Joint Industry Response to the European Commission's Call for Feedback on the BMR

ISDA, GFMA and FIA, hereafter referred to as 'The Associations' very much welcome the European Commission's recognition of the problems caused by the current drafting of the Benchmarks Regulation (BMR), and the careful thought and consideration that has been given to addressing them. We strongly support the aim of establishing a third-country regime that is sustainable in the long term once the current transitional regime expires, and overall we consider that the proposal will result in a more proportionate regime for users and administrators of benchmarks, that still provides vital protections.

We have set out below our comments on the Commission's proposal, along with potential draft amendments where possible, as well as some additional revisions that we consider would also support the Commission's aims.

SCOPE OF BENCHMARKS SUBJECT TO BMR

1. Commission power to exempt benchmarks

Commission proposed text	**Suggested amendment**
Article 2(2) This Regulation shall not apply to: …	Article 2(2) This Regulation shall not apply to: … **(i) a benchmark which has been designated by the Commission in accordance with Article 18a(1).**
	Article 18a **Commission power to designate benchmarks as exempt** **1. The Commission may designate a benchmark where it considers that it is not in the public interest for the administrator to be to be subject to obligations under this Regulation with respect to the relevant benchmark.** **2. By [date] the Commission shall adopt a delegated act in accordance with Article 49 to create a list of benchmarks that fulfil the criteria laid down in paragraph 1 of**

	<u>this Article. The Commission shall update that list as appropriate.</u>

Justification:

- The Commission should have a power to exempt any benchmark from the regime where it considers (after appropriate consultation with the market and with the administrators) that it is not in the public interest for the relevant benchmark to be in scope. This is to ensure that there is flexibility to continue ongoing use where the detriment that prohibition would cause to EU investors outweighs the benefits that would be gained by keeping it in scope of the regulation. Building this power into the BMR now will avoid the need for Level 1 text amendments in the future.

- We recognise that the EC's proposal deletes the current exemption for certain FX benchmarks designated by the EC on the basis that use of such benchmarks within the European Union currently falls well below the €50bn Significant Benchmark threshold. However, there is no guarantee that use of such benchmarks will not increase in the future. In the UK, for example, we understand that there are some benchmarks whose use currently exceeds the critical benchmarks threshold. If such benchmarks were to come automatically into scope, this would have significant negative consequences for EU investors, as already recognised when the previous exemption power was introduced – they would lose access to what would be a very important benchmark, disrupting their business and putting them at a significant competitive disadvantage. There is no reason why this should be limited to FX benchmarks – equivalent detrimental impacts would arise with respect to such widely used benchmarks of any type if EU users have their access turned off. The exemption power proposed above will help manage this risk, avoiding the need for future Level 1 text amendments.

2. Commodity benchmarks

We welcome the approach taken by the Commission to commodity benchmarks, maintaining the tailored requirements for commodity benchmark administrators while also ensuring that non-significant, non-critical commodity benchmarks will be out of scope of the BMR.

We note that the Council compromise text would bring commodity benchmarks subject to Annex II (i.e., any commodity benchmarks other than critical benchmarks where the underlying asset is gold, silver or palladium) back into scope for mandatory compliance, even if they are not significant benchmarks. While we understand that this may be intended to address issues around commodity price volatility, we are concerned that the Council's proposed amendment on this issue would likely have the opposite effect, exacerbating commodity price volatility, with EU users effectively becoming prohibited from using benchmarks which are vital to their day-to-day risk management capability. It would also put these users at a competitive disadvantage to their peers in other jurisdictions.

3. Automatic permission for new use of a prohibited benchmark, in order to facilitate risk management and risk reduction

Commission proposed text	**Suggested amendment**
Article 29 **Use of significant benchmarks, EU Climate Transition Benchmarks and EU Paris-Aligned Benchmarks** 1a. A supervised entity that uses a benchmark in existing financial contracts or financial instruments that is subject to a public notice under Article 24a(5) shall replace that benchmark with an appropriate alternative within 6 months following the publication of that notice, or issue and publish a statement on its website informing clients of the absence of an appropriate alternative.	Article 29 **Use of significant benchmarks, EU Climate Transition Benchmarks and EU Paris-Aligned Benchmarks** 1a. A supervised entity that uses a benchmark in existing financial contracts or financial instruments that is subject to a public notice under Article 24a(5) shall replace that benchmark with an appropriate alternative within ~~6~~ **12** months following the publication of that notice, **or provide a reasoned explanation for not being able to do so**.
…	… **3. The prohibition in paragraph 1 of this Article shall not apply to the following:** **(a) market making in support of client activity related to transactions executed before the effective date of the prohibition;** **(b) transactions or other activities that reduce or hedge the supervised entity's or any client of the supervised entity's exposure to the prohibited benchmark;** **(c) novations of transactions;** **(d) transactions executed for the purposes of participation in a central counterparty auction procedure in the case of a member default, including transactions to hedge the resulting exposure;** **(e) interpolation or other use provided for in contractual fallback arrangements in connection with the prohibited benchmark**.

Justification:

- Lessons learned from transition away from other critical or significant benchmarks (e.g., LIBOR, WIBOR) have indicated that 6 months is not sufficient time for a supervised entity to properly arrange and implement an alternative rate. Transition can be a complex process involving numerous teams, systems, data, potential modelling changes and client communications. Requiring transition within 6 months leaves no room to address unexpected challenges or issues such as lack of immediate availability of an alternative benchmark.
- Supervised entities that are unable to replace a benchmark with an appropriate alternative are required to publish a statement informing clients of the absence of an appropriate alternative. As was seen in relation to 'tough legacy' populations of LIBOR referencing transactions, there are a number of reasons why it may not be possible to replace a benchmark with an appropriate alternative. In recognition of this, Article 29(1a) should be amended so that supervised entities' obligation is to provide a reasoned explanation as to why a replacement is not possible.
- In relation to the need for continued use of prohibited benchmarks, the experience with LIBOR transition indicated that supervised entities needed to continue adding new references to otherwise prohibited benchmarks for risk management/risk reduction purposes for approximately 18 months after its use was effectively prohibited. There is no reason to think that the situation would be any different for any other in-scope benchmark that becomes prohibited. Supervised entities in the EU should therefore be automatically permitted to continue to use prohibited benchmarks for risk reduction/management purposes following publication of a notice otherwise prohibiting their use in new transactions. This would be the case so long as the benchmark continues to be published during the relevant period.
- Continued use would be permitted for activities including (without limitation) entering into offsetting transactions that reference the prohibited benchmark, novating positions and determining close-out amounts.

4. Threshold for significant benchmarks

- We agree with the Commission that the significant benchmark threshold should be kept at the current level of EUR 50 bn. We are not aware of any studies or reports reviewing the level of the threshold and we are concerned that the industry (including both benchmark administrators and users) does not currently have sufficient information to assess the impact of reducing the threshold. If the Commission does intend to reduce the threshold, we would welcome a detailed cost benefit analysis identifying which benchmarks would be brought into scope as a result, as well as a consultation seeking industry input on the impact of bringing these benchmarks into scope. We would ask that any such consultation be carried out once the proposed amendments to the BMR have come into effect and the market has absorbed their impact. We would be particularly concerned about inclusion of any third country benchmarks that do not meet the current EUR 50 bn threshold for significance, following removal of the temporary transitional regime for third country benchmarks.

APPLICATION PROCESS

5. EU administrators that are currently authorised should not have to re-apply

Commission proposed text	Suggested amendment
Recital 21 To ensure a seamless transition to the rules introduced under this Regulation and to avoid that administrators have to go through a procedure for registration or authorisation more than once, competent authorities and ESMA should provide less burdensome application procedures for administrators that are already authorised, registered, endorsed or recognised and that apply for a new authorisation, registration, endorsement or recognition within two years from the date of application of this amending Regulation.	Recital 21 To ensure a seamless transition to the rules introduced under this Regulation, ***administrators previously registered, authorised, recognised, endorsed or equivalent under Regulation (EU) 2016/1011 should continue to be registered, authorised, recognised, endorsed or equivalent without needing to re-apply, to the extent that they administer any in-scope benchmark or voluntarily opt in to the Regulation.***

Justification:

- Currently authorised administrators should not be required to reapply where they administer significant benchmarks as at the first day of the new regime. The text should make absolutely clear that currently authorised administrators should not be obliged to re-apply under BMR where they are administrators of significant benchmarks on the basis of having breached the €50bn use threshold as at day 1 of the new regime.

- We note that the Council text proposes that administrators who are currently authorised, recognised or endorsed should have a period of up to six months during which they can determine whether or not they will be designated. If they are designated, the Council text provides that they should not need to reapply. However, there may be administrators who wish to remain authorised, recognised or endorsed, regardless of whether or not they are designated. It should be open to any administrator to retain their current status without having to reapply (e.g., by submitting a simple notice that they wish to retain their current status).

6. Single Regulatory Authority for EU Administrators

- An administrator should only be subject to authorisation and supervision in one member state. If an administrator is already the administrator of a significant benchmark, and another of its benchmarks becomes significant, its existing national competent authority (NCA) should be involved in the designation process and it should only be supervised by a single NCA.

7. Time to initiate application

- Article 24a(1) and Article 24a(2) each require the EU administrator of a significant benchmark to "seek authorisation or registration" within 60 working days following the notification referred to in Article 24(2) or 24(3) respectively. The consequence for not

doing so, however, is set out in Article 24(5)(a) and applies if the administrator concerned "has not initiated procedures" to comply with paragraph 2.

- A similar requirement applies to non-EU administrators under Article 24a(3), which requires non-EU administrators of a significant benchmark to seek recognition or endorsement.

- It is unclear precisely what action is meant by "seek authorisation / registration / recognition / endorsement" or by "initiate procedures" – is the intention to refer to obtaining authorisation etc, to submitting an application, or to a stage before submitting an application? Even if the intention is to refer to the submission for an application for recognition or endorsement, administrators are likely to need longer than 60 working days (and non-EU administrators are likely to need longer still). For an EU administrator, at the very least they will need to go through the process of reviewing their businesses to confirm that they are able to comply with the obligations on administrators, make appropriate changes (potentially including hiring new staff) and obtain management approval for the changes. For a non-EU administrator, they will need to go through the process of ensuring compliance with the recognition or endorsement regime. The process for arranging for another entity to endorse or act as the EU reference entity is not a quick one, even where intragroup arrangements may be possible.

8. Voluntary authorisation

Commission proposed text	**Suggested amendment**
Article 24 …	Article 24 **6a. Administrators of benchmarks which do not meet the requirements to be considered as critical, significant, commodity benchmarks subject to Annex II, EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks or ESG Benchmarks may voluntarily apply for access to the register provided for in Article 36 either by means of authorisation, registration, recognition or endorsement.** **Administrators who voluntarily opt in to this Regulation shall be subject to the same regime as administrators of significant benchmarks, save that the ESMA draft regulatory technical standards referred to in Articles 5(5), 11(5), 13(3) and 16(5) shall not cover or apply to administrators who have voluntarily opted in to this Regulation.**

	ESMA may issue guidelines in accordance with Article 16 of Regulation (EU) No 1095/2010, addressed to administrators who have voluntarily opted in to this Regulation, to specify the elements referred to in Articles 5(5), 11(5), 13(3) and 16(5). **Administrators who have voluntarily opted in to this Regulation may still be subject to administrative penalties in the event of non-compliance or infringement of Regulation (EU) 2016/1011.**

Justification:

- Administrators of non-significant benchmarks should also be able to apply voluntarily for authorisation (or recognition or endorsement, in the case of non-EU administrators) whether or not they expect their benchmarks to become significant or otherwise within the scope of BMR. This would be particularly helpful for administrators that expect their benchmark to become significant, as it allows them more time to prepare their application.

- For administrators whose benchmarks are not significant and who do not expect their benchmarks to become significant, the relevant obligations under BMR should be those that currently apply to non-significant administrators.

9. Automatic de-scoping of benchmarks when they cease to qualify as significant

- When a benchmark ceases to qualify as a significant benchmark, but the administrator wishes to remain authorised or recognised / endorsed, they should have a period of time within which they can confirm this to their NCA or ESMA. Otherwise, the benchmark should be removed from the register with the result that the administrator ceases to be subject to the obligations on significant benchmark administrators with respect to that benchmark.

10. Designation of benchmarks as significant

- The list of significant benchmarks should be reviewed every 2 years (in line with the process for reviewing critical benchmarks) so that benchmarks can cease being classified as significant benchmarks when they have ceased to meet the criteria (although administrators should also be able to seek removal of their benchmarks from the register at any time if the benchmark has ceased to meet the criteria for significance).

- The process for designating significant benchmarks which do not meet the €50bn threshold should be conformed to that for designating critical benchmarks that do not meet the €400bn threshold that is set out in Article 20 (1)(c)(iii).

- We would also welcome confirmation that the obligations on contributors to benchmarks would only apply where the benchmark itself is within scope of the BMR. This may require amendments to BMR itself as well as to the ESMA Q&A on BMR.

In particular, the ESMA Q&A on BMR currently provide that the obligations on contributors may apply to certain out of scope benchmarks (e.g., central bank benchmarks).

11. Limit administrator liability to data that is reasonably accessible to them.

- EU and non-EU administrators should only be required to make “reasonable efforts” to provide their NCA (or ESMA) on request with information on whether the usage of a benchmark in the EU exceeds the threshold to the extent that such data is available to them from publicly available data sources. Many EU and third country administrators will not easily be able to obtain this information.
- The Parliament text proposes an obligation for benchmark users to report information on their use of benchmarks, in addition to an obligation for administrators of benchmarks to request a globally agreed identifier code to enable consistent identification of their benchmarks. This places a very disproportionate administrative burden on users of benchmarks (completely at odds with the Commission's aim to reduce such burdens) while failing to provide a complete solution. We are concerned that relying on benchmark users to report data on volumes of benchmark usage is unlikely to give a full picture of benchmark use in the EU (and may lead to other issues such as double counting).
- However, we agree that if the intention is to have a hard quantitative threshold for significance, it would be appropriate for the Commission or ESMA either to publish information that it holds on volumes of use or to keep administrators updated (either periodically or when the volumes of use come close to the threshold for significance), to enable administrators (and particularly non-EU administrators) to monitor whether or not they may be close to the threshold for significance. Administrators should be able to rely on the information provided by the Commission or ESMA.
- However the threshold is set, or however relevant information is obtained, the key factor will be to make sure that administrators are able to comply with the regime.

12. Obligations on administrators of significant benchmarks should be limited to their activities with respect to significant benchmarks

- We would welcome amendments to clarify that administrators are only required to comply with the obligations under BMR with respect to the significant benchmarks (or other in-scope benchmarks) that they administer – they should not be required to comply with these obligations with respect to any non-significant benchmarks or benchmarks that are not otherwise within scope of BMR.

THIRD COUNTRY REGIME

13. Third-country Administrator Exemption

Commission proposed text	Suggested amendment
Article 2 **Scope** 2. This Regulation shall not apply to: … (h) an index provider in respect of an index provided by said provider where that index provider is unaware and could not reasonably have been aware that that index is used for the purposes referred to in point (3) of Article 3(1).	Article 2 **Scope** 2. This Regulation shall not apply to: … (h) an index provider in respect of an index provided by said provider where that index provider is unaware and could not reasonably have been aware that that index **meets the requirements to be considered as critical, significant or a commodity benchmark subject to Annex II.**

Justification:

- There should be an exemption for administrators who are not aware and could not reasonably be aware that usage of their benchmark in the EU exceeds the threshold for significance (or the threshold to be a critical benchmark, or that the benchmark would be a commodity benchmark subject to Annex II). We assume that any administrator publishing an EU CTB or PAB is doing so intentionally, so would not need to rely on an exemption.
- Otherwise, there is a concern that third country administrators would try to restrict the use by EU supervised entities of indices they provide (we saw this in practice when the BMR was first introduced and non-EU administrators became concerned that use of their benchmarks in the EU could trigger a requirement for them to seek recognition or endorsement or to face enforcement action from EU authorities). This situation can be detrimental to EU market participants as it would create an unlevel playing field.

14. Danger of choking use in the EU

- There is a danger that non-EU administrators may be reluctant to continue to provide unfettered access to their benchmarks in the EU as the easiest way to avoid penalties for breach of BMR if they are required to monitor use of their benchmarks before they become designated as significant benchmark administrators or if they may be subject to penalties for failing to notify that their benchmark exceeds the threshold for significance.
- An alternative would be for the Commission and ESMA to monitor themselves the use in the EU (based on currently available public data sources) of benchmarks provided by non-EU administrators and for the Commission and ESMA to give notice to such administrators when the use of their indices comes close to exceeding the threshold for significance.

15. Moving to reliance on Equivalence

- Non-EU administrators who are recognised or endorsed should be able to opt for inclusion in the register on the basis of equivalence if their benchmark is subsequently covered by an equivalence decision. There should be a transitional period during which they can withdraw their recognition or endorsement and wind down the arrangements that they had made in order to obtain recognition or endorsement.

16. IOSCO principles criteria

Commission proposed text	**Suggested amendment**
Article 32 **Recognition of an administrator located in a third country** 2. An administrator located in a third country that intends to obtain recognition as referred to in Article 24a(1) and (3) shall comply with this Regulation, with the exception of Article 11(4) and Article 16, 20, 21 and 23. The administrator located in a third country may fulfil that condition by applying the IOSCO principles for financial benchmarks or the IOSCO principles for PRAs as applicable, provided that such application is equivalent to compliance with this Regulation, with the exception of Article 11(4) and Articles 16, 20, 21 and 23.	Article 32 **Recognition of an administrator located in a third country** 2. An administrator located in a third country that intends to obtain recognition as referred to in Article 24a(1) and (3) shall comply with this Regulation, with the exception of Article 11(4) and Article 16, 20, 21 and 23. The administrator located in a third country may fulfil that condition by applying the IOSCO principles for financial benchmarks or the IOSCO principles for PRAs as applicable**~~, provided that such application is equivalent to compliance with this Regulation, with the exception of Article 11(4) and Articles 16, 20, 21 and 23~~**.

Justification:

- The words "provided that such application is equivalent to compliance with this Regulation, with the exception of Article 11(4) and Articles 16, 20, 21 and 23" should be deleted from the provision in Article 32 that allows third country administrators seeking recognition to fulfil the obligation to comply with BMR by applying the IOSCO principles as this additional requirement currently has the effect of negating administrators' ability to satisfy that obligation in that way.

17. Clarification on the responsibilities of the legal representative

- Non-EU firms seeking recognition are required to appoint a legal representative in the EU which will, together with the administrator, perform the oversight function in relation to benchmarks provided by the administrator. Non-EU firms have reported a number of challenges in meeting this requirement, including the cost involved in appointing an EU legal representative and the difficulty in determining what functions the legal representative needs to perform and what level of responsibility it is required to have. In particular, it would be useful to have clarification on where the line is between having appropriate oversight and actually performing the function of administrator. The challenge facing potential legal representatives is that they may be exposed to liability for breaches of BMR, but they may not be able to take on sufficient control of production of the benchmark to manage the risk of those

liabilities without becoming the administrator. The level of control that a legal representative can have over production of a benchmark raises a number of issues, including the administrator's own obligations under its home state regime (where relevant) as well as commercial and competition law issues.

- Similar issues can also arise with the endorsement regime (in particular with respect to cost and potential for commercial and competition law issues). These would be exacerbated by a restriction of the endorsement regime so that only EU authorised administrators can endorse non-EU benchmarks (as proposed by the Parliament). In particular, this would prevent EU supervised entities from endorsing benchmarks produced by their non-EU affiliates (unless the EU supervised entity is also a benchmark administrator), meaning that those non-EU affiliates may no longer be able to provide their benchmarks for use in the EU.

18. Third Country Administrators and PAB/CTBs

- It should be possible for a non-EU administrator to publish a PAB / CTB. Currently the majority of these benchmarks are produced by non-EU administrators and if they cease to qualify with no ability for the administrator to take steps to ensure that they qualify, this will create significant disruption.
- We note that the Parliament's proposed amendments would permit a non-EU administrator to publish a PAB / CTB (see new Article 19da and relevant connected provisions).

19. Consistency of statutory power to replace a Significant Benchmark between EU and Third Country benchmarks

- The power for the Commission under Article 23b to designate a replacement benchmark should cover all EU and non-EU in-scope benchmarks, including significant benchmarks (currently it only covers critical benchmarks, in-scope benchmarks based on input data and in-scope third country benchmarks).

OTHER ISSUES

20. Impact of the BMR Reform proposal on the Prospectus Regulation

- The descoping of non-significant indices would mean that administrators providing only non-significant indices would no longer meet the conditions for being authorised and regulated as administrators under BMR. Currently, issuers of securities linked to indices provided by administrators registered under BMR can benefit from certain disclosure exemptions under Prospectus Regulation (Section 2.2.2 of Annex 17 of Delegated Regulation (EU) 2019/980). In case the providers of such indices cease to be authorised as administrators, each time an issuer issues a security referencing a new non-significant index, they would be required to submit a fuller disclosure on such index, triggering the obligation to prepare a standalone prospectus to be approved by the relevant NCA each time instead of issuing under an already approved issuance programme and benefiting from a lighter disclosure regime.
- If administrators are permitted to apply for authorisation, recognition or enforcement on a voluntary basis (or to retain their existing status even if they are not designated), they would continue to meet the conditions specified in the Prospectus Regulation. However, it would be disproportionate to require administrators to voluntarily seek supervision under the BMR solely to mitigate the impacts for issuers under the Prospectus Regulation and in practice we expect that this would not be a realistic solution.

21. Impact of the BMR Reform proposal on the Sustainable Finance Disclosure Regulation

- The Sustainable Finance Disclosure Regulation requires financial market participants to disclose an indication of where a reference benchmark's methodology can be found. As non-significant benchmark administrators would no longer be required to publish information on their methodology, it would be useful to have confirmation that this obligation under SFDR can be satisfied with a reference to information on the methodology that does not necessarily comply with the BMR obligations for transparency of methodology.

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 77 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, LinkedIn, Facebook and YouTube.

About FIA

FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers. FIA's mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system, and promote high standards of professional conduct. As the principal members of derivatives clearinghouses worldwide, FIA's clearing firm members play a critical role in the reduction of systemic risk in global financial markets. For more information about FIA and its activities: http://www.fia.org/

About the GFXD

The Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association (GFMA) was formed in co-operation with the Association for Financial Markets in Europe (AFME), the Securities Industry and Financial Markets Association (SIFMA) and the Asia Securities Industry and Financial Markets Association (ASIFMA). Its members comprise 24[1] global foreign exchange (FX) market participants, collectively representing the majority of the FX inter-dealer market[2] . Both the GFXD and its members are committed to ensuring a robust, open and fair marketplace and welcome the opportunity for continued dialogue with global regulators.

[1] Bank of America, Bank of New York Mellon, Barclays, BNP Paribas, Citi, Credit Agricole, Deutsche Bank, Goldman Sachs, HSBC, ING, JP Morgan, Lloyds, Mizuho, Morgan Stanley, MUFG, NatWest Markets, Nomura, Northern Trust, RBC, Standard Chartered Bank, State Street, UBS, US Bank and Wells Fargo

[2] According to Euromoney survey