SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 270 and 275

[Release Nos. IA–6050; IC–34618; File No. S7–18–22]

RIN 3235–AM95

Request for Comment on Certain Information Providers Acting as Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; equest for comment.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is seeking public comment on certain information providers whose activities, 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'').

DATES: Comments should be received on or before August 16, 2022.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. S7–18–22 on the subject line.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–18–22. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post all comments on the Commission's website (*http://www.sec.gov*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this request for comment. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Christopher Chase, Juliet Han, Senior Counsels, or Melissa Roverts Harke, Assistant Director, Investment Adviser Regulation Office, or Matthew Cook, Senior Counsel, Chief Counsel's Office, Division of Investment Management, at (202) 551–6787 or *IARules@sec.gov,* Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is seeking public comment on certain information providers whose activities, in whole or in part, may cause them to meet the definition of ''investment adviser'' under the Act.

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I. Introduction

The role of index providers, model portfolio providers, and pricing services (''information providers'' or ''providers'') has grown in size and scope in recent years, significantly changing the face of the asset management industry. The development and nature of these services may raise investment adviser status issues under the Advisers Act.[1] Investment adviser status, in turn, has regulatory implications, including questions relating to registration under the Advisers Act. In addition, the development and nature of these services may raise questions under the Investment Company Act of 1940 (''Investment Company Act''), including whether an information provider is acting as an ''investment adviser'' of an investment company under the Investment Company Act.[2] These 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. Some individual information providers of the types we describe below have registered with the Commission as investment advisers (sometimes because of other business in which they engage), and others have not.[3] Some may be prohibited (absent exemptive relief) from Commission registration because, for example, they lack regulatory assets under management. Depending on the facts and circumstances, however, particular information providers may have an ability, perhaps through operations of sufficient size and scope, to affect national markets or otherwise have a ''national presence.'' Accordingly, we are seeking comment regarding information providers to facilitate consideration of whether regulatory action is necessary and appropriate to further the Commission's mission.

A. Index Providers

Index providers compile, create the methodology for, sponsor, administer, and/or license market indexes. They typically determine the particular ''market'' (which may be a sector or other group of securities) that the index measures, the index constituents that measure that market, and the weightings that each constituent receives. Once the 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 (*i.e.,* index reconstitution) or modifying their

[1] 15 U.S.C. 80b. Unless otherwise noted, all references to statutory sections are to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and all references to rules under the Advisers Act are to title 17, part 275 of the Code of Federal Regulations [17 CFR 275].

[2] 15 U.S.C. 80a–2(20).

[3] For example, at least one pricing service has registered as an investment adviser with the Commission because it has related person advisers; another has registered because of its ability to affect national markets (despite a lack of assets under management). *See, e.g., infra* note 42 (discussing IDC application and order).

weighting within the index (*i.e.,* index rebalancing),[4] in some cases without publicly disclosing their index methodologies or rules.

The number and variety of indexes have grown over time, with millions of indexes in the global market.[5] Some 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.[6] Specialized indexes can be composed of constituents on the basis of a variety of considerations, including ''factors'' that may be seen to cause certain types of securities to outperform or underperform the market as a whole. Index providers that offer specialized indexes might allow a user to ''specify the customization criteria'' on which a provider can create an index;[7] offer ''flexibility'' with respect to the components of the index;[8] and can be ''built to the exact specifications of . . . clients, in any major asset class.''[9]

Index providers are compensated by licensing indexes to users for the creation of investment products, reporting, and internal use. Generally, index providers license information related to their indexes to two main groups—those that seek to use the index as a benchmark, such as active managers, and those that seek to track the index, such as index funds. Although there are many indexes available and no formal barriers to becoming an index provider, three index providers account for over two-thirds of the market for indexes, totaling approximately $5.0 billion in revenue in 2021.[10]

While 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.[11] In some cases, these decisions may be personalized for a particular user, for example designing or modifying an index for the specific purpose of licensing its use by particular investors and/or their advisers to be employed as part of their investment strategy. Whether or not an index is specialized, the index provider's inclusion or exclusion of a particular security in an index drives advisers with clients tracking that index to purchase or sell securities in response.

B. Model Portfolio Providers

A model portfolio generally consists 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. As with indexes, a model portfolio may be rebalanced or have constituent changes over time.[12] These models provide a convenient way to allocate and diversify investments through a single, professionally managed portfolio. For example, an investment adviser can outsource portfolio management to a model portfolio provider and select among several models offering the adviser's clients different risk targets. A stable or more conservative portfolio generally would invest in mutual funds and ETFs that provide a client with low risk exposure and low return volatility, while an aggressive portfolio generally would invest in mutual funds and ETFs that provide the client with higher-risk exposure and higher return volatility.

Model portfolio providers, sometimes referred to as ''model originators,'' include broker-dealers, asset managers, third-party strategists, asset allocators, and advisers.[13] They 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. While target allocation models that pursue defined outcomes or investment strategies (*e.g.,* capital preservation, income) have been most common in the marketplace, 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.[14]

Model portfolio providers may consider the characteristics and investment goals of a general client type, such as whether the investor is focused on retirement or short-term financial management, or may engage in a more detailed, customized analysis when crafting a model portfolio through, for example, the use of direct indexing strategies.[15]

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[4] *See* Paul G. Mahoney & Adriana Z. Robertson, Advisers by Another Name, University of Virginia School of Law (Jan. 2021), at 28, *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3767087* (''[C]ompiling an index . . . is an inherently discretionary exercise.'').

[5] *See, e.g.,* Index Industry Association, Fourth Annual IIA Benchmark Survey Reveals Significant Growth in ESG Amid Continued Multi-Asset Innovation & Heightened Competition (Oct. 28, 2020), *available at https://www.businesswire.com/news/home/20201028005255/en/Index-Industry%E2%80%99s-Fourth-Annual-Benchmark-Survey-Reveals-Significant-Growth-in-ESG-Amid-Continued-Multi-Asset-Innovation-Heightened-Competition* (noting that in 2020, the overall number of indexes climbed by approximately three percent to 3.05 million).

[6] For purposes of this Request for Comment, ''specialized'' indexes may be customized or bespoke indexes. ''Customized'' indexes are those where an existing index is modified to suit the needs of a particular user, *e.g.,* removing from a securities index all securities issued by companies engaged in a particular trade or business, and ''bespoke'' indexes are those where an index provider constructs an index at the request or direction of a particular user.

[7] Customized Indexes for Specific Needs, MSCI, *available at https://www.msci.com/custom-indexes.*

[8] FTSE Russell Product Guide Oct 2019, FTSE Russell (2019), at 15, *available at https://content.ftserussell.com/sites/default/files/support_document/FTSE%20Russell%20Product%20Guide%20Oct%202019%20Single.pdf.*

[9] Bespoke and Custom Index Service, Markit, *available at https://products.markit.com/indices/products/BespokeIndices.asp?showLevel=8.*

[10] Sonya Swink, Index Providers Take Record $5bn in Revenue in 2021, Financial Times (May 24, 2022), *available at https://www.ft.com/content/595c3c18-7c13-4e33-9a68-f82f558b7ad6.*

[11] Some scholars have recently made this argument. *See* Adriana Z. Robertson, Passive in Name Only: Delegated Management and ''Index'' Investing, 36 Yale J. on Reg. 795, 798 (2019) (''Rather than being passive in any meaningful sense, index investing simply represents a form of delegated management. . . . Not only are these indices managed portfolios in the strictly financial sense, by their construction they often also imply a substantial amount of delegated decisionmaking authority.''); *see also* Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, The New Titans of Wall Street: A Theoretical Framework for Passive Investors, 18 U. Pa. L. Rev. 17, 21 (2019) (''The construction and management of [an] index is not passive but entails a form of managed investing, if not by the passive funds themselves, then by the index providers.''). Indexes may be actively rebalanced or reconstituted on a predetermined schedule (*e.g.,* semiannually). Constitution also may change on an ad hoc basis as a result of mergers, acquisitions, or bankruptcies.

[12] A model portfolio may be physically or synthetically rebalanced (*e.g.,* to reduce costs during a volatile market, derivatives that have the effect of rebalancing may be used in lieu of trading in a defined benefit plan). Model portfolios are distinct from portfolio allocation models, which can be educational tools that investors use to obtain a sense of which asset classes (as opposed to which specific securities) are appropriate for the investor to allocate its assets to (*e.g.,* 60% in equities, 40% in fixed income).

[13] This discussion focuses on third-party model portfolio providers that sell models to wealth managers that apply them to client portfolios (or make available selected models to clients) versus internal firm models. This discussion includes as third-party model portfolio providers those persons who make available their own portfolios so that others can copy or license those portfolios in exchange for compensation. Portfolios may be made available through the provider's online platform.

[14] Model Portfolios See Greater Usage Among Advisory Firms, Ted Godbout, National Association of Plan Advisors (Feb. 23, 2021), *available at https://www.napa-net.org/news-info/daily-news/model-portfolios-see-greater-usage-among-advisory-firms.*

[15] Direct indexing is a personalized indexing strategy in which, rather than invest in one or more index ETFs, an investor buys some or all of an index's constituent securities (*i.e.,* a representative amount) to mirror its characteristics and then periodically adjusts these holdings to continue to closely replicate the index. With this investment strategy, an investor may achieve the diversification benefits of an ETF as well as the flexibilities that come from owning individual securities, such as tax benefits (*e.g.,* harvesting individual security tax losses and capital gains) and customization (*e.g.,* overweighting or underweighting a security or

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Model portfolio providers generally are compensated by fees on securities bought, sold, and held in the model (*e.g.,* an asset manager that builds a model using proprietary products), but some providers charge a fee for the use of the model portfolio separate from the underlying product fees or receive commissions or other transaction-based compensation.[16]

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.[17] For example, clients may be unsure which services are being performed by a model portfolio provider and which are being performed by the adviser, as well as by whom they are owed a fiduciary duty. This uncertainty may be increased where, for example, the client-facing adviser seeks to disclaim or limit its fiduciary duty or any other duty when implementing a model provided by a third-party model portfolio provider.[18] In addition, an adviser may invest according to a model customized by the provider for the adviser, including where (for example) the model portfolio provider may adjust the model based on input from the adviser.

C. Pricing Services

Pricing services provide prices, valuations, and additional data about a particular investment (*e.g.,* a security, a derivative, or another investment), to assist users with determining an appropriate value of the investment.[19] In addition, a pricing service may provide pricing information when market quotations are unavailable, such as when the primary market for a foreign security is closed, or when the relevant security is traded in over-the-counter markets that result in incomplete information on the security's market price.

In providing pricing information to users, pricing services may exercise significant discretion. They often determine a valuation methodology to use; develop valuation model templates; determine the sources or relevance of inputs; determine whether the valuations generated are appropriate or require further adjustment; and may need to address any pricing challenges raised by the user. Because pricing services rely on and prioritize differently a variety of inputs, methods, models, and assumptions in determining a pricing level, different pricing services may determine different pricing levels for the same security.[20] A pricing service may offer different pricing levels for the same security as well, depending on the service's type of analysis or evaluation and the user's needs. Depending on the specific analysis, pricing services may be compensated through subscription fees, through other fixed fees, and as a percentage of assets.

The Commission recently discussed pricing services in adopting rule 2a–5 under the Investment Company Act, which addresses valuation practices and the role of the board of directors with respect to the fair value of the investments of a registered investment company or business development company.[21] Under the rule, fair value as determined in good faith requires overseeing and evaluating any pricing services used. The Commission 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.[22] Staff have also 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.[23]

II. Investment Adviser Status Under the Advisers Act

The Advisers Act generally defines an ''investment adviser'' as any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or any person who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.[24] The definition generally includes three elements for determining whether a person is an investment adviser: (i) the person provides advice, or issues analyses or reports, concerning securities; (ii) the person is in the business of providing such services; and (iii) the person provides such services for compensation. Each element must be met in order for a person to be deemed an investment adviser.

With respect to the first element, a person generally is an investment adviser even if its advice, reports, or analyses about securities do not relate to *specific* securities, provided the services are performed as part of a business and for compensation. For example, in the context of financial planning services, our staff has taken the position that a person may be ''advising'' another within the meaning of the Advisers Act if the advice addresses whether to invest in securities instead of a non-securities investment.[25]

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sector allocation). The availability of fractional share investing and commission-free trading has made direct indexing an increasingly popular strategy for certain retail investors. *See* Rebecca Baldridge and Benjamin Curry, Beat Funds at Their Own Game with Direct Indexing, Forbes (Apr. 15, 2021), *available at https://www.forbes.com/advisor/investing/direct-indexing/*; Steve Johnson, Direct Indexing Looks Set to Disrupt the Retail ETF Market, Financial Times (Feb. 10, 2021), *available at https://www.ft.com/content/3b35120a-dd92-48b0-8b6f-e26f116473e0*; Rebecca Lake, What is Direct Indexing?, U.S. News & World Report (Sept. 20, 2019), *available at https://money.usnews.com/investing/investing-101/articles/what-is-direct-indexing.*

[16] The additional fee compensates the model provider for its asset allocation advice. 2020 Model Portfolio Landscape, Morningstar Manager Research (Aug. 2020), at 3. Any person receiving transaction-based compensation (such as commissions) in exchange for providing a model portfolio or other information service must determine whether it is subject to statutory or regulatory requirements under Federal law, including the requirement to register as a broker-dealer pursuant to section 15(a) of the Securities Exchange Act of 1934. *See* 15 U.S.C. 78o(a).

[17] There may be a similar lack of understanding among investors in pooled investment vehicles, including registered investment companies, that rely on third-party models.

[18] The Commission has stated that ''an adviser's federal fiduciary duty may not be waived, though it will apply in a manner that reflects the agreed-upon scope of the relationship.'' Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (June 5, 2019) [84 FR 33669, 33672 (Jul. 12, 2019)].

[19] The names for these services may vary, such as pricing services, valuation agents, or providers of fairness opinions.

[20] *See* Money Market Fund Reform, Amendments to Form PF, Investment Advisers Act Release No. 3879 (July 23, 2014) [79 FR 47736 (Aug. 14, 2014)].

[21] Good Faith Determinations of Fair Value, Investment Company Act Release No. 34128 (Dec. 3, 2020) [86 FR 748, 756 (Jan. 6, 2021)] (''Fair Value Release''), *available at https://www.sec.gov/rules/final/2020/ic-34128.pdf.*

[22] *See* Fair Value Release, at text following n.98.

[23] Compliance Alert, Division of Examinations (published as Office of Compliance Inspections and Examinations), Securities and Exchange Commission (July 2008), *available at https://www.sec.gov/about/offices/ocie/complialert0708.htm.* This compliance alert and other staff statements (including those cited herein) represent the views of Commission staff and are not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of these documents and, like all staff statements, they have no legal force or effect, do not alter or amend applicable law, and create no new or additional obligations for any person.

[24] 15 U.S.C. 80b–2(a)(11).

[25] Statement of Staff Interpretive Position, Applicability of the Investment Advisers Act to

With respect to the second element, giving advice does not need to constitute the principal business activity or any particular portion of the business activities of a person in order for the person to be considered ''in the business'' of acting as an investment adviser under the Advisers Act. Rather, the giving of advice need only be done on a basis such that it constitutes a business activity occurring with some regularity.[26] Finally, the receipt of any economic benefit, whether in the form of an advisory fee or some other fee relating to the total services rendered, commissions, or some combination of the two, would generally suffice with respect to compensation under the definition. The source of an ''economic benefit'' that would satisfy this element of the definition is not, however, limited to fees and commissions.[27]

As technology and advisory practices have evolved, one aspect of this statutory definition that market participants have questioned is whether certain types of information or data constitute ''analyses or reports concerning securities.'' For example, these questions have arisen in the context of databases and various computer software services offering calculations and pricing models. Our staff has considered these questions, in the context of one part of the statutory definition,[28] and stated that, while this is a facts and circumstances analysis, relevant factors could include whether: (i) The information is not readily available to the public in its raw state, (ii) the categories of information are highly selective, and (iii) the information is organized or presented in a manner that suggests the purchase, holding, or sale of any security or securities.[29]

The Advisers Act expressly excludes from the definition of investment adviser certain types of persons or persons engaging in certain types of activities.[30] The exclusions generally cover persons that are already subject to regulation, either by the Commission or another regulator, or persons that Congress did not intend to be covered by the Act. For example, the Advisers Act excludes from the definition ''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.'' [31] The Advisers Act also authorizes the Commission to exempt from the definition of investment adviser any other person ''not within the intent'' of the statutory definition.[32]

In addition, the Advisers Act excludes from the definition the ''publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation'' (''publisher's exclusion'').[33] In *Lowe* v. *SEC,* the Supreme Court construed the publisher's exclusion and held that publishers are excluded from the definition under the Advisers Act as long as their publication: (i) Provides only impersonal advice; (ii) is ''bona fide,'' meaning that it provides genuine and disinterested commentary; and (iii) is of general and regular circulation rather than issued from time to time in response to episodic market activity.[34] Building on *Lowe,* the court in *SEC* v. *Park* stated that the personalized or disinterested nature of a publication ''clearly'' affects whether it is ''bona fide.'' [35]

Certain providers have relied on the publisher's exclusion. We believe that index providers have historically concluded, for example, that, even if they meet the definition of investment adviser, they may rely on the exclusion and thus need not register with the Commission or be subject to any section of the Advisers Act, including section 206. Similarly, other providers, such as pricing services, may be relying on the publisher's exclusion.

Given the length of time since *Lowe* was decided, and understanding that new business models have developed in the interim, we are considering the extent to which providers' activities, in whole or in part, may raise investment adviser status issues. We specifically request comment on the following:

Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act Release No. 1092 (Oct. 8, 1987) [52 FR 38400, 38402 (Oct. 16, 1987)] (''Financial Planners Release'') (''A person who, in the course of developing a financial program for a client, advises a client as to the desirability of investing in, purchasing or selling securities, as opposed to, or in relation to, any non-securities investment or financial vehicle would also be ''advising'' others within the meaning of Section 202(a)(11).''); *see also U.S.* v. *Elliott,* 62 F.3d 1304, 1309–10 (11th Cir. 1996) (citing Financial Planners Release and stating ''[W]e are persuaded that both Elliott and Melhorn are 'in the business' of advising others because they satisfy all three of the disjunctive factors'' in the Financial Planners Release); *Luzerne County Retirement Bd.* v. *Makowski,* 627 F.Supp.2d 506, 572–74 (M.D. Penn. 1995) (applying three-part test of Financial Planners Release and granting summary judgment in favor of defendants as to count alleging violations of the Advisers Act); *infra* note 31 (describing the Solely Incidental Release, as defined therein).

[26] *See, e.g., Elliott,* 62 F.3d at 1310 (stating that defendants ''provided investment advice on more than rare, isolated occasions'' and ''regularly gave advice regarding the safety and effectiveness'' of specific investment vehicles ''based upon the personal circumstances of individual investors''); *SEC* v. *Battoo,* 158 F. Supp. 3d 676, 698 (N.D. Ill. 2016). Our staff took a similar view. *See* Financial Planners Release, 52 FR at 38402 (''The frequency of the activity is a factor, but not determinative.'').

[27] At least one court has found that an ''economic benefit'' could even include an adviser's ill-gotten gains from investors' misappropriated funds. *See U.S.* v. *Ogale,* 378 Fed. Appx. 959, 960–61 (11th Cir. 2010) (''The receipt of any economic benefit qualifies as compensation under the Investment Adviser's [sic] Act and thus the investment adviser enhancement.''); *see also U.S.* v. *Miller,* 833 F.3d 274, 282 (3rd Cir. 2016) (finding that adviser compensation includes ''any economic benefit'' and holding that defendant who sold his firm's promissory notes to his clients met the compensation element of Section 202(a)(11)); *U.S.* v. *Elliott,* 62 F.3d at 1311 (finding that adviser compensation includes ''any economic benefit'' and holding that defendants were investment advisers even though they did not receive an investment adviser's fee but did receive compensation from an economic relationship that included providing ongoing investment advice as a primary aspect of the relationship).

[28] This staff analysis does not consider other aspects of the statutory definition—*e.g.,* whether such information or data constitutes advice ''as to the value of securities,'' *see* section 202(a)(11).

[29] *See, e.g.,* Datastream International, Inc., SEC Staff No-Action Letter (Mar. 15, 1993), *available at https://www.sec.gov/divisions/investment/noaction/1993/datastream-international-031593-202a.pdf*; RDM Infodustries, SEC Staff No-Action Letter (Mar. 25, 1996), *available at https://www.sec.gov/divisions/investment/noaction/1996/rfminfodustries032596.pdf.*

[30] *See* 15 U.S.C. 80b–2(a)(11)(A) through (H). A person relying on any of the exclusions must meet all of its requirements. *See, e.g.,* Solely Incidental Release, *infra* note 31.

[31] 15 U.S.C. 80b–2(a)(11)(C) (''broker-dealer exclusion''). The Commission has adopted an interpretation of the ''solely incidental prong'' of the broker-dealer exclusion that states that ''a broker-dealer's provision of advice as to the value and characteristics of securities or as to the advisability of transacting in securities is consistent with the solely incidental prong if the advice is provided in connection with and is reasonably related to the broker-dealer's primary business of effecting securities transactions.'' Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, Investment Advisers Act Release No. 5249 (June 5, 2019) [84 FR 33681 (July 12, 2019)] (''Solely Incidental Release''). The Solely Incidental Release also states that ''[w]hether advisory services provided by a broker-dealer satisfy the solely incidental prong is assessed based on the facts and circumstances surrounding the broker-dealer's business, the specific services offered, and the relationship between the broker-dealer and the customer.'' *Id.* In the Solely Incidental Release, the Commission stated that broker-dealers ''receive special compensation where there is a clearly definable charge for investment advice.'' *Id.* at n.68 (internal citations omitted).

[32] 15 U.S.C. 80b–2(a)(11)(H). The Commission is authorized to exempt persons by rule, regulation, or order, *see id.,* and has exercised that authority. *See, e.g.,* In the Matter of 1112 Partners, LLC, Investment Advisers Act Release No. 4917 (May 29, 2018) (order).

[33] 15 U.S.C. 80b–2(a)(11)(D).

[34] *Lowe,* 472 U.S. 181, 208–210 (1985); *see also* Alfred A. Zurl, SEC Staff No-Action Letter (Aug. 7, 1995), *available at https://www.sec.gov/divisions/investment/noaction/1995/alfredzurl080795.pdf* (applying *Lowe*).

[35] *SEC* v. *Park,* 99 F. Supp.2d 889, 895 (N.D. Ill. 2000).

General

1. Are our descriptions of each information provider accurate and comprehensive? What types of potential risks and conflicts of interest does each type of provider present? How many providers of each type do commenters estimate currently offer their services in the United States?

2. Are there any other types of information providers whose activities, in whole or in part, may raise investment adviser status issues? If so, which providers, and why?

General Questions Related to Information Providers' Status

3. How do providers analyze whether they meet the Advisers Act's definition of ''investment adviser'' under each element of the definition? For those providers that have determined that they meet the definition, what were the determining factors?

4. In light of new technologies and current market practices, when determining what constitutes ''analyses or reports concerning securities,'' what factors may raise investment adviser status issues? For example, are the factors described above appropriate? [36] Should they be modified? If so, what modifications and why? What economic benefits and costs would result if advisers were required to consider the factors described above or with modifications? Alternatively, are there other factors that advisers should be required to consider regarding what constitutes ''analyses or reports concerning securities''? Should the Commission provide additional guidance? What benefits and costs would result from requiring other factors or providing additional guidance?

5. We understand that some information providers may determine that providing data or other information is not providing ''analyses or reports concerning securities'' and therefore the provider is not an investment adviser under the Advisers Act based on the factors above. Which types of information providers take this position, and on what basis do they consider such data and information not to be analyses or reports concerning securities?

6. Which providers rely on the publisher's exclusion? On what basis? To what extent do they rely on *Lowe* to inform the determination? How do they determine whether their publications are ''impersonal,'' ''bona fide,'' or of ''general and regular circulation''?

7. Which providers rely on another exclusion from the definition of ''investment adviser''? Which exclusion and on what basis? For example, do some broker-dealers that provide model portfolios to their customers rely on the broker-dealer exclusion from the definition of investment adviser? To what extent do broker-dealer model portfolio providers provide their portfolios to investors or to other financial professionals, such as investment advisers or other managers (*e.g.,* banks, trust companies), which may then use the model portfolios with their own customers or clients? Does this have an impact on the broker-dealer's reliance on the exclusion? How are broker-dealers typically compensated for providing these model portfolios? Under what circumstances does a broker-dealer provide a model portfolio in exchange for a commission or other transaction-based compensation? On what basis is such commission or other transaction-based compensation charged? Do these broker-dealers receive different forms of compensation?

8. To what extent do information providers view themselves as having fiduciary obligations to any investors that rely on the information they provide (for example, when investors receive such information through another financial professional)? How do providers view the scope of such obligations? Do they view their obligations more narrowly than those of a traditional client-facing adviser, and if so, how? How do these providers address potential conflicts of interest that may arise during their relationships with clients or users of their services?

9. How do information providers exercise discretion in providing information? For example, do index providers or model portfolio providers create indexes or portfolios at the request of their licensees or users based on more customized investment objectives and goals? In these circumstances, does the provider include or exclude certain companies, funds, or countries from an index or portfolio based on the input of its licensee or user? As another example, in determining which inputs or factors to prioritize in assessing a security's price, does a pricing service prioritize certain factors over others based on the input of its licensee or user?

10. In what ways do information providers exercise discretion in establishing and updating their services or the information they provide? Is such discretion limited by a service's users? For example, with respect to pricing services, do users limit providers' discretion by contract, either by reference to standard pricing guides or principles or otherwise? If so, do users treat pricing services differently from other providers in how discretion is limited? If so, how and on what basis? Do the responses change when considering other types of information providers?

11. To what extent, and under what circumstances, does each type of information provider personalize the services it offers? For example, what are industry practices around direct indexing and specialized indexes, and how prevalent are they?

12. Do information providers adjust the services offered based on input from the users of their services? Do providers disclose such adjustments to users, including when such adjustments are made to address previous errors of the provider?

13. Under what circumstances do information providers disclose changes or updates to the services provided, and to whom? For example, describe index providers' disclosures about the changes in the index strategy or related aspects (*e.g.,* tracking methodology, portfolio structure, portfolio limitations, index data distribution channels) and the level of discretion that the index provider may exercise. How do information providers communicate these changes or updates?

14. How, and in what form, are information providers compensated? Do information providers charge license, subscription, or other types of fees? Are there tiers of fees? For example, do pricing services' users pay multiple times for use of the same price? Are subscription fees different from engagement fees? If so, how? When an investment adviser or an investment company compensates information providers, is that compensation borne by advisory clients or fund investors?

15. Should the Commission use its authority to exempt any of the information providers from the definition of ''investment adviser''? [37] If so, what facts and circumstances should factor in to an exemption? Please explain your answer.

16. What are the economic benefits and costs associated with investment adviser status for each type of information provider identified above? Are there provisions of the Advisers Act that providers are unable to comply with or that would be operationally complex and burdensome?

Questions Related to Index Providers

17. To what extent are users of index providers' services registered investment companies or other pooled

[36] *See supra* text accompanying note 29.

[37] *See supra* note 32.

investment vehicles? What other types of users license indexes? Is there a difference in this respect between users of broad-based indexes and specialized indexes?

18. Do index providers that develop broad-based indexes raise different investment adviser status issues as compared to those that develop customized or bespoke indexes? If so, what factors categorize or distinguish different types of indexes? Does an index that is specialized raise investment adviser status issues? Are there other parameters that we should utilize?

19. How, if at all, do index providers limit the dissemination of their methodologies or indexes to only those who license such information? Should the limitations placed on dissemination affect the analysis of their status as an investment adviser?

20. Under what circumstances, if any, is an index provider compensated based on the amount of assets that are managed according to its index? Do compensation methods for index providers differ based on whether they provide broad-based indexes or specialized indexes? If so, how or on what basis do such compensation methods differ?

21. What are the economic benefits and costs associated with investment adviser status for index providers that develop broad-based indexes versus specialized indexes?

Questions Related to Model Portfolio Providers

22. Do model portfolio providers raise different investment adviser status issues than those raised by index providers that provide specialized indexes? In what ways are they distinguishable?

Questions Related to Pricing Services

23. Is there 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? How should any regulation reflect these distinctions, or any other distinction between types of pricing services?

24. To what extent do the results of price challenges to a pricing service's values affect the prices provided to other users of pricing services? Are there times when a pricing service aggregates or delivers information from another pricing service?

III. Implications of Investment Adviser Status

A. Registration Under, and Applicability of, the Advisers Act

Generally, a person that meets the definition of ''investment adviser'' (and cannot rely on an exclusion) must register under the Advisers Act, unless it: (i) Is prohibited from registering under section 203A of the Act, or (ii) qualifies for an exemption from the Act's registration requirement, each as discussed below. All advisers, including an unregistered adviser, are subject to the Advisers Act's antifraud provisions.[38]

1. Advisers Prohibited From Registering Under the Advisers Act

Section 203A of the Advisers Act prohibits certain advisers from registering under the Act, unless they meet an assets-under-management (''AUM'') threshold. In general, a small adviser with less than $25 million in AUM that is regulated or required to be regulated as an adviser in the state where it maintains its principal office and place of business, and a mid-sized adviser with between $25 million and $100 million in AUM that is required to be registered as an adviser in the state where it maintains its principal office and place of business and that is subject to examination by its state securities commissioner, are ineligible to register with the Commission. These smaller and mid-sized advisers are regulated at the state level.[39]

The relevant thresholds reflect an amount ''designed to distinguish investment advisers with a national presence from those that are essentially local businesses.'' [40] Even when advisers lack such a ''national presence,'' we are authorized to exempt from the prohibition on Commission registration those investment advisers for which the prohibition ''would be unfair, a burden on interstate commerce, or otherwise inconsistent'' with the purposes of the Act's provisions allocating authority between the Commission and state securities authorities.[41] On this basis, we have exempted certain types of advisers from the prohibition against registration with the Commission, including pension consultants, internet investment advisers, and some pricing services.[42]

Certain providers, if they are investment advisers, may not have significant AUM, or regulatory assets under management (''RAUM''), depending on how those terms are used,[43] but could service a significant portion of the financial intermediaries and other players in the national financial markets with broad market effects. For example, to the extent that many advisers rely on a single pricing service, and all use that service's evaluated price for a particular security, that pricing service may affect the national market in that security in a way that would not happen if the same advisers each reached independent determinations of, or relied on separate pricing services to determine, the security's price. Similarly, the decisions of index providers can affect domestic and global financial markets in some circumstances. Some analysis has shown an increase in stock price, among other effects, associated with inclusion in the S&P 500 Index.[44] As an example,

[38] *See* section 206 of the Act, rules 206(4)–5 and 206(4)-8 under the Act;*see also, e.g.,* S. Rep. No. 1760, 86th Cong., 2d Sess. 7 (1960), which specifies that the antifraud provisions in section 206 of the Act apply to both registered and unregistered advisers.

[39] The Act also provides several voluntary exemptions from registration. *See, e.g.,* 15 U.S.C. 80b–3(b), (l), and (m). In addition, venture capital fund advisers and private fund advisers with less than $150 million in AUM in the United States (referred to as ''exempt reporting advisers'') are exempt from registration, but are required to file reports on Form ADV with the Commission and are subject to certain rules under the Act. *See* 15 U.S.C. 80b–3(l) and (m); 15 U.S.C. 80b–4(a); 17 CFR 275.204–4.

[40] Exemption for Certain Investment Advisers Operating Through the Internet, Investment Advisers Act Release No. 2091 (Dec. 12, 2002) [67 FR 77620, 77621 (Dec. 18, 2002)], at nn.4–5 and accompanying text (citing S. Rep. No. 293, 104th Cong., 2d Sess. 3–5 (1996) (''Senate Report'')); *see also* Senate Report at 3–4 (''The states should play an important and logical role in regulating small investment advisers whose activities are likely to be concentrated in their home state. Larger advisers, with national businesses, should be registered with the Commission and be subject to national rules.'').

[41] 15 U.S.C. 80b–3a(c).

[42] *See* rule 203A–2(a) and (e); Rules Implementing Amendments to the Advisers Act of 1940, Investment Advisers Act Release No. 1633 (May 15, 1997) [62 FR 28112 (May 22, 1997)], at n.60 and accompanying text (noting the Commission's adoption of a higher assets-under-management threshold for registration by pension consultants as ''necessary to demonstrate that a pension consultant's activities have an effect on national markets''). *See* Interactive Data Corporation, Investment Advisers Act Release No. 1685 (Dec. 9, 1997) (notice) and In the Matter of Interactive Data Corporation, Investment Advisers Act Release No. 1692 (Jan. 6, 1998) (order) (Interactive Data Corporation (''IDC'') argued that it should be permitted to register despite the fact that it did not qualify for an exemption from the prohibition on registration. Specifically, IDC argued that it is the type of large, national investment adviser that Congress intended to be registered with the SEC, that prohibiting its registration would unfairly burden interstate commerce, and that its services have a significant national impact).

[43] *See infra* text accompanying note 47.

[44] *See, e.g.,* Jim Hawley and Jon Lukomnik, The Long and Short of It: Are We Asking the Right Questions? Modern Portfolio Theory and Time Horizons, 41 Seattle U. L. Rev. 449, 453–456 (2018) (summarizing studies describing market effects of

Continued

model portfolios may be used to manage large amounts of assets (serving, in some cases, as the basis for their providers' compensation), even though model portfolio providers do not have discretionary authority over those assets and, accordingly, may not have RAUM.[45]

2. Requirements for SEC-Registered Advisers

Advisers registered (or required to be registered) with the Commission are subject to substantive prohibitions and requirements; contractual requirements; recordkeeping obligations; and oversight by the Commission, including periodic filings and inspection. Many of the rules under the Act are generally designed to apply to the variety of advisers' business models. Form ADV similarly is designed to facilitate reporting by advisers with disparate business models and client types. However, it is possible to differentiate application of the adviser regulatory regime (including reporting requirements) to a type of investment adviser.[46]

To the extent that providers' activities may constitute investment advice, and have the potential to affect broadly the national securities markets, we request comment on all aspects of the investment adviser regulatory regime with respect to these providers. Such comments would be particularly useful given that many of the provisions of the Act, the rules thereunder, and Form ADV are designed primarily for investment advisers that provide investment advice designed for the objectives and needs of specific clients, which may not be the case with all of these information providers. We specifically request comment on the following:

Registration Under the Advisers Act

25. To the extent that a provider meets the Act's definition of ''investment adviser,'' should it register with the SEC or the states in which it maintains its principal office or places of business? As a policy matter, should Commission registration be permitted or required? What economic benefits and costs would result? What would be the effect of registration on the ability of new competitors to come into the marketplace? What would be the effect of registration on providers' ability to speak or communicate? If any type of information provider were required to register, what process might we provide to ensure an orderly transition of registration status?

26. Some providers are currently SEC-registered while others are not. For each type, on what basis? For those providers that have registered with the Commission as investment advisers, what were the determining factors? How would the economic benefits and costs differ between providers that are currently SEC-registered and others that are not?

27. Do providers have RAUM with respect to their information services?[47] For example, do providers ''provide continuous and regular supervisory or management services'' to securities portfolios as required by the instructions on Form ADV for purposes of calculating RAUM? What range of RAUM is common? Should the Commission amend the Instructions to Form ADV to provide a calculation of RAUM that encompasses any or all providers? In particular, should the Commission define RAUM in a manner that explicitly applies to model portfolio providers?

28. Should there be exemptions from the prohibition against registration for providers that have a ''national presence'' or can have a significant effect on the national markets regardless of RAUM? Are there factors that we should take into account in identifying those providers? For example, what characteristics would distinguish providers that have a national presence from ones that do not? Should registration be mandatory or optional? What would be the economic benefits and costs of mandatory or optional registration?

29. Under what circumstances should a provider that acts as an investment adviser be required to treat as its advisory client another investment adviser that uses its services (the ''serviced adviser'')? Under what circumstances, if any, should such a provider's advisory client be the client, or end-user, of the serviced adviser? If a provider's advisory client is the end-user of the serviced adviser, to what extent and under what circumstances should such end-user have the right to approve the assignment of the advisory agreement between the serviced adviser and the provider? To what extent and under what circumstances should such end-user receive the disclosure documents of the provider?

Applicability of the Advisers Act

30. Should we exempt providers that meet the definition of investment adviser, and are required to register with the SEC under the Advisers Act, from any of the provisions of the Act and rules that apply to SEC-registered advisers and, if so, which provisions and why? Would any such provisions raise operational or compliance challenges such that an exemption is necessary? What would be the economic benefits and costs of exempting providers that meet the definition of investment adviser, and are required to register with the SEC under the Act? How would such an exemption affect investors? What would be the effects on competition in the market for information providers if we were to exempt providers from some or all requirements of the Act? Alternatively, should any provisions of the Act or rules apply differently to providers? Which ones, why, and how should they apply? For example, should disclosure obligations differ to the extent the providers do not have a client-facing role?

31. Would requiring providers to register with the SEC and become subject to the regulatory regime under

index inclusion) (internal citations omitted). *But see* Maria Kasch and Asani Sarkar, Is There an S&P 500 Index Effect?, FIRS 2013 (Mar. 2014), *available at https://ssrn.com/abstract=2171235.*

[45] As another example, when major equity index providers included in their emerging market indexes the ''A shares'' of certain Chinese companies listed in China, the weight of Chinese markets in those indexes increased and investors tracking those indexes invested in those companies. *See, e.g.,* Division of Economic and Risk Analysis, U.S. Securities and Exchange Commission, Risk Spotlight: U.S. Investors' Exposure to Domestic Chinese Issuers (July 6, 2020), *available at https://www.sec.gov/files/US-Investors-Exposure-to-Domestic-Chinese-Issuers_2020.07.06.pdf* (noting that the weight of Chinese A shares in the three emerging market indexes ranged between 4% and 5.5% after completion of each index's inclusion process); *see also* Xie Yu, China's Bonds Win Third Key Index Inclusion, Wall Street Journal (Sept. 24, 2020) (reporting that FTSE Russell would add Chinese government debt to certain indices and estimating the inclusion ''could attract more than $100 billion of foreign capital''), *available at https://www.wsj.com/articles/chinas-bonds-win-third-key-index-inclusion-11600994714;* Robin Wigglesworth, Trillions 258–59 (Portfolio 2021) (describing efforts by the Chinese government to affect decisions of index providers).

[46] The Commission has tailored the adviser regulatory regime to recognize advisers in different situations. *See* Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Advisers Act Release No. 3222 (June 22, 2011) [76 FR 39645 (July 6, 2011)] (adopting rules to implement exemptions from the registration requirements of the Advisers Act for advisers to certain privately offered investment funds and stating that the Commission does not apply most of the substantive provisions of the Advisers Act to the non-U.S. clients of a non-U.S. adviser registered with the Commission).

[47] Form ADV uses the term ''regulatory assets under management'' instead of ''assets under management.'' Form ADV describes how advisers must calculate RAUM and states that in determining the amount of RAUM, an adviser should ''include the securities portfolios for which [it] provide[s] continuous and regular supervisory or management services as of the date of filing'' the form. *See* Form ADV, Instructions for Part 1A, Instruction 5.b.

the Act in its current form cause them to alter their business models, consolidate, or exit the market? [48] How would this affect investors?

32. At least one regulatory framework for index providers exists outside of the United States, under the European Securities and Market Authority (''ESMA'') and its EU Benchmarks Regulation (''BMR'').[49] Some of the BMR's key provisions include requiring EU administrators of a broad class of benchmarks to be authorized or registered by a national regulator, and for these administrators to implement various governance systems and other controls to ensure the integrity and reliability of their benchmarks. Administrators are also required to provide a code of conduct specifying requirements and responsibilities regarding input data. Although the BMR affects U.S.-based index providers that wish to have market access in the EU, it does not directly affect their business in the United States. Should any U.S. regulatory action, if adopted and implemented, be aligned with the framework placed by the BMR in the EU? Are there particular components of the BMR that should or should not be applied to index providers in the United States, and why? What has been the effect of the BMR on the provision of benchmarks and indexes in the EU? Has the BMR served as a barrier to entry for new benchmark and index providers?

Reporting Obligations and Public Disclosure

33. What information do registered advisers and investment companies currently submit to the Commission with respect to their information providers? What information, if any, should registrants be required to submit? What information currently required should be modified and why? Should some of the information be provided confidentially to the Commission? If so, which types of information and why?

34. Should Form ADV require specific information about advisers' use of information providers? Should we require additional or different information on Form ADV for providers that meet the definition of investment adviser and are required to register with the SEC under the Advisers Act? If so, what information? What would be the economic benefit and cost of requiring additional or different information on Form ADV?

B. Related Investment Company Act Matters

Analysis under the Investment Company Act of whether a person is an investment adviser of a fund generally relies on two main elements:

(i) The person regularly furnishes advice to the fund with respect to the desirability of investing in, purchasing or selling securities or other property, or is empowered to determine what securities or property should be purchased or sold by the fund; and

(ii) The person acts pursuant to a contract with the fund.[50]

In addition, the Investment Company Act includes in the definition of an investment adviser to a fund a person who, pursuant to a contract with an investment adviser of an investment company, ''regularly performs substantially all the duties'' undertaken by such investment adviser.[51]

An investment adviser of a fund under the Investment Company Act is subject to certain requirements and limitations. Among other things, this status may trigger prohibitions related to self-dealing and other types of overreaching of a fund by its affiliates (including its investment adviser), ineligibility criteria for certain affiliated persons (including investment advisers), and requirements related to the approval of compliance procedures and practices by the fund's board of directors.[52] In addition, the Investment Company Act contains specific requirements related to shareholder and board approval of the fund's advisory contract (including of any assignment of the contract).[53]

The Investment Company Act sets out certain exceptions to its definition of investment adviser of a fund, including for persons distributing their publications to subscribers, providing statistical information without regularly furnishing advice or making recommendations concerning specific securities, compensated under the supervision of a court, or persons excluded by rule or regulation.[54]

Certain providers may implicate the Investment Company Act's provisions relating to an investment adviser of an investment company. For example, index providers, particularly to the extent the index provider maintains a bespoke index created for a single fund, could meet the definition of an investment adviser to a fund under the Investment Company Act. This may be the case if the index is maintained with an eye to the specific needs of a fund. To the extent that no exception from the definition applies, the index provider could implicate the Investment Company Act's definition of investment adviser of an investment company, including when the index provider does not contract directly with a fund, but instead indirectly with the fund's investment adviser. A similar analysis may apply to other providers, as well.

We request comment on certain aspects of the Investment Company Act regime with respect to providers. We specifically request comment on the following:

35. How do providers analyze whether they meet the Investment Company Act's definition of ''investment adviser'' of a fund under each element of the definition? What are the economic benefits and costs associated with whether a provider meets the Investment Company Act's definition of ''investment adviser'' of a fund? Would the application of the definition to providers serve as a material barrier to entry for new entrants?

36. To what extent do providers contract directly with funds? For example, do providers typically enter into contracts with the fund's adviser, or an affiliate of the adviser? If a fund's adviser delegates services to a provider, what duties does the adviser retain and what duties does the adviser delegate? Does the fund or its adviser make an affirmative determination made whether the provider is acting as an investment adviser under the Investment Company Act?

37. The Investment Company Act excludes from the definition of investment adviser of a fund ''a person whose advice is furnished solely through uniform publications distributed to subscribers thereto.'' To what extent do providers distribute uniform publications? If so, how do these providers interpret ''uniform''? Do providers that rely on the Advisers Act publisher's exclusion also rely on this exception and, if so, on what basis?

38. To the extent a provider to a fund is an investment adviser of the fund, the fund and its provider would need to comply with various provisions of the Investment Company Act. What would be a reasonable amount of time for a

[48] *See, e.g.,* Kathleen H. Moriarty, Should Index Providers Be Regulated as Investment Advisers Under the U.S. Investment Advisers Act of 1940, Journal of Index Investing (2021), at 67–68, *available at https://jii.pm-research.com/content/iijindinv/11-12/4-1/54.full.pdf.*

[49] Regulation (EU) 2016/1011.

[50] *See* 15 U.S.C. 80a–2(a)(20)(A).

[51] *See* 15 U.S.C. 80a–2(a)(20)(B).

[52] In addition, among other provisions related to its relationship with a fund, an adviser under the Investment Company Act is subject to regulations related to loans, purchases or sales of assets, or the receipt of commissions or similar compensation in connection with such purchases and sales. *See* 15 U.S.C. 80a–17.

[53] 15 U.S.C. 80a–15(a); 15 U.S.C. 80a–15(c).

[54] *See* 15 U.S.C. 80a–2(a)(20).

registered investment company to come into compliance with these provisions? Are there measures we can take to assist with the transition? Are there provisions of the Investment Company Act that present unique challenges for providers?

39. Rule 38a–1 under the Investment Company Act requires a fund's board, including a majority of its independent directors, to approve policies and procedures reasonably designed to prevent violation of the Federal securities laws by the fund and certain service providers.[55] To what extent do funds currently extend their compliance program to information providers, where such entity is not considered an investment adviser or one of the rule's other named service providers (principal underwriters, administrators and transfer agents)? Does this analysis differ depending on the provider? Should we amend Rule 38a–1 to incorporate information providers within a fund's compliance program, rather than requiring registration of information providers as investment advisers? What would be the costs and benefits of such an approach?

40. In circumstances where a fund's adviser contracts with an information provider, how much information is provided to the fund's board regarding the providers on an ongoing basis? Do fund boards approve the engagement of providers in these circumstances? Does this differ depending on the provider?

General Request for Comment

This request for comment is not intended to limit the scope of comments, views, issues, or approaches to be considered. In addition to information providers, investment advisers and investment companies, advisory clients and other investors, we welcome comment from other market participants and particularly welcome statistical, empirical, and other data from commenters that may support their views or support or refute the views or issues raised by other commenters.

By the Commission.

Dated: June 15, 2022.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2022–13307 Filed 6–21–22; 8:45 am]

BILLING CODE 8011–01–P

[55] *See* rule 38a–1 under the Investment Company Act.

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 680

[Docket No. FHWA–2022–0008]

RIN 2125–AG10

National Electric Vehicle Infrastructure Formula Program

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: The FHWA proposes to establish regulations setting minimum standards and requirements for projects funded under the National Electric Vehicle Infrastructure (NEVI) Formula Program and projects for the construction of publicly accessible electric vehicle (EV) chargers under certain statutory authorities. The standards and requirements proposed would apply to the installation, operation, or maintenance of EV charging infrastructure; the interoperability of EV charging infrastructure; traffic control device or on-premises signage acquired, installed, or operated in concert with EV charging infrastructure; data, including the format and schedule for the submission of such data; network connectivity of EV charging infrastructure; and information on publicly available EV charging infrastructure locations, pricing, real-time availability, and accessibility through mapping applications.

DATES: Comments must be received on or before August 22, 2022.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit comments by only one of the following means:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.

All submissions should include the agency name and the docket number that appears in the heading of this document or the Regulation Identifier Number (RIN) for the rulemaking. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Gary Jensen, Office of Natural Environment, (202) 366–2048, or via email at *Gary.Jensen@dot.gov,* or Ms. Dawn Horan, Office of the Chief Counsel (HCC–30), (202) 366–9615, or via email at *Dawn.M.Horan@dot.gov.* Office hours are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document and all comments received may be viewed online through the Federal eRulemaking portal at *www.regulations.gov* using the docket number listed above. Electronic retrieval help and guidelines are also available at *www.regulations.gov.* An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *www.FederalRegister.gov* and the Government Publishing Office's website at *www.GovInfo.gov.*

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, FHWA will also continue to file relevant information in the docket as it becomes available after the comment period closing date and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period and after FHWA has had the opportunity to review the comments submitted.

Executive Summary

The FHWA proposes to establish regulations that would set minimum standards and requirements for projects funded under the NEVI Formula Program and projects for the construction of publicly accessible EV chargers funded under title 23, United States Code.[1] The FHWA is directed by Paragraph (2) under the Highway Infrastructure Program heading in title VIII of division J of the Bipartisan

[1] Refer to ''DOT Funding and Financing Programs with EV Eligibilities'' chart on pages 10–11 in the NEVI Formula Program Guidance, found at: *https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/nominations/90d_nevi_formula_program_guidance.pdf.*