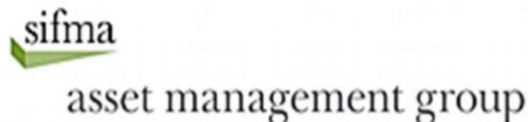



August 16, 2022

_Submitted electronically via SEC.gov_
Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

**Re: Request for Comment on Certain Information Providers Acting as Investment Advisers, Release Nos. IA-6050; IC-34618; File No. S7-18-22**

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association[1] ("SIFMA"), jointly with its Asset Management Group[2] ("SIFMA AMG"), appreciates the opportunity to provide comments to the United States Securities and Exchange Commission (the "SEC") on the SEC's Request for Comment on Certain Information Providers Acting as Investment Advisers (the "RFC").[3]

This comment letter offers the consolidated perspectives of our buyside and sellside members, who have substantial concerns with the potential characterization and regulation of index providers, model portfolio providers and pricing services ("Information Providers") as investment advisers.

---

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] SIFMA's Asset Management Group (SIFMA AMG) brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg.

[3] _Request for Comment on Certain Information Providers Acting as Investment Advisers_, 87 Fed. Reg. 37254 (June 22, 2022) (hereinafter, "RFC").

## I. Executive Summary

As noted above, SIFMA, SIFMA AMG, and their various members have considered the RFC and the attendant investment adviser status questions. For the convenience of the SEC, we have summarized below the key points discussed in the sections that follow:

- The RFC mischaracterizes or does not articulate important aspects of the services that Information Providers perform nor the basis for asserting that such services merit their treatment as investment advisers.

- The nature of the services of Information Providers falls outside the scope of the statutory definition of "investment advice." As such, Information Providers do not fall within the definition of "Investment Adviser" under historical interpretations under both the Investment Advisers Act of 1940, as amended ("Advisers Act"), and the Investment Company Act of 1940, as amended ("Investment Company Act").

- Registration of Information Providers as investment advisers would not address any known investor harm or policy concerns. The RFC identifies neither investor protection concerns nor policy rationales to support characterizing or regulating Information Providers as investment advisers nor does it consider any reasonably available alternatives to regulating Information Providers as investment advisers.

- Regulating Information Providers as investment advisers likely would cause significant disruption in the services they provide to investment advisers, other regulated financial intermediaries, and other institutional clients. Such disruption would result in a diminution of the services they provide, drive up the costs of such services for investors without tangible benefit, and thereby result in substantially reduced liquidity for numerous securities instruments and investment funds.

- The existing governance framework of Information Providers affords effective and efficient protections. There are existing, extensive governance and control frameworks as well as parallel regulations that render regulating Information Providers as investment advisers unnecessary.

- The SEC lacks authority to regulate Information Providers as investment advisers and, if it determines that regulating Information Providers as investment advisers, or otherwise, is appropriate, the SEC should first obtain authority from Congress to do so.

As requested in the RFC, this letter seeks first to provide insight with respect to the services of Information Providers, specifically with respect to how such services are utilized and employed by buyside and sellside market participants. The letter will then offer an analysis of whether Information Providers meet the Advisers Act and Investment Company Act definitions of "investment adviser" under each element of the definition. The letter will explore the costs associated with investment adviser status, specifically regarding the potential for Information Providers to alter their business models, consolidate, or exit the market. We also explore the operational implications of investment adviser status of Information Providers under the Advisers Act and the Investment Company Act and its ultimate effect on investors. Finally, we analyze existing safeguards as well as alternative avenues of regulation that would be more closely contoured to the specifics of Information Providers' services.

## II. The RFC Mischaracterizes Important Aspects of the Services That Information Providers Provide and Fails to Articulate a Basis for Asserting That They Are Investment Advisers.

The RFC presents the SEC's views on the services provided by each category of Information Provider in the context of requesting comments concerning whether those services potentially implicate investment adviser status. We believe the RFC either mischaracterizes or does not articulate important aspects of Information Provider services and relationships in this context, as discussed in greater detail below.

### A. *Index Providers*

An index is a mathematical formula based upon the value of a group of stocks, bonds, derivatives, commodities or other financial assets, the output of which represents and measures the performance of a particular market, investment theme or asset class. Indexes are created and operated by index providers. Index providers perform the following primary roles with respect to a particular index: (i) designing the index, (ii) constructing an appropriate index methodology, (iii) calculating and publishing the index, and (iv) maintaining the index through rebalances, reconstitutions and other developments.

Designing an index begins with a determination of the market, economic sector, theme or asset class (together, a "market") to measure and takes into consideration many factors, including whether the measured market presents a marketable basis for an index-based product, whether prices of the potential constituents are available to the index provider and market participants, and whether the constituents are sufficiently accessible and liquid to be included in the portfolio of an index-based product.

After the index provider determines the market to be measured, it then prepares a written index methodology, which sets forth the rules governing the index's construction, calculation, publication, and maintenance.

- Index construction rules determine which instruments are eligible or ineligible for inclusion in an index and the criteria for selecting and weighting eligible instruments. For example, an index's eligibility requirements may specify that only the stocks of companies operating in the healthcare industry, as defined based on a particular source or approach, are eligible for inclusion. From there, the index's selection criteria applies various screens to determine the constituents ultimately included in the index. For example, an index's selection criteria may apply market capitalization (e.g., a minimum capitalization of $1 billion), liquidity (e.g., a minimum daily trading volume) and dividend screens (e.g., a minimum number of consecutive years issuing dividends); rank the qualifying stocks by various fundamental factors (e.g., price-to-equity ratio, annual revenue, etc.); and include within the index the predetermined number of qualifying constituents based on rank. The index methodology further defines the rules for weighting constituents selected for inclusion. For example, the methodology may specify that all selected constituents are equally weighted, weighted by market capitalization, weighted by price, or otherwise weighted.

- Index calculation rules determine how the value or "level" of the index is calculated. The index methodology generally provides a formula to apply to the selected constituents to determine the index's value. For example, an index calculation formula for a market capitalization-weighted index may specify how the market capitalization for each constituent is calculated (e.g., by multiplying the issuer's shares outstanding by its stock price), how the market capitalization of the

entire index is calculated (e.g., by adding the market capitalization of each constituent) and how the final index value is determined (e.g., by dividing that sum by the index divisor, which generally is a number set at index launch and, among other things, is designed to scale the index value downward to a usable level).

- Index publication rules determine how frequently an index is published (e.g., daily). Index providers may publish the index constituents and values through various outlets, including their own websites or through third-party vendors.

- Index rules govern potential changes to the rules themselves and particularly with respect to the rules governing the methodology of the index. While such events may be relatively infrequent, rule change policies will apply and will result in updated index documents.

- Index maintenance rules govern the process for updating the index constituents over time. Maintenance rules set forth the schedule according to which constituents are added to and subtracted from the index, commonly referred to as a reconstitution, and reweighted within the index, commonly referred to as a rebalancing. This schedule is often quarterly, semi-annually or annually. The methodology further sets forth the rules for taking into account specific corporate actions and other events that occur between rebalancing and reconstitution dates ("Corporate Actions"). Examples of Corporate Actions include dividends, acquisitions, and bankruptcies. In each such instance, the methodology defines the manner in which, and timing as of which, the index is adjusted to reflect the Corporate Action (e.g., if the constituent is acquired, it is removed from the index on the day following shareholder approval of the acquisition).

- Indexes are intentionally designed to minimize the circumstances under which the index provider may exercise any degree of discretion, and the circumstances under which an index provider may exercise such limited discretion generally are set forth in the methodology or in a separate document regarding the use of "expert judgement."[4] For many indexes, the circumstances under which an index provider exercises such limited discretion are quite narrow relative to the operation of the index as a whole. Common examples of circumstances under which such limited discretion may be exercised include: (i) unusual market events or Corporate Actions not contemplated by the methodology; (ii) discrepancies with the price of an asset provided by a pricing source; and (iii) periods of market stress. The well-defined exercise of limited discretion within clear parameters and subject to rigorous governance is necessary as an index methodology cannot anticipate every market condition or circumstance that could impact the index. Therefore, while discretion may be used by index providers from time to time, the circumstances typically are limited and governed by the index rules and the index provider's written governance procedures. Any significant degree of discretion is anathema in the context of an index as index providers do not desire to exercise broad discretion and licensees do not desire the index to be subject to broad discretion.

---

[4] "Expert judgment" is a term used in both the Benchmarks Regulation ("BMR") of the European Union (the "EU") and the Principles for Financial Benchmarks published by the International Organization of Securities Commissions (the "IOSCO Principles"), which require (in the case of BMR) or recommend (in the case of the IOSCO Principles) that index providers prepare written guidelines setting forth and controlling the circumstances under which the index provider may exercise discretion. As discussed in greater detail in *infra* Section VI, many index providers voluntarily comply with the IOSCO Principles even if they are not subject to BMR.

**The RFC mischaracterizes index providers' exercise of discretion.**

The RFC states that reconstitutions and rebalancings "leave room for significant discretion—for example, an index provider typically has the ability to make changes to the index by adding or dropping particular constituents (*i.e.*, index reconstitution) or modifying their weighting within the index (*i.e.*, index rebalancing)."[5]

Contrary to this statement, most index providers exercise no discretion when rebalancing and reconstituting an index under normal circumstances, as they apply the same eligibility, selection and weighting rules described above as of each specified rebalancing or reconstitution date. Constituents are added to, removed from, and/or reweighted within the index based on the index rules. While a limited and narrow degree of discretion may be used on occasion, such as when the index methodology does not anticipate a unique market event impacting the index, those circumstances are subject to clear governance, and notice of such events is often published in a written document. This transparency in the well-governed exercise of such limited discretion is especially important for index-based ETFs, where authorized participants and market makers value transparency to allow them to support an effective arbitrage mechanism and hedge exposures. Further, for certain indexes, an independent index calculation agent calculates and publishes the level of the index on a day-to-day basis according to a rulebook. For these indexes, the index provider generally would only become involved in such calculations in connection with a unique and unexpected market disruption affecting the index, and only then contribute to the calculations within prescribed parameters.

The RFC also cites changes made to reflect Corporate Actions as examples of active decision-making by index providers.[6] However, index providers do not typically exercise discretion when adjusting the index for Corporate Actions between rebalancing or reconstitution dates, for which rules govern the index provider's actions, unless there is a specific feature of the Corporate Action that is not contemplated by the methodology. And even then, the rules set forth in the methodology determine the adjustments to be made, and the index provider applies those rules systematically to derive the resulting index makeup and level for the relevant Corporate Action.

We therefore wish to emphasize that indexes typically are designed so that in all aspects of an index's operations (i.e., rebalancings, reconstitutions, Corporate Actions, or otherwise), the index provider may exercise discretion only in specific limited circumstances (e.g., market disruptions or unique and unexpected Corporate Actions), within narrowly defined parameters, and with clear governance.

**Index Providers do not drive advisers with clients tracking an index to purchase or sell securities in response to index changes.**

The RFC states that "the index provider's inclusion or exclusion of a particular security in an index drives advisers with clients tracking that index to purchase or sell securities in response,"[7] suggesting that doing so is a form of providing advice to licensee advisers that manage index-linked investment products and that index providers therefore may be considered investment advisers.

---

[5] RFC at 37254-37255.

[6] *Id.* at 37255, n. 11.

[7] *Id.* at 37255.

As discussed above, index providers design indexes at the outset, as set forth in the methodology, to operate in a formulaic, predictable, and replicable manner. It is true that the index provider has authority to identify the market to measure via an index, design and prepare the methodology that governs the index's operation, and license the index as a basis for index-linked products sponsored by the licensees. However, this service in no way is a recommendation to a licensee to buy or sell a security for itself or its client, as applicable.

First, the investment objective of index-linked products often is to seek to track the returns of the index, rather than to have exposure to the specific constituents of the index. The licensee adviser is responsible for advising its client on the most appropriate way to track those returns. In this regard, it is the responsibility of the licensee adviser to determine whether and how to replicate the index in its client's portfolio. The licensee adviser could choose to do so, or it could choose to invest in a subset of the index constituents, in securities not included in the index or in one or more derivatives, if the licensee adviser believes that doing so provides a more efficient means of tracking the index's performance or is otherwise appropriate in light of the client's investment objective. The index provider neither plays a role in how the licensee adviser selects securities or otherwise manages its client's portfolio to seek to track the index's performance nor does it play a role in the valuation of securities held by a fund.

Second, even before licensing the index, the licensee adviser typically would undertake significant due diligence on the index provider, index methodology, and prior index performance. For example, the licensee adviser typically would request information to evaluate, among other things, the capability of the index provider to operate the index as set forth in the methodology (e.g., internal structures and controls in place to support the index operations) and the business continuity plan of the index provider. In doing so, the adviser determines that the index methodology is designed to generate performance that is trackable, and the methodology will select constituents that are appropriate for the client, either through direct investments or synthetic access to the returns. In this regard, licensee advisers understand how the index works and predetermine that resulting changes in the index are appropriate for their clients. When rebalancings or reconstitutions are published, licensee advisers determine independently how best to reflect those updates in their clients' portfolios. In no way do licensee advisers view index providers as providing investment advice, nor do they act on updates to the index as recommendations to buy or sell. Those decisions are made solely by the licensee adviser. If a licensee adviser deems a change to be inappropriate, it can avoid implementing the change in its clients' portfolios or discontinue using the index.

An index provider therefore does not "drive" a licensee adviser to buy, hold or sell a security or recommend that it do so. The licensee adviser has already made the decision that doing so is appropriate by virtue of its understanding and selection of the index as a basis for the licensee adviser's product. The index provider simply implements the index rules and provides market measurements that the licensee adviser has determined are appropriate for its clients, without a view as to whether the constituents are good or bad investments for the licensee adviser to implement for its clients. And, as described above, the licensee adviser has no obligation to implement changes in any actual portfolio in response to a change in the reference index.

Further, as discussed in Section V below, index providers provide indexes to be used as a basis for a host of products other than funds registered under the Investment Company Act. These products include, but are not limited to, derivatives, structured products, and insurance contracts whose performance is linked to the performance of the underlying index. These products are not pooled investment vehicles and do not

provide end-investors with an interest in the underlying assets of the index. Instead, these products provide synthetic exposure to the performance of the index. As a result, the institutions issuing, sponsoring, or trading these products do not purchase or sell any of the individual underlying assets of the index on behalf of end-investors.

**Bespoke indexes are not materially different from, and do not present greater concerns than, other indexes.**

The RFC implies that it is more likely that an index provider may operate as an investment adviser when the index provider creates and operates an index for a specific client – so-called "bespoke indexes."[8] This is a seriously flawed assumption as bespoke indexes do not operate in any materially different manner than other indexes. While bespoke indexes may be designed at the direction of and with input from a licensee adviser, they operate in accordance with the same rules-based principles, and typically allow for the limited use of discretion, as outlined above, applicable to broader indexes. Even where a licensee adviser provides input on an index design or requests that an update be made to the index, that input or request comes from the licensee adviser and any change would be reflected in the index methodology and implemented in accordance with that methodology. In no way does an index provider provide advice to a licensee adviser when the adviser is the one requesting that the action be taken. Moreover, the involvement of the licensee adviser in providing more input into the design of the methodology for a bespoke index makes it even less reasonable to conclude the index provider is providing advice than in the context of a general index.[9]

We also note that, prior to the adoption of Rule 6c-11 under the Investment Company Act, the SEC imposed through the exemptive application process additional conditions on ETFs that sought to track bespoke indexes created by affiliates of the index ETF's investment adviser ("Self-Indexed ETFs"). The conditions established a framework that required: (i) transparency of the index; (ii) the adoption of policies and procedures designed to mitigate conflicts of interest; (iii) limitations on the ability to change the rules for index compilation and the component securities of the index; (iv) that the index provider enter into an agreement with an unaffiliated third-party to act as calculation agent; and (v) certain limitations designed to separate employees of the index provider, investment adviser and calculation agent. These principles are also often applied in the design and operation of indexes, even outside of the ETF context.

When adopting Rule 6c-11, however, the SEC determined that Self-Indexed ETFs presented no greater concerns than other ETFs by virtue of existing protections afforded by the federal securities laws

---

[8] *See id.* ("While indexes have historically been associated with passive investing, index providers, particularly those that design specialized indexes, may be making active decisions in designing or administering the index. In some cases, these decisions may be personalized for a particular user, for example designing or modifying an index for the specific purpose of licensing its use by particular investors and/or their advisers to be employed as part of their investment strategy").

[9] This dynamic is also applicable in the context of products not registered under the Investment Company Act, such as index-linked derivatives. For example, a customer may request that an index provider create an index for use in an index-linked swap to hedge against a specific risk unique to the customer. In such a scenario, the client functionally is requesting that the index provider structure a rules-based payout formula. See *infra* Section V for a discussion of the use of indexes in products not registered under the Investment Company Act and the potential harm to those products and their markets if Information Providers were regulated as investment advisers.

and the daily portfolio transparency of the Self-Indexed ETFs.[10] Accordingly, the SEC allowed Self-Indexed ETFs to operate without any additional conditions relative to other ETFs. We are not aware of any material changes in the operation of Self-Indexed ETFs or other ETFs that use bespoke indexes created by unaffiliated index providers (which presumably would cause less concern with the SEC than Self-Indexed ETFs) since the adoption of Rule 6c-11. We continue to agree with the SEC's position articulated in the Rule 6c-11 adopting release that Self-Indexed ETFs, and by extension other ETFs that use bespoke indexes, do not present greater concerns than, or warrant greater regulation than, other ETFs. Therefore, we submit that regulating index providers of bespoke indexes as investment advisers is unnecessary and contrary to the position taken by the SEC on Self-Indexed ETFs just three years ago.

B. *Model Portfolio Providers*

There are distinct parties in a model portfolio arrangement: the model portfolio provider, the program sponsor, and the program sponsor's end-client. Model portfolio providers undertake market research and construct a model portfolio, which, the RFC notes, is a "diversified group of assets (often mutual funds or [ETFs]) designed to achieve a particular expected return with exposure to corresponding risks."[11] Many program sponsors are either registered investment advisers or bank fiduciaries that use model portfolios when providing investment advice to their end-user clients, often through a wrap fee or separately managed account program. Some program sponsors provide additional layers of investment advice, including asset allocation and tax overlay services. Other program sponsors are not advisers or fiduciaries but instead provide a model technology platform for use by client-facing advisers, or are registered broker-dealers or insurance companies. In all model portfolio arrangements, however, there is a client-facing party between the model portfolio provider and end-user clients with ultimate discretion over end-user clients' accounts.

Model portfolio programs provide significant benefits to end-user clients. For example, the increased use of model portfolios has brought separately managed account programs and sophisticated strategies like tax-loss harvesting to a wider array of investors than previously available, with the potential to reduce fees paid by end-clients.

**The RFC does not articulate why a model portfolio provider should be considered an investment adviser.**

The RFC does not articulate why a model portfolio provider should be considered an investment adviser, either generally[12] or specifically with respect to the sponsor's end-client. We therefore believe it is appropriate to explain important aspects about the model portfolio provider-sponsor relationship.

---

[10] Exchange Traded Funds, 84 Fed. Reg. 57162, 57168-57169 (Oct. 24, 2019) ("We agree with the commenters who stated that the existing federal securities laws adequately address any special concerns that self-indexed ETFs present, including the potential ability of an affiliated index provider to manipulate an underlying index to the benefit or detriment of a self-indexed ETF…. Therefore, we continue to believe that portfolio transparency combined with existing requirements should be sufficient to protect against the abuses addressed in exemptive applications of ETF sponsors that either use affiliated index providers or create their own indexes.").

[11] RFC at 37255.

[12] As a practical matter, nearly all model portfolio providers to retail managed accounts are registered investment advisers or bank fiduciaries.

Model portfolio providers create model portfolios and distribute them to program sponsors or model platforms. Model portfolios are not designed with the specific needs or circumstances of any particular end-user client. In fact, model portfolio providers typically do not know the identity of or any other information about any end-user clients. Sponsors or other advisers who are accessing models through a model platform are solely responsible for determining whether a model is appropriate for their clients, and they are under no obligation to implement the model portfolio's components in their end-user clients' portfolios. The sponsor or other adviser may deviate from a model for any reason and in its sole discretion as the fiduciary of the end-user client, including to accommodate individual client investment guidelines or restrictions, cash flow, tax or other needs specific to particular clients, about which the model portfolio provider has no knowledge.

C. *Pricing Services*[13]

Funds registered under the Investment Company Act are required to determine the net asset value ("NAV") of their portfolios in accordance with applicable provisions of the Investment Company Act and the rules thereunder.[14] Private funds are required to arrange for the periodic determination of their NAVs by virtue of their governing or disclosure documents. [15] Asset managers arrange for the calculation of NAV of other products based on disclosure documents or client agreements applicable to those products. Funds and managers discharge this obligation to determine NAVs in a variety of ways, including, but not limited to, hiring third-party pricing services to provide pricing data, obtaining broker quotes on securities, using internally-derived valuations or a combination of each. Such third-party pricing service providers should be distinguished from collateral valuation, and other similar valuation responsibilities, which are performed by parties to a derivatives transaction, and which we believe are outside the scope of the RFC's focus.

Pricing services produce independent, asset-level evaluations (or prices), typically through the employment of publicly disclosed evaluation methodologies that are, in most cases, consistent with market convention and fair value accounting standards. Pricing services can vary by the asset classes that they cover as well as the level of specialization and expertise that they provide. Standard pricing services typically focus their offering on asset classes that are widely traded among market participants and for which there exists relevant market data, and generally appeal to a large and diverse customer base of institutional investors – namely Investment Company Act-registered funds, fund administrators, banks and insurance companies.

A pricing service typically provides all its users with a single, uniform fair value assessment of the price at which a particular asset would currently trade under normal market conditions. The pricing provider

---

[13] Pricing services refer to providers offering valuations for the purposes of this comment letter as the description of the pricing services is limited as such in the RFC.

[14] *See* Section 23(b) of the Investment Company Act (providing that closed-end funds that issue common stock generally may not sell such stock at a price below the current NAV); *see also* Rule 22c-1(b) of the Investment Company Act (requiring open-end funds to calculate NAV at least daily Monday through Friday at the specific time or times set by the fund's board, subject to limited exceptions); Rule 22c-3 of the Investment Company Act (providing that interval funds that periodically repurchase their shares in accordance with Rule 22c-3 under the Investment Company Act must calculate the NAVs of such repurchased shares consistent with Section 2(a)(41)(B) of the Investment Company Act.).

[15] For example, a private fund's governing or offering documents may specify that the fund will calculate NAV each month in connection with contributions and withdrawals.

generates prices without knowing the identity or use case of the customer that will receive the data. In fact, different customers may use the same price in a different manner. As part of the pricing methodology, pricing services typically establish a trading color hierarchy, in which data points in the market are ranked by their objectivity (e.g., round lot trades are generally at the top of the hierarchy). These assessments consistently follow stated processes and methodologies, and are not personalized to, or influenced by, any particular user.

Regarding fees, pricing services typically offer subscription-based licenses or charge users on an à la carte basis to allow access to price information that they publish. Fees are typically not tied to, or influenced by, the actual evaluation provided for any given asset, the size or direction of the position, or the performance of the fund or asset. Such fees compensate the vendor for expenses incurred in technology, analysis, and collection of data.

**The RFC mischaracterizes the discretion exercised by pricing services.**

The RFC states: "In providing pricing information to users, pricing services may exercise significant discretion. They often determine a valuation methodology to use; develop valuation model templates; determine the sources or relevance of inputs; determine whether the valuations generated are appropriate or require further adjustment; and may need to address any pricing challenges raised by the user…. A pricing service may offer different pricing levels for the same security as well, depending on the service's type of analysis or evaluation and the user's needs."[16]

However, the "discretion" referred to above is performed within the bounds of a pricing service's evaluation methodology which is available to customers and is not customized or tailored to a specific customer or end-user, but instead is specific to the asset itself, and recognizes that each asset may have unique features to be considered. Importantly, a pricing service has no "discretion" to make investment decisions for its customers. While exceptions may exist at the margins, it is generally untrue that pricing services offer different customers different prices for the same asset. Rather, a pricing service generally offers a single asset price to all its customers. In fact, pricing services typically do not know whether the end-user (e.g., a particular fund) even holds the particular asset and thus do not have the ability to tailor the price to the end-user. Additionally, when considering pricing challenges from customers, pricing services consider the facts and circumstances around the asset, as well as the market data available, and, when a revision is warranted, they publish the revision or update the valuation going forward to all customers receiving the valuation.

**The RFC mischaracterizes the relationship between pricing services and their customers.**

When discussing the discretion that the SEC believes pricing services may exercise, the RFC implies that the pricing services determine the ultimate price used by a customer to value the relevant assets, or exert an outsized influence on the customer regarding the price ultimately used. This perception is not consistent with actual practice. A pricing service's customer has complete control over whether and how to use the asset price provided. For example, the customer may discard the value, average the value with those provided by other vendors, use the value to compare with its internal valuation, or use a modified value. The pricing service has no influence over and no knowledge of the option chosen by the customer. Instead, the price provided by a pricing service is just one component used by the customer in satisfying the

---

[16] RFC at 37256.

customer's obligation to determine NAV. Additionally, the fund's auditor reviews the fund's pricing process and pricing providers for fair market value consistency and accuracy.

Further, it is important to note that pricing services do not provide asset prices to a customer for the purpose of advising the customer to buy, hold or sell the quoted assets. A price in isolation, as generally provided by a pricing service, does not in any way indicate the quality, suitability, or desirability of an investment. When creating a value, the pricing service does not consider, or have available, additional context, such as position size and direction, intrinsic value, future market conditions, and market liquidity. The price provided represents the pricing service's view on the asset's fair market value at a specific point in time and does not offer any insight or guidance on potential future price changes. Pricing services charge set, consistent fees that are not tied to the actual valuation levels provided or the investment strategy of the client and are agnostic to holdings size or direction. Pricing services also do not organize or present data to customers in a manner that suggests purchasing, holding, or selling any security.

## III. The Nature of the Services Falls Outside of the Scope of the Statutory Definition of "Investment Advice." Information Providers Do Not Fall Within the Definition of "Investment Adviser" Under Historical Interpretations.

Index providers, model providers, and pricing services have offered their services in one form or another for decades, and yet the SEC has not regulated them as investment advisers in the context of either the Advisers Act or Investment Company Act. No doubt, this historical treatment is because Information Providers do not have the kind of fiduciary, person-to-person relationships with their customers that is the litmus test of being an investment adviser under the Advisers Act. Nor do Information Providers engage in activities that bring them within the scope of investment advisers as defined under the Investment Company Act. Although the SEC seeks information on the extent to which Information Providers exercise investment discretion over accounts as bearing on investment adviser status or the policy considerations bearing on whether Information Providers should be regulated as investment advisers, Information Providers do not exercise investment discretion as that concept is understood under the federal securities laws. As discussed in Section II, the services provided by Information Providers are materially distinct from the services performed by investment advisers and, as such, the concomitant investment adviser legal framework is inapplicable.[17]

### A. *Information Providers are not investment advisers under the Advisers Act.*

Although the definition of "investment adviser" under the Advisers Act broadly covers "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities," this definition is limited by specific carveouts and interpreted in line with the legislative history of the Advisers Act and common law concepts of fiduciary duty that plainly do not apply to the Information Providers or their services.

The Advisers Act excludes from the definition of "investment adviser," among others, banks, broker-dealers whose performance of advisory services is solely incidental to their business as broker-

---

[17] For examples of how the services provided by Information Providers are materially distinct from those provided by investment advisers, *see infra* note 24.

dealers and that receive no special compensation therefor, and publishers of a bona fide newspaper, news magazine or business or financial publication of general and regular circulation.

In *Lowe v. SEC,*[18] the Supreme Court held that the "publisher's exclusion" is available to any *bona fide* publication of general and regular circulation that offers only "impersonalized" investment advice (*i.e.,* advice not tailored to the investment needs of specific clients).[19] Although the *Lowe* decision is often looked to for its application of the publisher's exclusion, for present purposes it is more important for establishing that a personal relationship between adviser and client is an essential condition of an investment adviser under the Advisers Act.

In interpreting the definition of investment adviser, the Supreme Court undertook an extensive review of the legislative history of the Advisers Act and concluded that "[t]he Act's legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice."[20] Indeed, the Supreme Court reversed the earlier appeals court holding that, in the words of the Supreme Court, "the Act does not distinguish between person-to-person advice and impersonal advice" and ruled that the touchstone of an investment adviser is a personal relationship between adviser and client.[21]

The Court stated that, "[a]s long as the communications between petitioners and their subscribers remain entirely impersonal and do not develop into the kind of fiduciary, person-to-person relationships that were discussed at length in the legislative history of the Act and that are characteristic of investment adviser-client relationships, we believe the publications are, at least presumptively, within the exclusion and thus not subject to registration under the Act."[22]

In short, the terms under which an Information Provider provides services to its financial intermediary and other institutional clients are very different from a traditional investment adviser-client relationship. Information Providers provide their clients with a measure of market performance, a model or an asset price. As discussed in Section II above, Information Providers do not provide this information as investment recommendations. Rather, it is the Information Provider's clients that are themselves required to exercise independent judgment when determining whether and how to use that information in making investment decisions for their clients. This relationship is in contrast with a traditional adviser-client relationship, which is traditionally characterized as a relationship of "trust and confidence" pursuant to which the adviser provides recommendations or advice regarding "the sound management of [the client's] investments."[23]

---

[18] 472 U.S. 181 (1985).

[19] *See id.* at 204-07; *see also Fortis Morse v. Republican Party of Va.,* 517 U.S. 186, 245-46 (1996) (Scalia, J., dissenting) (noting that "in *Lowe* . . . we held that a statute requiring all investment advisors' [sic] to register with the Securities and Exchange Commission . . . does not extend to persons who publish 'nonpersonalized' investment advice such as periodic market commentary.").

[20] *Lowe*, 472 U.S. at 204.

[21] *Id.* at 181.

[22] *Id.* at 210.

[23] *SEC v. Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 187 (1963).

Regarding pricing services specifically, although the definition of "investment adviser" under the Advisers Act includes any person who for compensation engages in the business of advising others "as to the value of securities," that cannot mean that anyone who provides pricing or valuation services is an investment adviser. Rather, we believe it is prudent to interpret the meaning of "advising as to the value of securities" as requiring that advice to be directional (i.e., whether the securities will increase, decrease or remain flat) so as to recommend a buy, hold or sell decision.[24] As discussed above and in Section II, pricing services do not provide prices in this manner.

Further, in no case should Information Providers be deemed investment advisers to the end-clients of their financial intermediary clients. In order for Information Providers to be deemed investment advisers under the Advisers Act under this view, a court or regulator would have to "look through" the relationship with the financial intermediary. However, the language of Section 202(a)(11) of the Advisers Act defining an "investment adviser" is clear and unambiguous in that it does not contain a "look through" provision. Congress' intent not to include a "look through" provision in Section 202(a)(11) can be found by comparing that section with Section 2(a)(20) of the Investment Company Act, discussed below. Both the Investment Company Act and the Advisers Act were considered and debated by Congress concurrently and were passed by the 76th Congress as Title I and Title II, respectively, to the same bill, which was presented to and signed into law by President Franklin D. Roosevelt on August 22, 1940.[25] Yet, Section 2(a)(20) contains a "look through" provision (which we discuss below as the "Sub-Adviser Prong") while Section 202(a)(11) does not.

Nor should Information Providers be deemed to have an implied advisory relationship with end-clients. This position aligns with longstanding guidance from the SEC staff. For example, the *Kempner Capital Management, Inc.* no-action letter involved the provision of investment advice to the trust department of a bank, which held various client accounts in a fiduciary capacity.[26] The SEC staff granted no-action relief stating that Kempner would not have to treat the bank's underlying clients as its own clients for purposes of Rule 205-3 under the Advisers Act because Kempner's advice was provided to the bank and was "not tailored to individual accounts or based on the individual circumstances of those accounts."[27] Instead, the SEC staff stated that Kempner could count the bank, and not the bank's underlying clients, as its clients for purposes of Rule 205-3 under the Advisers Act.

---

[24] This interpretation would be consistent with long-established SEC staff no-action letter guidance to the effect that the provider of securities data analytics should not be deemed an investment adviser if (i) the information is readily available to the public in its raw state; (ii) the categories of information presented are not highly selective; and (iii) the information is not organized or presented in a manner that suggests the purchase, holding, or sale of any security. *See*, *e.g.*, RDM Infodustries, SEC Staff No-Action Letter (Mar. 25, 1996); Datastream International, Inc., SEC Staff No-Action Letter (Mar. 15, 1993); EJV Partners, L.P., UniVu System, SEC Staff No-Action Letter (Dec. 7, 1992); David G. Takata, SEC Staff Denial of No-Action Request (Aug. 21, 1992); Media General Financial Services, Inc., SEC Staff No-Action Letter (July 20, 1992); Investex Investment Exchange, Inc., SEC Staff No-Action Letter (Apr. 9, 1990); Wilson Associates, SEC Staff No-Action Letter (May 25, 1998); Innosearch Corp., SEC Staff No-Action Letter (Sept. 12, 1985); Advantage: Investors, SEC Staff No-Action Letter (May 13, 1985).

[25] Pub. L. No. 76-768 (1940).

[26] *Kempner Capital Management, Inc.*, SEC No-Action Letter (pub. avail. Dec. 7, 1987).

[27] Rule 205-3 permits an investment adviser to be compensated on the basis of a share of the capital gains or capital appreciation of a client's assets, subject to certain conditions.

In another no-action letter issued to *Copeland Financial Services, Inc.*, in which the SEC staff permitted sub-advisers to charge Copeland a performance fee under Rule 205-3, the SEC staff concluded that those sub-advisers, who were providing Copeland with signals as to when to transfer assets among investment options in a variable annuity product, were not providing advice to the individual participants because "the sub-advisers' transfer recommendations are applicable generally to all the individual participants and are not specifically tailored to each individual client."[28] In our view, the "no look through" approach taken by the SEC staff in the *Kempner* and *Copeland* no-action letters is entirely consistent with the plain reading of Section 202(a)(11). These letters also stand for the proposition that an advisory relationship should not be implied with a client of another financial intermediary or institution in the absence of a person exercising investment discretion or providing advice that is tailored to the specific needs of a client.[29]

B. *Information Providers are not acting as investment advisers under the Investment Company Act.*

Section 2(a)(20) of the Investment Company Act provides three specific tests that cause a person to become an investment adviser to an investment company. Specifically, under Section 2(a)(20), the term "investment adviser" includes: (1) any person who pursuant to a contract with an investment company regularly furnishes advice to the investment company with respect to the desirability of investing in, purchasing or selling securities or other property (the "Regularly Furnishing Advice Prong"); or (2) any person who pursuant to a contract with an investment company is empowered to determine what securities or other property will be purchased or sold by the investment company (the "Investment Discretion Prong"); or (3) any person who pursuant to a contract with a person described in (1) or (2) above regularly performs substantially all of the duties undertaken by such person described in (1) or (2) above (the "Sub-Adviser Prong").

Information Providers are not acting as investment advisers under the Regularly Furnishing Advice Prong or the Investment Discretion Prong. To be an investment adviser to an investment company under the Regularly Furnishing Advice Prong or the Investment Discretion Prong, the Information Provider would either have to provide investment advice on a regular basis to an investment company or be authorized to provide discretionary investment advice to an investment company, pursuant to a contract. The contractual requirement is a central element of both prongs. This element is not satisfied in the context of the arrangements because Information Providers typically only enter into the agreements with an investment adviser to an investment company.[30] Further, as discussed above, Information Providers only provide access

28 *Copeland Financial Services, Inc.*, SEC No-Action Letter (pub. avail. Sept. 21, 1992).

29 What is important here, as was the case in the *Kempner* and *Copeland* no-action letters, is that an unaffiliated financial intermediary interposes its own judgment with respect to the merits and usefulness of the Information Provider's services and will be responsible for any portfolio management decisions for the end-clients. Thus, these arrangements are distinguishable from the arrangements described in *National Regulatory Services, Inc.*, SEC Staff No-Action Letter (pub. avail. Dec. 2, 1992), in which the SEC staff implied a contractual relationship between a wrap fee money manager and the client in the absence of a written contract. There, the money manager exercised investment discretion and there was no independent fiduciary interposing its judgment with respect to the money manager's investment decisions.

30 In *Advisers by Another Name*, an academic article cited in the RFC, while arguing that certain index providers come within the statutory definition of "investment adviser" under the Investment Company Act, the authors concede that "[t]he more challenging aspect of the definition arises from the language 'pursuant to a contract.'" *See* Paul G. Mahoney & Adriana Z. Robertson, *Advisers by Another Name*, University of Virginia School of Law (Jan. 2021), at 38, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3767087. In an effort to overcome this clearly inapplicable

to data to investment advisers concerning market performance, models or securities prices, and it is the investment advisers that have sole authority regarding whether and how to use that data. For example, an investment adviser may determine to buy a derivative, rather than an index constituent, as part of its strategy to track the index's performance. Or an investment adviser may determine not to use a particular price provided by a pricing service and instead fair value the security under its and/or its client's applicable pricing procedures. The Information Provider does not provide advice as to the desirability of buying, selling or investing in securities or other property or determine what securities or other property an investment company buys or sells.

Information Providers are not acting as investment advisers under the Sub-Adviser Prong. To be an investment adviser to a fund under the Sub-Adviser Prong, an Information Provider would have to satisfy two elements. First, it would have to have a contract with the investment company's investment adviser and, second, it would have to regularly perform substantially all of the duties undertaken by the investment adviser. While the contractual element may be satisfied, Information Providers do not regularly perform substantially all of the duties undertaken by the investment company's investment adviser. A hallmark of an investment company advisory relationship is the adviser's authority to exercise investment discretion over the investment company's assets and to make investments consistent with the investment company's stated investment objectives and limitations. Further, Information Providers do not take into account whether the information they provide is suitable for any investment company.

Moreover, there are other duties typically undertaken by an investment company's adviser, including, but not limited to, the selection of broker-dealers to effect securities transactions on behalf of the investment company, the selection of markets or exchanges in which to execute such transactions, the obligation to vote proxies on behalf of the investment company, and in some cases, the provision of administrative support services to the investment company – none of which are performed by Information Providers. In the index provider context, even if one assumes that rebalancing and reconstituting an index equates to furnishing advice to a fund that seeks to track the index, rebalancings and reconstitutions happen only at periodic intervals (e.g., quarterly, semi-annually or annually), with an occasional Corporate Action adjustment occurring in the interim. Serving as investment adviser to a fund, however, is a daily activity, with certain aspects such as monitoring portfolio risk requiring constant attention, none of which are performed or are desired or contemplated to be performed by an index provider. Accordingly, an Information Provider does not "regularly perform substantially all" of the duties of an investment company's investment adviser.

C. *Information Providers do not act as common law fiduciaries.*

The *Capital Gains Research Bureau* decision highlighted the Advisers Act's recognition that fiduciary duties exist between investment advisers and their clients based on an understanding of fiduciary concepts under common law. As was noted by Judge Posner in his 1992 opinion in *Burdett v. Miller*,

---

aspect of the definition, Mahoney and Robertson point to Section 12(a)(1) of the Securities Act of 1933, as amended (the "Securities Act") by analogy and the right of action available to those outside of contractual privity. *See Pinter v. Dahl*, 486 U.S. 622 (1988). However, the Supreme Court's reasoning in *Pinter* turned on whether the individual "engages in ***solicitation***, an activity not inherently confined to the actual owner." *Id.* at 643 (emphasis added). Mahoney and Robertson proffer, "In the case of an index fund, the index provider and its licensee, the primary adviser, both ***intend*** that the licensee will sublicense the index to the fund." *Mahoney and Robertson*, *supra* note 29, at 38 (emphasis added). Regardless of whether index providers intend for investment companies to use their services, they do not solicit the purchase of fund shares by end-investors.

fiduciary obligations generally are not simply imposed upon a party.[31] Rather, the existence and scope of a fiduciary relationship depends on the facts and circumstances, including the scope of the relationship.[32]

The services Information Providers provide do not implicate any fiduciary duties recognized under common law. It is generally accepted that a fiduciary relationship arises only if "one person has reposed trust and confidence in another who thereby gains influence and superiority over the other."[33] As discussed above, the relationship between an Information Provider and its customer generally would not be described as one of "trust and confidence" since the Information Provider generally acts as an arm's length counterparty and/or must be independent and impartial.[34] It is also not one where the Information Provider gains "influence and superiority" since the Information Provider, in the performance of these services, does not recommend any particular course of action or have authority to direct or act for its customer in any way.[35] Additionally, with respect to pricing providers, these relationships are not "personal" since a provider of independent valuations must be impartial and is not permitted to take the ultimate objective of its client into account when valuing assets, and the pricing provider, acting independently, cannot act solely in the best interest of its client (in the sense that it can render valuations not favorable to the client).

D. *Information Providers do not exercise investment discretion.*

The SEC suggests that Information Providers exercise investment discretion as a basis for asserting that they are acting as investment advisers or to justify regulating Information Providers as such.

Whether a person exercises investment discretion is largely a question of fact based on whether a person is authorized to make investment decisions. Section 3(a)(35) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), provides that a person exercises "investment discretion" with respect to an account "if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the SEC, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of this title and rules and regulations thereunder."

---

31 *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992) ("We have given two examples of categories of relations in which fiduciary duties are imposed (lawyer-client, guardian-ward), and the relationship between an investment adviser and the people he advises is not a third.").

32 *See, e.g., Stevenson v. Rochdale Inv. Mgmt., Inc.,* No. 3:97-CV-1544-L, 2000 U.S. Dist. LEXIS 13110, at *12 (N.D. Tex. Sept. 7, 2000) ("A fiduciary relationship exists when the parties are under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation.").

33 *See Cap. Gains Rsch. Bureau,* 375 U.S. at 191; *see also Burdett,* 957 F.2d at 1381.

34 *See, e.g.,* Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 B.U. L. Rev. 1289, 1293 (2011) ("Fiduciaries cannot perform their services unless they are entrusted with property or power."). An Information Provider does not receive property to manage on behalf of its customers. Although some Information Providers enjoy a large market share in their respective industry, this is not from dominion over customer assets but rather from the quality of the services provided over time.

35 *See Burdett*, 957 F. 2d at 1379 (quoting *Amendola v. Bayer*, 907 F.2d. 760, 763 (7th Cir. 1990)).

Information Providers are not "authorized to determine" what securities or other property are purchased or sold by or for any account and do not "make decisions" as to what securities or other property are purchased or sold by or for an account, as those activities are solely in the province of the Information Providers' customers or their end-clients.

Although Section 3(a)(35) contemplates (in clause (C)) the possibility that the exercise of "influence with respect to the purchase and sale of securities or other property" could potentially constitute "investment discretion," it does so only where the SEC adopts a rule under Section 3(a)(35)(C) to define "investment discretion" based on influence over investment decisions, which it has not done, and which we do not believe is appropriate in the context of Information Providers for the reasons discussed in this letter. In this regard, we do not believe an Information Provider reasonably can be said to exercise influence over whether and how its client purchases or sells a security or other property based on the data provided by an Information Provider. It is solely the client's decision to license the data provided by the Information Provider in the first instance and determine how to use the data going forward.

## IV. Registration Would Not Address Any Known Investor Harm Or Policy Concerns. The RFC Does Not Articulate Sufficient Investor Protection Concerns Or Policy Rationale to Support Characterizing Information Providers as Investment Advisers

The RFC sufficiently develops neither compelling investor protection concerns nor policy rationales to support characterizing or regulating Information Providers as investment advisers nor does it consider any reasonably available alternatives to regulating Information Providers as investment advisers.

A. *Index Providers.*

The RFC does not speak to any specific investor protection concern in its discussion of index providers individually, but asserts the following in conjunction with Information Providers:

> *[Their] operations also raise potential concerns about investor protection and market risk, including, for example, the potential for front-running of trades where [they] and their personnel have advance knowledge of changes to the information they generate and potential conflicts of interest where the providers or their personnel hold investments they value or that are constituents of their indexes or models.*[36]

As discussed in further detail in Section VI below, Information Providers, entities using their services and those entities' clients are, in large part, already subject to existing regulatory and governance regimes that address the concerns articulated in the RFC. Regarding front-running specifically, Information Provider employees and agents are already subject to the insider trading prohibitions of Section 10(b) of, and Rule 10b-5 under, the Exchange Act, and the SEC has already exercised its authority in this context.[37] Further, exchange-traded index-based products are subject to rules of their listing exchanges requiring index

[36] RFC at 37252.

[37] *See SEC v. Yang*, Civil Action No. 1:29-cv-04427 (E.D.N.Y. Filed Sept. 21, 2020) (finding defendant employee of an index provider and an associate in violation of Section 10(b) and Rule 10b-5 for trading on inside information regarding securities to be added to or removed from an index maintained by the defendant's employer).

providers to adopt firewalls around individuals with access to material non-public information about index constituents.[38]

Additionally, investment adviser status appears a potentially inefficient and ineffective method of mitigating the conflicts of interest identified. For example, if an index provider licenses an index to several different clients, the responsibility to manage conflicts of interest could be a confounding exercise. Additionally, in the case of OTC bilateral contracts between institutions, it is unclear what purpose it would serve to have an index provider act as an investment adviser to both parties. Or, even for bespoke indexes, such indexes are often a modified version of an existing index and part of a larger family of indexes, which raises the question of how an index provider would make a decision that affects a family of indexes without first considering the best interests of a single individual client with competing interests on a bespoke index in that family. There is a potential frustration of purpose without an accompanying identifiable benefit to any end-client or investor. Further, the SEC can address these concerns regarding potential Information Provider conflicts of interest through more specific due diligence or oversight responsibilities of existing investment advisers with respect to their unaffiliated Information Providers (*e.g.,* to encourage more transparency or governance over any exercise of discretion).

B. *Model Portfolio Providers*

Regarding model portfolio providers, the RFC states: "Investment advisers' use of a third party's model portfolios may raise concerns with respect to clients' understanding of the fees they are paying, the services being performed by each party (i.e., the client-facing adviser and the model portfolio provider), and their respective conflicts (or potential conflicts) of interest."[39] The SEC can address these issues by developing narrowly tailored disclosure requirements applicable to the client-facing adviser. It is unclear what additional benefit imposing a fiduciary duty on the model portfolio provider achieves, particularly when the model portfolio provider does not know the identity of, and has no relationship with, the end-user client.

The RFC further states that such "uncertainty may be increased where, for example, the client-facing adviser seeks to disclaim or limit its fiduciary duty or any other duty when implementing a model provided by a third-party model portfolio provider."[40] The perceived uncertainty can be managed by

---

[38] *See, e.g.,* NYSE Arca Rule 5.2-E(j)(3)(b)(1) (regarding index ETFs: "If the index is maintained by a broker-dealer or fund advisor, the broker-dealer or fund advisor shall erect and maintain a 'firewall' around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer or fund advisor. In addition, any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index or portfolio composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index."); *see also* NYSE Arca Rule 5.2E(j)(6)(C) (regarding "Index-Linked Securities" (e.g., exchange-traded notes): "If the value of an Index-Linked Security listed under Rule 5.2-E(j)(6) is based in whole or in part on an index that is maintained by a broker-dealer, the broker-dealer shall erect and maintain a 'firewall' around the personnel responsible for the maintenance of such index or who have access to information concerning changes and adjustments to the index, and the index shall be calculated by a third party who is not a broker-dealer.").

[39] RFC at 37256.

[40] *Id.*

addressing with the client-facing adviser the SEC's position that fiduciary duty may not be waived.[41] This would be a more direct and effective way of addressing confusion relating to non-permitted disclaimers of fiduciary duty by existing investment advisers, as compared to extending a fiduciary duty to a model provider that has no influence on such disclaimer.

Model portfolio providers have no privity of contract, or any relationship at all, with the end-users of models. Imposing an investment advisory relationship with respect to those end-users would place the model portfolio provider in an untenable position of owing a fiduciary duty to clients it does not know. The SEC should articulate clear policy benefits before doing so.

C. *Pricing Services*

Regarding pricing services, the RFC explains that, in adopting Rule 2a-5 under the Investment Company Act, the SEC "noted potential risks and conflicts of interest that pricing services can present in registrants' valuing of securities."[42] The adopting release to Rule 2a-5 cites as an example of such conflict that pricing services have a conflict between providing accurate prices and "maintaining continuing business relationships" with the registered fund's valuation designee appointed under the Rule.[43]

In response to these conflicts of interest, the SEC has required the board of directors of an Investment Company Act-registered fund or the fund's investment adviser serving as valuation designee, each of which owes a fiduciary duty to fund shareholders, to establish policies and procedures for overseeing pricing services. Auditors also evaluate funds' valuation methodologies. It is not clear how imposing an additional layer of fiduciary obligations on pricing services adds meaningful additional protections to the funds beyond those that could be achieved through a more tailored requirement to address potential conflicts.

The RFC further provides that the SEC staff "have also observed compliance issues in connection with registrants' interactions with third-party pricing services, including the risks of misleading disclosure regarding whether those services provide 'independent' values and the possibility of stale or otherwise inaccurate valuations."[44] Regarding independence concerns, pricing providers occasionally may request documentation regarding the security being evaluated from the investment adviser, such as bond indentures, if that information is not already in the pricing provider's possession. However, pricing services generally have written independence policies governing how they use data that is received from either their client or other market participants to ensure independent review. Regarding the use of stale or inaccurate prices by registrants, related concerns can be addressed through clarification from the SEC on how registered funds, their boards and their advisers should manage stale or inaccurate prices under Rule 2a-5, to the extent the SEC does not believe existing guidance is sufficient. Further, as noted above, misleading disclosure also can be addressed directly through the SEC's authority over registered fund and adviser disclosure documents.

---

41 *See id.* ("The Commission has stated that 'an adviser's federal fiduciary duty may not be waived, though it will apply in a manner that reflects the agreed-upon scope of the relationship.'" (citing Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (June 5, 2019)).

42 RFC at 37256.

43 Good Faith Determinations of Fair Value, Investment Company Act Release No. 34128 at 32 (Dec. 3, 2020).

44 RFC at 37256.

In considering both whether the provision of pricing and valuation services should be considered investment advisory services under the Advisers Act and whether a provider of independent valuations should be considered a fiduciary, it is instructive to look to the treatment of such services under the parallel regulatory regime under the Employee Retirement Income Security Act of 1974 ("ERISA"). When determining whether pricing and valuation services involve investment advice under ERISA, both the courts and the U.S. Department of Labor ("DOL"), the agency charged with implementing rules relating to ERISA enforcement, have historically concluded that the provision of such services does not necessarily involve investment advice and that, therefore, persons providing such services are not ERISA fiduciaries. For example, in the context of ERISA fiduciary claims asserted against stock appraisers, courts have applied these ERISA rules to routinely reject the notion that appraisers who merely value an employer's stock owned by an ESOP owe fiduciary duties.[45] Likewise, guidance issued by the DOL has rejected the notion that appraisers owe fiduciary duties under ERISA.[46] DOL guidance in this area instructs that pricing services in the normal course should not be considered investment advisers with attendant fiduciary duties.

D. *Information Providers Generally*

With respect to extending a fiduciary duty to Information Providers, it is unclear what additional protections or policy rationales or even increased clarity could result. As a threshold matter, it is uncertain to whom the Information Provider would owe fiduciary duties if they were ultimately imposed. Information Provider clients are sophisticated institutions that conduct extensive due diligence on their vendors. If Information Providers' fiduciary duties extended to retail investors who already retain registered investment advisers to maintain their investments, this would also be redundant with the layers of protections that already serve to safeguard such investors.[47]

From a policy standpoint, the SEC should seek to regulate market participants based on the services they actually provide and the actual dynamics of their relationships. If the SEC identifies compelling investor protection concerns and believes that regulation of Information Providers is warranted, the SEC should consider a framework that is tailored to Information Providers' services. Specifically, the SEC should consider the nature of client relationships of Information Providers, namely that many are interacting, at least on some level, with sophisticated, institutional clients. Additionally, any regulation should bear in mind the distinctions between different kinds of Information Providers, including the nature of the services, types of clients, and whether such services are (i) widely available, (ii) completely individualized, or (iii) a customized version of a standard product.

## V. **<u>Regulating Information Providers as Investment Advisers Likely Would Cause Significant Market Disruption</u>.**

---

[45] *See, e.g.*, *Kloots v. Am. Express Tax & Bus. Servs., Inc.*, 2006 WL 1644374, *6-7 (N.D. Ohio June 12, 2006); *Keach v. U.S. Tr. Co., N.A.*, 240 F. Supp. 2d 832 (7th Cir. 2002); *Scott v. Evins*, 802 F. Supp. 411, 413 n.11 (N.D. Ala. 1992); *Foltz v. U.S. News & World Rep., Inc.*, 627 F. Supp. 1143, 1167 (D.D.C. 1986).

[46] *See* 29 C.F.R. § 2509.75-5 (1975) ("[A]ttorneys, accountants, actuaries and consultants performing their usual professional functions will ordinarily not be considered fiduciaries . . . ."); DOL Advisory Op. 76-65 (June 7, 1976) (observing that a consultant who merely values employer securities is not an ERISA fiduciary).

[47] *See infra*. Section VI.

The breadth of products that would be affected by regulating Information Providers as investment advisers cannot be overstated. Although the RFC primarily focuses on Information Providers servicing or interacting with Investment Company Act-registered funds, the potential reach is not so limited. With respect to indexes for example, market participants sponsor and utilize other index-linked products extensively. These products include exchange-traded notes, index-linked derivatives such as options and futures contracts, index-linked structured products, and fixed index annuities and index-linked universal life insurance policies offered by insurance companies.

If any regulation of Information Providers limits their ability from a commercial standpoint to define and negotiate limits on liability when providing intrinsically non-fiduciary services as the SEC has proposed for private fund advisers, that could substantially disrupt the provision and pricing of their services, which do not factor in the prospect of potentially unlimited liability. This would include any regulatory framework that restricts Information Providers from providing information on an "as is" basis, disclaiming or limiting liability to gross negligence, or capping liability at fees paid (which limitations typically exclude intellectual property infringement-related liabilities), which are commonplace and commercially reasonable, especially in light of the same commercial terms being imposed on Information Providers for the underlying exchange data used to calculate indexes.

Further, any regulation of Information Providers as investment advisers subject to SEC or state registration would require that the Information Providers undertake extensive buildouts of their compliance processes and develop disclosures that would be costly. The costs of registering as an investment adviser and complying with the Advisers Act will vary from Information Provider to Information Provider and depend on, among other things, the size of the business, services provided, and complexity of the business structure. Individual Information Providers may determine that the cost outweighs the benefit to them and discontinue providing the applicable information to clients, while those that do not likely will seek to pass the increased costs to their clients directly. In all cases these costs, which include compliance, administrative, operational, and other added costs, far outweigh any perceived benefit of requiring firms to comply with an additional regulatory regime that was not intended to apply to Information Providers.

More concerning is the potential that these costs would be passed on to investors. For example, as of December 31, 2021, index mutual fund total net assets amounted to $5.7 trillion and index ETF total net assets to $7.2 trillion.[48] Even assuming a new regulatory regime increases fees for these products by only one basis point, that would represent $129 billion in increased expenses potentially taken out of the hands of investors by managers passing along costs, ultimately making it more difficult for investors to build wealth. Index products are widely available, highly liquid and varied in design and strategy. In this way, index funds represent the democratization of finance. We recommend that the SEC carefully consider the actual benefit of any proposed regulation in light of the likely costs.

Any regulation of Information Providers as investment advisers under the Investment Company Act would interfere with the normal operation of the investment companies and their investment advisers if, among other things, investment companies were required to seek shareholder approval to change an index provider or pricing service. Related proxy costs likely would be treated as a fund expense. Further, Information Providers would be subject to board approval and oversight – an endeavour that is time intensive and costly.

---

[48] *See* Investment Company Institute, *2022 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry* (May 22, 2022), https://www.ici.org/system/files/2022-05/2022_factbook.pdf.

We note also that deeming Information Providers to be investment advisers would raise complex issues under Section 17(a) of the Investment Company Act. Section 17(a) of the Investment Company Act generally prohibits an affiliated person of a registered investment company ("first-tier affiliated person"), or an affiliated person of such person ("second-tier affiliated person"), from knowingly selling any security or other property to or purchasing any security from the investment company. An investment company's investment adviser is an affiliated person of the investment company.[49] An Information Provider deemed to be an investment adviser of a fund tracking its index therefore would be a first-tier affiliated person of that index fund and a second-tier affiliated person of other funds affiliated with the index fund (e.g., other funds managed by the index fund's investment adviser). Under this scenario, the Information Provider would be prohibited from buying securities from or selling securities to the index fund or the index fund's affiliated funds. Further, the Information Provider's affiliated persons (including a controlling parent or companies under common control) would be considered second-tier affiliated persons of the index fund and also would be prohibited from buying securities from or selling securities to the index fund.

This could cause significant disruptions in index ETF markets. A broker-dealer that acts as an index provider and also conducts a business as an authorized participant ("AP") would not be able to engage in in-kind basket transactions, including creations, redemptions, rebalancings and reconstitutions, with any ETFs that use the index provider's indexes (as a first-tier affiliated person) or any funds managed by that fund's investment adviser (as a second-tier affiliated person) ("Affected ETFs").[50] An AP that is an affiliated person of an index provider would not be able to engage in any such in-kind basket transactions with any ETFs that track the index provider's indexes (as a second-tier affiliated person).

Under these circumstances, Affected ETFs would experience a reduction in the number of APs available for both creation-redemption activity and also to perform rebalancings and reconstitutions, which "could result in the deviation between market price and NAV per share widening in cases where there are very few authorized participants or other market participants actively engaged in transactions with the ETF."[51] Additionally, certain Affected ETFs that invest in specialized assets (e.g., non-U.S. debt ETFs) may use a particular AP with capabilities in trading those assets for a large portion of the Affected ETF's creations, redemptions, rebalancings and reconstitutions. Those Affected ETFs may find their operations particularly disrupted.

The SEC also should consider whether the principal transaction prohibitions in the Advisers Act[52] could have adverse consequences on index-linked products that are not Investment Company Act-registered

---

[49] Section 2(a)(3)(E) of the Investment Company Act defines an "affiliated person" of an investment company to include the investment company's investment adviser.

[50] Rule 6c-11(b)(3) under the Investment Company Act exempts APs from the prohibitions provided in Section 17(a)(1) and (2) of the Investment Company Act with regard to the deposit and receipt of baskets with an ETF only if the AP is affiliated with the ETF by virtue of holding with the power to vote 5% or more of the ETF's shares; as such, affiliation by virtue of being deemed an investment adviser would eliminate an AP's ability to rely on this exemption.

[51] Exchange Traded Funds *supra* note 8, at 57174.

[52] The SEC has applied Section 206(3) not only to principal transactions engaged in or effected by any adviser, but also when an adviser causes a client to enter into a principal transaction that is effected by a broker-dealer that controls, is controlled by, or is under common control with, the adviser. *See Interpretation of Section 206(3) of the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 1732 (July 17, 1998), 63 Fed. Reg. 39505 n.3

ETFs. For example, institutional investors may license a custom index from an index provider for use in an over-the-counter derivative instrument to hedge specific risks. These instruments would effectively be discontinued to the extent an index provider or its affiliate is prohibited from serving, or determines that there is no longer an appropriate business case to continue serving, as counterparty to the instrument, if the index provider or its affiliate is functionally the only available counterparty. The markets for these derivatives and other products not registered under the Investment Company Act are vast, complex and critical to the risk management capabilities of firms large and small. We recommend that the SEC evaluate any potential direct and indirect impacts that regulating Information Providers as investment advisers would have on these markets.

Additionally, any regulation of broker-dealer Information Providers as investment advisers subject to SEC or state registration or regulation would effectively preclude broker-dealers from effecting principal transactions for clients receiving any services deemed to involve investment advice because of the requirement to obtain client consent on a trade-by-trade basis. This principal transaction prohibition will make derivative contracts written by Information Providers or their affiliates practically impossible. In addition to regular hedge funds facing OTC derivatives, in many cases, index exposure, through underlying products such as ETFs, fixed index annuities and index-linked universal life insurance policies offered by insurance companies, is provided to the product issuer by way of a derivative contract facing an affiliate of the Information Provider publishing the index. The application of the principal transaction prohibition may effectively prohibit the use of these derivative contracts, significantly complicating the ability of ETF and insurance providers to hedge their index exposure. Consequently, the types of index exposures available to investors and insurance customers may be significantly diminished.

The restrictions on agency and principal trading in Section 206(3), which can make sense for investment advisers and fiduciaries (e.g., when exercising investment discretion), run counter to the essential role of broker-dealers. Section 206(3) should not apply to trading conducted by a broker-dealer providing only Information Provider services. Unfortunately, there is no clear SEC or SEC staff guidance on this issue.[53] In addition, while Rule 206(3)-1 exempts a broker-dealer from Section 206(3) in connection with any transaction in relation to which the broker-dealer "is acting as an investment adviser solely" through "publicly distributed written materials" or oral statements that "do not purport to meet the objectives or needs of specific individuals or accounts," the precise scope of the rule remains unclear because the SEC has not defined or provided guidance on when "written materials or oral statements . . . do not purport to meet the objectives or needs of specific individuals or accounts."[54]

Additionally, regulating Information Providers as investment advisers may result in further market consolidation due to the obstacles discussed above. With respect to index providers, the RFC acknowledges that "[a]lthough there are many indexes available and no formal barriers to becoming an index provider, three index providers account for over two-thirds of the market for indexes."[55] Imposing a cumbersome

---

(July 23, 1998) (citing *Hartzmark & Co.,* SEC Staff No-Action Letter (Nov. 11, 1973) (applying Section 206(3) when an adviser effects transactions through its broker-dealer parent)).

53 *Cf.* Morgan, Lewis & Bockius LLP, SEC Staff No-Action Letter (Apr. 16, 1997).

54 It is also unclear whether Rule 206(3)-1 is available only to dual registrants, or also to broker-dealers affiliated with an investment adviser.

55 RFC at 37255.

regulatory regime may operate as a barrier to entry for some Information Providers and force some Information Providers out of the market, and thereby result in a more concentrated market for their services.

A reduction in the number or scope of Information Providers would have additional adverse effects on market liquidity, pricing transparency, the ability for issuers to issue securities and the ability for investment funds to publish reliable daily net asset values and would necessarily increase the reliance on broker quotes and, with respect to pricing providers, other less reliable sources of pricing. With respect to model portfolio providers specifically, fees charged by client-facing advisers to their end-user clients likely would increase, and the benefits of model portfolios discussed above in Section II likely would decrease, if model portfolio providers discontinued their services over fiduciary liability concerns.

All told, Information Providers may exit the business, limit their services, and/or increase their fees, which would limit options available to institutional and retail investors and increase the costs of such options, in circumstances where the costs would be passed on to end-clients and investors – all that would undoubtedly outweigh what limited benefits, if any, which have been articulated by the SEC.

## VI. The Existing Governance Framework of Information Providers Affords Protections. There Are Existing, Extensive Governance and Control Frameworks as Well as Parallel Regulations That Render Regulating Information Providers as Investment Advisers Unnecessary.

Products that utilize Information Providers already are subject to extensive regulation under the Advisers Act, Investment Company Act, Exchange Act and other regulatory regimes. Index providers also may be subject to non-U.S. regulation and/or voluntarily comply with existing governance frameworks.

- As discussed earlier, the investment advisers to Investment Company Act-registered funds and model portfolio investors are responsible for implementing their clients' investment objectives through index funds or model portfolios, including researching, selecting and monitoring the applicable index or model portfolio. These investment advisers already are registered under the Advisers Act, owe fiduciary duties of care and loyalty to those funds and investors, must adopt compliance programs and comply with various disclosure requirements regarding fees and conflicts of interest, among other things, and are subject to examinations and enforcement actions by the SEC. It is unclear what additional benefit will flow to funds and model portfolio investors that already enjoy the protections of a fiduciary relationship by imposing fiduciary obligations on Information Providers that have no direct relationship with those funds or investors.

- Further, the Investment Company Act subjects funds registered thereunder to extensive regulation, including requiring that the funds, their investment advisers and certain other primary service providers adopt a compliance program reasonably designed to prevent violations of the federal securities laws and codes of ethics reasonably designed to protect fund investors in connection with the personal trading of fund portfolio securities by insiders. Investment Company Act-registered funds are also prohibited from engaging in principal trades with insiders absent narrow exemptions. Investment Company Act-registered funds are overseen by boards of directors, a majority of which must meet strict independence requirements, that owe fiduciary duties of care and loyalty to shareholders. Accordingly, investors in Investment Company Act-registered funds already have two levels of fiduciary protection built into their existing structure, supported by extensive regulation of the funds themselves and the investment advisers that manage them.

- With respect to the prices provided to Investment Company Act-registered funds by pricing services, independent fund auditors review, as part of the fund's annual audit, the prices ascribed to all portfolio holdings as of fiscal year-end. Further, a fund's board reviews and approves pricing services used by the fund in accordance with Rule 2a-5 under the Investment Company Act. Rule 2a-5 also sets forth extensive controls on fair valuation of fund securities, which is the responsibility of either the fund's board or, if delegated, the fund's investment adviser, each of which is a fiduciary to fund shareholders.

- To the extent that a broker-dealer provides proprietary indexes, products with performance linked to an index, model portfolios, valuations, or to a customer that involves a recommendation, the broker-dealer is already subject to a parallel regulatory scheme, including suitability and disclosure obligations, under SEC and FINRA rules. In the case of retail customers, Regulation Best Interest establishes a best interest standard of conduct for broker-dealers and their associated persons when they recommend a securities transaction or investment strategy involving securities to retail investors.

- Employees and agents of all Information Providers, whether or not they provide information for use by Investment Company Act-registered products, are subject to criminal liability for insider trading in violation of Section 10(b) of, and Rule 10b-5 under, the Exchange Act.

- Fixed index annuities and index-linked universal life insurance policies are subject to an extensive framework of state insurance regulation. The SEC should carefully consider any impact that regulating index providers as investment advisers will have on the markets for these products and how such regulation would interact with and affect the comprehensive regulatory regime already covering these products.

- Index providers that provide indexes for use in financial instruments in the EU are also subject to BMR. Index providers that qualify as "administrators"[56] under BMR must obtain authorization from and/or register with their national competent authority and comply with a comprehensive regulatory framework concerning index governance, methodology creation and operation and input data verification. For example, BMR, among other things, requires index providers to (i) adopt a code of conduct governing the integrity of input data; (ii) ensure that the input data accurately and reliably represents the market or economic reality that the index is intended to measure; (iii) create and publish clear guidelines regarding the types of input data, the priority of their use and the exercise of discretion; (iv) ensure that the index methodology is robust, reliable, resilient and verifiable; and (v) develop, operate and administer the index transparently, which includes publishing procedures for consulting on any proposed material change in the index methodology and the rationale for such changes.

- In addition to the extensive regulatory framework that exists for index-based products, many index providers also voluntarily comply with the IOSCO Principles. The IOSCO Principles provide a comprehensive framework for designing and operating indexes, setting forth principles: (i)

[56] An "administrator" under BMR is the natural or legal person that has control over the provision of a benchmark and in particular administers the arrangements for determining the benchmark, collects and analyzes the input data, determines the benchmark and publishes it.

addressing index governance, including conflicts of interest; (ii) promoting the quality and integrity of index design and methodologies, including principles relating to data integrity and material changes to a methodology; and (iii) establishing processes for addressing complaints, maintaining index records and undergoing third-party audits in order to provide evidence of an index provider's compliance with applicable quality standards.

- Neither the BMR nor the IOSCO Principles deem index providers to be investment advisers and do not impose a fiduciary obligation on them. Instead, BMR and IOSCO identify the specific areas of index operation that are not addressed by other regulatory frameworks and regulate those areas through principles constructed specifically to address areas of potential concern.

As demonstrated by the foregoing, index-linked products, and the primary stakeholders in their ecosystems, are currently subject to significant regulation and/or voluntary governance. The SEC should clearly articulate the specific harms it may wish to address through regulating Information Providers as investment advisers and consider carefully whether these harms are already addressed through the extensive existing regulatory and governance frameworks applicable to the affected products and their stakeholders. The SEC should further consider whether regulating Information Providers as investment advisers will cause an Information Provider to act in contravention of any requirement to which it is subject under those other regulations or governance frameworks.

## VII. The SEC Lacks Authority to Regulate Information Providers.

As discussed above, Information Providers are not acting as fiduciaries or investment advisers under the Advisers Act or the Investment Company Act. Any rules or interpretations treating Information Providers as investment advisers likely would result in judicial scrutiny.

However, the SEC is not without options. From a policy standpoint, the SEC could seek from Congress tailored and appropriate authority to regulate Information Providers. Consider BMR, for example. BMR introduced a common framework to ensure that benchmarks are robust and reliable and to minimize conflicts of interest. Should a similar avenue be explored, we advocate that the SEC consider a "principles based" framework in accordance with its historical precedent, as opposed to the prescriptive approach taken by the EU. We reiterate that if enhanced regulation is determined to be necessary, investment adviser status is an overly burdensome mechanism with limited long-term utility. Further, any action that the SEC takes should be undertaken by formal rulemaking, not SEC or staff interpretation, with the full benefit of public comment.

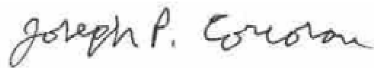
* * *

SIFMA and SIFMA AMG appreciate the opportunity to respond to the RFC and also your consideration of our recommendations as set forth herein. SIFMA and SIFMA AMG would welcome the opportunity to meet with the SEC staff to discuss our recommendations and any other aspects of the RFC.

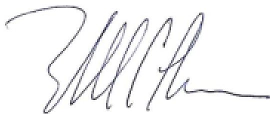
If you have any questions or require additional information, please do not hesitate to contact us by calling Rob Toomey at (212) 313-1124, Lindsay Keljo at (202) 962-7312, Joe Corcoran at (202) 962-7383 or Bill Thum at (202) 962-7381.

Robert Toomey
Managing Director, Associate General Counsel
SIFMA

Lindsey Weber Keljo
Head - Asset Management Group
SIFMA AMG



Joseph Corcoran
Managing Director, Associate General Counsel
SIFMA



William C. Thum
Managing Director, Associate General Counsel
SIFMA AMG

cc: Honorable Gary Gensler, Chair, U.S. Securities and Exchange Commission
Honorable Caroline A. Crenshaw, Commissioner, U.S. Securities and Exchange Commission
Honorable Jaime Lizárraga, Commissioner, U.S. Securities and Exchange Commission
Honorable Hester M. Peirce, Commissioner, U.S. Securities and Exchange Commission
Honorable Mark T. Uyeda, Commissioner, U.S. Securities and Exchange Commission
Mr. William Birdthistle, Director, Division of Investment Management, U.S. Securities and Exchange Commission