August 16, 2022

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

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

Dear Ms. Countryman,

Intercontinental Exchange, Inc. ("ICE"), on behalf of itself and its subsidiaries, appreciates the opportunity to comment on the Securities and Exchange Commission's (the "Commission" or "SEC") request for comments on whether the activities of certain information providers, in whole or in part, may cause them to meet the definition of "investment adviser" under the Investment Advisers Act of 1940 ("Advisers Act" or "Act").[1] As discussed below, ICE is supportive of regulatory initiatives designed to improve transparency and enhance investor protection and overall fairness and efficiency of the securities markets.

We believe that our five decades of experience as a pricing services provider and an index administrator[2] can provide useful insights into the questions asked by the Commission and we are appreciative of the opportunity to share our perspectives with the Commission.

Background on ICE Data Services

ICE, through its ICE Data Services business, offers a suite of pricing, market data, analytics, and related services, including through its subsidiary, ICE Data Pricing & Reference Data, LLC ("PRD"). Index Services are provided through another subsidiary of ICE, ICE Data Indices, LLC ("IDI").

The PRD business provides pricing, evaluations, analytics, reference data and corporate actions for securities across the globe and is designed to support financial institutions' and investment funds' pricing, securities operations, research and portfolio management activities. PRD produces daily evaluations for approximately 2.8 million fixed income and international equity securities. Our evaluated pricing spans over 150 countries and covers a wide range of financial instruments including sovereign, corporate and municipal bonds, structured products, leveraged loans, as well as our Fair Value Information Services for international equities, options, futures, and fixed income products. PRD's reference data complements these evaluated pricing services by offering its clients a broad range of

[1] Request for Comment on Certain Information Providers Acting as Investment Advisers, Investment Advisers Act Release No. 6050; Investment Company Act Release No. 34618 (June 15, 2022) [87 FR 37254 (June 22, 2022)] ("Request for Comments").

[2] ICE Data Indices was formed as a combination of the acquisition of the Bank of America Merrill Lynch Global Research division's fixed income index platform, the NYSE Index group, and the Interactive Data Corporation ETF and Index Services group, which have been producing and administering indices since 1973, 1965 and 2015 respectively.

current and historical descriptive information, covering over 35 million active and retired financial instruments. PRD is registered with the SEC as an investment adviser under the Advisers Act.

IDI's extensive global index offering includes over 6,000 fixed income, equity, currency, mortgage, and volatility indices that are used by market participants around the world. IDI adheres to the IOSCO Principles for Financial Benchmarks published by the International Organization of Securities Commissions (the "IOSCO Principles")[3] and has published a Statement of Adherence with the IOSCO Principles that has been reviewed by ICE's external auditor. IDI is also recognized as a third country benchmark administrator with the UK Financial Conduct Authority (the "FCA") and is subject to the UK's Benchmark Regulation.

Executive Summary

1. Pricing services
    a. We believe that the SEC's regulatory framework should treat all pricing services providers the same, i.e., that the SEC would either require all pricing services providers to register as investment advisers or conclude that this activity does not constitute investment advice for all pricing services providers under the Advisers Act.
    b. If the SEC concludes that pricing services providers are investment advisers, it should tailor its rules for pricing services to better apply to their activities.

2. Index providers
    a. We believe that index providers, by virtue of their activities and services, do not meet the definition of investment adviser under the Act.
    b. ICE does not oppose regulation of index providers; however, any such regulation should be appropriate, proportionate, and specific to index providers and designed to achieve equivalence with global benchmark regulatory regimes such as the EU and UK Benchmark Regulation ("BMR"), which are largely consistent with the IOSCO Principles.

3. No-Action Letters Excluding Certain Activities from the Scope of the Definition of Investment Advisers
    a. We believe that the exclusions currently set forth in staff no-action letters[4] on whether certain types of information or data constitute "analyses or reports concerning securities" should remain in place, with some modifications.

I. Application of the Advisers Act to Pricing Services

ICE believes that the SEC rules applicable to pricing services should create a level playing field, i.e., that the SEC should either require all pricing services providers to register as investment advisers or conclude that this activity does not constitute investment advice for all pricing services providers under the Advisers Act.

[3] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD474.pdf
[4] See Request for Comments, supra note 1, at footnote 29.

PRD initially registered with the SEC as an investment adviser and then deregistered in 1997 as a result of the adoption of Section 203A of the Advisers Act. In 1998, the Commission granted PRD an exemption from Section 203A(a) of the Advisers Act and, based on this exemption, PRD registered again with the SEC as an investment adviser. The reasons for registering were outlined in PRD's application for exemption and the notice of the filing of the application.[5] Over the years, the PRD business has grown both organically and through acquisition of other pricing services that were registered as investment advisers.[6]

While the Commission's Request for Comments generally describes pricing services, such as PRD, correctly, we believe that the SEC overemphasizes the use of discretion associated with the evaluation of securities. While there is discretion in the development of the types of evaluation methodologies used, these evaluation methodologies apply standard valuation techniques that are well understood by financial market participants who subscribe to pricing services. These techniques intentionally vary by asset class,[7] yet are consistently designed to maximize the use of relevant observable inputs, including traded and quoted prices for similar assets, benchmark yield curves and market-corroborated inputs. In that sense, the discretion in the development of evaluation methodologies is limited. The same applies to the oversight of the outputs from the pricing application used by PRD. The rules-based pricing application is overseen by evaluators whose role is to handle exceptions that are flagged by the pricing system for review and resolution. Pricing services like PRD provide transparency into their service by, for example, making their methodologies, as well as additional information on the application of the methodologies, available to their clients.

Pricing services like those provided by PRD are uniformly provided to all users who subscribe to such service, not customized per subscriber and are deemed impersonal investment advice. Subscribers can select from different types of evaluated prices made available by PRD to all clients. For example, a client can select to subscribe to a bid, mid or ask evaluation, or select to subscribe to an evaluation as of a specific time (e.g. 3:00PM, 4:00PM, continuously). Regardless of the evaluation type, these evaluated prices are uniformly available to all subscribers of the service and are not based on the special circumstances or needs of such subscribers. These types of pricing services fit within the exception from the definition of an investment adviser of a fund under the Investment Company Act which exclude from the definition "a person whose advice is furnished solely through uniform publications distributed to subscribers thereto."

PRD does not design, market or sell investment strategies or hold or manage assets, and its pricing services are uniform in nature and are provided to a large customer base either directly[8] and/or indirectly through resellers. PRD's evaluated prices represent market-based measurements that are processed through a rules-based pricing application and represent its good faith determination as to what the holder may receive in an orderly transaction for an institutional round lot position under current market conditions. The rules-based logic utilizes standard valuation techniques that vary by asset class and maximize the use of relevant observable inputs, including quoted prices for similar assets, benchmark yield curves and market corroborated inputs. Given that, on average, less than 1% of the outstanding U.S. dollar debt trades on any given day, PRD generally draws parallels from

[5] Release No. IA-1685

[6] Muller Data Corporation acquired in 1999 and S&P Securities Evaluations acquired in 2016.

[7] Different asset classes have different characteristics that should be considered in order to appropriately evaluate those securities, such as the consideration of prepayment risks for mortgage-backed securities.

[8] PRD has more than 2,700 customers.

current market activity to generate evaluations for the majority of issues that have not traded. Since the evaluated prices leverage rules-based models, the exercise of discretion over the outputs published is quite minimal. PRD maintains discretion and control over the final design of its products and services. Changes or enhancements may take clients' feedback into consideration but are ultimately designed to serve PRD's collective client base and are not customized for individual users. PRD understands its obligation, as an independent pricing services provider, to have its evaluated pricing reflect its good faith opinion.

PRD's application of the Advisers Act to its advisory business is based on its recognition that as a pricing vendor, it has an obligation to remain independent and to provide its customers with pricing that reflects its good faith opinion. To achieve this, PRD provides transparency into its methodologies, maintains a conflicts of interest policy and register, and has policies and procedures that govern its production of services and to ensure that its marketing materials are not misleading and comply with the requirements of the Advisers Act.

PRD believes the Commission's recent adoption of Rule 2a-5[9] provides an opportunity for the Commission to use its authority to exempt pricing services from the definition of investment adviser. In connection with the adoption of Rule 2a-5, the SEC thoroughly examined the role of pricing services to funds and imposed in the rule a requirement for funds to oversee pricing services providers including "establishing the process for approving, monitoring, and evaluating each pricing services provider and initiating price challenges as appropriate."[10] The adopting release for Rule 2a-5 discusses the potential conflicts of interest for pricing services providers and requires funds to exercise oversight of the pricing services used. The standards applicable to pricing services established by Rule 2a-5 benefit not only the funds subject to the rule but also other customers of pricing services by virtue of the impersonal nature of such services. Consequently, the added benefit to investor protection by additionally requiring pricing services to register as investment advisers is limited.

If the Commission does find the Advisers Act applicable to pricing services providers, then certain requirements under the Advisers Act can be applicable or are broad enough to become applicable to pricing services, including the requirement to adopt a code of ethics, the compliance rule and management of conflicts of interest. From PRD's experience, the focus should be on policies and procedures that are designed to ensure that the methodologies/methods developed do what they intend to do; that conflicts and potential conflicts of interest are identified and managed; that inputs used are validated; and that users are provided with information to allow them to understand the services they receive.

Other Advisers Act provisions, however, are less applicable to pricing services providers and, if the Commission requires pricing services providers to register as investment advisers, ICE recommends that such providers be exempted from the following requirements:

- Form ADV part 2A (the "Brochure"), Items 12 (brokerage fees), 13 (review of accounts), 15 (custody) 16 (investment discretion), and 17 (voting customer securities) clearly do not apply to pricing services providers.

[9] https://www.sec.gov/rules/final/2020/ic-34128.pdf
[10] https://www.sec.gov/rules/final/2020/ic-34128.pdf, page 208

- Item 14 (customer referrals and other compensation), which requires disclosure of commercial information, and Item 18 (financial information) are less appropriate to the type of services provided by pricing services. Pricing services providers typically do not have the relationship with investors, instead providing their services (pricing information) to institutional customers who have the fiduciary relationship with the investor. While the requirement to disclose financial information is relevant in the context of investment advisers providing discretionary services or having custody over their customers assets, it is not relevant to impersonal non-discretionary services such as those provided by pricing services. As such, its application limits pricing services providers' flexibility in contracting with its customers and creates unnecessary operational hurdles.

- Form ADV Part 1A includes requirements that are not applicable to pricing services providers such as part of Item 5 (Regulatory Assets Under Management), Item 7B (Private Fund Reporting), Item 8 (Participation or interest in client transactions), Item 9 (Custody), and Item 12 (Small Businesses).

- Under Schedule D, the adviser is required to report all "other offices," including all locations from where advisory employees are working from home on a permanent basis. COVID-19 had a profound impact on how companies are doing business and caused the number of employees that now work from home to increase. In the context of the impersonal services provided by pricing services, ICE questions the benefit in reporting home addresses especially against the privacy rights of those employees whose residential addresses are being shared with those employees tasked with compiling and reviewing the information for Form ADV filing and whom otherwise would not be privy to such information and then further shared with the SEC through the filing of Form ADV. In addition, Item 5 requires the breakdown of the customer base into 14 categories and, next to each category, an indication of the amount of regulatory assets under management (RAUM) associated with it. For pricing services with thousands of customers and no RAUM, the compilation of this information requires investing a significant amount of time, especially, since these are unique sector classifications which are not otherwise used in the industry for sector classification. Given that pricing services do not have RAUM, which needs to be reported in connection with each category, ICE questions the benefit in providing this client breakdown due to the significant effort required in compiling it. For these reasons, to the extent the SEC finds the Advisers Act applicable to pricing services providers, ICE recommends exempting pricing services providers from the requirement to list all other offices and the requirement to compile advisory clients into the 14 categories.

II. Application of the Advisers Act to Index Providers

A. Index Providers Do Not Fall Within the Advisers Act Definition of Investment Adviser

ICE does not believe that index providers meet the definition of "investment adviser" under the Act,[11] because they do not:

1. advis[e] others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities"; nor

[11] Section 202(a)(11) of the Advisers Act

2. "issue[] or promulgate analyses or reports concerning securities."

Instead, an index provider offers a metric (i.e., an index) for measuring markets, sectors or themes. An index provider does not create products, such as securities or futures, that reference its metrics and does not advise on the value of those financial instruments. Moreover, the value of such financial instruments is not merely based on the index provider's metric but is also dependent on other factors in the design of the financial instrument.

In addition, while the Commission's description of index providers is generally correct, ICE does not agree with its broad assertion that index providers have significant discretion when determining index levels or selecting constituents. Nor does ICE agree with the Commission's suggestion that most, or all, indices are not determined in a transparent manner. While there are some indices that involve varying degrees of discretion, most indices are rules-based and have publicly transparent rules and methodologies. Furthermore, for those indices that are administered in accordance with the IOSCO Principles, the degree to which discretion is used is fully transparent to users.[12]

It should be emphasized that index providers do not have investment discretion. Discretion lies with the investment adviser to the fund, whether it is an actively managed fund or passively managed one. For actively managed funds and portfolios, portfolio managers license the use of an index as their performance benchmark, solely for comparison purposes. In fact, the fund/portfolio manager is not at all constrained by the composition of the index in choosing securities for their fund or portfolio. Even in the case of passively managed index tracking funds and portfolios, it is still the fund/portfolio manager who exercises the investment discretion through the selection of the underlying benchmark index. The fund/portfolio manager can make a determination whether to hold some or all of the securities in the index, and at times may hold securities that are not in the index. Seldom would funds or portfolios that are passively managed hold all of the constituents of the index or indices they are tracking. Instead, they would typically select a subset of the constituents that represents the composition of the index. By contrast, the index provider is simply following the published rules and methodologies of the given index.

An index provider's activities, including in the case of customized indices, are more aligned with the activities described in the series of No-Action letters highlighted in the Request for Comments ("Calculator No-Action Letters)[13] in that (1) the information used as an input to the calculation is readily available to the public in its raw state; (2) the categories of information presented are not highly selective; and (3) the information is not organized or presented in a manner that suggest the purchase, holding or sale of any security or securities. Index providers, like IDI, that adhere to the IOSCO Principles

[12] In addition, ICE disagrees with the Commission's statement that "[w]hile indexes have historically been associated with passive investing, index providers, particularly those that design specialized indexes, may be making active decisions in designing or administering the index." We do not believe this to be a correct assessment of the history of the use of indices. Indices were initially associated with performance benchmarking for active investors. Use of indices for passive investing came about much later and, to this day, passive indexing accounts for a smaller proportion of index usage than active investing.

[13] See Request for Comments, supra note 1, at footnote 29.

and to other benchmark regulations apply these requirements to all types of indices, including custom and bespoke indices.

B. Alternative Framework for Index Providers

As stated above, ICE believes that the Act, as currently drafted, is not the appropriate framework by which to oversee the use of indices in financial products. As such, ICE recommends that in accordance with Section 2(a)(11)(H) of the Act, the SEC designate index providers that adhere to the IOSCO Principles, or that operate under a regime specifically designed to regulate index activities, as "other persons not within the intent of" the definition of Investment Adviser. The IOSCO Principles, as well as regulations applicable to index providers such as the BMR, address many of the questions the SEC raises about the activities of index providers without classifying these activities as investment advice or imposing a fiduciary duty on index providers. For example, the IOSCO Principles are designed to address:

(i) the governance arrangements that should be in place to protect the integrity of the benchmark determination process and for the identification, management, prevention and disclosure of conflicts of interest;

(ii) the quality of the benchmark through requirements around benchmark design, the quality and sufficiency of data used, the exercise of discretion in the index determination process and the provision of transparency into the benchmark methodology including a requirement to publish or make it available; and

(iii) the quality of the methodologies utilized.

By applying these principles, index providers, like IDI, establish an objective process for determining the benchmark; establish and follow a transparent set of rules and methodologies that are reflective of the benchmark's stated objective; and establish governance arrangements to protect the integrity of the index and the process by which it is maintained. Accordingly, we believe a better course of action would be for the SEC to require index providers to publish annually an internally or externally audited statement of compliance with the IOSCO Principles. It is worth noting that many index providers, including IDI, already adhere to the IOSCO Principles and undergo such audits. Imposing this as a requirement would ensure that all index providers operating in the U.S. meet the same high level of standards.

Requiring application of the IOSCO Principles for all index providers is particularly important with respect to addressing potential and actual conflicts of interest that may have been identified. This may occur, for example, in situations where index providers are compensated based on the amount of assets that are managed and linked to an index. In fact, asset-based fees are a common practice for product licenses issued for passive index-linked products. The IOSCO Principles address these issues by ensuring that there is governance over the administration of the indices and that controls are put in place to avoid or manage any real or perceived conflicts of interest that could arise as a result of these arrangements.

The IOSCO Principles have been in place for almost a decade and many index providers are both familiar with and follow them. Multiple regulatory bodies in multiple jurisdictions (UK, EU, Australia,

Singapore, and Japan) have regulations that are largely drawn from, and are aligned with, the IOSCO Principles. ICE sees no incremental investor protection benefits that could be derived by subjecting index providers to the Advisers Act. In addition to the IOSCO Principles, many index providers are subject to these other regulatory regimes where they operate in those countries, such as the benchmark regulations in the EU and UK. As with other index providers, most of IDI's indices are used in multiple jurisdictions including in the U.S., EU, UK and Asia and, as such, each index must be compliant with the regulations that may be applicable there. Because the IOSCO Principles are widely applied today, a new regulatory framework for index providers that is not completely aligned with the IOSCO principles could lead to conflicting requirements among jurisdictions. These potential impacts will likely result in higher costs to index providers that will ultimately be passed on to the users of index services. Higher charges to end users will likely impact the attractiveness of the marketplace and reduce the benefits that retail customers gained from cost reductions achieved by the arrival of index products in the first place.

As stated, ICE believes that the goal the SEC is looking to achieve by regulating index providers can be achieved by exempting from registration as Investment Advisers those index providers that adhere to the IOSCO Principles and that obtain an internal or external audit of their statement of their adherence to these principles. An additional way to protect the investing public is for the SEC to impose an obligation on the index users, e.g., requiring funds or other market participants issuing a financial product to use only indices offered by index providers that demonstrate adherence to the IOSCO Principles. Moreover, in other jurisdictions, instead of regulating all index providers directly, certain regulators publish admission guidelines around the types of indices that an issuer of financial products to be admitted for exchange trading can use for passive products.[14]

Finally, any U.S. regulatory framework applicable to index providers should be designed such that other jurisdictions (e.g. the EU and the UK) that have adopted benchmark legislation are able to determine the U.S. framework to be equivalent. This would avoid the need for index providers to comply with multiple distinct sets of rules and be subject to regulatory oversight by multiple regulatory bodies in multiple jurisdictions (UK, EU, US). In this regard, ICE does not believe that the Advisers Act would be found equivalent to BMR, as it cannot be directly mapped to the IOSCO Principles.

III. No-Action Letters Excluding Certain Activities from the Scope of the Definition of Investment Advisers

ICE supports continuing to exclude certain activities from what constitutes "analyses or reports concerning securities" and thus from the definition of Investment Adviser. Currently, under staff no-action letters[15] an activity will not constitute investment advice if: (1) the categories of information presented are not highly selective; (2) the information is not organized or presented in a manner which suggests the purchase, holding or sale of any security or securities; and (3) the information is readily available to the public in its raw state.

---

[14] See for example, Exchange traded products: Admission guidelines published by the Australian Securities & Investments Commission.

[15] Wilson Associates, SEC No-Action letter (May 25, 1988); EJV Partners, L.P. UniVu System, SEC No-Action letter (Dec 7, 1992); Datastream International, Inc., SEC No-Action letter (Mar 15, 1993); Missouri Innovation Center, Inc., SEC No-Action letter (Oct 17, 1995)

ICE recommends that in retaining this exclusion, the Commission would take the opportunity to modify the third prong of the test by removing the qualifier "in its raw state." This qualification creates an ambiguity relative to certain data inputs or information that may be used as an input in the creation of reports or analyses (e.g., credit ratings). ICE does not believe that the use of information that is based on a calculation such as a rating, a score or GHG emission should cause the service to fail the third prong of the test because such information is not considered "raw." ICE believes that an interpretation that the use of a rating or another readily available calculated input does not meet the "raw state" requirement is not the intent of this qualifier; such interpretation can cause many software providers to be deemed Investment Advisers by virtue of making such standard, impersonal and widely available information available in their services for the creation of analyses or reports.

Finally, for the same reasons outlined above, ICE believes that the staff's position in the no-action letters cited by the SEC in the Request for Comments[16] that certain providers of computer software services offering analytical tools may also not be investment advisers within the meaning of the Advisers Act by considering the following factors: (1) the sophistication of the users of the service; (2) the degree to which the users themselves performed the calculations; (3) the degree to which the product or service was pre-packaged and not personalized for each customer; and (4) whether the calculations or models were based on traditional or standard calculations should remain available as well.

* * * * *

ICE appreciates the opportunity to present its perspective and views on the Commission's Request for Comments. Should any questions arise about the content of this letter, please do not hesitate to contact me.

Respectfully submitted,

Amanda Hindlian
Amanda Hindlian (Aug 16, 2022 14:30 EDT)

Amanda Hindlian
President, ICE Fixed Income and Data Services

[16] Specifically, EJV Partners, L.P. UniVu System, SEC No-Action letter (Dec 7, 1992); Datastream International, Inc., SEC No-Action letter (Mar 15, 1993).