LPL Financial

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October 10, 2023

Submitted electronically

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

Re: File Number S7-12-23, RIN 3235-AN00; 3235-AN14, "Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers"

Dear Ms. Countryman:

On behalf of LPL Financial LLC ("LPL"), I am writing to share our concerns with the Securities and Exchange Commission's (the "SEC" or "Commission") proposed rule, "Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers" (the "Proposal"). As more fully discussed below, we believe the Proposal runs counter to the SEC's goals of promoting efficiency and enhancing access to financial services for American investors.

If implemented, the Proposal would have significant adverse and unintended effects on the ability of financial professionals to provide their much-needed financial advice and related products and services to millions of investors. The Commission has not demonstrated adequate justification for the immense practical burdens that would result from the Proposal, particularly in light of the well-functioning investor protections provided under the existing regulatory framework for investment advisers and broker-dealers. Accordingly, we request that the Commission withdraw the Proposal and, if appropriate following additional analysis by the Commission, re-propose a rule that is more narrowly tailored to problematic emerging technologies.

I. Overview of LPL Financial; Support for Trade Association Comments

LPL is a leading retail investment advisory firm, independent broker-dealer and registered investment adviser ("RIA") custodian operating in all 50 states. We are steadfast in our belief that Americans deserve access to personalized guidance from a financial professional, and we serve as a trusted partner to approximately 22,000 financial professionals across the country, including financial professionals at over 1,100 banks and credit unions and approximately 500 registered investment advisers.

We provide our financial professionals with the technology, research, clearing and compliance services and practice management programs they need to serve their clients and create thriving businesses. Because LPL does not have any proprietary investment products, our financial professionals are able to offer lower-conflict, personalized advice to investors seeking wealth management, retirement planning, financial planning and asset management solutions.

LPL is a member of the Securities Industry and Financial Markets Association, the American Securities Association, the Investment Advisers Association (the "Trade Associations"). We support their comments submitted in response to the Proposal, as well as the comments submitted by Davis & Harman LLP on behalf of multiple trade associations.

II. Concerns with the Proposal

In addition to our support for the comments submitted by the Trade Associations and Davis & Harman, we write to amplify several concerns with the Proposal.

First, the Commission maintains that the Proposal is necessary due to the accelerated use of predictive data analytics and related technologies to provide investment advice.[1] The definition of "covered technology" in the Proposal, however, is sweeping in scope and extends well beyond artificial intelligence and other emerging technologies. Nearly every interaction between a financial professional and a client will implicate a technology that directly or indirectly involves optimizing for, guiding, predicting or directing investment-related behaviors or outcomes, including routine technologies that have been used by broker-dealers and RIAs for decades. Further, by mandating that conflicts be neutralized or eliminated, the Proposal would upend the current well-functioning regulatory framework that generally permits conflicts to be addressed through disclosure. The Proposal is therefore at odds with the SEC's existing standards of care for brokerage and advisory businesses, and not harmonized with the current regulatory regime. Finally, we are concerned that the ongoing obligations outlined in the Proposal will inadvertently limit investors' access to investment advice because the requirements will make it challenging for financial professionals to service smaller accounts.

Therefore, we believe that the Proposal should be withdrawn. It will impose unnecessary regulatory burdens that will discourage financial professionals and their firms from using current and future technologies, which in turn will impede investors' access to appropriate financial services, thwart the benefits of innovation and ultimately limit the efficiency and competiveness of the industry. If justified following further analysis by the Commission, the SEC should re-propose a significantly modified new rule that narrowly addresses the concerns raised in the Proposal.

The Definition of "Covered Technology" is Overly Broad

For decades, technology has helped financial professionals optimize their time and planning, to the benefit of American investors. For example, technologies enabling online communication between financial professionals and their clients, high-speed data processing and analytical tools have been widely adopted in the securities industry and benefited investors through increased personalization of financial planning and wealth management, access to financial products and services, and lowered costs resulting from efficiency. In short, the use of these technologies has helped to fuel "the largest, most sophisticated and most innovative capital markets in the world."[2]

The definition of "covered technology" in the Proposal, however, is so broad that it captures a wide range of tools and software that are not necessarily predictive data and analytics tools as intended by the SEC. Moreover, the ambiguity in the Proposal regarding what constitutes "covered technology," particularly in the context of investment-related behaviors or outcomes, leaves financial professionals and their firms unsure of which technology or tools fall within the definition. For example, even technology such as Microsoft Excel, which is widely used by financial professionals for calculations and modeling to guide investment advice, may be captured in the definition, along with email systems used to communicate forward-looking financial advice. The Proposal would therefore present a Hobson's choice: A financial professional could either conduct the extensive analysis required by the Proposal, as further described below, and eliminate or neutralize any conflict in using Microsoft Excel, or choose to conduct his or her calculations on hand rather than using a spreadsheet. Microsoft Excel has been in use since 1985, with

[1] See "SEC Proposes New Requirements to Address Risks to Investors From Conflicts of Interest Associated With The Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers" available at: https://www.sec.gov/news/press-release/2023-140

[2] See testimony of Chair Gary Gensler before the United States Senate Committee on Banking, Housing and Urban Affairs on September 12, 2023.

no concerns or proposed rulemaking to mitigate potential conflicts until now – nearly 40 years later. While Microsoft Excel is merely one example, it speaks to the overbreadth of the definition and common sense need to narrow the Proposal to focus on technology that is truly problematic.

The Proposal Would Override the Existing Regulatory Regime, Triggering Adverse Effects on Investors

The Proposal fails to explain why current regulation, which already requires that any recommendation or advice be in the best interest of the investor, is inadequate to address potential conflicts of interest arising from technology.

Financial advisers, as fiduciaries, are subject to the Investment Advisers Act of 1940 (the "Advisers Act") which provides a well-functioning and long-standing regulatory regime. Under the Advisers Act, fiduciaries are held to a high standard of conduct to ensure that their clients' interests are placed ahead of the adviser and the firm. Registered representatives are subject to the SEC's Regulation Best Interest, which requires broker-dealers and their associated persons to act in the best interest of a retail customer when providing personalized financial advice, and a broker-dealer must provide full and fair disclosure, in writing, or all material facts relating to the scope and terms of the relationship with the retail customer.

Under existing SEC rules, disclosure of conflicts is delivered to clients on a consistent basis, through Form ADV and Form CRS, allowing each client to read and understand any potential conflict of interest prior to entering into a relationship with a financial professional or when evaluating investment strategy. These disclosures are made in a uniform and consistent manner, meaning that the client consistently receives the same, updated, clear and concise document for review.

The practice of disclosure, rather than "elimination or neutralization," preserves the ability to provide lower-cost investment services to all Americans and is consistent with the SEC's goals of promoting efficiency and competition.[3]

Increased Due Diligence Requirements Will Result in Higher Fees and Reduced Access to Services

LPL is also concerned about the extensive due diligence requirements set forth in the Proposal, and the impact they will have on servicing certain brokerage accounts. The Proposal requires "elimination or neutralization of the effect of conflicts of interest," which can only be satisfied through extensive due diligence and testing of covered technology. The Proposal requires that each covered technology be tested and the testing results documented, regardless of whether or not there is a conflict, and testing must also be conducted on a periodic basis thereafter.

Given the number of technology products used by financial professionals in their day-to-day operations, these requirements could add hours of costly due diligence and testing for each investor account. The requirements may also result in higher costs or reduced access for investors, as financial professionals pass along the additional compliance costs or prioritize clients with larger portfolios. For example, we believe that financial professionals may seek to implement account minimums, thus limiting access to investment advice for low and moderate income individuals. This result would run counter to the promise of technology in making financial advice more accessible rather than less.

[3] See testimony of Chair Gary Gensler before the United States Senate Committee on Banking, Housing and Urban Affairs on September 12, 2023. "In particular, in 1996, Congress mandated that, in addition to investor protection and public interest, the SEC consider efficiency and competition, in formulating our rules."

We also believe that the due diligence requirements are unnecessary for investment advisers, who are already performing due diligence as part of their fiduciary duty obligations and are required to make full and fair disclosure of any conflict that cannot be mitigated. The Proposal would impose additional due diligence requirements, using a wholly new and different standard of care than the existing regulatory framework, and extend the requirements even beyond basic interactions with existing customer relationships to arms-length marketing communications.

Similarly, broker-dealers are already required to act in their customers' best interest, again making these new due diligence requirements an unnecessary burden that only creates additional costs and thereby will have the effect of limiting access to investment assistance to those who need it most.

By proposing this rule, the Commission is ignoring the obligations to which financial advisers and broker-dealers are already subject. The Proposal undermines, rather than advances, the SEC's regulatory regime by replacing the requirements of Reg BI and the Advisers Act with a new standard of care. We believe that the existing structure provides strong consumer protections that promote innovation and efficiency for the benefit of investors, and should not be altered. In light of the unintended implications of the Proposal, we strongly encourage the SEC to reconsider the rules to strike a more appropriate balance between investor protection and industry innovation.

III. Conclusion

Thank you for your consideration of this letter. LPL appreciates the opportunity to comment on the Proposal, and we look forward to further discussions and revisions that will ensure the continued prosperity and well-being of investors and the financial advisory industry. Please contact Carolyn Jayne, SVP and Associate General Counsel at Carolyn.Jayne@lplfinancial.com or Elizabeth Hill, SVP and Associate General Counsel at Elizabeth.Hill@lplfinancial.com with any questions or concerns.

Sincerely,

Althea Brown
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