ACLI
Financial Security for Life

October 10, 2023

Via E-Mail: rule-comments@sec.gov

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

Re: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, File Number S7-12-23, Release No. 33-11151

Dear Ms. Countryman:

On behalf of our members, the American Council of Life Insurers (ACLI)[1] submits these comments regarding the Securities and Exchange Commission's (SEC or Commission) proposed new rule (the Proposal), Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers.

ACLI strongly urges the Commission to withdraw this Proposal. ACLI has previously supported the Commission's efforts to implement regulations aimed at protecting investors[2] and ACLI has a record of supporting reasonable regulation concerning the use of algorithms, predictive models, and artificial intelligence (AI) systems.[3] But this Proposal is anything but reasonable. ACLI has significant concerns, including: (1) existing securities rules cover firms' use of predictive data analytics (PDA); (2) where the Proposal is additive to existing rules, it is inconsistent with the Commission's prior interpretations of its rulemaking authority; (3) the Proposal does not satisfy the Commission's burden to meet administrative rulemaking standards; and (4) the Proposal would stagnate technology used to meet investor demands, reducing consumer access to insurance products.

[1] ACLI's member companies sell registered securities through registered broker-dealers (BDs) and investment advisers (IAs). For purposes of this letter, we refer to associated persons working under covered firms as "securities professionals." Additionally, all references to BDs and IAs refer to federally registered or dually registered entities.
[2] *See* ACLI Comment Letter on Proposed Regulation Best Interest (Aug. 3, 2018), available here: https://www.sec.gov/comments/s7-07-18/s70718-4173937-172339.pdf.
[3] *See* ACLI Comment Letter on NAIC Model Bulletin: Use of Algorithms, Predictive Models and Artificial Intelligence Systems by Insurers, pp. 3-17 (Sept. 5, 2023), available here: https://content.naic.org/sites/default/files/inline-files/_Comment-Letters-Model-Bulletin_2.pdf.

1. Existing Securities Rules Cover Firms' Use of PDA.

The Commission's stated purpose of this Proposal is to prevent customer harm arising from covered firms using PDAs to place firm interests ahead of investors' interests. However, the existing securities regulatory framework already address this concern, including in connection with covered firms' use of "covered technology."[4]

Broker-dealers (BDs) are bound by Regulation Best Interest (Reg BI).[5] Reg BI requires BDs to act in the best interest of a client when a BD or its associated persons make a recommendation to a retail customer regarding a securities transaction, investment advice, strategy involving securities, or types of securities accounts. Reg BI contains component obligations (care, disclosure, conflicts, and compliance obligations) that BDs follow to ensure their recommendations are in the best interest of their retail customers.[6] To date, 40 states have enacted a similar rule for annuity transactions based on a model rule adopted by the National Association of Insurance Commissioners (NAIC).[7] Investment Advisers (IAs) are bound by the IA Fiduciary Standard.[8] The IA Fiduciary Standard is a principles-based standard that consists of the Duty of Care and Duty of Loyalty for the entire duration of the relationship that an IA has with an investor.[9] Securities professionals' combined obligations regarding client interactions are summarized in the Standards of Conduct for Broker-Dealers (BDs) and Investment Advisers (IAs).[10]

On a business model level, ACLI members have indicated that they have been operating on the assumption that existing securities rules' technology-neutral language would apply when technology is used. Our members have already developed compliance policies and procedures that address conflicts of interest that may result from such technology.

For example, covered firms amongst our members using predictive data technology have safeguards in place to prevent improper recommendations, trading strategies, and transactions that are not in the best interest of a client. Most interactions between retail customers and technology include a human intermediary who needs to approve account actions like transactions and strategies involving securities. The information generated by such technology is not designed to rise to the level of a "recommendation" but rather assists securities professionals in

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[4] Commission staff point out that the proposal contains overlap between existing rules and the Proposal in the following sentence: "a firm's use of PDA-like technologies when engaging or communicating with—*including by providing information to, providing recommendations or advice to, or soliciting*—a prospective or current investor could take into consideration the firm's interest in a manner that places its interests ahead of investors' interests and thus harm investors." (emphasis added). *See* Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 88 Fed. Reg. 53960, at pp. 27 of PDF version (proposed Aug. 9, 2023), available here: https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf.

[5] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 17 C.F.R. § 240 (2019), available here: https://www.sec.gov/files/rules/final/2019/34-86031.pdf.

[6] *Id.*

[7] *See* NAIC's Suitability in Annuity Transactions Model Regulation (#275), available here: https://content.naic.org/sites/default/files/model-law-275.pdf.

[8] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 17 C.F.R. § 276 (2019), available here: https://www.sec.gov/files/rules/interp/2019/ia-5248.pdf.

[9] *Id.*

[10] ACLI Comment Letter Supporting Various Obligations Contained in the Resulting Standards of Conduct (Oct. 3, 2017), available here: https://www.sec.gov/comments/ia-bd-conduct-standards/cll4-2640466-161282.pdf.

understanding a client's suitability, objectives, and goals. Securities professionals may use information generated from the technology to perform a best interest review to determine if a given transaction or strategy is appropriate for the client. Our members indicated that securities professionals review results from technology generated information before recommending a product, strategy, or account to ensure the transaction is in the best interest of the client. Although the Proposal's title announces an effort to address "predictive data analytics," the Proposal defines "covered technologies" to include basic technological tools. Securities professionals have used tools like excel spreadsheets, software, and other interactive tools for decades to compare outcomes to ensure recommendations are in the best interest of their clients. This standard process not only demonstrates compliance with care obligations applicable to securities professionals, but often these tools enhance the capabilities of securities professionals to provide recommendations backed by data to be in the best interests of their clients.[11]

Further, the Proposal seeks to capture all activities that include "interactions" [12] with retail customers, including communications that do not rise to a "recommendation" that are governed by existing rules (i.e., FINRA advertising and communications with the public Rules for BDs,[13] the IA fiduciary duty and SEC Marketing Rule for IAs,[14] and generally antifraud provisions of the securities laws for both BDs and IAs).[15] Because covered firms have established compliance programs governing communications with retail customers under existing securities rules, there is no need to adopt new rules.

2. Where the Proposal is Additive to Existing Rules, it is Inconsistent with the Commission's Prior Interpretations of its Rulemaking Authority.

Where the Proposal extends beyond "recommendations"[16] and "interactions"[17] captured and governed by the existing securities regulatory framework, the Commission lacks authority. ACLI joined fifteen trade associations on a comment letter to the Commission addressing various aspects of this Proposal including comments regarding the authority of the Commission to issue a

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[11] 17 C.F.R. § 276, available here: https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf.

[12] *See* Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 88 Fed. Reg. 53960, at pp. 50 of PDF version (proposed Aug. 9, 2023), available here: https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf.

[13] FINRA Rule 2200, *et. seq.* available here: https://www.finra.org/rules-guidance/rulebooks/finra-rules/2200.

[14] 17 C.F.R. §§ 275, 279, available here: https://www.sec.gov/files/rules/final/2020/ia-5653.pdf; *see generally*, § 206 of Advisers Act.

[15] 17 C.F.R. § 240.10b-5, available here: https://www.ecfr.gov/current/title-17/part-240/section-240.10b-5#p-240.10b-5.

[16] [The Commission] interpret[s] whether a "recommendation" has been made to a retail customer that triggers the best interest obligation consistent with precedent under the anti-fraud provisions of the federal securities laws as applied to broker-dealers, and with how the term has been applied under the rules of self-regulatory organizations (SROs). *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, 17 C.F.R. § 240 (2019), available here: https://www.sec.gov/files/rules/final/2019/34-86031.pdf.

[17] We use "interaction" throughout the letter to reference the way the Proposal addresses conduct beyond a "recommendation." We generally believe "interactions" capture conduct that is beyond and within the scope of the term "solicitation" from the Commission's Marketing rules. *See* Investment Adviser Marketing, 17 C.F.R. (Dec. 2020), available: Final Rule: Investment Adviser Marketing (sec.gov); *See also,* Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 88 Fed. Reg. 53960, at pp. 40 of PDF version (proposed Aug. 9, 2023), available here: https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf.

rule expanding the historical obligations on covered firms.[18] In addition, rulemaking involving the Standards of Conduct and associated regulatory guidance issued by the Commission has never indicated a requirement to eliminate or neutralize conflicts of interest – nor to apply any such requirements to "reasonably foreseeable" [19] Instead, rules have required that securities professionals:

> […] 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 conflict.[20]

Further, the Commission highlighted the statutory intent from its Standards of Conduct:

> The fiduciary duty to which advisers are subject is not specifically defined in the Advisers Act or in Commission rules, but reflects a Congressional recognition "of the delicate fiduciary nature of an investment advisory relationship" as well as a Congressional intent to "eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested."[21]

In both instances in the Standards of Conduct, the Commission refers to conflicts of interest that exist at the time of "recommendation" and in the regular course of the fiduciary relationship, not to any potentially foreseeable conflicts. The Proposal would require securities professionals to scope out and eliminate potential future conflicts without giving investors the option to understand and waive them. Although Reg BI requires firms to set up policies and procedures to mitigate and, to the extent possible, eliminate conflicts of interest in certain situations,[22] the language of the Proposal would significantly amend and expand this requirement to broader client interactions and potential future conflicts of interest. The Proposal is a notable departure from the Commission's longstanding disclosure framework as an effective means to mitigate conflicts.

Another feature of this discussion includes the Commission's historical enforcement powers to address bad actors. The Commission still retains the power to address "improper

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[18] Joint Trade Comment Letter on SEC Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (Submitted Sept. 11, 2023), available here: https://www.sec.gov/comments/s7-12-23/s71223-258279-605062.pdf.

[19] Reg BI requires broker-dealers and their financial professionals to act in the best interest of retail investors *at the time* the recommendation is made. *See* Exchange Act rule 15*l*-1(a)(1) (emphasis added). The duty of care for investment advisers includes, among other things, the duty to provide advice and monitoring over the course of the relationship. 17 C.F.R. §§ 275 (2019). *See also* SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligations (Last Updated Apr. 20, 2023), available here: https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.

[20] 17 C.F.R. § 276 (2019), available here: https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12208.pdf. (emphasis added); ACLI notes that the Staff Bulletin on the Standards of Conduct for IAs and BDs regarding the conflict of interest obligation is not rulemaking nor has the effect of rulemaking. SEC Staff Bulletin on Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, n. 1 (Aug. 3, 2022), available here: https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.

[21] *Id.*

[22] In some cases, in order to avoid violating the obligation to act in the retail investor's best interest, firms may be required to eliminate the conflict or refrain from providing advice or recommendations that are influenced by the conflict. *See* SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest (Aug. 3, 2022), available here: https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.

recommendations."[23] Improper recommendations are those that undoubtedly cause harm to investors. Because the Commission retains its capabilities to address harms arising from improper recommendations, there is no substantiated reason it must regulate and enforce all client interactions – including those that do not result in a purchase or sale. We recommend the Commission provide further analysis regarding why traditional avenues for enforcement are inadequate.

The additive nature of the Proposal includes the sweeping definition of "covered technologies." The current definition captures a broad swath of tools, software, and activities that securities professionals use daily, and includes "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."[24] Our members have shared that, under the current Proposal, they will need to evaluate the following non-exhaustive list of tools:

- Web tools made available to customers to compare investments;
- Internal tools to assist securities professionals;
- Data sheets underlying internal tools to assist securities professionals;
- Data aggregators drawing information from different sources to generate reports;
- Financial planning tools;
- Factfinding/discovery software that generates analysis or reports, identifying gaps for investors to consider;
- Marketing tools using cookies or software to promote the firm or interactions between the firm and potential clients;
- Technology prompting investors to review account balances, contribution rates, and more through generated communications like texts, emails, and other log-in notices on applications or websites;
- Technology used to determine investment allocations and reflect potential impacts for rebalancing such allocations; and
- Technology that provides prompts or questions to gauge clients' risk, goals, and objectives similar to questionnaires determining suitability used in face-to-face interactions between investors and securities professionals.

Beyond a concern with the Proposal's direct impact on client-facing tools, ACLI members also have concerns that the breadth of the term "covered technologies" would cause significant operational problems for product distribution models such as when a limited-purpose wholesale distributor BD works with retail BDs. Requiring firms to evaluate both indirect and direct conflicts of interest would potentially require back-end distributors of life insurance products to evaluate tools amongst themselves (those tools used between wholesale and retail BDs). These important "value add" content and tools are used by product manufacturers to help educate BDs, and IAs. The content from these tools can filter down to interact with retail clients. Disincentivizing the sharing of educational information used to assist securities professionals in making recommendations in the best interest of clients could compound the negative and lasting impacts the Proposal would have on investors.

[23] Relatedly, FINRA still retains its powers to enforce suitability standards.
[24] *See* Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 88 Fed. Reg. 53960, at pp. 42 of PDF version (proposed Aug. 9, 2023), available here: https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf.

Should the Proposal be adopted to encompass the current definition of "covered technology," firms would need to reevaluate whether the Proposal's expansive compliance burdens outweigh firms' implementation of decades-old tools and technology currently used to assist securities professionals in making more accurate recommendations. Due to the Proposal's broad nature and lack of alignment with prior interpretations of the Commission's rulemaking authority, ACLI urges the Commission to withdraw the Proposal.

3. The Proposal Does Not Meet the Commission's Burden to Meet Administrative Rulemaking Standards.

The Commission's Current Guidance on Economic Analysis provides that, "the basic elements of a good regulatory economic analysis are: (1) a statement of the need for the proposed action; (2) the definition of a baseline against which to measure the likely economic consequences of the proposed regulation; (3) the identification of alternative regulatory approaches; and (4) an evaluation of the benefits and costs—both quantitative and qualitative—of the proposed action and main alternatives identified by the analysis."[25] The guidance also states that, "as a general matter, every economic analysis in the Commission's rulemakings should include those elements."[26] As is detailed below, this rulemaking proposal fails to meet any of these four elements. Courts have consistently ruled that an agency's failure to meet the basic required elements of regulatory analysis should correctly result in a finding that the rulemaking is arbitrary and capricious. ACLI members strongly assert that the Proposal fails to appropriately adhere to the rulemaking process under the Administrative Procedure Act, and, therefore, should be withdrawn.[27] When federal agencies create new regulations for the purpose of interpreting law, courts and administrative standards require that: 1) the regulation must be supported by substantial evidence; 2) agencies must consider reasonable alternatives to proposed policy including explaining why other approaches were rejected; and 3) agencies must consider the costs as well as the benefits imposed by the regulation. Further, if federal agencies fail to satisfy any of these elements, courts have held that the agency action creating new regulations is arbitrary and capricious.[28]

ACLI asserts that the Proposal is arbitrary and capricious because the contents, including the economic analysis, is not supported by evidence of a market failure; contains no meaningful regulatory alternatives; and does not contain a reasonable cost-benefit analysis. The Proposal provides only one anecdotal enforcement action to attempt to justify the expansive language of the Proposal without providing an offset benefit to investors. The analysis provided in the Proposal indicates that the Commission failed to meet its burden of administrative rulemaking standards.

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[25] Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012), available here: https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

[26] *Id.*

[27] *See* Joint Trade Comment Letter on SEC Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (Submitted Sept. 11, 2023), available here: https://www.centerforcapitalmarkets.com/wp-content/uploads/2023/09/Trade-Associations-PDA-Comment-Letter-Final.pdf?#.

[28] *Spirit Airlines, Inc. v. United States Dep't of Transp.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) (quoting *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (referring to the requirement to consider alternatives; *Genuine Parts Co. v. EPA*, 890 F.3d 302, 307, 312 (D.C. Cir. 2018) (citing *Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) and *Ctr. For Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992) (referring to the requirement for substantial evidence); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54 (1983) (referring to the requirement to consider costs as well as benefits).

a. The Commission provided no evidence of a market failure that would support the Proposal.

The Commission offers only anecdotal evidence to support a new rulemaking to address predictive data analytics. The Proposal references only one enforcement action against an investment adviser.[29] Because our members are operating with policies and procedures that address conflicts of interest arising from PDA technology and "covered technologies," an appropriate economic analysis would need to demonstrate evidence of widespread wrongdoing, or market failures due to a lack of compliance with existing rules to demonstrate the necessity of new and expansive rulemaking. Instead of the Proposal containing narrowly tailored language to address the wrongdoing referenced in the Proposal, the language captures nearly every technology securities professionals use daily with no attendant client benefit.

b. The Commission did not consider reasonable alternatives to the Proposal.

The Proposal does not identify meaningful alternative regulatory approaches. In the first alternative, the Commission indicates that the use of independent third-party assessments "could reduce the costs of complying with the associated proposed conflicts rules and eliminate or reduce the need for firms to maintain dedicated staff."[30] The Commission offers no evidence to support the assertion that outsourcing work to consultants would result in reduced costs for firms. At the conclusion of the description of this alternative, the Commission indicates that these consultants may be less efficient and could result in poor quality assessments due to a "race to the bottom."[31]

The second alternative would require personnel to participate in the process of adopting and implementing these policies and procedures. This alternative is not a real alternative because should the Proposal be adopted, these personnel and subject-matter experts would need to be involved in compliance. In fact, these personnel and subject-matter experts have already been assisting firms in complying with existing technology-neutral securities rules. Smaller firms likely need to spend more money to obtain special personnel if an alternative required their involvement. Firms would not be able to estimate the cost of this alternative because the language of this alternative does not specify what type of experts would need to be retained.

The third alternative would provide an exclusion for technologies that consider large datasets when "firms have no reason to believe the dataset favors the interests of the firm."[32] This alternative would still require firms to do analysis regarding whether large datasets fall into an exclusion rather than whether the dataset may result in a future conflict. Therefore, this alternative would not reduce the costs firms will incur because firms will need to separately assess whether their datasets fall under an exclusion.

The fourth alternative would effectively exempt investment advisers from the rule and related recordkeeping requirements.[33] Although this alternative may provide relief to IAs, the alternative has

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[29] *See* Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, 88 Fed. Reg. 53960, at pp. 30 of PDF version (proposed Aug. 9, 2023) (referring to a single enforcement action against a "no fee" robo-adviser portfolio), available here: https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf.
[30] *Id.* at 195-196.
[31] *Id.*
[32] *Id.* at 197.
[33] *Id.* at 198.

wider implications. Because the rule would retain the expansive definition of covered technologies, the alternative would likely complicate compliance for firms with dually registered securities professionals. We accordingly would disagree with the analysis in the following:

> "[…]this alternative cedes the benefits and costs of the proposed conflicts rules' requirements for a large portion of investor interactions with covered technologies, namely those interactions with broker-dealers that involve a recommendation, and with investment advisers."[34]

The first section of this letter addresses the ongoing obligations IAs have with clients and other existing obligations on BDs. Reg BI addresses much of the interactions this alternative describes are harmful to investors. Further, this alternative fails to address why BDs specifically would require additional rules compared to IAs.

The fifth alternative the Commission provided is to require that firms test covered technologies on an annual basis or at a minimum frequency rather than "periodically."[35] We note that the Commission indicates in the Proposal that, "the proposed requirement to retest a covered technology periodically does not specify how often retesting would be required."[36] Because the Proposal never defined what "periodic" testing would mean, the alternative's minimum requirement could merge with or be identical to the existing testing requirement in the Proposal. In addition, the analysis on whether covered technologies produce a future conflict would necessarily require a "test" of sorts. Therefore, this is not an alternative to the Proposal.

The sixth and final alternative the Commission offered would require a prescribed and standardized disclosure to be delivered to investors.[37] As we indicated in the first section of this letter, firms are already implementing disclosures for certain technologies that generate conflicts under existing securities rules and related forms when necessary. Although this alternative would allow the Commission to remain more consistent with its existing disclosure framework, the Commission seemingly attacks its own disclosure guidance with a single experiment another agency conducted using mortgage brokers.[38] Because this alternative, like the other alternatives, does not address the expansive nature of the Proposal, it is not a meaningful alternative to the Proposal.

c. <u>The Commission did not adequately assess the costs imposed by the Proposal.</u>

The Proposal lacks a sufficient evaluation of the benefits and costs, both quantitative and qualitative, of the proposed action and the main alternatives identified by the analysis. Beginning with direct costs, the Proposal offers only a rough estimate of the potential costs of evaluating the use of covered technology, identifying conflicts of interest, and eliminating or neutralizing them. The Commission estimates that the total initial cost to industry of this single aspect of the effort would be 1,033,850 hours of labor and $461.1 million; in addition to an ongoing annual cost of 516,835 hours of labor and $230.5 million.[39]

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[34] *Id.*
[35] *Id.* at 199.
[36] *Id.* at 74.
[37] *Id.* at 201.
[38] *Id.* at 201, n.338.
[39] These numbers are derived from adding the estimates provided for a "simple covered technology firm" and a "complex covered technology firm" in the chart, *id.*, at 184-85.

More specifically, due to the broad definitions of "covered technology" and "investor interaction," the estimates of annual time spent complying with the rule fall short of what ACLI members anticipate. ACLI members anticipate the direct costs associated with complying with this Proposal will be significantly greater than the costs associated with implementing Reg BI policies and procedures. Our members anticipate the compliance costs with the Proposal "as is" would require firms to expend millions of dollars just to evaluate the tools, software, and data sheets currently in use falling under the proposed definition of "covered technologies."

Indirect costs are mentioned in the proposal but not rigorously developed or quantified. To meet its legislative mandate, the Commission must recalculate the direct and indirect costs with the following improvements:

- Provide cost estimates that include due diligence and expenses associated prior to acquiring new software, technology, marketing tools, or website interfaces.
- Increase the Commission's hour estimates to capture the advanced analysis required to "evaluate any use or reasonably foreseeable potential use by the firm or its associated person."[40]
- Provide estimates regarding the frequency of testing expected for technology with AI capabilities.
- Incorporate hours firms will spend supplying training to compliance and securities professionals.
- Include costs associated with recordkeeping requirements for website interactions.
- Provide costs estimates associated with making changes to the technology and tools that may require coding, in order to eliminate or neutralize a conflict of interest.
- Discuss the impact on market stability associated with lower participation in capital markets if existing or new technologies are no longer available.

In its benefit analysis, the Commission claims that the Proposal would "positively impact efficiency by providing investors with greater confidence regarding the conflicts of interest associated with the use of covered technologies saving investors time trying to understand conflicts of interest before they invest."[41] The Commission claims that these two effects may result in greater competition, economic efficiency, and increased participation in financial markets. However, these assertions are not supported by any empirical evidence in the Proposal. Further, the Commission provides no evidence, study, or data that suggests investors are concerned about deficient regulatory enforcement capabilities via the existing securities framework to address covered firms' and securities professionals' mitigation and/or elimination of conflicts of interest such that investors feel the need to spend time researching potential conflicts of interests associated with their accounts. Essentially, the Commission suggests that the Proposal may or may not result in increased demand for financial advice via these effects and concludes that participation in financial markets may or may not increase. The Commission is uncertain how the Proposal will impact investors, and does not offer a reasonable hypothesis regarding the impact the Proposal will have on investors if adopted.

In summary, the Commission has failed to meet its burden under its own current administrative rulemaking standards because the Proposal contains inadequate evidentiary support on the need for rulemaking, contains no meaningful regulatory alternatives, and includes a flawed cost benefit

[40] *Id.* at 40.
[41] *Id.* at 191.

analysis that fails to demonstrate the Proposal's benefits to investors to justify its costs even with the Proposal's unreasonably low estimate of such costs.

4. The Proposal Would Stagnate Technology Used to Meet Investor Demands, Reducing Consumer Access to Insurance Products.

The financial industry is warning that mass retirements of agents and representatives will provide a gap in access to investment products and wealth advising. Predictive data analytics allow existing agents and representatives to be more efficient and potentially assist more clients. However, the potential for prohibitive costs from burdensome rulemaking may stifle the technological innovation firms need to meet retail investor demands. As a result, financial planning, and viable options for lifetime income products that play an important role in financial security would become only accessible to high net-worth individuals.

Under the Proposal, retail investors would no longer benefit from efficient technologies or tools used to better ensure transactions or strategies involving securities are in the best interest of their goals and objectives. This lack of efficiency could contribute to higher costs for retail investors as securities professionals will be forced to maintain a shorter list of clients to keep up with their existing obligations.

ACLI members serve 75 million American families that rely on life insurers' products for financial and retirement security. ACLI respectfully requests the Commission carefully consider the impact on retail investors' access to investment products including annuity and life insurance products. Public policies should promote access to retirement products. Instead, the Commission's Proposal would greatly limit consumers' options.

Conclusion

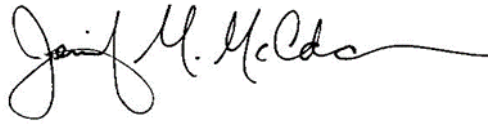
ACLI supports reasonable measures to protect investors[42] and regulate emerging technologies.[43] As detailed above, Reg BI and the NAIC Suitability in Annuity Transactions Model Regulation (#275), both of which ACLI support, already include significant consumer protections regarding product recommendations made to consumers, including the use of PDA in making such recommendations. Further, over the last several years, ACLI has engaged with various state regulatory agencies to create standards for AI technology. Of note, the insurance industry is anticipating a Model Bulletin from the NAIC.[44] Given this Proposal and the Commission's previous interest in Digital Engagement Practices, [45] the Commission would do well to align with the work

[42] *See* ACLI Comment Letter on Proposed Regulation Best Interest (Aug. 3, 2018), available here: https://www.sec.gov/comments/s7-07-18/s70718-4173937-172339.pdf.
[43] *See* ACLI Comment Letter on NAIC Model Bulletin: Use of Algorithms, Predictive Models and Artificial Intelligence Systems by Insurers, pp. 3-17 (Sept. 5, 2023), available here: https://content.naic.org/sites/default/files/inline-files/_Comment-Letters-Model-Bulletin_2.pdf.
[44] National Association of Insurance Commissioners ("NAIC")'s Exposure Draft of Model Bulletin on Use of Algorithms, Predictive Models, and Artificial Intelligence Systems by Insurers (Jul. 17, 2023), available here: https://content.naic.org/sites/default/files/national_meeting/07.17.23 Exposure Draft AI Model Bulletin.pdf.
[45] The Commission's Request for Information on Digital Engagement Practices indicated a focus on gamification and other activities that are not implemented by ACLI Member Companies. A standard practice of rulemaking includes broad based requests for information that lead to narrow, focused rulemaking. The Proposal is broad enough to capture a significant portion of ACLI member activities governed by the SEC whereas, the request for information lacked such notice. *See generally*, SEC Request for Information on

already being undertaken by other regulatory agencies. Achieving uniformity in regulations enables BDs and IAs to continue providing accessible advisory services.

While ACLI strongly urges the Commission to withdraw the Proposal, our members would be interested in collaborating with the Commission to determine a better course of action to address emerging technologies.

Sincerely,



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The Honorable Gary Gensler, Chair
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The Honorable Jaime Lizárraga, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Mark T. Uyeda, Commissioner
William A. Birdthistle, Director, Division of Investment Management

Digital Engagement Practices (Aug. 27, 2021), available here: https://www.sec.gov/files/rules/other/2021/34-92766.pdf.