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Submitted electronically through (https://www.sec.gov/rules/submitcomments.html)

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

Re: Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers: File Number S7-12-23

Dear Ms. Countryman,

Fidelity Investments ("Fidelity")[1] appreciates the opportunity to provide comments to the Securities and Exchange Commission ("SEC" or "Commission") on its proposed new rules and amendments under the Securities Exchange Act of 1934 ("Exchange Act") and the Investment Advisers Act of 1940 ("Advisers Act") to eliminate, or neutralize the effect of, certain conflicts of interest associated with broker-dealers' or investment advisers' interactions with investors through these firms' use of technologies that optimize for, predict, guide, forecast, or direct investment-related behaviors or outcomes ("Proposal" or "Proposed Rule").[2] Fidelity has long supported the SEC's mission of protecting investors and ensuring they have the information necessary to make informed investment decisions.

As a digital first company, Fidelity strongly believes that technology serves and benefits investors throughout their financial lives. For years, investors and savers alike have grown accustomed to using technology and digital tools as part of their investment, savings, and retirement strategies, and firms like Fidelity that provide these resources have developed a more personalized, efficient, and seamless user experience that both informs and engages investors. Consumers of all types benefit from digital interactions through the use of technology with their financial services providers and are comfortable relying on technology to help manage their financial lives.[3]

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[1] Fidelity is one of the world's largest providers of financial services, including investment management, retirement planning, portfolio guidance, brokerage, benefits outsourcing and many other financial products and services to more than 40 million individuals and institutions, as well as through 13,500 financial intermediary firms. Fidelity submits this letter on behalf of Fidelity companies that are registered broker-dealers and registered investment advisers or are otherwise impacted by the Proposal.
[2] *See* Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers, Release No. IA-6353, RIN 3235-AN14 (July 26, 2023), available at https://www.sec.gov/files/rules/proposed/2023/34-97990.pdf.
[3] *See* Pew Research Center, Mobile Fact Sheet (2019), at https://www.pewresearch.org/internet/fact-sheet/mobile/; Pew Research Center, Internet Broadband Fact Sheet (2019), at

Given our long and robust history of delivering a premium customer experience using digital tools, Fidelity is concerned that the Proposal will have significant negative consequences for Americans. Specifically, the Proposal will strongly discourage, and in some cases prohibit, financial services firms from using existing technology to interact with customers and will stifle future technological developments. Fidelity also believes the existing regulatory framework addresses the concerns identified in the Proposing Release and renders the Proposal unnecessary. Fidelity agrees with the Joint Trades Letter that the Commission lacks authority to adopt the Proposal, that the cost-benefit analysis supporting the Proposal is insufficient, and that the Proposal improperly overrides other rules without required notice and comment.[4] Accordingly, we respectfully encourage the Commission to utilize the existing regulatory framework to combat manipulative, unfair, and predatory business practices that may arise from digital interactions – as the Commission has done historically – and to withdraw the Proposal.

I. EXECUTIVE SUMMARY

Fidelity believes that the new requirements set forth in the Proposal are not only unnecessary, but will harm investors by stifling future innovation, barring the use of existing technology and limiting access to financial tools and information. Specifically, as discussed below:

1. **The existing regulatory framework sufficiently protects investors.** Broker-dealers and investment advisers today must comply with "extensive obligations...that are designed to promote conduct that among other things, protects investors from abusive practices."[5] The Commission has failed to properly articulate the harm the Proposal is trying to address and why existing regulation does not adequately address that harm.

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https://www.pewresearch.org/internet/factsheet/internet-broadband; Federal Reserve Board, Consumers and Mobile Financial Services (Mar. 2015), at https://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201503.pdf.

[4] *See* Joint Trades Letter in response to the Proposal available at https://www.sec.gov/comments/s7-12-23/s71223-258279-605062.pdf.

[5] In 1995, the SEC published its first interpretation on the use of electronic media to deliver regulatory communications, "Use of Electronic Media for Delivery Purposes," Securities Act Rel. No. 7233 (Oct. 6, 1995), available at https://www.govinfo.gov/content/pkg/FR-1995-10-13/pdf/95-25391.pdf. This release and the others that followed recognized the power of technology and, specifically, the electronic distribution of information, to "enhance the efficiency of the securities markets by allowing for the rapid dissemination of information to investors and financial markets in a more cost-efficient, widespread, and equitable manner than traditional paper-based methods. *Id.* at 53458. In providing this guidance, however, the SEC also clearly established the principle that the securities laws are technologically neutral. The use of electronic media did not change the substantive provisions of the federal securities laws. In fact, the SEC specifically stated that the guidance set forth in the 1995 release "addresses only the procedural aspects under the federal securities laws of electronic delivery and does not affect the rights and responsibilities of any party under the federal securities laws." *Id.* at 53459. In the 1995 release and in a subsequent release in 1996 extending the same principles to the delivery of required communications under the Advisers Act, the SEC was clear that the "liability provisions of the federal securities laws apply equally to electronic and paper-based media." *Id.* at note 11. *See also* Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information, Investment Advisers Act Rel. No. 1562 (May 9, 1996), available at https://www.sec.gov/rules/1996/05/use-electronic-media-delivery-purposes.

2. **The Proposal will reduce, and in some cases eliminate, the benefits investors receive from technology and digital interactions.** The Proposal threatens to not only limit future progress in democratizing saving and investing, but also to unwind much of the progress that has been made.

3. **The Proposal will result in decreased financial security for all Americans.** If adopted as proposed, the Proposal will greatly reduce the current use of technology that provides education and financial guidance to millions of Americans. As the Proposal will also likely result in degradation of the tools, strategies and information needed by investors to save and invest on their own terms, the Proposal's harm outweighs any potential benefit that the Commission believes will come from the Proposal.

4. **The Proposal is fatally flawed, harmful, and incapable of revision as it stands.** Many of the Proposal's definitions are overly broad and will ultimately disadvantage investors. Compliance with the Proposal will require an ongoing administrative burden so great that it will quickly become unreasonably onerous and potentially impossible. The Proposal also jettisons core principles on which decades of regulation have rested, namely that informed investors can make their own choices.

5. **The Proposal's Framework Is Unworkable.** The requirements to determine whether any conflict of interest results in placing the firm's or its associated person's interest ahead of investors' interests, and then to eliminate or neutralize such conflicts of interest, are impractical if not impossible.

II. <u>THE EXISTING REGULATORY FRAMEWORK SUFFICIENTLY PROTECTS INVESTORS</u>

As the SEC acknowledged in its *Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice*[6], broker-dealers and investment advisers today must comply with "extensive obligations … that are designed to promote conduct that, among other things, protects investors from abusive practices."[7] These specific obligations[8] apply even when a firm's services are delivered digitally.[9] In addition, broad anti-fraud

[6] Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice; Release Nos. 34-92766; IA-5833; File No. S7-10-21 RIN 3234-AN00 at p. 27 (Aug. 27, 2001); available at https://www.sec.gov/files/rules/other/2021/34-92766.pdf.
[7] *Id.*
[8] *Id.*
[9] *Id.*

provisions within the federal securities laws and regulations prohibit manipulative or deceptive conduct.[10] These obligations also subject broker-dealers and investment advisers to rigorous internal and external auditing standards. Broker-dealers must "deal fairly with their customers and observe high standards of commercial honor and just and equitable principles of trade,"[11] while investment advisers, as fiduciaries, owe their clients a duty of care and a duty of loyalty.[12]

There are also additional protections provided to customers when a recommendation is made to a retail customer of a broker-dealer. Under Regulation Best Interest, which became effective June 30, 2020, when making a recommendation to a retail investor regarding a security or an investment strategy involving securities (including an account type recommendation), a broker-dealer must act in such investor's best interest, and not place its interests ahead of the investor's.[13] For certain investors, the Employee Retirement Income Security Act of 1974 ("ERISA") imposes fiduciary duties when a broker-dealer provides investment advice to a plan participant regarding plan assets and similar rules apply with respect to recommendations of investments in individual retirement accounts.

Despite the existing robust regulatory framework providing investor protections, and the significant benefits investors receive from digital engagements and simplified digital interactions, the SEC has issued a Proposal which is overly broad and will eliminate the benefits received by millions of investors from these interactions. The Proposal will apply to virtually all digital interactions with a customer, as well as any in-person interactions that utilize even basic existing technology like spreadsheets used during in-person interactions or in preparation of the interaction. This sweeping Proposal is anti-digital and will reduce investors' access to information when making important financial decisions. The Proposal will also disincentivize broker-dealers and investment advisers from developing future technology or even using existing technology for the benefit of investors. In addition, there is a risk that entities not subject to the existing, rigorous regulatory framework applied to regulated financial services companies will step into the void left by this Proposal's impact.

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[10] *See* also Securities Act section 17(a), 15 U.S.C. 77q(a); Exchange Act section 10(b), 15 U.S.C. 78j(b); Exchange Act section 15(c), 15 U.S.C. 78o(c); Investment Advisers Act of 1940 ("Advisers Act") section 206, 15 U.S.C. 80b-6; see also Exchange Act section 9(a), 15 U.S.C. 78i(a); see also Basic v. Levinson, 485 U.S. 224, 239 n.17 (1988).

[11] *See*, e.g., Duker & Duker, Exchange Act Release No. 2350, 6 S.E.C. 386, 388 (Dec. 19, 1939) (Commission opinion) ("Inherent in the relationship between a dealer and his customer is the vital representation that the customer be dealt with fairly, and in accordance with the standards of the profession."); see also U.S. Securities and Exchange Commission, Report of the Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, at 238 (1st Sess. 1963) ("An obligation of fair dealing, based upon the general antifraud provisions of the Federal securities laws, rests upon the theory that even a dealer at arm's length impliedly represents when he hangs out his shingle that he will deal fairly with the public."); FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade); NASD Interpretive Material 2310-2 (Fair Dealing with Customers) ("Implicit in all member and registered representative relationships with customers and others is the fundamental responsibility for fair dealing. Sales efforts must therefore be undertaken only on a basis that can be judged as being within the ethical standards of [FINRA's] Rules, with particular emphasis on the requirement to deal fairly with the public.").

[12] *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019) [84 FR 33669, 33671 (July 12, 2019)] ("IA Fiduciary Duty Interpretation") (internal quotations omitted). This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own.

[13] *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct available at https://www.sec.gov/files/rules/final/2019/34-86031.pdf.

III. THE PROPOSAL WILL REDUCE, AND IN SOME CASES ELIMINATE, THE BENEFITS INVESTORS RECEIVE FROM TECHNOLOGY AND DIGITAL INTERACTIONS

In Fidelity's experience, digital interactions are required to meet the needs and expectations of investors and to connect with investors where they are.[14] Investors choose to interact with their service providers digitally, and financial service providers are no exception.[15] Investors benefit from robust and intuitive digital interactions to help them receive and process information regarding investment choices. Digital experiences also encourage retail investors, especially young retail investors, to plan for their financial futures and to take action to save and invest, increasing contributions to retirement accounts and engaging in other wealth-building activities.[16] Fidelity believes investors should be encouraged to make informed financial decisions facilitated through human, digital, or a combination of these interactions.

Although the Proposal highlights newer technologies such as artificial intelligence ("AI") to justify imposing material changes to the existing regulatory regime, the Proposal will also impair existing technology that provides personalized engagement for investors. Existing technology has supported investors for over two decades and the Commission has not identified any widespread investor harm arising from the use of it. In fact, technology has been tremendously effective at providing investors with investment advice, guidance, and information, as well as prompting actions that help millions of Americans pursue their financial goals every year. Many of these Americans do not work one-on-one with a financial advisor, either by choice or due to the amount of their investible assets. For these investors, technology provides the essential digital tools that enable them to learn, save and invest.[17]

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[14] According to the Pew Research Center, as of April 2021, 97% of Americans owned a cellphone of some kind, up from 62% in 2002; the percentage did not deviate for those Americans earning less than $30,000 per year. Of those Americans over 65, 92% owned cellphones. *See* Pew Research Center, Mobile Fact Sheet (2019), at https://www.pewresearch.org/internet/fact-sheet/mobile. The Pew Research Center further reports that, as of early 2021, 85% of Americans say they go online daily. *See* https://www.pewresearch.org/fact-tank/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online.

[15] *See* Investors in the United States–A Report of the National Financial Capability Study, FINRA Investor Education Foundation (2019), at https://www.usfinancialcapability.org/downloads/NFCS_2018_Inv_Survey_Full_Report.pdf (finding "the percentage of investors who prefer paper documents has decreased considerably relative to 2015, while preference for all other methods has increased."); Burham, K., Bogdan, M. & Schrass, D., Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet, 2015, ICI Research Perspective 21, no. 5 (Nov. 2015), at www.ici.org/pdf/per21-05.pdf (A survey by the Investment Company Institute in 2015 found that 91% of U.S. households who own mutual funds had Internet access (up from 68% in 2000), and that there was widespread use among various age groups, education levels and income levels); E-Delivery: Modernizing the Regulatory Communications Framework to Meet Investor Needs for the 21st Century (September 2020), at https://www.sifma.org/wp-content/uploads/2020/09/E-Delivery-Paper.pdf (Industry White Paper stating that financial firms surveyed by SIFMA reported year-over-year increases in electronic delivery adoption each year (without exception) by their clients in the last several years).

[16] *Id*. at note 5 and accompanying text.

[17] Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices. See Footnote 9.

Personalized digital interactions can enhance financial education and make investing more accessible to Americans with lower levels of investable assets. Traditionally, there has been no shortage of financial advice and guidance available to affluent investors. Firms like Fidelity have been working for years with technology, including AI, to develop scalable means to bring financial education, advice and guidance to less affluent investors while driving the cost of investing down. Equity trades that just a few decades ago cost hundreds of dollars are now free and investors can easily access an extensive array of advice, guidance and planning tools because of technological advancement. Collectively, the mass availability of these technology-driven investing tools coupled with the tremendous decrease in costs have democratized the investing and saving process for all Americans, regardless of their age or wealth. The Proposal threatens to not only limit future progress in democratizing saving and investing, but also to unwind much of the progress made to date. The barriers to using existing and new technology created by the Commission's fundamentally misguided Proposal are monumental and unwarranted in light of the vast benefit that technology already provides to investors.

IV. THE PROPOSAL WILL DECREASE FINANCIAL SECURITY FOR ALL AMERICANS

Fidelity estimates the Proposal could impact an exceptionally broad range of tools supporting an investment adviser's portfolio management process as well as hundreds of millions of digital interactions with retail customers. Impacted digital interactions range from personalized educational content which retail customers can act on independently, to non-personalized tools which a customer can use to research and purchase various investments, and information used by representatives when helping retail customers.

A. Financial Analysis and Customer Support

Included in the interactions impacted by the Proposal is Fidelity's suite of over 100 digital planning tools that allow self-directed investors to, among other actions, create a holistic financial plan or investment strategy, monitor their progress, and explore the hypothetical potential impact of certain changes. Fidelity's Planning & Guidance Center, for example, provides a personalized experience that assists investors in goal setting and understanding their full financial picture. The tools available through Fidelity's Planning & Guidance Center utilize long-standing and industry-standard analytics and are instrumental in providing self-directed investors the ability to manage their money as they see fit, in a cost-efficient manner. In addition to the regulations identified above, these digital planning tools are also subject to FINRA Rule 2214, which requires clear disclosures regarding the technology used in the analysis.[18] The Proposal will unnecessarily require additional regulation on top of the robust

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[18] FINRA Rule 2214 requires that firms both understand their technologies and provide sufficient information to customers so that customers also may understand them. Under the Rule, member firms must, among other things, "describe[] the criteria and methodology used, including the investment analysis tool's limitations and key assumptions," "describe[] the universe of investments considered in the analysis, explain[] how the tool determines which securities to select, disclose[] if the tool favors certain securities and, if so, explain[] the reason for the selectivity, and state[] that other investments not considered may have characteristics similar or superior to those

regulatory framework already applicable to these digital interactions and could result in these tools not being available to customers.

The Proposal will also greatly impact an array of digital interactions and communications that are intended to educate customers about their accounts. For instance, we use technology to identify which customers would benefit from contributing to their IRAs and where they stand relative to the applicable contribution limits. We also use technology to notify customers if they are holding a concentrated position, to help ensure they understand the risks of maintaining the position and to identify potential diversification options they could pursue. Some customers will open brokerage accounts and deposit cash into their accounts, but then will leave the funds uninvested. In that instance, we use technology to educate customers on the choices they have if they want to invest their funds. We also use technology to provide financial education to college students and other young investors to help them establish robust savings and investment habits for their lifetimes. While educating investors about these issues and the choices they have should be viewed as a positive investor outcome, because the resulting investor interactions could lead to an investor depositing more assets into their account, engaging in securities transitions, including purchasing propriety investments, a conflict of interest would likely exist under the Proposal. As it would be nearly impossible to definitively conclude that the use of the technology in this context did not put the interest of the firm ahead of that of the customer, the Proposal requires that these "conflicts" be eliminated or neutralized. Eliminating or materially changing these beneficial interactions (*i.e.,* to get and stay invested, to save and plan for financial goals and to have a diversified and well-constructed portfolio, etc.) in the name of "neutralization" is not in any customer's best interest.

Moreover, it is not only those investors who engage with us digitally that will be impacted; the Proposal will also limit the information our associates can utilize when assisting customers. When customers call Fidelity for help, they expect that our associates are knowledgeable about their account and can offer personalized help. Technology enables our associates to deliver customized levels of service that our customers expect. For example, technology informs our associates if a customer has not designated a beneficiary for their account, if the customer started a new account application or an enrollment into an investment advisory program, or if the customer is experiencing a life event. As the Proposal would require that we evaluate the relative benefit from the resulting action taken by any customer versus the benefit to the firm, the Proposal puts at risk the tools we rely upon to provide the personalized guidance expected by our customers. Additionally, the Proposal does not contain a carve out to

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being analyzed." FINRA Rule 2214(c)(1) and (c)(3). Additionally, a member firm "is responsible for ensuring that use of the investment analysis tool and all recommendations based on the investment analysis tool . . . comply, as applicable, with FINRA's suitability rule (Rule 2111), the other provisions of Rule 2210 (including, but not limited to, the principles of fair dealing and good faith . . .), the SEC rules (including, but not limited to, Securities Act 156) and other FINRA rules." FINRA Rule 2214.04. Member firms must disclose "whether the investment analysis tool searches, analyzes or in any way favors certain securities within the universe of securities considered based on revenue received by the member in connection with the sale of those securities or based on relationships or understandings between the member and the entity that created the investment analysis tool. The disclosure also must indicate whether the investment analysis tool is limited to searching, analyzing or in any way favoring securities in which the member makes a market, serves as underwriter, or has any other direct or indirect interest." FINRA Rule 2214.06.

exclude tools or technology used to fulfill unsolicited requests for information. For example, if a customer asks an associated person to model a bond ladder in which the customer could invest, the associated person will use a computer-based tool to do that, with financial benefit being received by the firm if the customer implements the bond ladder. The Proposal seems to require that the firm avoid making this tool available, unless the firm can first conclude that the bond ladder benefits the customer to a greater degree than it benefits the firm. By hindering our ability to use technology to educate our associates about the financial needs of our customers and to respond to customer inquiries, the Proposal undercuts our ability to properly serve our customers and ultimately harms customers.

B. Workplace Services

As a leader in the workplace benefits industry, Fidelity provides a wide variety of services to retirement plan participants, including services that are intended to improve participants' financial wellness overall. These services have resulted in significantly better outcomes for participants across a wide spectrum of measures. For example, Fidelity uses multiple layers of employer and participant data to deliver a highly personalized retirement savings assessment to millions of participants each quarter. The assessment shows participants where they stand by comparing their current savings rate and investment mix to Fidelity's own research. Due to the personalized nature of these communications, there are roughly 20,000 variations of the message content presented across the participant population. The personalized nature of these communications has led to materially higher open rates and engagement rates than more generic communications. And more importantly, these communications have led to significant increases in contribution rates and in participants engaging in investment guidance interactions.

Another digital interaction provided to plan participants is a Financial Wellness Check-Up ("FWCU"), which is a personalized assessment that helps participants understand where they are on their personal financial journey and suggests what to focus on next. As compared to participants that did not take a FWCU, participants that took the FWCU were:

- Thirteen times more likely to save for an emergency;
- Five times more likely to participate in an educational workshop;
- Three times more likely to update their retirement contribution rate; and
- Five times more likely to meet with a financial representative to create a financial plan.

These statistics provide clear evidence that personalized communications advance retirement investors' financial wellness. Often, Fidelity is the only source of quality financial information and education received by these investors. The breadth of the Proposal puts technology-based retirement communications at risk, which in turn will harm retirement investors and leave them without guidance on how to secure their financial goals including retirement, health, and education needs. Or worse, these investors may seek information and guidance from unregulated or unqualified sources.

C. Portfolio Management

Across the financial services industry, almost every modern investment tool that facilitates sound investment decision-making on behalf of an advisory client – from risk management technologies, portfolio optimizers, portfolio analysis applications, trading software, to spreadsheets – could fall into the Proposal's overbroad definition of "covered technology," thus requiring an ongoing administrative burden so great that compliance becomes unreasonably onerous and potentially impossible. The Proposal requires investment advisers to engage in speculative analysis to determine whether the adviser's interest is taken into account through the use of a technology, whether the adviser's interests have been put ahead of investors' interests and, if so, whether actions taken sufficiently meet the undefined standard of "neutralization" or the conflict must be eliminated. The Commission recognizes some of the potential impacts of these burdens, including significant compliance costs, the imposition of higher advisory fees and the loss of certain technologies that could be beneficial for investors even in the theoretical case where an adviser has no conflicts.[19] However, the impact of the Proposal implicates greater harms than the Commission recognizes. The Proposal also threatens an investment adviser's ability to utilize investment resources that fundamentally support sound investment decision-making for investors, such as portfolio modeling tools, portfolio analytics software and other financial modeling tools, without which firms could not provide quality advice and services. The Proposal also threatens to severely limit the ability to react quickly and nimbly to the ever-changing and evolving financial markets. The value of investment advice depends not only on its substance but on the timeliness of its delivery. The need to constantly evaluate, test and document technology before its implementation or material modification for conflicts will stymie a firm's ability to adapt and rapidly respond to markets, particularly where a covered technology is the vehicle through which the advice is delivered.[20] Put plainly, at some point, compliance burdens can become so significant that they will jeopardize the quality of and speed with which sound and prudent advice can be rendered. For many advisers, the Proposal has the potential to cripple the investment process.

We also note that the Proposal would likely result in investment advisers avoiding the legitimate use of proprietary products that are permissible under the Advisers Act and/or Investment Company Act of 1940 (the "1940 Act"). As a fiduciary serving different investment needs and delivering a range of diversified portfolio strategies, Fidelity may utilize Fidelity funds to deliver portfolio management services, including investing in proprietary funds on behalf of other Fidelity mutual funds or managed account customers. Using affiliated funds allows Fidelity to more efficiently deliver a broad range of investment strategies or to achieve a more consistent allocation of investment strategies across multiple advised accounts. The Proposal would require advisers that wish to use proprietary products to deliver their portfolio strategies efficiently and effectively with the support or use of covered technologies to engage in a near-impossible evaluation of the relative benefit to the customer and to the firm that results from using the proprietary products. If the adviser were to decide to forgo investment in proprietary products,

[19] Proposing Release, *supra* note 2, at 191-192.
[20] For instance, advisers that deliver advice through models could be deprived of their ability to quickly execute investment decisions through model updates as a result of the need to stop and evaluate, test and identify each and every conflict associated with the updates before they are implemented, even if a delay in a volatile market would cause harm to investors.

the impact to customers could include less choice and higher prices for investment management services. The actual harms that will likely arise from the Proposal significantly outweigh any harms asserted by the Commission, particularly in absence of any concrete evidence that the existing framework of full and fair disclosure has been ineffective to address its concerns.

V. SPECIFIC FLAWS

For the reasons described above, Fidelity believes the Proposal is fatally flawed, harmful, and unfit for revision as it stands. However, should the Commission seek to revise the Proposal and re-propose, allowing for additional public review and comment, we offer the following considerations.

A. The proposed definition of "investor" is overly broad

The Commission provides no explanation for expanding the scope of the Proposal for registered investment advisers beyond their interactions with natural persons. Contrary to the Proposal's application to broker-dealers, Rule 211(h)(2)-4 as proposed applies to an investment adviser's interactions with any existing and prospective client, including any existing or prospective investor in a pooled investment vehicle advised by the adviser.[21] The Commission does not distinguish between institutional and retail investors despite its prior recognition that a client's capacity for understanding conflicts may differ depending on the nature of the client. In its 2019 interpretive release on advisers' standard of conduct, the Commission acknowledged that even the fiduciary obligation to disclose conflicts to institutional and retail clients can vary significantly as "institutional clients generally have a greater capacity and more resources than retail clients to analyze and understand complex conflicts and their ramifications."[22] The Proposal fails to recognize that institutional clients are no less skilled than their adviser with respect to being able to understand "lengthy, highly technical, and variable" disclosure relating to technology that, in many cases, the institutional client is also employing within its own walls.[23] Complex technology and technology-based products such as machine learning, AI, chatbots, push notifications, and technologies for data analytics and data collection, are hardly unique to the investment industry; such technology is employed by every corporate organization in one respect or another, and the Commission provides no rationale for why an institutional client's capacity to digest or comprehend the complexity of such technology is diminished in the context of investment advisory services.

Moreover, the Commission's application of the Proposal to advisory clients that are registered investment companies and business development companies contradicts the framework under the 1940 Act that charges independent directors with the primary responsibility of monitoring potential conflicts of interest. The structure of investment companies, which have no employees of their own, involves inherent conflicts of interest between the fund and the sponsor's affiliates, who commonly manage most aspects of the fund's basic operations including the provision of

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[21] Proposing Release, at 49.
[22] *Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, SEC Release No. IA-5248 (June 5, 2019).
[23] Proposing Release, *supra* note 2, at 26.

investment advisory services. Congress has already spoken through the 1940 Act on its desired approach for how these inherent conflicts are to be addressed; as the U.S. Supreme Court recognized, the fund board composition requirements for independent directors is "[t]he cornerstone of the [1940 Act's] effort to control conflicts of interest within mutual funds".[24] The application of the Proposal to investment companies flies in the face of Congressional intent that conflicts be managed not directly, but by the "watchdog" function of these funds' independent directors.[25] The Proposal attempts to mandate the very kind of direct control that Congress deliberately opted not to pursue in its design of the 1940 Act. We strongly urge the Commission to continue to empower independent directors to make their own independent evaluation and assessment of advisory conflicts and to manage these conflicts, and in doing so, fulfill their mandate as envisioned by Congress and expected by shareholders who compensate them for this purpose.[26]

B. The definition of "Investor Interaction" is overly broad

The examples provided in the Proposing Release of what constitutes use of a covered technology in an investor interaction renders the Proposal ambiguous and overly expansive.[27] Almost every communication a financial firm engages in with its customers will qualify as an "investor interaction" and be subject to the Proposal.

The explanation of "use" of a covered technology "indirectly" in an investor interaction is particularly troublesome. The Proposing Release states that using a covered technology "to provide individual brokers or advisers with customized insights into an investor's needs and interests" that the broker or adviser might then use "to supplement their existing knowledge and expertise when making a suggestion to the investor" at some later date would "result in the firm using a covered technology in an investor interaction".[28] The breadth of that construct is immense and will sweep in almost any technology a firm's associated persons use to review client data and relationships.

Additionally, the discussion of indirect uses as well as the proposed definition of an "investor interaction" raise the question of whether a firm's interaction with its intermediary clients – registered broker-dealers and investment advisers ("intermediary" or "intermediaries") would be in scope. Typically, firms do not interact with or provide information directly to an intermediary's clients, but information may be shared with them indirectly through the intermediary, who would itself be subject to the new rules. Fidelity does not believe that the

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[24] Burks v. Lasker*,* 441 U.S. 471, 482 (Jan. 17, 1979).
[25] *See id.* at 416 (noting that "[t]his 'watchdog' control was chosen [by Congress] in preference to the more direct controls on behavior exemplified by the options not adopted.").
[26] We also believe that the definition of "investor" in proposed Rule 211(h)(2)-4 inappropriately extends to prospective or current fund shareholders. The advisory client of a fund adviser is the fund, rather than individual fund shareholders. Accordingly, a fund's adviser must carry out its fiduciary obligations with the lens of what is in the best interest of the fund and not fund shareholders whose individual interests may not be aligned with one another (*e.g.,* shareholders who hold fund positions in taxable vs. tax-deferred accounts).
[27] *See* Proposing Release, *supra* note 2, at 51-52.
[28] *Id.* at 52.

Commission intended for this type of intermediated relationship to be within the scope of the Proposal, but the breadth of the definitions and ambiguity in the Proposing Release raises questions as to whether the use of technology in such an arrangement is in scope.[29]

VI. THE PROPOSAL'S FRAMEWORK IS UNWORKABLE

The requirements to determine whether any conflict of interest results in placing the firm's or its associated person's interest ahead of investors' interests, and then to eliminate or neutralize such conflicts of interest, are impractical if not impossible. For many technologies, relative benefit is not reducible to a math equation where one can assess which interest is given greater weight. Moreover, in many potential uses, such as using a covered technology to draft advertisements, the firm will not have the information necessary to make any determination regarding the interests of the investors that might be involved in a resulting "investor interaction." Thus, a firm will likely not be able to determine that its interests are not being placed ahead of the interests of investors. Given this reality, the option to "neutralize" the effect of a conflict – where "[t]he measure of whether the effect of the conflict has been neutralized would be if the investor interaction does not place the firm's or associated person's interest ahead of the investor" – has no practical meaning and firms will be forced to stop using many covered technologies to the detriment of their customers.[30]

Each of the compliance obligations outlined in the Proposing Release raises concerns. Considering the expansive definition of "covered technology," broker-dealers and investment advisers will have to conduct extensive investigations across their organizations and will be hard pressed to identify all of their covered technologies. Requiring firms to evaluate and identify every possible covered technology for potential conflicts – including unintended conflicts – in any reasonably foreseeable potential use, is setting up even the most diligent for failure, and will take tremendous amounts of time and effort, especially given the testing, analysis and documentation required to make these determinations. That time and effort will be misplaced given the Commission's inability to identify specific harms that the Proposal is purporting to address that are not currently mitigated by the existing regulatory framework.

VII. CONCLUSION

Fidelity supports the Commission's efforts to protect customers from predatory risks and decisions not made in an investor's best interests. However, this Proposal seeks to address a

[29] During the Form CRS implementation period, the SEC issued two FAQs that effectively exclude clearing and carrying broker-dealers from the requirements under the Form CRS Rule in certain intermediated interactions. One of the FAQs notes, in relevant part, that "qualified custodians serving solely in that capacity do not typically establish the kind of relationship with retail investors that the relationship summary was designed to address." See, "Qualified Custodian" FAQ and "Qualified Custodians, Clearing or Carrying Broker-Dealers – Introduced Accounts of Registered Investment Advisers' Clients" FAQ. These exclusions avoid redundant regulation in recognition that since the Intermediary has the primary relationship with the investor, it is appropriate for the investor to receive the Intermediary's Form CRS only. Likewise, here, the Intermediary has the primary relationship with the investor and is the appropriate entity to ensure its advice and services are appropriate, including through assessing and addressing conflicts of interest.

[30] Proposing Release, *supra* note 2, at 97.

perceived problem by radically overhauling a longstanding regulatory framework that sufficiently protects investors. As the Proposal will also likely result in degradation of the tools, strategies and information needed by investors to save and invest on their own terms, the Proposal's harm outweighs any potential benefit that the Commission believes will come from the Proposal. We encourage the Commission to withdraw the Proposal.

* * *

Fidelity is pleased to provide further information, participate in any direct outreach efforts the Commission undertakes, or respond to questions the Commission may have about our comments.

Sincerely,

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

William Birdthistle, Director, Division of Investment Management

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