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VIA ELECTRONIC MAIL: rule-comments@sec.gov

October 10, 2023

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

Re: File Number S7-12-23: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers

Dear Ms. Countryman:

On July 26, 2023, the Securities and Exchange Commission ("SEC" or "Commission") proposed new rules under the Securities Exchange Act of 1934, as amended (the "Exchange Act") and Investment Advisers Act of 1940, as amended (the "Advisers Act") requiring registered investment advisers and broker-dealers to eliminate, or neutralize the effect of, certain conflicts of interest associated with their interactions with investors through the use of certain "covered technologies" (the "Proposal" or the "Proposed Rules").[1] The Proposal was published in the Federal Register on August 9, 2023.

On behalf of the Atria Wealth Solutions independent broker/dealers and SEC-registered investment advisers, specifically, Cadaret Grant & Co., NEXT Financial Group, Inc., SCF Securities, Inc. and SCF Investment Advisors, Inc., Western International Securities, Inc., Grove Point Investments, LLC, Grove Point Advisors, LLC, CUSO Financial Services, L.P., and Sorrento Pacific Financial, LLC, (collectively, the "Firms") we appreciate the opportunity to comment on the Proposal and note our collective agreement with the factual and legal considerations and points detailed in the letter filed by The Financial Services Institute ("FSI"). The Firms collectively serve the needs of U.S. investors by providing individualized services and support from over 2,700 financial professionals.

[1] Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, SEC Release Nos. 34-97990; IA 6353 (July 26, 2023), 88 Fed. Reg. 53960 (Aug. 9, 2023), available here.

On behalf of the Firms, we comment separately for the purpose of highlighting the negative impact the Proposed Rules would have on broker-dealers, investment advisers, and investors, and implore the SEC to withdraw the Proposal as currently drafted.

1. Introduction

The Firms believe that the Proposal should be withdrawn because it is overly broad, problematic, impractical, and, if adopted, would significantly alter broker-dealers' and investment advisers' existing business models and standards of care without providing any meaningful investor protection benefit. The Proposal would require firms to identify and evaluate every potential conflict of interest resulting from any use of a "covered technology" in an "investor interaction."[2] If a conflict "place[s] the interests of the [firm] . . . ahead of the interests of investors," the firm would be required to "eliminate or neutralize" the conflict.[3] The definitions of "covered technology," "investor interaction," and "conflict of interest" are excessively overbroad, encompassing all aspects of a firm's operations.

The Proposal relies on conclusory and unsupported statements about the dangers of "technology," without giving adequate consideration to the benefits that technology and innovation bring to investors through the form of better service and decreased cost. The SEC fails to acknowledge or understand how technology is used by broker-dealers and investment advisers, and, in doing so, does not acknowledge or consider the substantial harmful ripple effects and limitations for retail investors if the Proposal is adopted.

2. Comments

a. The Proposal Would Conflict with Existing Standards of Conduct

The Proposal would supersede current regulations and established legal standards, including Regulation Best Interest ("Reg BI") and the investment adviser fiduciary duty (the "Standards of Conduct") and, in many instances, would directly contradict past SEC guidance surrounding how firms address conflicts of interest. The Proposal defines "conflict of interest," as "when a [firm] uses a covered technology that takes into consideration an interest of the [firm], or a natural person who is an associated person of a [firm]."[4] Importantly, the definition takes into account any use of a "covered technology,"[5] and not just a use that is tied to a securities recommendation or securities advice, which is a far broader scope of conflicts than is contemplated by the Standards of Conduct.

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[2] Proposed Rules 15l-2(b)(1) and 211(h)(2)-4(b)(1).

[3] Proposed Rules 15l-2(b)(3) and 211(h)(2)-4(b)(3).

[4] Proposed Rules 15l-2(a) and 211(h)(2)-4(a).

[5] "Covered technology" is defined in the Proposed Rules 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." *See* Proposed Rules 15l-2(a) and 211(h)(2)-4(a).

If a broker-dealer or investment adviser determines that such a conflict of interest "results in an investor interaction that places the interests of the [broker-dealer or investment adviser] . . . ahead of the interests of investors," the firm must "eliminate, or neutralize the effect of" the conflict.[6] This, again, is contrary to the SEC's approach to addressing conflicts under the Standards of Conduct, where firms are often permitted to disclose and/or mitigate conflicts rather than eliminate them.

b. The Proposed Rule Would Be Significantly Burdensome for Independent Financial Services Firms to Apply

The Proposal would be especially impactful on independent financial services firms. By way of background, dually-registered independent financial advisors[7] associated with independent financial services firms are typically self-employed independent contractors, rather than employees of a broker-dealer through which they are registered. Independent financial advisors make significant investments in their own businesses, including in technology to help them run those businesses. Typically, independent financial services firms do not mandate that independent financial advisors use a specific set of pre-selected technologies. By design, independent financial advisors expect flexibility in the software, hardware, and third-party vendors they can use to best serve their customers. Many of these technologies operate to effectively serve and help customers identify and implement investment strategies intended to benefit them and meet their financial priorities, goals and objectives. The Proposal would require independent financial services firms to collect, catalogue, and evaluate *every technology* used by its independent financial advisors in an "investor interaction," including reviewing any use or reasonably foreseeable use of said technology to determine whether it presents a conflict of interest.[8] In the event that a conflict of interest exists that could cause the financial advisor to place his or her interest ahead of the interest of investors, the independent financial services firms would be required to "eliminate or neutralize" the conflict.

In the independent financial services firm model, where each financial advisor has the freedom to select the technology that best fits their business, collecting and evaluating information about every technology used in an "investor interaction" is a virtually impossible burden, and could lead to their not being able or willing to use such technology that would have been beneficial to those customers by providing additional resources and guidance to consider. The Firm believes that, if the Proposal is passed, it would radically change the independent financial services firm model by forcing independent financial services firms to pre-select certain technologies for use by its associated independent financial advisors, preventing independent financial advisors from selecting technologies that best serve their customers' interests.

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[6] *See* Proposed Rules 15l-2(b) and 211(h)(2)-4(b). The SEC does not explain in the Proposing Release the difference between "eliminating" and "neutralizing the effect of" a conflict.

[7] The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a dually registered representative of a broker-dealer and an investment adviser representative of a registered investment adviser firm. The use of the term "investment adviser" or "adviser" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

[8] *See* Proposed Rules 15l-2(a) and 211(h)(2)-4(a).

c. The Proposal Would Jeopardize Differential Compensation Arrangements.

The Proposal would also jeopardize the viability of differential compensation arrangements**.** Because technology proliferates every aspect of a broker-dealer's business, the Proposal is likely to apply to every recommendation made by a financial advisor, and subsequent sale by a broker-dealer. Because of the Proposal's broad and novel definition on "conflict of interest," if the Proposal is adopted, broker-dealers may no longer be permitted to pay differential or variable compensation for the sale of any product available on their platform. The end-result is that many broker-dealers may be required to levelize compensation across all product types – a scenario that fails to account for the plurality and diversity of compensation arrangements across product types.

In the adopting release for Reg BI, the SEC specifically discussed "mitigation methods" that firms could implement to comply with the Conflict of Interest obligation with regard to differential compensation arrangements[9] If the Proposal moves forward, this guidance would be rendered meaningless and firms would be forced to abandon the approach under Reg BI.

d. The Proposal Fails to Comply with the Administrative Procedures Act ("APA")

Finally, the Proposal does not comply with the APA's rulemaking requirements.[10] In any rule proposal, the SEC has an obligation to provide sufficient factual detail on the legal basis, rationale, and supporting evidence for regulatory provisions such that interested parties are "fairly apprised" of content, the reasoning of the agency implementing them, and the foreseeable manner in which such regulations may affect their interests."[11] The SEC fails to comply with the APA in two important respects: (1) it does not give adequate consideration on how firms use technology to deliver better outcomes and innovative, cost-efficient products and services to investors; and (2) it overlooks the connections and interdependencies between the Proposal and other pending SEC proposals.

Conclusion

The Firms believe that the SEC should withdraw the Proposal and proactively collaborate with broker-dealers and investment advisers to enhance its understanding of the technology used by firms in their interactions with investors. We respectfully propose that the SEC should recognize the substantial and important protections that are already in place through the existing Standards of Conduct and regulatory framework, and should tailor any future rulemaking to avoid conflicts with existing law, rules, and regulations.

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[9] *See* Regulation Best Interest, Securities Exchange Act Release No. 86031 (June 5, 2019), 84 Fed. Reg. 33318, 33392 (July 12, 2019) (the SEC notes that firms could ""minimiz[e] compensation incentives for employees to favor one type of account over another; or to favor one type of product over another, proprietary or preferred products, or comparable products sold on a principal basis, for example, by establishing differential compensation based on neutral factors."

[10] 5 U.S.C. § 553.

[11] *See*, *e.g.*, *Mid Continent Nail Corporation v. United States*, 846 F.3d 1364, 1373-74 (Jan. 27, 2017).

The Firms are committed to constructive engagement in the regulatory process and welcomes the opportunity to work with the SEC on this effort and to participate in further discussions regarding these important issues and other regulatory efforts. We look forward to continued consideration and evaluations of the FSI letter and similar advocacy in this regard.

Thank you.

Respectfully submitted,

DocuSigned by:
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