

August 16, 2022

SECURITIES AND EXCHANGE COMMISSION (SEC)  
100 F Street, N.E.  
Washington, D.C. 20549  
Attn: Secretary  
(email submission via: rule-comments@sec.gov)

Re: **Request for Comment on Certain Information Providers Acting as Investment Advisers**  
**[Release Nos. IA-6050; IC-34618; File No. S7-18-22]**  
**RIN 3235-AM95**

Dear Secretary/SEC:

We at Mark Fontanilla & Co., LLC (“MFCo”) appreciate the opportunity to provide a response to the SEC’s *Request for Comment on Certain Information Providers Acting as Investment Advisers* (“RFC”). The SEC has made significant strides in improving the landscape for the nation’s financial markets, and we thank you for seeking input from market participants and the public on index, model portfolio, and pricing service providers.

As background to our views, MFCo is a minority-owned financial analytics firm that provides market data, information, and research, including index/benchmark products, plus index administration, design, validation, and performance measurement technology. In the design, construction, methodologies, and administration of its indexes/benchmarks, MFCo adheres to the Principles for Financial Benchmarks established by the International Organization of Securities Commissions (“IOSCO”) in 2013 (<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf>). These IOSCO Principles, created in response to prior investigations and enforcement actions related to attempted benchmark manipulation issues, provide a robust operational framework that has been adopted across the industry for index/benchmark providers based on several key pillars: governance, quality of benchmarks, quality of methodologies, and accountability.

Based on our particular perspective and our approach to the provision of indexes/benchmarks, we respectfully disagree that an index provider should be treated as an “investment adviser” under the Investment Advisers Act of 1940 (“Act”) due to the following major points:

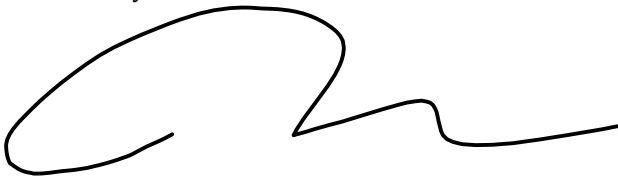
- **Indexes/Index Providers Do Not Provide Advice On Whether To Buy/Sell/Hold Securities**
  - According to the Act, an "investment adviser" engages in the business of advising others, for remuneration, on what a security is worth, its investability, or whether it should be bought or sold.

- Indexes/index providers do not provide recommendations of action on individual securities. Rather, they provide financial data, information, and various performance metrics on prescribed groupings of investments, which are indexed based on an algorithmic, repeatable computational processes.
  - Further, even “custom” created indexes that incorporate client specifications such as sector, security issuance years, or concentration caps on individual securities do not constitute advice. Index customization is virtually identical to the procedural creation of say the S&P 500® Financials Index, which is comprised of companies included in the S&P 500, but are also classified as members of the GICS® financials sector. The index “basket” is a procedural subset of a broader index’s constituency, but the methodology is still the same algorithmic, repeatable computational process, with no recommendations provided by either the index provider or the index data itself.
- **Indexes/Index Providers Do Not Fulfill Or Perform Investment Adviser Fiduciary Functions. The "Investment Adviser" Designation For Index Providers Would Provide Conflicts of Interest, Outsized Legal Risks, Increased Investor Costs, and Small-Firm Disadvantages**
  - Index providers do not manage securities portfolios on behalf of clients, assess suitability of investments, make allocation or market-timing recommendations, or perform other fiduciary/operational investment adviser functions, whether directly or indirectly. Index providers do provide reference data and information in the form of index products that may be utilized by conventional investment advisers.
    - Further, investment advisers are subject to legal risk and responsibility specifically related to their fiduciary responsibilities. If index providers were classified as investment advisers, look-through fiduciary risk could be passed and/or shared with conventional investment advisers that utilize index providers and their index products, creating outsized risk and cost for the index provider.
      - Higher index provider risk would result in higher operating costs, which would further result in higher system costs, eventually raising costs for individual investors.
  - Additionally under IOSCO principles and prudent business practices, index providers are supposed to maintain independence and avoid conflicts of interest. An investment adviser’s fiduciary responsibility to beneficially service its clients contrasts with an index provider’s independence protocol.
  - A consequence of outsized compliance risk and cost increases that may result from index providers being categorized as “investment advisers” would be existing large-scale registered investment advisers and the largest index providers would be afforded substantial economic operating cost advantage, putting smaller firms, especially minority-owned businesses, at a distinct disadvantage.

- **Global Best-Practice Adoptions/Conventions Are Already In Place**
  - The IOSCO Principles for index/benchmark providers has been adopted by most of the index providers across the globe, including within the U.S., since its release in 2013. Those firms that adhere to the IOSCO Principles have instituted the IOSCO framework in their operational processes, policies and procedures, auditing practices, and index methodologies and administration protocols. As such, a regulatory switch in framework to an “investment adviser” designation would either negate much of this existing IOSCO operationalization, or introduce substantial new and different adoption requirements.

Thanks again for the opportunity to provide comments regarding the SEC’s *Request for Comment on Certain Information Providers Acting as Investment Advisers*. If you have any questions or would like to discuss any of these comments further, please feel free to contact us at MF&Co at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Fontanilla', with a stylized flourish extending to the right.

Mark Fontanilla  
Founder/Managing Member  
Mark Fontanilla & Co., LLC