STRADLEY RONON

Stradley Ronon Stevens & Young, LLP
2000 K Street, N.W.
Suite 700
Washington, DC 20006
Telephone 202.822.9611
Fax 202.822.0140
www.stradley.com

October 10, 2023

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

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

Dear Ms. Countryman:

Stradley Ronon appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's (Commission's or SEC's) proposal on Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers.[1] Our firm represents many registered investment advisers with a wide variety of clients. We are writing to provide our views on certain components of the Proposal that relate to the Investment Advisers Act of 1940 (Advisers Act).

For the reasons described below, we believe that the Commission lacks the authority to adopt the Proposal. We respectfully request that the Commission review the responses to its request for comments and withdraw the Proposal, as it would inhibit the development of investor-friendly technologies.

A. The Commission lacks the authority to promulgate the Rule because the rule is significant and the Commission lacks express congressional authorization.

Under the Supreme Court's major questions doctrine, if an agency seeks to decide an issue of major national significance, its action must be authorized by clear congressional mandate. The major questions doctrine "developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress

[1] Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (Predictive Analytics Proposal), SEC Release Nos. 34-97990; IA-6353 (July 26, 2023), *available at* https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf.

could reasonably be understood to have granted."[2] In describing this doctrine in a recent case the Court stated, "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[3] Applying this standard to an EPA action, the Court held that "it is not plausible that Congress gave EPA the authority to adopt on its own [] a regulatory scheme" that would "force a nationwide transition away from the use of coal."[4] We believe that it is similarly not plausible that Congress gave the Commission the authority to adopt this regulatory scheme that would force investment advisers to transition away from the use of technologies that benefit investors.[5]

B. The Commission lacks the authority to promulgate the Proposal because Section 211(h)(2) must be interpreted in the context of related Advisers Act provisions.

Section 211(h) was added to the Advisers Act by Section 913 of the Dodd-Frank Act in 2010 in response to the financial crisis.[6] It would be convenient with respect to this Proposal for the Commission to read Section 211(h)(2) as a standalone prescription of authority; it would also be contradictory to the canons of statutory construction. As described by the Supreme Court, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[7]

Dodd-Frank Section 913 added both Section 211(g), which provides the Commission with authority to establish a harmonized standard of conduct for broker-dealers and investment advisers, and Section 211(h), which the Commission relies on here. In our view, Section 211(h), read as a whole, provides authority to issue rules related to a harmonized standard of conduct rather than a separate, standalone rulemaking authority.[8] Accordingly, we question whether the Commission's interpretation of 211(h)(2) is appropriate in justifying the authority for the Proposal.[9]

---

[2] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).
[3] *Id.* at 2616; *see also id.* at 2621 (Gorsuch, J., concurring) (asserting that "an agency must point to clear congressional authorization when it seeks to regulate a 'significant portion of the American economy'") (quoting *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).
[4] *Id.* at 2616.
[5] The Commission itself recognized these impacts of the Proposal, stating "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. 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." Predictive Analytics Proposal at 203–4.
[6] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. 111-203, 124 Stat. 1827–29 (2010) (codified at 15 U.S.C. § 80b-11(h)).
[7] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).
[8] Section 211(h)(1) directs the Commission to "facilitate the provision of simple and clear disclosures to investors" regarding conflicts of interest. Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. § 80b-11(h).
[9] Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(C) (agency regulations "in excess of statutory jurisdiction [or] authority" shall be held unlawful).

C. The Proposal is arbitrary and capricious in light of the reliance interests generated by the longstanding convention of disclosure of conflicts under the Advisers Act.

The Proposal is a departure from the Commission's longstanding approach to regulating investment adviser conflicts of interest. In particular, as described in the Commission's Interpretation Regarding Standard of Conduct for Investment Advisers, "an investment adviser must eliminate *or make full and fair disclosure of* all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict."[10] The Proposal, however, would require investment advisers to *eliminate or neutralize* the effect of certain conflicts of interest associated with the use, or reasonably foreseeable potential use, of a covered technology.[11]

According to the Supreme Court, "In explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[12] The Commission's Proposal does not adequately demonstrate cognizance of its longstanding policies about conflicts, or take into account serious reliance interests on those policies by investment advisers.[13] For example, the Proposal would eliminate an adviser's ability to fully and fairly disclose a conflict and obtain informed consent, even where the adviser has mitigated the conflict as necessary to determine that the adviser's advice continues to be in the best interest of the client. The proposed rule also uses a series of terms that are either overly broadly defined or unclear. Accordingly, we question whether the Proposal sufficiently explains the Commission's departure, and whether adopting the Proposal would be consistent with Administrative Procedure Act.[14]

---

[10] Commission Interpretation Regarding Standard of Conduct for Investment Advisers (Standard of Conduct Interpretation), 84 Fed. Reg. 33,669 (July 12, 2019) (codified at 17 C.F.R. pt. 276) (citing *SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 192 (1963)) (emphasis added); *see also* Form ADV, 17 C.F.R. § 279.1 (2022) (providing for disclosure of conflicts of interest); Div. Inv. Mgmt., SEC, No. 2017-02, IM Guidance Update: Robo-Advisers (2017), https://www.sec.gov/investment/im-guidance-2017-02.pdf (recommending robo-advisers provide clients with specific disclosures related to conflicts of interest); Investment Adviser Marketing, 17 C.F.R. § 275.206(4)(b) (2022) (requiring investment advisers who advertise their services to state and describe conflicts of interest); *Cap. Gains*, 375 U.S. at 198–99 (observing that the Advisers Act reflects a purpose "to substitute a philosophy of disclosure for the philosophy of caveat emptor").

[11] The Proposal departs from other important components of the Standard of Conduct Interpretation, including the following: "[the] fiduciary duty must be viewed in the context of the agreed-upon scope of the relationship between the adviser and the client." Standard of Conduct Interpretation, 84 Fed. Reg. at 33,671.

[12] *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (citing *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009)); *see also Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006) ("A statutory interpretation . . . that results from an unexplained departure from prior [agency] policy and practice is not a reasonable one.") (quoting *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 156 (D.C. Cir. 2005)).

[13] *Encino Motorcars, LLC*, 579 U.S. at 222 ("An '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be arbitrary and capricious change from agency practice.") (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)); *id.* ("An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference.") (citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

[14] *See* APA, 5 U.S.C. § 706(2)(A) (agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" shall be held unlawful).

***

Thank you for considering our comments. If you have any questions, please contact our Investment Management Group at (202) 822-9611.

Very truly yours,

/s/ Stradley Ronon Stevens & Young, LLP

Stradley Ronon Stevens and & Young, LLP

cc: David Grim, Esq.
Katie Gallop