January 23, 2023

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Outsourcing by Investment Advisers (File No. S7-25-22)

Dear Ms. Countryman:

Intercontinental Exchange, Inc. ("ICE"), on behalf of itself and its subsidiaries, appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's ("Commission" or "SEC") Proposed Rule on Outsourcing by Investment Advisers ("Proposal").[1]

ICE provides market infrastructure, data services and technology solutions to a broad range of customers including financial institutions, corporations and government entities. Through its Fixed Income and Data Services segment, ICE provides, among other things, fixed income pricing, reference data, and corporate actions information designed to support financial institutions' and investment funds' pricing activities, securities operations, research, and portfolio management. We produce daily evaluations for approximately 3 million fixed income securities spanning approximately 150 countries and 80 currencies, including sovereign, corporate and municipal bonds, mortgage, and asset-backed securities as well as leveraged loans. ICE's reference data complements the evaluated pricing by providing our clients a broad range of descriptive information, covering millions of financial instruments. A subsidiary of ICE, ICE Data Pricing & Reference Data, LLC, is registered with the SEC under the Investment Advisers Act of 1940 ("Investment Advisers Act"), for its evaluated pricing and other advisory services.

Another subsidiary of ICE, ICE Data Indices, LLC ("IDI"), is an index provider. IDI's extensive global index offering includes over 6,000 fixed income, equity, currency, mortgage, and volatility indices that are used by market participants around the world. IDI adheres to the IOSCO Principles for Financial Benchmarks published by the International Organization of Securities Commissions (the "IOSCO Principles") and has published a Statement of Adherence with the IOSCO Principles that has been reviewed by ICE's external auditor. IDI is also recognized as a third country benchmark administrator with the UK Financial Conduct Authority (the "FCA") and is subject to the UK's Benchmark Regulation.

I. Introduction

In 2022, the SEC published multiple rule proposals and a request for information, all addressing aspects of the oversight and use by investment advisers of certain service providers, including the proposals on Cybersecurity Risk Management for Investment Advisers, Registered Companies, and Business

[1] https://www.sec.gov/rules/proposed/2022/ia-6176.pdf

Development Companies,[2] Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices,[3] and the Request for Comment on Certain Information Providers Acting as Investment Advisers.[4] Commenters' responses to these rule proposals questioned their necessity, the risks on which they are based, the requirements proposed to address these risks, and the benefits to investors, and voiced concerns over the challenges these rule proposals pose to market participants.[5] Likewise, we question the necessity and appropriateness of this Proposal. Both as a Registered Investment Adviser and as a service provider to investment advisers, ICE believes that the Proposal would implement a prescriptive framework, with major implementation challenges and onboarding and economic risks, and could undermine investor protections.

II. Rule is Unnecessary to Address the Risks Associated with Outsourcing

Investment Advisers are subject to a fiduciary duty and other obligations, whether they perform functions themselves or outsource them. Consequently, under the current legal framework, Investment Advisers are required to oversee third parties to whom they outsource certain functions. This Proposal places new burdens when outsourcing that assume that when an Investment Adviser performs functions directly, the same risks do not exist. In fact, these risks may be greater, for example, if the Investment Adviser does not have the level of knowledge or expertise to perform the function as the third party. By increasing the costs and scrutiny requirements associated with outsourcing to third party service providers the SEC would discourage their use and likely increase risks that Investment Advisers choose to perform functions themselves that they would be better performed if outsourced. Furthermore, these additional requirements would disproportionately harm smaller asset managers that may not have the knowledge and expertise in house, thereby potentially reducing competition for investment advisory services, which would ultimately harm investors. The SEC does not consider the risks and costs associated with the incentive the Proposal would create to insource functions.

III. The Proposal Requires a Level of Disclosure that Can Put the Investment Adviser at Risk

A. *Proposed Item 206(4)-11(a)*

Proposed Item 206(4)-11(a) sets out minimum requirements that need to be met by advisers prior to outsourcing "covered functions" to "service providers." While the rule recognizes that a service provider can be a "related person" and that the scope of functions covered by the definition of "covered functions" is broad, it sets the same minimum requirements for all service providers, regardless of the relationship to the adviser or the type of service provided. For example, as it relates to an affiliate that is part of the same organization and under the same control structure, we agree that oversight is required to ensure compliance with the Advisers Act requirements. However, the risks associated with

---

[2] https://www.sec.gov/rules/proposed/2022/33-11028.pdf
[3] https://www.sec.gov/rules/proposed/2022/ia-6034.pdf
[4] https://www.sec.gov/rules/other/2022/ia-6050.pdf
[5] For example, see Eric J. Pan, *The SEC's Rules Are Getting Unreal,* The Wall Street Journal (October 31, 2022) *available at https://www.wsj.com/articles/sec-securities-exchange-commission-investment-swing-reporting-requirements-cybersecurity-11667246912?page=1*

outsourcing tasks to such an affiliated service provider are different from those when outsourcing to an unaffiliated service provider and, therefore, the due diligence and monitoring should be tailored as well.

The ability of an adviser to perform due diligence and monitoring over the different types of outsourced functions also depends on the type of function. For example, there is hardly any ability to negotiate agreements with cloud data providers or perform customized due diligence over them and the expectation is that users of such services will rely on independent certifications or attestations in lieu of specific requirements such as those included in the Proposal. The expectation that service providers such as cloud data providers would agree to the requirements set forth in Proposed Item 206(4)-11(a) and specifically, obtaining the reasonable assurances set forth in Item 206(4)-11(a)(v) and (vi) is unrealistic. The prescriptive requirements proposed would not allow for these differences between different types of providers to be taken into account in connection with the type of due diligence and oversight that may be appropriate in each case. ICE is concerned with the overly prescriptive requirements set out in the Proposal and the inability to successfully and meaningfully implement them, and recommends that the Commission replace those requirements with a more general requirement similar to the approach taken in Rule 2a-5 with regard to Evaluated Pricing Services.[6]

B. *Proposed Item 204-2(1)*

ICE strongly opposes the requirement under proposed item 204-2(1) to allow staff of the Commission to access the records that are stored electronically through computers or systems during the required retention period. Electronic record retention systems especially in large organizations may be used by multiple entities within the group and can be complex. Additionally, the proposed requirements would create information security risks that are contrary to goals of protecting the records of customers of regulated entities and, for this reason, are inconsistent with ICE policies and industry best practices related to Identity Access Management ("IAM") / enforcing of individual accounts to sensitive systems, inability to obtain confirmation of required security awareness training for access to those systems, and Data-Loss Prevention ("DLP") controls. To protect our systems and records, ICE's DLP system is designed to block the download of content by individuals outside of our organization, a security protection that would not be permitted by the Proposal. For these reasons, we believe that the staff of the Commission should not have access to regulated entities' systems. Commission staff may obtain records upon request in accordance with Rule 204-2.

C. *Form ADV Part 1A Proposed Item 7.C and Section 7.C of Schedule D*

ICE opposes the requirement to disclose the level of detail in Form ADV Part 1A as proposed. While ICE agrees that the adviser should maintain a list of its service providers that contains the type of information outlined in proposed section 7.C on Schedule D, it is extremely concerned with making this information public because of the opportunity such disclosure would provide to nefarious actors to exploit this data as part of their open-source intelligence ("OSINT") activities. For this reason, we, for example, have a policy that prohibits our vendors from disclosing that we are users of their service. This list would open not only registered investment advisers to the risk of targeted, sector-wide supply chain

[6] See Rule 2a-5 Fair Valuation Determination and Readily Available Market Quotations section 2a-5(a)(4).

attacks, but also those advisers' affiliates, partners, and customers. In addition to the public availability of information around financial services industry service providers increasing the risk for sector-wide supply chain attacks (such as the SolarWinds attack of 2020)[7], it would also increase the risk of business email compromise at either firm or service provider, as verified knowledge of commercial relationships between companies would be widely available. Public availability of service provider information would also increase the potential for more sophisticated, and thus more likely to be successful, social engineering exploits. In summary, a requirement to disclose the proposed level of detail would significantly compromise advisers' cybersecurity posture. ICE believes these risks clearly outweigh the benefits the Commission has articulated for making service provider information public.[8] Specifically, public availability of this information is not necessary for the Commission to quickly identify all advisers utilizing certain service providers and analyze the potential breadth of the impact from a market event associated with such service provider because the Commission could require advisers to maintain this information and make it available to the Commission upon request.

IV. Additional risks and undesirable outcomes that can result from this Proposal

A. *Insourcing Risks*

We agree with the SEC that "*clients also can benefit from outsourcing, including through better quality of service, lower fees (if the adviser passes along any cost savings), or some combination.*"[9] Although the Proposal highlights various risks and potential conflicts of interest that may arise from outsourcing to a third party service provider certain functions defined by the Proposal as "covered functions," the SEC generally ignores significant benefits from outsourcing, such as a reduction in potential conflicts of interest by, for example, using an independent source to perform the function (e.g. an index provider or pricing vendor).

The extensive nature of the proposed requirements on registered investment advisers that outsource would incentivize advisers to insource functions and services which they may be less equipped than a third party to perform. There is little doubt that the costs associated with renegotiating existing agreements and implementing new policies, procedures and programs for the oversight of their service providers would discourage such outsourcing. Further, advisers may be required to insource certain functions because service providers will not agree to certain requirements included in the Proposal, such as the reasonable assurances the adviser must obtain from the third party as required in Proposed Item 206(4)-11(1)(v) and 206(4)-11(1)(vi). At best, the costs to advisers of outsourcing would increase as the number of service providers willing to agree to new contract terms would fall and those service providers willing to agree to the new terms would increase their fees. As a consequence, these rules could have material adverse impacts on advisers' clients through quality and costs (i.e. the loss of independence and expertise as well as the economies of scale from leveraging a specialized service provider). Investor protection is the ultimate purpose of the Advisers Act and ICE does not believe that insourcing services that otherwise would have been outsourced is in the best interest of investors.

---

[7] SolarWinds hack explained: Everything you need to know, https://www.techtarget.com/whatis/feature/SolarWinds-hack-explained-Everything-you-need-to-know

[8] https://www.sec.gov/rules/proposed/2022/ia-6176.pdf, pages 15,19,74,75

[9] https://www.sec.gov/rules/proposed/2022/ia-6176.pdf, Page 8.

B. *Economic Analysis*

As a service provider who offers several different functionalities proposed to be in scope of these new requirements, we observe that the economic analysis section fails to capture a likely industry cost. Our clients currently conduct various degrees of due diligence of our services and operations based on the client's assessment of the significance of the services provided to the adviser's business. The Proposal would require all of our investment adviser clients to simultaneously ramp up their due diligence efforts and oversight of the services we provide, regardless of the scope of the relationship or the importance of the services to the adviser's business. In response to the due diligence that clients would be required to perform, we would need to consider meaningfully reevaluating our staffing needs to respond to the influx of due diligence questionnaires, onsite visit requests, and other requests designed to monitor our performance. These costs would be passed through to our clients and borne as higher adviser expenses for investors. The Commission does not consider these costs associated with the Proposal.

Another cost the proposal fails to capture relates to the increased risk the Proposal imposes on service providers. As a service provider, we have contracts with thousands of clients, a combination of registered investment advisers as well as other entity types and make efforts to streamline and standardize our contracts and contracting processes. Our contracts with clients reflect the risk allocation acceptable for the parties and the commercial terms are derived from that. The Proposal would increase the risk to service providers and, thus, is likely to increase fees service providers charge. The Proposal is also likely to lead to some service providers being unwilling to continue to provide services to certain Advisers, particularly where the service provider (such as a cloud provider) contracts with multiple industries and determines that this risk profile it is no longer economically feasible under the Proposal's requirements.

V. Pricing Service Providers should be Exempt from the Rule

ICE also believes that the SEC's inclusion of pricing services providers in this proposed rule would be inappropriate. With the adoption of SEC Rule 2a-5 in December 2020,[10] the industry has very recently implemented new policies and procedures, tools and datasets specifically designed to assist Investment Companies in their oversight of the fair value determination process. Rule 2a-5 includes requirements regarding oversight of third party providers of evaluated pricing services which have taken into account the nuances and uniqueness of providing these types of pricing services in connection with the fair value determination processes.

In the Proposal the SEC acknowledges that oversight of evaluated pricing services providers is currently covered under Rule 2a-5 and that these obligations may be exercised by investment advisers acting as the "valuation designee" to the fund. The Proposal would add obligations to pricing service providers such as the reasonable assurances the adviser must obtain from the third parties. We do not believe that this Proposal brings any incremental benefits with regards to these valuation processes. The work done by evaluated pricing service providers, like ICE, to accommodate the due diligence and oversight requirements under Rule 2a-5 can benefit all our clients and in fact, documentation that we developed

[10] https://www.sec.gov/rules/final/2020/ic-34128.pdf (Good Faith Determinations of Fair Value)

to address the needs of our investment company clients are available to clients that subscribe to our evaluated pricing services regardless of their classification. Before imposing more requirements on evaluation service providers, ICE believes that the SEC should analyze the benefits that Rule 2a-5 brings to the industry and investors.

VI. Index Providers that adhere to the IOSCO Principles for Financial Benchmarks should be exempt from the Rule

In the Proposal, the SEC states that it believes "that the services of an index provider, if retained by an adviser for purposes of formulating the adviser's investment advice, would meet the first element of the definition of a covered function because such services would be necessary for the adviser to provide investment advice to its client."[11] The Proposal further distinguishes between the licensing of a bespoke index created specifically for the adviser and a commonly available index.[12] ICE believes that the proposed distinction between a custom index and a commonly available index in this context is misplaced and it is the intended use of the index that should determine whether the service provided by the index provider would meet the covered function definition.

Custom indices, in most cases, are created by applying a filter or exposure caps on an existing index to better reflect or measure the customer's investment interests. Many users of these custom indices license them for use as a comparison benchmark for performance of a portfolio and not to inform the adviser's investment decisions. Clients would typically ask for these filters or exposure caps to be applied if their investment policy is not entirely consistent or correlates with available broad-based indices (e.g. if the index covers more countries in a geography than the countries covered by the adviser's policy). They would do that to be able to provide a more apples to apples performance attribution. In that sense, ICE disagrees with the Commission's assertion that any licensing of a custom index should automatically be deemed a covered function. ICE believes that the manner in which the index is used by the adviser should determine whether the function is a covered function or not.

In addition, ICE is concerned with the overly prescriptive nature of the Proposal with regard to index providers. As described in our comment letter to the Request for Comment on Certain Information Providers Acting as Investment Advisers,[13] ICE believes that the IOSCO Principles for Financial Benchmarks sufficiently address the concerns raised by the SEC in the request for comments as well as in this Proposal relative to index providers. As such, ICE recommends that the SEC exempt index providers that adhere to the IOSCO principles and that publish an audited compliance statement, from the requirements of the rule.

VII. The Proposal Should not be Based on the Anti-Fraud Provisions in Section 206 of the Investment Advisers Act

ICE believes that grounding the Proposal in Section 206 of the Investment Advisers Act is misplaced.

---

[11] https://www.sec.gov/rules/proposed/2022/ia-6176.pdf Page 23
[12] https://www.sec.gov/rules/proposed/2022/ia-6176.pdf Page 26
[13] https://www.sec.gov/comments/s7-18-22/s71822-20137875-308217.pdf

Section 206(4) states that it is unlawful for an adviser "to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." The purpose of the rule is to generally protect investors by as stated by SEC Chair, Gary Gensler, "requiring that investment advisers take steps to continue to meet their fiduciary and other legal obligations."[14] The connection between the purpose of this Proposal and fraudulent, deceptive or manipulative activity by advisers is tenuous.

VIII. The Compliance Date Proposed is too short

The Proposal suggests that registered investment advisers would be required to comply with the Proposal, ten months after any final rule's effective date. Given the comments provided above with regard to the anticipated challenges associated with the Proposal, we anticipate that the effort to identify all covered functions and providers that fall into the definition of service providers and that the due diligence requirements and contract negotiations would require additional significant amount of time. Further, as investment advisers may need to insource certain functions that their service provider is no longer willing to provide, a multi-year implementation timeframe would be necessary

* * * * *

ICE appreciates the opportunity to present its perspective and views on the Commission's Proposal. Should any questions arise about the content of this letter, please do not hesitate to contact me.

Respectfully submitted,

Amanda Hindlian
President, ICE Fixed Income and Data Services

[14] See Gary Gensler, "Statement on Proposed Amendments Regarding Service Providers Oversight" (October 26, 2022) *available at* https://www.sec.gov/news/statement/gensler-statement-service-providers-oversight-102622