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Filed Electronically
Ms. Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549

Re: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, File No. S7-12-23; Petition for Rulemaking to Amend the Definition of "Small Entity" in Rule 0-7 under the Investment Advisers Act of 1940 ("Advisers Act") for Purposes of the Regulatory Flexibility Act

Dear Ms. Countryman:

Pickard Djinis and Pisarri LLP[1] submits these comments in opposition to the above-referenced proposal relating to investment advisers' use of predictive data analytics ("PDA") and similar tools ("Proposal").[2] We believe that the Proposal would impede advisers' legitimate use of both emerging and established forms of technology by adding unnecessary, unworkable and cost-prohibitive compliance requirements to the fiduciary standards that have protected investors through more than eight decades of technological change. The deficiencies in this rulemaking are too pervasive to be corrected; we respectfully urge the Commission to withdraw the Proposal in its entirety.

We also take this opportunity to comment in support of the above-referenced petition for rulemaking that the Investment Advisers Association ("IAA") submitted to the Commission on September 14, 2023 ("IAA Petition").[3] Updating the definition of "small entity" in Advisers Act Rule

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[1] Pickard Djinis and Pisarri LLP is a law firm specializing in securities regulation relating to investment advisers, broker-dealers and service providers thereto. Our investment adviser client base ranges from global firms with hundreds of employees and billions of dollars of regulatory assets under management to solo practitioners with relatively modest amounts of managed assets. This letter reflects the views of a number of our federally regulated clients.

[2] *Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, Securities Exchange Act of 1934 ("Exchange Act")* Rel. No. 97990; Advisers Act Rel. No. 6353 *(Jul. 26, 2023), available at* https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf ("Proposing Release"). The Proposal seeks to impose parallel restrictions on broker-dealers under the Exchange Act, but the broker-dealer side of the Proposal is beyond the scope of these comments.

[3] The IAA Petition is available at SEC.gov | Rulemaking petition to amend Rule 0-7 under the Investment Advisers Act of 1940, which defines a small entity for purposes of the Regulatory Flexibility Act of 1980.

0-7 in the manner the Petition suggests is critical, in order for the Commission to satisfy its obligations under the Regulatory Flexibility Act.

ANALYSIS

Proposed Advisers Act Rule 211(h)(2)-4 would require investment advisers to eliminate or neutralize the effects of conflicts of interest arising in connection with the use of a "covered technology" in an "investor interaction." Advisers who engage in such activities would be obliged to adopt and periodically review a new set of highly prescriptive compliance policies and procedures. They also would be required to extensively document their compliance with Rule 211(h)(2)-4, by virtue of yet another round of changes to the Advisers Act recordkeeping rule.[4]

We find the Proposal insupportable for many reasons, including the following:

The Commission has exceeded its rulemaking authority.

The Commission contends that this rulemaking is authorized by Advisers Act Section 211(h), a provision that was added to the statute by Section 913 of the Dodd-Frank Act.[5] We respectfully submit that the Commission has overstated its authority.

Congress enacted Section 913 to address a long-running debate over the appropriate standard of conduct applicable to personalized investment recommendations made to retail investors. Gaps between the fiduciary standard governing investment advisers and the suitability standard that applied to broker-dealers left retail investors vulnerable and confused. Congress did not resolve this debate itself; rather, it directed the Commission to do so, following the steps spelled out in Section 913, including a study, a report and rulemaking. In this last regard, Congress authorized the adoption of a fiduciary standard of conduct for broker-dealers providing personalized advice to retail clients. And it added a new subsection (g) to Section 211 of the Advisers Act authorizing the adoption of a harmonized standard of conduct for brokers and advisers that was no less stringent than advisers' existing fiduciary standard. Two aspects of Section 211(g) are especially significant.

The first is the direction that under a harmonized standard of conduct, "any material conflicts of interest shall be disclosed and may be consented to by the customer." The second is the prohibition against defining the term "customer" to include an investor in a private fund managed by an investment adviser, where the fund has entered into an advisory contract with the adviser.

In addition to authorizing the adoption of a harmonized standard of conduct for advisers and broker-dealers, Section 913 of Dodd-Frank also authorized certain ancillary rulemaking. In a new Section 211(h), entitled "*Other Matters,*" Congress directed the Commission to:

> (1) facilitate the provision of simple and clear disclosures to investors regarding their relationships with brokers, dealers and investment advisers, including any material

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[4] As indicated below, the Commission has adopted or proposed amendments to the recordkeeping rule at least seven times in the past nineteen months. *See infra.* note 45.

[5] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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.

When Section 211(h) is read in context—as fundamental principles of statutory construction demand[6]—it is clear that "certain sales practices, conflicts of interest and compensation schemes" in 211(h)(2) relate to the retail investor standard of conduct established under 211(g). Nothing in the legislative history suggests otherwise.[7]

In sum, Section 913 authorized the Commission to tackle the thorny problem of harmonizing broker-dealer and investment adviser standards of conduct with respect to retail investors. Section 913 did not grant the Commission *carte blanche* to regulate the use of technology generally, or to upend the principles-based Advisers Act regulatory regime that Congress constructed on the twin pillars of fiduciary duty and disclosure.

The Commission has not established a need for the Proposal.

The principles-based regulatory regime established under the Advisers Act is scalable and evergreen. The simple, yet elegant, design of the fiduciary duties of care and loyalty have protected investors from the days of rotary phones to today's world of mobile apps.

The duty of care requires an adviser to make "a reasonable investigation" to determine that it is not basing its advice on materially inaccurate or incomplete information, regardless of how that information is compiled or conveyed.[8] Likewise, the duty of loyalty requires an adviser to eliminate, or manage and disclose, "all conflicts of interest which might incline [the] adviser . . . to render advice [that is] not disinterested,"[9] whether or not those conflicts arise in connection with the use of technology. If a conflict does exist, the adviser must disclose that conflict clearly and obtain its clients' *informed* consent. If informed consent cannot be obtained, the adviser must either mitigate the conflict to make informed consent possible or eliminate the conflict altogether.[10] This flexible approach respects the fact that advisers and clients are a diverse lot, ill-served by one-size-fits-all regulation.

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[6] *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000).

[7] *See* Joint Explanatory Statement of the Committee of Conference, Conference Committee Report No. 111-517 to accompany H.R. 4173, 111th Cong., 2d Sess. (2010) at 870.

[8] SEC, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers,* Advisers Act Rel. No. 5248 (Jun. 5, 2019) ("Fiduciary Standard Release") at 16 and note 27, citing Division of Investment Management, "Robo-Advisers," IM Guidance Update No. 2017-02 (Feb. 2017), available at https://www.sec.gov/investment/im-guidance-2017-02.pdf.

[9] *Id.* at 23, citing *SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 191-192 (1963) ("*Capital Gains*").

[10] *Id.* at 28.

The Advisers Act Compliance Rule[11] is scalable and evergreen, too. This rule facilitates the implementation and enforcement of the duties of care and loyalty by requiring advisers to adopt and periodically test written compliance procedures that are tailored to advisers' particular risks and operations. Additional reviews of those procedures must be undertaken, and necessary adjustments to the procedures, made, whenever the adviser's operations change, including a material change in the adviser's use of technology. When it adopted the compliance rule in 2003, the Commission recognized the importance of flexibility, saying, "[A]dvisers are too varied in their operations for the [rule] to impose a single set of universally applicable required elements."[12]

An adviser's use of technology for marketing purposes is also governed by Advisers Act Rule 206(4)-1, which was substantially overhauled in December 2020, with a compliance date of November 2022. The revised rule—dubbed the "Marketing Rule"—was designed to address the dramatic technological changes that had taken place since its predecessor rules were adopted decades ago[13] and was intended to be adaptable to technological changes yet to come. In the Commission's words:

> This revision will expand the scope of the current rule to encompass all offers of an investment adviser's investment advisory services with regard to securities regardless of how they are disseminated . . . . We recognize that electronic media (including social media and other internet communications) and mobile communications play a significant role in current advertising practices. We also believe this revision will help the definition remain evergreen in the face of evolving technology and methods of communication.[14]

In the instant Proposal, the Commission acknowledges that that the Advisers Act's foundational fiduciary duties as well as its Compliance Rule and its Marketing Rule already address conflicts of interest arising in connection with advisers' use of technology.[15] The Commission also acknowledges that advances in technology over the eighty-plus-year lifespan of the Advisers Act "have helped to promote transparency, liquidity, and efficiency in our capital markets,"[16] and that the "use of technology is now central to how firms provide their products and services to investors."[17] The Commission does not identify any failure by the Advisers Act regulatory regime to keep pace with technological change.

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[11] Rule 206(4)-7.

[12] *Compliance Programs of Investment Companies and Investment Advisers*, Advisers Act Rel. No. 2204 (Dec. 17, 2003), *available at* SEC.gov | Compliance Programs of Investment Companies and Investment Advisers.

[13] The Advertising Rule, which was also denominated 206(4)-1, was adopted in 1961, while the Cash Solicitation Rule, designated 206(4)-3, was adopted in 1979.

[14] *Investment Adviser Marketing*, Advisers Act Rel. No. 5653 (Dec. 22, 2020) at 17, *available at* Final Rule: Investment Adviser Marketing (sec.gov).

[15] Proposing Release at 158-161.

[16] *Id.* at text accompanying note 19.

[17] *Id.* at 14.

Nevertheless, the Proposal veers sharply away from principles-based regulation. The Commission contends that because the Advisers Act "does not require *specific* elements" (emphasis in original) or "have *specific* obligations" (emphasis added) for eliminating or neutralizing conflicts of interest that novel technologies such as PDA and artificial intelligence (AI) may pose, a new, prescriptive layer of regulation is in order.[18]

This stance is perplexing because the machine learning-fueled modeling capabilities of AI have been used in financial applications like portfolio management, portfolio risk management and trading for years.[19] And PDA-like technologies have been used to provide investment advice since at least 2010, when the first robo-advisers began offering their services to the public at large.[20] Today's surge in AI/PDA tools is simply the natural consequence of a technological progression that has been building for at least thirty years. That being the case, we submit that the hysteria around these tools is overblown.[21]

The existing regulatory framework has effectively ushered investment advisers and their clients—at all levels of sophistication—from a pre-digital era into the interconnected world of cloud computing, social media and mobile applications.[22] The Commission has offered no evidence to the contrary. There is no need for this rulemaking.

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[18] Proposing Release at 222 – 223.

[19] The machine learning aspect of AI, for example, has been used to analyze large data sets and formulate quantitative strategies for years. *See generally* Candice Tse, "An AI On the Future," Goldman Sachs Asset Management Perspectives (Aug. 7, 2023), *available at* https://www.gsam.com/content/gsam/us/en/advisors/market-insights/gsam-insights/perspectives/2023/artificial-intelligence-future.html (stating AI as a concept has existed since 1956 and that machine learning and AI have been used in quant strategies in investing for some time); Söhnke M. Bartram*, et al*., "Artificial Intelligence in Asset Management," CFA Institute Research Foundation, (2020) at 4-5, *available at* https://www.cfainstitute.org/-/media/documents/book/rf-lit-review/2020/rflr-artificial-intelligence-in-asset-management.ashx (arguing "a large part of what is branded as AI (or [machine learning]) in finance is not new but has existed in the form of statistical or economic modeling techniques for a long time," and recent interest in AI is due to the increased computing power, data volume, and AI algorithm accessibility available today as compared to decades past).

[20] *See generally* Jill E. Fisch et al., "The Emergence of the Robo-advisor," Pension Research Council Working Paper 2018-12 (Dec. 2018) at 8, *available at* https://pensionresearchcouncil.wharton.upenn.edu/wp-content/uploads/2018/12/WP-2018-12-Fisch-et-al.pdf ("The first consumer-facing robo-advisors, Wealthfront and Betterment, began operations in 2008, yet neither company offered financial advice to retail investors until 2010.").

[21] *See generally* Patrick Grady and Daniel Castro, "Tech Panics, Generative AI, and the Need for Regulatory Caution," Center for Data Innovation (May 1, 2023), *available at* https://www2.datainnovation.org/2023-ai-panic-cycle.pdf (discussing how the escalation of exaggerated and misleading concerns about generative AI's potential to cause harm has followed a predictable trajectory called "the Tech Panic Cycle," and explaining how that phenomenon occurred for other technological advances like the printing press, the phonograph, and film).

[22] *See* Proposing Release at note 114.

The operative terms in Rule 211(h)(2)-4 are vague, overbroad and/or at odds with plain English.

Covered Technology

Rule 211(h)(2)-4(a) defines a "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." The precise contours of this definition are anyone's guess. Despite the Commission's stated intent to mitigate harm that may be caused by gamified or "smart" technologies that can be tailored to the unique proclivities of each investor through continued use, the rule's proposed definition of covered technology seems virtually limitless.[23] Given the costly ramifications of being scoped into the rule, the Commission must narrowly tailor the definition of covered technology to the perceived problem being addressed. It has not done so.

Investor

With regard to investment advisers, the Proposal defines "investor" as a current or prospective client or current or prospective investor in a pooled investment vehicle the adviser advises. By contrast, an "investor" under the broker-dealer side of the Proposal is limited to natural persons who seek or receive services primarily for personal, family or household purposes — in other words, retail customers. For the reasons explained above, we submit that Rule 211(h)(2)-4(a)'s broad definition of "investor" exceeds the scope of the Commission's rulemaking authority. We also find the distinction between the proposed Advisers Act and Exchange Act definitions puzzling. The Proposal is designed largely in response to the "gamification" of broker-dealer mobile trading apps,[24] not to address concerns about institutional investment advisory services. That being the case, there is no justification for imposing heavier compliance burdens on advisers than on broker-dealers.

Should the Commission proceed with this rulemaking—and we believe it should not—we urge the Commission to limit the Advisers Act definition of "investor" to retail clients.

Investor Interaction

Proposed Rule 211(h)(2)-4(a) defines an "investor interaction" as "engaging or communicating with an investor, including by exercising discretion with respect to an investor's account; providing information to an investor; or soliciting an investor." This definition is intended to cover the implementation of investment decisions on behalf of clients, as well as any form of communication with clients or prospective clients, including "any advertisements, disseminated by or on behalf of a firm, that offer or promote services or that seek to obtain or retain one or more investors."[25]

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[23] Even mundane tools, such as financial modeling applications used to detect historical correlations between economic business cycles and the market returns of various asset classes in order to optimize asset allocations for managed accounts, would be considered "covered technologies" under the rule. Proposing Release at 44.

[24] *Id.* at 13, 16.

[25] *Id*. at 50-51.

This definition is overbroad. If the Commission believes there is an unaddressed risk that AI and other new-fangled technologies may entice unsophisticated investors to make improvident investment decisions they cannot comprehend, the Commission should narrowly tailor an appropriate response. But there is no credible risk that fiduciary investment advisers are incapable of understanding the tools they use to develop and effectuate their investment advice. Discretionary managers' use of covered technology should be removed from the definition of "investor interaction."

Likewise, the use of covered technology for marketing purposes should be eliminated from the Proposal. Federally registered investment advisers have spent an enormous amount of time and money getting ready for the "evergreen" Marketing Rule's November 2022 compliance deadline. It is unconscionable for the Commission, less than one year later, to move the goal posts on permissible marketing practices again.

Conflict of Interest

In ordinary parlance, "conflict" is "a state of disagreement or disharmony between persons or ideas; a clash."[26] A conflict presupposes a tension between opposing or incompatible forces. A "conflict of interest" arises where a party's pursuit of one interest might compromise its ability to pursue a competing interest. Or, as the Supreme Court has put it, a conflict of interest is something that might "incline an adviser . . . to render advice that [is] not disinterested."[27]

By contrast, proposed Rule 211(h)(2)-4(a) defines *conflict of interest* as an adviser's use of a covered technology that "takes into consideration" an interest of the adviser or associated person thereof. With this much looser standard, there need not be any tension between the adviser's interest and that of its clients.

In addition to being at odds with plain English, the proposed definition of conflict of interest is overbroad and extremely vague. An adviser presumably would not employ any technological tool that did not advance its interests in some way. If the use of PDA to run "what-if" scenarios is designed to improve the adviser's performance, thus increasing asset-based revenues and making it easier to attract new business, does the adviser have a conflict of interest? What if the use of such performance-enhancing technology results in a recommendation to buy or sell highly-liquid, large-cap stocks that the adviser or its associated persons also own? Since the Commission warns that "the presence of any firm interest in any degree" would constitute a conflict of interest, we assume the answer to both questions is "yes."[28]

Such a "one-hand-clapping" approach to conflicts would impose substantial costs on advisers while doing nothing to protect investors. If this rulemaking moves forward, we ask the Commission to revert to the commonly accepted interpretation of conflicts of interest reflected in the Fiduciary Standard Release.[29]

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[26] The American Heritage Dictionary of the English Language (5th ed. 2011).

[27] *Capital Gains, supra* note 9.

[28] Proposing Release at 83.

[29] *See* note 8, *supra.*

The Commission has overstated the benefits and understated the costs of the Proposal.

Having failed to identify a need for this rulemaking, the Commission has also failed to conduct an appropriate benefit-cost analysis of the Proposal. On the benefit side, the Commission suggests that Rule 211(h)(2)-4 would help investors because it would apply to a broader set of investor actions than the existing Advisers Act regime covers. That is not so. An adviser's fiduciary duties already apply to "the entire scope of its relationship with its client[s],"[30] and the Advisers Act's antifraud provisions extend the adviser's obligation of fair dealing beyond the client relationship, to prospective clients as well.[31]

The Commission also states that replacing the existing duty to disclose conflicts and obtain informed client consent with a duty to eliminate or neutralize the effects of conflicts that place the adviser's interest ahead of its clients' will enhance investor protection. This assertion, too, is questionable. Conflict mitigation or elimination is already required where disclosure cannot elicit informed consent. Outlawing reliance on disclosure of conflicts that lend themselves to informed consent avails investors nothing. Finally, contrary to the Commission's assertion, substituting prescriptive procedural requirements for the flexible standards embodied in the Compliance Rule cannot be construed as a benefit in the absence of evidence that the current requirements put advisory clients at risk. As discussed above, the Commission has offered no such evidence.

With regard to the cost side of the ledger, the Commission has understated or simply ignored the expense, difficulty, and, in many cases, impossibility of complying with Rule 211(h)(2)-4.

The Commission has grossly underestimated the direct cost and time required of what it characterizes as "simple" and "complex" covered technology firms[32] because it fails to acknowledge the breathtaking scope of the term "covered technology." Virtually every type of technology a firm uses will trigger the initial assessment and one-sided conflict identification requirements of the proposed rule.[33] Since most, if not all, of these technologies might be found to consider the firm's interest in some way, advisers would also have far-ranging duties to identify which conflicts must be eliminated or neutralized and to take appropriate action regarding same.[34]

It is unlikely that the average firm has personnel with "sufficient knowledge of both the applicable programming language and the firm's regulatory obligations to review the source code of the technology, review documentation regarding how the technology works, and review the data considered by the covered technology (as well as how it is weighted)."[35] This will cause firms to either hire individuals with the requisite expertise—if they have the means to do so—or

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[30] Proposing Release at 161; Fiduciary Standard Release at 18.

[31] Fiduciary Standard Release at note 42; *See also* the Marketing Rule.

[32] Proposing Release at 184-185.

[33] Rule 211(h)(2)-4(b)(1).

[34] Rule 211(h)(2)-4(b)(2) and (3).

[35] Proposing Release at 63.

eliminate its use of the covered technology altogether.

The Commission's suggestion that firms could modify technologies to neutralize conflicts is also overly optimistic, as is the expectation that firms possess the requisite expertise to embed explainability features or curate data in a manner that is devoid of firm interest. Moreover, many firms use third-party technologies (like black box algorithmic trading applications) instead of proprietary tools precisely because they do not have the technological skills to create or modify such technologies themselves. It is laughable to think that third-party providers will comply with firms' demands to change the core functionalities of, or provide proprietary information about, their technologies simply because the SEC has adopted a new rule.

The Proposal also expects investment advisers to engage in prognostication. Rule 211(h)(2)-4(b)(1) requires firms to evaluate "any use or reasonably foreseeable potential use" of a covered technology for conflicts. How can a firm reasonably predict whether a conflict of interest would actually exist in a technology's future use? Developing mechanisms or models that could forecast potential and future conflicts of interest in current and future technologies would be an exploratory gamble at best, given how rapidly technologies evolve.

The most likely consequence of the Proposal is that it will "dissuade firms from using certain technologies when it is too difficult or costly to adequately evaluate the use of the covered technology, identify a conflict of interest, or determine whether they place the firm's or an associated person's interest ahead of an investor's."[36] This would introduce a perverse conflict of interest in which advisers refrain from using tools that clearly benefit investors in order to escape the burdens of a new regulation.

The benefits of the Proposal do not justify its costs. The Proposal should be withdrawn.

The Commission has failed to properly assess the impact of the Proposal on small advisers.

As is so often the case, the Commission has failed to assess the impact of the Proposal on small advisers because the standard the Commission uses to identify such businesses is so flawed. The assets-under-management test incorporated into Advisers Act Rule 0-7(a) ensures that the Commission's assessment of the effect of its rules on small advisers will eliminate almost the entire population of federal registrants from consideration. Ironically, the firms that do meet this unsuitable test may have more resources than the ones that do not. And because the firms that the Commission considers "small" do not manage assets,[37] they have far fewer regulatory burdens than other advisers do.

In the instant rulemaking, the implications of the flawed small-entity standard are not hard to find. To cite just one example, the Commission opines that "without appropriate personnel," an adviser may be unable to modify software or understand, monitor and update code as necessary to ensure its ongoing ability to identify and address conflicts of interest.[38] But the Commission

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[36] Proposing Release at 189.

[37] Instead, their right to register under the Advisers Act derives from some other activity that is deemed to have an effect on the national markets.

[38] Proposing Release at 32.

fails to explain what "appropriate personnel" means to the thousands of federally registered advisers who have only a handful of employees. The Commission also fails to acknowledge that a small adviser that engages a third-party service provider to perform the compliance tasks required by Rule 211(h)(2)-4 would rapidly sink into more compliance quicksand under the Commission's pending Outsourcing Proposal.[39] The practical effect of the Commission's blinders-on approach to regulatory flexibility will be to deprive small advisers of access to the tools they need to fulfill their fiduciary duties to their clients, or to drive them out of business altogether.

Because an adviser's ability to shoulder regulatory compliance burdens ultimately depends on its human resources, we believe that Rule 0-7 should be amended to identify small entities by looking at their staff, not their R-AUM. For this reason, we support the IAA Petition and urge the Commission to amend Rule 0-7 accordingly.

The Proposal must be evaluated in the context of other investment adviser rulemaking.

The Proposal is part of an avalanche of Commission rulemaking affecting investment advisers over the past two and a half years.[40] These actions, collectively, threaten to transform the principles-based Advisers Act regulatory regime into a costly, prescriptive, rules-based system that would overwhelm advisers and harm the clients they serve. The scope and pace of this rulemaking raise a number of concerns.

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[39] *Outsourcing by Investment Advisers*, Advisers Act Rel. No. 6176 (Oct. 26, 2022), *available at* Proposed rule: Outsourcing by Investment Advisers (sec.gov).

[40] Recent rulemaking includes: *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*; Advisers Act Rel. No. 6383 (Aug. 23, 2023), *available at* SEC.gov | Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews ("Private Fund Rulemaking"); *Regulation S-P; Privacy of Consumer Financial Information and Safeguarding Customer Information*, Advisers Act Rel. No. 6262 (Mar. 15, 2023), *available at* SEC.gov | Regulation S-P: Privacy of Consumer Financial Information and Safeguarding Customer Information ("Reg. S-P Proposal"); *Shortening the Securities Transaction Settlement Cycle*, Advisers Act Rel. No. 6239 (Feb. 15, 2023) *available at* SEC.gov | Shortening the Securities Transaction Settlement Cycle (Settlement Cycle Rule"); *Safeguarding Advisory Client Assets,* Advisers Act Rel. No. 6240 (Feb. 15, 2023) *available at* SEC.gov | Safeguarding Advisory Client Assets ("Safeguarding Proposal"); Outsourcing Proposal, *supra,* note 33; *Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers,* Exchange Act Rel. No. 96206 (Nov. 4, 2022), *available at* Final Rule: Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers (sec.gov); *Electronic Submission of Applications for Orders under the Advisers Act and the Investment Company Act, Confidential Treatment Requests for Filings on Form 13F, and Form ADV-NR; Amendments to Form 13F*, Advisers Act Rel. No. 6056 (Jun. 23, 2022), *available at* SEC.gov | Electronic Submission of Applications for Orders Under the Advisers Act and the Investment Company Act, Confidential Treatment Requests for Filings on Form 13F, and Form ADV-NR; Amendments to Form 13F; *Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices,* Advisers Act Rel. No. 6034 (May 25, 2022), *available at* SEC.gov | Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices; *Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies*, Advisers Act Rel. No. 5956 (Feb. 9, 2022), *available at* SEC.gov | Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies ("Cybersecurity Proposal").

First, they distort the public comment process. Even the most well-resourced commenters find it difficult to thoroughly analyze the Commission's successive, voluminous releases and answer the thousands of discrete questions posed therein in the time allotted. Although comment periods have reopened for certain proposals,[41] short, disjointed windows do not give the public the "meaningful opportunity" to participate in the Commission's rulemaking that the Administrative Procedures Act requires.[42]

The rapid issuance of successive, complex proposals also robs the Commission of the opportunity to use the public comments from one rulemaking to inform the design of the next. Commenters have repeatedly questioned the need for prescriptive new regulation of matters already addressed by fiduciary principles or existing rules[43] and have repeatedly questioned the Commission's assessment of the impact of its proposals on small advisers.[44] However, without addressing these important issues, the Commission has issued yet another proposal that repeats the same mistakes.

Furthermore, the scope and pace of the recent rulemaking set investment advisers up to fail. Before they can complete the many operational and compliance tasks necessary to address one batch of regulatory changes, another batch is upon them.[45] And as demonstrated by the Marketing Rule, an adviser may expend significant time and money complying with one new regulation, only to have its efforts rendered obsolete by a newer, inconsistent set of obligations.

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[41] *See e.g. Reopening of Comment Period for Safeguarding Advisory Client Assets*, Advisers Act Rel. No. 6384 (Aug. 23, 2023); and *Reopening of Comment Period for "Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies,"* Advisers Act Rel. No. 6263 (Mar. 15, 2023).

[42] 5 USCS § 553(c); *Craker v. United States DEA*, 44 F.4th 48, 55 (1st Cir. 2022) ("[T]he APA generally requires the agency to first publish a notice of proposed rulemaking and provide interested parties with a meaningful opportunity to comment on the proposal."). *See also* Executive Order 12866, Regulatory Planning and Review (Sept. 30, 1993), 58 Fed. Reg. 51735 (Oct. 4, 1993) ("[E]ach agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.").

[43] *See e.g.,* Comment Letter of Pickard Djinis and Pisarri LLP on the Outsourcing Proposal (Dec. 27, 2022); Comment Letter of the New York City Bar, Committee on Compliance on the Outsourcing Proposal (Dec. 27, 2022); Comment Letter of American Investment Council on the Outsourcing Proposal (Dec. 22, 2022); Comment Letter of Pickard Djinis and Pisarri LLP on the Cybersecurity Proposal (May 3, 2022); and Comment Letter of Investment Adviser Association on the Cybersecurity Proposal (Apr. 11, 2022).

[44] *See e.g.,* Comment Letter of U.S. Small Business Administration, Office of Advocacy on the Safeguarding Proposal (May 5, 2023); Comment Letter of Pickard Djinis and Pisarri LLP on the Safeguarding Proposal (May 8, 2023); Comment Letter of Investment Adviser Association on the Outsourcing Proposal (Apr. 20, 2023); Comment Letter of Pickard Djinis and Pisarri LLP on the Outsourcing Proposal (Dec. 27, 2022); and Comment Letter of American Investment Council on the Outsourcing Proposal (Dec. 22, 2022).

[45] In the past nineteen months alone, the Commission has adopted or proposed seven separate amendments of the Advisers Act recordkeeping rule. In addition to the Proposal, amendments to Rule 204-2 have been adopted in connection with Private Fund Rulemaking and the Settlement Cycle Rule and have been proposed in the Reg. S-P Proposal, the Safeguarding Proposal, the Outsourcing Proposal, and the Cybersecurity Proposal.

For large advisers, frenetic rulemaking poses a budgeting and planning nightmare; for small advisers, it poses an existential threat. If the Commission has determined that investment advising is no longer an appropriate business for small firms it should say so and explain how that determination comports with the agency's mandate to foster competition and protect investors. If forced consolidation of the investment adviser industry is not the Commission's goal, we urge the Commission to take a more measured and holistic approach that recognizes the cumulative impact of all new rules and rule amendments on an already robust and mature regulatory regime.

CONCLUSION

For all the foregoing reasons, we respectfully urge the Commission to terminate this rulemaking and withdraw the Proposal. We would be happy to supply any additional information you may desire about the matters discussed above. Kindly contact the undersigned at 202.223.4418 if we can be of further assistance.

Respectfully submitted,

Mari-Anne Pisarri

cc: The Honorable Gary Gensler, Chairman
The Honorable Hester M. Peirce
The Honorable Caroline A. Crenshaw
The Honorable Mark Uyeda
The Honorable Jaime Lizárraga
William A. Birdthistle, Director, Division of Investment Management