venture capitalists, hedge fund managers, analysts, the press, and social media commentators—are freely able to use, publish, and discuss such results;
- warn clients about investment tools the investor suspects to be biased or unreliable, by, for example, warning a client that a third-party stock predictor app that is going viral on TikTok appears to suspiciously overweight recommendations for Chinese stocks, or is being used to phish for personal information, or favors a strategy that is extremely risk and unlikely to be in the best interest of the client;
- or engage in communications that might be seen as encouraging additional investing behaviors—such as using on-screen confetti to congratulate an investor when he adds more funds to an account[31]—because the Commission fears such communications may prey on the psychological weaknesses of unsophisticated investors, rendering them helpless to make competent decisions about how much to invest, thereby putting the firms' interests ahead of investors.

The rule thus acts as a Commission-imposed gag order that will prevent investors from receiving fully-informed investment guidance from the very experts whom they trust to provide them with such advice.

Further, even when the proposed rule does not outright censor content, it severely burdens speech by restricting the means by which communications are allowed to occur. Investment advisors can place one-

[31] For example, see Proposal, 16 (expressing concern over "celebrations of trading").

on-one calls to investors to notify them of important market developments, but they cannot utilize software that will automatically notify their clients via electronic means. Investment advisors can meet in-person with clients and ask them a ten-question survey to gauge their risk appetite and investment preferences before recommending an investment strategy, but they cannot streamline that process (and democratize it by making it available to small investors for whom it would not be cost effective to call individually) by using an interactive website feature to do the same.

Such restrictions are particularly problematic, especially from a First Amendment perspective, given that the Big Three (BlackRock, State Street, and Vanguard) asset managers—all of which have investment advisory arms—are all sending the same (and, we believe, misleading) message to their investors: Stakeholder capitalism is pro-capitalism, climate risk is investment risk, and promoting ESG goals will enhance returns.[32] They wield almost unimaginable monopoly power to send these messages.[33] The regulation would thus deprive Strive and others hoping to speak out against this misinformation of the tools needed to reach investors at the same scale as the Big Three. The First Amendment does not countenance this result.

b. The Proposed Rule's Process-Based Restrictions Violate The First Amendment

The proposed rule's severe restrictions on the ways in which investors are permitted to receive investment advice from their advisors—e.g., via text message, but not a push notification; via phone call, but not a chatbot; via a country club outing, but not an on-screen graphic; via a newsletter with a "read next" section generated by a typewriter, but not an algorithm—present significant First Amendment concerns.

As courts have explained, "[t]he right of free speech necessarily embodies the means used for its dissemination because the right is worthless in the absence of a meaningful method of its expression."[34] For that reason, the United States Constitution "protect[s] bullhorns, and other sound-amplifying devices, as 'indispensable instruments' of public speech."[35] Accordingly, "a restriction on volume . . . can effectively function as a restriction on speech" itself, and so no blanket prohibitions are allowed.

In today's technology-driven society, push notifications, interactive websites, mass emails and chatbots are the modern bullhorn—effective ways of amplifying a message to reach many listeners cheaply, easily and at once. Thus, a restriction on these tools is tantamount to a restriction on speech itself, and so subject to the same constitutional constraints.

[32] Dan Morenoff, "Break Up the ESG Investing Giants," *Wall Street Journal*, August 31, 2022, https://www.wsj.com/articles/break-up-the-esg-investing-giants-state-street-blackrock-vanguard-voting-ownership-big-three-competitor-antitrust-11661961693; Anson Frericks, "While He's Re-Writing the Music, Larry Fink Won't Change the Underlying ESG Tune," Real Clear Markets, March 23, 2023, https://www.realclearmarkets.com/articles/2023/03/24/while_hes_re-writing_the_music_larry_fink_wont_change_the_underlying_esg_tune_889211.html.
[33] Farhad Manjoo, "BlackRock, Vanguard and State Street Control a Piece of Nearly Everything," *New York Times*, May 13, 2022, https://www.nytimes.com/2022/05/12/opinion/vanguard-power-blackrock-state-street.html.
[34] Wollam v. City of Palm Springs, 379 P.2d 481, 486 (Cal. 1963).
[35] Cuviello v. City of Vallejo, 944 F.3d 816 (9th Cir. 2019).

The Commission's primary attempt to justify these process-based restrictions—by claiming that new technology enables potentially-problematic communications to spread at a previously unprecedented *scale*—is unpersuasive.[36] Courts have struck down anti-spam statutes, for example, by explaining that email is the modern equivalent of leafletting.[37] The fact that you can spam one million people at once, or send push notifications to hundreds, is irrelevant from a First Amendment perspective.

To the contrary, if anything, the cost-effectiveness and scalability of disseminating messages via push notifications, chatbots, and robo-advisory services is a factor that points in favor of *increased* protection under the First Amendment, not less. As commentators have explained, the Supreme Court has shown "special solicitude" for inexpensive means of disseminating messages precisely because such modes are "much less expensive than alternate forms of communication" and so accessible to the average person.[38] Yet the proposed rule would restrict investment advisors from using the most cost-effective means of communications available, forcing them to instead take an expensive, individualized approach that will prevent these messages from being received by small investors who might benefit from them most.

The First Amendment does not permit such a result. If the First Amendment would have prohibited the government from forcing the Founders to handwrite the Federalist Papers instead of using a printing press, it equally prohibits the Commission from forcing investment advisors to use outmoded means of communication when more efficient means are available.

c. The Proposed Rule's Content-Based Restrictions Violate The First Amendment

The proposed rule's content-based restrictions are even more offensive to the Constitution. Much of the rule regulates the content of conversations—what figures can and cannot be discussed, what graphics can and cannot be used—and so is plainly content based. Entire topics (such as discussing the output of black box investing algorithms) are completely banned, regardless of whether that message is disseminated in person, over the phone, or via a chatbot. Thus, while the proposed rule no doubt restricts the means by which investment advisors are permitted to communicate with their clients as discussed above, it goes much further, and in doing so, would be unconstitutional under the First Amendment's test for content-based restrictions as well.

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[36] Proposal, 6 (arguing regulation is needed because "due to the scalability of these technologies and the potential for firms to reach a broad audience at a rapid speed, as discussed below, any resulting conflicts of interest could cause harm to investors in a more pronounced fashion and on a broader scale than previously possible"); see also Proposal, 10.

[37] See Jaynes v. Virginia, 666 S.E.2d 303 (Va. 2008).

[38] Philip Hirschhorn, "Noncommercial Door-to-Door Solicitation and the Proper Standard of Review for Municipal Time, Place, and Manner Restrictions," *Fordham Law Review* 55, no. 6: 1139 (1987), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2755&context=flr; see also Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812-13 (1984) ("Door to door distribution of circulars is essential to the poorly financed causes of little people" [quoting *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943)]).

As the Supreme Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the First Amendment protects commercial speech, even when the speaker is motivated by a desire to increase his own profits.[39] This includes the right of commercial speakers to provide truthful information about what they are selling and the right of potential consumers to receive such information.[40] Pharmacists have a constitutional right to advertise drugs; [41] liquor stores have a constitutional right to advertise liquor;[42] even tobacco companies have a constitutional right to advertise their wares.[43] Thus, even assuming the regulation at issue here targets purely commercial speech,[44] **the government is simply not permitted to silence speech in the name of protecting listeners** who the state believes are too simple-minded to understand that the speaker may be speaking to promote his own interests, in addition to those of the listener.

Accordingly, following *Virginia Board of Pharmacy*, the Supreme Court articulated a multi-part inquiry into when government can regulate commercial speech.[45] First, the speaker must show that its communication is truthful and concerns a lawful activity. Second, the government must show that its interest in regulating the speech is substantial. If both conditions are met, the Court must determine whether the regulation directly advances the government's asserted interest and is no more extensive than is necessary to serve that interest.

Each step points squarely towards the unconstitutionality of the Commission's proposed rule here. There is no doubt that the regulation targets truthful information about a lawful activity—namely, investing. And the asserted government interest—protecting investors from the theoretical harms of new technology—is purely speculative. But even if it were not, the regulation's overwhelming breadth is far more extensive than necessary to serve that interest—particularly since any misleading, or fraudulent, speech is already banned.

While the Supreme Court has never directly ruled on the First Amendment rights of investors to receive investment advice free from government interference, it has come close. In *Lowe v. SEC*, for example, the Commission sought to enjoin the publication of an investment newsletter because the author did not

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[39] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-73 (1976).
[40] See Susan Heyman, "The Quiet Period in a Noisy World: Rethinking Securities Regulation and Corporate Free Speech," *Ohio State Law Journal* 74, no. 2 (2013): 190, https://kb.osu.edu/bitstream/handle/1811/71583/OSLJ_V74N2_0189.pdf.
[41] *Virginia State Board of Pharmacy*, 425 U.S. 748, 761-73 (1976).
[42] 4 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996).
[43] Lorillard Tobacco Company v. Reilly, 533 U.S. 525, 561-66 (2001).
[44] There is reason to doubt this is the case. The proposed rule targets not just advertising, but any communication between an investment advisor and his client. To the extent this includes non-commercial and political speech—including, for example, discussions about developments in the legislative pushback against ESG investing or how rising geopolitical tensions between the U.S. and China could have economic repercussions—the proposed regulation would be subject to strict (rather than intermediate) scrutiny, which it would even more clearly fail. See Virginia v. Black, 538 US. 343, 365 (2003) ("[L]awful political speech [is] at the core of what the First Amendment is designed to protect"); Monitor Patriot Company *v. Roy*, 401 U.S. 265, 272 (1971) (explaining the First Amendment "has its fullest and most urgent application" to political speech).
[45] Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557, 557-58 (1980) (holding that a Public Service Commission regulation that completely banned promotional advertising by electric utilities in the hopes of reducing oil consumption violated the First Amendment).

have an investment analyst's license.[46] The Commission did not allege that the newsletter's content was false or misleading. The Supreme Court avoided the constitutional issue by deciding the case under the Advisors Act, but stated that **"it is difficult to see why the expression of an opinion about a marketable security should not" be protected by the First Amendment.**[47] In concurrence, Justice White, joined by two other justices, went further: He would have held that the Commission's attempt to bar the dissemination of the newsletter was unconstitutional because such a restriction was more extensive than necessary to prevent the "mere possibility" of fraud.

Commentators have read this case broadly, and appropriately so. As one law professor explained, "[t]he government's fear that a future newsletter might contain false or misleading information cannot justify the suppression of current speech that a hearer has an interest in receiving."[48] Another wrote:

> Such a reverse prophylaxis, which suppresses useful speech today in order to avoid the risk of harmful speech tomorrow, can rarely, if ever, be justified from a hearer-centered point of view. In effect, it asks current hearers to forego information that they wish to receive in order to assure that hypothetical future hearers will not risk receiving harmful information.[49]

That is precisely the case here. The Commission is seeking to force current hearers to forego information they wish to receive (automated updates on market information, or stock price drops, or AI generated information, or newsletters containing such research) in order to eliminate the possibility that hypothetical future hearers will receive harmful information (which is conflicted, or preys on psychological vulnerabilities, or profiles certain users based on impermissible metrics) that is far from certain to occur.

The vagueness and breadth of the proposed rule are also likely to chill protected speech, giving rise to additional First Amendment concerns.[50] As explained in Section I.b. above, the definition of "covered technology" is so broad it includes things like spell check (which is algorithm-based), and using Google for research (which uses AI in search results), and a calculator (which uses mathematical functions). If any communications using these tools are subject to the regulation, the impact on speech will be severe, and so is unlikely to survive First Amendment scrutiny.

To be clear, there are plenty of things that the Commission can, and already has, done to protect investors. Regulations that bar investment advisors from providing fraudulent or misleading advice are certainly permissible.[51] Regulations that require disclosures of potential conflicts of interests are also

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[46] Lowe v. Securities and Exchange Commission, 472 U.S. 181, 184 (1985).
[47] *Lowe* at 210.
[48] Heyman, "Quiet Period in a Noisy World," 217.
[49] Burt Neuborne, "The First Amendment and Government Regulation of Capital Markets," Brooklyn Law Review 55, no.1 (1989): 5, 43.
[50] See Wendy Gerwick Couture, "The Collision Course Between the First Amendment and Securities Fraud," 65 Alabama Law Review 903 (2013): 905, https://www.law.ua.edu/resources/pubs/lrarticles/Volume%2065/Issue%204/2%20Couture%20903-974.pdf.
[51] For example, see Securities and Exchange Commission v. Texas Gulf Sulphur Company, 401 F.2d 833 (2d Cir. 1968).

likely to withstand scrutiny, as are regulations that are tailored to address substantial, concrete harm, like bans on communications made to further insider trading or market manipulation. But **regulations "that prohibit the disclosure of truthful, non-misleading, and sometimes material speech based on paternalistic concerns" are categorically distinct**.[52] That is precisely the situation here: The proposed rule is a prior restraint on speech (because testing and auditing needs to take place ahead of time),[53] which is subject to the highest level of scrutiny, without a clear showing of any concrete harm to investors that the speech restriction would prevent, particularly if such communications are coupled with disclosures about the use and limitations of such technology.

As former Attorney General Bill Barr recently explained, **"there is no 'securities law exception' to the First Amendment."**[54] Accordingly, "under the U.S. Constitution, unless a communication is deceptive, the mere fact that it imparts to a customer information consistent with a speaker's own interests can't possibly justify these sweeping restraints."[55]

Given the gravity of these concerns, we respectfully urge the Commission to decline to enact the proposed rule in any form, and instead rely on existing, more carefully tailored regulations to protect investors from fraud, misinformation, and other potential harms.

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We thank you for taking the time to review our input and are happy to be of further assistance as this endeavor proceeds. Should you have any questions about our views, please do not hesitate to reach out to me directly.

Sincerely,

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[52] Heyman, "Quiet Period in a Noisy World," 217.
[53] While the prior restraint doctrine typically applies when the government claims the power to preapprove a speaker's message before it can be released, courts have also applied the doctrine where the government seeks to impose other preconditions on the dissemination of information, such as the payment of a tax. Here, the testing and auditing are similar, burdensome preconditions that will functionally operate as a prior restraint on speech and so should be subject to similar scrutiny.
[54] William P. Barr and Barbara Comstock, "Gary Gensler's Plan to Control Information," *Wall Street Journal*, September 10, 2023, https://www.wsj.com/articles/gary-genslers-plan-to-control-information-sec-financial-regulation-firms-investors-technology-market-927579dc.
[55] Barr and Comstock, "Gary Gensler's Plan."