

CLIENT ALERT

SEC Requests Comment on Whether Certain Information Providers Are Acting as Investment Advisers

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On June 15, 2022, the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) issued a request for public comment on whether the activities of index providers, model portfolio providers and pricing services (collectively, “information providers”) could cause them to meet the definition of “investment adviser” under the Investment Advisers Act of 1940 (the “Advisers Act”).¹ The Request for Comment states that the SEC is seeking comment on these activities “to facilitate consideration of whether regulatory action is necessary and appropriate to further the Commission’s mission.” If the SEC were to take regulatory action with respect to certain information providers, such as causing them to fall within the definition of “investment adviser” for purposes of the Advisers Act, the operations and compliance costs of such information providers could be impacted significantly.

¹ See Request for Comment on Certain Information Providers Acting as Investment Advisers, Investment Advisers Act Release No. 6050 (June 15, 2022) (the “Request for Comment”), available [here](#).

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Overview of the Request for Comment

The Request for Comment states that the role of index providers,² model portfolio providers³ and pricing services⁴ has grown in size and scope in recent years. The development and nature of the services provided by these information providers raises questions with respect to investment adviser status and registration under the Advisers Act and, in some cases, investment adviser status under the Investment Company Act of 1940 (the “Investment Company Act”). The Request for Comment also notes that information providers’ operations raise potential concerns about investor protection and market risk, including 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 and their personnel hold investments they value or that are constituents of their indexes or models. Finally, the Request for Comment states that some information providers may have an ability to affect national markets or otherwise have a “national presence.” For these reasons, the SEC is seeking comment on whether the activities of information providers may necessitate regulatory action.

Investment Adviser Status under the Advisers Act

Information providers currently look to regulatory guidance and various exclusions from the Advisers Act definition of “investment adviser” to determine their regulatory status. The SEC staff has issued a series of no-action letters taking the position that information providers would not be deemed to be acting as investment advisers within the meaning of the Advisers Act if (i) the information they provide is readily available to the public in its raw state, (ii) the categories of information they provide are not highly selective, and (iii) the information they provide is not organized or presented in a manner that suggests the purchase, holding, or sale of any security or securities.⁵ The Advisers Act expressly excludes from the definition of investment adviser, among other persons, “any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor”⁶ (commonly referred to as the “broker-dealer exclusion”) and the “publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation”⁷ (commonly referred to

² The Request for Comment describes index providers as providers that “compile, create the methodology for, sponsor, administer, and/or license market indexes.”

³ The Request for Comment describes model portfolio providers as providers that create model portfolios “generally consist[ing] of a diversified group of assets (often mutual funds or exchange-traded funds (‘ETFs’)) designed to achieve a particular expected return with exposure to corresponding risks.”

⁴ The Request for Comment describes pricing services as services that “provide prices, valuations, and additional data about a particular investment . . . , to assist users with determining an appropriate value of the investment.”

⁵ See, e.g., Datastream International, Inc., SEC No-Action Letter (Mar. 15, 1993); RDM Infodustries, SEC No-Action Letter (Mar. 25, 1996).

⁶ 15 U.S.C. 80b-2(a)(11)(C).

⁷ 15 U.S.C. 80b-2(a)(11)(D).

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as the “publisher’s exclusion”). Many information providers rely on SEC staff no-action guidance, the broker-dealer exclusion and/or the publisher’s exclusion to conclude that they are not investment advisers under the Advisers Act.

The Request for Comment asks a series of questions related to information providers’ status under the Advisers Act, including how providers analyze whether they meet the definition of investment adviser. It includes specific questions regarding the various types of information providers, such as whether index providers that develop broad-based indexes raise different investment adviser status issues as compared to those that develop customized or bespoke indexes, and whether there is a distinction between typical pricing services in the market and a “valuation specialist” that exercises informed judgment in determining valuation inputs, methodologies and the legitimacy of a valuation conclusion.

Implications of Investment Adviser Status

Registration Under, and Applicability of, the Advisers Act. Persons that meet the definition of investment adviser under the Advisers Act and cannot rely on an exclusion must register as an investment adviser under the Advisers Act unless they qualify for an exemption from registration. Section 203A of the Advisers Act, however, prohibits certain advisers from registering under the Advisers Act unless they meet a regulatory assets under management threshold. The Request for Comment notes that certain information providers, if they were investment advisers, may not have sufficient regulatory assets under management to be able to register as investment advisers under the Advisers Act, but may service a significant portion of the financial intermediaries and other players in the national financial markets with broad market effects. The Request for Comment notes, by way of example, that to the extent many investment advisers use a single pricing service’s evaluated price for a particular security, that pricing service may affect the national market in that security.

The Request for Comment seeks input on, among other things, whether an information provider that meets the definition of investment adviser should register with the SEC or the states in which it maintains its principal offices or places of business, and whether a provider that acts as an investment adviser should be required to treat another investment adviser that uses its services as the provider’s advisory client.

The Request for Comment also notes that the substantive prohibitions and requirements of the Advisers Act, the rules thereunder and Form ADV are generally designed to apply to the variety of advisers’ business models, but indicates that further regulatory action could differentiate application of the adviser regulatory regime (including reporting requirements) by type of investment adviser. The Request for Comment asks whether requiring information providers to become subject to the regulatory regime under the Advisers Act in its current form would cause them to alter their business models, consolidate, or exit the market, and how such events would affect investors.

Related Investment Company Act Matters. The Request for Comment states that certain information providers’ activities may implicate the Investment Company Act’s provisions relating to an investment adviser of an investment company. The

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SEC requests comment on, among other things, how information providers analyze whether they meet the Investment Company Act's definition of investment adviser, and to what extent funds currently extend their compliance program to information providers where such entities are not considered investment advisers.

Next Steps

Comments in response to the Request for Comment must be submitted no later than August 16, 2022. While the Request for Comment notes certain questions specifically on which the SEC is seeking feedback, it states that it is not intended to limit the scope of comments, views, issues, or approaches to be considered.

Though the Request for Comment may signal potential new rulemaking by the SEC addressing information providers, it is not clear how the SEC would address potential statutory hurdles to certain aspects of any new rulemaking, such as where information providers rely on a statutory exclusion from the definition of investment adviser.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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