# Congress of the United States
## Washington, DC 20515

September 22, 2023

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

Chair Gensler:

We write today to express our concerns regarding the recent Securities and Exchange Commission ("SEC") proposal on predictive data analytics used by broker-dealers and investment advisers (the "Proposal").[1] The Proposal is misguided, unnecessarily broad, and threatens to harm both investors and our capital markets.

While it is promoted as an investor protection measure, the Proposal's true intention seems to be rewriting existing and well-functioning SEC regulations, such as Regulation Best Interest ("Reg BI") and the fiduciary standard. This is likely to result in a burdensome, one-size-fits-all approach being imposed on all broker-dealers and investment advisers, irrespective of the technology they utilize.[2] This new, untested standard would apply indiscriminately, whether or not firms provide personalized investment recommendations or advice to their customers.[3]

In 2019, under the leadership of Chairman Jay Clayton, the SEC, after conducting rigorous economic analysis and engaging extensively with investors, rejected calls for a broad uniform fiduciary standard in favor of Reg BI. Reg BI is a tailored, data-driven regulation that elevated the standard of conduct for broker-dealers while preserving their ability to serve retail customers.[4] We supported Reg BI because it benefits Main Street Americans who rely on affordable products and transparent financial advice to meet their financial needs.

---

[1] *See* Release No. 34-97990, Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisors (Jul. 26, 2023), *available at* https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf.

[2] *See* id. at 11-12 ("[W]e are proposing that a [broker-dealer's and investment adviser's] use of certain PDA-like technologies in an investor interaction that places the firm's interests ahead of the investors' interests involves a conflict of interest that must be eliminated or its effects neutralized in accordance with the proposed conflicts rules.").

[3] *See* id. at 11, 43, 53, 175.

[4] *See* SEC Regulation Best Interest at 20, https://www.sec.gov/files/rules/final/2019/34-86031.pdf ("We have also declined to craft a new uniform standard that would apply equally and without differentiation to both broker-dealers and investment advisers. Adopting a "one size fits all" approach would risk reducing investor choice and access to existing products, services, service providers, and payment options, and would increase costs for firms and for retail investors in both broker-dealer and investment adviser relationships. Moreover, applying a new uniform standard to advisers would mean jettisoning to some extent the fiduciary standard under the Advisers Act that has worked well for retail clients and our markets and is backed by decades of regulatory and judicial precedent.").

Since its adoption, and without analysis of its operational effects, progressive politicians and consumer groups have opposed Reg BI,[5] questioning its adequacy in addressing perceived conflicts of interest within the financial services industry.[6] Now, the SEC appears to be attempting to rewrite history. The Proposal invents an undefined realm of "conflicts" associated with the use of technology by broker-dealers and investment advisers, alleging their pervasiveness and severity. Furthermore, the SEC has previously recognized that a one-size-fits-all fiduciary rule would limit investor choice and access, increase costs, and exceed its authority under Dodd-Frank.[7]

Under the Proposal, the term "covered technology" is defined broadly to capture a firm's use of "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 in an investor interaction." Moreover, the term "investor interaction" essentially includes almost every communication with an investor. As a result, the Proposal would have adverse consequences for our capital markets and retail investors with no demonstratable benefits. It would burden broker-dealers and investment advisers with extensive and costly regulatory requirements, potentially leading them to pass these expenses on to customers. Additionally, it could hinder the use of electronic tools and innovative technologies that have already improved market efficiency and accessibility for millions of new investors.

Notably missing from the Proposal's inadequate economic analysis is data on ways technology will benefit retail investors, nor an adequate estimate of the cost for businesses to adhere to these rules. This one-size-fits-all approach will discourage firms from using certain technologies, potentially depriving investors of their benefits. As acknowledged by the SEC itself, the Proposal is likely to:

> dissuade firms from using certain technologies when it is too difficult or costly to adequately evaluate the use of the covered technology, identify a conflict of interest, or determine whether they place the firm's or an associated person's interest ahead of an investor's[…]Investors would lose the benefit of such technologies if firms determine that the process of eliminating, or neutralizing the effect of, conflicts is too difficult, costly, or uncertain to succeed.[8]

Regulations should be technology-neutral to promote innovation and efficiency in capital markets. A reduction in innovation could result in less orderly and efficient capital markets, increased complexity, higher costs for retail investors, and a decline in retail investor participation.

Additionally, if the SEC seeks to enhance existing standards, it should be transparent about its intentions and seek explicit authority from Congress.

---

[5] *See* https://consumerfed.org/in_the_media/cfa-and-afr-warn-secs-regulation-best-interest-will-harm-vulnerable-investors/; https://www.politico.com/story/2019/06/05/warren-waters-blast-sec-financial-advice-rule-as-wall-street-cheers-1507335.

[6] *See* Letter from Barbara Roper and Micah Hauptman to the Department of Labor. (Aug. 7, 2017), at 43-44, https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00529.pdf.

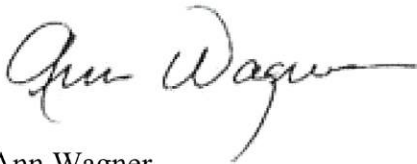[7] *Supra* note 4.

[8] *Supra* note 1 at 189.

If the SEC's goal is to supplant Reg BI and the existing fiduciary standard with the Proposal's heightened "best interest" standard, it should be transparent and direct about its actions. It should not rely on the recent attention around predictive data analytics or artificial intelligence as a pretext.

Furthermore, if the SEC intends to assume the role of a technology regulator, it should seek explicit authority from Congress. To that end, please respond to the following requests and questions no later than September 26, 2023:

1. Describe in detail, both qualitatively *and* quantitatively, the benefits various types of technologies have provided to retail investors. This should include specific examples and data illustrating how technology has improved access, efficiency, and transparency in financial markets, resulting in enhanced outcomes for retail investors.

2. Describe in detail, both qualitatively *and* quantitatively, the costs and negative externalities the Proposal may have on U.S capital markets, U.S. retail investors, and technological innovation in the U.S.

3. Describe in detail the steps the SEC has taken to understand the uses of covered technologies, as defined in the Proposal, prior to the publication of the Proposal. This should encompass a list of all individuals or entities with whom the SEC, its Commissioners, and staff have engaged in discussions related to the Proposal, including discussions concerning Reg BI and the fiduciary duty. Provide names, meeting dates, and concise descriptions of the subjects discussed during these meetings.

4. Describe in detail, both qualitatively *and* quantitatively, the negative impacts the Proposal may have on the ability of smaller broker-dealers and investment advisers to enter the market and compete with larger incumbent firms. In your response, please provide us with your analysis of how you determine the threshold for who is a small broker-dealer or investment adviser and why such determination is appropriate.

5. Describe in detail whether the SEC has statutory authority and is qualified to be a technology regulator. Provide a detailed explanation of the legal basis and expertise that supports the SEC's role in regulating technology, especially in the context of predictive data analytics, artificial intelligence, and machine learning technologies.

6. Identify the number of staff within the Division of Trading and Markets, the Division of Investment Management, and the Division of Economic and Risk Analysis who were actively involved in drafting the Proposal and hold advanced degrees in fields such as computer science, data science, or engineering. Provide detailed information about their roles at the SEC and their qualifications concerning the covered technologies defined in the Proposal.

7. Describe the nature of communication and collaboration between the Divisions responsible for drafting the Proposal and the Strategic Hub for Innovation and Financial Technology ("FinHub"). Highlight how FinHub coordinates the SEC's oversight and response to emerging technologies, including artificial intelligence and machine learning.

8. Offer a comprehensive explanation of the contributions made by FinHub in the context of the Proposal, including the number of staff involved and their qualifications. Additionally, provide an exhaustive list of all other provisions within federal securities laws that allow the use of disclosure as a means to address conflicts of interest, with detailed descriptions of each provision.
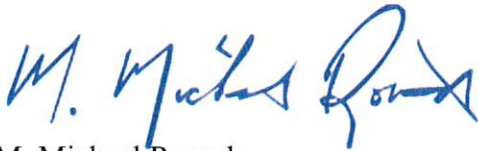
Sincerely,

Ann Wagner
Chairman
Subcommittee on Capital Markets
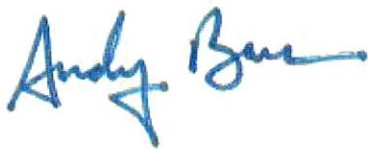House Committee on Financial Services

French Hill
Chairman
Subcommittee on Digital Assets, Financial
Technology and Inclusion
House Committee on Financial Services

M. Michael Rounds
Ranking Member
Subcommittee on Securities, Insurance,
and Investment
Senate Banking Committee

Bill Hagerty
United States Senator

Andy Barr
Chairman
Subcommittee on Financial Institutions
and Monetary Policy
House Committee on Financial Services

Bill Huizenga
Chairman
Subcommittee on Oversight & Investigations
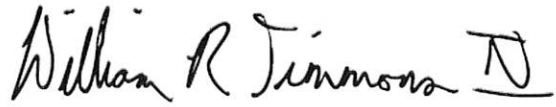House Committee on Financial Services

Blaine Luetkemeyer
Chairman
Subcommittee on National Security,
Illicit Finance, and International Financial Institutions
House Committee on Financial Services

Frank Lucas
Member of Congress

Dan Meuser
Member of Congress

William Timmons
Member of Congress

Mike Flood
Member of Congress

Zach Nunn
Member of Congress

Scott Fitzgerald
Member of Congress

Young Kim
Member of Congress

Byron Donalds
Member of Congress

John Rose
Member of Congress

Bryan Steil
Member of Congress

Barry Loudermilk
Member of Congress

Monica De La Cruz
Member of Congress

Roger Williams
Member of Congress

Alex X. Mooney
Member of Congress