



PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

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October 1, 2021

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
rule-comments@sec.gov

Re: Request for Comment on Release 34-92766 (Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches)

Dear Secretary Countryman:

I write on behalf of the Public Investors Advocate Bar Association (“PIABA”), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, courts, and in regulatory rule-making and the legislative process, while also advocating for public education regarding investment fraud and industry misconduct.

In Release No. 34-92766, the Securities and Exchange Commission (“the Commission”) requested information and public comment on matters relating to, among other things, broker-dealers’ use of “digital engagement practices” (“DEPs”), the analytical and technological tools and methods used in connection with DEPs, and the potential investor protection concerns posed by DEPs. In particular, the Commission requested comment on how the use of DEPs is impacted by several existing broker-dealer obligations, such as the standard of conduct under Regulation Best Interest (“Reg BI”).

While brokerage firms’ adoption of new technologies can offer beneficial services to its customers, such as increased access to information, product choice, and investor education, PIABA believes that the increasingly omnipresent usage of DEPs poses a unique investor protection threat, especially considering the new wave of inexperienced and unsophisticated market participants the last eighteen months have brought. The persuasive nature encouraging trading activity by certain DEPs and the marketing of such investing platforms are two important areas for promoting investor protection.

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1. DEPs Are Persuasive Calls to Action That Influence Investor Trading and Should be Subject to Reg BI

One particularly relevant concern is whether a broker-dealer's use of DEPs on its digital platforms constitutes recommendations for the purpose of Reg BI, and thus should be held to the conduct standards propounded by Reg BI. As identified in the Commission's Release, an important factor considered in determining whether a recommendation has taken place includes whether a communication reasonably could be viewed as a "call to action," and reasonably would influence an investor to trade a particular security or group of securities. The Commission cites to NASD Notice to Members 01-23 in its Request, which provides examples of activities falling within the definition of "recommendation," including:

- A member sends a customer-specific electronic communication (e.g., an e-mail or pop-up screen) to a targeted customer or group of customers encouraging the particular customer(s) to purchase a security;¹
- A member sends its customers an e-mail stating that customers should be invested in stocks from a particular sector (such as technology) and urges customers to purchase one or more stocks from a list with "buy" recommendations;
- A member provides a portfolio analysis tool that allows a customer to indicate an investment goal and input personalized information such as age, financial condition, and risk tolerance. The member in this instance then sends (or displays to) the customer a list of specific securities the customer could buy or sell to meet the investment goal the customer has indicated; and
- A member uses data-mining technology (the electronic collection of information of website users) to analyze a customer's financial or online activity—whether or not known by the customer—and then, based on those observations, sends (or "pushes") specific investment suggestions that the customer purchase or sell a security.

These gamification features on investing platforms exceed the type of suggestive actions that meet the definition of a "recommendation" and were envisioned by the examples originally set forth by the NASD

¹ This example provided in NASD Notice to Members 01-23 contains the following endnote:

Note that there are instances where sending a customer an electronic communication that highlights a particular security (or securities) will not be viewed as a "recommendation." For instance, while each case requires an analysis of the particular facts and circumstances, a member generally would not be viewed as making a "recommendation" when, pursuant to a customer's request, it sends the customer (1) **electronic "alerts"** (such as account activity alerts, market alerts, or price, volume, and earnings alerts) or (2) research announcements (e.g., a firm's "stock of the week") that are not tailored to the individual customer, **as long as neither—given their content, context, and manner of presentation—would lead a customer reasonably to believe that the firm is suggesting that the customer take action in response to the communication.**

in 2001. It must be noted that these are not passive or neutral actions on digital platforms but rather digital *engagement* strategies and practices. In fact, these engagement strategies, including badges, contests, leaderboards, and status lists, are inherently interactive and are specifically designed to persuade a customer to take action and/or reward a desired behavior relating to trade execution. The timing, frequency, and manner of some engagement strategies encourage risky behavior, such as frequent trading and investing in higher risk products.

PIABA has concerns that broker-dealers utilizing DEPs are doing so without supervising transactions that constitute recommendations for the purpose of compliance with Reg BI and all the other industry conduct rules. This would, of course, undermine the very purpose of Reg BI – to ensure that all recommendations made to customers are in those customers’ best interests.

Some broker-dealers², in an effort to encourage trading, are providing customers lists of securities on their applications, including lists of the most-traded securities on the platform and the most popular securities traded. On Robinhood, for example, this list is provided on the home screen of the application and is one of the first items that a new customer sees. This is no different than a broker handing a list of securities to a customer. Such a list encourages customers to search for and make those investments and should be considered a “recommendation.”³ Despite providing these lists to all customers by default, these broker-dealers are not conducting an analysis under Reg BI of the securities contained in the lists for customers, which is inconsistent with their obligations as registered broker-dealers.

2. Brokerage Firm’s Usage and Marketing of DEPs Should Be Fair and Balanced

PIABA agrees with the Commission that the advent of digital platforms for investing have multiplied the opportunities for retail investors to invest and trade in securities.⁴ Their growth, however, has also multiplied the risks inherent in investing, and the communications about such risks. PIABA believes that FINRA Rule 2210, Communications with the Public, remains a critical regulatory solution to regulate DEPs moving forward as digital platforms and their features become more sophisticated.

For instance, consider the so-called “copy trading” offered on some social trading digital platforms. Brokerage firms should fairly communicate about this trading method, yet marketing materials often lull traders into a false sense of security. Whether touting an automated trading experience or showcasing low-risk traders to follow, member communications can oversimplify the risks of investing, and certain engagement strategies on digital platforms tend to downplay the complexity of certain investment strategies.

² See, e.g., *Massachusetts Division of Securities v. Robinhood Financial, LLC*, Administrative Complaint No. 2020-0047, December 16, 2020.

³ As another example, customers may receive push notifications on their mobile devices if they have opened an investment account but have yet to make any trades. Upon clicking the notification, they are taken to the aforementioned popular stock list.

⁴ See, e.g., FINRA Letter of Acceptance, Waiver and Consent No. 2020066971201 (Robinhood grew users from fewer than 500,000 customers in 2015 to over 31 million as of June 2021.)

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October 1, 2021

Page 4

To promote balanced and fair communications about DEPs, brokerage firms should be encouraged to closely supervise how and to what extent their DEPs are providing recommendations, and further should incorporate investor education *directly into* the digital platform themselves. Rather than bury an informative description in fine print, digital platforms could improve interactive features to educate investors while serving a transactional need of affecting securities trading. This is especially relevant for more complex trading strategies, such as options trading, where investors are able obtain certain trading levels beyond their requisite experience.

Conclusion

In sum, PIABA believes that continued scrutiny of how DEPs on digital platforms risk providing, or in many instances, do provide recommendations that would subject them to rules such as Reg BI will help promote investor protection. Moreover, we believe that FINRA Rule 2210 remains a powerful tool to ensure fair and balanced communications in the marketing and usage of DEPs on digital platforms. Combined with an increased emphasis on investor education, the securities industry – retail investors, brokerage firms, and regulators – will be better for it.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "David P. Meyer".

David P. Meyer, President
Public Investors Advocate Bar Association