

Submitted Electronically

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RE: Request for Comment on Certain Information Providers Acting as Investment Advisors¹

The International Swaps and Derivatives Association, Inc. (“ISDA”)² appreciates the opportunity to provide comments to the Securities and Exchange Commission (“Commission” or “SEC”) on its Request for Comment on Certain Information Providers Acting as Investment Advisers (“request for comment”). ISDA has played an active role in benchmark reform in the United States, the European Union and globally and strongly supports efforts to ensure the resiliency of benchmarks.

The request for comment addresses, among other things, whether index providers in the United States should have to register as “investment advisers” under the Investment Advisers Act of 1940 (1940 Act). As noted in the request for comment, index providers license information related to their indexes to a number of entities, including those who use the index as a benchmark.

Derivatives market participants are among those entities who license and use indexes as benchmarks in a variety of products, including interest rate, equity, FX, commodity and inflation derivatives. As a result, requirements applicable to index providers affect the derivatives market, as well as the broader financial market given the role that derivatives play in hedging a wide variety of financial and non-financial products.

As discussed below, we strongly caution the Commission against requiring index providers to register as investment advisers under the 1940 Act or implementing any regulation of such entities that is not specifically tailored to the risks of the services they provide. We also strongly discourage use of the European Union Benchmarks Regulation (EU BMR) as a template for regulation or legislation in the United States given concerns among benchmark users that the regulation may expose them to cliff-edge risks not proportionate or consistent with the protections provided by the regulation. Any future benchmark legislation or regulation in the United States should be aligned to global best practices, should be tailored and proportionate to

¹ <https://www.govinfo.gov/content/pkg/FR-2022-06-22/pdf/2022-13307.pdf>

² Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 990 member institutions from 78 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association’s website: www.isda.org.

the risks associated with US index providers and should not duplicate any other legislation or regulation applicable to those entities.

Regulation of Index Providers Under the 1940 Act

While regulation of index providers and the indexes they publish could increase the safety and soundness of the market by mitigating the risks of disruption and ensuring adequate governance, transparency and reliability in financial products, regulation must be specifically tailored to the relevant risks. The International Organization of Securities Commissions (IOSCO) codified global best practices for regulation of benchmarks and providers of benchmarks in 2013 in its *Principles for Financial Benchmarks* (IOSCO Principles)³, long after enactment of the 1940 Act and implementing regulations. Therefore, without modification tailored to index providers, the 1940 act does not account for or contemplate the IOSCO Principles and, in our view, is inherently not fit for purpose to regulate these entities and the critical services they provide to market participants.

Irrespective of whether providers of the types of benchmarks referenced in derivatives are investment advisers under the 1940 Act, regulation of activities related to providing indexes under a statutory framework that was designed for different purposes and that does not account for global best practices would be detrimental to the market and would be unlikely to actually achieve the objectives of benchmark regulation in any meaningful way. If index providers respond to regulation by ceasing to produce indexes or by limiting their use (e.g., to specific use cases, specific types of entities or users in certain jurisdictions), benchmark users would face increased uncertainty, contract dislocation, market fragmentation, competitive disadvantages and major disruptions in the financial markets

EU Benchmarks Regulation

We have seen benchmark regulation in other jurisdictions actually have adverse impacts on benchmark users and put them at a significant competitive disadvantage. Specifically, over the past several years, ISDA, alongside GFMA and FIA, has advocated for critical changes to the EU BMR, arguing that it is not fit for purpose in its current format and goes beyond the IOSCO Principles.⁴ Any regulation of indexes or index providers that is not specifically tailored to relevant risks could have similarly adverse outcomes for the US market.

The request for comment asks whether any US regulatory action should be aligned with the framework of the EU BMR. It also asks about the effect of the BMR on the provision of benchmarks and indexes in the European Union and whether the BMR has served as a barrier to entry for new benchmark and index providers. Current fundamental issues with the EU BMR have yet to be resolved and therefore we strongly believe that it should not be a model for benchmark regulation in the United States or any other jurisdictions. In this context, it is worth noting that, specifically in response to the concerns mentioned above, the effective date for some of the EU BMR's most significant provisions has been deferred multiple times since 2018

³ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf>.

⁴ <https://www.isda.org/a/YM2gE/The-Importance-of-Reforming-the-EU-Benchmarks-Regulation.pdf>.

(currently extended to 2023, with an option for further extension to 2025), and that the European Commission is holding a consultation about very significant reforms to the regulation.

Notwithstanding our position regarding alignment with the EU BMR, we do recognize the value to financial markets of certain aspects of the EU BMR. Specifically, we agree that benchmark administrators should have governance systems and other controls in place to ensure the integrity and reliability of their benchmarks and should have clear requirements and responsibilities regarding input data. However, requirements related to authorization or registration of benchmarks (including in particular third-country benchmarks) and any prohibition on use by market participants can lead to uncertainty and disruption in financial markets.

Conclusion

As described above, ISDA has played an active role in benchmark reform in the United States, the European Union and globally, and strongly supports efforts to ensure the resiliency of benchmarks. We would therefore welcome the opportunity to work with the Commission, as well as other regulators and policymakers, to consider whether targeted regulation of index providers is appropriate and necessary in the United States. However, we do not believe any current frameworks in the United States (or the European Union) are fit for this purpose.

We appreciate the opportunity to submit our response to the request for comment. If you have any questions or would like more information, please reach out to Ann Battle, Senior Counsel, Market Transitions & Head of Benchmark Reform at [REDACTED]

Sincerely,



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