August 16, 2022

Submitted electronically through rule-comments@sec.gov

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

Re: Request for Comment on Certain Information Providers Acting as Investment Advisers [File No. S7–18–22]

Dear Ms. Countryman:

The Money Management Institute ("MMI") appreciates the opportunity to provide comments to the Securities and Exchange Commission ("SEC" or the "Commission") in response to its request for information and public comment on certain information providers acting as investment advisers.[1]

MMI is the national organization for the advisory solutions industry, representing a broad spectrum of investment advisers that manage separate accounts as well as sponsors of investment consulting programs. MMI was organized in 1997 to serve as a forum for the industry's leaders to address common concerns, discuss industry issues, and work together to better serve investors. Our membership comprises firms that offer comprehensive financial consulting services to individual investors, foundations, retirement plans, and trusts; related professional portfolio-management firms; and firms that provide long-term services to sponsor, manager, and vendor firms. MMI is a leader for the advisory solutions industry on regulatory and legislative issues.

As the leading industry association representing providers of managed account solutions, we are commenting on the role of model providers in the context of retail managed accounts. In the retail separately managed account ("SMA") context, virtually all model providers are registered investment advisers or regulated bank or trust company fiduciaries[2] that, in turn, provide model portfolios to other registered investment advisers or banks and trust companies ("Fiduciaries") for use when advising their respective clients ("end-clients"). The fact that, in the SMA context, virtually all model providers are registered investment advisers or regulated bank fiduciaries does not mean that the provision of model portfolios is necessarily investment advice or, even if it is in certain circumstances, that any such investment advice is the same as investment advice provided by

---

[1] *Request for Comment on Certain Information Providers Acting as Investment Advisers*, 87 Fed. Reg. 37,254 (June 22, 2022) (the "Request").

[2] Model providers typically are registered investment advisers because providing model portfolios is an aspect of their overall advisory business and because they are typically selected by program sponsors based on their actual track record in managing client accounts.

traditional client-facing investment advisers, or that, as a legal matter, the provision of a model portfolio involves any fiduciary, person-to-person relationship with any end-client of a Fiduciary.

MMI supports appropriate efforts to protect investors, as well as efforts to preserve current business models and investor choice. We are concerned, however, that any action by the SEC or its staff to treat model providers as investment advisers to end-clients when providing model portfolios might have the unintended consequence of ultimately harming investors, as well as negatively impacting model providers, sponsors, and investment advisers in the SMA marketplace by unnecessarily increasing the costs, risks and compliance burdens of providing model portfolios. Such negative impact might very well prompt model providers to cut back significantly on the arrangements under which they provide model portfolios, drop out of the market entirely, or charge significantly more for model portfolios, all of which will negatively affect end-clients.

By way of background, model providers publish model portfolios in various contexts, including to:

- Provide generic investment education regarding capital markets perspectives (in which case, the model portfolios may focus on asset allocation);
- Assist in distribution of proprietary mutual funds or exchange traded funds by offering generic ideas on how the funds might fit within various type of strategies, including in combination with one another; and
- In the SMA program context, as a tool for other Fiduciaries when advising their end-clients, as discussed below.

SMA programs play an important role by providing high-quality institutional management options to investors with both large and small account balances. SMA programs are typically sponsored by Fiduciaries that offer discretionary investment advisory services to clients, typically pursuant to arrangements with other investment advisers.[3] SMA programs include (i) so-called "wrap fee programs" as well as (ii) programs in which the end-client receives the same complement of services in an unbundled form. Unlike clients in pooled investment vehicles such as mutual funds, end-clients in SMA programs receive tailored advice based on their investment objectives and financial circumstances and retain direct and sole ownership of their account assets. Through SMA programs, end-clients typically receive comprehensive investment services that include, in the aggregate, financial advisory, portfolio management, custody, securities execution, reporting, and consultation.

SMA programs are typically designed to comply with the nonexclusive safe harbor from the definition of "investment company" for certain discretionary investment advisory programs under Rule 3a-4 of the Investment Company Act of 1940 ("Investment Company Act"). Rule 3a-4 is designed to ensure that investment advisers relying on the rule provide individualized or tailored advice to their individual clients, which negates the concern that the discretionary advisory program

[3] Some SMA program sponsors are not themselves Fiduciaries but instead sponsor model technology platforms for use by client-facing Fiduciaries with ultimate discretion over end-clients' accounts.

might be deemed to involve the pooling of client assets that may require registration and regulation as an investment company. For example, the rule requires the sponsor or its designee, among other things, to (i) provide quarterly statements of all activity in the account; (ii) manage the account in accordance with reasonable client restrictions; (iii) contact each client at least annually to learn of changes in the client's financial situation or investment objectives and any changes in the restrictions imposed by the client; and (iv) make personnel of the manager of the client's account who are knowledgeable about the account and its management reasonably available to the client for consultation.

Although the definition of "investment adviser" under the Investment Advisers Act of 1940 ("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 who is an investment advice fiduciary that plainly do not apply to the model providers or their services. As noted above, the Advisers Act excludes from the definition of "investment adviser," among others, banks, trust companies, broker-dealers whose performance of advisory services is solely incidental to their business as broker-dealers and that receive no special compensation therefor, and publishers of bona fide newspapers, news magazines or business or financial publications of general and regular circulation.

Although specific arrangements can vary by SMA program, program sponsor, model provider, model portfolio, Fiduciary and the attendant circumstances, model portfolios provided in this context do not necessarily involve the provision of investment advice that makes the provider an "investment adviser" for purposes of the definition of that term under Section 202(a)(11) of the Advisers Act. In this regard, as discussed below, a model provider does not have the kind of fiduciary, person-to-person relationships that the Supreme Court in *Lowe v. SEC*,[4] viewed as necessary for investment adviser status. A model portfolio may serve more as the type of tool that, as the Commission noted, the SEC staff has not treated as investment advice.[5] Moreover, some providers may be expressly excluded from the definition of "investment adviser," including under the separate exclusions for banks, broker-dealers and publishers.

As noted, in the retail managed account context, virtually all model providers are regulated Fiduciaries that provide model portfolios for use by other regulated Fiduciaries. Fiduciaries use model portfolios as tools or inputs in providing advice to their end-clients. The Fiduciaries are responsible for the appropriateness of any investment advice they provide to, or investment decisions they make for, end-clients based on or by reference to model portfolios, including (as

[4] 472 U.S. 181 (1985).

[5] See Request, 87 Fed. Reg. at 37,257 n. 29.

applicable) based on the Commission's 2019 Fiduciary Interpretation[6] and Rule 3a-4 under the Investment Company Act.

In contrast to Fiduciaries, model providers do not act as investment advisers to the Fiduciaries' end-clients merely by virtue of delivering model portfolios to the Fiduciaries. Model portfolios are not typically tailored or adjusted to any given Fiduciary and, in any event, are not tailored to the needs or objectives of any specific end-client of a Fiduciary.[7] Model providers do not enter into any investment advisory agreements with end-clients, typically do not know the identity of or any other information about any end- clients, interact with end-clients or exercise investment discretion over accounts of end-clients, as discussed below. The Fiduciaries are solely responsible for determining whether a model portfolio is appropriate for their end-clients, are typically under no obligation to implement the model portfolio's components in their end-clients' portfolios, and may deviate from a model portfolio in their sole discretion (including to accommodate particular end-client investment guidelines or restrictions, cash flow, tax or other needs specific to particular end-clients, about which the model provider typically has no knowledge).

Model providers do not exercise investment discretion in the ordinary sense of that term and as defined in the Securities Exchange Act of 1934 ("Exchange Act") because they are not the ultimate makers of any investment decisions made by Fiduciaries for their end-clients, and typically model providers are not aware of those investment decisions. Whether a person exercises investment discretion is largely a question of fact based on whether a person is authorized or makes investment decisions. Section 3(a)(35) of 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 Commission, 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."[8] Model 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 (i.e., Fiduciaries) 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

---

[6] *See* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Advisers Act Release No. 5248 (June 5, 2019), 84 Fed. Reg. 33,669 (July 12, 2019).

[7] Although the Request states that "Model portfolio providers may consider the characteristics and investment goals of a general client type, such as whether the investor is focused on retirement or short-term financial management," Request at 37,255, we have not observed this actually occurring, nor would any such consideration result in a model portfolio being tailored to any given client.

[8] 15 U.S.C. § 78c(3)(a)(35).

“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 the SEC has not done.

Nor do model providers, in the words of Form ADV, “have ongoing responsibility to select or make recommendations, based upon the needs of the client, as to specific securities or other investments the account may purchase or sell and, if such recommendations are accepted by the client, [have responsibility] for arranging or effecting the purchase or sale.”[9] Correspondingly, model providers typically do not treat assets in end-client accounts managed by Fiduciaries as the model providers’ regulatory assets under management for Form ADV reporting purposes.

In *Lowe v. SEC*,[10] 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).[11] Although the *Lowe* decision is often looked to for its application of the publisher’s exclusion, for present purposes it is more important in establishing that a personal relationship between an 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.”[12] 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.[13]

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.”[14]

---

[9] Form ADV General Instructions Item 5(b)(3).

[10] 472 U.S. 181 (1985).

[11] *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”).

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

[13] *Id.* at 181

[14] *Id.* at 210.

In short, the terms under which a model provider provides services are very different from a traditional investment advisor-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."[15]

Even if a model provider were somehow deemed to have a personal relationship with, and therefore deemed an investment adviser to, a client to which it provides a model portfolio, that client would only be the regulated Fiduciary to which the model provider provides the model portfolio, which itself is required to exercise independent judgment when advising or making recommendations to its end-clients. In no case should model providers be deemed investment advisers to end-clients of a Fiduciary.

In order for model providers to be deemed investment advisers to end-clients under the Advisers Act, a court or regulator would have to "look through" or disregard the relationship between the Fiduciary and the end-client. However, the language of Advisers Act Section 202(a)(11) defining an "investment adviser" is clear and unambiguous in that it does not contain a "look through" provision. Congress's 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.[16] 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.[17] Yet, Section 2(a)(20) contains a "look through" provision (which we discuss below as the "Sub-Adviser Prong") and Section 202(a)(11) does not.

Our view that model providers should not be deemed to have an implied advisory relationship with end-clients aligns with long-standing 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.[18] The SEC staff granted no-action relief, stating that Kempner would not have to treat the bank's end-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."[19] Instead, the SEC staff stated that Kempner could count the bank, and not the bank's end-clients, as its clients for purposes of Rule 205-3 under the Advisers Act.

In another SEC staff 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

---

[15] *SEC v. Cap. Gains Rsch. Bureau, Inc.,* 375 U.S. 180, 187 (1963).

[16] *See* 15 U.S.C. 80a-2(a)(20).

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

[18] *Kempner Cap. Mgmt., Inc.*, SEC No-Action Letter (Dec. 7, 1987).

[19] 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.

Money Management Institute

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."[20] 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) and the Supreme Court's holding in *Lowe*. These letters also stand for the proposition that an advisory relationship should not be implied with a client of another Fiduciary in the absence of a person actually exercising investment discretion or providing advice that is tailored to the specific needs of an end-client.[21]

As noted above, we are concerned that any action by the SEC to treat model providers as investment advisers to end-clients when providing model portfolios to their Fiduciaries might have the unintended consequence of ultimately harming investors, as well as negatively impacting model providers, sponsors, other investment advisers in the SMA marketplace by unnecessarily increasing the costs, risks and compliance burdens of providing model portfolios. Such negative impact might very well prompt model providers to cut back significantly on the arrangements under which they provide model portfolios, drop out of the market entirely, or charge significantly more for model portfolios, all of which will negatively impact end-clients.

End-clients benefit from the comprehensive services provided to them by their Fiduciaries in obtaining access to the expertise of institutional money managers when investing smaller amounts of assets that would otherwise not be eligible for the money manager's services. An expanded interpretation of "investment adviser" to deem a relationship to exist between a model provider and end-clients would be duplicative, inefficient, and costly while giving end-clients no, or only marginal, additional protections.

We see no reason why an adviser-client relationship should be deemed to exist between a model provider and end-clients of other Fiduciaries where model providers (1) do not have privity or an advisory relationship with end-clients, (2) do not exercise investment discretion over end-client accounts, (3) do not generally have specific knowledge about end-clients or their accounts, and (4) do not provide any investment advice that is tailored to the particular financial objectives or investment circumstances of the end-clients. As previously noted, the Fiduciary has a direct advisory and fiduciary duty to its end-clients. Specifically, the client and the Fiduciary enter into discretionary

---

20 *Copeland Fin.l Servs., Inc.*, SEC No-Action Letter (Sept. 21, 1992).

21 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.

investment advisory agreements. The Fiduciary enters into a model provider agreement with the model provider to which the end-client is not a party, and under which the model provider agrees to provide its generic models in a particular strategy to the Fiduciary. The Fiduciary decides how and when to employ the models and manages the clients' accounts on a discretionary basis.

It is important to note that the Fiduciary generally has responsibility vis-à-vis its end-clients for exercising investment discretion over the end-clients' accounts, including when making investment decisions as to specific investments and implementing trades. As such, the Fiduciary would be subject to duties of care and loyalty under the Advisers Act, as applicable. Thus, there is no gap in regulatory coverage in this context, as the Fiduciary is ultimately responsible to the client, and it would be unnecessarily duplicative to impose fiduciary obligations to the end-clients on the model provider. In addition to the fact that model providers generally do not know the identity of or have any information regarding the Fiduciary's end-clients, and have no advisory relationship with the Fiduciary's end-clients, there is already a regulated entity — the Fiduciary chosen by the client— with responsibility for managing the end-client account. Treating model providers as investment adviser fiduciaries to the end-clients would require model providers to perform activities that are already being performed by the Fiduciaries as regulated fiduciaries.

Moreover, the SEC and its staff have appeared to view investment adviser status and fiduciary responsibilities as being largely coextensive – meaning that if an entity is an investment adviser, it is per se a fiduciary even though the performance of the services might not create fiduciary status under common law. This is important from the standpoint of understanding the nature of a model provider's obligations (fiduciary or not), the ability of the provider to disclaim or limit its responsibility (i.e., through exculpatory or hedge clauses or caps on liability) so that its potential contractual exposure is aligned with its role and the generally low fees it charges. In other words, if any regulation of model 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,[22] 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 model providers from providing information on an "as is" basis, disclaiming or limiting liability to gross negligence, or capping liability at fees paid, which are commonplace and commercially reasonable.

The Request refers in general terms to certain "concerns" but does not offer any concrete examples in which these concerns have, in actuality, arisen in practice or resulted in any harm to investors or the markets. Nor does the Request really delve into (or concretely seek information on) how Fiduciaries and model providers address these concerns.

For example, in general terms, the Request states that "[t]hese providers' operations also raise potential concerns about investor protection and market risk, including, for example, the potential for frontrunning of trades where the providers and their personnel have advance

---

[22] *See* Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, 87 Fed. Reg. 16,886 (Mar. 24, 2022).

knowledge of changes to the information they generate and potential conflicts of interest where the providers or their personnel hold investments that they value or that are constituents of their indexes or models."[23] However, the Request identifies no circumstance where this concern actually materialized or impacted investors or the markets, including in the case of model portfolios used by Fiduciaries.

The Request also states that "[i]nvestment 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. For example, clients may be unsure which services are being performed by a model portfolio provider and which are being performed by the adviser, as well as by whom they are owed a fiduciary duty." In practice, however, model-based SMA program agreements and related disclosures generally can be expected to provide clear disclosure about which entities perform which services, the fees that end-clients are charged, and which entity is acting as a Fiduciary to the client. Moreover, many model-based SMA program Fiduciaries deliver Form ADV Part 2A and Form CRS brochures for model providers even though the model providers do not have an advisory relationship with end-clients. Sponsors may do this because end-clients might be involved in selecting the model portfolio, or the sponsors might want to ensure that end-clients have, and consider information about, conflicts or business practices disclosed in the providers' brochures rather than have end-clients rely solely on the given sponsor to do so.

We hope that our comments are helpful to the Commission and its staff. We would be glad to answer any questions or provide further assistance. Please feel free to contact me at [redacted] or contact Chad Papanier at [redacted].

Very truly yours,

Craig Pfeiffer

President and CEO

Money Management Institute

[23] Request at 37,254.