



August 16, 2022

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

**Re: SEC Request for Comment on Certain Information Providers Acting as Investment Advisers  
(No. S7-18-22)**

Dear Ms. Countryman,

Cboe Global Markets (“Cboe”) appreciates the opportunity to respond to the Securities and Exchange Commission (“SEC” or “Commission”) Request for Comment on Certain Information Providers Acting as Investment Advisers (the “Request”).<sup>1</sup> Cboe, through its subsidiaries, is a leading provider of regulated market infrastructure, indexing, market data and analytics, and clearing and investment solutions.

Cboe does not believe that certain information providers, namely index providers and pricing services, should be regulated as investment advisers under the Investment Advisors Act of 1940. **Cboe does not provide investment advice, does not hold itself out as an investment adviser, does not have investment discretion, and is not a fiduciary to any investor.** Cboe does, however, strive to deliver solutions and products that support and empower investors. As an exchange Cboe has created nearly every options product innovation of note (e.g., equity options; index options; LEAPs; FLEX options; and most recently Nanos). As an index provider Cboe pioneered the volatility space with the creation of the Cboe Volatility Index® (VIX Index®), and we continue to advance the indexing space with buffer protection, buy/write, correlation, and dispersion indices. As a data and analytics provider Cboe offers valuation services that enable investors to better navigate options pricing. Further, as an educator,<sup>2</sup> Cboe provides information and tools that enable investors to better understand risk management.<sup>3</sup>

We are concerned that treating indices or pricing services as investment advice would unnecessarily restrict the free flow of market information, stifle innovation, and reduce the availability of tools that aid investors.

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<sup>1</sup> Securities and Exchange Commission, Release Nos. IA-6050; IC-34618 (June 15, 2022), 87 FR 37254 (June 22, 2022).

<sup>2</sup> The Options Institute educates curious minds about the role of an exchange, market structure, derivatives products, and the life cycle of a transaction.

<sup>3</sup> See, e.g., White Paper on Risk Management Overlay Strategies (March 2015), *available at*, [https://cdn.cboe.com/resources/education/research\\_publications/rmoverlaystrategieswp.pdf](https://cdn.cboe.com/resources/education/research_publications/rmoverlaystrategieswp.pdf).

Growth of the index industry has greatly benefitted investors. Asset managers and product issuers are accessing better resources for measuring performance, and costs are being reduced as product issuers incorporate indices in their strategies. Index providers are also leading the way to help investors better assess and navigate ESG and sustainability factors. Imposing investment adviser requirements on index providers would significantly impede this growth and these benefits. As such, we encourage the exercise of caution and a “do no harm” approach to regulatory expansion.

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### Index Providers

Cboe’s index business does not provide investment advice. Cboe is an information provider in its purest form, providing informative and educational tools and resources. Cboe’s indices are rules-based and constructed, maintained, and systematically calculated according to a set of defined methodologies. Indices are not designed to meet the investment objective of any individual licensee. Cboe does not exercise any investment discretion, which is self-evident considering indices are not investable products. Indices are simply point in time market information. Investable products are ETFs, mutual funds, insurance products, etc., which are all regulated and issued by regulated entities that may or may not utilize an index. Non-transparent active ETFs, for example, generally do not seek to track a particular index. These funds adopt their own investment thesis and exercise discretion in carrying out their own investment objectives. The same is true for funds that license and track an index (whether the index is broad-based, widely used, ‘specialized’ or whether the fund is fully or partially replicating the index). The fund exercises complete and total discretion around what securities to buy or sell, not the index provider.

The Request queries whether an index provider is providing investment advice when its index is tracked by a fund that purchases or sells component securities. Just as when a fund purchasing or selling securities because a security no longer meets an exchange’s listing criteria does not translate into the exchange giving investment advice, the trading by a fund in component securities in an effort to track an index does not result in the index provider providing investment advice. Market information acted upon by the market cannot be de facto investment advice. A fund’s response to market information must be its own. This is especially the case given index rebalancing and reconstitution that leads to changes in composition are based on an index’s predefined rules. In advance of index providers publishing the results of a rebalance, market participants can (and do) independently research and determine what changes an index will undergo during the rebalance. Market participants anticipate specific index changes because the index rules are transparent and widely available.

Whether an index is broad-based, narrow-based, widely-used or rarely-used, equity, commodity, strategy or currency, **index providers do not provide opinions on the advisability for any investor to purchase or sell securities that are components of an index.**<sup>4</sup> This would seemingly demonstrate that an index provider does not – in fact or in spirit – meet the definition of an ‘investment adviser’ under the Investment Advisers Act. Even so, out of an abundance of caution index providers have also relied on the ‘publisher’s exclusion’ to further demonstrate that index providers are outside the scope of the Act. Despite suggestions that the publisher’s exclusion may need to be revisited, the Request does not articulate a harm that would justify doing so.

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<sup>4</sup> For decades, as a client and licensee of many major index providers, Cboe has never considered its index licensor as providing Cboe investment advice. It is simply antithetical to the function an index provider performs.

It is not difficult to imagine quite serious unintended consequences that would naturally flow from applying the investment adviser regulatory regime to index providers. Treating index provision as investment advice would have a chilling effect on innovation and the free flow of market information – investors would be worse off for it. Not to mention there could be a detrimental impact on competition.

Lastly, given existing incentives to act transparently, proactively manage conflicts, and promote tools that aid investors, the question that arises is whether any benefits of additional regulation (and the Investment Adviser regime in particular) will outweigh the impacts of increased regulatory burdens, restrictions on the free flow of market information, and reduced innovation. We think not.

#### Pricing Services

The Commission broadly defines pricing services as services that 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.”<sup>5</sup> The implication is that these services may be providing investment advice. Again, as with index providers, an important distinction is that pricing services do not provide opinions on the advisability for any investors to take action. These are educational and informational tools, not advice.

The Options Institute, for example, which has been educating investors for decades, provides tools and information that enable investors to learn and better understand options investing concepts, such as options strategies, volatility, and indeed pricing. In furtherance of these educational efforts the Options Institute provides freely available tools like the options calculator, which generates theoretical prices and Greek values for particular options. It is highly unlikely that the Options Institute would be able to offer such informative educational tools if doing so was considered investment advice.

The Commission also indicates that pricing services “may exercise significant discretion” in that they “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.”<sup>6</sup> Again, the implication is that these practices are dispositive of investment advice. However, as with index providers, pricing services exercise no investment discretion and do not advise clients to take action. In exercising their *business* discretion pricing services will certainly develop business practices such as developing and implementing pricing methodologies, but this cannot be proof of investment advice.

Pricing tools and analytics – black box or open – are not advice. They are informational resources that enable and empower investors to navigate a complicated financial landscape. Treating these services as investment advice would not serve investors. It would hinder the development and availability of tools and analysis that benefit investors. Here again there does not appear to be an articulated harm that would be alleviated by treating pricing services as investment advisers.

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<sup>5</sup> Request at 37256.

<sup>6</sup> *Id.*

Cboe appreciates the opportunity to share its views on the request for comment and welcomes the opportunity to discuss these comments further.

Sincerely,

A handwritten signature in black ink, appearing to read "Angelo Evangelou". The signature is fluid and cursive, with the first name "Angelo" and last name "Evangelou" clearly distinguishable.

Angelo Evangelou  
Chief Policy Officer  
Cboe Global Markets, Inc.