

June 28, 2022

## SEC Solicits Comments on Whether Certain Service Providers Are Investment Advisers

On June 15, 2022, the SEC issued a [release](#) (the “Release”) focused on index providers, model portfolio providers, and pricing services (“Information Providers”) whose activities may cause them to meet the definition of “investment adviser” under the Advisers Act.

The Release states that Information Providers’ “operations also raise potential concerns about investor protection and market risk, including, for example, the potential for front-running of trades where the providers and their personnel have advance knowledge of changes to the information they generate and potential conflicts of interest where the providers or their personnel hold investments they value or that are constituents of their indexes or models.” The Release goes on to discuss other legal concerns that may be raised by each type of Information Provider’s activities as they relate to investment adviser status issues.

The following summarizes the Release’s contents with respect to the three types of Information Providers.

### Index Providers

The Release notes that, once an index is designed and its methodology is created, Index Providers “determine the index’s level (or measurement) pursuant to that methodology. These activities leave room for significant discretion—for example, an index provider typically has the ability to make changes to the index by adding or dropping particular constituents . . . or modifying their weighting within the index . . . in some cases without publicly disclosing their index methodologies or rules.” In addition, the Release notes that some indexes “are broad-based and widely used, while others are more narrowly focused, including specialized indexes that are designed to be tracked by a particular user.”

The SEC believes that index providers have historically concluded that, even if they meet the definition of investment adviser in Section 202(a)(11) of the Advisers Act, they may rely on the “publishers exclusion” within Section 202(a)(11)(D), which excludes from the definition any “publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation.” Any entity that relies on the publishers exclusion is not required to register with the SEC and is exempted from all provisions of the Advisers Act, including the anti-fraud provisions of Section 206.

### Model Portfolio Providers

The Release notes that model portfolio providers include broker-dealers, asset managers, third-party strategists, asset allocators, and advisers. These providers, among other things, “may design allocation models, may update or rebalance them over time, provide various degrees of customization, and may offer this information on a discretionary or non-discretionary basis.” In addition, the Release states that “there is a growing demand for specialized models that focus on a particular industry or strategy—for example, models that focus on sustainable or ‘ESG’ (environmental, social, and governance) investments.”

The Release states that investment advisers’ use of a third party’s model portfolios “may raise concerns with respect to clients’ understanding of the fees they are paying, the services being performed by each party (*i.e.*, the client-facing adviser and the model portfolio provider), and their respective conflicts (or potential conflicts) of interest.”

### Pricing Services

The Release notes that the SEC discussed pricing services in adopting Rule 2a-5 under the 1940 Act.<sup>1</sup> In that discussion, the Release states that the SEC “recognized that pricing services play an important role in the fair value process, while also noting the potential risks and conflicts of interest that pricing services can present in registrants’ valuing of securities.” Citing a 2008 “Dear CCO” letter from the SEC staff, the Release also states that the staff has observed

“compliance issues in connection with registrants’ interactions with third-party pricing services, including the risks of misleading disclosure regarding whether those services provide ‘independent’ values and the possibility of stale or otherwise inaccurate valuations.”

## Observations

The Release requests comment on dozens of issues relating to Information Providers, starting with basic questions such as “Are our descriptions of each information provider accurate and comprehensive?” and “What types of potential risks and conflicts of interest does each type of provider present?”

Thereafter, the Release poses a wide range of questions intended to elicit information to facilitate the SEC’s understanding of Information Providers’ practices, for example, how Information Providers analyze whether they meet the Advisers Act’s definition of “investment adviser” under each element of the statutory definition and how each type of Information Provider personalizes the services it offers.

The Release appears to be a fact-seeking document intended to establish a foundation from which the SEC may propose that certain Information Providers (or specific activities or arrangements of Information Providers) meet the definition of “investment adviser” under the Advisers Act. This is consistent with Chair Gary Gensler’s public [statement](#) accompanying the Release in which he observed:

The request seeks comment . . . on whether these information providers are providing investment advice under particular facts and circumstances, and thus acting as “investment advisers” under the securities laws. In addition, as some information providers may not fit neatly into the Commission’s existing regulatory structure for investment advisers, the release seeks comment on how existing rules should apply to them.

It follows that Information Providers that are not currently registered as investment advisers may benefit from:

- Reviewing the processes and analyses on which they now rely to avoid registration under the Advisers Act; and
- Submitting a comment letter in response to the Release’s specific questions to underscore that Information Providers’ activities or arrangements (i) do not implicate the Advisers Act’s investor protection concerns and/or (ii) could be better addressed through specific regulatory action that is less burdensome (and, therefore, more cost effective) than application of the entirety of the Advisers Act to those activities and arrangements.

## Comment Deadline

The Release states that responses should be received no later than before 30 days after the date of the Release’s publication in the *Federal Register* or August 16, 2022, whichever is later. The Release was published in the *Federal Register* on June 22, 2022. Therefore, responses to the Release should be received by the SEC **no later than August 16, 2022**.

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If you would like to learn more about the issues in this Alert, please contact your usual Ropes & Gray attorney contacts.

1. Good Faith Determinations of Fair Value, Rel. No. IC-34128 (Dec. 3, 2020), which is described in detail in our December 20, 2020 Ropes & Gray [Alert](#).