MEMORANDUM

To: American Association for Justice and Healthy Markets Association
From: Gupta Wessler LLP
Date: June 10, 2026
Re: Index-fund advisers' fiduciary duties regarding SpaceX IPO

This legal memorandum describes our analysis of the fiduciary obligations of investment advisers to index-tracking funds in connection with SpaceX's anticipated initial public offering (IPO) and its expected inclusion in the Nasdaq-100 and Russell 1000 indices.

The anticipated SpaceX IPO presents index-tracking fund advisers with an important fiduciary decision. SpaceX is poised to enter the Nasdaq-100 and the Russell 1000 on accelerated timelines under newly relaxed index methodologies, with a limited float, an extraordinary valuation, concentrated founder control, and highly unusual bylaws that raise significant investor-protection concerns by purporting to restrict shareholder remedies. Taken together, these features require an adviser to a fund tracking these benchmarks to undertake an independent analysis of whether SpaceX inclusion is consistent with the fund's investment objective, the representations in the fund's offering documents, and the adviser's fiduciary duty.

This memorandum addresses the legal obligations of investment advisers to funds that track these benchmarks and how those obligations apply to SpaceX's anticipated index inclusion. The adviser's fiduciary duty under Section 206 of the Investment Advisers Act requires an independent analysis whenever circumstances change in ways that may affect the appropriateness of mechanical index tracking. That duty cannot be outsourced to the index provider and is reinforced by the discretion that the adviser's own offering documents typically reserve. As applied to SpaceX, the changes to the Nasdaq and FTSE Russell index methodologies and the distinctive features of the company present an unusually strong case for that analysis. The adviser need not reach any predetermined result. But they should make and document a reasoned decision addressing the changed index methodologies, the risks presented by SpaceX's securities, and whether fund disclosures remain accurate.

Our assessment is that an adviser who includes SpaceX without undertaking an independent analysis of whether the investment is consistent with the fund's investment objectives may be exposed to liability for breach of fiduciary duty.

2001 K Street, NW, Suite 850 North, Washington, DC 20006
O 202.888.1741 / F 202.888.7792
GUPTAWESSLER.COM

I. Index tracking does not eliminate fiduciary judgment.

The Investment Advisers Act establishes a federal fiduciary duty for investment advisers, including the advisers to mutual funds, ETFs, and other pooled vehicles that track securities indices. *See* 15 U.S.C. § 80b-6; *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (holding that "Congress recognized the investment adviser to be" a fiduciary); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) ("§ 206 establishes federal fiduciary standards to govern the conduct of investment advisers."); Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33,669, 33,669 (July 12, 2019) ("Fiduciary Interpretation") ("Under federal law, an investment adviser is a fiduciary.").

The fiduciary duty includes both a duty of care and a duty of loyalty. *See* Fiduciary Interpretation, 84 Fed. Reg. at 33,671. The duty of loyalty requires that an adviser "not subordinate its clients' interests to its own." *Id.* at 33,675. The duty of care includes the duty to provide advice in the client's best interest, the duty to seek best execution where the adviser is responsible for selecting broker-dealers, and the duty to provide advice and monitoring at a frequency that is in the client's best interest. *Id.* at 33,672–75. The duty of care also requires a "reasonable understanding of the client's objectives." *Id.* at 33,673. For a fund client, those objectives are ordinarily reflected in the fund's investment mandate, prospectus, statement of additional information, investment policies, and applicable legal and regulatory constraints. And the SEC has stated that an adviser's reasonable belief that their advice is in the client's best interest requires a "reasonable investigation into the investment" sufficient to avoid advice based on materially inaccurate or incomplete information. *Id.* at 33,674.

These principles apply to an index-tracking fund. An index mandate shapes the adviser's duty but does not eliminate it. The adviser's decision to implement an index change, trade into newly added securities, manage tracking error, and determine whether to use replication, representative sampling, substitutes, or other disclosed techniques remain fiduciary decisions. As the SEC has emphasized, an adviser's fiduciary duty follows the contours of the agreed relationship, but "the relationship in all cases remains that of a fiduciary to the client," and the adviser's federal fiduciary duty may not be waived. Fiduciary Interpretation, 84 Fed. Reg. at 33,671–72.

The duty to monitor likewise does not end with initial index selection or portfolio construction. The SEC has stated that, where an adviser has an ongoing relationship with a client and is compensated with a periodic asset-based fee, the adviser's duty to provide advice and monitoring will be "relatively extensive," consistent with the nature of the relationship. Fiduciary Interpretation, 84 Fed. Reg. at 33,675. That understanding accords with ordinary

fiduciary principles. As the Supreme Court has explained in the ERISA context, common-law trust principles recognize "a continuing duty to monitor trust investments and remove imprudent ones," separate from the duty to exercise prudence in selecting investments at the outset. *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015). When circumstances change in ways that bear on the appropriateness of mechanical implementation—such as a significant change in index methodology, a compressed index-inclusion timeline, or the addition of a newly public issuer with materially unusual liquidity, valuation, governance, or shareholder-rights characteristics—the adviser must evaluate whether mechanical implementation remains consistent with the fund's mandate and the fund's best interest.

Nor may an adviser substitute the index provider's judgment for their own. The SEC has recognized that index providers compile indices, create methodologies, determine constituents and weightings, and may exercise significant discretion by adding or removing constituents or modifying weightings. *See* Request for Comment on Certain Information Providers Acting as Investment Advisers, 87 Fed. Reg. 37,254, 37,255 (June 22, 2022). But that practical reality does not shift, let alone eliminate, the adviser's independent fiduciary duty. The adviser remains the regulated fiduciary engaged to implement the fund's investment strategy. That conclusion is easiest to see at the extremes. For instance, if an index provider added a sanctioned issuer, an issuer the fund could not lawfully hold, or a security whose inclusion would cause the fund to violate a fundamental policy, no adviser could defend the purchase on the ground that the index required it.

The fund's own disclosure documents typically reinforce the need for judgment. Index-fund prospectuses generally do not promise automatic, literal, full replication in all circumstances. They often state that the fund "seeks" to track an index, may use replication or representative sampling, may not hold every index constituent, may overweight or underweight securities, or may otherwise deviate from strict replication for liquidity, transaction-cost, tax, regulatory, operational, or other reasons. Where a fund has told investors that the adviser retains discretion to depart from mechanical replication in appropriate circumstances, the adviser should be prepared to show that it considered whether those circumstances existed.

Those disclosures are especially important here. Existing prospectus language may have been drafted against an assumed index regime in which the company would season as a public company, demonstrate certain financial characteristics, or enter an index over a less compressed period. If the index provider changes those assumptions, the adviser should consider whether the fund's disclosures remain accurate as applied to the new regime. Under Section 34(b) of the Investment Company Act, it is unlawful for any person to make an "untrue statement of a material fact" in a registration statement or other covered document, or to omit

a fact necessary in order to prevent the statement made from being materially misleading. 15 U.S.C. § 80a-33(b). And Section 206(2) of the Advisers Act prohibits the adviser from engaging in "any transaction, practice, or course of business which operates as a fraud or deceit upon any client." 15 U.S.C. § 80b-6(2). Where the assumptions underlying a fund's disclosures no longer hold, the adviser bears responsibility for assessing whether updates or other corrective steps are required.

The adviser is not required to reach any predetermined conclusion, but it must undertake an analysis, document its reasoning, and be prepared to demonstrate to the SEC, fund directors, and investors that the conclusion they reached was the product of deliberate fiduciary judgment. If the analysis identifies a material concern, the adviser must determine whether to exercise its reserved discretion, update the fund's disclosures, or take other action consistent with its fiduciary obligations.

II. SpaceX's IPO presents an unusual index event.

SpaceX's anticipated inclusion in several major indices presents precisely the kind of non-routine event that will likely require an adviser to exercise independent fiduciary judgment. Two categories of features distinguish this situation from the ordinary index addition. First, major index providers have changed their inclusion methodologies in ways that accelerate the inclusion of newly public mega-cap companies and relax criteria that previously operated as investor-protection screens. Second, SpaceX itself presents characteristics that differ materially from ordinary constituents of those indices: a limited initial float, an extraordinary valuation relative to current revenues and earnings, concentrated founder control, and bylaws that purport to restrict shareholder remedies. The combination of these features creates an unusually strong case that advisers must make a deliberate fiduciary judgment.

A. Fast-entry rules significantly change the index-tracking decision.

Nasdaq and FTSE Russell have recently adopted methodology changes that accelerate the inclusion of newly public mega-cap companies. Their stated rationales and contemporaneous reporting link these changes to the anticipated wave of mega-cap IPOs, including SpaceX.[1]

[1] *See, e.g.*, Echo Wang & Anirban Sen, *SpaceX accelerates IPO timeline, targets June 12 listing on Nasdaq, sources say*, Reuters (May 15, 2026), https://www.reuters.com/world/spacex-accelerates-ipo-timeline-targets-june-11-pricing-nasdaq-2026-05-15/.

The Nasdaq-100 methodology now contains a "Fast Entry" process under which a newly public company may be evaluated as of the end of its seventh trading day and typically added after fifteen trading days if its full market capitalization ranks within the top forty current index constituents.[2] Nasdaq also states there is no minimum free-float criterion. FTSE Russell has also adopted a fast-entry rule under which eligible large companies may be added after the close of the fifth trading day following initial listing.[3]

S&P Dow Jones Indices recently reached a different conclusion. S&P considered, but ultimately declined to adopt, proposed exceptions to its seasoning period, minimum investable weight factor, and financial-viability screens based on market capitalization.[4] A newly public company generally must still trade on an eligible exchange for at least twelve months before S&P 500 inclusion, must satisfy the minimum investable weight requirement, and must have positive GAAP net income for the most recent quarter and the sum of the most recent four quarters. S&P concluded that exceptions to these requirements "should not be granted solely based on market capitalization" and that retaining them "preserves core index principles."[5]

The changes adopted by Nasdaq and FTSE Russell relax the seasoning requirements designed to ensure that index inclusion would occur only after the market had a meaningful opportunity to price newly public securities. Compressing that period increases the risk that index-linked funds will be required to trade into a predictable, concentrated demand event before the market has developed reliable information. This is especially true in the case of SpaceX given the company's small initial float. Shortening the seasoning period could leave index investors bearing losses after any market correction. *See, e.g.*, *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556, 576–77 (S.D.N.Y. 2008) (relying on SEC regulatory history and trading-volume data to conclude that, during the twenty-five-day post-IPO period, the market for a newly public security "has likely not yet become 'efficient'" because information may not yet be broadly disseminated and aftermarket trading may not yet have stabilized).

---

[2] *Nasdaq-100 Index Methodology Changes: Frequently Asked Questions*, Nasdaq Global Indexes (May 2026), https://indexes.nasdaqomx.com/docs/2026_May_NDX_Changes_FAQ.pdf.

[3] *FTSE Russell introduces IPO Fast Entry enhancements for Russell US Indexes*, London Stock Exch. Grp. (May 26, 2026), https://www.lseg.com/en/media-centre/press-releases/ftse-russell/2026/ftse-russell-introduces-ipo-fast-entry-enhancements-for-russell-us-indexes.

[4] *S&P Dow Jones Indices Consultation on Treatment of MegaCap Companies—Results*, S&P Dow Jones Indices (June 4, 2026), https://press.spglobal.com/2026-06-04-S-P-Dow-Jones-Indices-Consultation-on-Treatment-of-MegaCap-Companies-Results.

[5] *Id.*

These methodology changes create material new facts that will likely trigger an adviser's obligations. Funds tracking these benchmarks were generally marketed and operated against the prior index regime. Their prospectuses, statements of additional information, and marketing materials may not have been drafted to address immediate or near-immediate inclusion of a newly public company with limited float and no sustained public-company financial record. The benchmarks have now changed character. An adviser therefore cannot assume that the fund's existing investment thesis, risk disclosures, and tracking methodology remain accurate and appropriate as applied to the changed index regime. Moreover, S&P's considered judgment that existing requirements are consistent with "substantial market coverage and sector balance" and with the indices' role as "representative and investable benchmarks" underscores the need for Nasdaq- and Russell-tracking funds to independently evaluate whether mechanical inclusion is prudent.[6]

B. SpaceX's governance and shareholder-remedy provisions likely will require specific review.

Beyond the methodology changes, SpaceX itself presents characteristics that will likely require independent fiduciary analysis.

First, SpaceX's proposed bylaws contain unusually restrictive shareholder-enforcement provisions. The bylaws define "internal disputes" to include derivative proceedings, internal-affairs claims, fiduciary-duty claims, and "any action based on state or federal securities or trade regulation laws." *See* Space Exploration Technologies Corp., Amended and Restated Bylaws (proposed), Art. X, § 10.1(a)–(b), filed as Exhibit 3.2 to Form S-1 (filed May 20, 2026). They designate the Texas Business Court as the sole and exclusive forum for those disputes, unless SpaceX consents otherwise. *Id.* The bylaws also include a class-action waiver and a jury-trial waiver. *Id.* § 10.1(c), (e). If a court determines that a covered dispute is not subject to the Texas Business Court's jurisdiction, the bylaws provide for mandatory ICC arbitration, again with restrictions on collective proceedings. *Id.* § 10.2.

Those provisions raise significant investor-protection concerns. They purport to channel federal securities claims to a state forum even though Exchange Act claims are subject to exclusive federal jurisdiction. 15 U.S.C. § 78aa(a). They purport to eliminate the class action mechanism that ordinarily makes federal securities claims economically viable for institutional investors and retail beneficiaries alike. And they purport to bind secondary-market purchasers, including index-tracking funds, through the act of acquiring or holding shares. Although the

[6] *S&P Dow Jones Indices Consultation*, *supra* note 4.

enforceability of these provisions will likely be contested, they attempt to significantly limit the legal rights attached to the securities that funds would acquire.

Second, SpaceX's governance structure concentrates voting control in a manner that materially affects the value and enforceability of public shareholders' rights. SpaceX will have multiple classes of stock that will give Elon Musk voting control and require his votes to remove him from the Board and from his position as CEO. Musk is expected to retain 82.4 percent of the combined voting power of the company.[7] While multi-class share structures are not unprecedented among large-cap public companies, concentrated founder control combined with restrictions on shareholder litigation presents a governance profile that advisers will likely need to evaluate before treating SpaceX as an ordinary index constituent.

C. Advisers will likely need to independently decide whether to track SpaceX.

Each of the features described above is, on its own, the kind of change in circumstances that will likely require an adviser to undertake the analysis that the fiduciary duty of care requires. Together, they create an especially strong case for fiduciary review. Not only have certain index methodologies changed, but the security being added has limited float, limited seasoning, unusual governance, and unusual remedies-restricting bylaws. A fund's existing disclosures were likely not drafted with these features in mind.

At a minimum, the adviser would need to evaluate whether SpaceX's inclusion is consistent with the fund's investment objective, principal strategies, and risk disclosures; whether the fund's prospectus or statement of additional information adequately describes the risks presented; the expected transaction costs and market impact of index-linked buying; whether board or investor communications are required; and whether the decision and rationale have been contemporaneously documented.

If an adviser mechanically includes SpaceX without undertaking an independent analysis, and if the analysis would have identified material concerns the adviser failed to address, the adviser may face meaningful exposure. The SEC has authority to enforce the adviser's federal fiduciary obligations under Section 206 of the Advisers Act. 15 U.S.C. § 80b-9.

---

[7] *See* Space Exploration Technologies Corp., Amendment No. 2 to Form S-1 Registration Statement (filed June 3, 2026).

Investors, plan beneficiaries, and other fiduciaries may also seek relief through other causes of action. For instance, where index inclusion of a security like SpaceX renders a fund's registration statement and prospectus inaccurate or misleading, investors may assert disclosure claims under Sections 11 and 12(a) of the Securities Act. *See* 15 U.S.C §§ 77k, 77l(a)(2); *see, e.g.*, *In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534 (N.D. Cal. 2009) (certifying Securities Act classes where bond funds' portfolios allegedly diverged from the funds' stated investment objectives and risk disclosures). Investors may also assert state-law fiduciary-duty and contract claims premised on the fund's failure to adhere to its stated investment objective. *See, e.g.*, *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 779 F.3d 1036, 1050–62 (9th Cir. 2015) (holding that an index fund's shareholders stated direct claims against the adviser and trustees for breach of fiduciary duty and contract for failing to manage the fund in accordance with its stated index-tracking objective). Courts evaluating such claims have looked to the federal fiduciary standard described above. *See, e.g.*, *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 502 (3d Cir. 2013) (collecting cases). Third and finally, where the adviser manages retirement assets as an ERISA fiduciary, plan participants and co-fiduciaries may sue for breach of ERISA's duties of prudence and loyalty, including the continuing duty to monitor each plan investment. *See* 29 U.S.C. §§ 1104(a), 1132(a)(2); *Tibble*, 575 U.S. at 529–30.

# # # #