October 10, 2023

VIA ELECTRONIC SUBMISSION

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

Re: Proposed Rule 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:

The American Investment Council (the "AIC")[1] and the Loan Syndications and Trading Association ("LSTA")[2] jointly write to express serious concerns about the Securities and Exchange Commission's (the "Commission" or "SEC") proposed rule under the Investment Advisers Act of 1940 (the "Advisers Act") regarding Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (the "Proposal").[3] Our comments stem from our shared perspective that the SEC has no authority under Advisers Act Section 211(h) to adopt any rules applicable to investment advisers' management of private funds. The Proposal also

[1] AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long-term investment. In this effort, AIC develops, analyzes, and distributes information about the private equity and private credit industry and its contributions to the U.S. and global economy. Established in 2007 and formerly known as the Private Equity Growth Capital Council, AIC is based in Washington, D.C. For further information about the AIC and its members, please visit our website at http://www.investmentcouncil.org.

[2] The LSTA is a not-for-profit trade association that is made up of a broad and diverse membership involved in the origination, syndication, and trade of commercial loans. The 575 members of the LSTA include commercial banks, investment banks, broker-dealers, hedge funds, mutual funds, insurance companies, fund managers, and other institutional lenders, as well as service providers and vendors. The LSTA undertakes a wide variety of activities to foster the development of policies and market practices designed to promote just and equitable marketplace principles and to encourage cooperation and coordination with firms facilitating transactions in loans. Since 1995, the LSTA has developed standardized practices, procedures, and documentation to enhance market efficiency, transparency, and certainty. For more information, visit www.lsta.org.

[3] Proposed Rule, Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, SEC Rel. Nos. 34-97990; IA-6353 (July 26, 2023), 88 FR 53960 (Aug. 9, 2023) (the "Proposing Release").

directly impacts compliance with the SEC's recently-adopted Marketing Rule, without any explanation of that impact as is required under principles of administrative law. We limit our comments to those topics, as well as our continued concern with the inadequate amount of time the SEC continues to offer the public to comment on its rules proposals. We also suggest a way forward for the SEC to better inform itself and its staff about the use of technology in the marketplace.

In addition, we share a concern that the Proposal, by effectively restricting the use of technology, would have a negative impact on private equity fund investors[4] and on the marketplace for the origination, syndication, and trading of commercial loans. Other commenters explain this concern in great detail, but private fund investors and loan recipients benefit from the use of technology. The SEC should take into account that they are the ones that will bear the brunt of the impact of the Proposal. In summary, we urge the SEC to withdraw the ill-informed, overreaching Proposal.

The SEC has provided an unreasonably short amount of time to comment. We and twelve other associations already have expressed our concerns regarding the SEC's unreasonably short comment period for this Proposal and requested an additional 60 days to comment.[5] We believe strongly that additional time is necessary to provide our members and other public commenters the ability to assess and comment on the impact of the Proposal. The SEC has a practice of considering comments that are submitted after a formal comment period, but setting a formal comment date has meaning and an unreasonably short one effectively cuts off the ability for commenters to take full measures to analyze and explain the impact of a rule proposal. This is all the more true for this Proposal, which is both sweeping and vague in scope. Indeed, the SEC states expressly in the Proposing Release that its intention is to apply the Proposal to, among others, "future and existing technologies," which makes the job of analyzing and informing the SEC of the impacts of the Proposal very challenging.[6]

With such broad ambitions to apply a rule to technologies not yet in existence – or even conceived – and a lack of appreciation of the impact the Proposal would have on the recently-adopted Marketing Rule for investment advisers (see discussion below), the SEC's comment period is simply too short. It is too short, even accounting for the time necessary to publish the Proposal in the Federal Register to formally start the comment period.[7] Rejecting the request for an additional 60 days to comment, as the SEC effectively has done, is an agency action that is

[4] For purposes of this letter, we generally refer to private equity and private credit fund advisers as "private equity funds."

[5] Joint Letter re Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, File No. S7-12-23 (Aug. 15, 2023), available at: https://www.sec.gov/comments/s7-12-23/s71223-245299-541662.pdf.

[6] Proposing Release at 43.

[7] Furthermore, the SEC voted on the Proposal at the end of July, when many persons necessary to assess the impact of a vast change in regulations are unavailable while traveling with family and friends or otherwise on paid time off.

unfair to commenters and to the SEC itself. That decision forecloses the opportunity for the SEC to make well-informed decisions by cutting off the ability of commenters to fully inform it of the impact of the proposal by the SEC's unreasonable deadline for comments. A proposal as sweeping as one that seeks to affect future technologies demands greater thought and consideration.

The Proposal also has important implications for other SEC proposals, like the outsourcing[8] and cybersecurity proposals,[9] without discussing those implications. If the SEC did not account for the impact of the Proposal on the Marketing Rule or the numerous rule proposals issued by the SEC, commenters certainly deserve time to analyze that impact for themselves and inform the SEC of their views. More broadly, the sheer number and vast scope of proposed rulemakings issued by the SEC over the past two years is truly unprecedented, particularly given the lack of any Congressional mandate.

An aspect of the Proposal that makes it even more challenging to provide meaningful comment is the proposed definition of "covered technology," which is so broad that it applies to almost any mechanical device, potentially even a telephone. Such an expansive definition, coupled with the vague set of compliance conditions that the Proposal would impose, would not only create disincentives to the use of technologies by fiduciaries and other covered firms, but may effectively preclude those firms' use of certain technologies. This is at odds with SEC statements in the Proposing Release that acknowledge the many benefits of technologies to investors.

Again, the SEC must provide sufficient time for commenters to identify and analyze the impacts, including the potential results that firms would no longer be able to avail themselves of certain technologies because the SEC's proposal is so unworkable. Firms also need to consider the shifting nature of the regulatory and commercial landscape resulting from this collective set of proposals and new rules, as well as the cumulative burden on registrants, service providers, and investors. Because the SEC has not provided sufficient time to consider the Proposal, our letter focuses on issues that we believe may be more specific to the loan marketplace and to private equity advisers than to other commenters.

We unequivocally urge the SEC to exclude from the scope of the Proposal all advertisements and endorsements subject to its recently adopted Marketing Rule. The SEC's Proposing Release does not address or explain the impact the Proposal would have on the recently adopted sweeping overhaul of rule 206(4)-1 under the Advisers Act (the "Marketing Rule").[10] The Proposing Release identifies the Marketing Rule as "Duplicative, Overlapping, or Conflicting" with the Proposal, but does not state whether the SEC believes it to be duplicative, overlapping or

---

[8] *See* Outsourcing by Investment Advisers, SEC Rel. No. IA- 6176 (Oct. 26, 2022), 87 FR 68816 (Nov. 16, 2022) (the "Outsourcing Proposal"), available at: https://www.sec.gov/files/rules/proposed/2022/ia-6176.pdf.

[9] *See e.g.*, Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies, SEC Rel. Nos. 33-11028; 34-94197; IA-5956; IC-34497 (Feb. 9, 2022), 87 FR 13524 (Mar. 9, 2022) available at: https://www.sec.gov/files/rules/proposed/2022/33-11028.pdf.

[10] Final Rule, Investment Adviser Marketing, SEC Rel. No. IA-5653 (Dec. 20, 2020), 86 FR 13024 (Mar. 5, 2021) (the "Marketing Rule Release"), available at: https://www.sec.gov/files/rules/final/2020/ia-5653.pdf.

conflicting.[11] Indeed, we could find no analysis or explanation in the Proposing Release of the interplay between that rule and the Proposal. The SEC must exclude advertisements and endorsements from the scope of the Proposal, if ever adopted, because the SEC's policy goals relating to technology were already addressed when the SEC adopted that rule just over two years ago.

Both the Marketing Rule and the Proposal, if adopted, will affect investment advisers' use of technology when communicating with investors. It appears to us that the SEC would inappropriately apply the Proposal to an "investor interaction" that also is an "advertisement" for purposes of the Marketing Rule.[12] The Proposal defines an "investor interaction," as "engaging or communicating with an investor."[13] The Marketing Rule defines an investment adviser's "advertisements." as any direct or indirect communication to investors that offers the investment adviser's investment advisory services with regard to a private fund advised by the investment adviser.[14] The SEC also specifically states that an advertisement is an investor interaction for purposes of the Proposal.[15] Endorsements for purposes of the Marketing Rule follow a similar analysis.

The SEC, however, provides no guidance about, or even an explanation of, the conflict between the Marketing Rule and the Proposal. For example, the SEC does not address whether compliance with the specific requirements of the Marketing Rule would be sufficient to "neutralize" a conflict of interest as required under the Proposal. Presumably that would be the case because there would be no other logical outcome of the rulemaking, but commenters are left to guess because the SEC has failed to explain its thinking.

Paradoxically, while not explaining the conflicts between the Proposal and the Marketing Rule, the SEC instead points to the Marketing Rule as an example of actions taken by the SEC to account for new technologies.[16] More concerning, the SEC has asked no questions for commenters to respond to about the significant impact that the Proposal would have specifically on compliance with the Marketing Rule. Based on the Proposing Release, we have concluded that the SEC could

---

[11] Proposing Release at 222.

[12] The SEC appears to agree, identifying several examples of advertisements that would be covered by the Proposal. *See*, *e.g.*, Proposing Release at 50 (explaining that the term "investor interaction" would " capture any advertisements, disseminated by or on behalf of a firm, that offer or promote services or that seek to obtain or retain one or more investors).

[13] Proposed Rule 211(h)(2)-4(a). The Proposal defines an investor to include "any prospective or current investor in a pooled investment vehicle (as defined in §275.206(4)-8) advised by the investment adviser." *Id*.

[14] An "investor interaction" also appears to include an "endorsement" under the Marketing Rule of an investment adviser by a broker-dealer when recommending an investor invest in a private fund.

[15] Proposing Release at 50-51.

[16] *See*, *e.g.*, Proposing Release, footnotes 19, 23 and 66, and the accompanying text. The SEC then identifies some marketing practices as examples of technology that is intended to be covered by the Proposal. *See*, *e.g.*, Proposing Release at 16 (discussing differential marketing and design elements or features designed to engage investors).

not have had a full appreciation of the impact that the Marketing Rule when it issued the Proposal. At best, this appears to be an inadvertent material omission in the SEC's analysis of its proposal.

The SEC must exclude communications under the Marketing Rule from the scope of the Proposal, if adopted.[17] In adopting the Marketing Rule, the SEC said that rule would comprehensively regulate investment advisers' marketing communications, and to be "'evergreen' in light of ever-changing technology."[18] In other words, the SEC already has recently considered the application of existing and future technology in taking the agency action to adopt the sweeping changes to the Marketing Rule, which changes only went into effect last year.

Section 211(h) of the Advisers Act does not provide the SEC with authority to adopt the Proposal. We and fourteen other associations already have expressed our strong objection to the SEC asserting that Sections 211(h) of the Advisers Act provides it any source of authority to adopt the Proposal.[19] It does not. We do not restate here the full arguments from the associations' joint letter for why Section 211(h) does not provide the SEC with the boundless rulemaking authority the SEC asserts. We do wish to point out that in asserting authority under Sections 211(h) of the Advisers Act, the SEC appears to believe Congress granted it a blank check to adopt rules regarding any sales practice, conflict of interest, or compensation practice of an investment adviser. As we and the other associations have stated, this cannot possibly be the case with an authority granted in a section entitled "Other Matters."

The Proposal lacks a discussion of both the SEC's understanding of the scope of its authority under this statutory provision and the specific findings of the SEC, as they relate to covered technologies, that would support the link between each of the proposed prohibitions and its statutory authority. Without any such explanations, the public is left without meaningful opportunity to comment.

---

[17] For the sake of clarity, we do not support adoption of the Proposal even with this change.

[18] Marketing Rule Release at 9. In the proposing release for the Marketing Rule, the SEC specifically said that it contemplated changes in technology as it relates to investment advisory services and communications. The Proposal does not discuss the differences in view the SEC appears to have about technologies today as compared to three years ago when the SEC adopted the Marketing Rule. *See* Proposed Rule, Investment Adviser Advertisements; Compensation for Solicitations, SEC Rel. No. IA-5407 (Nov. 4, 2019), 84 FR 67518 (Dec. 10, 2019), available at: https://www.sec.gov/files/rules/proposed/2019/ia-5407.pdf. ("Specifically, in our development of the proposed rule, we have considered changes in the technology used for communications, the expectations of investors shopping for advisory services, and the nature of the investment advisory industry, including the types of investors seeking and receiving investment advisory services.").

[19] Joint Letter re Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (SEC Rel. Nos. 34-97990; IA-6353 (July 26, 2023)), available at: https://www.sec.gov/comments/s7-12-23/s71223-258279-605062.pdf. Rather than repeat it, we incorporate herein the discussion from that letter about the lack of authority under Section 211(h) of the Advisers Act to adopt the Proposal.

The SEC's apparent belief that it has expansive rulemaking authority is especially troubling given that the same authority relied upon for the Proposal is currently pending court review.[20] The SEC should cease asserting Section 211(h) as rulemaking authority until the outcome of the court's review. Otherwise, the SEC creates a situation ripe for market disruption, as is the potential with its "Private Fund Adviser Rule" that is the subject of the court's review. The SEC would place firms affected by the Proposal with no choice but to hastily prepare for compliance with the rule on a short compliance deadline, which would be all for naught if the court vacates the rule, which we believe likely will be the case.[21]

We recommend an alternative to the Proposal. We urge the SEC not to adopt the Proposal, but instead to use this as an opportunity for the SEC to foster a constructive dialogue with the investment advisory industry and advisory clients to better inform itself of the practices surrounding predictive data analytics and other technologies. For example, we recommend the SEC or its staff host a roundtable with both industry participants and investors, which would provide the SEC's staff an opportunity to learn more about appropriate and effective practices regarding the use of emerging technologies by investment advisers. We stand ready to participate constructively in these efforts.

* * * * *

We would be pleased to answer any questions that you might have concerning our comments.

Respectfully submitted,

/s/ Rebekah Goshorn Jurata
General Counsel
American Investment Council

/s/ Elliot Ganz
Head of Advocacy & Co-Head Policy Group
Loan Syndications and Trading Association

[20] Petition for Review, *Nat'l Ass'n of Priv. Fund Managers, v. Sec. Exch. Comm'n*, No. 23-60471 (5th Cir. Sept. 1, 2023).

[21] For similar reasons, we believe the SEC should withdraw its Outsourcing Proposal. That rule proposal asserts rulemaking authority under Section 206(4) of the Advisers Act, which also is under the court's review. *See* Outsourcing Proposal at 203.