

21 August 2017

Rhonda Luo
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Market Infrastructure
Australian Securities and Investments Commission
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Sydney NSW 2000

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Dear Rhonda

Implementing the financial benchmark regulatory regime

The International Swaps and Derivatives Association, Inc. (**ISDA**)¹ is grateful for the opportunity to comment on the July 2017 Consultation Paper 292, *Implementing the financial benchmark regulatory regime (CP 292)*, including:

- (a) Attachment 1 to CP 292 – draft administration rules (“**Draft Administration Rules**”);
- (b) Attachment 2 to CP 292 – draft regulatory guide (“**Draft Guide**”); and
- (c) Attachment 3 to CP 292 – draft compelled rules (“**Draft Compelled Rules**”).

Our submission is limited to the specific issues raised below and our members may choose to make their own individual submissions in relation to CP 292.

¹ **About ISDA:** Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 875 member institutions from 68 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, 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 web site: www.isda.org.

Since its inception, ISDA has pioneered efforts to identify and reduce the sources of risk in the derivatives and risk management business through documentation that is the recognized standard throughout the global market, legal opinions that facilitate enforceability of agreements and collateral arrangements, the development of sound risk management practices, and advancing the understanding and treatment of derivatives and risk management from public policy and regulatory capital perspectives.

ISDA acknowledges and supports the flexible regime proposed to be adopted, which is to be administered and implemented by the Australian Securities and Investment Commission (**ASIC**). We note that in its flexibility, the regime affords ASIC wide discretions and substantive rule making power and in respect of a broad range of entities. Accordingly, the scope and substance of ASIC's rules, including with respect to the entities that may be compelled to submit data or information, and the guidance provided in respect of the rules and the manner in which ASIC's powers and discretions will be used is critically important. We would welcome further formal and informal consultation with ASIC in relation to any further changes to the proposed rules and guidance, including in advance of the publication of any particular proposed changes, to the extent appropriate. We set out below our submissions in relation to CP 292, including the attachments.

Submissions

For the reasons set out below, ISDA makes the following observations and submissions:

(a) Breadth of the Draft Compelled Rules should align with the underlying legislation

Given the breadth of the entities covered by the regime, we submit that the scope of the entities which may be subject to the compulsion power set out in the Draft Compelled Rules should be limited to, and aligned with, the scope of the entities identified in the Exposure Draft of the *Corporations Amendment (Financial Benchmarks) Bill 2017* (Cth) (**Exposure Draft**). In this regard, we note that under the Exposure Draft, ASIC is to be given the power to require, by written notice, an entity² to “*continue* to provide data or information” to the benchmark administrator and “to provide ASIC with some or all of *that* data or information.”³ We note that the entities to which this obligation may be applied is broad, and may capture any entity whose activities result in the provision of data or information to the administrator for the benchmark.⁴ However, we consider that the Exposure Draft limits these to entities which already *provide* the information or data

² This entity is one which is “referred to in paragraph 908CB(h)”; Exposure Draft, proposed section 908CE(1)(a).

³ Exposure Draft, proposed section 908CE (emphasis added).

⁴ The Exposure Draft provides ASIC with the power to compel “an entity referred to in paragraph 908CB(h)”, which section refers to “entities whose activities result in the provision of data or information to holders of benchmark administrator licences for the generation or administration of the financial benchmarks specified in those licences”: Exposure Draft, proposed sections 908CE(1)(a) and 908CB(h).

to the administrator, and to requiring those entities to *continue* to provide, or to provide to ASIC, the information or data they are already providing.

We note that the Draft Compelled Rules purport to go further than this, and to enable ASIC to, by written notice, compel a Contributor to provide data or information to the administrator or to ASIC. For these purposes, the definition of “Contributor” corresponds to the entities to which ASIC may make the rules set out in the legislation.⁵ However, the powers are not similarly limited to compelling entities to “continue” to provide the information or data to the administrator, or to provide some or all of *that* information (which they are already providing) to ASIC.⁶ To this end, the example written notice, and the guidance in relation to the circumstances ASIC considers it would be in the “public interest” to compel contributors, all refer to contributors that are currently “appointed” or are “*eligible to be*” appointed, as a “prime bank.”⁷

In light of the broad scope of entities which may be “Contributors”, we submit that the Draft Compelled Rules align with ASIC’s powers under the Exposure Draft so that it is clear from the face of the rules the power to compel submission is limited to entities which already provide information or data to the administrator.

(b) Support for international and cross-border consistency

ISDA supports ASIC seeking to maintain international regulatory consistency in implementing this regime, and doing so in an expeditious manner to assist with equivalence assessments with overseas regulators.⁸

In addition, ISDA supports ASIC’s powers to grant exemptions (whether from the requirement to hold a licence generally or in relation to any specific requirement) in a manner which aligns with international principles (and taking into account compliance with an equivalent overseas regulatory regime).⁹

(c) Support for financial benchmarks not being prescribed by legislation

We acknowledge and support that the Exposure Draft provides for a principles-based approach to determining whether a benchmark constitutes a “financial benchmark” or “significant financial benchmark”, rather than legislatively specifying particular

⁵ Draft Compelled Rules, rule 1.2.2.

⁶ Draft Compelled Rules, rule 3.1.1.

⁷ Draft Guide, 000.125; CP 292, paragraph 49; Example of a Written Notice under Paragraph 3.1.1(1)(a) of the Draft Compelled Rules, sections (2) and (3); (emphasis added).

⁸ CP 292, paragraph 13 and 15.

⁹ CP 292, Part C.

benchmarks. We consider that this will enable the framework to be both flexible and adaptable to the needs of the regime and circumstances over time.

We acknowledge that ASIC has proposed that, initially and consistently with the CFR advice,¹⁰ there are five benchmarks that are “likely to meet the criteria for significant benchmarks” in the proposed legislation.¹¹ Although we do not make any submission in relation to the specific benchmarks listed, we would welcome ASIC consulting on the list prior to a declaration being made and strongly support ASIC’s stated intention to “undertake consultation, as appropriate, before declaring any other benchmarks as significant”.¹² We would also welcome, to the extent possible, the publication of the evidence which underpins the decision to make a declaration, as set out in the “Rationale” for the proposed initial declaration.¹³ We support regulatory transparency regarding the basis, and associated evidence, for a declaration, where possible.

(d) **Timeframe for Draft Compelled Rules**

ISDA supports the establishment of a clear, certain, transparent and objective framework setting out the circumstances, and the manner, in which ASIC will exercise its compulsion powers. In this regard, ISDA supports the guidance ASIC has given in the Draft Guide in relation to the circumstances in which ASIC considers it will be “in the public interest” to issue a compulsion notice under the Draft Compelled Rules.

We submit that careful consideration should be given to subjecting ASIC’s powers to compel either the licensee or a “Contributor” to a time limit, in accordance with equivalent compulsion powers under the European Benchmarks Regulation, which are both subject to a maximum period of 24 months.¹⁴

In addition, we submit that ASIC should consider granting a short time period to existing Contributors that are compelled to continue to provide information to adopt this

¹⁰ The “**CFR advice**” refers to the letter titled “Council of Financial Regulators: Regulation of Financial Benchmarks” addressed to The Hon Scott Morrison MP, Treasurer, from Glenn Stevens AC, Governor of the Reserve Bank of Australia, on behalf of the Council of Financial Regulators, and dated 23 August 2016.

¹¹ CP 292, Proposal C1.

¹² CP 292, paragraph 31.

¹³ CP 292, paragraph 30.

¹⁴ In this submission, “**European Benchmarks Regulation**” means Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014). These time limits are set out in Article 21, in respect of the mandatory administration of a critical benchmark, and Article 23, in respect of mandatory contribution to a critical benchmark, see: Article 21(3); Article 23(6), 23(10). In both instances, there is an initial time frame that must not exceed 12 months, with an additional power to extend the compulsion by an appropriate period of time not exceeding 12 months, with the total period to not exceed 24 months: European Benchmarks Regulation, Article 21(3) and Article 23(6)(b).

requirement internally, in particular, if there is a substantive change in submission requirements. This will allow the impacted entities to change internal procedures and controls to meet the new contributor requirements.

(e) Further guidance should be given around the content of ASIC’s “incidental or related” powers

As noted above, ISDA supports a well-defined, clear and objective framework within which ASIC will exercise its compulsion powers, and to that end, we would be grateful for further guidance regarding the circumstances in which ASIC considers it would be “in the public interest” to exercise these powers. We would be grateful if it could be considered whether further examples of, or guidance in relation to, the following could be provided:

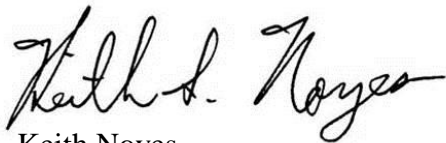
- (i) the “particular ways” in which ASIC may compel the benchmark administrator to administer or generate the significant benchmark;¹⁵ and
- (ii) the powers and matters which ASIC would consider “incidental or related” to ASIC’s powers to compel submission to, or generation of, the significant benchmark (as set out under section 908CE(1)(c)(i) and (ii)).

Conclusion

We thank you for the opportunity to respond to the consultation on the Reforms. We would be very happy to discuss this matter further at your convenience. Please do not hesitate to contact Keith Noyes, Regional Director, Asia Pacific (knoyes@isda.org, +852 2200 5900), Erryan Abdul Samad, Assistant General Counsel (eabdulsamad@isda.org, +65 6653 4170), Jing Gu, Senior Counsel (jgu@isda.org, +65 6653 4170) or Rishi Kapoor, Director, Public Policy, Asia-Pacific (rkapoor@isda.org, +852 2200 5900) if we may be of further assistance.

Yours sincerely,

For the **International Swaps and Derivatives Association, Inc.**



Keith Noyes

Regional Director, Asia-Pacific

¹⁵ Noting that, the Draft Compelled Rules provide (in rule 2.1.1(3)) that a notice may notice may:

“specify the requirements the licensee must comply with in generating or administering the significant financial benchmark, including... (i) requirements relating to changes to the method the licensee uses to generate or administer the significant financial benchmark.”