Securities Regulation Daily Wrap Up, SEC NEWS AND SPEECHES—Comment letters oppose the SEC's data analytics proposal, (Oct 12, 2023)

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The letters are highly critical of the proposed rules, claiming, among other things, that they violate the First Amendment.

The SEC has received comment letters in connection with its issuance of a rulemaking proposal on Wednesday, July 26, which would impose new requirements on the use of predictive analytics and similar technologies by broker-dealers and investment advisers (*Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker Dealers and Investment Advisers*, Release No. 34-97990, July 26, 2023).

Proposal. A fact sheet on the proposal explains that it would:

- Require a firm to analyze and identify, then eliminate or neutralize the effect of conflicts of interest associated with the firm’s use of covered technologies in investor interactions that place the firm’s or its associated person’s interest ahead of investors’ interests;
- Require a firm that has any investor interaction using covered technology to have written policies and procedures reasonably designed to prevent violations of (in the case of investment advisers) or achieve compliance with (in the case of broker-dealers) the proposed rules; and
- Impose recordkeeping requirements related to the proposed conflicts rules.

Commission vote. The Commission voted 3-2 to issue the predictive analytics proposal, with SEC Chair Gary Gensler, in addition to Commissioners Caroline Crenshaw and Jaime Lizárraga voting in favor of the proposal. Commissioners Hester Peirce and Mark Uyeda voted against it.

Comment letters. On October 10, 2023, the U.S. Chamber of Commerce submitted its comment letter stating that the SEC should abandon the proposal because it is “entirely unworkable, fails to consider existing regulation that governs investment recommendations made to retail investors, and is based upon false premises and assumptions about the use of technology by broker-dealers and investment advisers.” The robust protections already provided to investors should be considered in any future review of technology in the investment space, the letter concluded.

The Investment Company Institute (ICI) submitted its comment letter on October 10, 2023, urging the SEC to withdraw its proposal because the proposed rules are “unnecessary and would have detrimental consequences for the very investors the SEC seeks to protect.” In its comment letter, the ICI stated that the proposed rules “would fundamentally change well-established legal principles that govern how firms, and their representatives, address conflicts of interest in compliance with the federal securities laws.” The ICI also stated that the proposed rules raise constitutional issues because they would unduly restrict a firm’s ability to communicate with investors.

Similarly, SIFMA submitted its comment letter on October 10, 2023, stating that the proposed rules are fundamentally flawed because they would “broadly impose a new conflicts elimination or ‘neutralization’ requirement on Broker-Dealers (BD) and Registered Investment Advisers (RIA) interactions with investors, covering both: (i) advisory relationships and the provision of recommendations and (ii) arms-length communications where the BD or RIA has not undertaken special duties to the investor or invited reliance on the provider’s expertise.” This, SIFMA suggests, would “fundamentally rewrite the existing regulatory regime under which RIAs and BDs provide services to investors.”

The Investment Adviser Association (IAA) also submitted its comment letter on October 10, 2023, stating that, among other things, the proposed rules would "without justification, effectively replace the robust fiduciary duty principles for managing conflicts of interest with clients," duplicate principles-based regulations already delineated in the Advisors Act, incur significant additional costs, and have the "unintended consequence of impeding beneficial and important communications between an adviser and its clients."

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