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Submitted Electronically

August 16, 2022

Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

**RE: Release Nos. IA–6050; IC-34618; File No. S7-18-22; RIN 3235-AM95**
**Request for Comment: Certain Information Providers Acting as Investment Advisers**

Ladies and Gentlemen:

Morningstar welcomes the opportunity to write in response to the request for comment[1], or RFC, regarding Certain Information Providers Acting as Investment Advisers, recently published by the Securities and Exchange Commission, or SEC.

Morningstar has a long history of advocating for transparency in global markets and brings two perspectives to the RFC. As an index provider, Morningstar fits into this definition of information provider, which gives us a broad view of the RFC and the potential effects of requiring information providers to register as investment advisers. Owing to our experience in the United Kingdom and European Union as a regulated benchmark administrator under both the UK and EU benchmark regulations, we also bring useful knowledge and perspective on the introduction and operation of the UK and EU benchmark regulations.

This letter contains: 1) a summary of our views and 2) detailed answers to selected questions posed in the Proposed Rule, attached as Appendix A.

**Executive Summary**

Morningstar supports the Commission's potential regulation of information providers but believes such regulation does not need to rise to the level of registration as an investment adviser.

To further facilitate the Commission's goal, we submit the following comments and suggestions:

- We agree wholeheartedly with the importance of investor protection via the provision and administration of robust, transparent and well-governed indexes that are used for measuring investment performance and, in particular, for the creation of index-tracking investment products. Nonetheless, we do not believe Morningstar Indexes meets the elements of an investment adviser as currently defined.
- The decision to use indexes should always rest with the index fund manager, registered adviser, or specific investor. We believe that all index users are best served by those index providers that create and manage indexes according to robust, transparent, objective methodologies, and that do not give advice regarding the suitability of those indexes for investment product usage, nor exercise discretion in the management of those indexes.

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[1] SEC. 2022. Request for Comment on Certain Information Providers Acting as Investment Advisers. https://www.sec.gov/rules/other/2022/ia-6050.pdf (RFC)

- Morningstar is confident that Morningstar Indexes does not give advice; it merely makes available tools that can be used by those who wish to create or trade investment products. We therefore suggest the SEC give clarity that investment adviser status is not appropriate (and therefore exemptions not necessary) for index providers that demonstrably:
    - create and follow robust, objective, and transparent index methodologies,
    - meet the obligations of the IOSCO Principles for Financial Benchmarks (ideally via an external audit as the meeting of this standard is self-declared), or
    - are regulated under one of the existing benchmark regulations.
- Measures that restrict competition in the United States or allow U.S. access by non-U.S. providers that do not hold the same obligations as U.S. providers are unlikely to serve U.S. investors well. In addition, establishing a regulatory framework in the U.S. governing index providers that service U.S. investors that is substantively different from the existing benchmark regulations would unduly burden the U.S. providers without effectively mitigating the stated concerns about investor protection or market risk. If the SEC feels it must move ahead with regulatory proposals in respect of index providers, alignment with the existing U.K. and EU benchmark regulations would significantly reduce such issues.
- We believe clarifying the obligations on fund boards (that would in turn place appropriate obligations on index providers) may be the most effective and efficient approach to addressing concerns about index providers. In contrast to requiring index providers to register under the Advisers Act, such an approach would align the interests of investors, fund boards, index providers, and the SEC in a transparent and efficient framework that does not dramatically increase the regulatory burden on any market participant but is likely to increase investor protection.

In summary, we support the Commission in potentially regulating certain information providers acting as investment advisers but believe this regulation does not need to extend to registration as an investment adviser. We hope our feedback can be helpful as the Commission moves forward toward a proposed rule. We have summarized our views above and answer some specific questions from the Proposed Rule in Appendix A.

Morningstar thanks the Commission for the opportunity to comment. We believe Morningstar is uniquely positioned to contribute to the discourse on potential benchmarks regulations as a respected data and index provider, as a “third country” recognized benchmark administrator under the U.K. benchmark regulation, as owner of local U.K. and EU index providers directly regulated under both the U.K. and EU benchmark regulations, and as a provider of benchmark regulation services to other index providers. We would therefore be pleased to engage with the Commission on an ongoing basis, leveraging our global organization of experts operating in multiple jurisdictions.

Should you wish to discuss these and other comments, please do not hesitate to contact us as indicated below:

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Sincerely,

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# Appendix: Answers to Selected Questions

## SECTION II. INVESTMENT ADVISER STATUS UNDER THE ADVISERS ACT

### General

**1. Are our descriptions of each information provider accurate and comprehensive?**

*The description of index providers is broadly correct. However, we would make two points:*

*First, the description presumes that index providers are both empowered to use, and exercise, discretion to select and weigh index constituents. Most index providers (although there are some notable U.S. index exceptions) do not typically have such discretion. Instead, index providers generally use robust, transparent and objective methodologies to determine index constituents and weightings, and users of such indexes are able to identify the constituent and weighting changes that index providers implement before those changes are announced or implemented, by following those methodologies. While index providers are usually permitted to exercise discretion in certain circumstances in accordance with such index methodologies, such discretion is solely granted to enable the index provider to handle unusual events when the methodology does not provide express indication of how to handle a particular scenario, such as a complex corporate action or market event. If an index provider were to make arbitrary, discretionary decisions concerning constituents and weightings without publicly disclosing its methodology and/or to serve its own purposes, confidence in that index as an objective barometer and tool would rapidly collapse.*

*Second, in broad terms, index providers administer two types of indexes: broadly constituted indexes that are used solely for "benchmarking" the performance of investment managers and "tradable" indexes whose constituents and weightings are "copied" by index-tracking investment products such as exchange-traded funds. The former activity primarily enables the investor to assess the value of investment advice and/or "active" fund management. The latter activity (tradable indexing) does on the surface appear to have some of the characteristics of advice, however, we argue below that this is a superficial resemblance because the task of the index provider is to identify and weight securities that meet transparently defined criteria, not to assess securities' investment worthiness.*

**What types of potential risks and conflicts of interest does each type of provider present?**

*The risk of inappropriate use of discretion is, we believe, generally effectively managed through the use of robust, transparent, and objective index methodologies. Where methodologies are not sufficiently transparent and/or permit broad use of discretion by the index provider, some risk may exist.*

*A risk owing to the inappropriate exercise of discretion may exist where index owners, or their affiliates, are also the providers of key data used to determine constituents and weightings, such as where an index owner or product provider outsources the administration of indexes to a calculation agent. Here, transparent methodologies, together with appropriately designed and implemented governance processes, can effectively mitigate the risk. For example, Morningstar Indexes (Morningstar or we) ensures that clients who provide data have suitable arrangements to separate staff involved in their index responsibilities from their data provision responsibilities.*

*Morningstar also maintains a comprehensive conflict-of-interest register for its index provider entities. This document covers any actual conflicts as well as potential conflicts and details how both are monitored and, where required, mitigated. Our compliance team works with the business to ensure that staff are trained to recognize and call attention to any potential conflicts, that any new conflicts or potential conflicts are captured on the register, and that compliance with the policy is monitored. The primary* *potential conflicts surround interactions with clients, particularly where clients provide data that is integral to the administration of an index calculated on their behalf.*

## General Questions Related to Information Providers' Status

**2. 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?**

*Morningstar is confident that our indexing activities do not meet the elements of the SEC's definition of an investment adviser. We do not meet the first element: "The person provides advice or issues analyses or reports concerning securities."*

*Rather than providing advice, Morningstar's role is to build and administer indexes or to work with clients to build and administer indexes that either measure the performance of a group of assets or that enable the creation of an investment product that "tracks" that group of assets. In each case, the resulting index is administered in accordance with the applicable methodology. Even in cases in which we work with clients to create custom indexes, we make no judgment, and we make it clear that we make no judgment, regarding the suitability of an investment product based on any of the indexes we administer. Instead, the key decisions of whether to use an index, and on how to use it and to create the investment product, rest on the product creator and investment manager. Additionally, once an index is "live", the periodic decisions on whether to change constituents or weightings are controlled by the published index methodology, not by any investment decision taken at that point, nor by Morningstar Indexes' beliefs or those of its clients.*

*In addition, publishers are excluded from the requirement to register as investment advisers under certain conditions, and we believe Morningstar also meets such conditions. The creation and ongoing maintenance of indexes is impersonal, based on set of asset characteristics which are predefined in the relevant methodology. The indexes are disinterested because they are based on analyses or rules that do not promote a particular security. Finally, the indexes are of regular circulation because they are updated according to published timelines.*

**3. 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? 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?**

*We do not disagree with the stated relevant factors. Nonetheless, we would reiterate that the provision of index constituents and weightings—particularly where robust, transparent and objective methodologies exist for their identification—does not constitute an advisory statement about a security or securities. Instead, it constitutes a statement of the appropriate representation of a clearly defined group of assets. There remains a question of how securities are identified as representing that group of assets and therefore as being potentially eligible for an index. Where this cannot be systematically identified by reference to a published metric, there will always be "edge cases" where it is necessary to employ discretion to place securities. For example, take the classification of companies into an industry classification system such as GICS or ICB. Where a company is active in more than one industry, metrics such as reported segmented revenues are used to identify the appropriate industry in which to classify* *a company. But companies do not necessarily report revenues within segments that correspond to the industries identified by GICS or ICB, particularly in rapidly moving technologies or "thematic" areas such as metaverse involvement, AI technology, and so on. In these cases, suitably trained staff are used to classify companies. This does not constitute advice; it merely identifies an area that requires implementation of appropriate measures by the relevant index provider for effective management of the associated conflicts of interest.*

4. **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"?**

   *Our position is clearly in line with the decision in Lowe, and we believe index provision by Morningstar Indexes meets each of the three defined requirements but is not solely informed by it.*

5. **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?**

   *No response provided.*

6. **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?**

   *The quality of the indexes we administer is of utmost importance to Morningstar Indexes as a responsible index provider. A key element of this is ensuring that index methodologies are robust, transparent, and objective, which empowers index users to make informed decisions on whether to use an index. We expend great effort ensuring that the index methodology used for an index is accompanied by a governance structure that is designed to make certain that the index is maintained and managed in a well-informed, well-overseen way and that oversight is part of that governance structure. This oversight is provided, as mandated by the benchmark regulations and the IOSCO Principles for Financial Benchmarks, by a group of suitably qualified individuals who are independent of the Morningstar Indexes business and are not part of the management or operational Morningstar Indexes teams.*

7. **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?**

*The explosion in the provision of thematic and investment-strategy-based ("smart beta") indexes and self-indexing is driven by an appetite for products that allow investors to achieve more-customized investment goals. The methodology that governs such an index does "include or exclude certain companies, funds, or countries … based on the input of its licensee or user" but only by establishing a mechanism to transparently identify representative securities that meet the index's objective. For example, a methodology may exclude securities that are issued by entities not engaged in the required business, that have insufficient liquidity to be suitable for inclusion in investment funds, or that are issued by entities from countries that are difficult to invest in. Such exclusions relate to categories of securities based on index objectives and are not made on a security-by-security basis. Once the index is operating, such exclusions are also made by the systematic following of the index's methodology not by reference to the licensee/user. And importantly, prices (within indexes) are taken from traded markets not from pricing services.*

8. **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?**

*Part of the value that index users see in the indexes they use, is the absence of discretion in the identification of constituents and weightings—as they are specifically looking for investments that are not managed in accordance with active investment decisions. The providers of index-based products recognize this desire and create and use index methodologies that are robust, transparent, and objective and that limit the likelihood of the index providers' having to exercise discretion (because of complex corporate actions, difficult market environments, and so on) as much as possible.*

9. **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?**

*Most index providers now administer tradable indexes—those designed to be used as the underlying for an investment product. These may be created entirely by the provider or in partnership with clients. The extent of personalization/customization of a tradable index for a client varies, but it is driven more by the requirements of the index than the needs of the client. This is due to the usage; a tradable index is designed to be usable as the vehicle for an investment product, and the client may or may not have expertise in the management of such products, as clients are often experts in a particular data item or a particular area of research—the identification of securities involved in a particular industry, for example. Index providers such as Morningstar therefore may provide calculation services for a client who builds (and are the owners and administrators of) their own indexes, but more often provides services of helping clients identify and codify the themes that they wish to index and of designing the indexes to meet the clients' requirements. It remains the decision of an index licensee whether to use the index as the underlying for an investment product.*

*The table below seeks to show the range of "personalizations" that index providers offer.*

*Table: Responsibility for the various roles that are part of index administration/index provision, where the index belongs to an index provider or to a client*

| | ***Index Ownership*** | ***Administrative Responsibility*** | ***Data provision*** | ***Calculation provider*** | ***Constituent and weighting management*** |
|---|---|---|---|---|---|
| ***Index provider*** | *In some cases* | *In most cases* | *Usually index provider or regulated sources* | *In most cases* | *Always, in accordance with methodology* |
| ***Client*** | *In some cases* | *Infrequently* | *Often combination of index provider and client* | *Infrequently* | *No. (Even where clients provide data, the checking of this data and its incorporation into identifying constituents and weightings is carried out by the index provider, as per IOSCO Principles for Financial Benchmarks and BMR stipulations.)* |

Source: Morningstar Indexes.

10. **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?**

*Index providers, through good practice and regulatory requirement (under the UK and EU Benchmark Regulations, or BMR), allow stakeholders to propose changes to methodologies (but not to individual constituents or weightings) or to request index providers investigate a possible error in calculation. An example of the former would be a proposed change to liquidity rules concerning eligibility after a material change in the underlying market. This would not result in a retrospective change to published index constituents, weightings, or values but can result in a change to the methodology after a further consultation with stakeholders, and would be published in advance of its introduction in a transparent manner. The discovery of an error might result in a correction to a stated index value but is governed by published error correction policies.*

11. **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?**

*Regulated index providers such as Morningstar (regulated under the UK and EU Benchmark Regulations, or BMRs) are required to publish and follow policies (generally known as "cessation and material change" policies) concerning changes to index methodologies that set forth a clear, mandatory process that requires discussion of potential changes with index stakeholders. As we operate in a competitive market as well as a matter of good practice, we always discuss changes to distribution channels or distribution formats well ahead of their introduction. Proposed methodology changes remain subject to public consultation to ensure that stakeholders have a voice, via websites and direct communications to stakeholders via email. Changes to distribution formats and channels are usually discussed directly with clients.*

**12. 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 advisery clients or fund investors?**

*Customers pay for index data according to their use of that data and in ways appropriate to that use. For example, users accessing data "on screen" pay flat fees per user; the use of index data to create index-tracking products is usually charged based on the assets under management in that product.*

*It is certainly the case that data users can pay multiple times for the same data item. Anecdotally, we understand that at least one large index provider can charge a single user six times for the same data item given different usage, whether it be on screen or in databases, in index tracking products or for research, for derivatives use, for benchmarking, and so on.*

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

*We are confident that where index providers use robust, transparent, objective methodologies, follow the IOSCO Principles for Financial Benchmarks, and/or are regulated under one of the various benchmark regulations, they already meet appropriate requirements to obviate the need for being regulated in the United States as an "investment adviser." Various aspects of our responses to this request for information discuss in detail the rationale for our views. We would further emphasize that index providers do not give advice; they merely make available tools that can be used by those who wish to create or trade investment products.*
*We therefore suggest investors would benefit from the SEC clarifying that investment adviser status is not appropriate (and therefore exemptions not necessary) for index providers who demonstrably:*

- *Create and follow robust, objective, transparent index methodologies,*
- *Meet the obligations of the IOSCO Principles for Financial Benchmarks (ideally via an external audit as the meeting of this standard is self-declared), or*
- *Are regulated under one of the existing benchmark regulations.*

## Questions Related to Index Providers

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

*There is a broad range of users of Morningstar's indexes, certainly including the issuers of ETFs and similar products. Other licensees include research houses and academic institutions, providers of actively managed funds and hedge funds that require suitable performance benchmarks, derivatives exchanges (and traders of index derivatives), and data providers that wish to market their data through the publishing of indexes whose performance is driven by their data.*

*There is a substantive difference between the users of broad-based indexes and specialized indexes. Generally, (broad-based) benchmarks are used for benchmarking—the measurement of performance rather than the replication of that (index)* *performance. Such benchmarks are created entirely within the index provider using its own data or data sourced from exchanges or other regulated sources, are generally largely commoditized, are used by many types of users rather than just by investment companies/investment vehicles, and have very competitive, low pricing based on assets under management. Specialized ("custom") indexes are generally created for individual product-issuing clients, are used by only that client (although the resulting investment products are of course more broadly available), and may use data sourced from that particular client. Pricing for these tends to be a combination of up-front fees and ongoing AUM-based fees.*

15. **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?**

*There are substantive differences in how broad-based and customized indexes are created and licensed, but the actual activity performed by the index provider remains the same: the dispassionate creation of a group of assets that meet a particular investment grouping, strategy, or theme in accordance with the applicable methodology. The objective is accurate representation of the relevant group of assets in accordance with the methodology, not the performance of such assets, and the index user retains the right to choose to use an index that is appropriate for use to which they intend to put it.*

*Customized indexes do often use data from unregulated sources or the product issuers (where they are acknowledged experts in a particular thematic example). As a result, it is clearly appropriate that conflicts of interest are effectively managed and appropriate controls exercised by the index provider over that data. Such controls are an integral part of the requirements placed on index providers by the IOSCO Principles for Financial Benchmarks and the existing benchmark regulations.*

16. **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?**

*There is generally no limitation on the dissemination of methodologies. That these methodologies are made publicly available is seen as a distinct advantage of the index-based investment approach. Index values (including related data that is necessary to operate an index-tracking product, such as constituent lists, constituent weightings, and expected changes to these) are generally provided only to licensees, by either sending such data direct, making it available via SFTP, or using permissions controls managed by the data distributor.*

17. **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?**

*Most index providers look to charge AUM-based fees for both benchmarks and specialized indexes, although this model is declining as competition continues to increase in the space and cost pressures further incentivize issuers to require fixed-cost pricing. Where the index provider has specialist knowledge, access to data, or other advantages, it will have more power to require AUM-based feeds. Hence, compensation to index providers is generally driven by their ability to charge them rather than according to index type. The fees achieved vary based primarily on the size of the client and amount of AUM they bring to the product. Although the overall amount will rise as AUM rises, generally the percentage fee charged will fall.*

## Questions Related to Model Portfolio Providers

# SECTION III. IMPLICATIONS OF INVESTMENT ADVISER STATUS

## Registration under the Advisers Act

**18. 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?**

*In our experience, particularly in the EU, administration of the EU benchmark regulation at the national level by each member state's "national competent authority" resulted in, from time to time, substantive differences in the interpretation and implementation of such regulation.*

*Such inconsistency is clearly a less-than-desirable scenario for both the index providers and users. Therefore, an index provider would prefer a uniform regulatory framework that applies to all index providers active in the US and that is administered by the SEC.*

*Any requirement to register would, unsurprisingly, increase costs for incumbents and even more so on potential new competitors. Again, our experience in the EU is that the cost and burden associated with building compliance systems and hiring compliance teams have raised the barriers to entry for potential new competitors (before they can reach profitability or even during the revenue-generating stage), and therefore have discouraged competition and reduced the innovation that would come from new competitors.*

*Additionally, the extra-territorial impact of the EU and UK benchmark regulations means that not only have these regulations limited domestic competition, but also they have reduced access to indexes and index strategies for EU and UK investors, where the providers of indexes have in some instances decided simply to not allow their indexes to be used within the UK and EU. Similarly, the inclusion of index providers under the Advisers Act would likely reduce the number of index providers competing in the US and curtail the access that US investors currently have to innovative new indexes, particularly in the index-based strategies and thematic space.*

## Applicability of the Advisers Act

**19. 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?**

*We would recommend that any change to the status of information providers be designed in a manner to not introduce inconsistencies in the regulatory regime borne by competitors or (ideally) reduce competition, as neither is in the interest of providers or their customers. Introducing exemptions, while in principle may appear as a good idea, is likely to also introduce just such inconsistencies.*

20. **Would requiring providers to register with the SEC and become subject to the regulatory regime under the Act in its current form cause them to alter their business models, consolidate, or exit the market? How would this affect investors?**

    *Clear evidence can be gleaned from the UK and EU benchmark regulation experience, where after some years, many non-UK and non-EU providers of benchmarks have not looked for authorization within those jurisdictions, essentially making their benchmarks unavailable to UK and EU users. Our interactions with these providers (as a provider of regulatory services to them) indicate that this is almost entirely due to the associated cost and burden of compliance. Additionally, there is evidence that various UK- and EU-based information providers have considered moving their activities outside the regulatory jurisdiction. Others have "outsourced" the regulated activities and regulatory responsibility for benchmark administration to external providers. While this is justifiable as it passes the responsibility for governance to entities with very high experience and expertise in the area and perhaps even increases investor protection, it is perhaps not in line with the original intention of the regulations to place those responsibilities on the index owners.*

    *It is also important to note that new developments in indexing and new index products often derive from outside the US, from outside those markets with benchmark regulations, or from small research houses or other companies that do not have the resources to become regulated, especially where there are multiple regulations. These new developments and products therefore would become unavailable to US investors.*

21. **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"). 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?**

    *It is important to note that the EU and UK benchmark regulations are not unique; similar regulations exist in Singapore, Australia, and other jurisdictions. However, these others have one key difference: They only apply to the administration of a very small number of benchmarks that are of particular relevance or criticality to the local market. As the SEC may be aware, we would also* *highlight that European Commission is conducting a public consultation regarding potential reductions in the scope of the EU BMR, and the UK Treasury has discussed the impact of the UK BMR with us.*

*The other significant feature of the above referenced index-specific regulations is that they do not treat index providers as advisers. Rather, the regulations are designed as a measured set of requirements for index providers, recognizing the areas of regulatory priorities, which we share: governance, transparency, and conflict management.*

*As the major US index providers are, as the request for information points out, already "recognized" or "endorsed" under the EU BMR, making any US action aligned with the EU BMR would be welcomed by index providers, including Morningstar Indexes, clients, and end investors. Such an approach would not only avoid imposing undue burden and cost of compliance on providers (such costs would, at least in part, be passed on to users and investors) but also would minimize the risk of market disruption from an end-investor perspective while not impinging on the efficacy of the regulatory action.*

*Regarding components of the BMR that should or should not be applied to index providers in the US, we would strongly recommend that the primary focus should be achieving a level playing field. We would also encourage the SEC to adopt an approach that does not require undue or duplicative administrative burdens on index providers. For example, a US BMR should be built to ensure equivalence existed with other national benchmark regulations and the EU BMR. Also, where a US index provider already has an authorization either directly under another country's BMR, or is recognized or its indexes endorsed, we suggest that its indexes should be available for US use, and the decision of application by the index provider under the US BMR be left to the administrator. Further, a particular nuance of the EU BMR is that it defines "regulated data" as data that is regulated within the EU. We would strongly recommend that any US BMR recognize various other jurisdictions as providing suitably regulated data. Finally, the definition of "index" that is used by the EU and UK BMRs is extraordinarily wide, bringing into scope various reference prices in interest rates and commodities and elsewhere—even weather data in one notable case—and it is possible that the SEC's concerns do not exist in some of these calculated prices.*

*Regarding the creation of barriers to entry, please see our comments to question 18 above.*

## B. Related Investment Company Act Matters

**22. 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?**

*The discussion surrounding this point within the consultation alludes to indexes that are "maintained with an eye to the specific needs of a fund." While we would not dispute that customized indexes are often created and designed with such an eye—so that the funds that track them can be managed in an efficient and cost-effective way in the best interests of investors—we would strongly deny that ongoing maintenance has any discretionary elements that could be considered as maintenance for "the specific needs of (the) fund." As discussed above, there is no flexibility to allow discretionary decisions (those that are not explicitly clear from the methodology) that could be tilted toward the fund's interests. The only discretion that can be used is to resolve a situation where the methodology is not clear. The decision of whether to allow the exercise of discretion is always taken only by index committees, which are aware of their obligations to monitor for conflicts of interest and to follow the intent of the methodology as transparently and objectively as possible, and to fully document the decisions taken.*

*Similarly, we believe we meet the publisher's exemption because we design indexes and publish them on a regular basis, to be used by those that license them.*

**23. 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?**

*Generally, Morningstar contracts with fund managers and with other product issuers. In principle, Morningstar could perhaps contract with an ETF management company, but we do not see any meaningful differentiation that would result from this.*

*As previously discussed, customized indexes are in many cases built from the expertise of both the index provider and the client. However, the most common arrangement does not involve a client's/fund's performing the ongoing management of an index . Typically, once the index's design and methodology are agreed upon, the index provider takes all decisions. However, in some cases, the client is given a role where it has relevant expertise. This is most common when the index is a "thematic" index that comprises securities that represent a common theme, such as cryptocurrency technology providers, or robotics, or the metaverse, and so on. In such cases, the client may be the best source of data as to which securities meet the theme definition, and therefore its input may be used. However, as codified in the UK and EU benchmark regulations and as a matter of best practice, the conflict of interest that arises from such an arrangement is carefully monitored and mitigated. And where the index provider is the administrator of the index, it accepts responsibility for the independent creation of and independence of the data used in the index.*

**24. 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. 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?**

*Morningstar would support this as a preferred alternative to adding index providers to the definition of investment advisers. If individual funds were allowed to specify their own requirements, the administrative burden might become excessive. Hence, Morningstar respectfully suggests that the SEC focus on precisely what documentation it requires from index providers in order to be comfortable that its own concerns as well as funds' concerns are adequately addressed. The creation of such a "standardized document set" would create a level playing field, remove a potentially huge administrative burden from index providers and from fund boards (which would have to gain competence and knowledge in this area), and also be efficient as much of the likely documentation required is public already via the requirements of the BMRs.*