

ONPOINT / A legal update from Dechert's Financial Services Group

Request for Comment on Certain Information Providers Acting as Investment Advisers

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Request for Comment on Certain Information Providers Acting as Investment Advisers

July 2022 / Authored by David Bartels, Allison Fumai, Mark Perlow, Steven Rabitz, Michael Sherman, Elona Belokon and David Peters

The Securities and Exchange Commission on June 15, 2022 requested comments related to information providers (such as index providers, model portfolio providers and pricing services) whose activities the SEC believes may bring them within the definition of “investment adviser” under the Investment Advisers Act of 1940 (Request).¹ The Request follows comments by the Director of the Division of Investment Management in a recent speech, in which he asserted that the traditional role of investment advisers has “splintered” among various service providers (including “Information Providers” or “Providers,” as defined below).² The Request focuses on whether such information providers are acting as investment advisers in ways that might warrant regulation under the Advisers Act and the Investment Company Act of 1940.

In Brief

The Request focuses on three types of Providers.

- *Index providers.* The Request points to the growth and variety of indexes, including specialized indexes developed for particular users. The Request posits, in particular, that index providers may be making active decisions that, in turn, drive investment advisers’ purchase and sale decisions.
- *Model providers.* The Request observes increasing demand for models, including ones that are customized or have a specialized focus, such as ESG investing. The Request then notes SEC concerns regarding: investors’ understanding of the fees that they are paying; the separate services performed by the investment adviser and the model portfolio provider; and conflicts of interest.
- *Pricing services.* The Request: recalls SEC observations concerning the importance of pricing services; asserts that pricing services often exercise discretion in the pricing process; and states that the SEC staff has observed compliance issues arising from registrants’ interactions with third-party pricing services.

The Request recognizes that the growth and development of the industry presents a broad range of questions for commenters, including questions regarding: the general conduct and behavior of index providers, model portfolio providers and pricing services; compensation structures; the extent to which these firms currently meet the definition of investment adviser; and the economic benefits and costs of registering as investment advisers under the Advisers Act.³ While the analysis and questions in the Request are presented in a neutral manner, the SEC’s framing and the

¹ SEC, Press Release, [SEC Requests Information and Comment on Advisers Act Regulatory Status of Index Providers, Model Portfolio Providers, and Pricing Services](#) (June 15, 2022). At times, this *OnPoint* tracks language in the Press Release and the Request without the use of quotation marks.

² William Birdthistle, [Remarks at the IAA Investment Adviser Compliance Conference](#) (Mar. 3, 2022) (IAA Speech).

³ Comments may be submitted: electronically through the SEC’s internet comment form; via email to rule-comments@sec.gov, with File Number S7-18-22 in the subject line; or mailed to the SEC office at Securities and Exchange Commission, 100 F Street NE, Washington, D.C., 20549-1090. See SEC, [Internet Comment Form](#). All submissions should refer to File Number S7-18-22.

nature of the Request suggest that the SEC sees potential risks to investors and markets arising from the activities of Information Providers, many of which currently are not overseen by the Commission. While the Request itself does not include specific proposals for new rules or regulations, the SEC has used similar requests in the past to gather information in advance of considering rulemaking or policy changes.

These factors suggest that the SEC may be considering extending the potential reach of its regulatory tools under the Advisers Act and Investment Company Act. If so, there could be significant business and compliance impacts for Information Providers, their customers (particularly, investment advisers and investment companies), investors and other market participants. By furnishing responses, Information Providers, investment advisers, investment companies, investors and other market participants can assure that their unique circumstances and perspectives are heard and considered as (and if) the SEC determines to move forward with rulemaking.

For the full list of questions included in the Request, please refer to Appendix A. Comments must be filed by August 16, 2022.

Introduction

The SEC's Press Release announcing the Request notes that "the role of index providers, model portfolio providers, and pricing services ('[I]nformation [P]roviders' or '[P]roviders') has grown in size and scope in recent years, significantly changing the face of the asset management industry." As these services proliferate, the SEC believes that it is increasingly important to understand how Information Providers may fit within the regulatory regimes created by the Advisers Act and the Investment Company Act. The SEC believes that Providers raise potential investor-protection concerns, including the potential for front-running of trades or conflicts of interest, as well as the Providers' potential ability to affect national markets or otherwise have a "national presence." The SEC stated in its Press Release that the Commission seeks to gain a better understanding of whether regulatory action addressing Information Providers is necessary and appropriate.

In the first section of the Request, the SEC summarizes what it views as the roles performed and potential regulatory issues presented by index providers, model portfolio providers and pricing services. In this framing, the SEC echoes themes expressed by the Director of the SEC's Division of Investment Management in recent remarks regarding what he described as "fracture" and "chaos" in the investment management industry: "financial fracture has occurred in the ecosystem of entities that provide services to advisers and their clients. Whereas advisers themselves once performed many of the functions necessary to run investments, today we see those tasks splintered into distinct index providers, valuation services, model providers, risk managers, data analysts, and many more."⁴ From this broader list of functions, the Request focuses on index providers, model providers and pricing services.

Index Providers

The Request defines index providers as those that "compile, create the methodology for, sponsor, administer, and/or license market indexes." The Request notes that index providers are compensated by licensing indexes to users, generally either as a benchmark or to track the index. Generally, index providers will determine: the particular "market," or grouping, of securities that the index measures; the index constituents that measure that market; and the weightings of each constituent. Index providers then use their designed methodology to determine the index's level or measurement. The Request notes the growth in number and variety of indexes, pointing out that there are millions of

⁴ IAA Speech, *supra* note 2.

indexes in the global market, with varying sizes, focus and goals⁵ and observes that index providers can have significant discretion over the composition and weightings of the index, without necessarily needing to publicly disclose their index methodologies or rules. The Request also states that index providers' inclusion or exclusion of a particular security in an index drives decisions to purchase or sell securities by investment advisers tracking the applicable index.

The Request states that some indexes are highly specialized and intended to be tracked by a particular user. The Request emphasizes the customization available through specialized indexes, which can be tailored to a customer's exact inclusion criteria and/or composition (for example, that the composition of constituents could be based on "factors" that could be seen to cause certain types of securities to outperform or underperform the market). In the Request, the SEC posits that index providers, especially those that design specialized indexes, may be making active decisions in creating or administering the index and which drive decisions by market participants.

Model Portfolio Providers

The Request defines a model portfolio as "generally consist[ing] of a diversified group of assets (often mutual funds or exchange-traded funds ('ETFs')) designed to achieve a particular expected return with exposure to corresponding risks." Model portfolio providers can include broker-dealers, asset managers, third-party strategists, asset allocators and advisers. Model portfolio providers: design allocation models; may update or rebalance them periodically; have the ability to customize the models; and may offer the models on a discretionary or non-discretionary basis. The Request notes in particular that model portfolio providers may consider the investment goals and characteristics of general investor types and may craft more customized and detailed portfolios (for example, through direct-indexing strategies). The Request also observes the increased demand for specialized models (e.g., focused on ESG investing).

Model portfolio providers typically are compensated by fees on the securities bought, sold or held in the model, but can also be compensated through a fee for the use of the model portfolio separate from the underlying products or through commissions. The Request notes the SEC's concerns regarding: investors' understanding of the fees they are paying; the separate services performed by the investment adviser and the model portfolio provider; and any conflicts of interest. The SEC states that these concerns are heightened when the investment adviser disclaims or limits its fiduciary duty as a result of implementing a third-party model portfolio provider's model or when the adviser and model portfolio provider appear to influence each other's model or investments.

Pricing Services

Pricing services, according to the Request, "provide prices, valuations, and additional data about a particular investment (e.g., a security, a derivative or another investment), to assist users with determining an appropriate value of the investment." In the Request, the SEC asserted that pricing services often exercise discretion in the pricing process, by determining: the valuation methodology; the sources of inputs; and whether the valuations generated are appropriate or require adjustment. Different pricing services calculate different pricing levels for the same security; sometimes the same pricing service calculates different pricing levels for the same security because pricing services use a variety of inputs, methods, models and assumptions, and may respond to different users' needs. Pricing services may be compensated through subscription fees, other fixed fees or as a percentage of assets.

⁵ See, e.g., Index Industry Association, [Fourth Annual IIA Benchmark Survey Reveals Significant Growth in ESG Amid Continued Multi-Asset Innovation & Heightened Competition](#) (Oct. 28, 2020).

Recently, the SEC discussed pricing services in adopting rule 2a-5 under the Investment Company Act in addressing valuation policies.⁶ In this rulemaking release, the SEC recognized the important role that pricing services play in the fair value process, as well as what the Request describes as potential risks and conflicts of interest.⁷ The SEC noted that its staff had observed compliance issues arising from registrants' interactions with third-party pricing services, including misleading disclosures relating to whether the third-party pricing services provide independent values or the "possibility of stale or otherwise inaccurate valuations."⁸

Investment Adviser Status Under the Advisers Act

In the Request, the SEC outlined its views of the scope of the definition of "investment adviser," as well as the "Publisher's Exclusion" from this definition (as discussed below), to set up its arguments for the potential applicability of the Advisers Act to Information Providers. The following provides a summary of the SEC's views. Under the Advisers Act, an investment adviser is defined as "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 any person who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities."⁹ The definition focuses on three elements, all of which must be met: (i) the person provides advice or issues analyses or reports, concerning securities; (ii) the person is in the business of providing such services; and (iii) the person provides such services for compensation. The person's advice, reports or analyses do not need to relate to specific securities, provided that the services are performed as part of a business and for compensation. To be considered "in the business" of acting as an investment adviser under the Advisers Act, the provision of advice does not need to constitute the person's principal business activity or any requisite portion of the business activities. Courts have held, and the SEC staff believes, that the furnishing of advice must constitute only a business activity occurring with some regularity. The provision of investment advice, therefore, must be disseminated on more than rare, isolated occasions.¹⁰ Finally, compensation can take the form of any economic benefit, including but not limited to, fees relating to the services rendered or commissions.

The Advisers Act excludes certain types of persons from its definition of investment adviser, generally those that already are subject to regulation by the SEC or another regulator or those that Congress did not intend to be covered by the Advisers Act. Excluded persons may include (but are not limited to): brokers or dealers whose advisory services are solely incidental to the conduct of their business as a broker or dealer and that receive no special compensation for such services; and the "publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation" (Publisher's Exclusion).¹¹ In *Lowe v. SEC*, the Supreme Court construed the Publisher's Exclusion by holding that publishers are excluded from the definition under the Advisers

⁶ [Good Faith Determinations of Fair Value](#), Investment Company Act Release No. 34128 (Dec. 3, 2020) [86 FR 748, 756 (Jan. 6, 2021)] (Fair Value Release).

⁷ *Id.*

⁸ [Compliance Alert](#), Division of Examinations (published as Office of Compliance Inspections and Examinations), Securities and Exchange Commission (July 2008).

⁹ See section 202(a)(11) of the Advisers Act.

¹⁰ *United States v. Elliott*, 62 F.3d 1304, 1310 (1995) (stating that defendants "provided investment advice on more than rare, isolated occasions" and "regularly gave advice regarding the safety and effectiveness" of specific investment vehicles "based upon the personal circumstances of individual investors").

¹¹ See section 202(a)(11)(A) through (H) of the Advisers Act.

Act, if their publication: (i) provides only impersonal advice; (ii) is “bona fide,” meaning that it provides genuine and disinterested commentary; and (iii) is of general and regular circulation rather than issued from time to time in response to episodic market activity.¹² The Request asserts that many Information Providers historically have relied on the Publisher’s Exclusion to avoid registration with the SEC as an investment adviser.

Based on the considerations outlined above, the Request asks for comments relating to the policies and conduct of index providers, model portfolio providers and pricing services. This *OnPoint* summarizes the questions included in the Request. For a comprehensive list of the Request’s questions for comment, please refer to Appendix A.

- *General*
 - Information on each type of Information Provider (including an opinion on whether the descriptions summarized above are accurate), as well as potential risks and conflicts related to these Information Providers.
 - Comments on whether there are additional types of Information Providers that may raise investment adviser status issues.
- *General Questions Related to Information Providers’ Status*
 - How Information Providers analyze whether they meet the Advisers Act’s definition of investment adviser under the elements.
 - Which factors, given new technologies and current market practices, raise investment adviser status issues.
 - How Providers that rely on the Publisher’s Exclusion determine whether their publications are “impersonal,” “bona fide,” or of “general and regular circulation.”
 - Whether there are Providers that rely on other exclusions from the definition of investment adviser, and how those Providers offer portfolios, interact with investors and are compensated.
 - The extent to which Information Providers view themselves as having fiduciary obligations to investors that rely on the information they provide.
 - How Information Providers exercise discretion in providing information.
 - What the extent and circumstances of the personalization of Information Providers’ services and information are.
 - How much discretion the Information Providers have over their information and what types of disclosures related to changes/updates to the services are being provided.
 - How Information Providers are compensated.

¹² *Lowe v. SEC*, 472 U.S. 181, 208-210 (1985).

- Whether and to the extent to which there are economic benefits and costs associated with investment adviser status for each type of Information Provider, and whether any of the provisions of the Advisers Act would be operationally complex or burdensome for the Providers.
- *Questions Related to Index Providers*
 - What the different types of users of index providers' services are and whether there is a difference in the type of user based on the type of index.
 - What the differences in investment adviser status issues are between index providers that develop broad-based indexes versus those that develop customized indexes, including differences in economic benefits and costs associated with investment adviser status.
 - How index providers limit the dissemination of their methodologies to those that license such information, and whether those limitations should affect the analysis of their status as an investment adviser.
 - How index providers are compensated, including the circumstances whereby an index provider compensates based on the amount of assets that are managed according to its index.
- *Questions Related to Model Portfolio Providers*
 - Whether model portfolio providers raise different investment adviser status issues than those raised by index providers that provide specialized indexes.
- *Questions Related to Pricing Services*
 - What the potential distinctions are between typical pricing services in the market and a “valuation specialist” that exercises informed judgment in determining valuation inputs, methodologies, and the legitimacy of a valuation conclusion, and how any regulation should reflect these distinctions.
 - Whether and to the extent to which the results of price challenges to a pricing service's values affect the prices provided to other users of pricing services.

Implications of Investment Adviser Status

Registration under, and Applicability of, the Advisers Act

A person or firm that meets the definition of investment adviser must register under the Advisers Act unless it: (i) is prohibited from registering with the SEC, generally because it lacks sufficient assets under management; or (ii) qualifies for an exclusion or an exemption from registration.¹³ Additionally, all advisers, even those that are unregistered, are subject to the Advisers Act's antifraud provisions. A person or firm that meets the definition of

¹³ See section 203A of the Advisers Act.

investment adviser but qualifies for certain registration exemptions also may be subject to reporting obligations, as well as examination and recordkeeping responsibilities.¹⁴

Advisers Prohibited from Registering Under the Advisers Act

The SEC pointed out in the Request that advisers are not required to register under the Advisers Act unless they meet an assets-under-management (AUM) threshold.¹⁵ The Request then asserts that certain Providers may otherwise meet the definition of investment adviser but may not have significant AUM or regulatory assets under management (RAUM), and thus are not regulated under the Advisers Act. The Request states that these Providers may have the potential to service a significant portion of the financial intermediaries in the national financial markets with broad market effects. Additionally, the SEC asserted in the Request that model portfolios may be used to manage large amounts of assets, even though the model portfolio providers do not have discretionary authority over those assets, meaning it might not be reflected in the model portfolio providers' RAUM, and thus that they might not be registered under the Advisers Act.

Requirements for SEC-Registered Advisers

The Request points out that advisers that are registered or required to be registered with the SEC are subject to: substantive prohibitions and requirements; contractual requirements; recordkeeping obligations; and SEC oversight, which may involve periodic filings and inspection. The Request acknowledges that many of the provisions of the Advisers Act, the rules thereunder, and Form ADV are intended primarily for investment advisers that provide investment advice designed for the objectives and needs of specific clients, which may not be the case with respect to all Information Providers. Therefore, the Request asks for comments on whether and how the Advisers Act regulatory regime could or should apply to Providers, including:

Registration under the Advisers Act

- Whether Information Providers should register with the SEC or the states in which they maintain principal offices or places of business, and any economic benefits and costs of registration, including the effects of registration on Providers' ability to communicate.
- Whether Providers have RAUM with respect to their information services, including discussions of whether Providers "provide continuous and regular supervisory or management services" to securities portfolios. Whether the SEC should redefine RAUM to explicitly apply to model portfolio providers.
- What the potential exemptions from the prohibition against registration are, especially for Providers that have a national presence or can have a significant effect on the national markets regardless of RAUM; how the SEC

¹⁴ See section 206 of the Advisers Act, rules 206(4)-5 and 206(4)-8 under the Act; see also, e.g., S. Rep. No. 1760, 86th Cong., 2d Sess. 7 (1960), which specifies that the antifraud provisions in section 206 of the Advisers Act apply both to registered and unregistered advisers.

¹⁵ Generally, small advisers (less than \$25 million in AUM) and mid-sized advisers (between \$25 million and \$100 million in AUM) are prohibited from registering with the SEC and instead are intended to be regulated at the state level. However, certain types of advisers (including pension consultants, internet investment advisers and some pricing services) are exempt from the prohibition because the prohibition "would be unfair, a burden on state commerce, or otherwise inconsistent" with the Advisers Act. Advisers Act, section 203A.

should distinguish Providers that have a national presence; any economic benefits or costs of mandatory or optional registration.

- Under what circumstances a Provider that acts as an investment adviser should be required to treat as its advisory client another investment adviser that uses its services.

Applicability of the Advisers Act

- Whether Providers that meet the definition of investment adviser and are required to register with the SEC should be exempt from any of the provisions of the Advisers Act and rules that apply to SEC-registered advisers; how such exemptions would affect investors or market competition for Information Providers.
- Whether requiring Information Providers to register with the SEC would cause them to alter their business models, consolidate, or exit the market, and how such actions would affect investors.
- The extent to which U.S. regulatory action should be aligned with the European Union's Benchmark Regulation frameworks.

Reporting Obligations and Public Disclosure

- What the current reporting obligations and procedures are for registered advisers and investment companies with respect to their Information Providers, and whether any obligations should be added or modified.
- Whether Form ADV should require specific information about advisers' use of Information Providers, including the economic costs and benefits of such requirements.

Related Investment Company Act Matters

The SEC points out that under the Investment Company Act, determining whether a person is an investment adviser generally consists of two analytic elements: (i) determining whether the person regularly furnishes advice to the fund regarding the desirability of investing in, purchasing or selling securities or other property, or is empowered to determine what securities or property should be purchased or sold by the fund; and (ii) whether the person acts pursuant to a contract with the fund. The Investment Company Act outlines extensive requirements and limitations for investment advisers of a registered fund, including: prohibitions related to self-dealing; ineligibility criteria for certain affiliated persons; requirements related to the approval of compliance procedures and practices by the fund's board of directors; and specific requirements regarding shareholder and board approval of the fund's advisory contract.

As the SEC notes, exceptions to the Investment Company Act's definition of investment adviser to a fund include those for persons: distributing their publications to subscribers; providing statistical information without regularly furnishing advice or making recommendations concerning specific securities; compensated under the supervision of a court; or excluded by rule or regulation.¹⁶ However, the Request asserts that index providers could meet the definition of an investment adviser to a fund under the Investment Company Act, especially if the index is created for a single fund and is maintained with a focus on the specific needs of a fund. Given the SEC's beliefs regarding the

¹⁶ See section 2(a)(20) of the Investment Company Act.

potential for Information Providers to fall within the scope of the Investment Company Act, the Request asks for comments on certain aspects of the Investment Company Act regime related to Providers, including:

- How Providers analyze whether they meet the Investment Company Act's definition of investment adviser to a fund under each element and the economic benefits and costs associated with meeting the definition.
- The extent to which Providers contract directly with funds, and related duties.
- The extent to which Providers distribute uniform publications and the Providers' interpretation of "uniform," and whether Providers that rely on the Advisers Act's Publisher's Exclusion also rely on this exception under the Investment Company Act.
- The extent to which a Provider to a fund is an investment adviser to the fund, opinions on what a reasonable amount of time would be for a registered investment company to come into compliance with the provisions of the Investment Company Act that relate to investment advisers to funds, and whether any provisions of the Investment Company Act would present unique challenges to Providers.
- The extent to which registered funds currently extend their compliance programs to Information Providers, where the Provider is not considered an investment adviser; whether the SEC should amend Rule 38a-1 under the Investment Company Act to incorporate Information Providers within a fund's compliance program, rather than requiring registration of Information Providers as investment advisers.
- If a fund's adviser contracts with an Information Provider, how much information is provided to the fund's board regarding the Providers on an ongoing basis.

Potential Impact on Other Regulatory Frameworks

Moreover, if the SEC were to deem providers of index and other similar products and services to be investment advisers subject to the Advisers Act, it is uncertain what implications this may have under other regulatory frameworks, including, for example, under ERISA. In addition, there is a possibility that such a characterization could lead some to view that such providers should be regarded as ERISA fiduciaries to plans that utilize these services. ERISA prohibits fiduciaries from engaging in transactions with respect to the assets of the plans over which they have investment management or control, and similarly most exemptions from ERISA's "per se" prohibited transaction rules with unrelated third parties require that the unrelated third party not be a fiduciary to the plan. These issues could raise numerous unintended challenges. For example, an ERISA plan might become precluded from purchasing a financial instrument from a bank, the return of which is based on a broadly available index created by the bank. In addition, there are many instances where plans and investment managers use third-party indexes as benchmarks either for comparing performance, or for the generation of "alpha."

Conclusion

The Request seeks information related to index providers, model portfolio providers and pricing services, in order to determine whether, and the extent to which, they fit (or should be fit) into the current investment adviser regulatory framework. The Request emphasizes that responses do not need to be limited to the questions summarized above and reproduced in the Appendix, and that commenters do not need to be Information Providers, investment companies, investment advisers or their respective clients. While the analysis and questions presented in the Request are presented in neutral language, and the Request does not include any specific proposals for new rules or

regulations, the SEC's framing indicates that the SEC sees potential risks arising from Information Providers. Moreover, the SEC has used similar requests in the past to gather information before settling on a policy direction. As a result, it seems that the SEC may be considering applying the Advisers Act and/or the Investment Company Act (or some provisions of these Acts) to Information Providers. This could have important compliance and business consequences both for Providers and for market participants utilizing products or services of Providers. By furnishing responses, Information Providers, investment companies, investment advisers, investors and other market participants can assure that their unique circumstances and perspectives are heard and considered.

Appendix A

General

1. Are our descriptions of each Information Provider accurate and comprehensive? What types of potential risks and conflicts of interest does each type of Provider present? How many Providers of each type do commenters estimate currently offer their services in the United States?
2. Are there any other types of Information Providers whose activities, in whole or in part, may raise investment adviser status issues? If so, which Providers, and why?

General Questions Related to Information Providers' Status

3. How do Providers analyze whether they meet the Advisers Act's definition of "investment adviser" under each element of the definition? For those Providers that have determined that they meet the definition, what were the determining factors?
4. In light of new technologies and current market practices, when determining what constitutes "analyses or reports concerning securities," what factors may raise investment adviser status issues? For example, are the factors described above appropriate? Should they be modified? If so, what modifications and why? What economic benefits and costs would result if advisers were required to consider the factors described above or with modifications? Alternatively, are there other factors that advisers should be required to consider regarding what constitutes "analyses or reports concerning securities"? Should the Commission provide additional guidance? What benefits and costs would result from requiring other factors or providing additional guidance?
5. We understand that some Information Providers may determine that providing data or other information is not providing "analyses or reports concerning securities" and therefore the Provider is not an investment adviser under the Advisers Act based on the factors above. Which types of Information Providers take this position, and on what basis do they consider such data and information not to be analyses or reports concerning securities?
6. Which Providers rely on the Publisher's Exclusion? On what basis? To what extent do they rely on *Lowe* to inform the determination? How do they determine whether their publications are "impersonal," "bona fide," or of "general and regular circulation"?
7. Which Providers rely on another exclusion from the definition of "investment adviser"? Which exclusion and on what basis? For example, do some broker-dealers that provide model portfolios to their customers rely on the broker-dealer exclusion from the definition of investment adviser? To what extent do broker-dealer model portfolio providers provide their portfolios to investors or to other financial professionals, such as investment advisers or other managers (e.g., banks, trust companies), which may then use the model portfolios with their own customers or clients? Does this have an impact on the broker-dealer's reliance on the exclusion? How are broker-dealers typically compensated for providing these model portfolios? Under what circumstances does a broker-dealer provide a model portfolio in exchange for a commission or other transaction-based compensation? On what basis is such commission or other transaction-based compensation charged? Do these broker-dealers receive different forms of compensation?

8. To what extent do Information Providers view themselves as having fiduciary obligations to any investors that rely on the information they provide (for example, when investors receive such information through another financial professional)? How do Providers view the scope of such obligations? Do they view their obligations more narrowly than those of a traditional client-facing adviser, and if so, how? How do these Providers address potential conflicts of interest that may arise during their relationships with clients or users of their services?
9. How do Information Providers exercise discretion in providing information? For example, do index providers or model portfolio providers create indexes or portfolios at the request of their licensees or users based on more customized investment objectives and goals? In these circumstances, does the Provider include or exclude certain companies, funds, or countries from an index or portfolio based on the input of its licensee or user? As another example, in determining which inputs or factors to prioritize in assessing a security's price, does a pricing service prioritize certain factors over others based on the input of its licensee or user?
10. In what ways do Information Providers exercise discretion in establishing and updating their services or the information they provide? Is such discretion limited by a service's users? For example, with respect to pricing services, do users limit Providers' discretion by contract, either by reference to standard pricing guides or principles or otherwise? If so, do users treat pricing services differently from other Providers in how discretion is limited? If so, how and on what basis? Do the responses change when considering other types of information providers?
11. To what extent, and under what circumstances, does each type of Information Provider personalize the services it offers? For example, what are industry practices around direct indexing and specialized indexes, and how prevalent are they?
12. Do Information Providers adjust the services offered based on input from the users of their services? Do Providers disclose such adjustments to users, including when such adjustments are made to address previous errors of the Provider?
13. Under what circumstances do Information Providers disclose changes or updates to the services provided, and to whom? For example, describe index providers' disclosures about the changes in the index strategy or related aspects (e.g., tracking methodology, portfolio structure, portfolio limitations, index data distribution channels) and the level of discretion that the index provider may exercise. How do Information Providers communicate these changes or updates?
14. How, and in what form, are Information Providers compensated? Do Information Providers charge license, subscription, or other types of fees? Are there tiers of fees? For example, do pricing services' users pay multiple times for use of the same price? Are subscription fees different from engagement fees? If so, how? When an investment adviser or an investment company compensates Information Providers, is that compensation borne by advisory clients or fund investors?
15. Should the Commission use its authority to exempt any of the Information Providers from the definition of "investment adviser"? If so, what facts and circumstances should factor in to an exemption? Please explain your answer.

16. What are the economic benefits and costs associated with investment adviser status for each type of Information Provider identified above? Are there provisions of the Advisers Act that Providers are unable to comply with or that would be operationally complex and burdensome?

Questions Related to Index Providers

17. To what extent are users of index providers' services registered investment companies or other pooled investment vehicles? What other types of users license indexes? Is there a difference in this respect between users of broad-based indexes and specialized indexes?
18. Do index providers that develop broad-based indexes raise different investment adviser status issues as compared to those that develop customized or bespoke indexes? If so, what factors categorize or distinguish different types of indexes? Does an index that is specialized raise investment adviser status issues? Are there other parameters that we should utilize?
19. How, if at all, do index providers limit the dissemination of their methodologies or indexes to only those who license such information? Should the limitations placed on dissemination affect the analysis of their status as an investment adviser?
20. Under what circumstances, if any, is an index provider compensated based on the amount of assets that are managed according to its index? Do compensation methods for index providers differ based on whether they provide broad-based indexes or specialized indexes? If so, how or on what basis do such compensation methods differ?
21. What are the economic benefits and costs associated with investment adviser status for index providers that develop broad-based indexes versus specialized indexes?

Questions Related to Model Portfolio Providers

22. Do model portfolio providers raise different investment adviser status issues than those raised by index providers that provide specialized indexes? In what ways are they distinguishable?

Questions Related to Pricing Services

23. Is there a distinction between typical pricing services in the market and a "valuation specialist" that exercises informed judgment in determining valuation inputs, methodologies, and the legitimacy of a valuation conclusion? How should any regulation reflect these distinctions, or any other distinction between types of pricing services?
24. To what extent do the results of price challenges to a pricing service's values affect the prices provided to other users of pricing services? Are there times when a pricing service aggregates or delivers information from another pricing service?

Registration under the Advisers Act

25. To the extent that a Provider meets the Act's definition of "investment adviser," should it register with the SEC or the states in which it maintains its principal office or places of business? As a policy matter, should Commission registration be permitted or required? What economic benefits and costs would result? What

would be the effect of registration on the ability of new competitors to come into the marketplace? What would be the effect of registration on Providers' ability to speak or communicate? If any type of Information Provider were required to register, what process might we provide to ensure an orderly transition of registration status?

26. Some Providers are currently SEC-registered while others are not. For each type, on what basis? For those Providers that have registered with the Commission as investment advisers, what were the determining factors? How would the economic benefits and costs differ between Providers that are currently SEC-registered and others that are not? Do Providers have RAUM with respect to their information services? For example, do Providers "provide continuous and regular supervisory or management services" to securities portfolios as required by the instructions on Form ADV for purposes of calculating RAUM? What range of RAUM is common? Should the Commission amend the Instructions to Form ADV to provide a calculation of RAUM that encompasses any or all Providers? In particular, should the Commission define RAUM in a manner that explicitly applies to model portfolio providers?
27. Should there be exemptions from the prohibition against registration for Providers that have a "national presence" or can have a significant effect on the national markets regardless of RAUM? Are there factors that we should take into account in identifying those Providers? For example, what characteristics would distinguish Providers that have a national presence from ones that do not? Should registration be mandatory or optional? What would be the economic benefits and costs of mandatory or optional registration?
28. Under what circumstances should a Provider that acts as an investment adviser be required to treat as its advisory client another investment adviser that uses its services (the "serviced adviser")? Under what circumstances, if any, should such a Provider's advisory client be the client, or end-user, of the serviced adviser? If a Provider's advisory client is the end-user of the serviced adviser, to what extent and under what circumstances should such end-user have the right to approve the assignment of the advisory agreement between the serviced adviser and the provider? To what extent and under what circumstances should such end-user receive the disclosure documents of the Provider?

Applicability of the Advisers Act

29. Should we exempt Providers that meet the definition of investment adviser, and are required to register with the SEC under the Advisers Act, from any of the provisions of the Act and rules that apply to SEC-registered advisers and, if so, which provisions and why? Would any such provisions raise operational or compliance challenges such that an exemption is necessary? What would be the economic benefits and costs of exempting Providers that meet the definition of investment adviser, and are required to register with the SEC under the Act? How would such an exemption affect investors? What would be the effects on competition in the market for Information Providers if we were to exempt Providers from some or all requirements of the Act? Alternatively, should any provisions of the Act or rules apply differently to Providers? Which ones, why, and how should they apply? For example, should disclosure obligations differ to the extent the Providers do not have a client-facing role?
30. Would requiring Providers to register with the SEC and become subject to the regulatory regime under the Act in its current form cause them to alter their business models, consolidate, or exit the market? How would this affect investors?
31. At least one regulatory framework for index providers exists outside of the United States, under the European Securities and Market Authority (ESMA) and its EU Benchmarks Regulation (BMR).

32. Some of the BMR's key provisions include requiring EU administrators of a broad class of benchmarks to be authorized or registered by a national regulator, and for these administrators to implement various governance systems and other controls to ensure the integrity and reliability of their benchmarks. Administrators are also required to provide a code of conduct specifying requirements and responsibilities regarding input data. Although the BMR affects U.S.-based index providers that wish to have market access in the EU, it does not directly affect their business in the United States. Should any U.S. regulatory action, if adopted and implemented, be aligned with the framework placed by the BMR in the EU? Are there particular components of the BMR that should or should not be applied to index providers in the United States, and why? What has been the effect of the BMR on the provision of benchmarks and indexes in the EU? Has the BMR served as a barrier to entry for new benchmark and index providers?

Reporting Obligations and Public Disclosure

33. What information do registered advisers and investment companies currently submit to the Commission with respect to their Information Providers? What information, if any, should registrants be required to submit? What information currently required should be modified and why? Should some of the information be provided confidentially to the Commission? If so, which types of information and why?
34. Should Form ADV require specific information about advisers' use of Information Providers? Should we require additional or different information on Form ADV for Providers that meet the definition of investment adviser and are required to register with the SEC under the Advisers Act? If so, what information? What would be the economic benefit and cost of requiring additional or different information on Form ADV?

Investment Company Act Regime with Respect to Providers

35. How do Providers analyze whether they meet the Investment Company Act's definition of "investment adviser" of a fund under each element of the definition? What are the economic benefits and costs associated with whether a Provider meets the Investment Company Act's definition of "investment adviser" of a fund? Would the application of the definition to Providers serve as a material barrier to entry for new entrants?
36. To what extent do Providers contract directly with funds? For example, do Providers typically enter into contracts with the fund's adviser, or an affiliate of the adviser? If a fund's adviser delegates services to a Provider, what duties does the adviser retain and what duties does the adviser delegate? Does the fund or its adviser make an affirmative determination made whether the Provider is acting as an investment adviser under the Investment Company Act?
37. The Investment Company Act excludes from the definition of investment adviser of a fund "a person whose advice is furnished solely through uniform publications distributed to subscribers thereto." To what extent do Providers distribute uniform publications? If so, how do these Providers interpret "uniform"? Do Providers that rely on the Advisers Act Publisher's Exclusion also rely on this exception and, if so, on what basis?
38. To the extent a Provider to a fund is an investment adviser of the fund, the fund and its Provider would need to comply with various provisions of the Investment Company Act. What would be a reasonable amount of time for a registered investment company to come into compliance with these provisions? Are there measures we can take to assist with the transition? Are there provisions of the Investment Company Act that present unique challenges for Providers?

39. Rule 38a-1 under the Investment Company Act requires a fund's board, including a majority of its independent directors, to approve policies and procedures reasonably designed to prevent violation of the Federal securities laws by the fund and certain service providers. To what extent do funds currently extend their compliance program to Information Providers, where such entity is not considered an investment adviser or one of the rule's other named service providers (principal underwriters, administrators and transfer agents)? Does this analysis differ depending on the Provider? Should we amend Rule 38a-1 to incorporate Information Providers within a fund's compliance program, rather than requiring registration of Information Providers as investment advisers? What would be the costs and benefits of such an approach?
40. In circumstances where a fund's adviser contracts with an Information Provider, how much information is provided to the fund's board regarding the Providers on an ongoing basis? Do fund boards approve the engagement of Providers in these circumstances? Does this differ depending on the Provider?

General Request for Comment

This request for comment is not intended to limit the scope of comments, views, issues, or approaches to be considered. In addition to Information Providers, investment advisers and investment companies, advisory clients and other investors, we welcome comment from other market participants and particularly welcome statistical, empirical, and other data from commenters that may support their views or support or refute the views or issues raised by other commenters.

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