September 19, 2023

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE,
Washington, DC 20549-1090.

RE: File Number S7-12-23.
Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, RIN 3235-AN00; 3235-AN14

Dear Ms. Countryman:

On behalf of our members, the undersigned organizations are submitting this letter regarding the proposed rule entitled: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers. ***Briefly, we urge the SEC to withdraw the proposal because it suffers from numerous irreparable flaws. This letter focuses on the proposal's inadequate economic analysis that is lacking in substance; many, if not all, of the undersigned organizations will be submitting individual and/or joint comment letters that will focus on the other reasons why this proposal should be withdrawn. The flawed economic analysis raises the probability that the proposed rule, if finalized as is or in any comparable form, would be struck down by a court that would be likely to find it arbitrary and capricious. We believe that a more substantive and complete economic analysis would demonstrate that the proposed rule would have a devastating effect on low and middle-income investors.***

The proposal requires broker-dealers and investment advisers to determine if any covered technology takes into account factors favoring the broker-dealer, investment adviser, or an associated person. Even if the covered technologies are not part of a securities recommendation, they must be evaluated and tested to determine if conflicts of interest exist. If conflicts exist, the proposal requires a determination regarding whether the conflict results in the covered technology putting the interests of the broker-dealer, investment adviser, or associated person ahead of the interests of the investors. If a problematic conflict is found or "reasonably should have" been found, it must be "eliminated or neutralized promptly." Disclosure, a touchstone of the federal securities laws for almost a century and a longstanding practice relied upon by firms and recognized as effective by regulators, is insufficient by itself.

As noted below, some firms will have tens of thousands of covered technologies to test. And, it is important to recognize that a vast number of such technologies raise no conceivable issues, but would still need to be tested at a great cumulative expense. Examples of the beneficial technologies covered by this proposal include simple programs used by individuals to determine (1) how much money they need to retire, (2) how much they need to save annually to achieve their retirement goals, and (3) how much money they can afford to spend annually during retirement. The proposal would also cover programs used to demonstrate to individuals the

advantages of saving for retirement. In short, this proposal will harm all forms of savings, without any identifiable benefit, as discussed below.

As noted above, the undersigned organizations may well comment separately on the technical flaws of the proposal and the unworkably vague rules being proposed. Our purpose here is to note the inevitability of invalidation, together with the great cost to firms and investors and our economy during any time that the rule as proposed may be in effect.

Brief summary of the applicable law. The law requiring the SEC to examine the economic implications of any rule is very clear, as set forth by United States Court of Appeals for the District of Columbia:

> Under the APA, we will set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." . . . We must assure ourselves the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made." . . . The [Securities and Exchange] Commission also has a "statutory obligation to determine as best it can the economic implications of the rule." . . . Indeed, the Commission has a unique obligation to consider the effect of a new rule upon "efficiency, competition, and capital formation," . . . and its failure to "apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation" makes promulgation of the rule arbitrary and capricious and not in accordance with law.[1] [citations not included]

There is no data in the economic analysis of any benefits of the proposal. We have carefully reviewed the economic analysis underlying the proposal and have found no data on any benefits. Here is effectively the entire economic analysis of possible benefits:

> We ***preliminarily*** believe the primary benefit of the proposed conflicts rules and proposed recordkeeping amendments would stem from the requirement to eliminate, or neutralize the effect of, conflicts of interest that place the firm or associated person's interest ahead of investors' interests. This requirement ***could enhance investor protection*** by eliminating or neutralizing the effects of certain conflicts of interest . . . .
>
> Eliminating, or neutralizing the effect of, conflicts of interest would have two principal competition-related effects. ***First, investors could have greater confidence in interactions with firms using covered technologies, and could therefore be more likely to participate in financial markets.*** Second, when evaluating firms, investors would likely put additional weight on key factors such as advisory, management, or brokerage fees and execution quality . . . . These two effects ***could*** positively affect competition between firms and result in lower fees and higher service quality for investors. (emphasis added)

[1] *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir 2011).

There is no data in the economic analysis to support the “preliminary” beliefs expressed in it. Similarly, there is no justification for what the proposal's authors say “could” result. Supporting information is needed on the shortcomings (if any) in current law, on whether investors currently lack confidence in firms using the covered technology or are actually being harmed – or likely to be harmed - by the use of any covered technology, and on the potential impacts of the proposal on investor decisions. In short, the economic analysis contains vague speculation, triggering billions of dollars of costs. In fact, the SEC admits an extensive lack of knowledge:

> Where practicable, the Commission quantifies the likely economic effects of the proposed rules and amendments; however, the Commission is unable to quantify certain economic effects because it lacks the information necessary to provide estimates or ranges.

The economic analysis reflects no understanding of the number of “covered technologies” covered by the proposal. The economic analysis is vague; it does not estimate the number of covered technologies that a broker-dealer or investment adviser might have.

The estimates provided in Table 2 of the Direct Costs of Proposed Rules Requirements to Evaluate, Identify, Determine, and Eliminate, or Neutralize the Effect of, Certain Conflicts of Interest. For example, in the case of a “Complex Covered Technology Firm,” Table 2 estimates that it would take 100 hours to evaluate the use of covered technology and identify conflicts of interest. ***We are aware of at least one firm that has estimated that it has tens of thousands of covered technologies. So, assume that we conservatively estimate that the firm has 30,000 covered technologies. That would mean that each covered technology could be evaluated and analyzed in 12 seconds,[2] according to the SEC’s obviously wrong and unexplained analysis.***

It seems inevitable that a court would have no choice but to view this analysis as insufficient, and thus arbitrary and capricious.

The proposal recognizes the costs to investors but makes no effort to compare it to any possible benefits. The proposal admits that investors could bear substantial costs:

> ***Firms might pass the cost of the requirements along to investors through higher fees, commissions, or other methods.*** It is difficult to estimate or quantify how much of these costs firms will end up paying themselves instead of passing on to investors . . . . Some types of AI and machine learning, or a marketing algorithm with a large dataset, could be costly to test or difficult for the firm to assess. In these situations, ***investors would lose the potential benefit of these types of technologies, which could in theory have no conflict of interest*** . . . . The requirements to test and document conflicts related to the use of technologies would not only add costs to firms that use covered technologies in investor interaction, they could also slow down the rate at which firms update existing or develop or adopt new technologies. . . . ***These delays and associated monetary costs***

[2] The SEC’s economic analysis assumes that it would take a “complex covered technology firm” 100 hours to initially evaluate the use of all covered technology and identify conflicts of interest. 100 hours divided by 30,000 covered technologies equates to 12 seconds per covered technology.

> ***could reduce the quality or increase the cost of the technology or service for investors,*** and could reduce the revenues of the firms. (emphasis added)

No attempt is made to quantify this cost or compare it to any benefits of the proposal, especially since there is no analysis of any benefits.

In reality, this proposal would have a devastating effect on low and middle-income investors, an issue completely overlooked by the economic analysis. The SEC is falling into the same trap that resulted in the 2016 Department of Labor fiduciary rule, the failure of which is well documented. Effectively, like the DOL rule, this proposal puts the most pressure and additional costs on the brokerage model because normal commissions and similar payments are viewed as conflicts of interest. So, what the DOL rule did, and what this proposal will do, is accelerate the trend away from brokerage services to advisory services. The problem with that is that almost all small investors get their advice through the brokerage model. The advisory model is generally only available to larger accounts because advisers realistically cannot have a year-round fiduciary duty in exchange for, for example, $30 (1% of a $3,000 account). In fact, where the advisory model is available to smaller accounts, that is generally attributable to the use of covered technologies, exactly what is being challenged by this proposal.

What happens when the brokerage model gets too costly and risky? Firms cease providing services to small accounts, as they did in 2017 as a result of the DOL rule. In 2017, Deloitte studied institutions representing 43 percent of U.S. financial advisers and 27 percent of the retirement savings assets in the market. Deloitte found that, as of the 2016 fiduciary rule's first applicability date, 53 percent of study participants reported limiting or eliminating access to brokerage advice for smaller retirement accounts, impacting an estimated 10.2 million accounts and $900 billion in savings.[3]

A 2021 study sponsored by the Hispanic Leadership Fund shows how badly a resurrection of the 2016 rule would hurt small savers, especially in communities of color. The study shows that the racial wealth gap with respect to IRAs would increase by 20% over 10 years if the 2016 rule is resurrected.[4]

Additionally, it must be noted that registered representatives of a broker-dealer are already subject to Regulation Best Interest, and that and registered investment advisers are already subject to a fiduciary duty under the Advisers Act, which was clarified through guidance issued by the SEC in conjunction with the release of Reg BI. Since becoming effective in 2020, Reg BI has ensured that financial professionals are always acting in the best interest of their customer and that the customer is aware of any potential conflict through standardized disclosures. This regime works and allows firms to preserve access to financial advice for all savers – regardless

[3] Deloitte Study (August 9, 2017), as described in SIFMA's August 9, 2017 **comment letter** (study attached to letter as Appendix I)

[4] https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf

of income level. Moreover, all factors -- including technologies -- considered by broker-dealers and investment advisers that contribute to their advice are already subject to Reg BI or the fiduciary duty applicable to investment advisers, and thus must be in the customer's best interest.

The failure of this proposal to analyze the above set of problems and issues is yet one more reason that this proposal would inevitably be invalidated if finalized. We urge you to withdraw this proposal.

Thanks for your consideration of this comment.

American Benefits Council
American Securities Association
Finseca
Institute for Portfolio Alternatives
Insured Retirement Institute
National Association of Insurance and Financial Advisors