



**Reply form for the
Consultation Paper on Benchmarks Regulation**





Date: 29 September 2016

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in Consultation Paper on the Benchmarks Regulation, published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type < ESMA_QUESTION_CP_BMR_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives that ESMA should consider

Naming protocol

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_CP_BMR_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were XXXX, the name of the reply form would be:

ESMA_CP_BMR_XXXX_REPLYFORM or

ESMA_CP_BMR_XXXX_ANNEX1

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.



Deadline

Responses must reach us by **02 December 2016**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.



Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_CP_BMR_1>

The Global Financial Markets Association (“GFMA”)¹, in partnership with FIA and the International Swaps and Derivatives Association (“ISDA”)², collectively “the Associations”, are pleased to provide comments on ESMA’s Consultation Paper on draft technical standards under the Benchmarks Regulation (the “Consultation Paper”). We appreciate ESMA’s desire to solicit stakeholder views in order to facilitate the finalization of regulatory and implementing technical standards supporting the implementation of the Benchmarks Regulation (the “BMR”).

The Associations support the objectives of the BMR to ensure that benchmarks are produced in a transparent and reliable manner and so contribute to well-functioning and stable markets, and investor protection.³

While the Associations support the broad goals of the BMR to provide a regulatory framework for benchmarks in the European Union (“EU”), we continue to have significant concerns over several aspects of the regulation such as the workability of the third country regime amongst others and have elaborated further below in the context of related articles.

While answers are provided to certain questions within the Consultation Paper, based on the importance of the membership of the Associations, the fact that a question is **not** answered in great detail should not be interpreted as agreement with each position outlined in a specific section of the Consultation Paper.

If you have any questions, please contact Sean Davy at +1.212.313.1118 or via e-mail at sdavy@sifma.org, Tessa Jones at +44.20.7519.1827 or via e-mail at tjones@fia.org, or Julia Rodkiewicz at +32.2.4018761 or via e-mail at jrodkiewicz@isda.org.

Regards,

GFMA

FIA

ISDA

<ESMA_COMMENT_CP_BMR_1>

¹ The Global Financial Markets Associations (GFMA) brings together three of the world’s leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian, and North American members of GFMA. For more information, visit <http://www.gfma.org>.

² Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 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.

³ Press Release 29 September 2016, ESMA consults on future rules for financial benchmarks





Q1: Do you consider the non-exhaustive list of governance arrangements to be sufficiently flexible? Are there any other structures which you would like to see included?

<ESMA_QUESTION_CP_BMR_1>

The Associations are supportive of a range of potential governance arrangements that ensure an appropriate level of independence for the oversight committee. However, we believe that objective can be readily supported by an overriding requirement such that a majority of the voting members of the committee should be representatives that are not directly involved in the provision of the benchmark and not representatives of contributors. While we recognize that representatives that are involved in the provision of the benchmark can participate as non-voting members, we believe the prohibition on voting member status creates unnecessary inefficiencies and costs. We believe that concerns over conflicts of interest would be similarly addressed while permitting a broader range of non-executive employees. The non-executive employees would have significant expertise from their involvement in the provision of the benchmark to participate directly in the oversight function as voting members while ensuring that a check and balance exists by way of a limit to their percentage of representation. As the Consultation Paper correctly states, “The purpose of observers is to allow the oversight function to benefit from additional expertise.”⁴ ESMA further acknowledges the importance of expertise by permitting representatives of contributors or of supervised entities to participate in the oversight function, as long as the administrator ensures that members with conflicts of interest shall not hold a majority.⁵ We believe this rationale should be extended to those that are involved in the provision of the benchmark. In the absence of this flexibility, we suggest ESMA provide further guidance on those functions that would not be deemed to be involved in the provision of the benchmark. Given that administrators may choose to outsource certain activities, such guidance would presumably extend to those outsourced functions as well.

<ESMA_QUESTION_CP_BMR_1>

Q2: Do you support the option for the oversight function to be a natural person who is not otherwise employed by the administrator?

<ESMA_QUESTION_CP_BMR_2>

We are supportive of ESMA’s efforts to maintain elements of proportionality by allowing administrators the option for natural persons to operate as the oversight function for non-critical benchmarks in certain circumstances.⁶

<ESMA_QUESTION_CP_BMR_2>

Q3: Do you support the concept of observers and their inclusion in the oversight function?

<ESMA_QUESTION_CP_BMR_3>

⁴ Paragraph 16; Consultation Paper; “The purpose of observers is to allow the oversight function to benefit from additional expertise, in particular from public authorities from the EU and third countries that are not competent authorities under the BMR. However, market participants and other stakeholders could also act as observers.”

⁵ Draft RTS Article 1(6) at page 20; “Where a benchmark is based on contributions, and representatives of contributors or of supervised entities that use the benchmark, and other relevant stakeholders, are members of the oversight function, the administrator shall ensure that members with conflicts of interest shall not hold a majority.”

⁶ Paragraph 9; Consultation Paper; “Natural persons are permitted to operate as the oversight function under the draft RTS, except in the case of critical benchmarks or regulated data benchmarks used in financial contracts, financial instruments or investments funds have a total value greater than EUR 500 billion. It is expected that such a structure would be most appropriate for example in the case of an administrator that provides only a small number of benchmarks that are not widely used, or for benchmarks that are based entirely on readily available data, be it regulated or not, and are not widely used.”



The Associations further agree with the introduction of the concept of observers.

<ESMA_QUESTION_CP_BMR_3>

Q4: Do you think that the draft RTS allows for sufficient proportionality in the application of the requirements? If no, please explain why and provide proposals for introducing greater proportionality.

<ESMA_QUESTION_CP_BMR_4>

See below responses.

<ESMA_QUESTION_CP_BMR_4>

Q5: Do you have any other comments on the oversight function (composition, positioning and procedures) as set out in the draft RTS?

<ESMA_QUESTION_CP_BMR_5>

We understand ESMA's concerns that the inclusion of independent executive directors ("INEDs") as members of the oversight committee may "blur the lines between the oversight function and the management body of the administrator."⁷ However, in order to ensure proper, efficient and ongoing communication, the Associations suggests that ESMA clarify that the oversight committee be permitted to provide periodic updates, as well as, share meeting notes and minutes with the management body of the administrator.

Regarding critical benchmarks, where the appropriate compliance and legal staff of the administrator participate on the oversight committee, the Associations suggests that Article 1(2) of the draft RTS require only one independent member for the oversight committee for critical benchmarks.

We suggest that ESMA clarify the prohibition for a contributor to sit on the oversight function of more than one administrator, to the extent that the prohibition is on the specific individual and not the entire firm.

The Consultation Paper states that "ESMA considers that the oversight function must be able to act independently of the administrator in order to fulfil the following responsibility: reporting to the relevant competent authorities any misconduct by contributors, where the benchmark is based on input data from contributors, or administrators, of which the oversight function becomes aware, and any anomalous or suspicious input data."⁸ The Association believe that ESMA should explicitly refer to the Market Abuse Regulation (EU No 596/2014) as a reasonable standard for reporting suspicious activity or conduct by contributors.

<ESMA_QUESTION_CP_BMR_5>

Q6: Do you agree with the appropriateness and verifiability of input data that the administrator must ensure are in place? Please elaborate.

<ESMA_QUESTION_CP_BMR_6>

⁷ Paragraph 11; Consultation Paper

⁸ Paragraph 19; Consultation Paper



The Consultation Paper notes that administrators of regulated data benchmarks are not subject to validation requirements.⁹ As ESMA correctly states, “Regulated data by themselves present a high degree of verifiability as a result of the application of sectoral disciplines.” The Associations agree with ESMA’s view that it is appropriate for regulated data benchmarks to be exempt from certain requirements.

The Associations, however, remain concerned that ESMA, in the context of the draft RTS, has not articulated a process regarding the classification of data from third country regulated trading venues as regulated data in the context of the BMR. The Associations suggest that ESMA clearly specifies a process for how and when a review of third country regulated trading venue data will be reviewed for a determination as regulated data under the BMR. We believe ESMA should proactively make such determinations for the dominant trading venues in large trading centers (i.e. stocks, options, and futures exchanges, SEFs and ATSS).

The Associations agree with ESMA’s application of proportionality to allow administrators with additional discretion to determine how they ensure internal oversight and verification at the contributor level for significant benchmarks.

We believe that ESMA should make clear that administrators are not required to review the underlying records and transaction-level detail for each input, but will need the ability to access the information if there are questions over the material plausibility on input data. ESMA should also explicitly acknowledge that some input data may be derived from expert judgment rather than transactional data. The verifiability should be based on the reasonableness of the input, which would therefore be based on observations of related empirical data.

<ESMA_QUESTION_CP_BMR_6>

Q7: Do you agree with the internal oversight and verification procedures that the administrator must ensure are in place where contributions are made from a front-office function in a contributor organisation? Please elaborate.

<ESMA_QUESTION_CP_BMR_7>

Article 6 of the draft RTS references the requirement to “ensure”, stating that, “Administrators shall ensure that contributor’s internal oversight is structured along three lines of defence and operate with a written procedure describing the respective roles of the first, second and third line of defence as well as the method of cooperation and flow of information between these functions.” The Consultation paper describes verifiability as the characteristic “allowing the material plausibility of input data to be checked”.¹⁰ The Associations believe that the draft RTS should repeat this language to add clarity and in that context, should elaborate that administrators are required to review contributor’s policies and procedures consistent with the code of conduct. Further, they should be able to rely on representations as to internal governance and oversight. The administrator should **not** be required to conduct an audit of the contributor’s physical operations. In the case where an administrator reasonably believes that a contributor is not complying with the policies, the administrator must take prompt action.

The requirements for evaluation and validation listed by the draft RTS under Article 3 do not appear to appropriately distinguish between contributor inputs and other observable inputs. As currently formulated, the requirements appear to be tailored towards contributor benchmarks. In many cases, benchmarks are

⁹ Paragraph 61, Consultation Paper

¹⁰ Paragraph 58; Consultation Paper



created using readily observed data inputs (such that there is no “contributor” within the meaning of the Regulation) where certain requirements in Article 3 would presumably not apply. The Associations suggest that ESMA clarifies or separately list the requirements for evaluation and validation of input data that are unique to contributor input data to avoid confusion. Further, in the context of contributor input data, Article 3(2)(f) lists several data elements (including recordings of telephone conversations) which administrators “may include” when checking the coherence of the contribution with the relevant contribution metadata. The Associations propose that ESMA clarifies that the draft RTS are not imposing a new recording obligation but rather suggesting that recordings could be used for validation to the extent they exist as a result of internal policy or other regulation.

Several provisions under Article 3(2)(f)(v) relate to communications between specific parties while others are left open ended. We believe that ESMA should clarify that such provision refers only to communications between the contributor and the administrator and or alternatively, the submitter and approvers (if applicable) rather than all communications generally.

Under Article 6(3), the draft RTS requires administrators to ensure that contributors establish and maintain a conflicts of interest policy that covers disclosure to the administrator of actual or potential conflicts of interest. The Associations believe that the disclosure of contributor conflicts of interest should **only** be for “material” existing or potential conflicts. Further, ESMA should make clear that the “immediate” notification of any misconduct by the contributor is at the point where a determination of misconduct has been made by the contributor. It should **not** be at the point of mere suspicion so as to possibly impede or frustrate an initial investigation. We suggest (as per below) that such reporting should be made to and through regulators and not directly to the administrators.

Article 6(3) requires a conflicts of interest policy to avoid “the existence of any direct link between the remuneration of staff involved in input data contribution and the remuneration of or revenue generated by other contributor staff principally engaged in another activity, where a conflict of interest may arise in relation to those activities.” The requirement as currently formulated, fails to adequately address the fact that compensation is often at least partially dependent on a number of factors such as trading desk revenue, product revenue, and firm revenue overall. Therefore, the Associations believe that ESMA should acknowledge that compensation is typically dependent on a number of factors. Multi-factor compensation schemes are not considered “direct” in the context of the requirement, so long as such revenues are not the primary determinatives of compensation for the staff involved in input data contributions. Further, we note that Article 2 under the governance and control arrangements for supervised contributors references remuneration policies and the “independence from the performance of any other business”. It is unclear whether the different characterization implies a different standard. Similarly, “independence” is problematic given the multi-factor compensation schemes mentioned above.

Article 6(3) requires that administrators ensure that the second line of defence be comprised of a number of risk and compliance functions in order to mitigate potential conflicts of interest. In particular, requirement (d) states that an administrator shall maintain “a physical presence in the front office where applicable.” The Associations believe that this requirement should be removed as other aspects of the oversight function should be sufficient to detect and mitigate any potential conflicts of interest. Further, we believe that requirements (f) and (g) regarding the monitoring of communications should apply only to staff directly involved in submissions to a benchmark consistent with Article 6(1) under the code of conduct. We suggest that ESMA make it clear that the monitoring requirement can reasonably be accomplished in a variety of ways consistent with market practice (i.e. sampling of records or surveillance for keywords) and should not warrant a full review of each individual communication by submission staff. The requirement (h)(vi) highlights the need for administrators to ensure that contributors establish and maintain effective procedures to prevent or control the exchange of information where the exchange of that information may



affect the input data contributed. The Associations believe that this requirement would most appropriately apply only to submission staff at the contributor. ESMA should clarify that written supervisory policies and procedures, as well as education of the relevant staff, would be sufficient to fulfil this requirement.

<ESMA_QUESTION_CP_BMR_7>

Q8: Do you agree with the list of key elements proposed? Do you consider that there are any other means that could be taken into consideration to ensure that the benchmark’s methodology is traceable and verifiable?

<ESMA_QUESTION_CP_BMR_8>

The Associations generally agree with the proposed list of key elements of the methodology to be disclosed by administrators. Regarding the disclosure requirements for internal review and approval of the methodology, we support limiting disclosure to the publication of the bodies or functions and the role of the persons involved in the review and approval of the methodology and to the general characteristics of the procedures for their nomination and removal. The Associations agree with ESMA’s acknowledgement that the publication of the names of the persons responsible for reviewing the methodology may have adverse effects and could potentially discourage individuals from joining oversight bodies.

We remain concerned over the difficulty that administrators will likely face with respect to measuring the size of the underlying market of a benchmark. As discussed in the Association’s previous responses¹¹ to ESMA on the BMR, there are significant difficulties in assessing the size of the market for benchmark with any degree of accuracy or certainty. Benchmark administrators may not necessarily have line of sight into the data of linkages with different financial products, and there is a danger of inconsistency in data definitions and measurements. The Associations suggest that the requirement to disclose and estimate the size of market be removed or alternatively, ESMA should clarify that administrators should make a “reasonable assessment” subject to the reliability and availability of data. The latter would necessitate greater specification or guidance by ESMA to avoid simple overreliance on a potentially onerous and cumbersome written justification process. ESMA should also clarify that when they refer to the size of the underlying market they are referring to the total value of financial instruments, financial contracts or investment funds whose values are measured by reference to the benchmark.

<ESMA_QUESTION_CP_BMR_8>

Q9: Do you agree with the elements of the internal review of methodology to be disclosed? Do you consider that there are other elements of information regarding the procedure for internal review of methodology that should be included?

<ESMA_QUESTION_CP_BMR_9>

The Associations generally agree with the elements of the internal review to be disclosed.

<ESMA_QUESTION_CP_BMR_9>

Q10: Do you agree with the procedure for consultation on material changes to the methodology?

¹¹ See the Association’s response dated March 31, 2016 to ESMA’s Discussion Paper of the Benchmarks Regulation, <https://www.esma.europa.eu/file/17294/download?token=S8sxmFAY>; See the Association’s response dated June 29, 2016 to ESMA’s Consultation Paper on draft technical advice under the Benchmark Regulation, <https://www.esma.europa.eu/file/18933/download?token=qlABOjWu>



<ESMA_QUESTION_CP_BMR_10>

The Associations agree with the proposed procedure for consultation on material changes to the benchmark methodology. Further, we appreciate that ESMA allows administrators to define material change and determine the practical aspects of the consultation procedure at their discretion.¹²

In paragraph 98 of the consultation paper, ESMA is of the opinion that its empowerment does not allow it to provide an exemption from the obligation on administrators to consult on material changes to methodology of benchmark. The ultimate objective of the regulation is for benchmarks to represent the economic reality and if a consultation on the methodology frustrates this objective, the regulator should be able to allow notification in place of the consultation in specific circumstances.

<ESMA_QUESTION_CP_BMR_10>

Q11: Do you agree with this approach? Please explain your response.

<ESMA_QUESTION_CP_BMR_11>

The Associations generally agree with this approach.

<ESMA_QUESTION_CP_BMR_11>

Q12: Do you agree with this approach? What are the different characteristics of contributors that should be taken into consideration in this RTS? How should those characteristics be taken into account in the provisions suggested in this draft RTS? Please give examples.

<ESMA_QUESTION_CP_BMR_12>

The Associations generally agree with ESMA's approach, as previously noted in our response to question 7. We believe there can be multiple categories of contributions depending on the nature of the input. Further, we believe that ESMA should explicitly note that input data can come from various sources including readily observable data, transaction data submissions or contributed data based upon expert judgement.

<ESMA_QUESTION_CP_BMR_12>

Q13: Should the substantial exposures of individual traders or trading desk to benchmark related instruments apply to all types of benchmarks for all contributors?

<ESMA_QUESTION_CP_BMR_13>

The Associations believe that a recordkeeping requirement is reasonable but that the requirement should be based on the **ability** to readily determine significant exposures rather than require that this information be gathered and segregated as a unique process. We do not believe that the administrator should be permitted direct access to these records, given the commercial sensitive nature of this information. Access should only be through or by the regulators. Further, ESMA should clarify that the record keeping

¹² Paragraph 101; Consultation Paper; "In relation to the suggestion of some market participants to allow the administrator to differentiate the procedure to be applied according to the material change envisaged, ESMA highlights that this distinction is already embedded in the definition that the administrator will specify to a material change and would be included in the distinction between the procedure to be applied for material and non-material changes."



requirements for substantial exposures of individual traders or trading desks applies only to benchmarks for which a contributor is actually submitting input data and not all benchmarks more generally.

<ESMA_QUESTION_CP_BMR_13>

Q14: Do you agree with the proposals for the reporting of suspicious transaction in this draft RTS? Please explain your answer.

<ESMA_QUESTION_CP_BMR_14>

We generally agree with the proposals for the reporting of suspicious transactions to competent authorities including the competent authorities of the administrator. This requirement is in line with current market practices for whistle blowing.

As previously noted, the Associations believe that ESMA should explicitly refer to the Market Abuse Regulation (EU No 596/2014) as a reasonable standard for reporting suspicious activity or conduct by contributors.

The Associations believe that suspicious activity reporting to the relevant authority by the contributor should be sufficient. If ESMA were to continue to require a contributor to report suspicious input data to the administrator, the Associations would welcome clarification on how confidentiality and data protection issues should be dealt with by contributors at a legal and contractual level. Disclosure of such information to regulators is generally exempt from confidentiality and data protections obligations, however disclosure to administrators would presumably not be exempt.

<ESMA_QUESTION_CP_BMR_14>

Q15: Are there any provisions that should be added to or amended in the draft RTS to take into consideration the different characteristics of benchmarks? Please give examples.

<ESMA_QUESTION_CP_BMR_15>

The Associations believe that ESMA should provide guidance on the applicable requirements for benchmarks for which the use of expert judgement has not been totally eliminated. In particular, ESMA should provide clarity as to which information may be used to assist expert judgement.

The Associations support ESMA's clarification that the physical and operational separation between submitters and other staff is to occur where 'reasonably practicable', taking into account the nature, scale and complexity of the contributor's activities and whether the contribution activity is based on the core business or from ancillary activities by the contributor.

<ESMA_QUESTION_CP_BMR_15>

Q16: Do you have any further comments or suggestions relating to the draft RTS on the code of conduct?

<ESMA_QUESTION_CP_BMR_16>

The Associations agree with the general parameters for the code of conduct as described in the Consultation Paper. In particular, we support the application of proportionality whereby administrators of significant and non-significant benchmarks are required to maintain a code of conduct but are free to



determine the details to be included at their own discretion.¹³ Further, we agree that the code of conduct for contributors should contain behavior aspects such as reporting suspicious activity, conflicts of interest policies, and training.

The Associations supports ESMA's remark that input data that is readily available to an administrator is not considered a contribution (paragraph 104).

We support ESMA's statement that "a senior manager may not be necessary for sign-off" and the four-eye process for validations checks may be substituted for alternate processes where there are alternate effective checking processes (paragraph 115).

The Associations note that the draft RTS requires that records be in "easily accessible form", which could be interpreted strictly to require administrators to build new systems that will be costly and impractical to implement. In order to minimize these implementation burdens, we suggest that administrators should be able to rely on existing recordkeeping rather than having to create new segregated records to comply with the BMR. The Associations suggest that records should instead be accessible within a "defined period" and made available in "readily digestible" form.

Regarding the requirements for contributors to maintain a conflicts of interest registry, the Associations suggests that ESMA clarifies that only material conflicts should be included. Requiring contributors to develop a registry of even minor conflicts would be both impractical and time consuming while providing no material benefit to an underlying user's determination of whether to utilize a benchmark.

Regarding the code of conduct, Article 5(5) specifies that where administrators permit the use of automated systems for the purpose of providing submissions, the code of conduct should include a requirement that software update checks take place for automated systems prior to contributing input data. The Associations suggest that ESMA clarifies that the requirement should only apply to software updates which directly impact the calculation of a benchmark or could otherwise compromise the data integrity of a benchmark rather than routine software updates that will not otherwise affect the data directly. Further, Article (5)(1) requires contributors to have in place effective systems and controls to monitor input data including both pre- and post-contribution checks for suspicious input data. These requirements will likely be complex and difficult to fully implement in practice. The Association suggest that ESMA recognize that processes are likely to rely more heavily on post-contribution checks for suspicious input data as automated monitoring systems are generally backward looking in nature. The Associations believe that ESMA should explicitly refer to the Market Abuse Regulation (EU No 596/2014) as a reasonable standard for reporting suspicious activity or conduct by contributors.

<ESMA_QUESTION_CP_BMR_16>

Q17: Do you agree with the draft technical standards in relation to the governance and control arrangements for supervised contributors to benchmarks? Please provide reasons.

<ESMA_QUESTION_CP_BMR_17>

The Associations generally agree with the governance and control arrangements; however, we believe that ESMA should provide clarity around the meaning of "periodic" and we suggest that "periodic" be interpreted to be at least once per year. As mentioned above, we suggest that ESMA provide greater

¹³ Paragraph 105; Consultation Paper: "Administrators of significant and non-significant benchmarks can take the decision not to apply Article 15(2) which lays out the specific elements to be included in a code of conduct. Where Article 15(2) is not applied, as stated above, those administrators of significant or non-significant benchmark will be required to maintain a code of conduct for each benchmark or family of benchmarks but are free to determine the details to be included in the code."



clarification on remuneration policies in relation to submitters. The requirement for the independence of the performance of any other business unit of the contributor is problematic, as all compensation is indirectly related to overall performance of a firm. We therefore recommend applying the same language for the control framework requirement as per Article 6 under the BMR.

<ESMA_QUESTION_CP_BMR_17>

Q18: In particular, can you identify specific aspects of the draft Regulation that should be applied differentially to different supervised contributors in particular in terms of differences in input data provided and methodologies used, the risks of manipulation of the input data and the nature of the activities carried out by the supervised contributors?

<ESMA_QUESTION_CP_BMR_18>

Except where otherwise noted, the Association believe the framework recognizes the distinction between observable input data and contributed data with respect to the risk of manipulation.

We would however highlight that smaller firms may face relatively greater difficulties with segregation of functions and remuneration structure requirements. Therefore, we welcome the proportionality proposed in Article 2.3 of the RTS regarding the separation of submitters from other employees. However, the issues we raised in relation to compensation in question 17 for supervised contributors and in question 7 for front office function, are even more challenging and therefore important to be addressed for smaller market participants. We believe that it is important to ensure that the objective is not to discourage contributions but to effectively manage conflicts of interest. This issue is also relevant in the context of a proportionate treatment of significant and non-significant benchmarks.

<ESMA_QUESTION_CP_BMR_18>

Q19: Do you agree with ESMA's specifications of the criteria?

<ESMA_QUESTION_CP_BMR_19>

The Associations generally agree with ESMA's specifications of the criteria for significant benchmarks.

<ESMA_QUESTION_CP_BMR_19>

Q20: Do you agree with the content and structure of the two compliance statement templates? If not, please explain.

<ESMA_QUESTION_CP_BMR_20>

The Associations are generally supportive of the content and structure of the compliance statements.

We recommend that ESMA provides clarity on the requirement to "immediately" amend the compliance statement such that "immediately" be read with an "as soon as practicable" dimension. Further, we suggest that the requirement to "publish" the updated compliance statement should be read as to be made available on a website to the extent a web presence exists or if a web presence does not exist, that the updated statement be immediately available upon request.



The Associations suggest that ESMA explicitly recognizes in this section of the RTS that an administrator located in a third country may fulfill the requirements for compliance statements under the BMR by applying the IOSCO Principles.

<ESMA_QUESTION_CP_BMR_20>

Q21: Do you agree with the proposed specifications of the contents of a benchmark statement?

<ESMA_QUESTION_CP_BMR_21>

The Associations generally agree with the contents of the benchmark statements but recommend only including the specific article number and paragraph of the BMR instead of including the full text of each single provision.

<ESMA_QUESTION_CP_BMR_21>

Q22: Do you agree with the proposed specifications of the cases in which an update of such statement is required? Do you have any further proposals? Please explain.

<ESMA_QUESTION_CP_BMR_22>

The Associations generally agree with the proposed specifications.

<ESMA_QUESTION_CP_BMR_22>

Q23: Do you agree with the general approach to distinguish the contents of the application with reference to the cases of authorisation or registration?

<ESMA_QUESTION_CP_BMR_23>

Regarding paragraph 214, the Associations agree with the language suggesting that the registration and authorisation application is made for an entity and not for a benchmark. We support ESMA's statement in the analytical part of the consultation paper (paragraph 214) that the application is a one-off process and not subject to updates, except where specifically required elsewhere in the BMR (e.g. the benchmark statement or compliance statement provisions). It is important that this statement is clearly repeated in the RTS.

Similarly, as per paragraph 214 of the analytical section, the RTS should state (e.g. in RTS Article 1.4) that only material changes should be notified to the competent authority, given that Article 34(2) of the BMR refers to material changes only.

We welcome the RTS Article 1.4 which states that the applicant is not required to provide information where it 'may easily be in the possession of the competent authority, as the applicant already is a supervised entity'. We believe that this exemption should also cover public companies, where much of the information is public and thus should not need to be provided separately. If necessary, the public company can simply provide a web address or link to the specific web page location where such information can be found. For the sake of absolute clarity, we suggest ESMA delineate specifically in Article 1.4 of the RTS that this information will not be required if already previously provided separately to the same competent authority.



Further, paragraph 214 refers to Article 26(2) requiring the "administrator to immediately notify its competent authority when the administrator's non-significant benchmark exceeds the threshold". The Associations suggests that ESMA clarifies that such determination is based on a reasonable assessment by the administrator and that "immediately" be read with an "as soon as practicable" dimension.

Annex 1 point 6 and Annex II point 6 and 7 in the draft RTS, asks for specific benchmark information as this will be a "point in time" capture. We do not believe that such information should be necessary in any case for non-significant benchmarks. The authorisation and registration process should be primarily focused on providing evidence of a proportionate control framework for the category of benchmarks provided and more detailed information only for critical and significant benchmarks.

Article 1(3) (requiring an explanation of the provisions that are not applicable) is written in a broad manner which is confusing. We suggest that it be deleted as the related requirements in the compliance statement should be sufficient.

The Benchmarks Regulation does not apply to central banks, public authorities, CCPs (where they provide reference prices or settlement prices used for CCP risk-management and settlement), the provision of single reference prices, the media, persons publishing their own lending rate and certain smaller commodity benchmarks (Article 2). It is critically important to provide clear Level 3 guidance that these exemptions cover both EU and non-EU entities equally, given the extraterritorial scope of the BMR and potential for market disruption. For example, if third country CCPs are not exempt as users or administrators of benchmarks, this would undermine the G20 goal to incentivize clearing and could raise transatlantic competition issues. This would also be out of step with the EMIR effort to ensure the equivalence of non-EU CCPs. Further, should data providers of end of day prices of individual securities on non-EU markets not be exempt from requirements for administrators, EU investors in US securities could be put at a competitive disadvantage compared to those investing in EU securities.

We believe it is critically important to clarify that non-EU central banks (as well as EU central banks) are exempt in all their potential capacities under the BMR, i.e. as users and providers of benchmarks. Consequently, the users of central bank rates should also be exempt, as well as those entities who might be seen as contributors to central bank rates. The BMR Recital 14 would support this view: 'Central banks already meet principles, standards and procedures which ensure that they exercise their activities with integrity and in an independent manner'. A narrow interpretation of the central bank exemption under Article 2 of the BMR would restrict the use of third country central bank benchmarks in the EU since third country central banks would not be otherwise incentivized to seek authorization or recognition under the BMR. This would have negative consequences for the EU economy as central bank rate are crucial and widely used by corporates, asset managers and investment firms for hedging and investing.

We would also like to ask for more clarity on transitional provisions. In the recently published technical advice, ESMA has already helpfully explained its understanding that the transitional provisions apply not only to benchmarks existing on 30 June 2016 (the date of the entry into force of the BMR), but also to benchmarks existing on 1 Jan 2018 (the application date of the BMR). There still remains some ambiguity as to whether transitional provisions apply to all BMR requirements. The Associations therefore call on the Commission and ESMA to clarify that the transitional provisions apply not just to some requirements (registration, authorization, recognition, use and provision of benchmarks) but to all requirements (including Titles II-IV, on benchmark integrity and reliability, requirements for different types of benchmarks, transparency and consumer protection). In other words, *for the existing benchmarks* we would ask the Commission and ESMA to recognize that the BMR extends to 1 Jan 2020 (the full compliance date) and not only the date by which administrators have to apply for authorisation and



registration. It would clearly be unreasonable to be read the text any other way. The 2020 timeframe recognizes that administrators need time to put processes and policies in place to come into compliance and be ready for registration or recognition. It also recognizes that the BMRs specifications may not fully be in place for some time and thus time is needed to fully comprehend the exact requirements.

For new benchmarks introduced after 1 January 2018 it will also be challenging to comply with rules that may be available with little time in advance. This would risk hampering the provisions of new benchmarks to market participants wishing to reference them in financial instruments for hedging or investments purposes, with negative consequences for their economic activity and ultimately jobs and growth. ESMA should thus also consider the timing of requirements with respect to new benchmarks in the early stages of the BMR. It may also be challenging for national competent authorities and ESMA to prepare for the implementation of the BMR on time. For instance, we understand that the register for administrators may not be available before 1 January 2018.

<ESMA_QUESTION_CP_BMR_23>

Q24: Are the general and financial information requirements described appropriate for authorisation applications? Are the narrower requirements appropriate for registration applications?

<ESMA_QUESTION_CP_BMR_24>

We believe that these requirements are appropriate, given that duplicative financial statements do not have to be submitted by applying entities supervised by the same competent authorities as designated under the BMR. We suggest that this information should not be required where the administrator is a public company with financials publicly disclosed on a regular basis.

We support the reliance on existing information held by regulators in Annex II for registration and believe this should also be extended to application for authorisation.

To further enhance proportionality and provide more legal clarity, we would welcome additional specifications in Annex I point (2)(c), that financial forecasts for at least one year ahead, are required only if the applicant has not yet produced financial statements. This would be the same condition as included in the point (2)(b)(ii) of Annex I. We believe that this would be important in the case of new companies or de novo operations where sufficient historical financials do not exist. If necessary, competent authorities could instead be able to request financial forecasts if the financial condition of an entity is reasonably in question.

The Consultation Paper mentions disclosure of plans to access the capital markets when seeking authorization. The draft RTS seem to be clearer that such disclosure is only required where the applicant has not yet produced financial statements and delineates the requirement as to “raising financial resources” more generally rather than specifically to “access to the capital markets”. We ask that ESMA clarifies that the draft RTS is not in conflict with the Consultation Paper language.

<ESMA_QUESTION_CP_BMR_24>

Q25: Are the requirements covering the information on the applicant’s internal structure and functions appropriate?

<ESMA_QUESTION_CP_BMR_25>



The Associations strongly support the proposal that applicant entities supervised by the same competent authority as designated under the BMR and producing only non-significant benchmarks are not obliged to submit the same information twice, and can provide a synthetic description of their organization and governance, rather than a benchmark-specific description.

We believe that clarity is needed in Article 1 as to which information requested is specific to benchmark administration (if such information is discreetly available) and which pertains to the organization more broadly given that benchmark administration may be one of a number of businesses or even a non-consequential aspect of a very large business. Where administration is not a separate business operation, ESMA should clarify that it is acceptable to apply firm-wide policies if such policies address the conduct in question.

We reiterate our previous comments that conflicts of interest disclosure requirements should include only material conflicts. This will ensure that the information provided to investors and authorities is most relevant and not misleading. Similarly, while we believe that an administrator should have robust risks management policies. We do not believe that it is valuable or that it is commercial practice to “map risks” in the manner suggested in Annex I and we ask that this aspect of the requirement be removed.

<ESMA_QUESTION_CP_BMR_25>

Q26: Are the requirements described dealing with the benchmarks provided appropriate? In particular, is the way in which the commodity benchmarks requirements are handled acceptable?

<ESMA_QUESTION_CP_BMR_26>

The Associations generally agree with the proposed requirements.

We believe greater proportionality should be incorporated into Annex II. To follow the proportionate approach of the Regulation for input data for non-significant benchmarks, we suggest that requirements under 7(a)(ii), 7(a)(iii), 7(a)(v) should not apply to non-significant benchmarks. Further, we suggest the requirements under 7(b)(i) and 7(b)(ii) be replaced by a synthetic description of the methodologies and validation/review procedures.

Some benchmarks, particularly short lived indices which could be captured by the regulation are not designed to be used for more than 2 years and are not a benchmarking tool for the purposes of a long-term reference data point. The requirement to provide the granular detail for every benchmark as part of the application process would be disproportionate in relation to these benchmarks. We question the value of the detailed information given that this universe changes over time and there is no requirement to provide updated information. We therefore suggest that the information requirement for short lived or infrequently used benchmarks be permitted in a general summary format, if required at all. Furthermore, the requirement to provide such detailed information appears to go beyond the Level 1 text.

<ESMA_QUESTION_CP_BMR_26>

Q27: Is the specific treatment for a natural person as applicant appropriate?

<ESMA_QUESTION_CP_BMR_27>

The Associations generally agree with the proposed requirements.



<ESMA_QUESTION_CP_BMR_27>

Q28: Do you agree with the proposals outlined for requirements for other information?

<ESMA_QUESTION_CP_BMR_28>

The Associations generally agree with the proposed requirements.

<ESMA_QUESTION_CP_BMR_28>

Q29: Do you agree with the approach followed in the draft RTS as regards the general information that a third-country applicant should provide to the competent authority of the Member State of reference?

<ESMA_QUESTION_CP_BMR_29>

The Associations welcome the approach followed in the draft RTS regarding the information that a third country applicant should provide.

However, we would like to raise, and in some cases reiterate, some critical concerns regarding the workability of the third country regime.

There are three ways for third country benchmark to be qualified for use in the EU: equivalence, endorsement, and recognition.

- Equivalence of a third country regulatory and supervisory regime for benchmarks with the EU BMR could currently work only for very few benchmark administrators. This is because today few countries have an authorization regime for local critical benchmarks (i.e. Singapore and Japan). This is not the case for the U.S. Moreover, the process to grant an equivalence decision is a long one.
- Endorsement is the idea that an EU entity takes responsibility for a third country benchmark (i.e. regarding the compliance with the EU BMR). This will in all likelihood only be achievable where the third country administrator has a local EU presence, as we do not think that unrelated parties will be incentivized to take that responsibility.
- Accordingly, recognition is the method by which many third country benchmarks administrators could seek access for use of their benchmarks in the EU. However, there are significant issues to resolve for recognition to be a reasonable alternative.

Therefore, we believe that it is essential that ESMA and the Commission provide further guidance on several unclear aspects of the recognition regime. Further to the concerns on timing expressed earlier, there is the need for all these issues to be addressed sufficiently in advance of the BMR's application date (1 January 2018) to allow for implementation.

Absent such timely guidelines, after 1 January 2018 the use of third country benchmark in the EU would be hampered, EU financial markets disrupted and ultimately investment in EU and non-EU markets discouraged.

This roadblock (to recognition) could have detrimental effects on corporate and financial firms' willingness to invest in the EU and elsewhere, with wider negative impacts for the EU economy. The BMR has very broad scope, covering interest rates, foreign exchange rates, securities, commodities and other indices referenced in financial instruments. Benchmarks are widely used by corporates, asset managers and



investment firms for hedging and supporting their investment decisions. Hence, it is critically important to make the third country benchmarks qualifications workable in practice.

Such guidelines will be also important to provide the national authorities with a measure of consistency for analyzing applications for recognition across the EU.

In particular, we would support guidance such that:

- Any determination on whether the application of the IOSCO Principles is equivalent to the application of the BMR, should be principles based. The equivalence judgment should be made such the administrator's governance should follow the core elements of IOSCO Principles and the overall framework established by the Regulation rather than prescriptively meet each detailed requirement of the Regulation on a line by line basis. More guidance on this determination is essential to permit access to the EU as envisioned by the third country regime. We would welcome a statement saying e.g. the application of the IOSCO principles for financial benchmarks or the IOSCO principles for PRAs should be considered equivalent to the legal regime of the EU if it ensures that the substantial result of the applicable principles is similar to the EU requirements in accordance with the general regulatory goals of ensuring the accuracy, robustness and integrity of benchmarks and of the benchmarks determination process. This would be similar to the language on equivalence used in Recital 7 under EMIR.
- Current audit industry standards for certifications should be acceptable for an auditor's certification of equivalence, including reviews of existing policies and procedures of the administrator. Should ESMA have particular expectations as the form or substance of certifications, it is essential that guidance be provided early.
- While the core responsibilities of the legal representative seem relatively clear, the Associations believe some further guidance is necessary before representatives would be willing to assume that responsibility under the BMR. It is especially important for any such representative to fully understand the liability they take in serving as a third country administrator's legal representative, so as to be incentivized to take on such responsibilities and judge the reasonableness of such role. We suggest ESMA issue separate guidance on this role specifically.
- An administrator's judgement on the identification of the EU Member State of Reference should be based on a reasonable assessment based on available data in recognition that comprehensive data may not be available to the administrator.

To reiterate, we believe that it is critically important that ESMA and the Commission provide Q&As making the conditions for third country benchmarks recognition in the EU possible to be fulfilled in practice on 1 January 2018, given the importance of these benchmarks for EU corporates, asset managers and investment firms for hedging and investment decisions.

The Associations also strongly encourage national competent authorities to actively begin the process of seeking cooperation agreements between EU and non-EU authorities so that cooperation agreements do not become the primary obstacle to supervised administrators that wish to provide benchmarks into the EU after 1 January 2018.

<ESMA_QUESTION_CP_BMR_29>

Q30: Do you agree with the approach followed in the draft RTS as regards the information that a third-country applicant should provide in order to explain how it has chosen a specific Member State of reference and which are the identity and role of the appointed legal representative in such State?



<ESMA_QUESTION_CP_BMR_30>

The Associations generally agree with the approach followed in the draft RTS as it regards to the information that a third country applicant should provide.

<ESMA_QUESTION_CP_BMR_30>

Q31: Do you agree with the approach followed in the draft RTS as regards the information that a third-country applicant should give around the benchmarks it provides and that are already used or intended for use in the Union? In particular, do you agree with the proposals regarding the information to be provided on the types and the categories to which the benchmarks belong to?

<ESMA_QUESTION_CP_BMR_31>

The Associations generally agree with the approach followed in the draft RTS as it regards to the information that a third country applicant should provide. Our above general comments regarding information requirements for EU administrators apply equally to the information requirements for third country administrators.

We suggest that a benchmark identifier requirement be considered, as for EU administrators.

<ESMA_QUESTION_CP_BMR_31>