Erika Moore
Vice President and
Corporate Secretary
805 King Farm Boulevard
Rockville, MD 20850

VIA ELECTRONIC MAIL

October 10, 2023

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

Re: Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, Securities Exchange Act Release No. 97990, 88 Fed. Reg. 53960 (August 9, 2023) (File No. S7-12-23).

Dear Ms. Countryman:

The Nasdaq Stock Market LLC[1] ("Nasdaq") appreciates the opportunity to comment on the recent proposal, "Conflicts of Interest Associated with the Use of Predictive Analytics by Broker-Dealers and Investment Advisers" (the "Proposal"), published by the Securities and Exchange Commission ("Commission" or "SEC") on August 9, 2023.

Nasdaq supports the Proposal's goals of ensuring that regulated entities use new technologies and practices in a responsible manner, but believes that the Proposal's scope is too broad, and the terms contained therein too vague, to be effective at addressing the problems identified therein.

Specifically, we recommend that the Commission modify the proposal to further clarify the circumstances in which such new technologies raise unique conflicts of interest issues, and allow covered entities to address such concerns through disclosure of conflicts of interest or compliance through existing regulatory standards. Nasdaq further recommends that the Proposal

[1] Nasdaq ("NDAQ") is a global technology company serving the capital markets and other industries. Nasdaq has been a technology leader throughout its fifty-year tenure, developing market infrastructure that today powers more than 130 of the world's market infrastructure operators, including broker-dealers, exchanges, clearinghouses, and central securities depositories, in over 50 countries with end-to-end, mission-critical technology solutions. To learn more about the company visit www.nasdaq.com.

be revised to narrow the scope of "covered technologies" to only those that raise unique concerns about conflicts of interest identified by the Commission in the preamble to the Proposal.

Our recommendations are based on the belief that, as the Commission responds to the challenges raised by new technologies such as predictive analytics, existing regulations should be relied upon to the greatest degree possible to meet the challenge, and new rules be reserved for those issues not addressed by existing regulations. This approach not only avoids confusion over the application of overlapping regulations, but is also essential to provide the clarity and transparency necessary for innovation to flourish. It is particularly important in the context of conflicts of interest rules, which involve established interpretations by the Commission and FINRA developed over years of comment and relied upon by the industry.

Recognizing the complexity of issues raised by the use of predictive analytics, as well as the recent rapid changes in technology, Nasdaq suggests that the Commission mobilize industry expertise to identify the best and most efficient solutions to address the potential abuse of predictive analytics. This could be accomplished through a Commission-sponsored roundtable of experts with knowledge of the latest innovations, or possibly through a working group or blue-ribbon panel of industry experts. The goal would be to identify workable solutions to curb abuse while not stifling innovations that could benefit investors. The group could be given a set deadline to ensure that the work will be completed within a reasonable timeframe. We believe that a revised proposal should wait for such input, and would greatly benefit as a result.

The Commission should allow covered entities to address concerns about conflicts of interest through various means, including appropriate disclosure, and provide greater clarity about what it means to "eliminate" or "neutralize" a conflict.

The Proposal establishes a new standard for addressing conflicts of interest. Under the proposal, firms are required to "eliminate" or "neutralize" conflicts when an investor interaction places the interest of the firm "ahead of the interest of investors," but there is no option to address the risk of potential conflicts through appropriate disclosure.[2] This is a significant departure from the disclosure-based regime that the Commission has adopted in other contexts.

In the preamble to the Proposal, the Commission states that the newly proposed requirements are necessary in light of novel technologies, which are unique in their potential harm "due to the scalability of these technologies and the potential for firms to reach a broad audience at a rapid speed."[3] According to the Commission, the new technology necessitates a new approach to compliance because "when a firm uses covered technology in an investor interaction involving a conflict of interest, scalability can make disclosure of the conflict unachievable in many circumstances such that disclosure alone would be insufficient to adequately address the conflict of interest. This is because a conflict can replicate to a much

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[2] Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, Securities Exchange Act Release No. 97990, 88 Fed. Reg. 53960, 53969 (August 9, 2023) (File No. S7-12-23) ("Proposal").

[3] Id. at 53961.

greater magnitude and at a much greater speed than would be possible to address through timely disclosures."[4]

Although the Commission explains that this new standard is appropriate because of the "scalability" that PDA-like technologies create, the scope of the Proposal is not so limited. For example, the Proposal defines a conflict of interest to exist whenever a firm has "an interest" in an interaction. Without a limiting factor, however, an "interest" would exist in most interactions between a firm and its investors.[5]

It is also not clear how a firm would identify whether its interests would "come ahead" of its investors. As examples, the Commission identifies situations where it concludes that a firm has a conflict of interest where it stands to benefit to the detriment of its investors, such as using technologies to enroll investors in products that "financially benefit the firm but may not be consistent with" the investors' goals or risk tolerance.[6] There are, however, myriad other situations in which a firm could have "an interest" in an interaction that is not to the detriment of the investor. The Proposal does not offer a rubric, however, to distinguish between interests that might present an issue and those that do not.

Even if such a conflict is identified, the Commission does not describe what it means to "eliminate" or "neutralize" such a conflict, other than to eliminate the investor interaction entirely, or why those are the only remedies that should be available.

The Commission cites to the risk posed by "scalability" of PDA-like technologies for why timely disclosure is impossible to address a potential conflict, and also contends that the

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4 Id. at 53988.

5 For example, the Commission discusses how firms use PDA-like technology to engage directly with their investors, including through "digital engagement practices," such as "behavioral prompts, differential marketing, game-like features (commonly referred to as 'gamification'), and other design elements or features designed to engage retail investors when using a firm's digital platforms (e.g., website, portal, app)." Proposal at 53964. Given this discussion, it seems that the Commission is suggesting that even in these contexts, a firm would be viewed as having an "investor interaction" and given the potential benefits to the firm (from efficiency or lowered costs, etc.) to the firm, that these types of interactions would present a "conflict of interest" under the Proposal, given that the firm would "have an interest".

6 Proposal at 53967. The other examples the Commission provides in this section of the discussion have the same features of firms using technology to make decisions that the Commission concludes are to the detriment of investors, such as to "encourage investors to enter into more frequent trades or employ riskier trading strategies (e.g., margin trading) that will increase the firm's profit at the investors' expense, or inappropriately steer investors toward complex and risky securities products inconsistent with investors' investment objectives or risk profiles that result in harm to investors but that financially benefit the firm." Id.

complexity of PDA-like technology would make disclosure "lengthy, highly technical and variable, which could cause investors difficulty in understanding the disclosure."[7]

Although it is possible that certain PDA-like technologies could create conflicts that are not able to be resolved through disclosure, the Commission does not explain why it is impossible, in all uses of covered technology, to provide "timely disclosure," given that the same technology that scales interactions with investors can also be used to provide disclosures at each relevant point in the interaction. In light of the broad scope of the Proposal and its intent to cover existing technology as well as technology to be developed in the future, the Commission should not eliminate the possibility that disclosure can be provided in a timely and robust manner.

We urge the Commission to tailor the Proposal to the specific risks it seeks to address. Not all investor interactions and potential "conflicts of interest," as defined in the Proposal, result in the same degree of investor harm and require the same response. The Commission should consider the magnitude and likelihood of harm to investors that the potential conflict presents and whether there are countervailing benefits, either to the investor or to the markets that compensate for those risks. In many circumstances, simple disclosure should suffice as a remedy.

In light of the multifaceted nature of interactions between firms and investors and the wide range of potential conflicts of interest, the Commission should either narrow the Proposal to address solely those interactions that raise unique concerns or broaden the options for compliance.

The Commission should narrow the scope of "Covered Technology" solely to those technological practices that raise unique concerns about conflicts of interest.

We recommend that the Commission revise the Proposal to more precisely match the scope of issues the Commission identifies in the preamble. As drafted, the definitions of key terms such as "covered technology" and "investor interaction" are too broad and could reasonably include the full suite of technology and operational systems used by firms. This has the effect of creating wide-reaching compliance obligations which may be unrelated to the purpose of addressing conflicts of interest.

In the preamble, the Commission discusses trends and risks from technology such as "predictive data analytics," digital engagement practices that lead to "gamification," and artificial intelligence ("AI"), each of which are distinct technology implementations.[8] The Proposal is much broader, however. The "covered technology" is a non-exclusive list of generic tools and practices that form the basis for many technologies, such as "algorithms" and "models" and, in each case, to the extent that these components "predict[], guide[], forecast[], or direct[]" investment-related behaviors or outcomes.[9] This definition includes no limiting principle, but rather appears to apply to all systems that contribute to the operation of the covered entity

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7 Id. at 53967.

8 Id. at 53964.

9 Id. at 53963.

indiscriminately. Such a broad application is not consistent with the underlying rationale presented in the Proposal to protect investors from conflicts of interest.

The Proposal also imposes requirements on covered technologies used in connection with investor interactions, requiring firms to evaluate whether there is an associated conflict of interest, and obliging firms to test such technology periodically and when material modifications are made.[10]

Here, too, the Proposal's broad definitions would likely implicate the entirety of an entity's systems. The preamble includes a far-reaching discussion about technology as it relates to, among other things, "design elements or features designed to engage retail investors when using a firm's digital platforms (e.g., website, portal, app)," technology to develop investment strategies, and technology that is used to "analyze the success of specific features and marketing practices at influencing retail investor behavior," as well as "outsourcing their back office operations to vendors that rely heavily on technology."[11] With respect to AI, the Commission does not limit the scope of the rule to a specific AI implementation or use, but rather discusses AI that is and can be used for "responding to customer inquiries, automating back-office processes, quality control, risk management, client identification and monitoring, selection of trading algorithms, and portfolio management."[12]

Taken together, the breadth of covered technologies, investor interactions and the undefined concept of an "interest" make it difficult to discern any limits on the Proposal. Without a clear limit or an articulable standard for compliance, an entity would likely have to create a parallel technology review process for large aspects of its systems even though not all systems raise the concerns motivating the Proposal. Although the Commission explains that the Proposal is in line with Commission practice to "evolve[] regulation in light of market and technological developments,"[13] the Proposal in fact would apply to technology that does not necessarily change the nature of investor interaction, and therefore the impact of the Proposal is broader than justified by its own terms.

In light of these concerns, we recommend that the Commission mobilize industry expertise through an expert roundtable, working group or blue-ribbon panel to identify the best and most efficient solutions to address the potential abuse of predictive analytics. The goal of such input would be to modify the operative text of the Proposal to target solely those technologies and investor interactions that actually create a unique conflict of interest, rather than including technological components, i.e., algorithms, models, etc., that would de facto include all technology. A revised proposal should wait for such input.

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Nasdaq appreciates the opportunity to respond to the Commission's Proposal and applauds the Commission's actions to enhance investor protection. While Nasdaq supports the

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10 Id. at 53980.

11 Id. at 53964.

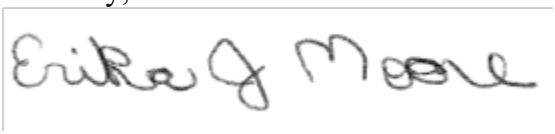
12 Id. at 53965.

13 Id.

Commission's efforts, it requests that the Commission consider the modifications noted above to ensure that the Proposal is appropriately tailored to the harms that the Commission has identified.

Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely,



Erika Moore
Vice President and Corporate Secretary