

SEC Casts Wider Investment Adviser Net: May Ensnare Index and Other Providers

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A June 15 release published by the SEC has requested public comment relevant to, primarily, the circumstances under which any of the following types of “information providers” should be deemed “investment advisers” for purposes of the Investment Advisers Act of 1940 or the Investment Company Act of 1940:

Index providers, who “compile, create the methodology for, sponsor, administer, and/or license market indexes.”

Model portfolio providers, including broker-dealers, asset managers, third-party strategists, asset allocators, and advisers. A model portfolio 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.”

Pricing services, who “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.”

The large number of specific questions on which the SEC’s release requested comments reflects the large number of factors that bear on this subject and the complex analysis that could be applied. The complexity is compounded by the wide variety in (a) the types of information and related services provided by each type of information provider; (b) the users of such information or services; (c) and the uses to which they put such information or services. Moreover, depending on the circumstances, the appropriate result under the Investment Advisers Act may differ from that under the Investment Company Act.

The release does not specifically mention insurance companies or the various types of investment products they issue, including those that have an index-based component or that entail model portfolio use. Nevertheless, in a number of contexts, insurance companies without a doubt use or provide types of information with which the SEC's release is concerned. This SEC initiative, therefore, could potentially be very significant for many insurance companies.

The SEC set August 16, 2022, as the deadline for receiving comments in response to its release. As with many other recent short SEC comment periods, it is questionable whether the SEC could have expected to receive very detailed or definitive comments on this subject. Nevertheless, many very substantive comments have been submitted. It is to be hoped, moreover, that there will be further opportunity for comment if and when the SEC develops a more concrete proposal on this subject, or that the SEC will at least be willing to consider comments received after the above deadline.

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