U.S. Chamber of Commerce

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Ms. 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, Securities and Exchange Commission; 87 Fed. Reg. 37254; Release No. IA-6050; File No. S7-18-22; (June 22, 2022)

Dear Ms. Countryman:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness ("Chamber") appreciates the opportunity to share our views on the Securities and Exchange Commission's ("Commission") request for comment on "Certain Information Providers Acting as Investment Advisers" ("Request").

The Request seeks input to help the Commission determine whether the actions of certain information providers, such as index providers, model portfolio providers, and pricing services, meet the definition of investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"). The Request notes that indices have historically been associated with passive investing, but that index providers increasingly used specialized factors when creating indices. While the Request does not specifically address questions regarding passive versus active management, the Chamber reiterates our position that investors can benefit from both approaches depending on their particular needs and circumstances.

Despite the Commission's claims that the growth of information provider services may raise questions about investment adviser status under the Advisers Act, it is notable that the Request did not identify specific market failures or investor harm that warrants any change in regulation. We discourage the Commission from overextending its authority by attempting to classify information providers as investment advisers, or to impose additional regulation on information providers that are already registered as investment advisers in some cases, and especially in situations where such additional regulation is unwarranted.

In its efforts to make a case for imposing investment adviser status on information providers, the Commission makes several incorrect statements in the Request that do not

accurately describe the market for information services as they exist today. We address below two such examples, specific to the Request's comments on index providers. Additionally, we express concern over the Commission's suggestion that it might seek to reevaluate the applicability of the Supreme Court's decision in Lowe v. SEC to information providers. We also comment on the changes to the marketplace that have increased transparency and reduced the possibility of conflicts of interest as the market for information services has grown. Further, we also explain how pricing services, like index providers, do not constitute investment advice. Finally, we explain that model providers should not have a client relationship imposed with the end user.

Erroneous Statements Ascribed to Index Providers

Discretion by Index Providers. The Commission explains that index providers "compile, create the methodology for, sponsor, administer, and/or license market indexes."[1] In describing the operations of index providers, the Request erroneously states that index providers have significant discretion to make changes without disclosing index methods and rules.

Index providers construct indices based on precise methodologies that follow clear rules regarding the selection of securities, and their weighting in an index. Firms also establish a clear process regarding the maintenance of the index, include ongoing review, evaluation of market performance, rebalancing, and removal of securities that no longer meet the criteria set out by the provider. These are well-established, transparent policies and procedures that are understood by the customers of index providers.

Those who rely on an index (asset managers and investors) as a representative benchmark for a particular market segment are provided with access to the methodology and rules governing actions of the index provider. It is simply not in the best interest of the index provider to make discretionary changes that are outside the scope of the methodology or the rules of the index. Indeed, even changes made in the event of unforeseen market events or unexpected changes to the business of a company in the index are made in accordance with established procedures. Of course, the relationship of the index and the fund manager is governed by an agreement that affords predictability.

Index Provider Decision-making. In addition, the Request asserts 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."[2] Notably, the Request provides no real-life examples that support the absolute nature of such an assertion. Second, the Request appears to ignore the basic fact that indices themselves are not investible products. To gain exposure to an index, an investor or institution will typically retain the services of an

[1] Securities and Exchange Commission, Release No. IA-6050; File No. S7-18-22 (June 15, 2022), Page 4. https://www.sec.gov/rules/other/2022/ia-6050.pdf

[2] Id. Page 6.

investment adviser or investment vehicle. The Request also does not explain why expansion of the investment adviser regime to include information providers is necessary to address potential conflicts of interest that are already addressed by the existing regulations applicable to investment advisers.

If the claim is that index providers are actively driving client purchases, we believe that is far-fetched. Index providers construct transparent indices that are representative of a particular market segment or investment strategy. As a representative benchmark, an index does not ascribe any particular merits or valuation to the specific securities that make up that particular market segment or investment strategy.

Given the processes governing index provider decision-making, it would be extremely difficult to encourage the acquisition of a particular security in an index because of a financial interest in that security. More importantly, there would be no incentive to do so, and many protections against doing so. Keep in mind, index providers do not have assets under management. Index providers do not have the right or authority to purchase, sell, or direct the purchase or sale of any security. At all times, the regulated investment adviser or fund manager maintains the responsibility for any and all trading and investment decisions.

This lack of conflict represents a very significant change in the market in recent years. The provision of indices was formerly the purview of banks, many of whom not only had assets under management, but also had proprietary accounts that owned and traded the financial instruments underpinning the indices. In part because of the regulatory efforts led by the International Organization of Securities Commissions ("IOSCO") to discourage bank-owned indices and promote transparency, and in part because of natural changes in the marketplace, banks have largely left the business and those who do not have the potential conflict of stock ownership – namely exchanges and other data providers – have become major index providers.

The decisions made by index providers (either the inclusion or exclusion of certain securities in an index) in creating a representative benchmark does not mean they are providing investment advice. Thus, any interest by a financial institution client or their investors in particular individual securities that comprise an index fund is made at their discretion.

Reevaluating *Lowe*

The Advisers Act includes a "publishers exclusion"[3] by which a "publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation" may be excluded from the definition of investment adviser and thus the obligation to register with the Commission. However, the questions included in the Request indicate the Commission's willingness to reevaluate the Supreme Court's interpretation of the "publishers exclusion" in its decision in *Lowe v. SEC*.

[3] Request for Comment, Page 14; Advisers Act, Section 202(a)(11)(D).

In *Lowe*, the Supreme Court unanimously (8-0) held that "publishers are excluded from the definition under the Advisers Act so long as 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." [4] The case further held that such publications are protected by the First Amendment.[5]

In delivering the Court's decision, Justice Stevens stated "As 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."[6]

In noting that index funds and pricing services may be relying on the "publishers exclusion," the Commission questions whether, given the development of new business models and the passage of time since the *Lowe* case was decided, information provider activities now raise investment adviser status questions.

Nonetheless, we seriously question the Commission's authority to reinterpret the "publishers exclusion" and the ability of information providers to avail themselves of the exclusion. First, the Commission has not identified any specific examples of misuse by information providers of the "publishers exclusion." Second, a reinterpretation of the exclusion – an exclusion affirmed by a unanimous Supreme Court that granted cert to address First Amendment concerns – would seem beyond the purview of the Commission.

Index Providers Already Addressing Transparency and Conflicts of Interest

Information providers are already addressing transparency and conflicts of their own volition and through principles established by IOSCO in its Principles for Financial Benchmarks.[7] In addition to the IOSCO principles, many index providers are also complying with the European Securities and Market Authority's EU Benchmarks Regulation ("BMR").[8] Both regimes are built on principles and benchmarks that are specific to information providers, rather than attempting to fit information providers into rules meant for other financial market actors. The unsuitability of applying the Investment Advisers Act to financial players who are not investment advisers

[4] Lowe v. SEC, 472 U.S. 181, 208-210 (1985).
[5] Lowe, Footnote 58. "…it is difficult to see why the expression of an opinion about a marketable security should not also be protected."
[6] Lowe, 211.
[7] IOSCO, Principles for Financial Benchmarks Final Report, July 2013. https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf
[8] ESMA, Benchmarks Regulation, https://www.esma.europa.eu/policy-rules/benchmarks

raises more than simply questions of practicality and suitability. It raises the question of whether the Commission has the authority to expand its jurisdiction without Congressional authority, especially in light of the First Amendment headwinds. We would note that our member firms who provide such information services are compliant with both the IOSCO principles and the BMR.

We discourage the Commission from attempting to treat information providers as investment advisers. Should the Commission feel compelled to take regulatory action, despite the lack of an identified problem in the market, we strongly encourage the Commission to consider principles that are specific to information providers. This may require new legislation. In addition, the Commission must consider a coordinated plan domestically (particularly in collaboration with the CFTC) and internationally so that information providers are not obligated to comply with differing regulations. Further, as the Commission considers existing benchmark regimes, it is notable that the European Union is just now in the process of reevaluating the scope of the BMR. That the EU is specifically asking stakeholders if the benchmarks should be scaled back is a strong indication that information providers are already highly effective in demonstrating transparency and managing any conflicts.

Pricing Services Are Not Investment Advice

The discussion above relating to index providers is, of course, equally applicable to pricing services. It is, once again, hard to see what problem the Commission is trying to address and difficult to see how the publication of a price or valuation would constitute investment advice. Indeed, the fact that the same valuation is provided to all users who are leveraging the same requirements and calculation methodology would seem to make the provision of pricing services the polar opposite of investment advice.

Like index providers, pricing services do not have assets under management, do not have the right or authority to purchase, sell or direct the purchase of sale of any security, and hence seem to have no conflict in providing pricing. Again, the regulated investment adviser utilizing a pricing service maintains the responsibility for any and all trading and investment decisions. Pricing providers do not have information regarding the direction, holdings, or fund positions. Most funds have more than one pricing provider, with multiple sources being combined to provide the final valuation of the fund.

Model Providers Should Not Have a Client Relationship Imposed with the End User

In the case of model providers where the model provider gives non-discretionary investment recommendations to an intermediary which has a client relationship with the end user of the model, it is difficult to see why the Commission might seek to impose a client relationship between the model provider and the end user of the model when a client relationship already exists with the intermediary. Yet, the Commission seems to question

whether one fiduciary relationship is adequate to safeguard the client's interests without discussing the harm they seek to cure. Imposing a client relationship on the model provider with the end user of the model, whether that model is adopted in whole or in part, would increase costs and regulatory burdens on the model provider to the extent that a valuable service at a lower price point would not be available to consumers. Echoing our discussion above, we continue to seek to understand the investor protection issue the Commission is seeking to address in its comments about model providers.

Conclusion

Thank you for considering these comments. The Chamber stands ready to discuss them further at your convenience.

Sincerely,

Kristen Malinconico
Director
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce