October 10, 2023

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

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

Charles Schwab & Co., Inc. ("CS&Co"), Charles Schwab Investment Management, Inc., doing business as Schwab Asset Management, and Schwab Retirement Plan Services (collectively, "Schwab")[1] submit this letter with respect to the rule proposal issued by the Securities and Exchange Commission (the "Commission"): *Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers* (the "Proposal").[2]

We appreciate the opportunity to comment on behalf of the millions of investors we have been proudly serving since 1975 when Schwab set out to challenge the Wall Street status quo by bringing low-cost investing options to Main Street investors.

We have a unique perspective to share with the Commission because Schwab is a full-service wealth-management firm that serves a diverse group of retail investors. We believe investing for

[1] The Charles Schwab Corporation (NYSE: SCHW) is a leading provider of financial services, with 34.4 million active brokerage accounts, 2.5 million corporate retirement plan participants, 1.8 million banking accounts, and $8.09 trillion in client assets as of August 31, 2023. Through its operating subsidiaries, the company provides a full range of wealth management, securities brokerage, banking, asset management, custody, and financial advisory services to individual investors and independent investment advisors. Its broker-dealer subsidiaries, Charles Schwab & Co., Inc., TD Ameritrade, Inc., and TD Ameritrade Clearing, Inc., (members SIPC, https://www.sipc.org), and their affiliates offer a complete range of investment services and products including an extensive selection of mutual funds; financial planning and investment advice; retirement plan and equity compensation plan services; referrals to independent, fee-based investment advisors; and custodial, operational and trading support for independent, fee-based investment advisors through Schwab Advisor Services. Its primary banking subsidiary, Charles Schwab Bank, SSB (member FDIC and an Equal Housing Lender), provides banking and lending services and products. More information is available at https://www.aboutschwab.com.

[2] SEC Release Nos. 34-97990; IA-6353 (July 26, 2023), 88 Fed. Reg. 53960 (Aug. 9, 2023).

the future is one of the most important things people can do for themselves and their families; indeed, it is critical to the health of our communities and to our society. We have adopted a firm-wide strategy of "Through Clients' Eyes" that places our clients' needs at the forefront. It has led Schwab to create tools that empower clients of all means with the information, customization, and control once reserved for only institutional investors.

We agree with the Commission that "[t]he use of technology is now central to how firms provide their products and services to investors."[3] Technological advances expand opportunities for all investors by bringing world-class trading platforms to retail investors that rival those used by investment professionals, lowering costs and commissions on trading. Millions of Schwab investors use services ranging from news alerts and publicly available investment resources to digital planning tools allowing investors to create road maps for their personal financial goals. Our tools give retail investors opportunities to select investments and alerts meeting their interests, rather than prescribing a regimented, one-size-fits-all approach. Substantial majorities—71% of our investors—believe that technology helps them reach their financial goals.[4] In fact, most online adult investors prefer to interact with their investment providers online.[5]

Schwab supports appropriate regulations to protect investors from conflicts of interest and the potential harms of technology. But instead of being consistent with the Commission's stated goal of protecting investors "while still allowing firms' use of technology to innovate and benefit investors,"[6] the Proposal risks depriving investors of both present and future technological benefits.[7]

Schwab believes the Proposal will discourage the use of technology and curtail technological advancement to the detriment of retail investors. The Proposal establishes an unjustified and unworkable presumption: namely, that any technology—whether existing or new—may have conflicts of interest and therefore cannot be used unless a firm is able to evaluate and demonstrate that there is no conflict of interest or that the conflict has been eliminated or

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[3] 88 Fed. Reg. 53963.

[4] Charles Schwab Investing & Technology Survey, 2021.

[5] Forrester Research (2022): 58% of US online adults who are investors prefer to interact with their investment providers online.

[6] 8 Fed. Reg. 53971 n.114.

[7] *See* Commissioner Hester M. Pierce, *Through the Looking Glass: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers Proposal* (Jul. 26, 2023) https://www.sec.gov/news/statement/peirce-statement-predictive-data-analytics-072623.

neutralized.[8] This is an impossible standard that will discourage innovation and decrease market access, especially for technologies where the costs are uncertain or the technology is more difficult to analyze. These limitations in both access and cost may prevent a firm from utilizing technology, even if it benefits investors. Given the risk of significant unintended consequences for retail investors, Schwab respectfully requests that the Commission withdraw the Proposal.

Were that not reason enough, the Proposal should be withdrawn because it is vulnerable to legal challenge on at least three separate grounds.

- First, we are concerned that the Commission oversteps its statutory authority. The Commission's cited statutory bases for this Proposal are catchall provisions without the clear congressionally delegated authority to support the Proposal's major industry reform. Further, the Proposal contradicts the textual limitations of these statutory provisions.
- Second, we believe that the Proposal is arbitrary and capricious and therefore does not conform to the requirements of the Administrative Procedure Act (the "APA"). Among other reasons, longstanding regulations currently protect investors and address conflicts of interest, the purported benefits of the Proposal are highly speculative, and the costs of the Proposal both in terms of direct costs and indirect harm to investors from the loss of current and future technologies far outweigh the potential benefits. Moreover, many of the Proposal's definitions, explanations, examples, and analyses are so vague and overbroad that Schwab cannot meaningfully understand, much less comment on, them.
- Third, many technologies within the scope of the Proposal convey protected speech, an issue the Commission has not evaluated under the First Amendment. The Commission openly discusses the Proposal's goal to regulate and shape speech without once mentioning First Amendment safeguards, despite constitutional requirements that any regulation of speech be narrowly tailored to a compelling interest.

I. The Proposal Exceeds the Commission's Statutory Authority

The Proposal exceeds the Commission's statutory authority. "Extraordinary grants of regulatory authority are rarely accomplished through . . . 'subtle device[s].'"[9] Here, the Commission seeks to use among the subtlest possible authority granted by Congress—two identical provisions titled "Other Matters"—to impose expensive and impossible burdens and radically shift away from a disclosure-based regime to one requiring neutralization or elimination of all technology-related

[8] *See* 88 Fed. Reg. at 53978 ("[F]irms would only be able to continue using [complex covered technologies] where all requirements of the proposed conflicts rules are met, including the requirements of the evaluation, identification, testing, determination, and elimination or neutralization sections.").

[9] *West Virginia v. EPA*, 142 S.Ct. 2587, 2609 (2022) (quoting *Whitman v. Am. Trucking Ass'ns*, 537 U.S. 457 (2001)).

conflicts.[10] This Proposal undoubtedly qualifies as a major question, and courts will no doubt evaluate its underlying authority on that basis.

The Commission claims that "[t]he proposal draws upon our authority under section 211(h) of the Advisers Act and section 15(l) of the Exchange Act."[11] These are identical catch-all provisions.[12] The Commission grounds its authority on the final subpart of this subsection--namely, to "promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors."[13] Applying a catch-all provision to enact major regulatory overhaul exceeds the Commission's statutory authority. This is the proverbial elephant hiding in a mousehole.[14]

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[15] The Commission acknowledges that "[a]dvisers already have a fiduciary duty to eliminate, or at least to expose, all conflicts of interest which might incline them—consciously or unconsciously—to render advice

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[10] 88 Fed. Reg. 54009. These costs are so significant that the Commission itself acknowledges in some instances that entire industry reform may be simpler than compliance. *See id.* ("In some cases, firms could opt to eliminate conflicts directly, such as by changing their fee structure or other revenue generation models, rather than eliminating or neutralizing the consideration of the conflicts within their covered technologies.").

[11] 88 Fed. Reg. 53971.

[12] In full each reads:

"The Commission shall—

(1) Facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest; and

(2) examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors."

15 U.S.C. 78o(l); 15 U.S.C. 80b-11(h).

[13] 88 Fed. Reg. 53971.

[14] *See Whitman v. Am. Trucking Ass'ns*, 537 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

[15] *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)).

that is not disinterested, and broker-dealers already have a duty to identify and at a minimum disclose or eliminate all conflicts of interest associated with a recommendation and mitigate certain conflicts of interest under its recently released Reg BI rules."[16] Yet disclosure is not enough under the Proposal; only neutralization or elimination of conflicts for covered technologies will suffice.

The Commission provides no analysis as to how such a narrow subsection of its statutes can support such a major proposal. The Proposal stretches the bounds of the Commission's previous practices both in its rejection of disclosure and in its expansive definitions of "covered technologies" and "investor interactions."[17] The Commission lacks the authority to depart from a disclosure-based regime, premised on informed consent and full and fair disclosure of material conflicts of interest.[18]

Beyond taking the nearly unprecedented decision to base major rulemaking on two catch-all provisions,[19] the Proposal ignores key text in the sub-sections relied upon. The statutes authorize the Commission to "examine and, where appropriate, promulgate rules prohibiting or restricting *certain* sales practices, conflicts of interest, and compensation schemes . . . that the Commission deems contrary to the public interest and the protection of investors."[20] The Commission goes far beyond the bounds of restricting "certain" conflicts of interests in this Proposal—within a paragraph, the Commission replaces "certain conflicts of interest" with "any conflict of interest" determined to "place[] its or an associated person's interest ahead of investors' interest."[21] While

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[16] 88 Fed. Reg. 53982.

[17] *See* Commissioner Hester M. Pierce, *Through the Looking Glass: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers Proposal* (Jul. 26, 2023) https://www.sec.gov/news/statement/peirce-statement-predictive-data-analytics-072623 ("But this release does more than single out particular technologies for regulatory hazing, it also rejects one of our primary regulatory tools—disclosure. If a firm determines that the use (or potential use) of a covered technology involves a conflict of interest, then the firm has to eliminate or neutralize the conflict. Disclosure is not an option.").

[18] *See, e.g.*, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963) ("A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.").

[19] In other recent rulemaking in the space, such as the Regulatory Best Interest rule ("Reg BI") and the Investment Advisers Marketing rule, the Commission has relied on multiple provisions of each enabling statute, including more substantive sections. *See* 84 Fed. Reg. 33318, (Jul. 12, 2019) (relying on 17 sections of statutory authority to promulgate the Regulation Best Interest rule); 86 Fed. Reg. 13024, 13138 (Mar.5, 2021) (relying on ten sections of statutory authority to promulgate the Investment Adviser Marketing rule).

[20] 15 U.S.C. 78o(l); 15 U.S.C. 80b-11(h) (emphasis added).

[21] 88 Fed. Reg. 53976.

the Commission attempts to argue this is narrower than the "broader universe of conflicts,"[22] they later undermine their own narrowing device.[23] Such a tortured reading does not give the Commission authority to rewrite the law. As such, this Proposal is beyond its authority.

II. The Proposal Is Arbitrary and Capricious Under the APA

Under the APA, the Commission "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[24] Additionally, the Commission is subject to "statutory obligation[s] to determine as best it can the economic implications of the rule" it proposes, and to "consider the effect of a new rule upon 'efficiency, competition, and capital formation.'"[25] The Proposal fails these statutory requirements and is, therefore, arbitrary and capricious.

First, the Proposal's cost-benefit analysis is inadequate. On the cost side, the Commission estimates, without providing support for its time estimates, that it will cost $460 million initially, and $230 million annually, to evaluate, identify, determine, and eliminate or neutralize conflicts of interest within covered technologies.[26] Given the sweeping definition of "covered technology," the Proposal almost certainly dramatically understates actual compliance costs of identifying, evaluating and documenting every "covered technology" from complex PDA technologies to simple spreadsheets and calculators.[27] The Proposal's indirect cost analysis gives no substantive consideration of its conceded possibility that firms may pass on compliance costs

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[22] 88 Fed. Reg. 53976-77 n.142 ("The elimination or neutralization requirement of the proposed rules applies only to a narrower, defined subset of the broader universe of conflicts – those conflicts that a firm determines *actually* place the interests of the firm or certain associated persons ahead of the interests of investors.")

[23] The Commission does this by placing the burden on firms without an explanation of what constitutes a determination that a conflict of interest does not qualify. 88 Fed. Reg. 53984 ("If a firm cannot determine that its use of covered technology does not result in a conflict of interest that places its interests ahead of those of investors, the firm generally should consider any conflict of interest associated with such use as one that must be eliminated or its effects neutralized, and take steps necessary to do so.") The Commission does not answer how this narrows the Proposal's reach to "certain" conflicts of interest rather than any.

[24] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

[25] *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting *Chamber of Commerce v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005); 15 U.S.C. 76c(f), 78w(a)(2), 80a-2(c)).

[26] 88 Fed. Reg. 54009 Tb. 2.

[27] *See* Commissioner Mark T. Uyeda, *Statement on the Proposals re: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers* (Jul. 26, 2023) https://www.sec.gov/news/statement/uyeda-statement-predictive-data-analytics-072623. The Commission, in fact, estimates it will take most firms ten hours and complex firms 100 hours to evaluate every technology used firm-wide. 88 Fed. Reg. 54009 Tb. 2.

to retail investors, or that market tools may lose efficiency, or that investors may lose the benefits of entire classes of technology.[28] The analysis stops short of the Commission's congressionally-mandated duty to consider whether these harms outweigh the benefits.

When it comes to benefits, the Commission merely discusses in general terms the benefits of minimizing conflicts of interest and providing investors access to technologies free of concern of conflicts—without ever weighing this against the technologies that the Commission concedes may no longer be made available to investors at all.[29] The Commission also does not evaluate whether existing fiduciary duties are sufficient to protect investors without adding the additional regulatory burdens and elimination requirements of this Proposal.[30] Courts have previously found that failure to account for these types of issues in an economic analysis makes it "incomplete" and "renders arbitrary and capricious the SEC's judgment."[31]

Second, the definition of covered technology is impossibly broad and unworkable. The Proposal defines "covered technology as 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."[32] The Commission

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[28] 88 Fed. Reg. 54010-11. *See also* Commissioner Hester M. Pierce, *Through the Looking Glass*, *supra* note 7 ("The economic analysis says that the proposed rules 'could … act as barriers to entry or create economies of scale, potentially making it challenging for smaller firms to compete.' Why isn't that 'could' a 'would'? It seems inevitable that a rule like this will prevent small firms from using technology that would enable them to serve their clients and compete with larger rivals.")

[29] *See* 88 Fed. Reg. 54010 ("The overall costs, including recordkeeping costs, of the proposed conflicts rules and proposed recordkeeping amendments could also cause some firms to avoid using certain covered technologies in investor interactions, even if the technologies did not create any conflicts of interest. This might happen if the costs of complying with the proposed rules and amendments exceed the revenue that can be gained and/or costs that can be saved by using the technology. For example, a firm might opt not to use an automated investment advice technology because of the costs associated with complying with the proposed rules and amendments. In these types of situations, firms would lose the potential revenues that these technologies could have generated, and investors would lose the potential benefits of the use of these technologies. In addition, in the absence of these technologies, firms might raise the costs of their services, thus increasing the costs to investors.").

[30] *See* Commissioner Mark T. Uyeda, *Statement on the Proposals*, *supra* note 27.

[31] *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (2010) ("As with its analysis of competition, however, the SEC's analysis is incomplete because it fails to determine whether, under the existing regime, sufficient protections existed to enable investors to make informed investment decisions and sellers to make suitable recommendations to investors. The SEC's failure to analyze the efficiency of the existing state law regime renders arbitrary and capricious the SEC's judgment that applying federal securities law would increase efficiency.").

[32] 88 Fed. Reg. 53972.

concedes how "broad" this definition is, to the extent it covers even spreadsheets and basic financial models.[33] It is impossible for firms to comply with such a sweeping Proposal.

Best illustrating this is the Commission's own suggestion of adding "explainability" features to understand complex technologies. The practicalities of this oft-proposed compliance measure leaves much to be desired: nowhere across the 17 mentions of "explainability" in the Proposal does the Commission provide a single example or citation as to what these technical features entail or describe explainability features in use today, let alone an analysis of their feasibility or cost as a potential means of compliance with the Proposal.[34] Nor is this a solution, as the Proposal warns that "[e]ven when explainability features are built into a covered technology, a firm might still be unable to determine whether the covered technology places its own interests ahead of investors' interests."[35] This response leads to a Proposal that the Commission itself repeatedly admits is "difficult or impossible" to comply with.[36]

Finally, the Commission dispenses with the alternative of disclosure of potential conflicts of interest, rather than difficult and costly "elimination or neutralization" in a mere three paragraphs.[37] However, the most the Commission can say is that "it is not clear that prescribing a standardized disclosure would be sufficient," that "[f]irms might have difficulty fully conveying the scope of conflicts of interest," and that "disclosures may be too lengthy to be meaningful or actionable."[38] Such a speculative basis to dispense with the long-accepted cure for conflict of interest is likewise arbitrary and capricious.[39]

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[33] 88 Fed. Red. 53972, 53977.

[34] In fact, the Commission's first mention of "'explanability' features" cites to a prior section merely describing concerns with opaque technologies. 88 Fed. Reg. 53977, 53977 n.148 ("For example, if a firm is concerned that it may not be possible to determine the specific data points that a covered technology relied on when it reached a particular conclusion, and how it weighted the information, the firm could build ''explainability'' features into the technology in order to give the model the capacity to explain why it reached a particular outcome, recommendation, or prediction.") ("*See supra* section I.B.4. (describing complex or opaque technologies, sometimes referred to as "black boxes").). *See also id.* at 53984 nn.169-170 (citing to the text around footnotes 148-151 as "discussing building explainability features into 'black box' algorithms").

[35] 88 Fed. Reg. 53984.

[36] 88 Fed. Reg. 53978, 53992, 54005.

[37] 88 Fed. Reg. 54014.

[38] 88 Fed. Reg. 54014.

[39] *See Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) (striking down an SEC rule where in part "the Commission failed adequately to address whether the regulatory requirements of the ICA reduce the need for, and hence the benefit to be had from" the rule).

This lack of analysis attempts to bury the underlying issue: many of the theoretical concerns the Commission wishes to solve are covered under existing regulations. Just in 2019 the Commission adopted Regulation Best Interest and Form CRS to address conflicts of interests and uphold fiduciary duties between investment advisors and investors.[40] In failing to conduct economic analysis of the unique provisions of this Proposal compared to existing rules, the Commission seeks to subject investors to extraneous and possibly duplicative regulation without ensuring that investors will benefit. Schwab is committed to its existing legal duties, such as common law fiduciary duties to all investors, Regulation Best Interest requirements, and even targeted guidance towards particular technologies about which the Commission is concerned.[41] The Commission has legal obligations to demonstrate that regulations are necessary and will benefit investors, and this Proposal fails on both fronts.

III. The Proposal Raises Serious First Amendment Issues

The Proposal raises serious questions under the First Amendment, without a single mention of any free speech concern.[42] Placing regulatory and reporting requirements on all technology-assisted communications made by firms would have an immediate chilling effect. The Proposal could harm retail investors by causing firms to slow or stop efforts to provide valuable, useful and truthful information to investors. We believe it will be particularly harmful for certain populations of self-directed investors, who purchase both proprietary and third-party funds on our platform; active trader investors who want and are accustomed to receiving extensive market research; and younger investors at the beginning of their financial journey.

Schwab acknowledges that the degree of First Amendment protection differs between commercial speech "that does 'no more than propose a commercial transaction'" and non-commercial speech, which is subject to more protection.[43] Regulations of commercial speech are subject to "a four-part analysis" consisting of whether the expression concerns lawful activity and is not misleading, whether the government interest is substantial, whether the regulation

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[40] 84 Fed. Reg. 33318; *see* Commissioner Mark T. Uyeda, *Statement on the Proposals*, *supra* note 27.

[41] *See, e.g.*, IM Guidance Update, February 2017, No. 2017-02.

[42] The Commission had notice of First Amendment concerns. In supporting the Proposal, the Commission cites to comments received in response to the 2021 Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulator Considerations and Potential Approaches. *See* 88 Fed. Reg. at 53968-69, 53969 n.92. Notably, though, the Commission does not mention any of the comments that raised First Amendment concerns. *See, e.g.* David Dusseault, President, Robinhood Financial, LLC, Comment on *Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Rel. Nos. 34-92766; IA-5833; File No. S7-10-21*, available at https://www.sec.gov/comments/s7-10-21/s71021-9316498-260092.pdf. The Commission, in fact, specifically cited this comment in another context. 88 Fed. Reg. 53970 n.101.

[43] *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976)).

directly advances the asserted interest, and whether it is not over-expansive.[44] However, the First Amendment is stricter if the law "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers."[45] The Commission has failed to conduct this analysis, despite the law's recognition "that the 'distinction between laws burdening and laws banning speech is but a matter of degree' and that the 'Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.'"[46]

While the Commission may regulate disclosures and securities communications as commercial speech, "the creation and dissemination of information are speech within the meaning of the First Amendment."[47] Many of these communications—particularly in-person communications, email and text messages, electronic libraries, and others listed in the Proposal—are entitled to First Amendment protection.[48] The Commission's proposed limitation on any speech disseminated by technology—which in practice would be virtually all communications to investors—that has not gone through the proposed conflict-vetting and elimination or neutralization process almost certainly runs afoul of the First Amendment.[49]

While the Commission's stated concern appears to be "communications that nudge or prompt more immediate and less informed action by the investor,"[50] the Proposal seeks to prevent this by requiring the elimination or neutralization of elements of that communication. Our concern is that this creates a viewpoint-based restriction on speech, one that is "presumptively

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[44] *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

[45] *Sorrell v. IMS Health Inc.*, 564 U.S. 522, 567 (2011).

[46] *Id.* at 565-66 (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000)).

[47] *Sorrell,* 564 U.S. at 570 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct")).

[48] *See Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2346-47 (2020) (holding a regulation of robocalls for debt collection to be a content-based speech restriction); *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017) (holding a regulation prohibiting a credit card surcharge to be a speech restriction).

[49] Schwab does not dispute that recommendations or advice given by investment advisors can be regulated and is already subject to fiduciary duty. We support strong regulatory guardrails to protect our investors, including adherence to fiduciary duties. But the Commission has failed to consider the implications that stretching regulations beyond mere disclosure and fiduciary adherence into "elimination or neutralization" of conflicts within speech implicates First Amendment rights.

[50] 88 Fed. Reg. at 53962.

unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[51] The Proposal fails both.

First, it is not narrowly tailored. It is so expansive as to be practically unlimited. The Commission concedes that both "covered technology" and "investor interaction" are broadly defined.[52] Take, for example, the extraordinarily broad definition of "investor interaction," which includes the "conveyance of information to or solicitation of investors, in any form."[53] The Proposal's examples further illustrate its reach—"electronic libraries," "research reports, news, quotes, and charts from a firm-created website," and "a firm-run email communication subscription that investors can sign up for and customize" would all be subject to regulation.[54] Such expansive definitions make it highly likely that the Proposal will impede permissible speech—such as communicating investment information, research, and educational programs.

Regulators have long recognized that the free flow of educational information is good for investors. That is why educational information was excluded from the definition of "recommendation" when the Commission adopted Regulation Best Interest. There, the Commission acknowledged that "Regulation Best Interest should not stifle investment education as a means to encourage financial wellness . . . and the approach we are taking to what is or is not considered a 'recommendation' achieves this goal."[55] The failure to account for First Amendment concerns in this Proposal, when the Commission had done so before in other contexts, is a significant oversight,[56] particularly where the Commission offers no explanation for the change.

Second, the Commission has not adequately established a compelling state interest. "Under the First Amendment, in commercial speech cases the government cannot rest on 'speculation or

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[51] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

[52] *See, e.g.*, 88 Fed. Reg. at 53972.

[53] 88 Fed. Reg. at 53974 (emphasis added).

[54] 88 Fed. Reg. at 53975.

[55] *See* 84 Fed. Reg. at 33338; *See also* Reg. Notice 11-02 ("FINRA, however, exempted from the new rule's coverage certain categories of educational material . . . as long as such material does not include (standing alone or in combination with other communications) a recommendation of a particular security or securities. FINRA believes that it is **important to encourage firms and associated persons to freely provide educational material and services to customers**." (emphasis added)).

[56] The Commission does note that "[t]he proposed definition, however, would not include technologies that are designed purely to inform investors." 88 Fed. Reg. 53972. However, its lone following example of "a website that describes the investor's current account balance and past performance but does not, for example, optimize for or predict future results, or otherwise guide or direct any investment-related action" does not alleviate our concern that the Proposal would stymie First Amendment protected speech seeking to inform investors or improve financial literacy, including in ways that may tangentially built investor trust and thereby encourage investments with Schwab. *Id.* The primary goal of Schwab's investment

conjecture.'"[57] The Proposal hypothesizes that communications such as notifications and alerts may incentivize investors to overly engage with investment platforms. This unsupported assertion is insufficient to create a presumption that technological tools to disseminate truthful information must be evaluated and tested to neutralize and eliminate potential conflicts of interest under the extensive new procedures in the Proposal.[58] Instead, we believe that allowing investors easy access to truthful and relevant content only improves financial literacy and improves investment outcomes especially for our retail investors. Limitations and excessive regulation on the manner of providing that communication could significantly infringe on Schwab's First Amendment rights.

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Schwab greatly appreciates the opportunity to submit this comment letter on the Proposal. If you have any questions or require additional information, please do not hesitate to contact us.

Sincerely,

Peter J. Morgan III
Managing Director, General Counsel and Corporate Secretary
The Charles Schwab Corporation

publications is to improve information access and financial literacy among investors, but the Proposal purposefully "capture[s] firm communications that may not rise to the level of a recommendation, yet are nonetheless designed to, or have the effect of, guiding or directing investors to take an investment-related action." *Id.* at 53975.

[57] *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

[58] *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011) ("[T]he 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech." (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002))).

Cc: The Hon. Gary Gensler, Chair

The Hon. Hester M. Peirce, Commissioner

The Hon. Caroline A. Crenshaw, Commissioner

The Hon. Mark T. Uyeda, Commissioner

The Hon. Jaime Lizárraga, Commissioner