

Congress of the United States

Washington, DC 20515

April 26, 2024

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington D.C. 20549

RE: SEC Predictive Data Analytics Proposed Rule (RIN 3235-AN00)

Chair Gensler:

We applaud the SEC for considering what actions are necessary to address the potential risks associated with predictive data analytics, artificial intelligence, and digital engagement practices used in investor interactions. While emerging technologies can present new threats to investors, and we support proactive efforts to address those associated risks, predictive data analytics tools can also provide many benefits to consumers. We encourage the SEC to clarify the proposed Predictive Data Analytics Rule, as necessary, to protect consumers from harmful conflicts of interest, while also maintaining consumers' access to PDA technologies that provide investors with valuable information, assistance, and tools.

As drafted, the proposal requires covered entities to determine whether a conflict of interest puts the interests of the firm ahead of the interests of the investor. We agree that firms should not use predictive data analytics tools that disadvantage investors, however, the proposal does not state how a firm should determine if their interest is being put ahead of the investor, or a group of investors who may have different goals. This ambiguity is especially difficult to resolve in instances where a firm identifies a conflict of interest that is not clearly detrimental to the interest of an investor. Commenters have described several services that prompt investors to take reasonable actions that will help them achieve their investment goals. For example, increasing contributions to their retirement fund, or speaking with an advisor about ways to achieve those goals. In these instances, a conflict of interest may exist because the broker-dealer or investment advisor could understandably expect to generate revenue if the investor increases their contributions to a retirement fund or agrees to pay for the advice of a regulated advisor. It is unclear, however, if this conflict of interest alone results in the interest of the firm being put ahead of the interests of the investor. While the firm could receive additional revenue, the investor may benefit from the recommendation and ultimately be better equipped to achieve their financial goals.

The SEC's proposed Predictive Data Analytics (PDA) Rule requires a broker-dealer or investment advisor to identify any conflict of interest resulting from the use of a "covered technology" in an investor interaction, determine if the technology places the interest of the firm ahead of investors; and eliminate or neutralize the effects of the conflict. A "covered technology" under this rule is defined as any analytical, technological, or computational function, algorithm, model, or similar method or process that optimizes for, predicts, guides, forecasts, or directs investment-related behaviors or outcomes. This definition of "covered technologies" could be interpreted to include technology as simple as an Excel Spreadsheet, or as complex as the latest generative AI model.

Appropriately, a goal of the proposal is to regulate digital engagement practices and the use of certain predictive technologies such as artificial intelligence, when interacting with retail investors, especially where harmful conflicts of interest may not be apparent. As many commenters have noted, the proposal would require the elimination or neutralization of *any* interest of the firm in PDA that results in the interest of the firm being put ahead of the interests of the investor, and it would treat retail and institutional investors similarly in the regulation of these potential conflicts. While we agree that disclosure of conflicts of interest, like those allowed under Regulation Best Interest, may not be effective for complex artificial intelligence, especially when interacting with retail investors, we believe that additional clarity is needed to preserve access to PDA tools that benefit consumers. Further, there may be instances where institutional investors are better equipped to understand the complexities of certain technologies and in such cases disclosure may be sufficient. We hope the Commission will clarify the proposed PDA Rule to align with the existing differentiation between retail and institutional investors.

We agree that *harmful* conflicts of interest should be eliminated, however, we are concerned that the proposed rule does not clearly articulate how firms should address situations where a conflict may exist, but the recommendation itself would be beneficial to the investor, nor does the proposal provide clear guidelines for how to “neutralize” such a conflict. We appreciate the Commission’s discussion of these issues in the preamble of the proposed rule, but we are concerned that the rule itself fails to capture the nuance articulated in the Commission’s preamble. Without further clarification, we worry that firms will choose to stop offering products that are beneficial to investors to avoid pitfalls created by legally ambiguous aspects of the proposed rule.

We encourage the Commission to continue its work to address risks stemming from emerging technologies. While we agree with many of the Commission’s stated goals for the proposed PDA Rule, we encourage the Commission to clarify how the proposal would work in practice, including how it would incorporate related existing rules, guidance, and standards regarding the use of investment analysis tools. The Commission could do so by clarifying how the proposal applies to mutually beneficial applications of PDA, and by providing a detailed description of how such conflicts should be neutralized to ensure investors are protected from conflicts of interest. This clarity will avoid inadvertently limiting access to tools that can help Americans achieve their financial goals, while also addressing the serious concerns raised by the Commission.

Thank you for your attention to this matter. We look forward to continuing to engage with you and your staff to address investor protection issues related to emerging technologies.

Sincerely,



Brad Sherman
Member of Congress
Ranking Member
Subcommittee on Capital Markets



Bill Foster
Member of Congress
Ranking Member
Subcommittee on Financial Institutions
and Monetary Policy

cc: The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark Uyeda, Commissioner
The Honorable Jaime Lizárraga, Commissioner