



**FINANCIAL
SERVICES
INSTITUTE**

VOICE OF INDEPENDENT
FINANCIAL SERVICES
FIRMS AND INDEPENDENT
FINANCIAL ADVISORS

VIA ELECTRONIC MAIL

October 1, 2021

Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: File No. S7-10-21: 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 (RIN 3235-AN00)

Dear Secretary:

On August 27, 2021, the U.S. Securities and Exchange Commission (SEC) published its request for information and public comment on matters related to (i) the use of digital engagement practices (DEPs) by broker-dealers and investment advisers and (ii) the use of technology to develop and provide investment advice (the Request).¹ With respect to DEPs, the SEC states that the Request is focused on assisting the SEC and its staff in better understanding and assessing the market practices associated with the use of DEPs by broker-dealers and investment advisers, providing a forum for market participants (including investors), and other interested parties to share their perspectives on the use of DEPs and the related tools and methods, and facilitating an assessment by the SEC and its staff of existing regulations and consideration of whether regulatory action may be needed to further the SEC's mission including protecting investors and maintaining fair, orderly, and efficient markets in connection with firms' use of DEPs and related tools and methods. The Financial Services Institute² (FSI) appreciates the opportunity to comment on this important issue.

¹ SEC, 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 (Aug. 27, 2021), <https://www.sec.gov/rules/other/2021/34-92766.pdf>. The Request explains that DEPs may include behavioral prompts, differential marketing, game-like features (commonly referred to as "gamification"), and other design elements or features designed to engage with retail investors on digital platforms (e.g., websites, portals and applications or "apps"), as well as the analytical and technological tools and methods used in connection with these DEPs.

² The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

Background on FSI Members

FSI is an industry association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial professionals and independent financial services firms. In the US, independent financial professionals account for a large percentage of all producing registered representatives. These financial professionals are self-employed independent contractors, rather than employees of Independent Broker-Dealers (IBDs). FSI's IBD member firms provide business support to independent financial professionals, in addition to supervising their business practices and arranging for the execution and clearing of customer transactions.

As it relates to the Request, it is important to note that financial advice provided through financial professionals is at the core of FSI members' business model. FSI members typically do not provide brokerage services through self-directed brokerage models and therefore our membership generally do not use DEPs to encourage self-directed trading or online trading.

Discussion

FSI appreciates the opportunity to provide comments in response to the Request, which focuses on a number of regulatory matters in connection with the growth of digital platforms for investing, such as online brokerages, robo-advisers, and mobile investment applications and portals. Given FSI members' business model, our comments below regarding DEPs is targeted to brokerage and advisory services provided via financial professionals. We also provide comment in response to specific questions raised about DEPs in connection with Regulation Best Interest (Reg BI) and, in particular, activity which may constitute a recommendation. We also note that our comments focus on DEPs and we are not providing comment at this time with respect to that part of the Request dealing with the provision of digital advisory services, including robo-advice.

I. FSI Members: A Model Focused on Person-to-Person Customer Relationships

Section II of the Request notes that broker-dealers and investment advisers, when interacting with retail investors through digital platforms, employ a variety of DEPs including social networking tools, games, streaks and other contests with prizes, points, badges, and leaderboard, notifications, celebrations for trading, visual cues, ideas presented at order placement and other curated lists or features, subscriptions and membership tiers, and chatbots. To this end, the Request solicits information on the extent to which broker-dealers use or expect to use DEPs, as well as the types of DEPs used and their intended purposes.

FSI's IBD member firms consider financial professionals to be central to the services they provide, which focus on a person-to-person customer relationship. Financial professionals provide services to customers that include, but are not limited to, financial education, planning, implementation, and investment monitoring. As a general matter, FSI's IBD member firms and their financial professionals do not employ DEPs to influence or encourage certain investor behavior or to facilitate online or self-directed trading.

II. Reg BI: Activity Constituting a Recommendation

Section II of the Request notes that the use of a DEP by a broker-dealer may, depending on the relevant facts and circumstances, constitute a recommendation for purposes of Reg BI. To this end, the Request solicits information on whether broker-dealers consider the observable impacts of DEPs when determining if they are making “recommendations” for purposes of Reg BI. The Request also states that, “[t]o the extent that a broker-dealer makes a recommendation, as that term is interpreted by the Commission under Reg BI, to a retail customer through or in connection with a DEP, Reg BI would apply to the recommendation.”

FSI agrees that “the determination of whether a broker-dealer has made a recommendation that triggers application of Regulation Best Interest should turn on the facts and circumstances of the particular situation.”³ FSI also agrees with the SEC’s longstanding position that “what constitutes a recommendation is highly fact-specific.”⁴ Moreover, FSI believes that the SEC’s principles-based approach, supported by existing SEC precedent and guidance as to what constitutes a “recommendation,”⁵ is well-positioned to handle ongoing technology changes in the industry.

However, the Request appears to suggest that the SEC may consider additional guidance to provide a modernized framework as to what constitutes a “recommendation” for purposes of Reg BI. FSI cautions the SEC that any guidance on whether a DEP constitutes a recommendation for purposes of Reg BI would need to be highly fact-specific due to the variations in DEPs and the rate at which technology evolves. Therefore, any such guidance should be limited to the use of a particular DEP under specific facts and circumstances, and such guidance should be carefully crafted to not disturb or contradict existing guidance now in place addressing advice provided via financial professionals, as well as information provided to support investor education.

Conclusion

FSI is committed to constructive engagement in the regulatory process and welcomes the opportunity to work with the SEC on this and other regulatory efforts. Thank you for considering FSI’s comments. Should you have any questions, please contact me at [REDACTED].

Respectfully submitted,



Senior Vice President, Policy & Deputy General Counsel

³ Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33318, 33335 (July 12, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-07-12/pdf/2019-12164.pdf>.

⁴ *Id.*

⁵ *Id.*