October 10, 2023

Ms. 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 No. S7–12–23)

Dear Ms. Countryman:

J.P. Morgan Wealth Management ("JPMWM") and J.P. Morgan Asset Management ("JPMAM"), collectively J.P. Morgan Chase & Co. ("JPMC"), are pleased to respond to the Securities and Exchange Commission's (the "SEC" or the "Commission") proposal titled Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (the "Proposed Rule").[1] JPMWM serves more than 2 million customers; JPMAM has more than $2 trillion in assets under management in the United States.

The SEC has expressed concern that broker-dealers and investment advisers could purposefully or inadvertently leverage Predictive Data Analytics ("PDAs") to put their interests ahead of the interests of their customers and clients. To address this risk, the Proposed Rule would require broker-dealers and investment advisers to: (1) review covered technologies that are used in investor interactions; (2) determine if the use of those technologies consider the interest of the broker-dealer or investment advisers and places that interest over those of investors; and, if so, (3) eliminate the conflict of interest or neutralize its effect.

Notwithstanding the SEC's stated concern, the Proposed Rule extends far beyond PDAs, capturing a wide range of technology applications that are not in need of additional regulation. As proposed, the rule would create new requirements for recommendations and advice, which are already robustly regulated under Regulation Best Interest ("Reg BI") and the Investment Advisers Act ("Advisers Act"). The Proposed Rule would also scope in and restrict a wide range of communications and engagements that benefit investors and are already governed by marketing rules and anti-fraud provisions. Because the SEC has not sufficiently articulated how existing regulations fail to protect investors, and the Proposed Rule would have a negative

[1] *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 (July 26, 2023), 88 Fed Reg 53960 (Aug. 9, 2023) ("Proposing Release").

impact on a wide range of tools and interactions that serve investors, JPMC does not support the Proposed Rule.

We agree with the positions set forth in letters filed by the Securities Industry and Financial Markets Association,[2] Investment Advisers Association,[3] and Investment Company Institute[4] that the Proposed Rule would: (1) negatively impact uses of technology that benefits investors; (2) be unnecessary on top of existing regulations; and (3) be unworkable both in its scope and requirements. In this letter, we provide examples of covered technologies that benefit investors and could be restricted or prevented under the Proposed Rule.

I. Background

In the Proposing Release, the SEC describes the technologies with which it is concerned as being inherently complex and opaque.[5] The scope of Proposed Rule, however, goes well beyond technology that could be described as such. In fact, the definition of "Covered Technology"[6] would extend to spreadsheets that help broker-dealers make investment recommendations, and mail merges used by investment advisers to keep clients informed during significant market events.[7]

[2] *See* Letter from Melissa MacGregor, Deputy General Counsel and Corporate Secretary, SIFMA and Kevin Ehrlich, Managing Director and Associate General Counsel, SIFMA to Vanessa Countryman, Secretary, SEC, *Re: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers,* Oct. 10, 2023.

[3] *See* Letter from Gail C. Bernstein, General Counsel, IAA and Sanjay Lamba, Associate General Counsel, IAA to Vanessa Countryman, Secretary, SEC, *Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (SEC Rel. Nos. 34-97990; IA-6353; File No. S7-12-23*), Oct. 10, 2023.

[4] *See* Letter from Susan Olson, General Counsel, ICI and Sarah A. Bessin, Deputy General Counsel, ICI to Vanessa Countryman, Secretary, SEC, *Re: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers; File No S7-12-23*, Oct. 10, 2023.

[5] Proposing Release at 26.

[6] "Covered technology means 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." § 275.211(h)(2)-4(a).

[7] Proposing Release at 42-3.

Similarly, in previous requests for information[8] and reports[9] the SEC and staff have expressed concern that the use of such technology by broker-dealers and investment advisers may be used to influence retail investors. Yet the Proposed Rule's definition of "Investor" is far broader, capturing sophisticated market participants like family offices,[10] mutual funds, and other institutional investors.[11]

Finally, the SEC Investor Advocate[12] and the Chair[13] have expressed concern about the use of artificial intelligence and sophisticated algorithms to induce or encourage investors to trade more often, invest in different products, or change their investment strategy. However, rather than targeting these specific interactions, the Proposed Rule defines "Investor Interactions" to include nearly all engagements and communications between broker-dealers or investment advisers and their customers or clients, including recommendations and advice.

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[8] *Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice*, Release Nos. 34-92766, IA-5833, File No. S7-10-21, (Aug. 27, 2021), 86 Fed. Reg. 49067 (Sept. 1, 2021) (sought information on behavioral prompts, differential marketing, game-like features, and other design elements or features designed to engage with retail investors on digital platforms).

[9] *See Staff Report on Equity and Options Market Structure Conditions in Early 2021* (Oct. 14, 2021) (suggests that during the meme stock episode of early 2021, PDA-like technologies that were intended to create positive feedback led to investors trading more than they would otherwise).

[10] The Proposed Rule is not meant to the supplant existing regulation. Proposing Release at 61. However, the proposed definition of Investor does not recognize staff interpretations and exemptive relief provided under existing regulation. *See* Letter from Emily Russell, Chief Counsel, SEC Division of Trading and Markets to Stephanie R. Nicholas, Counsel, WilmerHale, *Status of Institutional Family Offices for Purposes of Regulation Best Interest, SEC File No. S7-08-18 (Sept. 10, 2019) and Form CRS Relationship Summary, SEC File No. S7-08-18 (Sept. 10, 2019)*, Dec. 23, 2020, https://www.sec.gov/divisions/marketreg/mr-noaction/2020/sifma-122320-regbi.pdf (specifically carving out family offices out of Reg BI).

[11] "Investor means any prospective or current client of an investment adviser or any prospective or current investor in a pooled investment vehicle (as defined in § 275.206(4)-8) advised by the investment adviser." § 275.211(h)(2)-4(a).

[12] Rick Fleming, *Investor Protection in the Age of Gamification: Game Over for Regulation Best Interest?*, https://www.sec.gov/news/speech/fleming-sec-speaks-101321 (Oct. 13, 2021) ("using artificial intelligence, sophisticated algorithms, and game-like features, may blur the line between solicited and unsolicited transactions").

[13] Gary Gensler, *Statement on Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches*, https://www.sec.gov/news/public-statement/gensler-dep-request-comment (April, 2021) ("these features may encourage investors to trade more often, invest in different products, or change their investment strategy").

II. Recommendations and Advice

a. Regulation Best Interest

Regulation Best Interest ("Reg BI") requires broker-dealers to: (1) make investment recommendations that are in the best interest of retail customers; (2) establish, maintain, and enforce written policies and procedures reasonably designed to identify conflicts of interest; and (3) eliminate, or at a minimum disclose, all conflicts of interest associated with recommendations.[14]

These requirements prohibit broker-dealers from using any technology to provide recommendations that are not in the best interest of the client. The Proposing Release, however, argues that these requirements are insufficient when a broker-dealer uses technology in interactions with customers. It explains the SEC's concern that PDA-like technologies are so complicated, conflicts of interest may go "unidentified…or…unaddressed by broker-dealers."[15] However, Reg BI's requirement to eliminate or disclose conflicts of interest still is enforceable whenever a broker-dealer fails to identify and eliminate or disclose a conflict of interest.[16]

Staff guidance and interpretations, examinations, as well as SEC and FINRA enforcement actions have all been used to ensure compliance with Reg BI requirements.[17] These tools allow the SEC to: (1) ensure that broker-dealers understand their regulatory obligations; (2) identify deficiencies in compliance programs; and (3) prosecute violations related to Reg BI. Rather than adding an additional layer of regulation on top of Reg BI, the SEC should address its concerns with the use of technology in connection with recommendations through examination and enforcement tools already at its disposal.

b. Investment Advisers Act

The Proposed Rule also overlooks existing law which prohibits investment advisers from using PDA-like or other technologies to "place its own interests ahead of the interests of its client."[18] Specifically, the Advisers Act prohibits investment advisers from participating in

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[14] 17 C.F.R. § 240.15l-1.

[15] Proposing Release at 9.

[16] *Regulation Best Interest: The Broker-Dealer Standard of Conduct*, Release No. 34-86031, File No. S7-07-18, 84 Fed. Reg. 33318, https://www.sec.gov/files/rules/final/2019/34-86031.pdf (Jul. 12, 2019) ("scienter will not be required to establish a violation of Regulation Best Interest").

[17] *See* Securities and Exchange Commission, *Regulation Best Interest, Form CRS and Related Interpretations*, https://www.sec.gov/regulation-best-interest (last updated Apr. 20, 2023) and FINRA, *Reg BI and Form CRS Enforcement Actions*, https://www.finra.org/rules-guidance/key-topics/regulation-best-interest#enforcement (Oct. 2, 2023).

[18] *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, File No. S7-07-18, 84 Fed. Reg. 33681, https://www.sec.gov/files/rules/interp/2019/ia-5248.pdf (July 12, 2019).

fraudulent, deceptive, or manipulative conduct or engaging in any fraudulent or deceitful activity.[19] An essential Supreme Court decision from 1963 made clear that the Advisers Act imposes a fiduciary duty on investment advisers to act in the best interest of their clients and to cure conflicts of interest by eliminating, or at a minimum disclosing, their existence.[20] This framework has been reinforced by enforcement actions, interpretations, and staff guidance.[21]

Most recently, the SEC staff clarified that the Advisers Act framework extends to situations in which investment advisers use PDA-like and other technology to manage their clients assets, specifically clarifying that robo-advisers (which would be in scope of the Proposed Rule) "are subject to the substantive and fiduciary obligations of the Advisers Act."[22] Since publishing this guidance, the staff have examined investment advisers using such technology. In 2021, the Division of Examinations published observations related to compliance programs, formulation of advice, marketing and advertising practices, data protection practices, and registration at robo-advisory firms.[23] Meanwhile, the Division of Enforcement has taken action against investment advisers who use this technology to advise their clients but have failed to fulfil their fiduciary obligations.[24]

The SEC has not articulated a need to enhance the existing fiduciary framework. Nonetheless, because the Proposed Rule scopes in even the most basic uses of technology, it would capture nearly all types of interactions between advisers and their clients, including the discretionary management of client accounts. In doing so, it would expand upon traditional fiduciary obligations, and require all conflicts of interest be eliminated or neutralized rather than

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[19] 15 U.S.C § 80b–6.

[20] *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., et al.*, 375 U.S. 180 (1963).

[21] *See, e.g.*, Securities and Exchange Commission, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, https://www.sec.gov/files/rules/interp/2019/ia-5248.pdf (July 12, 2019); Division of Trading and Markets, SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest*, https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest (updated Aug. 3, 2023); Division of Trading and Markets, SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors*, https://www.sec.gov/tm/iabd-staff-bulletin (March 30, 2022).

[22] Division of Investment Management, SEC, *IM Guidance Update: Robo-Adviser*, https://www.sec.gov/investment/im-guidance-2017-02.pdf (Feb. 23, 2017).

[23] SEC Division of Examinations, *Observations from Examinations of Advisers that Provide Electronic Investment Advice*, https://www.sec.gov/files/exams-eia-risk-alert.pdf (Nov. 9, 2021).

[24] These cases have primarily relied on requirements to act in the best interest of the client and to disclose conflicts of interest. The fact that the respondents were using technology to discretionarily manage client assets had no bearing on the outcome. *See, e.g.*, Charles Schwab & Co., Inc., Advisers Act Release No. 6047 (Jun. 13, 2022) (robo-adviser placed firm's interest ahead of the client's); Wahed Invest LLC, Advisers Act Release No. 5959, (Feb. 10, 2022) (failure to have sufficient policies and procedures in place for automated investing platform); Betterment LLC, Advisers Act Release No. 6288 (Apr. 18, 2023) (robo-adviser failed to keep accurate records, was not transparent about the use of technology, and did not completely remediate losses caused by coding errors).

disclosed. This could have significant impacts on investment advisers' ability to serve their retail and institutional clients.

For example, it may become difficult for investment advisers to manage and offer target-date mutual funds and similar strategies. Target-date funds, a popular product designed to allocate and diversify retirement investments, are typically structured as funds of funds that only invest in other funds advised by the investment adviser ("proprietary funds"). Target-date funds could be deemed in scope of the Proposed Rule because: (1) they are clients of an investment adviser; (2) discretionary management is considered to be an investor interaction under the Proposed Rule; (3) the definition of covered technology could capture any number of analytical, technological or computational processes used to manage these funds; and (4) there is a potential conflict of interest because an investment adviser may limit the underlying funds to proprietary funds.[25]

Consistent with its fiduciary obligations, JPMC discloses this potential conflict of interest in its target-date fund summary prospectus; marketing materials also make clear that these funds hold proprietary funds.[26] We believe such disclosure is sufficient. There is no evidence, nor does the SEC suggest, that investors do not understand this structure. Indeed, the SEC has recognized the value that these fund structures provide to investors.[27] They have also become a staple of retirement investing. At the end of 2020, approximately 59 percent of 401(k) plan participants held target-date funds.[28] Nonetheless, under the Proposed Rule, advisers to such funds may be forced to neutralize or eliminate this well-understood potential conflict, which would create onerous compliance burdens and could present regulatory and litigation risk.

III. Tools, Services and Products that are not Recommendations or Advice

Broker-dealers and investment advisers also use covered technologies in connection with interactions that do not rise to the level of advice or recommendations, but are still governed by

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[25] "Conflict of interest exists when an investment adviser uses a covered technology that takes into consideration an interest of the investment adviser, or a natural person who is a person associated with the investment adviser." § 275.211(h)(2)-4(a).

[26] *See* J.P. Morgan SmartRetirement Funds Prospectus dated Nov. 1, 2022 at 4, https://am.jpmorgan.com/JPMorgan/TADF/46641u739/SP?site=JPMorgan ("Because the Fund's Adviser or its affiliates provide services to and receive fees from the underlying funds, the Fund's investments in the underlying funds benefit the Adviser and/or its affiliates. In addition, the Fund may hold a significant percentage of the shares of an underlying fund. As a result, the Fund's investments in an underlying fund may create a conflict of interest.").

[27] *See, e.g., Fund of Funds Arrangements, Final Rule*, Release Nos. 33-10871, IC-34045, File No. S7-27-18 (Oct. 7, 2020), 85 Fed. Reg. 73924 (Nov. 19, 2020) at 4 (stating target-date funds are "a convenient way to allocate and diversify their investments through a single, professionally managed portfolio.").

[28] ICI, *2023 Investment Company Fact Book*, https://www.ici.org/system/files/2023-05/2023-factbook.pdf (Oct. 4, 2023).

communications and marketing rules.[29] Such communications and engagements can drive positive outcomes for investors.

While such interactions by their nature take into account the interest of the firm (*i.e.*, they are designed to generate business opportunities) we disagree with the Commission's assumption that this inherent potential conflict of interest is not well understood by investors.[30] Moreover, as in many cases it would be impossible to neutralize such conflicts, the Proposed Rule could effectively prohibit certain communications and engagements that can facilitate positive outcomes for investors, in particular increased savings and investment.[31] Below we offer two examples. Similar concerns would apply to a wide range of tools offered by broker-dealers and investment advisers.

a. Retirement scenario calculators

JPMWM provides a number of retirement scenario calculators for both clients and the general public.[32] One example is the "IRA calculator" which allows users to compare traditional and Roth IRAs against a general (taxable) investment account and see how certain assumptions can impact their retirement strategy.[33] The Proposed Rule would capture these calculators because they provide information to investors using technology that forecasts investment-related outcomes and guides investment-related behavior. A potential conflict of interest could exist as the calculator is a marketing tool that is designed, at least in part, to encourage users to open and fund brokerage and advisory accounts at JPMWM.

b. Financial insight applications

JPMWM also offers the J.P. Morgan Wealth Plan ("Wealth Plan"), a free application that we offer to Chase customers.[34] Backed by internal research, Wealth Plan is intended to help users make smarter decisions by letting them set and prioritize financial goals. Once a user sets a goal in the application, Wealth Plan suggests steps they can take to achieve it. The application also provides simulators that allow a user to see how different choices could affect their financial future. The tool can be used independently or in conjunction with a JPMWM advisor. Wealth Plan would be in scope of the Proposed Rule because it is a technology that guides and forecasts

[29] FINRA Rule 2210(d) and 17 CFR § 275.206(4)-1.

[30] Proposing Release at 25.

[31] The Vanguard Group, *Putting a value on your value: Quantifying Vanguard Advisor's Alpha*® (Feb. 2019) (citing research that has found behavioral coaching may add 1% to 2% in net returns).

[32] J.P. Morgan Wealth Management, *Tools to help you plan for your future*, https://www.chase.com/personal/investments/investment-tools-resources (Oct. 4, 2023).

[33] Further information is available at https://www.chase.com/personal/investments/retirement/retirement-calculators/traditional-ira-calculator (Oct. 4, 2023).

[34] Further information is available at https://www.chase.com/personal/investments/wealth-plan.

investment-related behaviors and outcomes. A conflict of interest could exist because Wealth Plan is designed to encourage the use of JPMC services to achieve financial goals.

c. Impacts to customers and clients

Tools like the IRA calculator and Wealth Plan help clients improve their financial health. The Proposed Rule would at minimum complicate the offering of such tools, as firms would have to neutralize or eliminate the conflict of interest; it could also disincentivize the development of other tools that aid investors in identifying and meeting their financial goals. We think such a requirement is entirely unnecessary – consumers are well aware that such outreach is designed in part to generate business and marketing rules require these engagements be reviewed to ensure that they are fair, balanced, and not misleading.[35] The SEC has not demonstrated otherwise.

IV. Conclusion

While the SEC described the Proposed Rule as addressing "Predictive Data Analytics," and had previously articulated concerns with artificial intelligence and other transformational technologies, as discussed above, the Proposed Rule is far broader, capturing technology as simple as spreadsheets and adding new layers of regulation to investor interactions that are already well regulated. The SEC has not demonstrated the need for additional regulation of such technologies; moreover, the rule would create substantial negative impacts to investors that are not warranted. For these reasons, JPMC does not support the Proposed Rule. To the extent the SEC continues to be concerned about technology-driven interactions where conflicts of interest are not disclosed or evident to a reasonable retail investor, it should propose a rule narrowly targeted to address such concerns.

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[35] *Supra* note 29.

JPMC appreciates the opportunity to comment on the Proposed Rule. We would be pleased to provide any further information or respond to any questions that the Commission or the staff may have.

Very truly yours,

/s/ Kristin C. Lemkau

Kristin C. Lemkau
Chief Executive Officer
J.P. Morgan Wealth Management

/s/ George C.W. Gatch

George C.W. Gatch
Chief Executive Officer
J.P. Morgan Asset Management

Cc: The Honorable Gary Gensler, Chair
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