

**Written Statement of Leslie Van Buskirk, Administrator of the Division of
Securities at the Wisconsin Department of Financial Institutions, on the
“Draft Recommendation of the SEC Investor Advisory Committee’s
Disclosure Subcommittee Regarding Digital Engagement Practices”**

March 7, 2024

Introduction

I want to start with a sincere thank you. I appreciate the time and effort that has gone into drafting the revised version of this recommendation. As always, Paul Royce, Brian Hellmer, and Christine Lazaro were fearless leaders, and I am grateful for their engagement.

Respectfully, I cannot support the recommendation.¹ As I will explain, I firmly oppose the first two of the IAC’s five recommendations. I also have concerns with aspects of some of the remaining recommendations. A key consideration is my desire to address a longstanding concern – conflicts of interest – from a more holistic and realistic perspective.

Background

At the outset, I acknowledge that regulators are in the early innings of the work to align the regulatory framework more fully with the fast-evolving use of technology by broker-dealers and investment advisers. I believe that we as regulators should approach this transition as a moonshot. A moonshot approach probably would cost less money and time overall for both regulators and the industry than continual minor changes every few years. Moreover, I fear that if we do not make a major change soon to our framework, we will lose the trust of many investors.

I generally believe the SEC should pursue a final rulemaking that is broad, dynamic, and evergreen in scope and nature. Obviously, the Commission should continue to gather facts and right-size the rulemaking. But generally, I fail to see the value in writing a narrow rule or rules that will be outdated even before industry has implemented them.

Further, I respectfully think we need to acknowledge some historical and present context for our work. As we all may agree, disclosure has become less effective as a tool for conflict management than it was twenty years ago. This is due to factors like the increasing complexity of our markets, participants, and products, as well as the competition between disclosures and the increasing amount of other information that we as Americans consume daily. While investors have long struggled to comprehend conflicts on a relationship basis and a transaction basis, the struggle has only become more acute with the collision of the information age and our increasingly opaque, complex markets and ever-growing menu of investment options.

Concerns Regarding the Recommendation

As I stated, I firmly oppose the first two recommendations. In a nutshell, I believe the facts and circumstances, including lessons learned, investor behavior, and the pace of innovation, all

¹ <https://www.sec.gov/files/20240214-draft-recommendation-use-dep.pdf>

counsels against continued investments in a mostly analog regulatory framework that has long suffered from opacity, complexity, and conflicts.

To begin with, on page 10 of the recommendation, the IAC calls on the Commission to “Narrow the scope of the PDA Rule Proposal to target the unique risks of predictive data analytics and artificial intelligence that interact directly with investors.” Here, I believe the IAC is using the term *directly* consistent with the definitions offered in the SEC’s proposed rulemaking. There, *directly* refers to uses of a covered technology in an investor interaction that occurs directly through the use of a covered technology. An example is a behavioral feature on a platform that is meant to prompt, or has the effect or prompting, investors’ investment-related behaviors. By contrast, *indirectly* refers to firm personnel using the covered technology and communicating the resulting information gleaned to an investor. An example given by the SEC is an email from a broker recommending an investment product when the broker used PDA-like technology to generate the recommendation.

Next, on page 11, the IAC calls on the Commission to “build upon the existing regulatory framework which requires firms to ‘eliminate, mitigate or disclose conflicts of interest’ while recognizing that for certain inherently opaque and complex PDA and AI technologies, disclosure is not sufficient[,] and use the existing definition of conflicts under Regulation Best Interest and the Adviser Fiduciary Duty Interpretation.”

My first concern is that the recommendations would undermine the primary benefit of the SEC’s approach, which is to transition us to addressing associated conflicts at the earliest opportunity. To me, it is important to address conflicts earlier. Industry would benefit because they would avoid purchasing, designing, or developing technologies or practices that are non-compliant or otherwise conflicted or bad for business. Investors would benefit because any inadvertent harm against them has been avoided or minimized. Overall, our markets would benefit because we would foster trust among the participants. I am mindful that industry is concerned about costs. So are regulators. Based on my experience, I believe the costs would decrease over time and overall be less than our present approach. Also, in all likelihood, many registrants can leverage existing procedures because they are already assessing technology uses for compliance with non-securities laws such as data privacy laws.

Second, I believe the final rulemaking should cover both direct and indirect investor interactions. In my experience, most investors use a mix of paper and digital sources and tools, including on occasion recommendations or advice provided by associated persons. This is both in response to and a driver of the fact that many financial firms now offer a menu of brokerage, advisory, and hybrid arrangements, with and without varying levels of human engagement on investment strategies, advice, and recommendations. We need a final rule that takes a multifaceted approach rather than a binary approach.

Third, I believe the final rulemaking should transition us away from a legal definition of conflict of interest that invites industry to continue delivering conflicted advice and recommendations. In my experience, many newer investors are increasingly mistrustful of our markets and the private

and public institutions that serve them. Pursuing a final rulemaking that aligns with the expectations and behaviors of investors would be, in my opinion, a better approach for all.

Closing

As I wrap up, I want to acknowledge that certain content has been added to the revised recommendation. Specifically, on page 14, it reads, “We recommend that the Commission rely on existing regulations and principles to improve the oversight of [digital engagement practices] by clarifying the definition of what constitutes a recommendation.”

I agree that clarification is needed when it comes to recommendations. I think the IAC is right to encourage the SEC to be clearer that DEPs can be recommendations. We as state regulators are actively examining options for additional clarity as well.

Importantly, I do not agree that regulators should categorically carve out so-called “educational or informational DEPs” from recommendations. Doing so runs the risk of creating a loophole that would undermine any educational benefits that may be provided through DEPs.

I want to recognize that the IAC has discussed digital engagement practices a lot. I want to repeat a point because I think it may have been lost in our robust discussion. Specifically, I generally support the SEC’s broad approach to the definition of a covered technology. As proposed, it includes, and I am oversimplifying here before brevity, most digital engagement practices, predictive data analytics, and other kinds of technologies presenting conflicts. If the Commission were to narrow the scope of covered technologies in the final rulemaking such that selected DEPs were carved out, I would still believe that our securities laws should treat most digital engagement practices as recommendations.

In closing, I believe this is an opportunity to set up investors for greater success. I believe a rule that takes a bold approach to remove conflicts from tech at the design level is a great step in that direction. We should never take the trust placed in our capital markets for granted and that includes the trust increasingly tech-savvy investors place in the technology and tools they use to invest and save for their futures.

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