

# Morgan Stanley

*By electronic submission*

October 1, 2021

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

**Re: 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 (File No. S7-10-21)**

Dear Ms. Countryman:

Morgan Stanley appreciates the opportunity to comment on the Securities and Exchange Commission's (the "**Commission's**") request for information and comments on matters related to broker-dealer and investment adviser use of "digital engagement practices" ("**DEPs**"), associated analytical and technological tools, and investment adviser use of technology to develop and provide investment advice (the "**RFI**").

Morgan Stanley supports strong standards for broker-dealers and investment advisers that protect investors and manage conflicts, while at the same time preserving access to responsibly-designed digital tools that can educate, inform, and empower retail investors. Morgan Stanley, through both its Financial Advisor-led platform and its E\*TRADE platform, utilizes various DEPs that we believe are valuable to the general public, our clients, and Advisors. Importantly, Morgan Stanley does not utilize DEPs that encourage speculative trading or DEPs that gamify the investment process. We acknowledge the potential risks and conflicts associated with certain DEPs and the need to ensure investor protection in connection with their use.

The Commission's existing regulatory framework provides protections for retail investors against unjust and fraudulent practices, misleading communications and recommendations not in a client's best interest. We are concerned about potentially overbroad regulatory treatment of DEPs that could have a chilling effect on the responsible use of digital practices and thus curtail access to valuable investor information, tools, and assistance. We look forward to continuing to engage with the Commission and other stakeholders on this important topic.

## ***I. Morgan Stanley Background Information***

Morgan Stanley is a leading full-service global financial services firm. Since our founding in 1935, Morgan Stanley has been a client-focused organization providing a range of financial services and advice to individuals, corporations, and institutions. Our employee code of conduct stresses the primacy of client interests over those of the company or individual employees, and five “Core Values” guide our business approach, one of which is “Put Clients First.”<sup>1</sup>

Morgan Stanley’s wealth management division, Morgan Stanley Wealth Management, services approximately 14 million client relationships with over \$4.5 trillion in client assets. Morgan Stanley Wealth Management provides investment solutions designed to accommodate the investment objectives, risk tolerance and liquidity needs of individual investors and small to medium-sized businesses and institutions primarily through the use of two channels: (1) financial advisor-led brokerage and investment advisory services, and (2) self-directed brokerage and investment advisory accounts, including through the E\*TRADE platform.

## ***II. Technology Can Help Clients and Their Advisors Make Better Decisions about Investing***

Over the past several decades, technology has transformed the costs, analytical tools, and investing options available to the public, providing customers with numerous benefits, including access, competition, choice, and efficiency.<sup>2</sup> Morgan Stanley’s E\*TRADE self-directed brokerage platform has long been a leader in the online financial services space, developing one of the first digital platforms for online trading and paving the way for self-directed investors to control their investments online. For customers who choose to work with a Morgan Stanley Financial Advisor, technology has provided our Advisors with valuable tools that enable them to deliver the full intellectual capital of Morgan Stanley, increase their efficiency and better connect with, and service, their clients.

As the RFI acknowledges, DEPs utilized in our industry take a variety of forms and are used for different purposes. Morgan Stanley does not use the identified practices that “gamify” investing, such as trading contests or leaderboard rankings. Nor does Morgan Stanley employ DEPs that could potentially encourage speculative trading.

DEPs that are commonly used across the financial services sector can be categorized as falling into one of three categories: (1) educational/informational DEPs; (2) advertising/marketing DEPs; and (3) those DEPs that facilitate providing investment advice or recommendations to buy or sell securities. When designed and employed responsibly in accordance with existing regulatory requirements, DEPs can benefit investors regardless of category.

### ***a. Educational/Informational DEPs***

Many DEPs employed in our industry are valuable tools that can help clients and their financial advisors make more informed investment decisions. DEPs providing focused education and information

---

<sup>1</sup> The remaining Core Values are “Do the Right Thing,” “Lead with Exceptional Ideas,” “Commit to Diversity and Inclusion” and “Give Back”.

<sup>2</sup> These are qualities that the Commission has historically prioritized, noting in Regulation Best Interest, for example, that “[i]n designing Regulation Best Interest, we considered a number of options to enhance investor protection, while preserving, to the extent possible, retail investor access (in terms of choice and cost) to different types of investment services and products.” Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 *Fed. Reg.* 33,318, 33,321 (July 12, 2019) (“Regulation Best Interest”).

can facilitate comparisons, research, and diligence before decisions are made, and such content typically does not rise to a call to action to engage in specific securities transactions.

For example, in the self-directed space, E\*TRADE provides a “Knowledge” page on its public website offering a host of educational materials and research tools for anyone to access and learn from as part of their investing journey; the user can create their own screener or search journey based on their interests and criteria. E\*TRADE customers can also utilize a risk “slide” that allows them to simulate and stress test different market conditions and the impact on their portfolios. Such tools can empower retail investors and support the Commission’s priorities of investor protection and education.

In the Advisor-led space, integrated planning tools like our Goals Planning System help Financial Advisors and their clients collaborate on understanding the span of the client’s assets, liabilities, investments, and cash flow. Advisors can then conduct comparisons of investment scenarios so that they can develop informed advice to assist the client in reaching their financial goals.

*b. Advertising/Marketing DEPs*

Many full service and self-directed firms, including Morgan Stanley, use digital means to market their offerings, which can benefit clients by supporting financial objectives like saving for education and encouraging wealth building via reminders to maximize IRA contributions. Additionally, just because engagement with a DEP may ultimately lead to a transaction or generate revenue, it does not necessarily mean that the DEP itself rises to the level of a recommendation.

Personalized communications and marketing can provide clients with relevant information to consider given a life event such as retirement or the birth of a child, introduce clients to products and services in which they have expressed a prior interest, or inform them about upcoming educational events, and such engagement, in turn, can facilitate client knowledge about the choices available to them. Technological innovations allow Morgan Stanley to more precisely and effectively deliver information of interest to clients, while at the same time avoid unnecessary outreach to clients on matters that are likely not relevant to them.

*c. DEPs that Rise to the Level of Recommendations or Investment Advice*

As a threshold matter, while Morgan Stanley agrees that under certain circumstances a DEP can rise to the level of a recommendation or investment advice, many DEPs utilized today are clearly not recommendations, such as those in the above categories. Where a DEP does contain a recommendation that a client buy or sell a particular security or engage in an investment strategy involving securities, the obligations of Regulation Best Interest would apply. Similarly, where an investment adviser uses a DEP to communicate a recommendation or provide other investment advice, the fiduciary obligations under the Investment Advisers Act of 1940 (the “Advisers Act”) would apply.

For example, many of our Financial Advisors use our proprietary Next Best Action platform to more deeply engage with their clients. The platform leverages analytics to curate relevant content for Advisors to consider presenting to a client, and while the content includes educational and marketing ideas that would not be considered recommendations, there are also investment ideas where, if the Financial Advisor concludes they are in the best interest of a selected client, they can email the idea to the client. Morgan Stanley considers that digital communication of an investment idea to be a recommendation, subject to the applicable standard of care, just as it would be if delivered via phone or in person by the Advisor.

### ***III. The Existing Regulatory Environment Provides a Sound Foundation to Protect Retail Investors from DEP Abuses***

The Commission has long focused on protecting the investing public, and as the Commission itself notes in the RFI, the existing securities regulatory framework, bolstered by recent adjustments to conflict mitigation/elimination, compliance supervision, and customer communication requirements<sup>3</sup>, provides significant protection for investors, much of which already applies to firms' use of DEPs.<sup>4</sup> At their core, DEPs are a means of communicating with the public, and such communications are addressed in a variety of contexts and subject to wide regulation and guidance spanning decades. Regulation should not vary based on the means used to communicate or provide a service so as to maintain flexibility, encourage innovation, and preserve investor choice and access.

The existing regulatory framework imposes the following important requirements, amongst others, on use of DEPs.

#### *a. Examples of Regulation Applicable to All DEPs*

- **Anti-Fraud Requirements.** The anti-fraud provisions of the federal securities laws and Self Regulatory Organization rules broadly prohibit manipulative and deceptive conduct and require that broker-dealers deal fairly with their customers.<sup>5</sup>
- **Conflicts of Interest.** While the use of certain DEPs can create conflicts of interest, firms are already governed by obligations to manage conflicts. Where a DEP rises to the level of a recommendation, the conflicts of interest obligations of the Commission's Regulation Best Interest ("**Regulation BI**") would apply for broker-dealers. Even absent a recommendation, FINRA Rule 2010 requires that broker-dealers "observe high standards of commercial honor and just and equitable principles of trade," including the requirement that firms identify, mitigate and manage conflicts of interest. Under the Advisers Act, investment advisers are subject to a fiduciary duty and have similar conflicts of interest disclosure and mitigation regimes as required under Regulation BI. Therefore, even if a DEP is not a recommendation or investment advice, which most are not, a firm must still address material conflicts associated with its use of DEPs.
- **Technology & Data.** The risks associated with technology and data issues resulting from the use of DEPs are also not new or unique, and the existing regulatory framework provides for robust oversight. For example, the Commission's Regulation S-P, Regulation S-AM, and Regulation S-ID have established regimes for managing privacy, cyber, and fraud risks; the Federal Reserve's SR-11-7 (model risk management) addresses risks associated with business processes that may leverage AI/ML; and the Federal Reserve's SR-13-19 (third party/outsourcing regulatory requirements) addresses risks associated with third party AI/ML.

---

<sup>3</sup> These recent regulations include Regulation Best Interest, new RIA marketing rules, Department of Labor PTE 2020-02. Regulators are just beginning to examine and enforce these new regulations.

<sup>4</sup> 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, 86 *Fed. Reg.* 49,073 (Sept. 1, 2021).

<sup>5</sup> See FINRA Rule 2111; 15 U.S.C. §§78j, 78o(c).

b. *Examples of Regulation Applicable to Advertising/Marketing DEPs*

- **Customer Communications/Advertising.** Communications with customers and other members of the public must be fair, balanced, and truthful, among other content standards, and are subject to supervisory review and, in some instances, Financial Industry Regulatory Authority review, to ensure that the communications adhere to those standards. Certain communications, such as options communications, are subject to further heightened standards. These standards apply to electronic communications, including digital advertising and marketing as well electronic communications via email or social media.
- **Investment Adviser Advertising Regulations.** These regulations prohibit fraudulent, deceptive or manipulative advertisements. Recent amendments to these regulations expanded the general prohibitions to prohibit information “reasonably likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the adviser” and added “fair and balanced manner” to certain communications to the already general catch-alls of “untrue statements of material fact . . . and otherwise misleading information.”<sup>6</sup> The revisions also expanded the definition of Investment Adviser advertising.

c. *Examples of Regulation Applicable to DEPs Resulting in Recommendations*

- **Regulation Best Interest.** Regulation BI requires that broker-dealers act in the best interest of retail customers when recommending securities, investment strategies involving securities, and account types (including rollovers), and not place their interests ahead of the retail customers’. The rule does not distinguish whether the interaction is in person or via digital means, safeguarding the customer equally in both settings. In addition, firms must do more than provide a recommendation that is in the customer’s best interest—they must also provide certain disclosures designed to inform customers of the standard of care they are owed, the products and services offered by the firm and their associated fees, and any conflicts of interest associated with a recommendation. Moreover, Regulation BI requires that firms not only identify and disclose relevant conflicts, but that they mitigate and even eliminate certain types of conflicts.
- **Fiduciary Standards – Recommendations and Investment Advice.** Investment advisers are fiduciaries with respect to the investment advisory services they provide their clients, including specific recommendations and investment advice. Through its 2019 interpretive guidance on the Standard of Conduct for Investment Advisers, the Commission clarified that this ongoing fiduciary duty is composed of a duty of loyalty and a duty of care which requires investment advisers to provide advice that is in the best interest of their client. Investment advisers are also required to “eliminate, or at least to expose, all conflicts which might incline an investment adviser—consciously or unconsciously—to render advice which [is] not disinterested.”<sup>7</sup> This principles-based approach “expresses broadly the standard to which

---

<sup>6</sup> Investment Adviser Marketing, 86 *Fed. Reg.* 13,024 (Mar. 5, 2021). The amendments to Rule 206(4)-1 have a compliance deadline of Nov. 4, 2022.

<sup>7</sup> Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 *Fed. Reg.* 33,669, 33,670 (July 12, 2019) (quoting *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963)).

investment advisers are held while allowing them flexibility to meet that standard in the context of their specific services.”<sup>8</sup>

Additionally, broker-dealers, investment advisers, and other relevant financial firms are fiduciaries when providing investment advice to retirement investors under ERISA and the Internal Revenue Code, including recommendations to roll over retirement assets to an IRA account. Recommendations must be in the best interest of the retirement investor and there are related disclosure and due diligence requirements to ensure that clients are provided with the information regarding services, features, and costs needed to make an informed decision. The Department of Labor’s Prohibited Transaction Exemption 2020-02’s “principles-based approach is rooted in the Impartial Conduct Standards for fiduciaries providing investment advice. The Impartial Conduct Standards include a best interest standard, a reasonable compensation standard, and a requirement to make no misleading statements about investment transactions and other relevant matters.”<sup>9</sup>

#### ***IV. Given the Strength of the Existing Framework, the Industry and our Regulators Should Proceed Thoughtfully to Avoid Unintended Consequences***

Given the strength and breadth of the existing regulatory framework, Morgan Stanley believes that imposing an additional set of prescriptive requirements specifically governing the use or development of DEPs, particularly those that are responsibly designed and implemented, could stifle innovation and ultimately discourage firms from developing beneficial communications for existing and prospective customers. Regulators should promote responsible use of DEPs that avoid encouraging transactions inconsistent with a client’s investment objectives and risk tolerance. Less experienced investors may most benefit from the responsible use of educational materials and tools that firms provide digitally.

Should the Commission believe additional guidance is necessary, we suggest the adoption of principles-based, technology neutral adjustments to the existing regulatory regime to address the fast evolving technological landscape. As a guiding principle, regulation should not vary depending on how a communication is delivered; it should instead be based on the content of the communication.

Such an approach aligns with the Commission’s recent amendments to the regulatory framework governing retail investors. For example, in adopting Regulation Best Interest, the Commission thoughtfully chose not to further define “recommendation,” noting that, “[w]e [the Commission] continue to believe this general framework regarding what is a recommendation is appropriate.”<sup>10</sup> The Commission further noted that it was important that “Regulation Best Interest should not stifle investment education as a means to encourage financial wellness, or otherwise restrict broker-dealers from disseminating information about, for example, retirement plans. . . .”<sup>11</sup> In fact, in the proposing release, the Commission stated that “by drawing from principles that have developed under other regulatory regimes, we [the Commission] seek to establish greater consistency in the level of protection provided across the spectrum of registered investment advice and ease compliance with Regulation Best Interest where these other overlapping regulatory regimes are also applicable.”<sup>12</sup>

---

<sup>8</sup> *Id.* at 33,670.

<sup>9</sup> Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees, 85 *Fed. Reg.* 82,798, 82,800 (Dec. 18, 2020).

<sup>10</sup> Regulation Best Interest, 84 *Fed. Reg.* at 33,335.

<sup>11</sup> *Id.* at 33,338.

<sup>12</sup> Regulation Best Interest, Release No. 34– 83062 (Apr. 18, 2018) [83 FR 21574] (May 9, 2018) p. 12.

Finally, if the Commission believes that there are unique conflicts of interest inherent in those DEPs that result in a recommendation, it should utilize the existing Regulation BI/Investment Advisory framework, and consider whether additional disclosures are necessary under Regulation BI or whether a firm's use of such DEPs should be disclosed to Retail Clients in its Customer Relationship Summary (Form CRS).

***V. Additional Comments***

In this letter, we have focused our comments on the key points which we believe the Commission should consider with regards to the RFI. We also support the recommendations regarding the RFI contained in the Securities Industry and Financial Markets Association letter.

\* \* \*

We thank you for consideration of our comments.

Sincerely,

A handwritten signature in black ink that reads "Anne Tennant". The signature is written in a cursive, flowing style.

---

Anne Tennant  
Managing Director and General Counsel  
Morgan Stanley Wealth Management