S&P Dow Jones Indices

A Division of S&P Global

Via Email Electronic Submission

August 16, 2022

Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090
Attn: Secretary

Re: File Number S7-18-22 Submitted Via Electronic Filing
Request for Comment on Certain Information Providers Acting as Investment Advisers

S&P Dow Jones Indices LLC ("S&P DJI") welcomes the opportunity to provide feedback and engage with the Securities and Exchange Commission (the "Commission" or the "SEC") on its Request for Comment on "Certain Information Providers Acting as Investment Advisers" (the "Request"). S&P DJI has engaged with regulators and policymakers around the world to inform and offer insights on the role independent index providers serve in the marketplace and the many benefits indexing has brought to investors.

Below we set forth our response to certain questions posed by the Request, or portions thereof, as they relate to index providers and provide information about our business where we think it may be helpful.

Introduction:

S&P DJI provides independent, transparent and cost-effective index solutions to the global investment community. Our proprietary index offering covers asset classes in most major markets around the world and captures a wide array of index objectives, ranging from broad-based market measurements such as the S&P 500 and the Dow Jones Industrial Average to various strategy and thematic indices.

Indices have transformed financial markets and led to the creation of a wide variety of innovative financial products to meet investor needs. Since their inception in the 1970s, investment products based on indices have provided substantial benefits to asset owners, investment managers and, most importantly, investors. Index-based products have led to tremendous savings for investors around the world and afforded investors access to previously inaccessible market segments – democratizing access to diversified investments. Overall, indices foster transparency, market efficiency, and investor confidence.

As an independent index provider, S&P DJI operates separately from investors and product sponsors and is not affiliated with any sponsors or advisers of index-based investment products. S&P DJI does not advise on, create, manage, issue, trade, or clear any securities, investment products, or derivatives. Instead, S&P DJI licenses its index intellectual property to a wide variety of third parties for, among other purposes, research and analytics, performance benchmarking and the creation of investment/financial products that meet the ever-changing needs of market participants.

The index industry has evolved over the years beyond broad-based market measures and now captures narrower segments of the marketplace as well as factor-based and other investment strategies. Regardless of the measurement, the fundamentals of S&P DJI's indexing practices remain the same. All indices are rules-based, transparent, systematically calculated and governed under a robust control framework that protects the integrity of our index determination process.

Independent index providers require a sound index governance regime, transparent methodologies and a robust control framework that includes the segregation of responsibilities to address potential conflicts of interest. As such, S&P DJI has long supported and implemented the recommendations of the International Organization of Securities Commissions ("IOSCO") as published in its final report, IOSCO Principles on Financial Benchmarks dated July 2013 (the "IOSCO Principles"). In fact, S&P DJI had a governance framework that aligned with the IOSCO Principles before the final report was published. S&P DJI's adherence to the IOSCO Principles is evaluated annually through an assurance review by an independent, external audit firm.

S&P DJI believes that regulation of index providers under the Investment Advisers Act of 1940 (the "Advisers Act" or the "Act") is unnecessary, because (1) the role of index providers does not fall within the scope of the Advisers Act, and (2) most firms that use our indices to create investment products are already subject to the Act and have a fiduciary duty to their investors and clients. In addition, many index providers, including S&P DJI, dedicate substantial resources to adhering to the IOSCO Principles and are already governed by a framework (see below) that addresses the core policy concerns regulation is intended to address: transparency and the mitigation of conflicts of interest including, the segregation of duties. Imposing an additional layer of regulation would not necessarily serve investor protection purposes while adding considerable costs, which will inevitably be passed on to investors.

If the Commission does not agree with the sufficiency of the existing investor protections and believes the index industry requires regulation, then any effort to regulate the index industry should be appropriately limited and tailored. It is important to avoid unintended consequences that could disrupt the dramatic benefits of access and savings index innovation has brought to investors, particularly retail investors. We urge the SEC to act cautiously and begin robust engagement with the industry.

Reponses to Questions in the Request:

Question No. 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?

With respect to the Commission's accuracy of its description of index providers, we would like to point out that: (i) although the maintenance of indices involves the exercise of discretion, such discretion is exercised within the limitations of the index methodology and only to achieve the objective of the index; (ii) S&P DJI and most other index providers publish both broad-based indices and narrow specialized indices; and (iii) regardless of what type of index is published, S&P DJI and other members of the index industry employ a control framework to address transparency, disclosure and conflicts of interest, which seem to be the Commission's primary concerns. [1]

To address any potential risks and conflicts of interests in our index calculation process, S&P DJI employs a robust control framework to protect the integrity of its indices, mitigate risks and address potential conflicts of interest that may arise in our role as an independent index provider. [2] Transparency, segregation of responsibilities and documented policies and procedures all protect the independence and integrity of S&P DJI's analytical processes. For example:

- S&P DJI calculates and governs our indices based on publicly available methodologies outlining the objective, rules and criteria of each index. Available on our public website, these documents assist market participants to understand (i) the objectives of those indices (e.g., the markets the indices are designed to measure or the strategies the indices are designed to capture) and (ii) how the indices are calculated.

- S&P DJI imposes strict technological and physical firewalls segregating our commercial and analytical activities to prevent undue commercial influence on our analytical process. S&P DJI indices are governed by independent Index Committees, which are responsible for ensuring the indices achieve the objectives as outlined in their publicly available methodologies.

- S&P DJI has adopted and implemented policies and procedures, including a Code of Business Ethics, that seek to protect the integrity and independence of S&P DJI's index determination process. Those policies and procedures are designed and implemented in consideration of existing or potential risks posed by the benchmarks S&P DJI administers, requiring the disclosure, management, mitigation and avoidance of actual or potential conflicts of interest, including outside business and personal trading activities of Index personnel.

- S&P DJI, as an independent index provider, is unaffiliated with the market participants that use our indices as benchmarks for passively managed funds and other products or to benchmark the performance of actively managed products.

Finally, as previously noted, S&P DJI adheres to the IOSCO Principles, which were established by U.S. and other financial regulators, by undergoing an external review every year by

[1] S&P DJI and all other members of the Index Industry Association posit the value of operating according to industry-standard best practices which include maintenance of robust governance arrangements. See IIA Best Practice Guidelines - Index Industry Association.

[2] This control framework is not only called for by the IOSCO Principles and other regulatory regimes to which S&P DJI is already subject; it is demanded by the marketplace of index users.

an independent, globally recognized audit firm to demonstrate our adherence thereto. This audit is made publicly available on our website.[3]

General Questions Related to Information Providers' Status

Question No. 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?

Question No. 6. Which providers rely on the publisher's exclusion? On what basis? To what extent do they rely on [*Lowe vs. Securities and Exchange Commission,* 472 U.S. 181 (1985)] to inform the determination? How do they determine whether their publications are "impersonal," "bona fide," or of "general and regular circulation"?

S&P DJI does not operate as an investment adviser based on the long established and current state of the law and is unaware of any independent index provider that does operate as an investment adviser, registered or otherwise.

First and foremost, S&P DJI does not meet the definition of an investment adviser under the Advisers Act. Section 202(A)(II) defines an investment adviser as: "any person who, for compensation, engages in the business of **advising others** … as to the **value of securities** or as to the advisability of investing in, purchasing or selling securities".[4] In contrast to the management of an active portfolio, adding a stock to an index does not imply a judgment about its value; inclusion is strictly a function of an index's methodology in determining that such an addition meets the objective. An index provider creates, calculates and governs an index in order to capture a particular market segment or investment strategy. It is not our role to advise clients, nor do we in fact advise clients, for compensation or otherwise, on the value of securities or the advisability of investing in, purchasing or selling those securities. Indices are not securities. In calculating and maintaining an index, S&P DJI makes no judgment of the merits of investing in the underlying constituents. Instead, we ensure those index constituents meet the index eligibility criteria and that the index continues to achieve its objective as stated in the published index methodology.

In addition, even for investment products designed to mirror the performance of or otherwise track an index, S&P DJI does not provide any advice, recommendation, or opinion as to whether an investor should buy, sell or hold the securities that comprise or use the index. If an asset manager or fund sponsor wishes to launch a mutual fund, exchange-traded fund ("ETF") or any other financial product that tracks a given market, it may elect to license an index for that purpose. There are many index providers and a wide variety of indices from which to choose. Any index licensee then has the complete discretion to structure its fund or other financial product as it deems appropriate considering its own investment needs and the needs of its investors. Some licensees may elect to replicate an index by holding all the constituents within it, but others may choose to optimize and purchase only a representative sample of such index constituents. Some managers may use the index and apply their own proprietary screen on top of the index for

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[3] S&P DJI's most recently published independently audited IOSCO report can be found here: [Regulatory Information - Governance | S&P Dow Jones Indices (spglobal.com)].

[4] Emphasis added.

purposes of managing a particular strategy. Still other licensees may determine not to purchase any index constituents, but instead seek to replicate the index through use of derivatives. S&P DJI is agnostic as to how a licensee uses an index. S&P DJI is a publisher and licensor of index intellectual property and information services, not an adviser regarding investments. The investment adviser and/or product issuer controls all aspects of product development, starting from the selection of any given index from the multitude of options available, through the sales and marketing, and the ongoing management of the investment product.

It is S&P DJI's intent and desire that all S&P DJI indices ultimately are broadly adopted and used for a variety of product types (e.g., US and non—US funds, separate accounts, pooled investment vehicles, insurance products, derivatives). Although some indices may be licensed in the U.S. exclusively to a product sponsor so that it may have an opportunity to recoup its up-front investment, exclusivities are generally limited in scope with respect to product type, jurisdiction and duration. Even with respect to indices that may be licensed exclusively, S&P DJI does not advise on whether the constituents comprising the index are a "good" investment or whether to invest in the investment product leveraging such index at all. S&P DJI is simply licensing an index that measures a given market or captures a particular strategy; it does not advise on the value of the underlying index constituents.

Finally, although S&P DJI believes it is not an investment adviser under the Advisers Act, it also believes it may rely on the publisher's exclusion set forth in Section 202(a)(11)(D) of the Advisers Act, as interpreted by the Supreme Court in *Lowe vs. Securities and Exchange Commission*, 472 U.S. 181 (1985), if necessary. Indices developed by S&P DJI are uniform for all users of the index and published broadly to the marketplace; intraday values of the S&P 500 Index and Dow Jones Industrial Average can be seen on television screens and websites worldwide. Indices are generally not personalized, although some may be developed with input from an investment manager to implement an investment strategy for its own clients. Nor is any index timed to specific market activity – each index is published on a daily basis at a set time each day or on an intraday basis throughout the day. We also note the important point made by the Supreme Court in interpreting the publisher's exclusion: "The legislative history [of the Act] plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice. The 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." *Lowe v. SEC*, 472 U.S. 181, 207-8 (1985). That language clearly describes the relationship between our licensees and their own clients; it does not describe the relationship between S&P DJI and our licensees.

When S&P DJI licenses an index to a firm in the U.S. that plans to launch or manage a product based on such index, the product will typically be managed by a registered investment adviser that is subject to the SEC's jurisdiction and has a fiduciary duty to the investors in the product. In some instances, there is more than one fiduciary between the index provider and the end investor. Adding another layer of regulatory oversight serves little purpose, while imposing significant compliance burden on the index provider resulting in additional costs.

Question No. 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?

S&P DJI is not an investment adviser and therefore does not have fiduciary duties to the licensees of its indices. In addition, it does not have any fiduciary obligation to, or contractual privity with, the investors in products created by such licensees. Licenses are entered into with institutions that use the index in a variety of ways as described above. Each index is designed in accordance with stated rules; it is not intended to meet the investment objective of any individual licensee or investor. Although S&P DJI often includes design features to create indices that are stable, liquid and replicable when developing its indices, it does not consider the investment needs of its individual licensees and/or the downstream investors in our licensees' investment products. In fact, S&P DJI is not even necessarily aware of what those investment needs are. Instead, it assists its licensees with understanding its indices, their methodologies and indexing fundamentals. It is the investment advisers and asset managers that serve as fiduciaries to their own clients and investors.

Under the Advisers Act, an investment adviser is a fiduciary whose duty is to serve the best interests of its clients with a duty of care and a duty of loyalty. However, as mentioned, index providers deliver disinterested, uniform, impersonal information, in the form of a widely disseminated index that represents a market, market segment or captures an investment strategy for use by a variety of market participants for a variety of purposes. Given the multitude of users, it is not even clear to whom the index provider would owe a fiduciary duty. For example, before implementing material revisions to an index methodology, S&P DJI issues a public consultation to enable stakeholders with different perspectives and views to provide feedback.[5] Responses to consultations may vary and, at times, conflict, depending on the differing interests of the end user. As an independent and unaffiliated index provider, S&P DJI has and must continue to have the freedom and flexibility to maintain and preserve the index integrity independent from individual users' personal investment objectives.[6]

Regardless of its status, S&P DJI dedicates substantial resources to protect the integrity of its index determination process and address conflicts of interest. Please refer to our detailed response to Question 1 with respect to how S&P DJI addresses conflicts of interest.

Question No. 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,

[5] S&P DJI's consultation process is described on page 42 of the Equity Indices Policies & Practices Methodology. Information regarding S&P DJI's consultations can also be found here: Consultations - Governance | S&P Dow Jones Indices (spglobal.com).

[6] If an index provider were considered an investment adviser and fiduciary, then any fiduciary duty it had would have to be very narrowly construed and clearly defined, especially given the diverse and sometimes conflicting interests of its customers and other market participants. This concept was recognized in Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33,669 (July 12, 2019) ("Fiduciary Interpretation").

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?

S&P DJI's indices are rules-based, governed by published methodologies, and systematically calculated. Although discretion is freely exercised at the creation and development stages of an index, once launched, discretion is only exercised within the limitations of the methodology.

Those index methodologies that call for the exercise of discretion to maintain the index expressly describe when and how such discretion may be exercised. By way of example, the S&P 500 is sometimes referred to as an index that is maintained using Index Committee discretion. However, the S&P 500 methodology has a clear and transparent list of eligibility criteria used to determine the composition of the S&P 500. Companies that meet the eligibility requirements are not automatically added to the index – they join a pool of other eligible candidates and are considered for inclusion when appropriate. As described in the methodology, the Index Committee assesses several other factors such as sector balance and size representation when considering a candidate's actual inclusion in the index. While Index Committees consider an index objective when making decisions, at no time does an Index Committee consider the investment objectives of licensees or individual investors. [7]

S&P DJI may incorporate generalized feedback from market participants and/or specific requested design elements from customers that are investment advisers and/or product sponsors into the development of its indices. As mentioned above, when considering material changes to index methodologies, S&P DJI actively seeks comment from stakeholders through the consultation process. Collecting feedback from market participants is contemplated across the regulatory regimes applicable to index providers. However, regardless of whether an index is created in response to market or customer input, once an index is launched it becomes subject to the same control framework as all other S&P DJI indices. This control framework ensures our independence as an index provider and index integrity.

Question No. 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?

As mentioned above, S&P DJI may develop an index that incorporates customer suggested design elements. However, because S&P DJI is an independent index provider, the customer does not exercise any discretion with respect to maintenance of such index after the index is launched. Regardless of customer input into the index design, once launched, an index is systematically calculated, maintained in accordance with its published methodology and subject to S&P DJI's

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[7] Index Committees may apply discretion to make decisions that differ from the index methodology in certain circumstances including to avoid possible market disruption or when strict application of the index rules results in inconsistency with the index objective. https://www.spglobal.com/spdji/en/documents/methodologies/methodology-sp-equity-indices-policies-practices.pdf. See page 48.

standard governance framework. Also, if a licensee using an index believes changes to its methodology are necessary, S&P DJI may consider such request. If and only if S&P DJI's Index Committee finds such changes are potentially warranted, then S&P DJI will undertake a public consultation process with respect to any potential material change.

Even if an index is developed using customer input, it is still S&P DJI's goal for all indices to be used for a variety of product types. For example, while we might license a customer requested index for use with an ETF, we hope to also license that index for use with mutual funds, exchange-traded derivatives, non-US funds, and/or structured products.

Question No. 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?

S&P DJI regularly incorporates feedback from S&P DJI licensees and market participants more broadly into the development and maintenance of its indices – all in accordance with its control framework for such incorporation. Any licensee, market participant and member of the general public may provide feedback or suggest changes to an index methodology. S&P DJI actively seeks feedback through a variety of methods including public consultations, advisory committees and customer outreach. S&P DJI's website also describes methods for corporate engagement.[8]

However, as mentioned above, S&P DJI licensees cannot dictate changes to indices. If in response to feedback, an Index Committee believes material modifications to an index methodology may be warranted, then the Index Committee would undertake a public consultation to consider those modifications further and receive formalized input.[9]

In addition, S&P DJI licensees and market participants may contact S&P DJI to investigate anomalies in published index values or constituent data. If S&P DJI identifies an index error as a result of such contact, then S&P DJI may restate the index data in accordance with the index rules.

S&P DJI discloses adjustments to its index offerings as described below in our response to Question No. 13.

Question No. 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?

S&P DJI releases changes and updates to our indices to all index users, publishing regularly scheduled data files as well as ad hoc notices of changes to distributors and licensees through

[8] See Corporate Engagement - Governance | S&P Dow Jones Indices (spglobal.com)

[9] Information regarding S&P DJI's consultations can be found here: Consultations - Governance | S&P Dow Jones Indices (spglobal.com).

email, SFTP delivery, and sometimes via press releases and/or our website. All users of an index will receive the relevant information through a specific subscribed channel contemporaneously. When an Index Committee adds or removes any constituent from an index, there is an announcement to licensed index users outlining the changes. Any publication of a material change includes an effective date of such change.

See also our response to Question 9 above with respect to exercise of discretion.

Question No. 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 into an exemption? Please explain your answer.

For the reasons explained above, S&P DJI does not believe it meets the definition of investment adviser. However, if the SEC disagrees, we believe that a broad exemption for index providers is appropriate, particularly where (1) the product based on the index is managed by an entity that is regulated by the SEC or is subject to an exemption or exclusion from the definition (such as a bank); and/or (2) the index provider adheres to the IOSCO Principles and obtains an annual assurance review from an independent third party auditor, accessible to all stakeholders, to ensure such compliance. These exemptions are appropriate because an additional layer of regulation is not necessary to achieve the SEC's goals in these circumstances, as they would be duplicative of a structure that already protects investors effectively.

If the law evolves to regulate index providers, then S&P DJI stresses the importance of policy makers adopting a structure that is fit for that purpose. The IOSCO Principles established by the US. and other financial regulators, are specifically designed for index providers to address the risks associated with the index determination process. These risks are similar to those raised by the SEC– primarily, transparency and potential conflicts of interest. The IOSCO Principles address conflicts of interest (including elimination of risks due to personal interests), benchmark design, data quality, controls over data collection, complaint procedures and documentation standards. The IOSCO Principles protect investors against the concerns raised by the SEC without leading to unintended consequences associated with trying to fit index providers into a role they do not actually play.

Question No. 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?

Question No. 21. What are the economic benefits and costs associated with investment adviser status for index providers that develop broad-based indexes versus specialized indexes?

The fees associated with the commercialization of indices as a basis of an investment product are a relatively small part of a fund's overall costs and are generally linked proportionally to the fund's success (i.e., to its assets under management) if not to the fund's overall expenses as well. Additionally, the costs associated with an index-based fund are low compared with fees associated with active management. According to the Investment Company Institute in 2021, the average active equity mutual fund in the U.S. charged investors 68 basis points. By comparison, the average equity index fund charged 6 basis points. This price disparity is clearly significant. [10] Even when it comes to tracking specialized beta and thematic indices, passively managed funds have favorable fees compared to active funds.[11]

Importantly, it is the competition from low-cost index-based investment products that has in fact lowered the costs for all investment products, regardless of management style or market environment. In his book, "The Bogle Effect – How John Bogle and Vanguard Turned Wall Street Inside Out and Saved Investors Trillions", Eric Balchunas estimates total investor savings in the United States growing out of passive management in the 1970's and the very first ETF launched in 1993, the SPDR S&P 500 ETF, to the present, to be $1 trillion. As reported by Mr. Balchunas, even active funds have seen fees drop from 0.99 percent in 2000 to 0.66 percent today. That decline is significant when multiplied by trillions of dollars each year.[12]

In 2016, Warren Buffet estimated then ten-year investor savings of $100 billion due to index funds. In his annual Investor Letter, Mr. Buffett said, "For decades, Jack Bogle has urged investors to invest in ultra-low-cost index funds. In his crusade, he amassed only a tiny percentage of the wealth that has typically flowed to managers who have promised their investors large rewards while delivering them nothing – or, as in our bet, less than nothing – of added value" . . . ."Both large and small investors should stick with low-cost index funds."[13]

It is important to highlight that the fee structures under S&P DJI's current licensing agreements do not contemplate the additional costs and other requirements that would accrue where compliance with and/or liability under a fiduciary duty standard and the federal securities laws are imposed on index providers. It is inevitable that index provider fees will increase if faced with additional regulation and increased risk and liability, thereby ultimately eroding the significant savings associated with indexing.

Questions Related to Index Providers:

Question No. 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?

Most index licensees are financial institutions including exchanges, banks, asset managers, registered investment advisers, investment product sponsors, investment consultants, asset owners and insurance companies – many of which are institutions with direct fiduciary duties to their end

[10] See Investment Company Institute, 2022 Investment Company Fact Book, p. 107

[11] See "Morningstar Global Thematic Funds Landscape 2022", page 19 and "Morningstar -A Global Guide to Strategic-Beta Exchange-Traded Products", page 3.

[12] Eric Balchunas, The Bogle Effect: How John Bogle and Vanguard Turned Wall Street Inside Out and Saved Investors Trillions, see pages 24-26.

[13] Warren Buffet, 2016 Investor Letter, available at: https://www.berkshirehathaway.com/letters/2016ltr.pdf.

clients. With respect to investment advisers, they may exercise the license granted to launch an index-based registered fund. In a few instances, S&P DJI licensees are the funds themselves. Academic institutions, research companies, corporates and media companies are also index users.

All different types of users subscribe to a variety of indices based on their own specific needs. Our licensees often use both broad-based and specialized indices. The different indices are complementary to each other in that they together address a spectrum of needs. The user does not dictate the index licensed; rather, the intended use case determines which index users elect to license.

Question No. 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?

As mentioned above, although the index industry has evolved beyond broad-based, market measures and now captures certain strategies, the fundamentals of our indexing practices remain the same. S&P DJI indices are rules-based, transparent – governed by a published methodology, systematically calculated, and maintained under a robust control framework that protects the integrity of the index determination process.

All our indices are made widely available through regular publication. As described above, certain indices may be developed in response to a customer's request for specific design characteristics, but all indices are maintained pursuant to the same processes, procedures and control framework. The indices are also made available to licensees for use with a variety of products. To the extent that an index is developed incorporating a fund sponsor or manager's input, it is the manager that determines the fund's investments and trades, and whether and how the fund should adhere to the index or not. S&P DJI does not provide any advice, investment or otherwise, in connection therewith.

Question No. 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?

S&P DJI does not limit the dissemination of its methodologies. All index methodologies are published on S&P DJI's publicly accessible website. Certain index information also is made publicly available on the website. Access to index values and constituent level index information is readily available on a subscription basis. Intraday values of the S&P 500, Dow Jones Industrial Average and other indices also can be seen on multimedia devices worldwide.

Question No. 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?

S&P DJI structures its index license fees based on use case. For example, if an index is licensed for internal use only, the fees charged may be based on a flat fee subscription. However, if a licensee intends to commercialize the index through the creation of a mutual fund or ETF on the index, then compensation is often based on assets under management tied to the index in that fund. Fees may vary, particularly as a result of the costs associated developing and maintaining the index (e.g., technology or specialized third-party data).

Questions Related to Implications of Investment Adviser Status

Registration under the Advisers Act

Question No. 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?

As explained above, index providers do not meet the definition of investment adviser. However, if the Commission disagrees, then the index provider should be permitted to elect whether to register with the SEC or the states in which it maintains a principal office or place of business. If an index provider maintains offices and/or customers in multiple states, it would be overly burdensome and costly to register in multiple jurisdictions and comply with different state regulatory regimes. The index provider would be in the best position to determine which registration makes sense for its business.

Because S&P DJI is not an investment adviser and does not know what type of regime the SEC is considering under the Act, it not feasible to estimate how much time would be required to come into compliance with any proposed regulations by the Commission. In addition to designing and implementing an appropriate risk assessment and compliance regime, S&P DJI would potentially have to renegotiate hundreds of license agreements.

Question No. 27. 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?

S&P DJI, like other independent index providers, does not have any Regulatory Assets Under Management because it does not exercise any supervisory or management services for any securities portfolios. Accordingly, the Commission has no authority to require index providers to register with the SEC. [14]

Question No. 28. 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?

National presence is not an appropriate metric to use to determine registration, because it is vague and subjective and would therefore be difficult to define. If the SEC determines that an index provider meets the definition of "investment adviser", an express exemption from the prohibition against registration with the SEC would provide clarity and predictability with respect to index provider regulatory obligations as discussed above.

Question No. 29. **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?**

S&P DJI and other index providers do not engage in a fiduciary relationship with their licensees (much less the investors in licensee-sponsored products with whom an index provider has no contractual or other relationship) nor does it provide personalized, individualized investment advice to them. S&P DJI does not provide any supervisory or management services for any portfolios or have any RAUM. S&P DJI licenses its intellectual property and information services to investment advisers and asset managers who serve as fiduciaries to their own fund clients and investors.

However, if deemed an investment advisor in connection with licensing its indices for use with index-based investment products, then the SEC should treat the advisor to such funds and/or investment products as the index provider client. Neither the actual fund or investment product itself nor their users should be treated as the index provider's clients. The fund advisor, as a fiduciary to the fund and its users, would be the appropriate party with whom the index provider puts in place any necessary agreement and delivers any necessary Form ADV. To require

[14] Section 203A of the Investment Advisers Act states clearly that "No investment adviser that is regulated or required to be regulated as an investment adviser in the State in which it maintains its principal office and place of business shall register under section 203, unless the investment adviser—(A) has assets under management of not less than $25,000,000, or such higher amount as the Commission may, by rule, deem appropriate in accordance with the purposes of this title."

otherwise, would overhaul well established industry standards, slow index innovation and licensing, increase costs and become overwhelmingly administratively burdensome.

Under no circumstances should the registered fund itself be deemed the advisory client of the index provider. Regulating index providers as investment advisers to registered funds could subject them (and possibly their affiliates) to the provisions of the Investment Company Act, imposing even more broad-reaching and overwhelming costs. Fund advisory contracts and fees are subject to board approval oversight, including extensive information provided for annual approval. This is a time intensive and costly process with no commensurate benefit since the fund adviser is already regulated. Such treatment would also call into question the legitimacy of the hundreds of index provider relationships and contracts that have not previously been subject to fund board or fund shareholder approval.

Applicability of the Advisers Act

Question No. 30. 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?

Question No. 31. 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?

Registration with the SEC and regulation under the Advisers Act would inevitably lead to increased index provider costs, which would ultimately be borne by investors. Depending on the ultimate costs, index providers may need to modify their business models and consider consolidating and shutting down index products that may no longer be cost effective.

These changes also would inevitably result in a loss of market transparency and information available to market participants, academics, media and regulators alike. There are many indices that S&P DJI publishes offering highly specialized market-specific information. For example, we publish indices for eleven economic sectors and 69 industries in more than 50 countries – from mining stocks in Peru, to agriculture in New Zealand, large cap growth stocks in Canada, micro caps in Indonesia and thousands more. If S&P DJI were forced to shut down these indices due to costs associated with increased regulatory requirements and consideration of newly imposed fiduciary duties associated with licensing them, the ability for investors to assess, measure and understand these markets would be lost.

Question No. 32. 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"). 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?

While we continue to support the original objectives of the BMR, implementing the BMR has proved a challenge for many providers. This is due to the lack of proportionality of the BMR and its requirements placed on index providers, including non-European Union index providers whose indices are used in the EU (so called 3rd country regime). The BMR requires any index used for a financial or investment product, irrespective of risk or systemic importance of the index, to be regulated according to the BMR. The impact of this broad regulatory regime coupled with limited options for 3rd country index providers has led to the delay of the full application of the BMR, not once but twice. As evidence for the challenges in implementing the BMR, the European Commission is currently consulting on further potential changes to the regulation to explore "in particular whether there is a need to amend [the BMR] in order to reduce its scope."[15] It is clear that the original scope of the BMR was much broader than necessary, and this created significant challenges for benchmark users and administrators.

If the SEC intends to use BMR as a potential structure for regulating index providers, we urge the SEC to consider the evolution and potential re-scoping of the BMR as part of any cost-benefit analysis for domestic measures under consideration. We believe that a rule implementing the IOSCO Principles is a more appropriate and targeted set of standards and would avoid the unnecessary complexity that comes with additional regulatory divergence. Adherence to such principles could also be the basis for an exemption from investment adviser status.

Reporting Obligations and Public Disclosure

Question No. 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?

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[15] See consultation with respect to, inter alia, Article 54(6) of the BMR. https://ec.europa.eu/info/consultations/finance-2022-benchmarks-third-country_en.

With rare exceptions, S&P DJI contracts with the investment adviser to the fund and not the fund directly. The adviser does not delegate any duties to S&P DJI. The adviser obtains an intellectual property license from S&P DJI that allows it to use an index to commercialize investment products with the adviser's fund client. The adviser retains full discretion whether to mirror the performance of the index (or not) and if so, which investments are appropriate to accomplish this objective. Accepted industry norms assume that the index provider is not an investment adviser under the Investment Company Act or otherwise. In fact, S&P DJI's public facing notices state that S&P DJI is not an investment adviser and index licensees acknowledge this status in written agreements.

Question No. 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?

S&P DJI publishes uniform information to licensees of its indices and publicly to market participants. All licensees of an index are entitled to receive the same published index information, subject to applicable commercial terms.

For reasons stated above, S&P DJI does not constitute an investment adviser. However, if for some unfounded reason S&P DJI were considered an adviser to a fund, then it could also rely on the "unform publication" exclusion as well.

Question No. 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?

Regulation of index providers as an investment adviser to a registered fund presents monumental and unworkable compliance challenges and would create great disruption to the index industry. S&P DJI has hundreds of fund-related licensees in the U.S. alone. S&P DJI has never engaged with a fund board – and yet, the index industry has flourished to the significant benefit of investors and the marketplace at large. Regulation as a fund investment adviser would, among other requirements, necessitate (i) obtaining board or shareholder approval of industry standard index license agreements, including presentations on typical *Gartenberg* factors such as profitability (Section 15 of the Investment Company Act); (ii) index provider attendance at fund board meetings and regular board reporting which would require additional staffing and resources that index providers do not currently maintain; and (iii) board review and approval of index provider compliance program policies and procedures. Such regulation would also inevitably lead to a myriad of unintended consequences because the index provider, as an adviser, would become an affiliated person of a fund under Section 17 of the Investment Company Act. And it is impossible to reasonably predict how long it would take index providers to come into compliance with these provisions. Therefore, we strongly urge the SEC not to treat index providers as investment advisers to registered funds.

Question No. 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?

While S&P DJI cannot speak to the practices of the fund industry generally, fund advisers routinely review S&P DJI's annual IOSCO Statement and internal controls for purposes of exercising due diligence on S&P DJI as a service provider. The IOSCO Statement includes an independent review of S&P DJI's index governance, operations, business continuity plans, cyber security, business code of ethics and customer services. In light of this review, we can see why the Commission would consider incorporating index providers into a fund's compliance program as a means to address the SEC's concern with protecting fund shareholders.

However, S&P DJI has issued licenses related to hundreds of registered funds in the United States alone, so it would be an enormous unwieldy burden to respond to separate review processes for each fund. Therefore, if the SEC were to adopt a Rule 38a-1 approach, we urge the SEC to enable registered funds to rely on an index provider's annual independently audited IOSCO assessment to satisfy its obligations thereunder.

See also our response to Question No. 38.

Conclusion

We hope the information provided has been helpful and welcome the opportunity to engage on these important issues. S&P DJI does not act in an advisory capacity with our licensees or their customers and does not believe that index providers meet the definition of an investment adviser for the reasons described above. S&P DJI is nonetheless fully committed to the highest standards of integrity in operating our business—through a robust control framework and a sound governance regime based on transparency and avoidance of conflicts of interest. Given the limited role of independent index providers, their established practices and the involvement of a regulated intermediary in the ecosystem, we believe that additional regulation of index providers is unnecessary. Such regulation inevitably will result in additional costs, which ultimately will be borne by investors in index-based products. We urge the Commission, should it conclude that additional investor protection is warranted, to consider less disruptive and more appropriate measures such as a rule implementing the IOSCO Principles or incorporating index provider oversight into Rule 38a-1, which would formalize fund adviser oversight of index providers, where the fiduciary relationship appropriately resides.

Should you continue to have questions, we do want to continue to have an open dialogue with you before any further action is taken. If you have any questions, please feel free to contact us.

Sincerely,

Joe DePaolo
General Counsel
S&P Dow Jones Indices