December 27, 2022

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

Re: SEC Proposal on Outsourcing by Investment Advisers (No. S7-25-22)

Dear Ms. Countryman,

Cboe Global Markets ("Cboe") appreciates the opportunity to respond to the Securities and Exchange Commission's ("SEC" or "Commission") Proposal on Outsourcing by Investment Advisers (the "Proposal").[1] The Proposal creates a new rule and related amendments to prohibit SEC-registered investment advisers from outsourcing certain services or functions to service providers unless the investment adviser complies with increased due diligence and monitoring requirements. Cboe is supportive of ensuring all regulated entities perform proper due diligence; however, we are concerned that the Proposal will lead to confusion and increased costs for advisers, service providers, and investors without any meaningful improvement to investor protections.[2]

As acknowledged in the Proposal, the ability for investment advisers to outsource certain functions (such as pricing, valuation or indexing services) is beneficial for investors as it can reduce costs.[3] Moreover, given the existing incentives for registered investment advisers as fiduciaries to act transparently, proactively manage conflicts, and promote tools that aid investors, we note that the Proposal introduces considerable redundancies and question whether any benefits of additional regulation applied to the outsourcing of these functions will outweigh the likely negative impacts. We encourage the current due diligence requirements associated with the Investment Adviser regime to be carefully considered while keeping in mind a "do no harm" approach to the expansion of regulatory requirements with respect to outsourcing. As drafted, we believe the Proposal is unnecessarily burdensome and vague, and could potentially reduce competition and the utilization of quality service providers.

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[1] Securities and Exchange Commission, Release No. IA-6167 (October 26, 2022), 87 FR 68816 (November 16, 2022).
[2] Cboe's concerns (and comments) come from the perspective of a service provider. Cboe has a long history of supporting and advancing indexing both as an index provider (through our subsidiary Cboe Global Indices) and by offering valuation services that enable investors to better navigate options pricing.
[3] Proposal at 68817.

The Proposal is Redundant with Many Current Fiduciary Duties and Requirements of Investment Advisers and Fails to Identify a Problem in Need of Solving

Fiduciary duty requirements already exist for investment advisers. Specifically, the Investment Advisers Act establishes a fiduciary duty for investment advisers that comprises a duty of loyalty and a duty of care and is made enforceable by Section 206 of the Investment Advisers Act. Section 206(4) of the Investment Advisers Act makes it unlawful for any investment adviser to engage in any act, practice, or course of business that the SEC, by rule, defines as fraudulent, deceptive, or manipulative. This combination of a duty of care and duty of loyalty already requires investment advisers to act in the best interest of their clients at all times[4] – rendering aspects of the Proposal redundant while also not furthering investor protection in a meaningful way.

While Cboe nor its subsidiaries are investment advisers,[5] Cboe understands that robust due diligence is already an industry best practice. Investment advisers already conduct due diligence on index providers including related to operations, cybersecurity, business continuity plans, and certain policies (such as, among other things, index governance and error-handling), pursuant to their fiduciary duty. Further regulation in this regard would not necessarily result in improved oversight, but very well could result in increased costs and inconsistent application. Adding burdensome requirements that appear duplicative with existing obligations is a concern – especially because the Proposal fails to clearly articulate a problem in need of solving.

The Proposal is Overly Burdensome and Vague and Will Result in Negative Consequences Without Meaningfully Advancing Investor Safeguards

The definition of a "covered function" in the Proposal has two parts: (1) a function or service that is necessary for the adviser to provide its investment advisory services in compliance with the Federal securities laws, and (2) that, if not performed or performed negligently, would be reasonably likely to cause a material negative impact on the adviser's clients or on the adviser's ability to provide investment advisory services. While Cboe appreciates that the proposed rule attempts to provide interpretative latitude which can be beneficial in certain circumstances, we are concerned that such latitude, in this instance, will have negative downstream consequences on third party service providers as a result of differing interpretations regarding what constitutes "covered functions" by investment advisers along with differing demands/requirements that flow from those interpretations. This inconsistent application will create confusion and introduce unnecessary burdens on third party service providers. Such interpretative inconsistency is not in the best interest of investors as it can lead to confusion and increased costs that are often ultimately borne by investors.

Additionally, since the Proposal is broad and lacks clear guidance in many respects, investment advisers may take a reflexive and overly expansive view of "covered functions." That would undoubtedly add process, burden, and cost when it is unnecessary for the protection of investors. We are concerned that the Proposal will have negative impacts on competition as it will be onerous on both investment advisers as well as service providers. The increased burdens and costs associated with compliance could increase

[4] Proposal at 68819.

[5] 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.

barriers to entry for new and innovative entrants, and potentially lead to consolidation[6] in the industry - both of which would negatively impact competition while not meaningfully advancing investor safeguards.

Cboe is also concerned with the breadth of the Proposal in its extension to include subcontractors of third parties. The Proposal would require that the investment adviser determine whether the service provider has any subcontracting arrangements that would be material to the performance of the covered function. In the event of such a subcontracting arrangement, the Proposal would also require that the adviser identify and determine how it will mitigate and manage potential risks to clients or its ability to perform advisory services in light of any such subcontracting arrangement. This requirement could also lead to meaningful inconsistencies between advisers and could discourage use of efficient and innovative subcontractors. It could unnecessarily restrict the business operations of service providers without resulting in any meaningful benefit to investors.

We also query what other unintended consequences could result from the Proposal if adopted and how investors would be better protected – e.g., does the public disclosure of service providers in Form ADV create unnecessary loyalties and make it more difficult for investment advisers to change service providers in an agile manner? Would the Proposal introduce unintended litigation implications for service providers? Does usage of a specific third party for a specific purpose then imply an overall endorsement of said service provider by the investment adviser?

Finally, regarding pricing services, the associated costs and burdens with compliance could hinder the development and availability of important tools and analysis that benefit investors. Commissioner Uyeda alludes to this as well in his statement as he notes that "one possibility is that the burdensome nature of the service provider oversight requirements could cause certain service providers to cease doing business with smaller advisers altogether."[7] Cboe fears the Proposal will potentially result in harm to investors as innovative and valuable pricing services may pull back on offerings to some or all clients.

Index Providers, Pricing Service Providers, and Pricing Tools/Analytics Should Not be Explicitly Called Out as Covered Functions by Any Final Rule

In Question 8, the Commission queries whether the proposed rule should apply to index providers, model providers, valuation agents, or other service providers that may be central to an adviser's investment decision-making process. We assume the question is meant to ask whether those entities should be deemed covered functions. Cboe does not believe it is appropriate to explicitly call out index and pricing service providers as being central to an adviser's investment decision-making process. Index providers of

[6] Commissioner Peirce raised a similar point in her statement that "advisers will face less risk of second-guessing by the Commission if they pick service providers that everybody else is using. Tilting the regulatory field in favor of large providers raises barriers to entry and limits the opportunities for enterprising new firms trying to break into the business." *See* Commissioner Hester Peirce, Outsourcing Fiduciary Duty to the Commission: Statement on Proposed Outsourcing by Investment Advisers (October 26, 2022), available at https://www.sec.gov/news/statement/peirce-service-providers-oversight-102622 ("Peirce Statement").

[7] *See* Commissioner Mark Uyeda, Statement on Proposed Rule Regarding Outsourcing by Investment Advisers (October 26, 2022), available at https://www.sec.gov/news/statement/uyeda-statement-service-providers-oversight-102622 ("Uyeda Statement").

both standardized and bespoke indices should not be explicitly called out as covered functions in any final rule, as they may not be central to an adviser's investment decision making process.

Pricing service providers should also not be explicitly called out by any final rule in light of the recently enacted SEC Rule 2a-5[8] which requires fund boards to oversee and evaluate any pricing services used. Again, as with index providers, pricing services exercise no investment discretion and do not advise clients to take action. Similarly, pricing tools and analytics are informational resources that enable and empower investors to navigate a complicated financial landscape. Treating these services as covered functions might hinder investor access as the associated costs and burdens of compliance could greatly deter the development and availability of these important tools.

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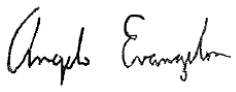
Cboe appreciates the opportunity to share its views on the Proposal and welcomes the opportunity to discuss these comments further.

Sincerely,



Angelo Evangelou
Chief Policy Officer
Cboe Global Markets, Inc.

[8] The rule establishes requirements for satisfying a fund board's obligation to determine fair value in good faith for purposes of the Investment Company Act. The rule requires a board or its valuation designee to assess and manage material risks associated with fair value determinations; select, apply and test fair value methodologies; and oversee and evaluate any pricing services used.