

Via email: comment@osc.gov.on.ca and consultation-en-cours@lautorite.qc.ca

June 12, 2019

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward
Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Dear Sirs and Mesdames,

Proposed National Instrument 25-102 *Designated Benchmarks and Benchmark Administrators and Companion Policy*

The International Swaps and Derivatives Association, Inc. ("**ISDA**" or "**we**")¹ welcomes the opportunity to provide comments on Proposed National Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and the related Companion Policy (collectively, "**NI 25-102**" or the "**Proposed Rule**") published by the Canadian Securities Administrators (the "**CSA**") on March 14, 2019. Terms not defined in this letter will have the same meanings given to them in the Proposed Rule.

¹ Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 71 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org. Follow us on Twitter @ISDA.

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ISDA supports the introduction of rules regulating financial benchmarks in Canada that are consistent with the IOSCO Financial Benchmark Principles. We see this as critical, particularly as such rules will reduce risks in Canadian financial markets and will allow Canadian designated benchmarks to be eligible for an equivalence determination in the EU, allowing them to be used by EU institutional market participants.

A. Limiting the scope of designated benchmarks

ISDA strongly supports the approach under the Proposed Rule that a benchmark administrator (and its associated benchmarks) should only be designated where the benchmarks have a significant connection to Canada and are sufficiently important to the financial markets in Canada, and submits that this approach should also apply whenever a benchmark administrator applies for designation. The notice accompanying the Proposed Rule also states that the CSA may designate other administrators and their associated benchmarks in the future on public interest grounds, including where the CSA becomes aware of activities of a benchmark administrator, contributor or user that raise concerns that align with certain regulatory risks in respect of such parties, and conclude that the administrator and benchmark in question should be designated. ISDA submits that any such designation should be made only where such concerns relate to the safety of, or confidence in, Canadian financial markets. Further, the CSA notice accompanying the Proposed Rule (the “**CSA Notice**”) should expressly state this.

ISDA also supports the intention of the CSA, as set out in the CSA Notice, to designate only RBSL as an administrator, and only CDOR and CORRA as its designated benchmarks under NI 25-102. Specifically naming RBSL, CDOR and CORRA provides certainty in the Canadian market. Limiting designated benchmarks only to those which represent a significant component of the Canadian financial markets and for which the administrator of, or majority of contributors to, such benchmarks are Canadian is critical, given the size of the Canadian financial market, relative to other markets, such as Europe and the United States. In the IOSCO Financial Benchmark Principles, IOSCO notes that implementation of the principles should be proportional to “the size and risks posed by each Benchmark and/or Administrator and the Benchmark-setting process.”²² Given the significant compliance requirements outlined in NI 25-102, it would not be proportional to bring benchmarks into the scope of these rules unless they represent a material component of the Canadian financial markets. Such an approach is appropriate for Canada, as opposed to the “catch and release” approach under the EU BMR, which assumes all potential benchmarks and administrators are in scope unless otherwise explicitly stated.

²² See Page 4 of the IOSCO Financial Benchmark Principles.

B. Clarifying the Scope of the NI 25-102

Our experience with the EU BMR has shown that it is extremely important that the Proposed Rule is clear with respect to whether a benchmark, an administrator, a contributor or a user is in scope. Under the EU BMR, many concerns have been raised with respect to the uncertainty of the scope of that rule, including the fact that certain terms are used without providing adequate guidance, such as the meaning of the phrase “made available to the public” in the definition of “benchmark”, and what constitutes the “use of a benchmark”. While many of those concerns are not applicable in the context of NI 25-102, there are two concerns raised with respect to the EU BMR which we believe should be considered under the Proposed Rule. First, we submit it would be useful to add commentary to clarify that the determination of initial margin and variation margin under derivatives contracts would not constitute the use of a benchmark as a reference under NI 25-102, whether such benchmark is used to calculate interest payable on margin delivered, or whether such benchmark is used to determine the amount of margin to be delivered in the first place. This interpretation is consistent with how the “use of a benchmark” is interpreted by the European Securities and Markets Authority under the EU BMR.³ Secondly, the draft Companion Policy provides that one factor in determining whether a benchmark would be considered a “critical benchmark” is whether the benchmark is used as a reference for financial instruments or financial contracts or for measuring the performance of investment funds, having a total value in Canada of at least \$400 billion. ISDA is of the view that additional guidance should be provided as to how a regulator or securities regulatory authority will be determining the “value” of such instruments, contracts and performance of investment funds for this purpose.

C. Consultation Period Required Before Designating an Administrator or Benchmark

As demonstrated in the implementation of the EU BMR, ISDA has concerns about a domestic regulator regulating foreign benchmark administrators and their associated benchmarks. Some non-EU benchmark administrators were unaware of, or hesitant to devote the resources, time and expenses required to be compliant with the EU BMR. There was a significant risk that EU firms and investors were going to be disallowed from issuing, or investing in, products which reference certain non-EU benchmarks after January 1, 2020. This resulted in the European regulators agreeing to delay the compliance with the

³ European Securities and Markets Authority, *Questions and Answers on the Benchmarks Regulation (BMR)*, ESMA70-145-11, Version 13, 23 May 2019 at page 18, available here. The answer in paragraph 5.11 on page 18 states expressly that the use of an index to calculate interest payable on collateral amounts does not constitute “use of a benchmark” under the EU BMR. ISDA understands that ESMA will be providing further clarity that benchmarks used to determine the amount of collateral payable in the first instance would also not constitute “use of a benchmark” under the EU BMR, for example, a benchmark used in a risk-based model to determine the margin amount, or a benchmark used in determining the market value of margin delivered.

EU BMR by third country administrators for two years. Foreign benchmark administrators would be even less likely to take on the effort to comply with the Canadian benchmark rules given the relatively small size of the Canadian market, negatively affecting liquidity and market access in Canada. ISDA therefore urges the CSA to require under the Proposed Rule that a minimum 90 day consultation period apply prior to the CSA designating any other administrator or benchmark under the Proposed Rule.

D. Exception for Certain Administrators

ISDA submits that should the Bank of Canada (or any other federal government agency or office) assume administrator duties for CDOR or CORRA, or any other designated benchmark under NI 25-102, the administrator requirements under NI 25-102 should not apply. It would not be appropriate for the CSA to regulate the activities of the Canadian central bank.

We would welcome the opportunity to discuss these and any related issues further with the CSA.

Yours truly,



Katherine Darras

General Counsel