

It's all fun and games: SEC requests information on digital engagement practices

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The SEC has issued a broad request for information and public comment on the use of “digital engagement practices” and analytics technology by broker-dealers and investment advisers.

In light of the growing popularity of digital investing platforms and increased scrutiny of these platforms by Congress, the SEC has released a broad [request for information and public comment](#) (RFI) on all matters related to the use of digital engagement practices and analytical and technological tools by broker-dealers and investment advisers.

The RFI includes 91 sets of questions, made up of approximately 410 questions in total, that are intended to:

- Help the SEC better understand and assess the use of digital engagement practices;
- Provide a forum for market participants to share perspectives on digital engagement practices; and
- Assist the SEC in assessing the application of existing regulations on digital engagement practices and considering whether any regulatory changes might be needed.

In a public statement on the RFI, SEC Chair Gensler stated that he is “particularly focused on policy questions about how we protect investors engaging with technologies that use [digital engagement practices],” including:

- “How might we protect investors in light of the potential conflicts of interest that may exist when [digital engagement practices] optimization practices have a statistically significant impact on platform revenues, data collection, or investor behavior?”
- “To the extent that [digital engagement practices] underlying predictive data analytics use “optimization functions” that, at least in part, optimize on revenues, data collection, or investor engagement—and to the extent that optimization leads to statistically significant changes in investor behavior—how does that affect the determination of whether [digital engagement practices] are making a recommendation or providing investment advice?”

Digital engagement practices

According to the SEC, digital engagement practices 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.” The RFI describes examples digital engagement practices, including social networking tools; games, streaks and other contests with prizes; points, badges, and leaderboards; notifications; celebrations for trading; visual cues; ideas presented at order placement and other curated lists or features; subscriptions and membership tiers; and chatbots.

The SEC acknowledges that the use of these practices can potentially benefit investors, such as by making investment platforms more accessible to retail investors or encouraging contributions to retirement accounts. It cautions, however, that retail investors may be harmed by digital engagement practices that encourage frequent trading or higher risk trading strategies involving options, margin or complex products.

The RFI includes a wide range of questions about these digital engagement practices, including with respect to industry practices, investor characteristics and practices, changes to investor behavior, public perspectives and data, and compensation structures—such as payment for order flow. In addition, the RFI asks about the use of analytical and technological tools related to digital engagement practices, including artificial intelligence, machine learning and other similar tools.

The RFI also includes a lengthy discussion of potential regulatory obligations that could be particularly relevant to digital engagement practices and related technological tools. Among others requirements, the SEC highlights:

- Account opening and other approval obligations, including know-your-customer and anti-money laundering requirements;
- Obligations of broker-dealers relating to investors transacting in options or trading on margin;
- Regulation Best Interest and suitability obligations, including noting that the use of certain digital engagement practices could constitute a recommendation;
- Disclosure obligations, including those at the inception of a customer relationship such as Form CRS; and
- Fiduciary duties of investment advisers.

With respect to compliance, the RFI includes specific questions on how firms are approaching regulatory compliance for digital engagement practices. The RFI also asks for comments on whether existing regulations should be modified or new regulatory approaches adopted to address investor protection concerns related to digital engagement practices.

Investment advisory technology

The final section of the RFI seeks comment on the use of technology by investment advisers to develop and provide investment advice. In particular, the SEC seeks comment on the use of:

- Robo-advisers, which provide asset management services through online, algorithm-based platforms;
- Internet investment advisers, which are advisers that use only an interactive website to provide investment advice; and
- Artificial intelligence, machine learning and other similar tools.

Again, the SEC acknowledges that there are potential benefits to these technologies, such as lowering the costs of advisory services. But it cautions that they come with potential risks. For example, the quality of investment advice may depend on the use of an algorithm or artificial intelligence and machine learning techniques that are flawed or insufficiently monitored by humans. In addition, the widespread use of artificial intelligence and machine learning could result in new or unexpected interconnectedness in financial markets that poses systemic risks to the financial system.

In addition to the specific questions raised, which may be responded to through the traditional public comment process, the SEC seeks to digitally engage with retail investors through a survey-style [Feedback Flyer](#), which the SEC is encouraging retail investors to use to provide feedback on their experiences with online trading and investing. Comments and responses to the RFI, including through the Feedback Flyer, are due October 1.

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