THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Submitted by email to rule-comments@sec.gov

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

Re: Comments on File Number S7-12-23

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to submit comments on the proposed rule entitled "*Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers*," published on August 9, 2023, in the *Federal Register* (Proposed Rule or proposal).[1] As discussed below, ERIC respectfully requests the proposal be withdrawn, because it will increase costs associated with workplace retirement and financial wellness programs.

ERIC is a national nonprofit organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state, city, and Congressional district.

Americans engage with an ERIC member company many times a day, such as when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage or snack, use cosmetics, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, or go shopping.

ERIC member companies offer employees financial wellness education and sponsor retirement plans, including both defined benefit and defined contribution plans, that are governed by the *Employee Retirement Income Security Act of 1974*, as amended (ERISA). Millions of workers and retirees participate in these plans. While the Securities and Exchange Commission (SEC or Commission) does not have interpretive jurisdiction over ERISA, its rulemakings have the potential to significantly disrupt programs in which employees participate.

[1] 88 Fed. Reg. 53960 (Aug. 9, 2023).

We expect providers of financial services will comment extensively on the practical difficulties in complying with this proposal. Stakeholders have already filed comments raising questions about the SEC's authority to promulgate these rules under the securities laws, and its lack of compliance with the requirements of the *Administrative Procedure Act*.[2] While the SEC's conflict of interest rules do not apply to interactions between financial firms and employer-sponsored retirement plans themselves, they do apply to interactions with retirement savers, including those in 401(k) plans.[3] We write exclusively to comment on the foreseeable consequences the proposal would have on large employers and their employees in the workplace.

Millions of Workers Rely on Workplace Retirement and Financial Wellness Programs

In the wake of the COVID-19 pandemic, market volatility, and rampant inflation, employers are fully committed to helping employees develop financial tools, literacy, and security. They do this by offering benefits such as ERISA-covered retirement plans, emergency savings programs, and holistic financial wellness programs.

Employers have many incentives to offer programs that enhance financial security. Survey data supports the conclusion that employees look to programs offered in the workplace to enhance their financial wellness. One recent survey reported that "*the workplace remains the primary source for accessing educational tools and financial guidance and that most employees value programs that can help them with emergency savings, financial education, and debt*."[4]

Another highlighted the important role these programs play. In that survey, 84 percent of employers said that offering financial wellness tools can help reduce employee attrition, and 81 percent said that wellness tools help attract higher quality employees. [5]

Both employers and employees overwhelmingly agreed that employers play a role in supporting financial wellness. Eighty percent of employers said that offering financial wellness programs can increase loyalty and productivity. Most relevantly for this proposal, 62 percent of employers surveyed offered employees access to investment advice services, a benefit valued by 40 percent of employees surveyed.

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[2] Letter from Jennifer M. McAdam, Assoc. Gen. Counsel, Am. Council of Life Insurers *et al* to Ms. Vanessa A. Countryman, *available at* https://www.sec.gov/comments/s7-12-23/s71223-258279-605062.pdf (Sept. 12, 2023).
[3] See, e.g., "Frequently Asked Questions on Regulation Best Interest," *available at* https://www.sec.gov/tm/faq-regulation-best-interest (noting "Regulation Best Interest" does not apply to "educational communications" but does apply in the context of recommendations).
[4] Banerjee, Sudipto, "SECURE 2.0 Could Boost Financial Wellness Landscape," *available at* https://www.troweprice.com/institutional/us/en/insights/articles/2023/q2/secure-2-0-could-boost-financial-wellness-landscape-na.html (June 2023).
[5] Bank of America, "Navigating a new era of financial wellness: 2022 Workplace Benefits Report" *available at* https://business.bofa.com/content/dam/flagship/workplace-benefits/id20_0901/documents/2022-WBR.pdf (2022).

The Proposed Rule Will Increase Costs and Reduce Access to Workplace Programs

Large employers rely on financial firms to provide services to employees, whether in the context of retirement plans covered by ERISA or in the context of non-ERISA financial education and wellness programs. These programs are highly dependent on technology to efficiently and effectively deliver services and information, including data that can be personalized to employees. This technology is ever-evolving and presents exciting opportunities to generate positive outcomes for workers. Regulations that create uncertainty, increase costs, and stifle innovation do not benefit workers and should be resisted.

While the SEC does not regulate investment advice provided to ERISA plans, the Commision's rules do apply to advice provided to plan participants, including recommendations about investments and distributions. The SEC modified its regulations in 2019 to address conflicts of interest and the standard of care that financial services firms must provide to investors.[6] The Proposed Rule seeks to amend these new rules purportedly to address "predictive data analytics" (PDA) and artificial intelligence that can be used to enhance the investor experience. In support of these proposed modifications, the Commission states:

> *Existing obligations already restrict firms from placing their interests ahead of customers, clients, or investors in certain contexts, such as when providing investment advice or recommendations, including as a result of conflicting interests related to their use of covered technologies. But the proposed conflicts rules would be beneficial because they would apply to a broader set of investor interactions and impose express requirements to evaluate and document certain conflicts of interest and to eliminate them or neutralize their effect.* [7]

Despite its supposed focus on artificial intelligence and predictive data analytics, the actual proposal is sweeping. Under the proposed rule, investment advisers and broker-dealers using "covered technology" to interact with investors would be required to *"*evaluate any use or reasonably foreseeable potential use by the firm or its associated persons of a covered technology to identify any conflict of interest."[8]

The Proposed Rule applies to "covered technology" comprising a vast swath of tools that investors already rely on every day. The Proposed Rule defines the term 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*."[9] The reality behind this jargon is **basic tools currently in widespread use would be subject to new review and documentation rules, such as basic retirement**

[6] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318 (July 12, 2019) ("Reg BI").
[7] Proposed Rule, *supra* note 1, at 54005.
[8] SEC, "Fact Sheet: Conflicts of Interest and Predictive Data Analytics," *available at* https://www.sec.gov/files/34-97990-fact-sheet.pdf, 2.
[9] Proposed Rule, *supra* note 1, at 53972.

readiness applications, phone applications, and chatbots.[10] And, portfolio management and trading technologies would be implicated, affecting retirement savers and other investors.

Strikingly, the rule does not just cover investment recommendations made using this technology. Instead, the Proposed Rule would apply "*when a firm uses or reasonably foreseeably may use covered technology in an investor interaction*."[11] An investor interaction is defined as "*engaging or communicating with an investor, including by exercising discretion with respect to an investor's account; providing information to an investor; or soliciting an investor; except that the term does not apply to interactions solely for purposes of meeting legal or regulatory obligations or providing clerical, ministerial, or general administrative support*."[12]

The Commission freely acknowledges the breadth of situations to which the proposal would apply:

> *The use of these terms in the proposed conflicts rules is designed to capture a broad range of actions. This could include providing investment advice or recommendations, but it also encompasses design elements, features, or communications that nudge, prompt, cue, solicit, or influence investment-related behaviors or outcomes from investors*.[13]

Notably, this incredibly broad definition appears to implicate interactions that are not subject to the conflict of interest rules in Reg BI. For example, it appears that "providing information" encompasses interactions that would be purely educational.[14]

The obligations under the proposed regulation ostensibly are placed on financial firms, not employers offering workplace financial programs. These burdens include evaluating effectively all aspects of technology with which any investor may interact, eliminating or neutralizing a conflict of interest that could result from the investor interaction, and developing written policies

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[10] In this, we agree with Commissioner Uyeda, who stated that the proposal "in fact acknowledges that a spreadsheet that embeds financial calculations would be a 'covered technology.' It also appears that a myriad of commonly-used tools could qualify such as a simple electronic calculator, or an application that analyzes an investor's future retirement assets based on changing the asset allocation mix among stocks, bonds, and cash. In this regard, the proposed standard for interacting with investors also suffers from vagueness: virtually any investor interaction that is not purely administrative appears to be covered. And even for benign technologies – such as in my calculator example – firms are still required to develop, implement, periodically review, and extensively document the specific steps of why and how the use or potential use of the technology, in any investor interaction, does not pose a risk of conflicts of interest. Under the rule text, even non-electronic calculators like an abacus might be legally subject to its scope. This regulatory vagueness and considerable compliance challenges may cause firms to avoid innovation or efficiencies through automation. Investors will be ill served as a result." Commissioner Mark T. Uyeda, "Statement on the Proposals re: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers," *available at* https://www.sec.gov/news/statement/uyeda-statement-predictive-data-analytics-072623 (July 26, 2023).
[11] Fact Sheet, *supra* note 8 at 1.
[12] Proposed Rule, *supra* note 1, at 53974.
[13] *Id.* at 53972.
[14] Reg BI, *supra* note 6; *see also* Frequently Asked Questions on Regulation Best Interest, *supra* note 3.

and procedures reasonably designed to achieve compliance, including the process for determining and eliminating conflicts.[15]

However, the practical effect is that plan participants will suffer. Financial firms could scale back on the information offered, resulting in less personalized, useful data from which workers can benefit. Alternatively, it seems likely that costs would increase in order to account for the myriad regulatory burdens imposed. Employers will also bear a cost, as the proposal would reduce the value of the programs they're still able to offer. **Notably, the proposed regulation's economic analysis does not specifically account for the potential costs for retirement savers or employers, which could be substantial. Nor does the economic analysis quantify either the need for this regulation or the potential benefits for retirement savers.**

Conclusion

For the above reasons, the Proposed Rule should be withdrawn. We look forward to working with the SEC and other regulators to improve efficiency, reduce costs, and generate outcomes that benefit workers.

Sincerely,

Andy Banducci

[15] Fact Sheet, *supra* note 8.