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

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Ms. Countryman:

We are submitting this letter in response to the request of the Securities and Exchange Commission (the "**Commission**") for comments, pursuant to Release No. IA-6050,[1] on the status of index providers under the Investment Advisers Act of 1940 (the "**Advisers Act**"). As discussed below, we believe that the Advisers Act, both as intended by Congress and interpreted by the U.S. Supreme Court, does not apply to index providers.

I. Scope of the Advisers Act

For decades, the Commission has neither treated index providers as investment advisers nor asserted that they were investment advisers. To now expand the definition of "investment adviser" under the Advisers Act to include index providers would be contrary to Congress's intent in enacting the Advisers Act.

As demonstrated by the legislative history of the Advisers Act, and as recognized by the U.S. Supreme Court, Congress was primarily concerned with regulating those businesses that have a fiduciary relationship with their clients through the provision of personalized investment advice. For example, the House Report relating to the Advisers Act states "[t]he title also recognizes the personalized character of the services of investment advisers and especial care has been taken in the drafting of the bill to respect this

[1] Request for Comment on Certain Information Providers Acting as Investment Advisers, Release No. IA-6050 (June 15, 2022).

relationship between investment advisers and their clients."[2] Indeed, this was made clear during testimony as Congress contemplated the legislative text of the Advisers Act. One witness, in describing the advisory client relationship, testified: "It is a personal-service profession and depends for its success upon a close personal and confidential relationship between the investment-counsel firm and its client. It requires frequent and personal contact of a professional nature between us and our clients . . . ."[3] Moreover, the Supreme Court has explained that "[t]he [Advisers] Act was designed to apply to those persons engaged in the investment-advisory profession – those who provide personalized advice attuned to a client's concerns, whether by written or verbal communication."[4] The legislative history, according to Lowe, "plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice."[5]

Index providers, on the other hand, do not interact on a personalized basis with anyone who uses their indexes for investment purposes. Instead, as the Commission notes, index providers generally license their indexes to financial intermediaries for the creation of financial products, reporting, or other internal uses. Those activities do not constitute an advisory relationship and are the type of impersonal services that Congress did not seek to regulate under the Advisers Act.

While an index provider will interact directly on a commercial basis (e.g., to negotiate the terms of the licensing arrangement or to deliver the licensed product) with a financial intermediary that wishes to license an index for use in constructing or operating a financial product, or with an institutional investor that wishes to use an index for its own purposes, in doing so the index provider does not provide personalized investment advice. The index provider may, in certain circumstances, implement changes to an index methodology to create a specialized index at the request and direction of the intermediary or institutional investor, but it is merely following their directions and not advising them on whether such changes will generate better investment results.

Index providers are thus outside the scope of the types of businesses that Congress sought to regulate under the Advisers Act. The Commission should thus not seek to redefine the definition of investment adviser under the Advisers Act to apply to index providers.

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[2] See H. R. Rep. No. 2639, 76th Cong., 3d Sess., at 28 (1940). See also Lowe v. SEC, 472 U.S. 181, 204 (1985).

[3] Hearings on S. 3580 before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess., 47 (1940) (testimony of Charles M. O'Hearn).

[4] Lowe at 207-08.

[5] Id. at 182, 204.

II. Publisher's Exclusion

Even if the Commission were to construe the prima facie definition of investment adviser to apply to index providers, index providers would be excluded from that definition by the publisher's exclusion set forth in Section 202(a)(11)(D) of the Advisers Act and further articulated in Lowe.[6] Under the Supreme Court's decision in Lowe, a person may rely on the publisher's exclusion for publications that include investment advice if the publications: (i) provide only impersonal advice;[7] (ii) are "bona fide," meaning that they provide genuine and disinterested commentary;[8] and (iii) are of general and regular circulation rather than issued from time to time in response to episodic market activity.[9] Index providers meet these conditions (assuming an index even constitutes investment advice), as set forth below.

(i) *Impersonal Advice.* In discussing the "impersonal advice" prong in Lowe, the Supreme Court explained:

> As long as the communications . . . 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 [Advisers] Act and that are characteristic of investment adviser-client relationships, we believe the publications are, at least presumptively, within the [publisher's] exclusion and thus not subject to registration under the [Advisers] Act.[10]

Because, as discussed above, an index provider does not interact on a personalized basis with investors whose investments may be related to its indexes, any "advice" would be entirely impersonal in nature.[11]

(ii) *Bona Fide.* In discussing the "bona fide" prong in Lowe, the Supreme Court explained that "a 'bona fide' publication must be genuine in the sense that it contains

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[6] Depending on the specific facts and circumstances, other exemptions under the Advisers Act would also be available to an index provider, such as the exemptions under Sections 202(a)(11)(A) and (C) for banks and brokers.

[7] Id. at 210.

[8] Id. at 206.

[9] Id.

[10] Id. at 210.

[11] The fact that an index provider may interact directly with a financial intermediary or institutional investor in connection with implementing any requested changes to an index methodology to calculate a specialized index would not preclude an index provider from meeting this condition. As discussed above, those customer servicing activities do not involve the provision of personalized investment advice.

disinterested commentary and analysis as opposed to promotional material disseminated by a 'tout.'"[12] The creation of an index is genuine and disinterested. In creating an index, an index provider is not seeking to "tout" or recommend a particular security. Rather, indexes generally track a particular market, segment of a market, or other disinterested security-selection process. In each case, they are based on a pre-established methodology. Indexes are thus clearly "bona fide" for purposes of the publisher's exclusion.

(iii) *General and Regular Circulation.* In discussing the "general and regular circulation" prong in Lowe, the Supreme Court explained that "publications with a 'general and regular' circulation would not include "people who send out bulletins from time to time on the advisability of buying and selling stocks . . . or 'hit and run tipsters.'"[13] Index providers, on the other hand, generally update their indexes on a regular schedule unrelated to market events, such as to rebalance index constituents pursuant to a pre-determined and pre-published schedule. Moreover, the fact that an index might not be freely available to the public (e.g., might only be available to financial intermediaries that have licensed the index and their investors) should not preclude an index provider's ability to meet this condition, given that the newsletters held by the Lowe court to be covered by the publisher's exclusion were only distributed to paid subscribers. Accordingly, indexes are of "general and regular circulation" for purposes of the publisher's exclusion.

For these reasons, even if an index were deemed to constitute investment advice, or the prima facie definition of investment adviser were construed to include index providers, an index provider would nonetheless be excluded from the scope of the Advisers Act by the publisher's exclusion.

III. Conclusion

In closing, we would like to thank the Commission for the opportunity to comment on this important issue. As discussed above, however, we believe that the Advisers Act does not apply to index providers. To construe the definition of investment adviser under the Advisers Act to include index providers would be contrary to both congressional intent and the interpretation of the Act by the Supreme Court.[14]

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[12] Id. at 206.

[13] Id.

[14] In addition, we are concerned that such an action, in light of the Commission's longstanding practice with respect to index providers, could potentially be seen as arbitrary.

If you have any questions with respect to the matters raised in this letter, please contact Gregory Rowland at [redacted].

Very truly yours,

Davis Polk & Wardwell LLP