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VIA ELECTRONIC MAIL

October 10, 2023

Ms. Vanessa A. Countryman
Secretary
U.S. 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 (SEC Rel. Nos. 34-97990; IA-6353; File No. S7-12-23)

Dear Ms. Countryman:

The Lincoln Investment Companies appreciates the opportunity to comment on the Securities and Exchange Commission's ("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.

The Lincoln Investment Companies ("the Firm") is a privately held financial services company with its main office in Fort Washington, Pennsylvania. Our companies include Lincoln Investment Planning, LLC, a registered investment adviser and broker-dealer, and Capital Analysts, LLC, a registered investment adviser. We have been providing advice to individuals, families and institutions for over fifty years.

The Firm notes its agreement with the points found in the comment letter submitted by the Financial Services Institute ("FSI") regarding the Proposed Rules. We also agree with a number of positions presented in the September 12, 2023 letter filed by industry associations and trade groups. We write separately to emphasize the following points and to urge the Commission to withdraw the Proposal.

1. Overview

Our Firm is committed to working with the SEC and its staff on our shared goals of protecting investors while at the same time encouraging innovation that benefits investors. However, the expansive scope of the Proposal and the vagueness within it would cause a chilling

[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).

effect on even minor types of innovation and interactions with investors. Further, the Proposal effectively supplants aspects of the already complex regulatory regime under which financial services firms operate. The Proposal, if adopted, would impose an unworkable approach to addressing technology and investor communications and significantly alter the standard of care applicable to customers of broker-dealers and investment advisers, without providing commensurate meaningful investor protection. The Proposal would require firms to identify and evaluate every conflict 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 danger of "technology," as a whole, without giving adequate consideration to (1) the benefits that technology and innovation bring to investors through the form of greater access, better service and decreased costs and (2) the current regulatory construct that addresses communications with the public and obligations to act in the best interest of the investor.

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.

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. This, again, is a departure from the SEC's approach to addressing conflicts under the Standards of Conduct, which calls for elimination of certain conflicts, but permits firms to mitigate/disclose others. The Proposal instead introduces the new standard of neutralization, which

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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).

is both undefined and unclear. Further, the Proposal does not adequately address the difference between neutralization and mitigation or demonstrate why the current standards are not workable.

The Proposal would benefit from additional efforts to analyze the existing regulatory framework, seek to minimize costs and burdens and limit the scope to the types of technology that demonstrably pose the greatest risks. The Proposal is replete with references to actions that "might" or "could" or "may" occur that form the basis for the need to eliminate or neutralize conflicts, without providing substantive evidence that the existing regulatory framework does not or could not provide sufficient oversight. It is incumbent upon the SEC to consider a thorough economic analysis of the benefits and costs of the Proposed Rule to address any such deficiencies.

We are concerned with the broad scope of the Proposal, which would limit the ability of financial professionals to use important and highly beneficial tools to effectively communicate with investors – whether to provide financial education, coaching, or guidance, or to provide advice to existing clients. And while masked in concerns about the use of emerging technology, including "artificial intelligence," the Proposal is in fact primarily intended to address a concern about conflicts of interest more broadly, a concern that is already adequately covered by existing regulatory framework and controls, including the Standards of Conduct, the SEC Marketing Rule, FINRA Rules and Department of Labor regulations and guidance (as to retirement investors).

b. The Proposed Rule Would Adversely Impact Independent Financial Services Firms

The Proposal would be especially impactful on independent financial services firms given the sheer volume of "covered technology" as described under the Proposal. By way of background, dually-registered independent financial professionals associated with independent financial services firms are typically self-employed independent contractors, rather than employees of broker-dealers through which they are registered. Independent financial professionals make significant investments in their own businesses, including in technology, to help them run those businesses. The Proposal would require independent financial services firms to collect, catalogue, evaluate and test *every technology* used by the Firm and its independent financial professionals in an "investor interaction," including reviewing any use or reasonably foreseeable use of said technology to determine whether it presents a conflict of interest.[6] Under the Proposal, this process would need to be documented and repeated. In the event that a conflict of interest exists that causes the financial professional to place his or her interest ahead of the interest of investors, the independent financial services firm would be required to "eliminate or neutralize" the conflict, including those employed by its independent financial professionals. This is in contrast to the Conflict of Interest Obligation under Reg BI which the Reg BI Adopting Release noted "was intended to provide flexibility to broker-dealers regarding how to address conflicts of interest, whether through disclosure . . . or elimination." Additionally, the Proposal does not accurately assess the time, cost or burden associated with this process or justify the basis for imposing these requirements.

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

c. The Proposal Would Impact Compensation Arrangements

The Proposal would also impact compensation arrangements, including differential compensation arrangements, without providing adequate analysis of the consequences to the public, the industry and investors. Because technology proliferates every aspect of a broker-dealer's business, the Proposal is likely to apply to every recommendation made by a financial professional, and subsequent sale by a broker-dealer. Because of the Proposal's broad and novel definition of "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 broker-dealers may be required to levelize compensation across all product types, a scenario that fails to consider the diversity and complexity of products and compensation arrangements and fails to take into account the costs to bring products and services to investors and continue to maintain the availability of those products and services. The Standards of Conduct prescribe a process for addressing conflicts of interest associated with differential compensation arrangements and firms have implemented measures to comply. If the Proposal moves forward, this guidance would be rendered meaningless.

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

Finally, the Proposal does not comply with the APA's rulemaking requirements.[7] 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 manner in which such regulations foreseeable may affect their interests."[8] The SEC fails to comply with the APA in two important respects: (1) it does not give adequate consideration to the manner in which 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, as well as existing Rules.

Conclusion

We appreciate this opportunity to provide our comments on the Proposal. The Firm is committed to constructive engagement in the regulatory process and welcomes the opportunity to assist the Commission with its mission of protecting investors.

Respectfully submitted,

Susan Oberlies
SVP, Corporate Counsel & Secretary
The Lincoln Investment Companies

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[7] 5 U.S.C. § 553.

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