October 10, 2023

VIA ELECTRONIC SUBMISSION

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Proposed Rule on Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (File No. S7-12-23) ("Proposal")

Dear Ms. Countryman:

Intercontinental Exchange, Inc. ("ICE"), on behalf of itself and its subsidiaries, appreciates the opportunity to comment on the Proposal by the U.S. Securities and Exchange Commission's ("Commission" or "SEC")[1]. While we appreciate the Commission's concern that the use of certain forms of predictive data analytics ("PDA") by broker-dealers and investment advisers could create conflicts of interests that could potentially negatively impact investors, we believe that the Proposal is overly broad and unnecessarily restrictive in its application. As such, we believe it is prudent for the SEC to withdraw the Proposal to explore its unintended consequences more fully, as well as to evaluate how the Proposal interconnects with many of the other open rulemaking proposals issued by the SEC and existing regulatory requirements.

ICE's comments are based on its informed perspective as a user of significant technology resources, including PDA tools, to provide an extensive library of data and analytics products and services to the financial services industry. Although the Proposal includes proposed conflict rules for both broker-dealers and investment advisers, please note we have limited our response to the impact of proposed Rule 211(h)(2)-4 ("Proposed Rule") under the Investment Advisers Act of 1940 ("Advisers Act") which would potentially impact an ICE affiliate, ICE Data Pricing & Reference Data, LLC, which is an SEC-registered investment adviser. However, we believe that many of the issues we raise are equally applicable to the broker-dealer community. Below we provide a background of our data and analytics business as well as our views on certain aspect of the Proposed Rule and statements made by the Commission.

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[1] Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (Release No. Release Nos. 34-97990; IA-6353; File No. S7-12-23), 88 Fed. Reg. 53960 (proposed Aug. 9, 2023) (to be codified at 17 C.F.R. pt. 240) [hereinafter *Proposal*].

I. Overview of ICE Data Services

Through its U.S. subsidiary that is registered with the Commission under the Investment Advisers Act of 1940, ICE provides evaluated pricing and other advisory services. These services include end-of-day evaluations and continuous evaluated pricing (CEP™) services on approximately three million fixed income securities spanning nearly 150 countries and 80 currencies including sovereign, corporate and municipal bonds, mortgage and asset-backed securities as well as leveraged loans. ICE also offers a range of fixed income analytics and other workflow solutions including: Best Execution services, ICE Liquidity Indicators™, fixed income portfolio analytics and our ETF Hub. Our fixed income customers rely on our data, indices and analytics to inform pre-trade decision making, support post-trade regulatory and compliance needs and improve operational efficiency.[2]

As a leading provider of data and analytics to the financial services community, ICE utilizes many of the technologies referenced in the Proposal that would be captured by the broad definition of "covered technology"[3] provided in the Proposed Rule (e.g., mathematical models contained in spreadsheets, basic algorithms, etc.).[4] Specifically, we utilize Machine Learning as a tool to calibrate and normalize a variety of market data to produce, for example, dynamic bid-ask spreads currently applied to most investment grade and high yield corporate fixed income evaluations with a plan to expand to other asset classes in the near term. In connection with its evaluated pricing services, ICE utilizes sophisticated algorithms to generate a level where a round lot of each security is expected to transact in an orderly market. Additionally, we use time series techniques for aggregating and scoring data sources and many statistical tools like linear regressions to generate analytics for many of our products and services. While ICE does not currently utilize Generative AI or Large Language Models in providing its products or services, we continue to explore other tools available, including advanced technologies, that help us to improve our products and to develop additional products and services that benefit our clients. We can attest to the Commission's assertion that "[a]ccess to cheaper and more granular data, plus the additional availability of advanced computing power, have advanced data collection and processing technologies,"[5] and we believe investors have been the ultimate beneficiaries of these advancements. We believe it is important for the Commission to encourage and not unnecessarily stifle the continued development of tools that can benefit the investment community.

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[2] These products and services are offered by certain ICE affiliates in its Fixed Income and Data Services segment, which includes ICE Data Services, Inc. and its subsidiaries globally, ICE Data Indices, LLC, ICE Data Derivatives, Inc. and ICE Data Analytics, LLC.

[3] *See Proposal, supra* note 1, at 237 ("Covered technology means an 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.").

[4] *Id.* at 42-43 ("The proposed definition is designed to capture PDA-like technologies, such as AI, machine learning, or deep learning algorithms, neural networks, NLP, or large language models (including generative pre-trained transformers), as well as other technologies that make use of historical or real-time data, lookup tables, or correlation matrices among others.").

[5] *Id.* at 144

II. Existing Regulatory Framework is Sufficient

As a threshold matter, ICE agrees with the Commission's assertion that "firms should have robust practices to appropriately oversee and understand their use [of certain technologies] and take steps to identify and appropriately address any associated conflicts of interest."[6] However, ICE is of the opinion that there are already sufficiently robust laws, rules and regulations that obligate investment advisers to appropriately and adequately address such conflicts of interest. In fact, the Commission notes in the Proposal, "[e]xisting obligations already restrict firms from placing their interests ahead of customers, clients, or investors in certain contexts, such as when providing investment advice or recommendations, including as a result of conflicting interests related to their use of covered technologies."[7] The Commission asserts that the proposed conflict rules would be beneficial, in part, "because they would apply to a broader set of investor actions"[8] than the existing requirements; however, the SEC's own interpretation of the fiduciary duty applicable to investment advisers states that an investment adviser "must, *at all times,* serve the best interest of its client and not subordinate its client's interest to its own."(emphasis added)[9] It is difficult to imagine an application of conflict of interest requirements that apply more broadly than "at all times." In addition to the fiduciary duty it owes to its clients, investment advisers are subject to the antifraud provision of Section 206 of the Advisers Act and the rules promulgated thereunder.[10] Further, investment advisers are subject to the requirements of Rule 206(4)-7 which require the establishment of a reasonably designed compliance program to prevent violations of these obligations.[11] Thus, we do not see the need for additional rulemaking to address issues that are already thoroughly addressed by current statutory and regulatory requirements. Furthermore, we do not believe the Commission has set forth adequate rationale in the Proposal for imposing such additional, and sometimes conflicting, onerous and prescriptive requirements simply because certain technologies are used. The benefit of the currently broadly applicable principles-based requirements is that they apply to new business practices and technologies as they develop.

The SEC indicates that the proposed conflict rules are "important to help ensure that firms take proactive steps to identify conflicts of interest and evaluate their nature."[12] The issue of conflicts of interest has received an enormous amount of attention in the financial services industry, especially in recent years around the discussion of Regulation Best Interest ("Reg BI") and the issuance of the release of the SEC Fiduciary Interpretation. In the instructions for Form ADV

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6 *Id.* at 32

7 *Id.* at 168

8 *Id.*

9 Commission Interpretation Regarding Standard of Conduct for Investment Advisers (Release No. IA-5248; File No. S7-07-18),17 C.F.R § 276 (2019) [hereinafter *SEC Fiduciary Interpretation*] at 8.

10 15 U.S.C § 80b–6 (2021) -

11 Compliance procedures and practices, 17 C.F.R. § 275.206(4)-7 (2004).

12 *Proposal*, *supra* note 1, at 172.

Part 2, conflicts of interest are mentioned 26 times.[13] Given the settled body of law regarding advisers' obligations regarding conflicts of interest and the degree of attention the subject has gotten in recent years, we believe investment advisers are well-versed in the importance of identifying conflicts of interests and the requirement to eliminate or mitigate against such conflicts through disclosure if warranted. The Commission indicates an impetus behind the Proposal is that the SEC is "evaluating [its] regulations' effectiveness in protecting investors from the potentially harmful impact of conflicts of interest,"[14] yet it does not provide any evidence that the existing regulatory framework has proven to be ineffective. Without such evidence, it seems unnecessary to propose a new rule to further highlight requirements which already clearly exist under the current regulatory framework.

ICE does not think this Proposal is merely "complementary"[15] to the existing requirements nor does it "supplement, rather than supplant, existing regulatory obligations,"[16] as the SEC asserts. In addition, we think the Commission's characterization of the "Proposal" as "principles-based"[17] inaccurately describes what are onerous and prescriptive requirements that are at odds with the existing principles-based regulatory framework. The SEC's own description of the Proposal as a "*comprehensive* oversight framework, consisting of *targeted* obligations, policies and procedures, and recordkeeping requirements" (emphasis added)[18] contradicts the notion that the Proposal is merely complementary or supplemental or that these proposed requirements are principles-based. Even if the Proposal is only supplemental to the existing regulatory framework, the Commission has not provided sufficient rationale for why such supplemental obligations are needed.

Further, the Proposed Rule conflicts with existing requirements relating to disclosure of conflicts, and unnecessarily complicates an already robust principles-based framework. The current requirement established by the 1963 Supreme Court case, SEC v. Capital Gains Research Bureau, Inc.,[19] as reinforced by the SEC in the SEC Fiduciary Interpretation, is that "[u]nder its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser - consciously or unconsciously - to render advice which is not disinterested such that a client can provide informed consent to the

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[13] *See* Form ADV Part 2: Uniform Requirements for the Investment Adviser *Brochure* and *Brochure Supplement,* SEC 1707 (08-22) available at https://www.sec.gov/about/forms/formadv-part2.pdf. ("As a fiduciary, you also must seek to avoid conflicts of interest with your clients, and, at a minimum, make full disclosure of all material conflicts of interest between you and your clients that could affect the advisory relationship." *See also, id. (*"[Advisers] should discuss only conflicts the adviser has or is reasonably likely to have, and practices in which it engages or is reasonably likely to engage. If a conflict arises or the adviser decides to engage in a practice that it has not disclosed, supplemental disclosure must be provided to clients to obtain their consent. If you have a conflict or engage in a practice with respect to some (but not all) types or classes of clients, advice, or transactions, indicate as such rather than disclosing that you "may" have the conflict or engage in the practice.").

[14] *Proposal*, *supra* note 1, at 8.

[15] *Id.*at 223.

[16] *Id.* at 61.

[17] *Id.* at 38.

[18] *Id.* at 223.

[19] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

conflict."[20] Thus, the requirement in the Proposed Rule that investment advisers must eliminate or neutralize conflicts of interest associated with the use of covered technologies, and that disclosure is not an option, directly conflicts with the existing requirements. The Proposal continually emphasizes the "complexity and opacity of PDA-like technologies" as the reason that disclosure may not be sufficient and as the basis for additional requirements not currently set forth in the existing regulatory framework. While the SEC insists that the Proposal "aligns with (and in some respects may satisfy) firms' existing regulatory obligations,"[21] the very nature of the onerous and prescriptive requirements of the Proposal is at odds with the principles-based approach of the existing regulatory framework for investment advisers.

The SEC indicates these proposed additional prescriptive requirements are necessary because the use of certain covered technologies "may expose investors to unique risks."[22] However, the Proposal does not adequately articulate what those unique risks could be or why the current regulatory requirements related to conflicts of interest are insufficient. Many of the risks the SEC has identified are often present with or without technology[23] and there is no discernible reason why a potential conflict could be mitigated by adequate disclosure if no technology is used but must be eliminated or neutralized simply because a covered technology has been used. While the Commission indicates that the proposed conflict rules are intended to be technology neutral, it is on its face not. A technology neutral regulatory framework would apply consistently to conflicts of interest identified regardless of whether or not technology is used at all.

The SEC asks in the Proposal whether the expansive definition of "covered technology" will remain "evergreen" despite future technological advancements.[24] Since we believe the existing principles-based fiduciary duty obligation itself is already evergreen, we see no need for a wholesale revamp of the obligations around conflicts of interest related to "covered technology" which have been recognized for over 50 years.

III. Requirements are too Broad and Onerous

Even if the SEC concludes additional regulatory requirements are needed to address conflicts of interest in connection with the use of certain technologies, ICE believes there are several areas of the Proposed Rule that are overly prescriptive and onerous, as well as in conflict with the existing regulatory framework. Below is a discussion of the changes that ICE believes are

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20 *SEC Fiduciary Interpretation*, *supra* note 10, at.8

21 *Proposal*, *supra* note 1, at 37.

22 *Id*. at 9.

23 *See id*. at 28 ("For example, some members of the public have expressed concern that firms' use of these PDA-like technologies encourages practices that are profitable for the firm but may increase investors' costs, undermine investors' performance, or expose investors to unnecessary risks based on their individual investment profile, such as: (i) excessive trading,81 (ii) using trading strategies that carry additional risk (*e.g.*, options trading and trading on margin), and (iii) trading in complex securities products that are more remunerative to the firm but pose undue risk to the investor.[82])."

24 *Id*. at 46.

warranted to the Proposed Rule to better align with the existing principles-based regulatory framework.

A. Definition of "conflict of interest"

ICE believes that the definition of "conflict of interest" in the Proposed Rule is too broad and should be revised to be consistent with existing precedent that imposes obligations only insofar as conflicts are deemed to be material. The Proposed Rule defines conflict of interest as "when an investment adviser uses a covered technology that takes into consideration an interest of the investment adviser."[25] First, the absence of a materiality component is inconsistent with longstanding legal precedent that requires that investment advisers "seek to avoid conflict with its clients and, at a minimum, make full disclosure of any material conflict or potential conflict."[26] As noted above, this instruction is also provided in Item #3 of the Instructions to Form ADV Part 2 and the Commission confirmed this standard in its 2019 SEC Fiduciary Interpretation.

Even in Rule 206(4)-1, the investment adviser marketing rule which was adopted on December 22, 2020 with a compliance date of November 4, 2022 (the "Marketing Rule"), the SEC requires disclosure only of material conflicts in the context of testimonials and endorsements. In the final adopting release for the Marketing Rule, the SEC acknowledged it adopted the rule because "investment adviser marketing has evolved with advances in technology" and because "the use of the internet, mobile applications, and social media has become an integral part of business communications."[27] In short, in the instance of the Marketing Rule, the increased use of technology prompted new rulemaking, but it did not prompt the SEC to deviate from longstanding precedent that focuses only on material conflicts, and we do not think that there is any justification to do so here.

Additionally, the absence of a materiality component in the proposed definition of conflict of interest is even more burdensome because of the added requirement of the Proposed Rule that any such conflict must be eliminated or neutralized (see discussion below regarding the removal of the ability to disclose conflicts under the Proposed Rule). The Commission is proposing to deviate not only from its previous approach to addressing conflicts of interest by requiring elimination or neutralization of such conflicts, it is also substantially and without justification expanding the scope of what it considers a conflict to include conflicts that are not material.

B. Definition of "covered technology"

ICE views the definition of "covered technology" under the Proposed Rule to be overly broad and should be revised to focus on the specific types of technologies that the Commission can demonstrate with sufficient evidence can cause actual investor harm. Under the Proposed Rule,

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[25] *Id*. at 237.

[26] Amendments to Form ADV (Release No. IA-3060, File No. S7-10-00), 17 C. F. R. § 275 (2010) at 4. *See also*, SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963); In the Matter of Arleen W. Hughes, Exchange Act Release No. 4048 (Feb. 18, 1948).

[27] Investment Adviser Marketing (Release No. IA-5653; File No. S7-21-19), 17 C. F. R. § 275 (2020) at 8.

"*Covered technology* means an 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."[28] The Commission noted that "[t]he proposed definition is designed to capture PDA-like technologies, such as AI, machine learning, or deep learning algorithms, neural networks, NLP, or large language models (including generative pre-trained transformers), as well as other technologies that make use of historical or real-time data, lookup tables, or correlation matrices among others."[29] The Commission indicated it intentionally drafted the definition broadly enough so that the proposed conflicts rules would "continue to be applicable as technology develops and to provide firms with flexibility to develop approaches to their use of technology consistent with their business model."[30] While such a broad, expansive definition may provide flexibility to the Commission, it would not provide flexibility to investment advisers who will undoubtedly be forced to forego the use of certain technologies that would be captured by this overly broad definition.

By stating that the "definition of covered technology ***only*** applies to technologies that optimize for, predict, guide, forecast, or direct investment-related behaviors or outcomes" (emphasis added)[31] it is as if the Commission wants the industry to believe that the definition narrows the scope of the Proposed Rule. However, in the Proposal, the Commission acknowledges the definition would "capture a broad range of actions . . . including design elements, features, or communications that nudge, prompt, cue, solicit, or influence investment-related behaviors or outcomes from investors."[32] ICE recommends that the definition of "covered technology" should, at a minimum, only include technology used to provide investment advice. Thus, we suggest the Commission revise the phrase "investment-related behaviors or outcomes" as that could be interpreted broadly to include more than just technologies used to provide investment advice. Also, for investment advisers that offer non-advisory services alongside advisory services, the SEC should clarify that that "covered technology" applies only to technologies used to provide its advisory services much like the Marketing Rule defines "advertisement" as a communication "that offers the investment adviser's investment advisory services with regard to securities."[33]

In response to question # 4, we do believe some of the terms in the definition are redundant. From a purely grammatical perspective, there is no need to express the same or similar concepts in multiple ways as it only causes confusion. "Guide," according to Merriam Webster, means "to *direct*, supervise or influence to a particular end" or "to *direct* in a way or course".[34] Thus, in

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28 *Proposal*, *supra* note 1, at 237.

29 *Id.* at.42-43.

30 *Id.* at 38.

31 *Id.* at 46-47.

32 *Id.* at 43

33 Investment adviser marketing, 17 C. F. R. § 275.206(4)-1(e)(1)(i) (2021).

34 "guide." *Merriam-Webster.com*. 2023. https://www.merriam-webster.com (October 6, 2023).

essence, it means to direct, but the SEC includes "guide" as if it could mean something different than "direct." Without some clarification from the Commission on what else it is intending to capture, it makes more sense to use only "direct" in the definition of "covered technology." Similarly, the inclusion of "forecast" in the definition of "covered technology" can be construed as merely another way of saying "predict" as its definition is "to calculate or *predict* (some future event or condition) or "to indicate as likely to occur".[35]

Additionally, if the Commission were to keep the word "guide" in the definition of "covered technology," ICE recommends that it be limited to technologies that are used to directly guide investors to make specific investment decisions. The SEC should make it clear that the definition of "guide" does not cover technologies that are only intended to provide information to investors even if that information might be used indirectly to help "guide" an investor in their decision-making process.

The Commission indicates it is "not seeking to identify which technologies a firm should not use" while at the same time casting a net so wide that it would capture even technologies in use that have clearly benefited investors. Creating such a high hurdle to overcome seems likely to discourage continued use of such technologies and the further exploration of how technologies can benefit investors. As the Commission well knows, manual processes are fraught with their own set of problems (e.g., delays, data entry errors, etc.) and the use of technology has evolved, in part, to help eliminate some of the issues often associated with manual processes. In fact, the Commission has often expected firms to automate certain functions to avoid the problems associated with manual processes, yet the Proposal would have the effect of causing the industry to reverse course.

C. Definition of "investor"

ICE recommends that the SEC limit the definition of "investor" under the Proposed Rule to retail investors, as defined in Form CRS. For investment advisers, under the Proposed Rule "investor" would include "any prospective or current client of an investment adviser or any prospective or current investor in a pooled investment vehicle . . . advised by the investment adviser."[36] On the other hand, the proposed conflict rule applicable to broker-dealers, would define "investor" as only covering retail investors.[37] We believe it is best to have both proposed conflict rules apply to the same types of investors. The financial services industry has long suffered from a different standard of care for broker-dealers and investment advisers, and Reg BI was implemented to help narrow the gap between the two regulatory frameworks. Limiting the broker-dealer's requirements to retail investors but not for investment advisers will create a burden on the ability of investment advisers to compete with broker-dealers. Moreover, the different standards would be particularly burdensome for dually registered firms. Further, given that the Commission's

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[35] "forecast." *Merriam-Webster.com*. 2023. https://www.merriam-webster.com (October 6, 2023).

[36] *Proposal*, *supra* note 1, at 237.

[37] *Id*. at 230 ("*Investor* means a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes.").

stated concerns center around the ability to influence unsophisticated investors and to address conflicts caused by "complex" and/or "opaque" technologies that investors may not be able to understand, the Commission should limit the definition of "investor" to retail investors because it would limit the application of the Proposed Rule to those investors for which the Commission has articulated a basis for the new requirements.

D. Definition of "investor interaction"

ICE recommends that the definition of "investor interaction" in the Proposed Rule be narrowed to include only interactions that provide investment advice. The Proposed Rule defines "investor interaction" as "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."[38]

First, "engaging . . . with an investor" is broad and ambiguous, and it is unclear what "engaging with" is intended to mean. Consistent with our recommendation to limit the definition of "covered technology" to technology used to provide investment advice, we believe the definition of "investor interaction" should be limited to interactions that directly relate to the provision of investment advice. Alternatively, as noted above, much like the Commission did in the definition of "advertisement" in the Marketing Rule, the SEC could limit the definition of "investor interaction" to any interaction "that offers the investment adviser's investment advisory services."[39]We also believe that the Commission should further explore the interplay between the Proposed Rule and the Marketing Rule, particularly the communications covered by Rule 206(4)-1 and the conflicting requirements relating to disclosure of conflicts of interest in testimonials and endorsements.

The Commission makes it clear that it intentionally proposed a broad definition of "investor interaction" to capture more than just interactions involving the provision of investment advice or making recommendations,[40] including "design elements, features, or communications that nudge, prompt, cue, solicit, or influence investment-related behaviors or outcomes from investors."[41] However, the Commission does not provide sufficient rationale for why this rule should govern other investor interactions that do not relate to the provision of investment advice. The Commission's regulatory authority over investment advisers relates to the provision of advisory services and, as proposed, the definition would conceivably capture interactions that are outside of that authority. In addition, in the case of communications relating to advisory services, the definition of investor interaction would likely capture certain communications already covered by the Marketing Rule. For instance, capturing behavioral nudges within the definition

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38 *Id*. at.237.

39 Investment adviser marketing, 17 C. F. R. § 275.206(4)-1(e)(1)(i) (2021).

40 *Proposal*, *supra* note 1, at 28 footnote 80.

41 *Id*. at 43.

of "investor interaction" is akin to saying a well-placed advertisement would be covered if it was delivered via a covered technology, and if that is the case, then the Marketing Rule should apply.

Finally, the SEC's concern that the use of certain covered technologies "can take advantage of psychological biases and lead to impulsive, irrational investment decisions"[42] suggests that more traditional sales efforts do not pose the same risks. An abundance of case law and SEC enforcement actions involving disreputable sales practices suggests otherwise. As noted previously, the Commission paints these potential risks associated with the use of technology as "unique" but the types of sales practices issues they raise (e.g., "excessive trading, unsuitable investments, etc.) are not new or unique and the Commission has not explained why the existing regulatory framework does not protect investors from such behaviors, regardless of whether technology is used by the investment adviser or broker-dealer.

E. Requirement to eliminate or neutralize the effect of a conflict of interest

The current regulatory framework permits investment advisers to disclose material conflicts of interest. The Commission has not explained why disclosure is not sufficient to address the conflicts of interest addressed by the Proposal. The Proposed Rule would require investment advisers to "[e]liminate, or neutralize the effect of, any conflict of interest . . . determined to . . . to result in an investor interaction that places the interest of the investment adviser . . . ahead of the interests of investors."[43] The Commission asserts that disclosure relating to the conflicts covered by the Proposal would never provide adequate protection of investors but does not provide sufficient basis for why disclosure and consent would be ineffective.

The Commission believes that the complexity of covered technologies would "entail providing disclosure that is lengthy, highly technical, and variable, which could cause investors difficulty in understanding the disclosure."[44] The SEC also indicates that "disclosures may be too unspecific (if provided to cover the entire relationship) or too frequent (if provided with every interaction) to be useful to investors."[45] Disclosure is one of the core tenets of the federal securities laws. Figuring out how to explain complicated concepts in disclosure documents is something that the financial services industry and the SEC must do regularly. However, the Commission has concluded that this scenario, unlike other complicated issues, cannot be described clearly enough for investors to provide consent. Before concluding that no disclosure would ever be sufficient, we believe the Commission should work with the financial services community to carefully consider what disclosures would or could look like.

The SEC indicates "that the conflicts associated with the use of covered technology in investor interactions present a higher risk of harm to investors than conflicts associated with technologies

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42 *Id*. at 174.

43 *Id*. at 238.

44 *Id*. at 25.

45 *Id*. at 175.

that are not used in such interactions."[46] The Commission offers examples of specific risks that they are concerned about, but we note that these same risks could exist in a wholly analog environment. For example, the SEC expresses concerns that certain technologies could "prompt investors to enroll in products or services that financially benefit the firm but may not be consistent with their investment goals or risk tolerance, encourage investors to enter more frequent trades or employ riskier trading strategies . . ., or inappropriately steer investors toward complex and risk securities products."[47] Each of those examples is a risk that investors face every day when dealing with unscrupulous brokers or advisers, whether or not technology is involved. Brokers can encourage churning and other risky trading strategies without ever using technology. Advisers could steer investors toward complex securities that are unsuitable without the internet. The Commission has provided insufficient rationale as to why disclosure of conflicts of interest is sufficient when these risks exist in an analog environment but not when computer technology is used.

The SEC has concluded that "opacity [associated with the use of covered technologies] makes it more challenging for an investor to identify the presence of a conflict of interest, understand its importance, and take protective action when making an investment decision or otherwise interacting with the firm."[48] We think this statement underscores why disclosure is of such fundamental importance. Under the existing regulatory framework, because disclosure of material conflicts of interest is required, it would be the investment adviser's obligation to identify the presence of these conflicts of interests the Commission references. It should not be challenging for investors if proper and adequate disclosure is made by investment advisers as currently required. However, by removing the ability to mitigate a material conflict of interest by providing disclosure, the SEC is taking away the ability of investors to provide informed consent and, ultimately, the ability of investors to make their own decisions.

If the Commission decides to proceed with a rule that does not permit disclosure as a means to address material conflicts of interest, we believe it should reconsider including the requirement that firms "neutralize the effect of" a conflict as an alternative to eliminating the conflict. The Commission gives an example of A/B testing as one means a firm could use to neutralize the effect of a conflict, but without other examples, it is unclear what else a firm could do to neutralize a potential conflict. Without further guidance on what the SEC means by neutralize and how firms can demonstrate that they had neutralized the effect of a conflict of interest, it seems the only real recourse firms would have under the Proposed Rule is to eliminate any conflicts of interest.

IV. Limit Scope of Rule to Advisers that Manage Assets

Consistent with its views regarding the definition of "investor interaction" ICE believes that the SEC should include a specific exclusion for investment advisers that do not manage assets. As

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[46] *Id*. at 51.

[47] *Id*. at 26.

[48] *Id*. at 146.

noted previously, we believe that only interactions relating to the provision of investment advice should be captured by any rule the SEC adopts. Given the specific types of investor harm about which the Commission expresses concern,[49] ICE does not believe the Commission has justified extending its Proposal to firms not engaging in investor interactions that would present those types of risks. Investment advisers that do not manage assets are not in a position "to place their interests ahead of investors' interests" which is the risk that the Commission is purportedly trying to limit with this Proposal. Such investment advisers would continue to be subject to the existing regulatory framework that requires them to eliminate or disclose material conflicts.

V. Cost Benefit Analysis

ICE believes that the cost benefit analysis presented in the Proposal is inadequate and incomplete. Even by the SEC's own admission, "[s]ome of the benefits and costs discussed [in the Proposal] are impracticable to quantify because quantification would necessitate general assumptions about behavioral responses that would be difficult to quantify."[50] Given the broad use of technology and the expansive definition of "covered technology" the testing requirements to identify and evaluate technologies[51] would be extremely burdensome and costly.

Additionally, the analysis does not adequately address the benefits to investors through the advancement of technology or the potential harm to investors if the use of technology is hampered, as we think it will be if the Proposal is adopted. The Commission acknowledges the benefits of technology, particularly in the ability to analyze vast amounts of data.[52] The SEC also acknowledged that "new technologies can aid firms' interactions with investors, and bring greater access and product choice, potentially at a lower cost, without compromising investor protection, capital formation, and fair, orderly, and efficient markets"[53] However, this Proposal would undermine the progress that has been made by making it more difficult to leverage technology that has been so helpful in making the markets more accessible to investors and more efficient. The market has been able to significantly reduce the settlement cycle precisely because of efficiencies afforded by technology. We believe stifling innovation and forcing firms to forego technological advancements is a "cost" to investors that needs to be more fully explored and addressed by the Commission in their analysis.

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49 *Id*. at 7 ("[A]n investment adviser that is paid a percentage fee based on assets under management has an incentive to encourage a client to move assets into his or her advisory account, which could conflict with investors' interest, for example, to retain assets in a 401(k) plan or other retirement account." p.7 "[In]vestment product sponsors offer revenue sharing payments, creating an incentive for broker-dealers and investment advisers that accept such payments to favor those investments.").

50 *Id*. at 144.

51 *Id*. at 237 (Investment advisers would be required to evaluate covered technologies which would "testing each such covered technology prior to its implementation or material modification, and periodically thereafter, to determine whether the use of such covered technology is associated with a conflict of interest.").

52 *Id*. at 19.

53 *Id*. at 12.

ICE appreciates the valuable work that the Commission and its staff do to help protect investors and facilitate orderly markets. We are generally supportive of its rulemaking efforts to address important issues impacting the financial markets and investors. However, we believe the Proposal has significant issues and far-reaching ramifications that would likely have a negative impact on market participants and their investors that should be further explored before any rulemaking is adopted to address the use of PDA-like technology and the potential harm to investors that the Commission wishes to address. ICE appreciates the opportunity to present its perspective and views on the Commission's Proposal. Should any questions arise about the content of this letter, please do not hesitate to contact me.

Respectfully submitted,

Amanda Hindlian
President, ICE Fixed Income and Data Services