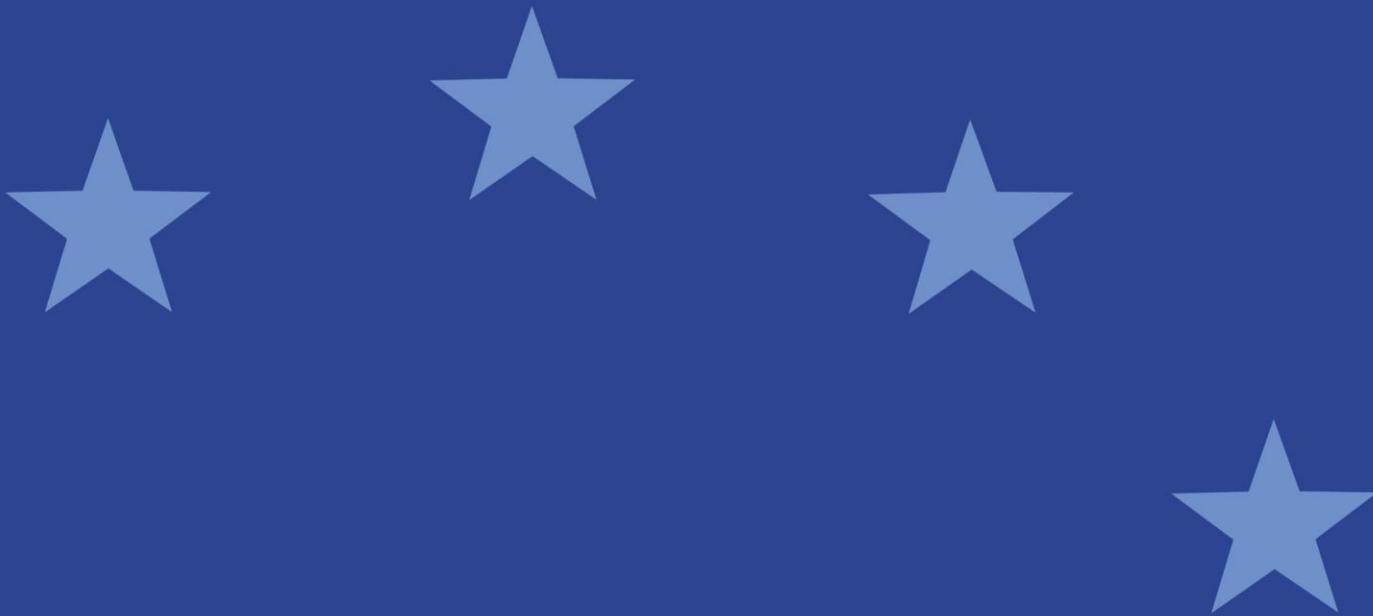




European Securities and
Markets Authority

Consultation Paper

Draft technical standards under the Benchmarks Regulation



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **2 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 close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. 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 not to disclose the response 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 heading [Legal Notice](#).

Who should read this paper

This paper may be specifically of interest to administrators of benchmarks and to any investor dealing with financial instruments and financial contracts whose value is determined by a benchmark or with investment funds whose performances are measured by means of a benchmark.

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1 Executive Summary

Reasons for publication

The European Commission proposed draft Regulation on indices used as benchmarks in financial instruments and financial contracts¹ (Benchmarks Regulation) in September 2013 in the wake of the manipulation of various benchmarks.

On 24 November 2015, the European Parliament and the Council reached a preliminary political agreement² on a compromise text of the Benchmarks Regulation, an agreement that was confirmed on 9 December 2015 by the Permanent Representatives Committee of the Council of the European Union³. The European Parliament voted and approved the text of the Benchmarks Regulation in its plenary session on the 28 April 2016. The Benchmarks Regulation⁴ has been published in the Official Journal of the European Union on the 29 June 2016 and entered into force the following day.

The Benchmarks Regulation requires ESMA to develop a number draft regulatory and implementing technical standards to be submitted to the Commission by 1 April 2017.

ESMA published a Discussion Paper⁵ (DP) on the Benchmarks Regulation on 15 February 2016. The DP included ESMA's policy orientations and initial proposals for both the draft technical standards and the technical advice to the Commission⁶.

This Consultation Paper (CP) is the follow-up of the DP with respect to ESMA's draft technical standards.

Contents

This CP is organised in ten chapters, each dedicated to one of the areas for which the Benchmarks Regulation requested ESMA to develop draft technical standards, namely: (i) procedures, characteristics and positioning of oversight function, (ii) appropriateness and verifiability of input data, (iii) transparency of methodology, (iv) specification of elements of the code of conduct of contributors, v) governance and control requirements for supervised contributors, (vi) specification of qualitative criteria for significant benchmarks, (vii) template for compliance statement for significant/non-significant benchmarks, (viii) contents of benchmark statement, (ix) information to be provided in applications for authorisation and registration, and (x) form and content for the application for recognition by third country administrators. Each chapter summarises the relevant provisions and their objectives, provides an explanation of the related policy issues and references to the relevant responses received to the DP. The CP also includes a first version of each draft technical standard and a preliminary high-level cost-benefit analysis.

Next Steps

ESMA will consider the responses to this CP, and will finalise the draft technical standards in order to submit them to the Commission before the 1 April 2017.

¹ The press release of the European Commission on the proposal:

http://europa.eu/rapid/press-release_IP-13-841_en.htm?locale=en

² See Commission statement : http://europa.eu/rapid/press-release_STATEMENT-15-6169_en.htm?locale=en

³ See Council statement:

http://www.consilium.europa.eu/press-releases-pdf/2015/12/40802206220_en_635852608200000000.pdf

⁴ Benchmarks Regulation published in the EU Official Journal:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1011>

⁵ The Discussion Paper is available here:

https://www.esma.europa.eu/sites/default/files/library/2016-288_discussion_paper_benchmarks_regulation.pdf

⁶ On 11 February 2016 ESMA received a request from the European Commission for technical advice on possible delegated acts, to be delivered within four months after the entry into force of the Regulation. The mandate for the technical advice is publicly available: http://ec.europa.eu/finance/securities/docs/benchmarks/160211-mandate-esma-request_en.pdf

2 Characteristics and procedures of the oversight function (Article 5 BMR)

2.1 Mandate

Article 5

5. ESMA shall develop draft regulatory technical standards to specify the procedures regarding the oversight function and the characteristics of the oversight function including its composition as well as its positioning within the organisational structure of the administrator, so as to ensure the integrity of the function and the absence of conflicts of interest. In particular, ESMA shall develop a non-exhaustive list of appropriate governance arrangements as laid down in paragraph 4.

ESMA shall distinguish between the different types of benchmarks and sectors as set out in this Regulation and shall take into consideration the differences in the ownership and control structure of administrators, the nature, scale and complexity of the provision of the benchmark, and the risk and impact of the benchmark, also in light of international convergence of supervisory practice in relation to governance requirements of benchmarks. However, the ESMA draft regulatory technical standards shall not cover or apply to administrators of non-significant benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

2.2 General remarks

1. Under Regulation (EU) 2016/1011 – the Benchmarks Regulation (BMR) – administrators of all benchmarks falling within the scope of Title II are required to establish a permanent and effective oversight function for all aspects of the provision of its benchmarks. The BMR sets out the minimum responsibilities and characteristics which administrators must introduce in order to ensure oversight of all aspects of the provision of their benchmarks.
2. In that context, ESMA is required to draft regulatory technical standards (RTS) to specify the detailed procedures and characteristics of oversight functions – in particular the positioning of a function within the organisation of the administrator and the composition of an oversight function, including a non-exhaustive list of governance arrangements. Under the BMR, the RTS must ensure the integrity of the oversight function and the absence of

conflicts of interest at the level of the administrator. The RTS do not however apply to the oversight functions of non-significant benchmarks or of interest rate benchmarks.

3. The BMR allows for a proportional application of the requirements for the oversight function at Level 1. ESMA also considers the mandate regarding composition to be flexible as it allows administrators to select the structure most appropriate to their businesses. For these reasons, ESMA has determined that there are few possibilities to introduce further proportionality in the RTS. However, ESMA recognises that the level of scrutiny required by infrequently used significant benchmarks may not be equal to that required by critical benchmarks. In that context, ESMA has introduced a number of provisions aimed at addressing the specific needs of different types of benchmarks which are dealt with under sections 2.3 (characteristics) and 2.4 (procedures) below.
4. Based on the mandate set out in the BMR, ESMA has developed draft RTS on the following specific characteristics: positioning and composition, including the non-exhaustive list of governance arrangements that are appropriate for an oversight function. ESMA notes that there is scope within the mandate to specify additional characteristics of the oversight function, as ESMA is required to “specify the characteristics of the oversight function **including** its composition as well as its positioning within the organisational structure of the administrators so as to ensure the integrity of the function and the absence of conflicts of interest”. ESMA considers however that the issues covered by the draft RTS are sufficient to address the mandate set out at Level 1.
5. In response to ESMA’s initial discussion paper (DP), a number of respondents highlighted concerns which ESMA believes are beyond the scope of the mandate for the RTS. Regarding the responsibilities of the oversight function – in particular annual reviews of methodologies by benchmark, oversight of third parties and taking action on breaches of the code of conduct – these are set out in the BMR and cannot be amended by the RTS. Recognising the role of the oversight function in reducing conflicts of interest at the level of the administrator, another respondent requested that the concept of “independent administration” be recognised as an alternative way of managing conflicts of interest. However, this is not within the scope of the characteristics and procedures of the oversight function; rather it could be considered within the context of conflicts of interest management at the level of the administrator under Article 4 of the BMR, which is not covered by these RTS.

2.3 Characteristics of the oversight function

Composition

6. The majority of the respondents to the DP have already established a committee to operate as their oversight function, in order to meet the demands of the IOSCO Principles for Financial Benchmarks, the EBA/ESMA Principles for Benchmarks-setting processes and, in some cases, domestic regulation. Some respondents stated that they operate multiple committees as part of their oversight functions, with each committee either responsible for

different benchmarks or for different tasks. ESMA has attempted to minimise the burden on administrators that would be involved in overhauling an already fit-for-purpose function by ensuring that the administrator has discretion over the structure most appropriate for their business. For example, where an administrator has in place a pre-existing committee which fulfils the responsibilities of the oversight function, it may be appropriate to nominate that committee as the oversight function. ESMA notes however that the competent authority of the administrator is tasked with the authorisation and supervision of the administrator, including the structure of its oversight function. The competent authority will therefore seek to ensure that the structure of the oversight function is appropriate to the benchmarks provision process at all times and may challenge the decisions of the administrator where necessary.

7. The BMR recognises the need to provide the administrator with flexibility in selecting the structure of the oversight function most suitable to its business, insofar as ESMA is required to establish a non-exhaustive list of governance arrangements appropriate for the oversight function to meet its responsibilities under Level 1. This non-exhaustive list, as well as the confirmation that the composition of the oversight function should be at the discretion of the administrator, was met with approval by a large proportion of respondents to the DP. While the structures included in the non-exhaustive list in the draft RTS have been somewhat amended to address concerns raised by respondents, the flexibility of the DP has been retained.
8. Many of the governance arrangements proposed in the non-exhaustive list take the form of a committee or a number of committees - reflecting the reality at most of the administrators that responded to the DP. Half of the respondents were in favouring of exercising oversight over benchmarks grouped together based on the underlying interest they seek to measure, while the other half supported the tailoring of oversight based on whether the benchmark is critical or significant. ESMA has taken the views that the possibility to establish an oversight function consisting of multiple committees will enable an administrator to select individuals with expertise tailored to a particular benchmark, while maintaining centralised oversight of all benchmarks. Most respondents were in favour of the option of having one oversight function for all their benchmarks; however, some respondents noted that they operate multiple committees which carry out separate tasks and together form the oversight function for specific benchmarks. ESMA considers that such a structure would also meet the requirements of Level 1 and it has been included in the non-exhaustive list.
9. 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 having 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 number of respondents to the DP in support of this proposal outnumbered those opposed. Concerns around continuity were at the root of the objections. ESMA has determined that it is necessary to retain the option of natural

persons operating as the oversight function to maintain proportionality in the requirements. ESMA considers that continuity can be maintained through record keeping and knowledge management, which are required as part of the rules on positioning of the oversight function and the procedures to be designed by the administrator. In order to ensure proportional application of the rules, ESMA has determined that the natural person can be an employee of the administrator or an external person contracted by the administrator for the purpose of carrying out the responsibilities of the oversight function. Such a person should not have a vested interest in the benchmark and would not be otherwise already employed by the administrator. ESMA would expect this option to be selected by administrators with a small workforce and staff who are not directly involved in the provision of the benchmark are not available.

10. The proposal which was met with the most opposition by respondents to the DP was the suggestion that independent members should be included in the oversight function for certain types of benchmarks. ESMA considered independent members to be either natural persons that are not directly affiliated with the administrator, or independent non-executive directors. The purpose of this proposal was to ensure appropriate management of the conflicts of interest which may arise at the level of the administrator, for example due to the administrator's ownership structure, controlling interests or other activities – consistent with Article 4(3) of the BMR. Independent members may also help to maintain objectivity in oversight where a number of different stakeholders with competing interests are acting as members of the oversight function. ESMA considers that independent members are most pertinent for benchmarks that have been designated as critical.
11. Approximately a third of respondents objected to any requirement to include independent members in the oversight function. Most were concerned that the introduction of individuals not affiliated with the administrator would introduce new conflicts where there previously were none. Some respondents opposed the possibility of including independent executive directors (INEDs) in particular, as they felt that this would blur the lines between the oversight function and the management body of the administrator. In response to the objections from respondents regarding the independence of INEDs from the management body of the administrator, ESMA has removed this element in favour of independent members only. Independent members are described as persons who are not otherwise directly affiliated with the administrator and who do not have a vested interest in the benchmark. Contributors and users are not therefore considered to be independent members.
12. Many respondents stressed the need for the oversight function to be composed of members with expertise appropriate to the benchmarks they are overseeing and ESMA has sought to reflect this in the draft RTS – both as part of the requirements for composition and in the procedures for the oversight function. ESMA takes the view that although external parties, such as users and contributors, may bring conflicts of interest to the oversight function, they can also provide vital expertise. Some respondents expressed unease at the prospect of being required to include users, contributors and other stakeholders in their oversight functions. A few felt that the inclusion of contributors could compromise the independence of the oversight function, others stated that users could

represent their own interests, rather than the markets, and some felt that any such requirements would go beyond the scope of the BMR. ESMA has determined that in order to reflect the spirit of the BMR, administrators are permitted, but not required, to invite external stakeholders to join their oversight function. Provisions for managing any associated conflicts of interest that may arise are included in the draft RTS. A few respondents also noted that they maintain advisory committees to consult the views of external stakeholders, rather than including them in the oversight function. This option has been reflected in the procedures for managing conflicts of interest within the oversight function.

13. Some respondents to the DP requested specific treatment for regulated data benchmarks and commodities benchmarks subject to Title II of the BMR. ESMA has determined that the flexible nature of the composition requirements, which allow the administrator to select the oversight function most appropriate to their business, should provide sufficient proportionality for administrators of commodities and regulated data benchmarks. In order to account for the specific natures of these benchmarks however, ESMA has proposed that administrators of regulated data benchmarks should consider including representatives of their input data sources as members of their oversight functions. Administrators of commodities benchmarks subject to Title II are, as is the case for all administrators providing benchmarks based on contributions, asked to consider including representatives of their contributors – supervised and non-supervised – as members of their oversight functions. ESMA would like to stress that administrators should consider but are not required to include these individuals as members, with the caveat that the composition of the oversight function is subject to the supervision of the administrator's competent authority.
14. Taking into account the concerns raised regarding the inclusion of external stakeholders as members, ESMA has considered it appropriate to retain the possibility for an administrator to establish a committee without external stakeholders. This proposal was supported by a number of respondents to the DP. Some respondents stated that they consider staff involved solely in areas such as legal and compliance to be sufficiently removed from benchmark provision to fulfil the role of independent members. In order to safeguard the integrity of the oversight, ESMA has proposed that staff of the administrator who are not involved in the provision of the benchmark must be included as members. Where it is necessary to establish a committee and the staff in question are not available, ESMA has taken the view that independent persons must be included as members of the oversight function.
15. In their responses to the DP, administrators discussed the structure of their existing oversight functions. In some cases, respondents stated that employees involved in benchmarks provision act as members of the oversight function, although these employees often do not have voting rights. ESMA has sought to reflect this reality in the draft RTS.
16. ESMA has also introduced the concept of observers into the draft RTS. Observers would not be permanent members of the oversight function and would be permitted to attend meetings, without voting rights, at the discretion of the oversight function only. 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.

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?

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

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

Positioning

17. ESMA's DP envisaged an oversight function that is embedded within an administrator's organisational structure and would be able to effectively challenge the management body⁷ of the administrator with regards to decisions on the provision of the benchmark. Under the BMR, the administrator – in particular its management body – is ultimately responsible for decisions around the benchmarks provision process. However, ESMA takes the view that the BMR requires the oversight function to act independently of the administrator in certain instances in order to fulfil its obligations. This is especially relevant in cases of misconduct at the administrator, as the oversight function is required to report such misconduct to the competent authority. ESMA therefore considers, contrary to the assertions of a few respondents, that the oversight function is not simply a consultative body.
18. A large majority of respondents supported the positioning of the oversight function as being embedded within the organisation of the administrator, stating that they believe this will facilitate effective challenge of the administrator with regards to the provision of the benchmark. ESMA has reflected this view in the draft RTS, and has highlighted the need for the oversight function to be able to provide effective scrutiny of the administrator. Some respondents stated that they believe that the role of the oversight function should be focused on the oversight of governance arrangements, rather than challenging the administrator. ESMA agrees that the oversight function must oversee the governance arrangements of the administrator, but ESMA is also confident that this is not possible without the ability to challenge the decisions of the administrator with regards to the benchmarks provision process.

⁷ As defined in Article 3(1)(20) of Regulation (EU) 2016/1011.

19. 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 (article 5(3)(i)).

20. ESMA's view is that independence of the oversight function is essential to allow reporting of misconduct to the competent authority. However, in all other respects, ESMA expects the oversight function to make recommendations to the administrator and to be able to record, but not take action on, any diversion of the administrator from those recommendations.

21. Almost all respondents agreed with ESMA that the oversight function should not have any oversight of the business decisions of the management body of the administrator, noting that administrators often form part of a wider business group. A couple of respondents expressed a preference for greater flexibility on this point. ESMA has determined that the management body and the oversight function should be separate, although the oversight function may invite members of the administrator's management body to attend its meetings (see Article 1(7) and Article 2(2) of the draft RTS).

22. A couple of respondents requested that the oversight function be separated internally from the rest of the business to avoid conflicts of interest. ESMA considers that this is appropriately dealt with in the draft RTS regarding the composition as staff of the administrator involved in the provision of the benchmark or any related activities are not permitted to be voting members of the oversight function. Conflicts of interest stemming from the wider business should be managed appropriately under the requirement for operation separation in Article 4(2) of the BMR.

23. A small number of respondents requested a clearly defined relationship between the management and the oversight function – some going so far as to suggest that the administrator be allowed to delegate decisions to the oversight function. ESMA considers this latter point to be beyond the scope of the mandate of the RTS.

2.4 Procedures regarding the oversight function

24. ESMA considers that the procedures set out in the draft RTS should apply to all benchmarks to ensure consistency across the market in the application of the BMR. However, oversight functions carried out by a natural person in accordance with paragraph 3 of the Annex of the RTS are exempt from certain procedures that would only be appropriate for a committee. The administrator will nonetheless have to ensure that such a natural person is not subject to conflicts of interest. The procedures in the draft RTS set out the minimum ESMA would expect and administrators are not restricted from introducing additional procedures appropriate to their benchmarks. Of the respondents who addressed

the need for differentiation between types of benchmarks, most did not see the need for different procedures.

25. ESMA only received two objections to the list of procedures proposed in the DP, which were focused on the requirement to publish the names of members of the oversight function. The respondents were concerned about the impact the publication requirement could have on the integrity of the function. ESMA has removed this requirement from its list of minimum procedures, although administrators are not prohibited from publishing the details, if they so choose. ESMA has also expanded the list of procedures originally envisaged in the DP, in response to feedback received from respondents and following further discussion at ESMA. In addition to the terms of reference, the criteria to select members, conflicts of interest declaration and processes for electing committee members, ESMA has added the following additional procedures in response to feedback to the DP: frequency of meetings; procedures for recording, redacting and publishing meeting minutes to ensure transparency of the work of the oversight function; criteria for selecting members based on their expertise; establishment of ethical policies, escalation and whistleblowing procedures; and determining terms of appointment for members.

26. Following further discussion of the Task Force, ESMA has also proposed the following additional procedures:

- criteria to identify oversight function observers in case external entities, for example public authorities which are not competent authorities under the Regulation seek to join or are invited by the oversight function;
- procedures for managing the involvement of staff of the administrator responsible for the provision of the benchmarks and of observers in the work of the oversight function, as the former are non-voting members and the latter, non-permanent;
- coordination of the oversight function when it consists of multiple committees or sub-functions, to guarantee centralised oversight;
- dispute resolution mechanism to ensure the enforcement of the procedures and to allow for the effective fulfilment of the responsibilities of the oversight function;
- processes governing the actions the oversight function must take independently of the administrator, in order to fulfil the responsibilities set out in the Regulation;
- management of the interaction between the oversight function and the management; and
- arrangements to safeguard the confidentiality of the work of the oversight function, where information cannot be publically disclosed.

27. Some respondents suggested that the remuneration of oversight function members should be transparently reported. ESMA has taken the view that such a requirement would not be proportionate and would potentially limit the ability of administrators to locate individuals willing to join the oversight function. The proposal has not been included in the draft RTS.
28. ESMA's DP noted that conflicts of interest may arise in the oversight function, in particular due to the vested interest of contributors in the benchmark. The DP also discussed the procedures to manage conflicts of interest arising from the composition of the oversight function. The majority of respondents agreed that individuals with possible conflicts of interest should not be prevented from joining oversight functions, provided that their conflicts of interest can be appropriately managed. Respondents believed that external stakeholders – in particular the example of contributors which was raised in the DP – should be prevented from joining an oversight function only if: their conflicts of interest cannot be managed; the individual in question is charged with financial services-related offences; or the person serves on the committee of another administrator. Respondents also stated that contributors in particular should be excluded from meetings of the oversight function if the meeting agenda included a discussion on the conduct of the contributors. Those objecting to the inclusion of contributors and other stakeholders, echoed the concerns raised in the discussion regarding composition – namely that the inclusion of such individuals would introduce conflicts of interest where there previously were none.
29. Respondents to the DP proposed a variety of different procedures for managing conflicts of interest in the oversight function. ESMA has incorporated the majority of these proposals into the draft RTS. ESMA has rejected the proposal to prohibit external parties from voting and does not mandate or prohibit the provision of voting rights to external members.

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.

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

2.5 Draft technical standards: Oversight function

COMMISSION DELEGATED REGULATION (EU) No .../2017

of **XXX**

[...]

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the procedures and characteristics of the oversight function

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 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 596/2014⁸, and in particular Article 5(5) thereof,

Whereas:

- (1) The list of structures set out in this Regulation is intended to be non-exhaustive, in compliance with the mandate under paragraph 5 of Article 5 of Regulation (EU) No 2016/1011. Administrators are allowed discretion to select the oversight function most appropriate for the benchmarks provided and are not restricted to establishing an oversight function based on the structures listed.
- (2) External stakeholders acting as members of an oversight function can provide valuable expertise, their participation could increase the effectiveness of the oversight function. Conflicts of interest within the oversight function may arise due to the conflicting interests of these members or due to relationships between members of the oversight function and their clients or other stakeholders. To mitigate such conflicts, independent members may be included within the oversight function – and they should be included in those overseeing critical benchmarks due to their importance for market integrity, financial stability, consumers, the real economy and the financing of households and businesses in Member States. Where independent members are not available, it may be appropriate for the administrator to adopt other procedures for managing conflicts of interest such as excluding members from certain discussions or removing voting rights of specific members.

⁸ OJ L 171, 29.6.2016, p. 1

- (3) In order to mitigate conflicts of interest, administrators may also allow staff of the administrator to be members of the oversight function if they are not directly involved in the provision of the relevant benchmarks. Such individuals could have appropriate objectivity to oversee the benchmark without compromising its integrity.
- (4) An oversight function may include multiple functions, allowing for a tailored approach to the oversight of different benchmarks, different types of benchmarks or different families of benchmarks by committees with specific, dedicated competencies. An oversight function may also include multiple functions carrying out different tasks, as there may be operational reasons why persons with appropriate expertise cannot all sit on committee – for example, geographical challenges. Both types of oversight functions have a single person or committee in charge of the direction of the oversight function and responsible for interaction with the management body of the administrator and with the competent authority to facilitate the centralisation of oversight.
- (5) For certain benchmarks, it may be possible for a natural person to act as the oversight function, provided the amount of time devoted to the oversight of the relevant benchmarks is appropriate to their degree of use and complexity and to the risks they pose. Such natural persons may be staff of the administrator or other external natural persons contracted by the administrator to carry out the role of the oversight function. External persons may be most appropriate when no staff of the administrator are available to perform the function, however these persons must not have a vested interest in the level of the benchmark. Where the oversight function is a natural person, it is exempt from certain procedures which are only appropriate for a committee. Due to the high degree of use of critical benchmarks and the risks they pose in certain instances, critical benchmarks cannot be overseen by a natural person.
- (6) To fulfil the responsibilities of the oversight function, members may need to have expert knowledge of the benchmark provision process but also of the underlying market the benchmark seeks to measure. Such expertise may be sourced from users and contributors active in the markets or from providers of regulated data. An oversight function may benefit from the expertise of contributors and users have an interest in ensuring the benchmark is robust. It is therefore appropriate that they be considered as members for such benchmarks.
- (7) Staff of the administrator that are directly involved in the provision of the benchmark may sit on the oversight function on condition they participate in a non-voting capacity as they can provide necessary insight into the work of the administrator. Their status as non-voting members is appropriate to ensure that the administrator does not hold undue influence over the decisions of the oversight function at the expense of supervised entities that use the benchmark, as well as other stakeholders.
- (8) The oversight function is an essential tool for managing conflicts of interest at the level of the administrator and in order to ensure the integrity of the function, persons convicted of financial services-related offences are prohibited from becoming members of an oversight function.
- (9) Observers may also join the oversight function, for example if they have an interest in the benchmark if it is widely used in their markets or if they can provide additional expertise. Such individuals are considered observers rather than members, as their presence is not permanent and they do not have voting rights. Their participation is

governed by the procedures of the oversight function as the final decision on whether or not an observer should be permitted to join lies with the oversight function in order to maintain the integrity of the oversight function.

- (10) Independent committees cannot be completely separated from the organisation of the administrator as the final decisions with regards to the business of the administrator lie with the management body and a separate committee could take decisions without fully appreciating the potentially detrimental impact of such decisions on the business of the administrator. An oversight function embedded within the organisation of the administrator would be best placed to challenge the decisions of the administrator with respect to the benchmarks.
- (11) In order for the oversight function to perform the role assigned by Regulation (EU) No 2016/1011, it is important that it has the ability to fully assess and challenge the decisions of the management body of the administrator and that, in case of a disagreement, the deliberations of the oversight function in this regard are recorded
- (12) In case the oversight function is a committee, procedures covering dispute resolution, conflicts of interest management and criteria to select members and observers, amongst others, are necessary to ensure that the oversight function, once established, can operate without impediment. There may however be other procedures appropriate to specific types of benchmarks or administrators which may not be envisaged in this Regulation but are necessary for the correct governance of their benchmarks and oversight functions are therefore free to introduce such additional procedures.
- (13) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (14) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010⁹.

HAS ADOPTED THIS REGULATION:

Article 1

Composition of the oversight function

1. The structure and composition of the oversight function shall be appropriate to the ownership and control structure of the administrator and shall be determined by the administrator based on the nature, scale and complexity of the provision of the benchmark and, where appropriate, in accordance with one or more of the non-exhaustive list of governance arrangements in Annex 1.
2. Where the benchmark is a critical benchmark, the oversight function shall be carried out by a committee with at least two independent members. Independent members shall be

⁹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

natural persons sitting on the oversight function who are not directly affiliated with the administrator other than through their involvement in the oversight function, and do not have a vested interest in the level of the relevant benchmark.

3. An administrator shall not establish an oversight function in accordance with Number 3 of the Annex for critical benchmarks or for regulated-data benchmarks that are used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds, having a total value greater than the value given in Article 17(2) of Regulation (EU) 1011/2016, on the basis of all the range of maturities or tenors of the benchmark.
4. The oversight function shall be composed of members that together have the skills, knowledge and expertise appropriate to the oversight of the provision of a particular benchmark, the underlying market or economic reality the benchmark seeks to measure and to the responsibilities the oversight function is required to fulfil.
5. Where a benchmark is a regulated-data benchmark, the administrator shall consider including, as members of the oversight function, representatives from the entities listed in point (a) of Article 3(1)(24) of Regulation (EU) No 1011/2016 and, where applicable, from entities contributing net asset values of investment funds.
6. 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. The administrator shall also give due consideration to conflicts arising from relationships between potential members and other external stakeholders with a vested interest in the level of the relevant benchmarks.
7. Where staff of the administrator who are directly involved in the provision of the benchmarks are members of the oversight function, the administrator shall ensure that the members in question do not adversely affect the integrity of the oversight function. Representatives of the management body may be invited to attend meetings by the oversight function but shall not be permanent members of the oversight function.
8. Members shall not include persons who have been convicted of financial services related offences, in particular manipulation or attempted manipulation under Regulation (EU) No 596/2014.
9. Observers shall be permitted to join the oversight function, in accordance with the procedures set out in Article 3(1)(b).

Article 2

Positioning of the oversight function

1. The positioning of the oversight function within the organisational structure of the administrator shall be appropriate to provide effective scrutiny of the provision of the benchmark(s).
2. The oversight function shall be embedded within the organisational structure of the administrator but separate from the management body and other governance functions of the benchmark administrator.

3. The oversight function shall assess and challenge the decisions of the management body of the administrator with regards to benchmarks provision in order to fulfil the requirements of Regulation (EU) No 2016/1011. The oversight function shall act independently of the administrator where required by Article 5(3)(i) of Regulation (EU) 1011/2016 shall report all other recommendations on benchmarks oversight to the management body.
4. Where the oversight function becomes aware that the management body acted or intends to act contrary to recommendations resulting from a decision of the oversight function, it shall record this clearly in the minutes of any meeting, or in records of decisions for oversight functions established in accordance with Number 3 of the Annex.

Article 3

Procedures governing the oversight function

1. An oversight function shall have procedures relating to the following areas:
 - (a) terms of reference for the oversight function, including the frequency of meetings, which shall occur regularly, and the recording and publication of minutes of the meetings or decisions of the oversight function;
 - (b) criteria to select members of the oversight function, including evaluation of members' expertise and skills and the time commitments required, and to identify appropriate observers that may be permitted to join some meetings of the oversight function;
 - (c) Disclosure to users and potential users of a benchmark, to the relevant competent authority and, where relevant, to contributors, of procedures regarding the management of conflicts of interest in accordance with Article 4;
 - (d) Processes for election, nomination or removal and replacement of members of the oversight function;
 - (e) Rules for the participation of the staff of the administrator sitting on the oversight function, who are directly involved in the provision of the benchmarks to be overseen;
 - (f) Criteria for determining which responsibilities may be delegated in accordance with Number 5 of the Annex;
 - (g) Criteria for choosing the person or committee within the oversight function acting as the contact point for the management body of the administrator and the competent authority, in accordance with Numbers 4 and 5 of the Annex;
 - (h) A mechanism for managing disputes within the oversight function;
 - (i) Processes governing the measures to be taken in respect of breaches of the code of conduct, where appropriate;
 - (j) Procedures for notifying the competent authority regarding suspected misconduct by contributors or the administrator and any anomalous or suspicious input data;

- (k) Frequency of, and approach to, interaction with other administrator's functions and in particular with the management body;
 - (l) Arrangements to prevent improper disclosure of confidential or sensitive information received, produced or discussed by the oversight function.
2. Where the oversight function is carried out by a natural person, subparagraph (e) of paragraph 1 do not apply.

Article 4

Conflicts of interest management procedures

1. Conflicts of interest which may arise within the oversight function due to competing interests of members shall be managed using, where appropriate, the following non-exhaustive list of procedures:
 - (a) Require members to disclose conflicts ahead of the discussion of each agenda item during meetings of the oversight function;
 - (b) Prohibit staff directly involved in the provision of the benchmark from voting on decisions of the oversight function;
 - (c) Remove voting rights from members for decisions that would have a direct business impact on the organisations they represent;
 - (d) Exclude members from specific discussions which would cause them to become conflicted, record the exclusion in the minutes of any relevant meeting and redact such minutes if they are published in accordance with Article 3(1)(a);
 - (e) Restrict membership of the oversight function to persons not already sitting on the oversight function of another administrator.
2. Where it is not possible to manage the conflicts of interest through the procedures in paragraph 1 or by other means, the administrator shall revise the structure of the oversight function and where appropriate, replace the conflicted members.
3. Where the oversight function is carried out by a natural person, subparagraphs (b) to (d) of paragraph 1 do not apply. The natural person carrying out the oversight function shall not be directly involved in the provision of the benchmark. Where the natural person carrying out the oversight function represents another organisation, it shall not make decisions that would have a direct business impact on such organisation.

Article 5

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.



It shall apply from 1 January 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

*For the Commission
The President*

On behalf of the President

[Position]

Annex

Non-exhaustive list of governance arrangements

1. An independent oversight committee consisting of a balanced representation of stakeholders including supervised entities that use the benchmark, contributors and other external stakeholders such as market infrastructure operators and other input data sources, as well as independent members and staff of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities;
2. A committee, where the administrator is not wholly owned or controlled by contributors to the benchmark or supervised entities that use it and no other conflicts of interest exist at the level of the oversight function. The committee shall include:
 - i. persons involved in the provision of the relevant benchmarks in a non-voting capacity;
 - ii. at least two members of staff representing other parts of the organisation of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities; and
 - iii. where appropriate staff members in accordance with subparagraph 2(ii) are not available, at least two independent members;
3. A natural person who is a staff member of the administrator or any other natural person whose services are placed at the administrator's disposal or under the control of the administrator, who is not directly involved in the provision of any relevant benchmark and has no vested interest in the level of the benchmark;
4. An oversight function consisting of multiple committees, each responsible for the oversight of a benchmark, type of benchmarks or family of benchmarks, provided that a single person or committee is designated as responsible for the overall direction and coordination of the oversight function and for interaction with the management body of the benchmark administrator and the competent authority;
5. An oversight function consisting of multiple committees, each performing a subset of the oversight responsibilities and tasks, provided that a single person or committee is designated as responsible for the overall direction and coordination of the oversight function and for interaction with the management body of the benchmark administrator and the competent authority.

3 Input data (Article 11 BMR)

3.1 Mandate

Article 11

5. ESMA shall develop draft regulatory technical standards to specify further how to ensure that input data is appropriate and verifiable, as required under points (a) and (b) of paragraph 1, as well as the internal oversight and verification procedures of a contributor that the administrator has to ensure are in place, in compliance with point (b) of paragraph 3, in order to ensure the integrity and accuracy of input data. However, the ESMA draft regulatory technical standards shall not cover or apply to administrators of non-significant benchmarks.

ESMA shall take into account the different types of benchmarks and sectors as set out in this Regulation, the nature of input data, the characteristics of the underlying market or economic reality and the principle of proportionality, the vulnerability of the benchmarks to manipulation as well as the international convergence of supervisory practice in relation to benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

3.2 Background

Article 11 BMR

30. According to Article 11 paragraph 1 (a) of the Regulation (EU) 2016/1011, input data shall be transaction data if available and appropriate. Point (b) of the same article adds that input data must be verifiable.
31. Point (b) of Article 11, paragraph 3 of the Regulation (EU) 2016/1011 establishes that where input data of a benchmark is contributed from a front office function in the contributor organisation the administrator shall ensure that contributors have in place adequate internal oversight and verification procedures. In the same paragraph of the provision, a front-office is defined as any department, division, group or personnel of contributors or any of its affiliates that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities
32. Article 11 paragraph 5 of the Regulation (EU) 2016/1011 requires ESMA to develop draft RTS to specify further how to ensure that input data is appropriate and verifiable, as required under points (a) and (b) of Article 11, paragraph 1.

33. ESMA is also required to draft RTS to specify further the internal oversight and verification procedures of a contributor that an administrator has to ensure are in place, in compliance with point (b) of Article 11, paragraph 3, of the Regulation (EU) 2016/1011, in order to ensure the integrity and accuracy of input data.
34. In drafting those RTS, ESMA shall take into account the different types of benchmarks and sectors as set out in the BMR, the nature of input data, the characteristics of the underlying market or economic reality and the principle of proportionality, the vulnerability of the benchmarks to manipulation as well as the international convergence of supervisory practice in relation to benchmarks.
35. These draft RTS are applicable to critical and significant benchmarks but, in accordance with Article 25, paragraph 1 of the Regulation (EU) 2016/1011, administrators of the latter may waive the application of Article 11(3), and hence, of the related articles in these RTS on front office contributions.
36. These draft RTS shall not cover or apply in the provision of non-significant benchmarks.

Content of the Discussion Paper

37. In the Discussion Paper, ESMA consulted on some general views it developed on appropriateness and verifiability of input data and on front office contributions.
38. ESMA stated that a precondition for the verifiability requirement that rests on the administrator is that clear and complete records are kept by the administrator. It also established a minimum list of records to be kept and suggested weekly transmission of information by contributors. Furthermore, it was proposed to apply verifiability criteria differently depending on the extent to which input data relies on expert judgement or the use of discretion. To this extent, it was suggested to exempt regulated data benchmarks from input data record keeping.
39. Moreover, it was argued that appropriateness of input data cannot be verified except by comparison with the criteria put forward in the methodology. Checks that may help the administrator to assess the appropriateness of input data were accordingly enumerated.
40. In addition, ESMA suggested to scrutinise input data in three stages: evaluation, validation and verification. Evaluation should consist of formal checks on each individual input data submission received from a single contributor such as the input data contributed by an authorised person, and provided on time and in the specified format. These checks were to be carried out prior to the publication of the benchmark. While the validation stage should consist of a posteriori substantive controls on the input data received from all contributors such as the identification of outliers and anomalies or the comparison of input data against previous contributions. Verification consisted of an in-depth examination of questionable input data including the process of its creation. To this end, the administrator would rely on information available in the market such as the comparison against historic series of data from underlying or related markets / economic realities. In this case, the benchmark can

be compared to related markets' rates from different maturities or currencies. Another proposed way to verify questionable data is for administrator to back test input data, in the case where they are non-transaction data, with transaction data as soon as those are available.

41. The Discussion Paper also listed different safeguards that the administrator should ensure are in place within the contributor where front office members contribute input data. The safeguards envisaged included skills and training of staff working in functions related to benchmark contribution, the establishment of a conflicts of interest policy covering a minimum list of topics and contingency and emergency procedures, and internal oversight at contributor level that ideally is based on the three lines of defence model. The three lines of defence model was defined in relation to clear defined roles in the effective internal oversight at the contributor level. The first line of defence referred to risk mitigation and control by front office staff in order for them to be aware of the standards they are expected to adhere to. The second line of defence referred to the activities of control functions such as compliance, legal and risk that are independent from the front office. The third line of defence referred to the activity of the internal audit.
42. Finally, differentiated applications were listed based on three distinct criteria: the type of input data used, the size and the characteristics of the contributors.

3.3 Feedback from stakeholders

Appropriateness and verifiability of input data

43. The majority of the respondents agreed with the fact that the concept of appropriateness is linked to the benchmark methodology but were of the opinion that verifying the appropriateness of input data on a daily basis would be disproportionate. Furthermore, some of them expressed the view that the checks to be performed by the administrator to assess the appropriateness of input data were highly dependent on the type of input data and on the methodology of the benchmark. In this context, some respondents disagreed with the proposal in the Discussion Paper related to the fact that the administrator should know the underlying sources and assumptions on which the contributor bases its submission in the case of non-transaction data arguing that it consists of proprietary and sensitive information that would reduce the willingness of some contributors to contribute data if they were to share this information with the administrator. These respondents suggested in this case that the administrator check the compliance with the general submission framework instead of each individual submission. Furthermore, some respondents expressed their concerns regarding the record keeping of the analyses performed and stated that these requirements should not go beyond what is foreseen in Article 8 of the Regulation 2016/1011.
44. Regarding the proposed record keeping obligation resting on administrators in order to ensure the verifiability of input data, the majority of the respondents were of the opinion that the list of records to be kept by the administrator was overly prescriptive and did not necessarily reflect the diversity of benchmarks in the market and the specific risk profile of

the category of input data. While recognising the importance of verifiability of contributions, they cautioned that requirements that indirectly require contributors to provide an inappropriate amount of information may reduce the willingness of contributors to contribute and so reduce the quality of the benchmark. Some respondents were of the opinion that the administrator is best placed to determine what information is needed from contributors in order to ensure verifiability. In addition, all respondents considered it appropriate that the frequency of transmission of information by contributors would be defined by the administrator. Finally, the majority of the respondents agreed that when expert judgment is relied on, additional appropriate measures to ensure verifiability of input data should be imposed.

45. The majority of the respondents agreed with the concepts of evaluation, validation and verification of input data as developed in the Discussion Paper. At the same time, several respondents argued that regulated data benchmarks, in view of the intrinsically more verifiable character of the input data used, should not be obliged to guarantee verifiability in the same manner as benchmarks using other types of input data. Furthermore, some respondents suggested also to include additional checks to the list provided for in the Discussion Paper in relation to the validation stage, such as a comparison of contributed data against previous contributions and the observation of indicators related to contributed data in order to verify market developments and possible influence on contributions.

Front office contributions

46. As suggested in the Discussion Paper, almost all respondents are of the opinion that all staff involved in input data submission should undergo training. In addition, some respondents opined that all staff, including submitters, management and staff in the relevant control and audit functions should undergo appropriate training programs tailored for their respective groups.
47. All respondents agreed with the three lines of defence principle as an ideal type of oversight architecture but the majority called for a proportional approach of this principle. More particularly, it was stated that the “four eyes” principle might not be practicable or proportionate for all categories of benchmarks. In addition, it was suggested to accept other oversight arrangements that achieve the same goals, depending on the scale and nature of contributor’s organisation.
48. In order to improve oversight at the level of the contributor, one respondent suggested to put in place an on-going cooperation between functions involved in the three lines of defence in order to ensure a continuous flow of information between them.
49. The majority of respondents agreed with the list of elements that should be contained in the conflicts of interest policy to be established in the case of front office contributions. Some respondents, while agreeing with this list, called for proportionality by stating that the conflicts of interest policy requirements should be generic enough so that smaller entities have the flexibility to adapt the policy to their own structure and ensure, as much as possible, the avoidance and management of conflicts of interest. Furthermore, some

respondents disagreed with the requirement for contributors to publicly disclose the conflicts of interest policy as suggested in the Discussion Paper. In this context, they suggest that making the policy available to the administrator should suffice.

50. Finally, the majority of the respondents agreed with the criteria that may justify differentiation.

3.4 Proposed draft regulatory technical standards

Appropriateness and verifiability of input data

51. The obligation specified in points (a) and (b) of Article 11, paragraph 1, and paragraph 5 of the Regulation (EU) 2016/1011, to ensure that input data is appropriate and verifiable, rests on the administrator of the benchmark.

52. In these draft RTS, ESMA differentiates the two concepts of appropriateness and verifiability as explained in the following paragraphs.

53. In ESMA's view, appropriateness of input data refers to the capability of input data, in conjunction with a benchmark's methodology, to provide an accurate and reliable representation of the market or economic reality the benchmark intends to measure, in accordance with Article 11(4) of the Regulation (EU) 2016/1011.

54. Therefore, an administrator's primary responsibility with respect to input data is to ensure that it is appropriate with respect to the established methodology.

55. The close link established by ESMA between the appropriateness of input data and the methodology of the benchmark have been acknowledged by the respondents to the Discussion Paper.

56. These draft RTS state that the administrator shall specify the requirements to ensure appropriateness of input data and establishes a minimum list of four elements these requirements shall cover, such as the hierarchy of input data type or the relevant thresholds for quality and quantity of input data. However, the appropriateness of input data depends on the type of input data and on the methodology to be applied to the benchmark. Therefore, and as expressed by some of the respondents to the Discussion Paper, this list of elements must be covered by the requirements established by the administrator as applicable to the relevant type of input data and benchmark. For example, if transaction data from a related market is used, this should be compatible with the methodology with a high degree of comparability of both markets. In the case of non-transaction data, the administrator would ensure that this type of input data is compatible with the methodology and that it accurately reflects the underlying market or economic reality.

57. The fact that input data is appropriate in the view of the methodology does not guarantee that it will not be either vulnerable for manipulation or manipulated. For this reason, Regulation (EU) 2016/1011 imposes that input data must, in addition, be verifiable.

58. Verifiability is the characteristic allowing the material plausibility of input data to be checked. As suggested in the Discussion Paper and agreed by the majority of the respondents to the Discussion Paper, verifiability is highly dependent on the type of input data. More precisely, non-transaction data are less easily verifiable than regulated data and transaction data.
59. Contrary to what was stated in the Discussion Paper and in light of the feed-back received, the draft RTS do not impose additional record keeping obligations for the administrator to ensure verifiability beyond what is required by the Regulation (EU) 2016/1011 to ensure verifiability. Consequently, the draft RTS do not establish a minimum list of records to be kept by the administrator. The main reason for this change of approach is that Article 8 of the Regulation (EU) 2016/1011 already requires the administrator to keep records of some information on which he may rely on so as to “enable an audit or evaluation of input data” (see article 8(2)). Moreover, in accordance with Article 15, paragraph 2 of the Regulation (EU) 2016/1011, contributors of critical benchmarks, significant and non-significant benchmarks whose administrator do not waive the application of this Article of the Regulation (EU) 2016/1011, are obliged to put in place record keeping policies as required by the code of conduct of their administrator.
60. Nevertheless, ESMA is of the opinion that the obligation for the administrator to ensure verifiability of input data is closely linked to the availability of sufficient information supporting input data. Therefore, these draft RTS state that in order to ensure verifiability of input data, the administrator must primarily rely on records kept on the basis of Article 8 of the Regulation (EU) 2016/1011. If existing records are not sufficient to ensure verifiability of input data, the administrator may require additional information from contributors, by specifying the content of the information needed and the frequency of transmission. From a practical perspective, this additional information is a duplicate of the list of relevant submission metadata that must be recorded by the contributor and that are included in the draft RTS on code of conduct¹⁰. Although it might be argued this redundancy could be avoided by referring to the list of records specified in the code of conduct RTS, this was not the option retained by ESMA as the scope of these RTS and the RTS on code of conduct may be different. On the one hand, the RTS on code of conduct, which should detail the record keeping policies to be put in place at the level of the contributors, are applicable to all benchmarks. Nevertheless, in accordance with Articles 25 and 26 of the Regulation (EU) 2016/1011, significant and non-significant benchmarks may waive the application of Article 15(2), and hence the application of the RTS on that subject. On the other hand, the present RTS, to the extent it relates to appropriateness and verifiability, apply to critical and significant benchmarks. As a consequence, even administrators of significant benchmarks who choose to waive the application of Article 15, paragraph 2 of the Regulation (EU) 2016/1011 and thus of the RTS on code of conduct, remain bound by Article 11(1) and by this RTS. For this reason, each of the RTS needs to be self-standing and the choice was made to repeat the list of records.

¹⁰ See section 5 – Code of conduct for Contributors.

61. Verifiability implies that administrators are able to carry out evaluation and validation which consists in formal checks on input data submitted. These checks, which shall be more extensive for non-transaction data, aim at allowing the administrator to assess the accuracy and reliability of the input data received from the contributors based solely on the input data contributed. Administrators of regulated data benchmarks are not subject to validation requirements as in this case, verifiability must be more appropriately understood as checking the provenance and transmission of the input data used.
62. These draft RTS also specify that the appropriateness of input data must be monitored by the administrator on an ongoing basis through evaluation and validation. This is in order to make clear that the appropriateness checks do not equate to a one shot screening of input data received from a new contributor in the view of the methodology, but that the requirements established to ensure appropriateness are themselves also subject to a continuous monitoring. In contrast to what was stated in the Discussion Paper and as requested by some respondents, ESMA does not specify further the frequency of this check since this is dependent on the characteristics of the benchmark.

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

Front office contributions

63. In accordance with point b of Article 11, paragraph 3, of the Regulation (EU) 2016/1011, the administrator must ensure that adequate internal oversight and verification procedures are in place where contributions are made from a front-office function in a contributor organisation. The reason for the establishment of such procedures is that contributions coming from a front office function present a particular risk of manipulation as a result of an inherent conflict of interest between the commercial role of the front office and its role in the contribution to a benchmark.
64. Therefore, these draft RTS specify appropriate arrangements for oversight and verification within the front office function of the contributor that the administrator shall ensure are in place. These appropriate arrangements are the verification on the authorisation of submitter and the building of a transparent internal oversight architecture structured along three lines of defence.
65. In order to limit and manage the inherent risks and conflicts of interests related to the front office function, administrators must ensure the effective functioning of the first line of defence by way of tailored training programmes to raise awareness about the proper input data submission procedures and that the second line of defence puts in place a conflict of interest policy appropriate to the context of front office functions. The administrator shall further verify that the contributors establish procedures (i) on whistleblowing (ii) to report any suspicious behaviour and (iii) to make staff involved in input data contributions aware of possible disciplinary sanctions.

66. As the RTS on code of conduct further specify the elements of the code of conduct referred in article 15(2) of the Regulation (EU) 2016/1011, the question arose whether these RTS could refer to the RTS on the code of conduct. Indeed, in accordance with Article 15, paragraph 6 of the Regulation (EU) 2016/1011, the RTS on the contents of the code of conduct states that the code of conduct of the administrator must provide specific rules on the identification of submitters and that it shall establish policies, procedures and controls that a contributor shall have in place, including amongst others, a conflict of interest policy, a training programme for all staff involved in the contribution process and a whistleblowing procedure. Therefore, for some of the abovementioned appropriate arrangements, these RTS on front office contributions could have referred to the RTS on the Code of conduct.
67. Nevertheless, it was decided to enumerate all those appropriate arrangements in these RTS rather than referring to the RTS on the code of conduct for some of these because the scope of these RTS and the RTS on the code of conduct differs in two points:
- a. the RTS on code of conduct are applicable to all contributors while these RTS only apply where input data of a benchmark is contributed from the front office function of a contributor;
 - b. the RTS on code of conduct apply to all benchmarks but in accordance with Article 25 and 26 of the Regulation (EU) 2016/1011, significant and non-significant benchmarks may waive the application of Article 15(2) BMR, and hence the application of the RTS on that subject. While these RTS on front office contributions only applies to critical and significant benchmarks but, in accordance with Article 25, paragraph 1 of the Regulation (EU) 2016/1011, the latter may waive the application of Article 11(3) and, by consequence, of the related articles of these RTS on front office contributions.
68. In the light of the abovementioned reasons, a cross-reference between these RTS and the RTS on the Code of Conduct risks creating undesirable consequences and inconsistencies.
69. The Discussion Paper proposal in relation to training was that staff involved in input data contribution and front office staff should undergo compulsory and appropriate training with the latter having more frequent and specific training. However, some of the respondents did not support this proposal and in order to be in line with point b of Article 11, paragraph 3 of the Regulation (EU) 2016/1011, the training programmes detailed in these draft RTS only apply to front office staff. While the general training requirements for staff involved in the contribution process are specified in the RTS on the code of conduct.
70. As agreed by the majority of the respondents, the internal oversight within contributors where input data of a benchmark is contributed from a front office function shall be structured along three lines of defence as described in paragraph 12. ESMA is of the view to include a process ensuring on-going cooperation between the lines of defence as also suggested by one respondent in order to increase the efficiency of the internal oversight within the contributor organisation.

71. This internal oversight at the level of the contributor should also be transparent to the administrator. This transparency includes the communication of the organisational arrangements and roles and responsibilities for input data contribution and the identity of submitters.
72. At the same time, respondents called for a proportional approach of this oversight architecture. Hence, the draft RTS state that administrators of significant benchmarks shall not require that contributors implement a “four eyes” principle if they demonstrate that adequate alternative safeguards are in place, and that administrators of significant benchmarks may allow a simplified internal oversight architecture taking into account the size of the contributor. In addition, for supervised contributors, administrators of significant benchmarks may allow the reliance on pre-existing internal oversight procedures.
73. The Discussion Paper proposed a conflict of interest policy in order to mitigate the risk of conflict of interests that arises when input data is contributed from the front office function and the staff has discretion regarding contributed data while at the same time have for example exposure against the relevant benchmark. This policy includes different measures such as disclosure and reporting of conflicts of interest, remuneration policies, and the physical separation between front office staff involved in contributing input data and other front office staff in order to limit improper or inadvertent communication of sensitive information between staff. The Discussion Paper also suggested to disclose this policy to the public. However, in the light of the comments received, and in order to limit adverse effects of the public disclosure, ESMA supports that the conflict of interest policy be made available to the administrator upon request.
74. Furthermore, in line with the proportionality principle and as requested by the majority of the respondents, administrators of significant benchmarks may exempt contributors from (i) establishing a clear segregation of duties between front office staff involved in input data contribution and other front office staff and (ii) from putting in place a physical separation between these persons, on the condition that the contributor demonstrates the existence of sound principles and procedures to manage conflicts of interests. This is due to the fact that some contributors of significant benchmarks may find it difficult to implement in practice these requirements in relation to the size of these contributors.
75. Finally, in the view of the particular risks arising from the simultaneous commercial and contribution roles of a front office function, these draft RTS state that a contributor whose front office contribute to the benchmark must put in place a whistleblowing procedure in order to escalate any misconduct in the contribution process, must inform front office staff of the possible disciplinary sanctions in case of breach of the policies and procedures related to benchmarks. In addition, the contributor should establish contingency measures or fall-back arrangements to ensure the provision of input data during conditions of market stress and a reporting system allowing front office contributors to notify the administrator any attempted or actual manipulation or failure to comply with benchmark related procedures and policies.

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.

3.5 Draft technical standards: Input data

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

[...]

supplementing Regulation (EU) No 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for appropriateness and verifiability of input data and for internal oversight and verification procedures of a contributor the administrator has to ensure are in place where input data is contributed from a front office function

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 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 596/2014¹¹, and in particular Article 11(5) thereof,

Whereas:

- (1) Appropriateness relates to the compatibility of input data with the methodology, the conjunction of which must allow a benchmark to reflect the underlying market or economic reality.
- (2) The specification of conditions input data must meet in order to be appropriate, in conjunction with methodology, should be undertaken by the administrator in view of the degree of representativeness of the input data that it could gather with respect to the market or economic reality that the benchmark is intended to measure, in compliance with what is required under Article 11, paragraph 4 of Regulation (EU) 2016/1011 and mindful of the actions required there.
- (3) Verifiability, as an obligation for the administrator, depends on the availability of sufficient information underpinning the input data. Information that is needed from contributors in order to ensure verifiability of input data is to be specified by the

¹¹ OJ L 171, 29.6.2016, p. 1.

administrator. The administrator disposes of several means to communicate requests and expectations to contributors, including, but not limited to, the code of conduct.

- (4) Verifiability is highly dependent on the type of input data used. For example, regulated data by themselves present a high degree of verifiability as a result of the application of sectoral disciplines. By contrast, types of input data that are less easily verifiable, notably non-transaction data, may still meet the requirement of verifiability if sufficient submission metadata is available to conduct extensive validation checks.
- (5) Evaluation and validation of input data are ongoing obligations for administrators, which are conditional on the verifiability of input data.
- (6) Contributions coming from a front office function present a particular risk as a result of an inherent conflict of interest between the commercial role of the front office and its role in contribution to a benchmark. The obligation of ensuring that adequate internal oversight and verification procedures are in place within a contributor organisation where contributions are made from a front office function rests on the administrator. Effective internal oversight in this specific instance relies on appropriate structures within the contributor organisation such as the three lines of defence model.
- (7) As an element of the first line of defence, it is important that contributor staff involved in input data submission are made aware, through tailored training programmes, of the proper procedures for input data submission.
- (8) Moreover, the oversight function within the contributor organisation should implement and maintain a conflicts of interest policy.
- (9) A further element that may clarify the behavioural expectations of staff involved in input data contribution is the awareness of possible disciplinary sanctions for breach of established procedures.
- (10) A notable tool that may be useful in bringing to light and escalating any misconduct would be the establishment of a whistleblowing procedure that permits any staff member to report an instance of misconduct to the relevant internal oversight function.
- (11) If misconduct is detected by the contributor, it is important that the administrator is notified immediately through the reporting of suspicious behaviour.
- (12) For significant benchmarks, it may be appropriate to afford administrators additional discretion in how they ensure internal oversight and verification at contributor level. In particular, it may be justified to differentiate the required measures in accordance with the size of the contributor organisation or according to pre-existing regulatory obligations to which contributors are subject.
- (13) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (14) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the

Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council¹².

HAS ADOPTED THIS REGULATION:

Chapter I – Appropriateness and verifiability of input data

Article 1

Appropriateness of input data

1. Administrators shall specify requirements to ensure that the input data obtained is appropriate in view of the methodology and that it accurately and reliably represents the market or economic reality that the benchmark is intended to measure. The requirements shall cover at least, as applicable to the relevant type of input data and benchmark:
 - (a) relevant thresholds for quantity and quality of input data;
 - (b) hierarchy of input data types;
 - (c) justification required for use of other than the primary types of input data;
 - (d) justification required for the exercise of any discretion or expert judgement in the contribution of input data.
2. Appropriateness shall be monitored on an ongoing basis through evaluation and validation.

Article 2

Verifiability of input data

1. Input data is verifiable when it can be checked to be accurate or to stem from a reliable source.
2. In order to demonstrate the verifiability of input data, an administrator shall ensure the availability of all submission metadata required to carry out the checks referred to in Article 3.
3. For the purpose of paragraph 2, an administrator relies on information recorded in accordance with Article 8 of the Regulation (EU) 2016/1011.
4. If additional information is necessary to demonstrate the verifiability of input data, an administrator shall be able to require it from contributors, and shall specify its precise content and the frequency with which it should be transmitted.

¹² Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Article 3

Evaluation and validation

Verifiability of input data implies that administrators are able to carry out the following checks on these data:

1. Evaluation, consisting of at least the following formal checks on each individual input data contribution:
 - (a) whether the input data is contributed by an authorised submitter;
 - (b) whether input data is provided on time;
 - (c) whether input data is provided in the format specified
 - (d) whether input data fulfils the quantitative threshold set in the methodology, if any.
2. Validation, conducted after publication of the benchmark, making use of techniques such as, where applicable:
 - (a) comparison within contributions from different contributors;
 - (b) comparison against previous contributions;
 - (c) comparison against related market indicators;
 - (d) comparison against historic series of data from underlying or related markets/economic realities;
 - (e) for non-transaction data: back testing to corroborate input data when transaction data become available;
 - (f) checking coherence of the contribution with relevant contribution metadata recorded by the contributor, which may include:
 - i) policies and procedures governing the contributions and relevant changes therein;
 - ii) substantial exposures of individual traders or trading desks to benchmark-related instruments as well as changes therein;
 - iii) a record of disciplinary actions taken against any contributor's staff in respect of benchmark-related activities;
 - iv) a list of submitters and approvers (if applicable), including their names and general roles, with the dates when submission-related roles were authorised and exited;
 - v) and, with reference to each specific contribution to be validated:
 - (1) date and time of the contribution;
 - (2) data inputs considered, data excluded and any other exercise of discretion;
 - (3) communication between the contributors and the administrator;
 - (4) relevant communication between the submitter and approvers within the contributor (if applicable);

- (5) records of input data queries and their respective outcomes;
- (6) recordings of telephone conversations;
- (7) electronic communications;
- (8) data traffic records;
- (9) whistleblowing disclosures.

Article 4

Regulated data benchmarks

Administrators of regulated data benchmarks are not subject to Article 3, paragraph 2.

Chapter II – Internal oversight and verification procedures in case of front office contributions

Article 5

Authorisation of front office submitters

Upon receiving the input data submission from the contributor, the administrator shall require information allowing the verification that the submitter has been permitted to submit input data on behalf of that contributor.

Article 6

Oversight and verification measures at contributor level

Where input data is contributed from a front office function, the administrator shall ensure that the contributor has the following oversight and verification procedures in place:

1. Administrators shall ensure that contributor's internal oversight is structured along three lines of defence and operates in accordance 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. Administrators shall ensure that operations of internal oversight function are subject to regular reporting to senior management and that all internal oversight and verification procedures are communicated to them upon request.
2. Administrators shall ensure that the first line of defence comprises front office staff which are aware of the procedure for input data contribution as well as of clear behavioural expectations:
 - (a) Elaborating training programmes tailored to the specific responsibilities of front office staff concerning at least:

- i) the code of conduct;
- ii) the applicable laws and regulations;
- iii) the contributor's internal control framework;
- iv) the contributor's internal conflicts of interest procedure;
- v) ethical standards;
- vi) the whistleblowing procedure;
- vii) disciplinary actions.

Administrators shall ensure that front office staff undergo training periodically or as necessary if there are material changes to the policies, procedures, or in response to specific events.

- (b) Performing effective checking processes of input data contributions such as a four-eyes process. Administrators shall ensure that contributions are prepared by an authorised submitter and reviewed for reasonableness, accuracy and completeness prior to contribution.
 - (c) Excluding the access of contributions to persons not involved in the submission process, except under the following circumstances, in which case the data will be restricted to those who need to have access to it, such as, but not limited to:
 - i) audit;
 - ii) investigations for suspicious inputs or errors.
 - (d) Setting up contingency measures or fall-back arrangements to ensure the provision of input data in the event of a disruption to the process of the provision of input data such as market stress.
3. Administrators shall ensure that the second line of defence comprises at least risk and compliance functions:
- (a) performing a second level and independent control in relation to the reasonableness, accuracy and completeness of the contributions;
 - (b) maintaining a whistleblowing procedure to assist internal oversight functions in detecting activities affecting the integrity of the benchmark;
 - (c) maintaining procedures to notify the administrator immediately when they become aware of any attempted or actual manipulation or failure to comply with benchmark-related policies and procedures;
 - (d) maintaining a physical presence in the front office where applicable;
 - (e) monitoring communications within the front office and between the front office and other internal functions;
 - (f) monitoring communications between the front office and external bodies;
 - (g) performing regular checks for suspicious communication;
 - (h) establishing and maintaining a conflicts of interest policy that is appropriate to the context of front office contributions, covering:

- i) disclosure to the administrator of actual or potential conflicts of interest of the contributor and of the contributor's front office staff members who are involved in the contribution;
 - ii) identification and reporting of conflicts of interest;
 - iii) avoiding 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;
 - iv) clear segregation of duties between front office staff involved in contributing input data and other front office staff;
 - v) physical separation between front office staff involved in contributing input data and other front office staff;
 - vi) effective procedures to prevent or control the exchange of information between front office staff and other contributor's staff, where the exchange of that information may affect the input data contributed;
 - vii) measures to prevent any person from exercising inappropriate influence over the way in which front office staff involved in contributing input data carry out activities;
 - viii) contingency provisions in case of temporary inefficiency of the controls of the flow of information
4. Administrators shall ensure that the third line of defence comprises at least the internal audit function performing independent checks on a regular basis on the controls exercised by the two lines of defence which may include, depending on the type of input data contributed, techniques such as:
- (a) comparison against previous contributions;
 - (b) comparison against related market indicators, where available;
 - (c) for non-transaction data: back testing to corroborate input data when transaction data become available.

Article 7

Significant benchmarks

1. Administrators of significant benchmarks may elect not to require that contributors implement a four-eyes process for contribution of input data, if they demonstrate that adequate alternative safeguards are in place to ensure reasonableness, accuracy and completeness of input data.
2. Administrators of significant benchmarks may elect to require the measures specified in Article 6, para. 3, h) iv) and h) v) only where appropriate, taking into account the nature, scale and complexity of the contributor's activities and whether the contribution activity is part of the core business of the contributor or constitutes an ancillary activity, on the

condition that the contributor demonstrates the existence of sound principles and procedures to manage conflicts of interest.

3. For supervised contributors, administrators of significant benchmarks may allow that the required internal oversight procedures in Article 6, be aligned to pre-existing internal oversight structures.
4. Administrators of significant benchmarks may allow a simplified internal oversight architecture for contributors the size of whose organisation does not allow the establishment of three separate lines of defence.

Article 8

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

For the Commission
The President

On behalf of the President

[Position]

4 Transparency of methodology (Article 13 BMR)

4.1 Mandate

Article 13

1. An administrator shall develop, operate and administer the benchmark and methodology transparently. To that end, the administrator shall publish or make available the following information:

(a) the key elements of the methodology that the administrator uses for each benchmark provided and published or, when applicable, for each family of benchmarks provided and published;

(b) details of the internal review and the approval of a given methodology, as well as the frequency of such review;

(c) the procedures for consulting on any proposed material change in the administrator's methodology and the rationale for such changes, including a definition of what constitutes a material change and the circumstances in which the administrator is to notify users of any such changes.

2. The procedures required under point (c) of paragraph 1 shall provide for:

(a) advance notice, with a clear time frame, that gives the opportunity to analyse and comment upon the impact of such proposed material changes; and

(b) the comments referred to in point (a) of this paragraph, and the administrator's response to those comments, to be made accessible after any consultation, except where confidentiality has been requested by the originator of the comments.

3. ESMA shall develop draft regulatory technical standards to specify further the information to be provided by an administrator in compliance with the requirements laid down in paragraphs 1 and 2, distinguishing for different types of benchmarks and sectors as set out in this Regulation. ESMA shall take into account the need to disclose those elements of the methodology that provide for sufficient detail to allow users to understand how a benchmark is provided and to assess its representativeness, its relevance to particular users and its appropriateness as a reference for financial instruments and contracts and the principle of proportionality. However, the ESMA draft regulatory technical standards shall not cover or apply to administrators of non-significant benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

4.2 Background

76. According to Regulation (EU) 2016/1011, an administrator has control over the provision of a benchmark which includes “determining a benchmark through the application of a formula or other method of calculation”. The accuracy and reliability of a benchmark in representing the economic reality it is intended to measure mainly depends on the

methodology used. It is therefore necessary to adopt a methodology that ensures the reliability and accuracy of the benchmark and is accountable through transparency.

77. ESMA is required to further specify the key elements of the methodology to be disclosed in order for users to understand how the benchmark is provided and to assess the appropriateness of the benchmark to their intended use, as a reference for financial instruments and financial contracts or to measure the performance of investment funds.
78. Once the methodology is established and internally approved by the benchmark's administrator, it may be subject to changes, in order to ensure the continued accuracy of the benchmark. According to Article 13(1)(b) of Regulation (EU) 2016/1011 the definition of the frequency of the review of the methodology lies with the administrator.
79. Any changes to the methodology have an impact on users and stakeholders of the benchmark. It is therefore necessary for the administrator to follow procedures that ESMA is required to further specify when changing the methodology of the benchmark. In particular, when the changes are deemed material, a consultation is needed in order to allow users and stakeholders to take the necessary actions in light of these changes or notify the administrator if they have concerns about these changes.

4.3 Responses to the Discussion Paper

80. In its Discussion Paper, ESMA proposed a minimum list of key elements of the methodology to be disclosed that was supported by a large majority of respondents. However, while some respondents stated that this minimum list is sufficient and additional elements of the benchmark's methodology should not be disclosed, others further argued that some transparency requirements foreseen in the UCITS framework¹³ should be included as key elements of the benchmark's methodology. These last respondents highlight that fund managers need to have access to a number of data related to benchmarks, the collection of which can be difficult and highly dependent on the administrators of benchmarks.
81. In relation to the internal review of the methodology, the respondents were generally in favour of ESMA's proposal in the Discussion Paper to leave some discretion to administrators to set the frequency of the internal review of the methodology. However, they did not support ESMA's approach to disclose in addition to the procedure for internal review and approval of the methodology, the names of the persons responsible for reviewing the methodology, stressing that there might be adverse effects to publishing such names.
82. Market participants were generally in favour of the proposal made in the Discussion Paper in relation to the consultation procedure for material changes of the methodology. However, several respondents pointed out that in certain circumstances, an administrator may need

¹³ ESMA Guidelines for competent authorities and UCITS management companies, 1 August 2014.

to implement material changes to the methodology rapidly and that a long and cumbersome consultation process may be an impediment in this regard.

83. Furthermore, while respondents agreed with ESMA's approach in relation to the publication on the administrator's or the benchmark's website of the consultation procedure for material changes in benchmark's methodology, as well as material changes in benchmark's methodology themselves and the elaboration of comments received, they do not support the proposal in relation to the availability of hard copies.

84. Some market participants proposed also to allow the administrator to differentiate the procedure to be applied according to the material change envisaged. They also highlighted that the publication of a summary of the responses to the consultation on material changes should be sufficient.

4.4 Key elements of the methodology

85. In relation to Article 13, Regulation (EU) 2016/1011 states in Recital 27 that the transparency of the methodology should not be meant as the publication of the formula applied for the determination of a benchmark, but rather the disclosure of the elements sufficient to allow stakeholders to understand how the benchmark is derived and to assess its representativeness, relevance and appropriateness for its intended use.

86. On the way to compromise between opposite views, ESMA is including in its draft RTS a description of the constituents of the benchmark's index in order for market participants to be informed about the universe of the benchmark's constituents and to have a better understanding of the methodology of the benchmark to allow them to assess the consistency of the benchmark with their intended use.

87. Furthermore, as stated by some respondents, ESMA mentions in its draft RTS that the key elements should be disclosed as applicable to the relevant benchmark and input data used. For example, the disclosure of the panel composition and eligibility criteria for panel membership would only apply to benchmarks based on contributions.

88. The administrator should disclose the following elements in order to allow users to understand the objective of the index and the underlying market it intends to measure:

- a. the definition of the benchmark and of the market or economic reality it intends to measure;
- b. an estimate of the size of the underlying market;
- c. the unit of measurement of the benchmark.

89. If the administrator has discretion in the selection and composition of inputs, the administrator should disclose the criteria applied to select input data. When relevant to the

methodology used, the priority given to different types of input data and the minimum quantity or quality of input data required should also be published.

90. According to Article 12(1)(e) of Regulation (EU) 2016/1011, the methodology should be traceable and verifiable. One of the key elements to be disclosed is therefore the means to ensure that the methodology is traceable and verifiable which could include the use of a secured algorithm for the calculation of the benchmark.
91. ESMA also found it useful to enlarge the list of key elements and to include in its draft RTS other key elements of the methodology such as contingency measures during conditions of market stress or when thresholds for minimum quantity and quality of input data are not met and limitations of the methodology, including - but not limited to - in illiquid markets. These elements would allow users to understand how the methodology of the benchmark would react to adverse conditions of the market. This approach was also supported by some of the comments received to the Discussion Paper.
92. In line with the principle of proportionality and in order to reduce the burden on administrators of significant benchmarks, the draft RTS allow these administrators to opt out from the disclosure of certain elements of the methodology.

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?

4.5 Internal review and approval of the methodology

93. In order to ensure the continued accuracy of the benchmark and its representativeness of the underlying market or economic reality, it may be necessary to change the methodology. However, any change of the methodology has an impact on the end users and stakeholders of the benchmark and should therefore be made available to the public.
94. In the Discussion Paper, ESMA proposed to disclose in addition to the procedure for internal review and approval of the methodology, the names of the persons responsible for reviewing the methodology in order to avoid possible conflicts of interest. However, ESMA acknowledges market participants concerns in relation to the adverse effects to publishing names of persons and is limiting in the draft RTS the publication to the bodies or functions and to 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. These transparency requirements would in ESMA's opinion be sufficient to address the possible conflicts of interest that would arise during the process of the internal review of the methodology.
95. As supported by the responses to the Discussion Paper, ESMA is of the view that it is appropriate to leave some discretion to administrators to set the frequency of the internal review of the methodology, which is dependent on the characteristics of the benchmark and on the evolution of the related market or of the characteristics of the underlying market

or economic reality the benchmark intends to measure. This discretion is limited however by the mandatory review of the methodology by the oversight function according to Article 5(3)(a) of the Regulation 2016/1011, which should be conducted at least annually.

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?

4.6 Procedure for material change of methodology

96. As stated above, material changes to the methodology affect end users of the benchmark and more generally stakeholders who should therefore be duly informed in advance and consulted in order for them to comment on these material changes and express any difficulties that these changes would imply.
97. Regulation (EU) 2016/1011 requires administrators to publish the procedure for the consultation on proposed material changes in their methodology along with the rationale for such changes, including a definition of what constitutes a material change.
98. Although some respondents to the Discussion Paper suggested that an exemption from the obligation to consult on material changes should be available to administrators to allow for swift adaptation of a benchmark's methodology in response to sudden market events, or in case the administrator is required to change a benchmark's methodology after a decision by the competent authority in the circumstances envisaged in Art. 23(6)(d) of the Regulation (EU) 2016/1011, ESMA is of the opinion that its empowerment does not allow for the creation of such an exemption.
99. As regards the proposal in the Discussion Paper in relation to the availability of hard copies upon request during the consultation procedure, ESMA's opinion is to leave this up to the discretion of the administrator, as long as all information is electronically available.
100. ESMA would also like to stress to market participants that according to the Regulation (EU) 2016/1011, Article 13(3) these draft RTS do not apply to non-significant benchmarks.
101. 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.
102. According to Regulation (EU) 2016/1011, the comments along with the responses to those comments by the administrator should be made accessible after any consultation except when confidentiality has been requested. Therefore, ESMA cannot support the publication of a summary of comments in order to avoid any risk of selecting comments and biasing the publication to users and stakeholders.



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

4.7 Draft technical standards: Transparency of methodology

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

[...]

supplementing Regulation (EU) No 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for information to be provided on key elements of methodology, internal review of methodology and the procedure to consult on material changes of methodology.

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2016/1011 of the European Parliament and of the Council of 08 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 596/2014¹⁴, and in particular Article 13(3) thereof,

Whereas:

- (1) Disclosure of key elements of the methodology serves the purpose of allowing users and potential users to understand how a benchmark is derived, what it measures and therefore to understand the appropriateness of the benchmark for their purposes and any limitations or risks of the methodology.
- (2) Benchmarks' methodologies are highly divergent. Any minimum list of key elements should therefore allow for its application only in so far as it is relevant to a particular benchmark methodology. For example, information on minimum liquidity that is specified for benchmark constituents may be relevant for equity benchmarks but not for commodity benchmarks.
- (3) For the purposes of ensuring the benchmark's reliability and accuracy, one of the key elements to be disclosed by the administrator is the definition of a minimum quantity

¹⁴ OJ L 171, 29.6.2016, p. 1.

and/or quality of input data in order to be able to apply the methodology of the benchmark and perform its calculation. In addition, when these standards of quantity or quality of input data are not met the methodology should describe the methodology of calculation in such exceptional circumstances.

- (4) The use of discretion in the determination of benchmarks increases their vulnerability to manipulation. In order to minimise this risk of manipulation, clear rules in relation to the circumstances when discretion can be used and how this discretion may be exercised should be disclosed by the administrator as part of the key elements of the methodology.
- (5) As markets change over time, an administrator may consider that a benchmark does no longer represent the market it intends to measure, and may decide to review its methodology to remedy this deficiency. It is important that users and potential users are sufficiently informed of this process, including its frequency, procedure, the bodies involved and the relevant governance process in which it is embedded.
- (6) Regulation (EU) 2016/1011 requires information regarding key elements of methodology and internal review of methodology be publicly accessible for critical and significant benchmarks. In accordance with the principle of proportionality, this Regulation avoids putting an excessive burden on administrators of significant benchmarks, by allowing them to choose to reduce disclosure to a more limited set of elements or to disclose certain elements at a reduced level of detail.
- (7) Whenever a benchmark administrator judges a change in methodology to be material in nature, an adequate consultation procedure should be followed. This procedure should communicate a level of information regarding the change that enables users and potential users to assess the expected impact of a proposed material change and provide them with a mechanism to give feedback on this change to the administrator.
- (8) In order to safeguard a user's or potential user's capacity of understanding how a benchmark is derived, what it measures and therefore of understanding the appropriateness of the benchmark for their purposes and any limitations or risks of the methodology, the rationale behind each proposed material change shall be disclosed.
- (9) The transparency of the consultation procedure may be ensured by publishing the comments received as well as the administrator's response to those comments. For critical benchmarks, both comments received and administrators' responses thereto should be accessible in full. For significant benchmarks, accessibility of the administrator's responses to comments may be achieved by way of publishing a feedback statement. Respondents may, however, request confidentiality of their response, which shall be respected by the administrator.
- (10) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (11) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the

Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council¹⁵.

HAS ADOPTED THIS REGULATION:

Article 1

Key elements of the methodology to be disclosed

1. The administrator shall disclose at least the following key elements of the methodology, as applicable to the relevant benchmark and input data used:

- 1) definition of the benchmark and of the market or economic reality it intends to represent;
- 2) estimate of the size of the underlying market;
- 3) unit of measurement of the benchmark;
- 4) criteria for selecting input data;
- 5) type(s) of input data used and the priority given to different types of input data;
- 6) minimum required quantity and/or quality of input data;
- 7) minimum liquidity requirements for the constituents of the benchmark;
- 8) rules identifying how and when discretion may be exercised in the determination of the benchmark;
- 9) a description of the constituents of a benchmark and the criteria used for selecting the constituents and for assigning weights to these;
- 10) whether the benchmark's methodology requires periodic changes to remain representative and, in such case:
 - a) criteria for and / or frequency of changes;
 - b) the interval and / or triggers for rebalancing the components of the benchmark.
- 11) if the benchmark takes into account the reinvestment of the dividends and coupons paid by the constituents;
- 12) panel composition and eligibility criteria for panel membership;
- 13) limitations of the methodology, including - but not limited to - in illiquid markets;
- 14) the means for tracing and verifying the methodology of calculation of the benchmark including – but not limited to – the use of a secured algorithm in order to perform the calculation;
- 15) error management procedures; contingency measures during conditions of market stress or when thresholds for minimum quantity and quality of input data are not met;

¹⁵ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- 16) triggers for the application of the procedures and measures under points (14) and (15);
- 17) clearly defined roles of third parties in data collection, computation or dissemination;
- 18) method used for the extrapolation and interpolation of data.

2. Administrators of significant benchmarks may opt not to disclose elements 16 to 18 of the list in Article 1, paragraph 1.

Article 2

Elements of the internal review of methodology to be disclosed

1. The administrator shall publish the following elements of information regarding the procedure for internal review of methodology:

- (i) a detailed description of the procedure for internal review and approval of the methodology, including:
 - a. the frequency of internal review, including any specific events that may give rise to internal review;
 - b. the bodies or functions within the administrator's organisational structure involved in reviewing and approving methodology;
 - c. the roles performed by the persons involved in reviewing and approving the methodology;
 - d. a general description of the procedure for nomination and removal of the persons involved in reviewing and approving methodology.
- (ii) a definition of what constitutes a material change, in connection with the particular benchmark, the underlying market or economic reality and the methodology of calculation;
- (iii) a description of the procedure for consulting on any proposed material change in the administrator's methodology;

2. Administrators of significant benchmarks may opt not to disclose sub-elements c and d of element i of paragraph 1.

Article 3

Procedure for consultation on material changes to the methodology

1. When consulting on a material change in the benchmark's methodology, an administrator shall:
 - a. ensure that stakeholders are at a minimum informed of the key elements of the proposed future methodology;
 - b. inform stakeholders of the reasoning behind the qualification of a proposed change to the methodology as a material change, explaining notably what its expected impact is on the benchmark determination, to the extent such impact can be estimated;

- c. publish or make available the rationale behind a proposed material change in such detail that stakeholders are able to assess what the effects of the proposed material change are on a benchmark's representativeness, relevance and appropriateness for its intended use.

Article 4

Publication of comments

1. The administrator shall make accessible in full the comments received in consulting on a proposed material change as well as the administrator's response to those comments except where confidentiality has been requested by the originator of the comments.
2. Administrators of significant benchmarks may elect to make accessible their responses to the comments received by publishing a feedback statement, which shall include:
 - a. the feedback of the administrator on the responses received in relation to the proposed changes;
 - b. the list of the respondents to the consultation, except where confidentiality has been requested by the originator of the comments;
 - c. the outcome of the consultation.

Article 5

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 January 2018

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

*For the Commission
The President*

On behalf of the President

[Position]

5 Code of conduct for contributors (Article 15 BMR)

5.1 Mandate

Article 15

6. ESMA shall develop draft regulatory technical standards to further specify the elements of the code of conduct referred to in paragraph 2 for different types of benchmarks, and in order to take account of developments in benchmarks and financial markets.

ESMA shall take into account the different characteristics of benchmarks and contributors, notably in terms of differences in input data and methodologies, the risks of input data being manipulated and international convergence of supervisory practices in relation to benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

5.2 General remarks

103. Regulation (EU) 2016/1011 (“the Regulation”) requires administrators, for each of the benchmarks or families of benchmarks they provide, to produce a code of conduct to specify the responsibilities for contributors with respect to aspects already indicated in Article 15, paragraph 2, of the Regulation, among which input data, record keeping, suspicious input data reporting and conflict management requirements. The integrity and accuracy of a benchmark depends on the integrity and accuracy of the input data provided by all contributors. Such obligations should be relied on and should be consistent with the benchmark administrator’s methodology and the controls the administrator performs on the input data received, as well as with the characteristics of the benchmark’s underlying market or economic reality and of the relevant input data.

104. A code of conduct is only necessary where a benchmark is based on contributions from contributors, as defined in Articles 3(8) and 15(1), of the Regulation. Input data that is readily available to an administrator is not considered a contribution. Benchmarks based on regulated data will not be subject to Article 15 due to the exemption under Article 17(1). According to Article 19(1) administrators of commodity benchmarks, where the majority of contributors are non-supervised entities, will not be required to maintain a code of conduct for those benchmarks, as they are subject to Annex II.

105. The mandate for these Regulatory Technical Standards requires the further specification of the details of Art 15(2) only. Subject to Article 25 and Article 26, 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 benchmarks 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.

106. Under Article 15(1) administrators are required to be continuously satisfied, or at least annually, that the contributors adhere to the code. For third country contributors, the administrator should do so to the extent possible (Recital 30). In case of indications of non-adherence of one or more contributors, the administrator should not use input data from those contributors and in such a case should obtain representative publicly available data (Article 11(1)(e) of the Regulation).
107. Administrators are required to ensure that their code(s) complies with the content of the Regulation. Competent Authorities, in case they find elements of the code of conduct which do not comply with the requirements of the BMR, can require the administrator to make adjustments of the Code of Conduct for a benchmark. Additionally, in case the competent authority considers that the representativeness of a critical benchmark is put at risk, after the assessment conducted according to Article 23 of the Regulation, it may ask the administrator to change the relative code of conduct.
108. The mandate under Article 15 of the Regulation requires ESMA to specify the terms of the code of conduct for different types of benchmarks and to take into account developments in benchmarks and financial markets. It is also necessary for ESMA to consider the different characteristics of benchmarks and contributors.
109. Although it is the Administrator's prerogative to decide how they will be satisfied that contributors adhere to the code of conduct, it is expected that the contributors undertake internal checks to ensure that they achieve compliance with the administrator's code of conduct.

5.3 Code of conduct

110. The scope of this RTS includes that the code of conduct provides for a clear description of input data to be provided and the requirements necessary to ensure that input data is provided in accordance with Article 11 on Input Data. The scope also mandates that the code of conduct states the policies to ensure that a contributor provides all relevant input data. The mandate of this RTS is similar to the mandate of the Input Data RTS which requires ESMA to specify how to ensure that input data is appropriate and verifiable. The mandate under Article 11 also requires ESMA to develop regulatory standards on the internal oversight and verification procedures for front office contributors. As each RTS could be waived independently, ESMA considers that both RTS should have sufficient detail to enable them to stand alone, this means that there are some provisions that may be found across both RTS.

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

111. The Discussion Paper mentioned that in the context of different characteristics of contributors, the regulatory nature of the contributors to a benchmark is relevant for

proportionality. However, taking into consideration the additional requirements for supervised contributors under the Article 16 RTS, ESMA is of the opinion that characteristics other than the regulatory nature of contributors should be taken into consideration in differentiating the requirements established by Article 15 code of conduct RTS.

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.

112. In the Discussion Paper, ESMA posed questions regarding the form of the code of conduct relating to whether the benchmark administrator should have a standard code for all types of benchmarks or whether the administrator should be mandated to tailor a code of conduct per benchmark or per economic reality or methodology. The majority of responses to these questions had the common theme that it should remain the administrator's prerogative whether to have a single code of conduct or a tailor made one. Upon analysis of the responses, and taking into consideration Article 15(3), which states that administrators may develop a single code of conduct for each family of benchmarks they provide, ESMA has the opinion that this RTS does not need to add more clarity to Article 15(3).
113. Technical standards on the provision of input data are specified in various sections of the RTS which covers policies for ensuring that a contributor provides all relevant input data, the contribution of input data and the validation of input data. The Discussion Paper posed suggestions regarding the contributor's contribution process which were largely supported by the respondents so ESMA is continuing with this approach.
114. The respondents were asked in the Discussion Paper whether the procedures for submitting input data were comprehensive. The majority of the respondents agreed that the list was comprehensive. Some respondents noted that the procedures should only be regarded if relevant. Another respondent suggested that the contributor should have in place contingency plans for submitting input data. ESMA agrees with these views. It is the administrator's responsibility to suggest the exact procedures so should state the procedures that are fit for their purpose. The draft RTS includes that contributors shall have documented contingency plans for submitting input data in the cases of technical and operational difficulties, temporary absence of authorised submitters and a shortage of appropriate input data.
115. With regards to validation checks, the majority of respondents supported the proposal so ESMA has continued with the proposal taking into consideration feedback from the respondents which included the suggestion of contributors detailing their checks to ensure that they achieve the levels set out in the code of conduct. ESMA agrees with this suggestion. A number of respondents disagreed with the prospect of senior management sign-off for the submissions as this may cause delays in the submissions and that task could be performed by someone else in the organisation with sufficient market insight. It

was also raised that approaches other than the four-eye process can be used as an effective checking system. ESMA accepts these points that a senior manager may not be necessary for sign-off and the four-eye process may be substituted for alternate processes where there are alternate effective checking processes that are appropriate to the nature and scale of the benchmark and the type of input data contributed and has taken this into account in the draft RTS. In taking the comments into consideration, ESMA has proposed standards for automated systems in the draft RTS.

116. The majority of the respondents to the Discussion Paper raised concerns with the proposal that suggested that the administrator should approve the submitter's role on behalf of a contributor and that the administrator have procedures to evaluate a submitter's identity. Those respondents had the opinion that it should remain the responsibility of the contributor to appoint and evaluate the submitters. ESMA agrees with the view of the respondents. The draft RTS has an article on submitters that provides the minimum standards that the contributor is expected to adopt when allowing a person to be a submitter on their behalf.
117. The method of identification of the submitters by the contributor to the administrator and the method by which the submissions will be authenticated as coming from the submitter has been suggested to be, in the draft RTS, the responsibility of the administrator to define. This will enable the administrator to design a process that is fit for their individual benchmark or benchmark family.
118. The draft RTS sets out the minimum policies to ensure that a contributor shall have in place to provide all relevant input data. The majority of the respondents agreed that the contributor's contribution process should foresee clear rules on the exclusion of data sources. This view has been reflected in the specifications of what should be included in the contributor's input data policy.
119. One respondent suggested that the policies that the contributor needs to have in place relating to input data should be audited and approved by the administrator. This suggestion has not been enacted in the RTS as this would have required expansion of Article 15(1) whereas the mandate of this RTS is to further clarify Article 15(2).
120. The policies, procedures and controls regarding the contribution of input data have been further specified in the RTS. This section includes a data input policy and policies regarding the transmission of data to the administrator.
121. The Discussion Paper suggested requirements for the contributor's contribution process was supported by the majority of the respondents so ESMA has maintained its approach in the draft RTS. ESMA has also taken into consideration comments and suggestions from the respondents. One respondent raised that they would like guidelines for non-front office contribution as well as front office contribution. In the RTS for the code of conduct ESMA has decided not to limit the articles to front office contributions and therefore this RTS will be applicable to all contributions, where appropriate. The RTS on Input Data will cover more specific requirements for front office contributions.

122. The Discussion Paper posed the questions as to whether rules are necessary to provide consistency of contributor's behaviour over time and whether or not those rules should be in the code of conduct or the methodology. The majority of the respondents agreed with the proposal and out of the respondents who suggested a preference, the majority stated that the place for these rules would be the code of conduct. The respondents that disagreed with the rules stated that they did not consider them to be necessary but if they were then they should not appear in both the code of conduct and the methodology as these should complement not duplicate each other. ESMA has decided to place the rules in the code of conduct so that the administrator can set out clear requirements regarding the behaviour of the contributor and expects that the administrator will monitor the consistency of the contributor's behaviour over time.

123. The minimum standards for record keeping, including the recording of the use of expert judgement, were suggested in the DP. The majority of respondents agreed with the proposal so ESMA has proceeded with them, taking into account suggestions received from the respondents including records of disciplinary actions taken against the contributor's staff in respect of benchmark-related activities, communication between submitters and approvers and between the contributor and administrator, substantial exposures of individual traders or trading desks to benchmark related instruments as well as changes therein. The respondents that did not agree stated that they disagreed that it should apply to benchmarks based upon readily available data. It is ESMA's view that the RTS on the Code of Conduct will not apply to readily available data benchmarks as they are not based upon contributions. Another respondent disagreed on the grounds of proportionality stating that the suggestions were operationally burdensome. ESMA has taken into consideration proportionality through limiting certain provisions to certain types of benchmark or contributor.

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

124. The Discussion Paper suggested that contributors should report suspicious transactions to compliance, senior management and the administrator as appropriate. The majority of the respondents agreed with the proposal and a number of respondents suggested that further to this the contributors should be expected to inform regulatory authorities about actual or suspected infringements. ESMA agrees with this suggestion and has proposed that contributors should report the actual or suspected infringements to the relevant competent authorities including the competent authority of the administrator. This proposal would ensure that the competent authority of the administrator is fully aware of any actual or suspected infringements which will strengthen the integrity of the benchmarks through ensuring that the competent authority that supervises the benchmark administrator has sufficient information to aid their legal and supervisory duties.

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

125. A proposal was put forward in the DP regarding what should be included in the code of conduct about the management of conflicts of interest. The majority of the respondents agreed with the proposals, with suggestions of contributors using a risk register. A couple of respondents disagreed on the basis that the paragraph in the discussion paper was unclear and that in some circumstances submitters may not be able to be physically separated from other employees. On the basis of the responses, ESMA has continued with the proposal, adding the suggestion for a risk register and adding clarity to the suggestions including 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 performed by the contributor.

126. Other questions that were raised in the DP included a query about whether contributors should be expected to comply with the code of conduct when their contribution is ancillary to their main business. ESMA has the view that this should not prevent the contributor from being compliant with the administrator's code of conduct.

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.

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

5.4 Draft technical standards: Elements to be included in the code of conduct

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

[...]

supplementing Regulation (EU) No 2016/1011 of the European Parliament and of the Council on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2016/1011 of the European Parliament and of the Council of 8 June 2016 on markets 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 596/2014¹⁶, and in particular Article 15(6) thereof,

Whereas:

- (1) According to the nature and the economic reality of the underlying market, the benchmark administrator may establish multiple codes of conduct or a single code of conduct for all benchmarks provided. Where the administrator develops a single code of conduct for a benchmark or benchmark family, that code of conduct should be sufficiently specific to be effective.
- (2) A key component to ensuring the integrity of benchmarks is that contributors appoint persons to submit the input data that have the correct knowledge, skills, experience and behaviour to perform the role. As such, this Regulation requires the code of conduct to specify that contributors should check the background of persons who seek to become submitters prior to communicating to the administrator the identity of that person as

¹⁶OJ L 171, 29.6.2016, p. 1.

someone who the contributor should accept submissions from on the contributor's behalf.

- (3) Communication channels between the administrator and the compliance staff of the contributor are an essential part of the identifying and reporting of suspected infringements of Regulation (EU) 2016/1011. As such, this Regulation provides that the contributor should provide contact details of their compliance department.
- (4) In order for a benchmark to be robust, contributors should behave in a consistent manner when contributing inputs of the required quality, accuracy and quantity. Requirements in this regulation seek to ensure that these needs are met by the contributor.
- (5) This regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (6) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council¹⁷.

HAS ADOPTED THIS REGULATION:

Article 1

Input data

1. The requirements that the administrator lists in the code of conduct regarding the contribution process shall reflect the methodology for the calculation of the benchmark, and include:
 - a) the types of permissible input data to be provided and the hierarchy in which input data is to be used;
 - b) the framework for the contributor's contribution process, including procedures for adjustments to, and standardisation of, the input data and to address potential errors in contributions;
 - c) the frequency for reviews of the framework for the contributor's contribution process.
2. Guidelines on the contributor's procedures for internal oversight and verification where applicable.

¹⁷ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Article 2

Submitters

1. The code of conduct shall provide that:
 - a) Persons shall not submit input data on behalf of the contributor unless that contributor has satisfied itself that those persons have the necessary skills, knowledge, training and experience for the duties assigned.
 - b) Only after the contributor is satisfied on point (a), can a person act as a submitter of input data on behalf of the contributor.
2. The code of conduct shall outline the due diligence process that the contributor shall undertake before being satisfied that a person has the necessary skills, knowledge, training and experience to submit input data on its behalf. This shall include:
 - a) Checks to verify the identity and qualifications of the potential submitter; and
 - b) Reference checks, which include reputational aspects such as clarifications as to whether or not the potential submitter has previously been excluded from submitting to a benchmark for reasons of misconduct which may have had an impact on the contribution.
3. The code of conduct shall state the method by which the administrator is to be notified of the identity of individuals permitted to submit input data on behalf of the contributor.
4. Administrators shall specify in their code of conduct that contributors shall notify the administrator of the contact details of the contributor's compliance function.

Article 3

Policies to ensure that a contributor provides all relevant input data

1. The policies that a contributor shall have to provide all relevant input data in accordance with the administrator's methodology shall be specified in the code of conduct. These policies shall include:
 - a) Input data policy which provides at least:
 - i) The description of the data that a submitter is permitted to use in determining a benchmark contribution.
 - ii) The characteristics of input data that the submitter may exclude from the contribution and the admitted rationales for the exclusion of such input data.
 - b) Policies and procedures on the transmission of data to the administrator. These shall include:
 - i) the method to be used for a secure data transfer;
 - ii) the frequency of the transmission, and
 - iii) contingency plans for submitting input data.
 - c) The contingency plans for submitting input data under Art 3(1)(b)(iii) shall include:

- i) technical and operational difficulties;
- ii) the temporary absence of submitters, and
- iii) a shortage of appropriate input data.

Article 4

Consistency of the process of contribution of input data

1. The code of conduct shall state the requirements expected throughout the contribution process on a consistent basis regarding:
 - a) quality and accuracy of data input;
 - b) quantity of input data;
 - c) frequency of submission, and
 - d) timeliness of submission.
2. The systems and controls that are used in relation to the contribution of input data shall be reviewed regularly, at least annually.

Article 5

Validation of input data

1. The code of conduct shall state that contributors shall have in place effective systems and controls to monitor input data. These shall include:
 - a) pre-contribution checks for suspicious input data;
 - b) post-contribution checks for suspicious input data, including the monitoring of communication.
2. The code of conduct shall state that contributors shall record details of the checks that are undertaken by the contributor in validation of the input data to demonstrate that they achieve the levels set out in the code of conduct.
3. Any validations to be required by the code of conduct shall be appropriate to the nature and scale of the benchmark and to the type of input data contributed. These shall include pre-contribution checks such as:
 - a) effective checking processes such as four-eyed checks, and
 - b) identification of abnormal trades.
4. Administrators that permit the use of automated systems for the purpose of providing the benchmark submission, shall specify in the code of conduct that where the manager of the contributor signs-off the automated system, that manager shall satisfy themselves that the automated system is fit for purpose and its effectiveness is able to be monitored on a continuous basis.
5. Where paragraph 4 is applicable, software update checks for the automated systems shall take place for automated systems prior to contributing input data.

Article 6

Record keeping policies

1. The code of conduct shall require contributors to keep records for at least five years in an easily accessible form and in a manner that has adequate safeguards against tampering. These records shall be made available to the administrator upon request: The minimum information to be kept is:
 - a) policies and procedures governing the contributions and relevant changes therein;
 - b) data inputs considered, data excluded and any other exercise of discretion for each benchmark contribution;
 - c) communications between the contributor and administrator;
 - d) relevant communications between the submitters and persons performing checks within the contributor;
 - e) any other information that would be needed by the administrator to verify the appropriateness of the contribution;
 - f) records of input data checks for compliance and whistleblowing queries and their respective outcomes;
 - g) substantial exposures of individual traders or trading desks to benchmark related instruments, as well as changes therein;
 - h) any disciplinary actions taken against any contributor's staff in respect of benchmark-related activities.
 - i) a list of submitters and persons performing checks (if applicable), including their names and general roles, with the dates when submission-related roles were authorised and exited.
2. For significant benchmarks, administrators shall not be obliged to apply point (1)(f).
3. For non-significant benchmarks, administrators shall not be obliged to apply point (1)(f) and (g).

Article 7

Reporting of suspicious input data

1. The code of conduct shall state that contributors shall have in place documented procedures to report suspicious input data where appropriate to:
 - a) the contributor's compliance function;
 - b) the administrator;
 - c) the relevant competent authorities via the means specified by those authorities.
2. The code of conduct shall provide:
 - a) All contributors report suspicious input data to the administrator and the method in which the Administrator is to be contacted in such cases.

- b) The name and contact details of the administrator's competent authority that all contributors can contact to report suspicious input data.

Article 8

Conflicts of interest

1. The policies, procedures and controls that the contributor has in place shall include at least:
 - a) A policy that addresses the management of conflicts of interest in the following respects:
 - i) identification and internal escalation of conflicts of interest;
 - ii) recruitment process for Submitters;
 - iii) remuneration policies of the Contributor's staff;
 - iv) management structure of the Contributor;
 - v) communication between the submission team and other functions that may have vested interests in connection with the input to the benchmark contributed;
 - vi) physical and operational separation between submitters and other staff, 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 on ancillary activities performed by the contributor;
 - vii) substantial exposures of individual traders or trading desks to benchmark related instruments, as well as to changes therein.
 - b) Conflicts of interest register, that shall be kept up to date in a timely manner and shall provide evidence of the conflicts of interest identified and of the management measures adopted thereto the register shall be accessible by internal or external auditors.

Article 9

Training

1. Staff who are involved in the contribution process shall be trained on all elements of the code of conduct on a periodic basis or as necessary if there are material changes to the policies, procedures or in response to specific events. The training shall include:
 - a) the contributors internal control framework;
 - b) conflicts of interest;
 - c) the code of conduct;
 - d) reporting of suspicious input data;
 - e) market abuse awareness and prevention.

Article 10

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 January 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

*For the Commission
The President*

On behalf of the President

[Position]

6. Governance and control requirements for supervised contributors (Article 16 BMR)

6.1. Mandate

Article 16

[...]

5. ESMA shall develop draft regulatory technical standards to specify further the requirements concerning governance, systems and controls, and policies set out in paragraphs 1, 2 and 3.

ESMA shall take into account the different characteristics of benchmarks and 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, and the developments in benchmarks and financial markets in light of international convergence of supervisory practices in relation to benchmarks. However, the ESMA draft regulatory technical standards shall not cover or apply to supervised contributors of non-significant benchmarks.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

127. Article 16 BMR requires ESMA to develop draft RTS to specify further the requirements concerning systems and control for supervised contributors set out in paragraphs 1, 2 and 3 for different types of benchmarks.

128. The scope of application of the mandate is specified as not extending to contributors to non-significant benchmarks. Furthermore, paragraph 5 of Annex 1 BMR states that the mandate does not cover interest rate benchmarks: instead paragraphs 6 to 12 of Annex 1 contain rules specifically for contributors to interest rate benchmarks.

129. ESMA's proposals in this section should be considered alongside the proposals on the code of conduct (Article 15 BMR), to which contributors will also be subject, and the proposals on input data (Article 11 BMR), as the requirements on supervised contributors all relate to the provision of input data.

6.2. Discussion Paper

130. The Discussion Paper contained detailed proposals for general requirements for supervised contributors, including on oversight, process, conflict of interest, in ten bullet points. ESMA also made specific proposals for requirements in relation to submitters, the individuals within supervised contributors responsible for submitting input data. These included proposals on training for submitters over and above that specified in Article 16(2)(b) BMR, and on separation of submitters from others in the organisation.

131. The Discussion paper also contained detailed proposals on signing off contributions, and on policies guiding any use of expert judgement or exercise of discretion.

6.3. Analysis following feedback from stakeholders

132. Overall the responses to the proposals were broadly positive, though many contained suggestions for changes.

133. In relation to the proposed general requirements, suggestions adopted by ESMA included:

- i. Specifying that "oversight" should include risk management
- ii. Adding conflict of interest "procedures" to conflict of interest "policies"

134. There were a number of responses to the proposal to specify that information about breaches and audits should be made available to the benchmark administrator. On reflection, ESMA concluded that this was unnecessary, as Article 16(4) BMR provides that a supervised contributor should make available to the administrator all of the information and records kept in accordance with the requirements.

135. On the proposals in relation to submitters almost all respondents agreed with the proposition that supervised contributors should ensure that submitters were not incentivised to manipulate indices or to maximise their contributions. But there were differing views on the details of the proposals for achieving this. Taking these into account, ESMA decided to elaborate the rules for avoiding incentivising manipulation, including through remuneration policy and separation from other staff, while not pursuing its idea of requiring remuneration policy to incentivise the "quality" of submissions or management of conflicts of interest.

136. Several responses to the proposals on sign-off of individual contributions argued that there are many cases when individual sign-off of every submission would be disproportionate, ESMA notes that Article 16(2)(a) BMR already qualifies the requirement for individual sign-off as "where proportionate". In light of the responses, ESMA has allowed for circumstances where sign-off might follow submission, and required clear rules and deadlines to be included, but has not itself specified rules or fixed deadlines.

137. Almost all responses supported ESMA's proposals in relation to policies guiding any use of expert judgement or exercise of discretion, and so ESMA maintains those proposals.

138. The responses included a number of proposals for categorising different types and characteristics of benchmarks and of supervised contributors. In the light of those, ESMA is proposing that some of the more detailed requirements (for timing of sign-off and for re-assessment of submitters' suitability) should apply only to critical benchmarks.

6.4. Proposal

139. Taking into account all the responses as above, ESMA proposes that the general systems and controls should ensure:
- i. identification of submitters and alternates
 - ii. effective checks of contributions by staff other than the submitter
 - iii. where sign-off has to follow submission – as may for example happen where there are frequent, automated contributions – clear rules and deadlines
 - iv. periodic review of the process and effective oversight
 - v. management of conflict of interest
 - vi. management of breaches of the Benchmarks Regulation and of the code of conduct
140. ESMA's proposals include more detailed treatment of the way in which input data is contributed, with provisions about the submitters, the individuals who contribute the input data. Submitters must have an understanding of the market or economic reality that the benchmark represents, and must be trained in the firm's conflicts of interest policy and on the applicable code of conduct. The training specified in these technical standards will be in addition to the training on the Benchmarks Regulation and the Market Abuse Regulation already required by Article 16(2)(b) of the former. For critical benchmarks, the firm should check at least once a year that each submitter still meets the required standards.
141. Article 16(2)(c) BMR requires organisational separation of submitters "where appropriate". ESMA proposes to specify that firms should also aim to separate submitters from other employees physically, and should have oversight and verification procedures in relation to possible submitters' conflicts of interests. Where separation is not possible, these procedures should be such as to control the interaction of submitters with front office employees. And a firm's remuneration policies should avoid giving submitters any incentives that might affect their contributions.
142. In relation to contributions that involve the use of expert judgement, ESMA proposes that each supervised contributor's procedure for applying expert judgement should include a framework for ensuring consistency in contributions, and specification of the information to be used. There should also be procedures for reviewing the use of expert judgement afterwards.
143. ESMA also proposes some elaboration of the requirements in Article 16(2)(d) and (e) BMR for record-keeping by the supervised contributor.

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.

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?

6.6. Draft technical standards: Governance and control requirements for supervised contributors

COMMISSION DELEGATED REGULATION (EU) No .../...

of [...]

supplementing Regulation (EU) No 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards on the governance and control arrangements for supervised contributors to benchmarks

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 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 596/2014¹⁸, and in particular Article 16(5) thereof,

Whereas:

- (1) In order to ensure that there is appropriate oversight and monitoring of the process for making contributions, this Regulation specifies appropriate monitoring of contributions. Recognising that there may be processes where sign-off in advance of individual contributions may be disproportionate, as for example where contributions are made many times a day by an automated system, this Regulation provides for alternative checks that cater for such circumstances.
- (2) It is important to minimise the exposure of submitters to incentives to manipulate benchmarks, and this Regulation therefore includes further details on the separation of submitters from other employees; on the procedures that will control the interaction of submitters with front office employees; and on the supervised contributor's remuneration policy for submitters to ensure that it cannot incentivise manipulation.
- (3) In order to ensure that the required record-keeping fulfils the purpose of enabling the supervised contributor, or the administrator or national competent authority, to review the way in which controls have been applied and to carry out any necessary investigations, this Regulation specifies further that the requirement to keep records of communications in relation to provision of input data should include the identities of

¹⁸ OJ L 171, 29.6.2016, p. 1.

those involved, which would include for example the author and recipients of any written communication, and the participants in any recorded telephone conversations.

- (4) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (5) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council¹⁹,

HAS ADOPTED THIS REGULATION:

Article 1

Governance, systems and controls

1. The systems and controls that a supervised contributor shall have in place to ensure the integrity, accuracy and reliability of all contributions of input data to the administrator shall include a documented and effective process for contributing data, with at least the following features:

- (a) a process for identification of submitters, and procedures for making contributions when a submitter is unexpectedly unavailable, including the identification of alternates;
- (b) policies, procedures and systems for monitoring the data used for the contributions, and the contributions, which should
 - (i) where it is proportionate for the controls to include a process for sign-off by a natural person senior to the submitter, include clear rules about the timing of the sign-off, and if this includes the possibility of sign-off after submission of the input data, the circumstances in which this is permitted and the deadlines for sign-off should be stated.
 - (ii) where it is not proportionate to include a process for such sign-off, provide for effective checks of the contribution to be carried out by staff other than the submitter who have sufficient knowledge, understanding and status to be able to challenge proposed or actual contributions; The frequency and timing of these checks should be specified taking into account the frequency of submission, the level of discretion involved in the process, and the nature, scale and complexity of the contributor's activities.

¹⁹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (iii) be capable of producing alerts in line with predefined parameters in order to allow for further analysis to be conducted.
2. The systems and controls shall include:
 - (a) periodic review of the process for contributing data;
 - (b) effective oversight of the process for contributing data including risk management, identification of senior personnel accountable for the process, and involvement, where appropriate, of the compliance function and internal audit;
 - (c) policy and procedures for management of conflicts of interest, which should include maintenance of a conflicts of interest register;
 - (d) a policy on whistleblowing, including appropriate safeguards for whistle-blowers.
 3. The systems and controls shall contain a procedure for detecting and managing breaches of Regulation (EU) No 2016/1011 or of the code of conduct required by Article 15 of that Regulation. The procedure for managing breaches shall include reviewing any detected breach or error, and recording actions taken as a consequence with a view to improving the supervised contributors' processes so as to avoid repetition.
 4. Subparagraphs (i) and (ii) of paragraph 1(b) shall apply only in the case of contributions to critical benchmarks.

Article 2

Process of contribution of input data

1. The systems and controls shall include processes and policies to ensure that each submitter:
 - (a) has adequate knowledge and experience to understand the underlying market or economic reality the benchmark is intended to measure; and
 - (b) receives adequate training on the firm's conflicts of interest policy and on the code of conduct for the relevant benchmark,
2. At least once a year all submitters' understanding and knowledge should be re-assessed to verify that it is still appropriate that they act as submitters.
3. The measures for the management of conflict of interest in the systems and controls should include:
 - (a) physical separation of submitters from other employees working in other business units within the contributor's organisational structure, 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 on ancillary activities performed by the contributor; and
 - (b) appropriate internal oversight and verification procedures; when there is no organisational or physical separation of employees, the oversight and verification procedures shall aim at controlling particularly the interaction of submitters with front office employees.

4. Those measures should also include remuneration policies in relation to submitters that ensure that the remuneration of a submitter:
 - (a) is not linked to the benchmark nor to the submissions made; and
 - (b) is independent of the performance of any other business unit of the contributor that is likely to be significantly affected by the benchmark.
5. Paragraph 2 shall not apply in the case of contributions to significant benchmarks or to commodity benchmarks that are not critical.

Article 3

Expert judgement

Where input data relies on expert judgement, the policies guiding the use of judgement or the exercise of discretion shall include at least the following:

- (a) the framework for ensuring consistency between different submitters, and consistency over time;
- (b) identification of the information that could be used to support the use of expert judgement, and of any information that must not be taken into account;
- (c) procedures for systematic retrospective reviews of the application of expert judgement.

Article 4

Record keeping

1. In keeping records of communications in relation to provision of input data the supervised contributor shall include the contributions made and the names of the submitters.
2. In keeping records of the contributor's exposure to financial instruments which use a benchmark as a reference, the supervised contributor shall include information on whether the holding of the instruments is part of the core activity of the contributor or is the result of treasury financing activity.
3. In keeping records of internal and external audits, the supervised contributor shall include, where applicable, the audit brief, the audit report, and a record of actions taken in response to each audit.

Article 5

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 January 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.



Done at Brussels, [...]

*For the Commission
The President*

On behalf of the President

[Position]

7. Criteria for significant benchmarks (Article 25 BMR)

7.1. Mandate

Article 25

3. A competent authority may decide that the administrator of the significant benchmark is nevertheless to apply one or more of the requirements of Articles 4(2), points (c), (d) and (e) of Article 4(7), point (b) of Article 11(3) and Article 15(2) if it considers that it would be appropriate taking into account the nature or the impact of the benchmarks or the size of the administrator. In its assessment, the competent authority shall, based on the information provided by the administrator, take into account the following criteria:

- a. the vulnerability of the benchmark to manipulation;
- b. the nature of the input data;
- c. the level of conflicts of interest;
- d. the degree of discretion of the administrator;
- e. the impact of the benchmark on markets;
- f. the nature, scale and complexity of the provision of the benchmark;
- g. the importance of the benchmark to financial stability;
- h. the value of financial instruments, financial contracts or investment funds that reference the benchmark;
- i. the administrator's size, organisational form or structure.

8. ESMA shall develop draft regulatory technical standards to further specify the criteria referred to in paragraph 3.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

7.2. Criteria for the assessment by National Competent Authorities

144. Administrators of significant benchmarks may choose not to apply a number of provisions of the Regulation (EU) 2016/1011 regarding the avoidance of conflicts of interest through organisational separation of the benchmark provision from other business or through increased control measures on their employees, regarding control mechanisms for input data contributed from a front office function and regarding minimum contents of the code of conduct for contributors.

145. Where an administrator has chosen not to apply one or more provisions, the competent authority may decide that the administrator shall nevertheless apply one or more of the respective provisions if it considers that it would be appropriate and has taken into account the nature or the impact of the benchmark or the size of the administrator as well as nine criteria set forth in Article 25(3) of Regulation (EU) No 2016/1011, which ESMA is required to further specify.
146. In its Discussion Paper ESMA proposed its initial draft clarification of the criteria and developed indications for the relevance of some of the criteria in the assessment process to be conducted by the competent authorities, taking into account the purpose of the provisions that are eligible for an opt-out by administrators of significant benchmarks, as well as the benchmarks' potential proneness to manipulation and potential indications for their decreased robustness, resulting from the administrator's size, organisational structure, business activities other than the benchmark provision or other aspects.
147. Respondents generally agreed with ESMA's initial approach but pointed out that certain considerations had not met the reality of all administrator's business activities. ESMA should additionally reflect upon the experience and expertise an administrator has in the provision of benchmarks and whether the administrator is an independent provider. The role of the provider should also be considered when the competent authority is suggested to look at past cases of manipulation. On the administrator's involvement in the market the benchmark is intended to measure, respondents stressed that ESMA should make clear that a conflict of interest could particularly evolve where the administrator holds positions in that specific market.
148. Some respondents also argued that ESMA should not indicate an outcome of the assessments the competent authorities will have to make at all. Respondents also argued that the elaborations in the Discussion Paper suggest that every decision by administrators of significant benchmarks to opt out of the application of one or more provisions according to Article 25 of the Regulation (EU) 2016/1011 would be subject to an approval by the relevant competent authority while the principle of proportionality in the Regulation would allow an opt out. Any decision to impose the application of the respective provisions should be exceptional and it would be the competent authority's burden to demonstrate the appropriateness of such a decision.
149. In developing the draft technical standards ESMA has reflected on the comments on the Discussion Paper and considers that each criterion should be assessed taking into account the purpose of the provision which the administrator has decided not to apply and should evaluate if such purpose can nonetheless be achieved through other means.
150. The criteria of the vulnerability of the benchmark to manipulation, the nature of the input data and of the nature, scale and complexity of the provision of the benchmark (Article 25(3)(a), (b) and (f) of the Regulation (EU) 2016/1011) address aspects that are inherent to the benchmark itself and to its methodology respectively. ESMA suggests that the competent authority in assessment of these criteria should take into account in particular structural elements of the benchmark to evaluate whether or not individual characteristics

of the benchmark or its actual provision process may justify to require the application of one or more of the requirements the administrator has opted out of. For the mentioned criteria, the requirements regarding the input data (Article 4(7) of the Regulation (EU) 2016/1011 can be of particular relevance.

151. The level of conflicts of interest, the degree of discretion of the administrator and the administrator's size, organisational form or structure (letters (c), (d) and (i) of Article 25 of the Regulation (EU) 2016/1011) relate foremost to the properties of the administrator and the specifying elements in the RTS point to typical sources of conflicts of interest – for example whether the administrator holds positions in financial instruments or financial contracts referencing the benchmark, its involvement with contributors or its corporate ties to actual or potential users of the benchmark – and possible means to mitigate them – through transparency, organisational separation or other adequate governance mechanisms. The elements developed by ESMA should be particularly helpful for competent authorities when they assess the re-application of requirements concerning governance and conflicts of interest avoidance (Articles 4(2) and 4(7)(c), (d) and (e) of the Regulation (EU) 2016/1011).

152. The remaining criteria of the impact of the benchmark on markets, the importance of the benchmark to financial stability and of the value of financial instruments, financial contracts or investment funds that reference the benchmark (letters (e), (g) and (h) of Article 25(3) of the Regulation (EU) 2016/1011) all relate to the financial importance of the benchmark – to either single markets or to financial stability on a wider scale. ESMA suggests in the RTS for the competent authorities to include respective elements in the assessment of the appropriateness of mandating the re-application of one or more requirements of the Regulation (EU) 2016/1011 and to consider the relevance the individual benchmark has or may have for a specific market or markets and – where known by the competent authority, through the application process or otherwise – the total value of financial instruments, financial contracts and investment funds referencing that benchmark, and any relevant quantitative relation to the total value of the respective instruments in the Member State, where available.

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

7.3. Draft technical standards: Criteria for significant benchmarks

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

[...]

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the criteria to be assessed by competent authorities when deciding to apply certain provisions the significant benchmarks

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation No 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 596/2014²⁰, and in particular Article 25(9) thereof,

Whereas:

- (1) Administrators of significant benchmarks may opt not to apply one or more provisions of the Regulation (EU) 2016/1011 that would otherwise be applicable to the type of benchmark they provide. The competent authority may decide that administrators have to apply one or more requirements the disapplication of which they have communicated to the competent authority, if the nature or the impact of the benchmark or the size of the administrator so justifies.
- (2) Competent authorities have to take into account a number of criteria when they assess the appropriateness of applying one or more requirements of the Regulation (EU) 2016/1011 which the administrator has previously chosen not to apply. It is important that these criteria are further specified to make their assessment by the competent authority more practical and to ensure their coherent application in all Member States. This Regulation sets forth elements for each criterion which further define its relevance in the context of Article 25 (3) of the Regulation (EU) 2016/1011 and which competent authorities shall consider in their assessment.
- (3) The further specification of the criteria is based on the nature of the provisions that administrators may waive when they provide significant benchmarks. Administrators of

²⁰ OJ L171, 29.6.2016, p.1.

significant benchmarks may elect not to operationally separate the provision of benchmarks from other parts of their business that may create an actual or potential conflict of interest. Administrators of significant benchmarks may also not apply provisions that prevent their employees and any other natural persons working for them, who are directly involved in the provision of a benchmark, from a number of situations and activities that could create a risk of conflicts of interest and an incentive to manipulation. Competent authorities should take account of these exceptions when they assess the criteria of Article 25(3) of the Regulation (EU) 2016/1011 in light of potential conflicts of interests. When administrators of significant benchmarks decide not to apply additional control measures for input data from front office functions or to develop the code of conduct without the minimum contents of Article 15(2) of the Regulation (EU) 2016/1011 competent authorities in their assessment should evaluate if the robustness and quality of input data is achieved by other means.

- (4) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (5) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council²¹.

HAS ADOPTED THIS REGULATION:

Article 1

Assessment of the appropriateness of applying specific requirements to administrators of significant benchmarks

1. When deciding whether an administrator of a significant benchmark is to apply one or more of the requirements laid down in Article 4(2), points (c), (d) and (e) of Article 4(7), point (b) of Article 11(3) and Article 15(2) of Regulation (EU) 2016/1011, the competent authority shall take into account the following elements:

- (a) in relation to the vulnerability of the benchmark to manipulation:
 - (i) whether the benchmark is based on transaction data, whether contributors are supervised entities or whether additional measures apply that increase the robustness of input data;

²¹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (ii) whether the administrator's organisational structure prevents incentives to manipulation and whether the administrator has a financial interest in financial instruments, financial contracts or investment funds referencing the benchmark;
 - (iii) whether there are proven cases of manipulation of the same benchmark or a benchmark with a similar methodology provided by an administrator of similar size and organisational structure;
 - (iv) whether there are specific incentives for a third party to try to manipulate the benchmark;
- (b) in relation to the nature of the input data:
 - (i) when the input data is transaction data, whether the administrator is a participant in the market or economic reality the benchmark intends to measure;
 - (ii) when the input data is provided by contributors, whether the contributors hold positions in financial instruments referencing that benchmark;
 - (iii) when the input data is sourced from third country exchanges or trading systems, whether a supervisory framework applicable to these exchanges or trading systems maintains the integrity of the input data;
 - (iv) where the input data consists of quotes, whether these are committed or indicative and whether the quotes are prone to manipulation;
- (c) in relation to the level of conflicts of interest:
 - (i) whether the administrator holds positions in financial instruments or financial contracts referencing the benchmark or could profit from the performance of an investment fund which is measured by the benchmark;
 - (ii) where the benchmark is based on contributions, how the administrator's actual or potential relations with contributors are governed by adequate control mechanisms;
 - (iii) Whether the administrator has controls or other measures in place that mitigate potential conflicts of interest effectively;
- (d) in relation to the degree of discretion of the administrator:
 - (i) where the benchmark methodology allows for expert judgement by the administrator, whether its exercise is sufficiently transparent;
 - (ii) where the benchmark is based on estimates, the effectiveness of internal control measures the administrator has in place;
- (e) in relation to the impact of the benchmark on markets:
 - (i) where a benchmark has particular relevance for a specific market or markets, whether the unreliability of the benchmark has a disruptive effect on the functioning of that specific market or markets and whether there are adequate substitutes for that benchmark;
 - (ii) When the benchmark is a significant benchmark according to Article 24 (1)(b) of the Regulation (EU) 2016/1011, and where known to the competent authority, any relevant quantitative relation of financial instruments, financial contracts, or

investment funds referencing the benchmark to the total value of the respective instruments in a Member State;

- (f) in relation to the nature, scale and complexity of the provision of the benchmark:
 - (i) the degree of which input data is based on contributions or whether the input data is transaction data and how this is reflected in the control mechanisms the administrator has in place;
 - (ii) the amount of data to be processed and the number of data sources and whether the administrator has sufficient technical means to continuously and robustly process the data;
 - (iii) whether the calculation method gives rise to operational risks in processing the data;
 - (iv) the extent to which the administrator relies on external contributors for the determination of the benchmark;
- (g) in relation to the importance of the benchmark to financial stability, the quantitative relation of the total value of financial instruments, financial contracts and investment funds referencing the benchmark to the total assets of the financial sector and of the banking sector in a Member State, where known to the competent authority;
- (h) in relation to the value of financial instruments, financial contracts or investment funds that reference the benchmark:
 - (i) the total value of all financial instruments, financial contracts and investment funds referencing the benchmark on the basis of all the range of maturities or tenors of the benchmark, where known to the competent authority;
 - (ii) whether the use of the benchmark is concentrated in individual categories of financial instruments, financial contracts or investment funds;
 - (iii) when a benchmark is a significant benchmark according to Article 24 (1)(a) of the Regulation (EU) 2016/1011, and where known to the competent authority, the proximity of the total value of referencing financial instruments, financial contracts and investment funds to the thresholds in points (a) and (c)(i) of Article 20 of the Regulation (EU) 2016/1011;
- (i) in relation to the administrator's size, organisational form or structure:
 - (i) when the provision of benchmarks is not the administrator's principal business activity, whether the provision of the benchmark is organisationally separate and whether other appropriate means are in place to avoid conflicts of interest.
 - (ii) when the administrator is part of a group and where one or more entities within such a group are actual or potential users of the benchmark, whether the entity providing the benchmark is acting independently and how appropriate the other means the administrator has in place are to avoid conflicts of interest.

Article 2

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

For the Commission
The President

On behalf of the President

[Position]

8 Compliance statement for administrators of significant and non-significant benchmarks (Articles 25 and 26 BMR)

8.1 Mandate

Article 25

7. Where an administrator of a significant benchmark does not comply with one or more of the requirements laid down in Article 4(2), points (c), (d) and (e) of Article 4(7), point (b) of Article 11(3) and Article 15(2), it shall publish and maintain a compliance statement that clearly states why it is appropriate for that administrator not to comply with those provisions.
8. ESMA shall develop draft implementing technical standards to develop a template for the compliance statement described in paragraph 7.

ESMA shall submit the draft implementing standards referred to in the first subparagraph to the Commission by 1 April 2017.

Article 26

3. Where an administrator of a non-significant benchmark chooses not to apply one or more of the provisions referred to in paragraph 1, it shall publish and maintain a compliance statement which shall clearly state why it is appropriate for that administrator not to comply with those provisions. The administrator shall provide the compliance statement to its competent authority.
4. The relevant competent authority shall review the compliance statement referred to in paragraph 3 of this Article. The competent authority may also request additional information from the administrator in respect of its non-significant benchmarks in accordance with Article 41 and may require changes to ensure compliance with this Regulation.
5. ESMA shall develop draft implementing technical standards to develop a template for the compliance statement described in paragraph 3.

ESMA shall submit the draft implementing standards referred to in the first subparagraph to the Commission by 1 April 2017.

8.2 Compliance statement: significant benchmarks

153. The Benchmarks Regulation (BMR) states that administrators of significant benchmarks may choose not to apply a number of provisions. These provisions, listed in Article 25(1), relate to the areas of: governance and conflict of interest (Article 4), input data (Article 11) and code of conduct (Article 15). An administrator may decide not to apply these requirements only when it “considers that the application of one or more of those provisions would be disproportionate taking into account the nature or impact of the benchmark or the size of the administrator” (Article 25(1)). However, the relevant national competent authority (“NCA”) may conduct an assessment and decide that one or more of the requirements waived should be applied, depending on the outcome of the said assessment.

154. Where the administrator chooses not to comply with one or more of the provisions listed in Article 25(1), it has to publish and maintain a compliance statement explaining why it considers it appropriate not to comply with those provisions.
155. In this context, ESMA is empowered to develop implementing technical standards (ITS) to develop a template for the compliance statement, to be used by all administrators of significant benchmarks availing themselves of the provision in Article 25(1). The template should ensure that the statement is clear and unambiguous, and at the same time the explanation of the non-application of the provisions should be as detailed and comprehensive as possible. That is because the main aim of the compliance statement is to provide competent authorities and the public with an explanation of why it is appropriate not to apply some requirements of the BMR: transparency and clarity should therefore be prominent features of the template for compliance statements.
156. In the Discussion Paper (DP), ESMA argued that a statement should refer to a single benchmark / family of benchmarks. According to the proposal of the DP, if an administrator decides not to apply some provisions to, e.g., three different benchmarks (not belonging to the same family of benchmarks), it should publish three separate statements (see para. 252 of the DP).
157. The DP already included a list of eleven items that ESMA was proposing to include in the compliance statement.
158. The respondents to the DP agreed with the items preliminary proposed by ESMA and suggested that no other items should be added. They were, however, in disagreement with the proposal of having a single compliance statement for each benchmark / family of benchmarks, and they suggested that a single compliance statement should be required for multiple benchmarks in cases where the same rationale for non-compliance exists, even if such benchmarks are not part of the same family.
159. In light of the feedback received, ESMA is now proposing in the draft ITS that administrators of significant benchmarks should publish a single compliance statement composed of multiple sections. First, a “general” section should include the identity of the administrator and of the relevant NCA as well as the date of creation and latest update of the compliance statement.
160. After the “general” section, the compliance statement should contain a “core” section including:
- a. an indication to which significant benchmarks the waived provisions do not apply;
 - b. which provisions the administrator has chosen not to apply;
 - c. explanations on the appropriateness of not applying each of the provisions waived.
161. This “core” section should be included in the compliance statement for each identifiable group of significant benchmarks (whether or not belonging to the same family) provided by

the administrator for which: (i) the same provisions are not complied with, and (ii) the same explanations for non-compliance apply.

162. For example, if an administrator of five significant benchmarks decides not to apply one of the requirements listed in Article 25(1) in the provision of three benchmarks, it would have to explain in the compliance statement why the application of that requirement is disproportionate in relation to those three benchmarks. In the case where the explanation of disproportionality is the same for the three benchmarks, the compliance statement of the administrator would be composed of: one “general” section and one “core” section, in which the three benchmarks are listed and the common explanation of appropriateness is included.
163. If the same administrator decides that for its remaining two significant benchmarks a different requirement, amongst the ones listed in Article 25(1), should not apply, it should check whether the reason for not applying this requirement to the two benchmarks is identical. If this is the case, the compliance statement of the administrator would thus include: a “general” section and two distinct “core” sections – a first “core” section for the group of three benchmarks referred to in the previous paragraph, and a second “core” section for the group of two benchmarks referred to in this paragraph.
164. In case the explanations for the non-application of one provision differ from one benchmark to another, in the second example provided, there would be a need to add an additional “core” section. In this case the result would be a compliance statement that includes: a “general” section and three distinct “core” sections - a first “core” section for the group of three benchmarks, a second “core” section for one of the two benchmarks belonging to the second group, and a third “core” section for the other benchmark of the second group. Indeed, even if the administrator applies the same exemption to several benchmarks, whenever the explanations for doing so are different, separate core sections are requested.
165. With this approach ESMA is aiming at minimising the administrative burden in connection with preparation of the compliance statement, while maintaining all the relevant information, in line with the Level 1 text.
166. The draft ITS requires an administrator of significant benchmarks also to amend the compliance statement whenever any of the information included within it is no longer up to date. This could be the case, for example, if a significant benchmark is to be added to the ones already included in the statement. After each amendment, the administrator of significant benchmarks should then publish the updated compliance statement (with a modified date of “last update” in the general section of the statement).

8.3 Compliance statement: non-significant benchmarks

167. In relation to non-significant benchmarks, the BMR has a similar approach towards possible non application of some requirements. According to Article 26(1) of the BMR, when a benchmark is not classified as critical or significant, its administrator may decide

not to apply a number of provisions indicated under the same Article and related to: governance and conflict of interest (Article 4), oversight function (Article 5), control framework (Article 6), accountability framework (Article 7), input data (Article 11), transparency of methodology (Article 13), reporting of infringement (Article 14), code of conduct (Article 15), governance and control requirements for supervised contributors (Article 16).

168. If an administrator decides not to apply any of the provisions listed in Article 26(1), it will have to publish and maintain a statement explaining why it is appropriate not to comply with the specific provisions.
169. The main difference with respect to the process for significant benchmarks is that in the case of non-significant benchmarks:
- a. there is no assessment by the competent authority of the appropriateness of the exemptions elected by the administrator (see Article 25(2) to (6) for significant benchmarks);
 - b. the compliance statement should also be provided to the relevant competent authority;
 - c. the competent authority may require additional information as well as changes to ensure compliance with the BMR (see Article 26(4));
170. Also in this context ESMA is empowered to develop draft ITS to establish a template for the compliance statement to be produced for non-significant benchmarks.
171. ESMA DP was proposing that the compliance statement for significant and non-significant benchmarks should have the same structure. The new draft ITS proposes a single compliance statement composed of multiple sections also in the case of administrators of non-significant benchmarks. The way the statement should be composed is exactly the same as for significant benchmarks.
172. In the case of non-significant benchmarks, the responses to the DP also suggested that administrators of non-significant benchmarks should have less burdensome compliance statements than administrators of significant ones.
173. Following the suggestion by market participants, and in line with the principle of proportionality, the draft ITS proposes for administrators of non-significant benchmarks a reduced number of items compared to the statement for significant benchmarks, while keeping the multiple sections structure. The goal is to reduce even further the administrative burden for administrators of non-significant benchmarks, while still providing for a compliance statement able to properly inform the relevant NCA and the public.

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

8.4 Draft technical standards: Compliance statement

**COMMISSION IMPLEMENTING REGULATION (EU) No .../... laying down
implementing technical standards with regard to the template for compliance statements
to be used by administrators of significant and non-significant benchmarks according to
Regulation (EU) No 2016/1011 of the European Parliament and of the Council**

of **XXX**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 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 596/2014²² and in particular Articles 25(8) and 26(5) thereof,

Whereas:

- (1) It is important that the compliance statement published and maintained by an administrator of significant and/or non-significant benchmarks is clear, so as to provide the public and the relevant national competent authority with the information contemplated by the Regulation.
- (2) Each compliance statement should be organised in sections, each of them referring to an identified group of benchmarks for which the same provisions are not complied with, and the same explanation for non-compliance apply. Each of these sections should contain, for each provision the administrator has chosen not to apply, a dedicated and sufficiently detailed statement of the reasons why the administrator considers it appropriate not to comply with that specific provision for the group of benchmarks in question.
- (3) In relation to significant benchmarks, such explanation should focus on the reasons why the application of that single provision would be disproportionate in light of the relevance of the benchmark, the nature of the input data used, the size, organisational form or structure of the administrator, or any other element the administrator considers relevant for the purpose of the compliance statement.
- (4) In accordance with the principle of proportionality, this Regulation avoids putting an excessive administrative burden on administrators of non-significant benchmarks by developing a template for the compliance statements of administrators of non-significant benchmarks that is less detailed.

²² OJ L 171, 29.6.2016, p. 1

- (5) This Regulation is based on the draft implementing technical standards submitted by the European Securities and Markets Authority to the Commission.
- (6) The European Securities and Markets Authority has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council²³,

HAS ADOPTED THIS REGULATION:

Article 1

Compliance statement for administrators of significant benchmarks

1. An administrator of significant benchmarks shall use the template included in Annex I for the production of a compliance statement pursuant to Article 25(7) of Regulation (EU) No 2016/1011.
2. An administrator of significant benchmarks shall amend the compliance statement immediately whenever any of the information included within it is no longer up to date. After each amendment, the administrator of significant benchmarks shall publish the updated compliance statement.

Article 2

Compliance statement for administrators of non-significant benchmarks

1. An administrator of non-significant benchmarks shall use the template included in Annex II for the production of a compliance statement pursuant to Article 26(3) of Regulation (EU) No 2016/1011.
2. An administrator of non-significant benchmarks shall amend the compliance statement immediately whenever any of the information included within it is no longer up to date. After each amendment, the administrator of non-significant benchmarks shall publish and provide to its competent authority the updated compliance statement.

Article 3

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2018.

²³ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).



This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

*For the Commission
The President*

On behalf of the President

[Position]

ANNEX I

Template for the compliance statement under Article 25 (7) of Regulation (EU) No 2016/1011

<i>Item</i>	<i>Text field</i>
A. General Information	
1. Date of creation of the compliance statement and of the latest update	1. Created: [dd/mm/yy] Last updated: [dd/mm/yy]
2. Identity of the administrator	2. [As it appears in the “Register of administrators and benchmarks” published by ESMA]
3. Relevant National Competent Authority	3. [The NCA who has authorised the administrator]
<p><i>The following section(s) includes:</i></p> <ul style="list-style-type: none"> • <i>which provisions the administrator has chosen not to apply,</i> • <i>explanations on the appropriateness of this choice in relation to each provision not applied, and</i> • <i>an indication to which significant benchmarks these provisions do not apply.</i> <p><i>Such a section shall cover each group of significant benchmarks provided by the administrator for which:</i></p> <ul style="list-style-type: none"> • <i>the same provisions are not complied with, and</i> • <i>the same explanations for non-compliance apply.</i> 	
B. [Insert name of the administrator as in field 2] chooses not to apply the following provisions of Regulation (EU) No 2016/1011 with respect to its significant benchmarks listed below	
4. Identification of significant benchmarks for which this section is relevant	4. [List of all the single benchmarks/ families of benchmarks , including, where available, single identifiers]
5. Indication to where the benchmark statements of the benchmarks referred to in section have been published	5.[e.g. webpage link]

<p>6. (i) clear identification of each single provision;</p> <p>(ii) for each provision listed under point (i), a dedicated, detailed and clear explanation of the reasons why the administrator considers it appropriate not to comply with that specific provision</p>	<p><i>6(i). [Number of the Article and paragraph of Regulation (EU) No 2016/1011 and full text of each single provision]</i></p> <hr/> <p><i>6(ii). [Explanation on the appropriateness of the non-compliance for each specific provision]</i></p>
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ANNEX II

Template for the compliance statement under Article 26 (3) of Regulation (EU) No 2016/1011

Item	Text field
A. General Information	
1. Date of creation of the compliance statement and of the latest update	1. Created: [dd/mm/yy] Last updated: [dd/mm/yy]
2. Identity of the administrator	2. [As it appears in the “Register of administrators and benchmarks” published by ESMA]
<p><i>The following section(s) includes:</i></p> <ul style="list-style-type: none"> • <i>which provisions the administrator has chosen not to apply,</i> • <i>explanations on the appropriateness of this choice in relation to each provision not applied, and</i> • <i>an indication to which non-significant benchmarks these provisions do not apply.</i> <p><i>This type of section shall be repeated for each group of non-significant benchmarks provided by the administrator for which:</i></p> <ul style="list-style-type: none"> • <i>the same provisions are not complied with, and</i> • <i>the same explanations for non-compliance apply.</i> 	
B. [Insert name of the administrator as in field 1] chooses to not apply the following provisions of Regulation (EU) No 2016/1011 with respect to its non-significant benchmarks listed below	
3. Identification of non-significant benchmarks for which this section is relevant	3. [List of all the single benchmarks / families of benchmarks, including, where available, single identifiers]
4. (i) clear identification of each single provision;	4(i). Number of the Article and paragraph of Regulation (EU) No 2016/1011 and full text of each single provision

<p>(ii) for each provision listed under point (i), a dedicated, detailed and clear explanation of the reasons why the administrator considers it appropriate not to comply with that specific provision</p>	<p><i>4(ii). [Explanation on the appropriateness of the non-compliance for each specific provision]</i></p>
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9 Benchmark statement (Article 27 BMR)

9.1 Mandate

Article 27

3. ESMA shall develop draft regulatory technical standards to further specify the contents of the benchmark statement and the cases in which an update of such statement is required, distinguishing for different types of benchmarks and sectors as set in this Regulation and taking into account the principle of proportionality.

ESMA shall submit the draft implementing standards referred to in the first subparagraph to the Commission by 1 April 2017.

9.2 General remarks and feedback

174. Article 27 of the Benchmarks Regulation (BMR) requires administrators to publish a benchmark statement. Article 27(1) states general requirements regarding transparency, appropriateness, and elements of discretion in the calculation of the benchmark and user caution. The minimum contents for all benchmark statements are specified in Article 27(2) with reference to the methodology and the process to determine the benchmark, in particular the input data.

175. Recital 43 of the Regulation explains that the benchmark statement is a tool for users of benchmarks to choose appropriately from among, and understand the risks of, benchmarks, and for this reason the statement provides information in relation to what a given benchmark intends to measure and its susceptibility to manipulation. The main aim of the statement is therefore to provide clear information to the public, informing it in a precise yet “user friendly” way.

176. The Discussion Paper (DP) provided some first proposals in relation to the general information of the benchmark statement, further specifying the contents laid down in Level 1, as well as specific requirements for different types of benchmarks.

177. In particular, the DP proposed enhanced disclosure requirements in relation to critical benchmarks with reference to: the degree of use of the critical benchmark in general and also with regard to different Member States, the nature of its contributors and their location, information on the most relevant types of financial instruments / contracts and investment funds that reference the critical benchmark, and the total reference value for this benchmark (see section 11.5.1 of the DP).

178. In relation to interest rate and commodity benchmarks, the DP proposed to include in the benchmark statement information about the specific requirements that the BMR impose on them due to their classification as interest rate or commodity benchmarks (see sections 11.4.1 and 11.4.2 of the DP).

179. The market participants' feedback on the proposals of the DP was generally positive. However, the respondents highlighted some concerns related to a small number of issues.
180. Market participants are generally worried about the duplication of information to be published by benchmark administrators under different BMR obligations. They see in particular an overlap between the information provided by the benchmark statement and the methodology to be published or made available by the administrator (Article 13 BMR). ESMA acknowledges that the two documents (methodology and benchmark statement) contain the same type of information to a certain extent. It is nevertheless clear that the requirement to publish both documents stems from the BMR, and therefore the proposal by some respondents to include the benchmark statement into the methodology, or vice versa, is not a viable option. Also, the possibility for the benchmarks statement to refer to the methodology document without repeating the same information is not something that ESMA can consider: Recital 43 explains that benchmark statements must be of reasonable length but at the same time must focus on providing the key information needed to users in an easily accessible manner, i.e. cross reference to other documents should be as limited as possible.
181. In relation to the specification of point (a) under Article 27(1), respondents suggested to add some flexibility to the definition of the circumstances in which the measurement of the market / economic reality of the benchmarks may become unreliable. A statement to this effect was added in the draft RTS (see Article 1(2)(c) of the draft RTS).
182. In relation to the explanation of the use of discretion in the calculation of the benchmarks, the main concern of respondents was again the duplication of information already included in other documents. The BMR in this respect is already very specific (see point (b) of Article 27(1) of the BMR: the benchmark statement should "lay down technical specifications that clearly and unambiguously identify the elements of the calculation of the benchmark in relation to which discretion may be exercised, the criteria applicable to the exercise of such discretion and the position of the persons that can exercise discretion, and how such discretion may be subsequently evaluated"). ESMA cannot reduce the content of point (b) of Article 27(1) of the BMR, and therefore the suggestions made in relation to the discretion used in the calculation have not been included in the draft RTS.
183. The DP proposed for both significant and non-significant benchmarks to include a reference to the compliance statement, where applicable. The DP also proposed three options to include this reference in the benchmark statement and was asking for the public preference. Respondents generally opposed the inclusion of information about the compliance statement in the benchmark statement because of the duplication of available information, as the compliance statement will be published and therefore available to everybody, just like the benchmark statement.
184. In light of the feedback received to this proposal, and the fact that Article 27 of the BMR does not make any reference to the compliance statement, ESMA has decided to change its approach and consequently the draft RTS does not contain any requirement to make reference to the compliance statement.

9.3 Content of the draft RTS

185. On the basis of the proposal included in the DP, and taking into account the concerns and suggestions submitted by the respondents, ESMA has prepared a draft RTS for the benchmark statement. The draft RTS has been organised as follows:

- Article 1 specifies the items included under Article 27(1) of the BMR;
- Articles 2 to 7 specify the items included under Article 27(2) of the BMR in relation to the different types of benchmarks; and
- Article 8 specifies the cases in which an update of the benchmarks statement is required.

186. ESMA has developed this structure of the RTS so as to propose a linear and easily understandable set of requirements that administrators should be able to implement smoothly, without an excessive increase in administrative cost.

General disclosure requirements

187. Article 1 of the draft RTS further specifies points (a) to (d) of Article 27(1) of the BMR. In relation to point (a) of Article 27 (1), Article 1 requires the benchmark statement to include a reference to the geographical boundaries of the measured market or economic reality as part of the general definition of the market or economic reality measured by the benchmarks.

188. The DP also proposed that the benchmark statement includes: information on actual or potential participants of the measured market, barriers to market access, an indication of the size of the measured market or economic reality. However, in response to some concerns expressed by market participants with respect to the availability of reliable data, the aforementioned elements have been included in the draft RTS only as factors to be considered by the administrator.

189. Point (a) of Article 27 (1) of the BMR refers also to the “circumstances in which the measurement of the benchmark may become unreliable”, and Article 1(2) of the draft RTS includes indicators that administrators should take into account when they define these circumstances.

190. Article 1(3) focuses on the use of discretion in the calculation of a benchmark (point (b) of Article 27(1) BMR). It is important that a benchmark statement includes clear and complete description of any element of discretion in the calculation, because the susceptibility to the manipulation of the benchmark is clearly linked to the use of discretion in the calculation. The draft RTS proposes that the benchmark statement should:

- identify each individual element of the benchmark determination process that is or may be subject to or indispensably require discretion, and describe, in

relation to each individual element, under what conditions, if any, discretion may or may not be used in accordance with the methodology of the benchmark;

- indicate the position of each function or body who may exercise discretion in relation to each individual element of the benchmark determination process;
- outline each step of the ex-post evaluation process for the use of discretion, including a clear reference to the function or body that evaluates any exercise of discretion and, where applicable, its role in the benchmark determination process.

191. This set of elements should provide the public with a clear and comprehensive view on the use of discretion during the determination of the benchmark. As already said, the presence of discretion in the computation of the benchmark could potentially imply the existence of conflict of interest and therefore could represent a source of manipulation of the benchmark, increasing the vulnerability of the latter. For this reason, ESMA believes that this set of precise information on discretion should be included in the benchmark statement, so as to enhance the transparency of the benchmark vis-à-vis the general public.

192. Points (c) and (d) of Article 27(1) of the BMR are covered by Article 1(4) of the RTS: administrators are required to indicate the means by which users will be informed of a change to or the cessation of the benchmark, with reference to the obligation stemming from Article 28 of the BMR.

Disclosure on types of benchmarks

193. Articles 2 to 7 further specify the points included in Article 27(2) of the BMR and they do so in relation to the different types of benchmarks.

194. For regulated data benchmarks, due to their nature and minor susceptibility to manipulation, the content of the benchmark statement is limited to the addition in the description of the input data of the sources of the input data used, and the sectoral disciplines applying to such sources of input data.

195. The draft RTS requires administrators of interest rate benchmarks to:

- refer to the enhanced regulatory regime applicable to interest rate benchmarks under Annex I to the BMR, and specify which increased oversight mechanisms are in force for the benchmark; and
- include, in relation to points (e) and (f) of Article 27(2) of the BMR, details on applicable time limits, e.g. with respect to delays in the publication of the benchmark or its re-determination, and provisions on notification of users of such exceptional events or circumstances.

196. The latter requirement, included for interest rate benchmarks in Article 3(1)(c) of the draft RTS, refers to additional information regarding procedures that might apply under exceptional circumstances, and it is proposed also for critical benchmarks in Article 5(h) of the draft RTS. This particular requirement reflects the paramount importance of critical benchmarks but also the potential systemic effects of interest rate benchmarks in case of manipulation or cessation of such benchmarks.

197. For commodity benchmarks, administrators would have to:

- indicate whether the benchmark falls under the regime of Title II of the BMR (“Benchmark integrity and reliability”, Article 4 to 16 of the BMR) or of Annex II (“Commodity benchmarks”)²⁴;
- include in the definitions of key terms a concise description of the criteria that define the relevant underlying physical commodity;
- with respect to the explanations that the administrator has to publish for each benchmark calculation according to Annex II, paragraph (7)(a) and (b) of BMR, indicate the source where such explanations may be found; outline, on an aggregate level, the professional profiles of the contributors to the benchmark and explain, where available, why the benchmark is predominantly based on contributions of non-supervised entities.

198. The proposed requirements for interest rate and commodity benchmarks are in line with the original content of the DP and mainly aim at informing the public about the specific regulatory regime to which interest rate and commodity benchmark are subject under the BMR.

199. Articles 5 to 7 of the draft RTS further specify the points included in Article 27(2) of the BMR in relation to critical, significant and non-significant benchmarks, taking into account the principle of proportionality. For critical benchmarks, apart from an indication of the qualification of critical benchmark, the draft RTS proposes an enhanced set of information due to the systemic relevance of the benchmark, broadly in line with what was proposed in the DP.

200. In particular, the benchmark statement should:

²⁴ Title II applies where a commodity benchmark:

- is a regulated data benchmark (input data from electricity and natural gas exchange are considered regulated data), or
- is based on submissions by contributors which are in majority supervised entities, or
- is a critical benchmark and the underlying asset is gold, silver or platinum.

Annex II applies in substitution of Title II (with exception of Article 10 – Outsourcing) where a commodity benchmark is not a regulated data benchmark and is based on submissions by contributors which are in majority non-supervised entities (unless it is outside the scope of the BMR), including critical benchmarks whose underlying asset is not gold, silver or platinum (for critical commodity benchmarks subject to Annex II, the requirements regarding mandatory contribution and colleges are not applicable).

- refer to the enhanced regulatory regime applicable to critical benchmarks under the BMR and specify which increased oversight mechanisms are in force for the benchmark;
- contain information, to the extent available, on the most relevant types of financial instruments / contracts and investment funds that reference the critical benchmark;
- contain information, to the extent available, on the degree of use of the benchmark in one or more Member States and on the total reference value in respect of the critical benchmark;
- explain that the benchmark is subject to mandatory administration and mandatory contribution and to supervision by a college of supervisors (including the national competent authority (NCA) and ESMA);
- where the benchmark is based on contributions, the statement should contain a list of the contributors; contain a description, on an aggregate level, of major categories of the contributors to the benchmark and where they are located;
- in the event of a planned cessation, administrators of critical benchmarks should provide details of how the users can contact the administrator or the NCA to provide further information on the adverse impact on the user should the benchmark cease to exist;
- for the purpose of Article 27 (2)(e) and (f) of the BMR, the benchmark statement should include details on applicable time limits, e.g. with respect to delays in the publication of the benchmark or its re-determination, and provisions on notification of users of such exceptional events or circumstances.

201. As a result of the above elements, the public, including persons with limited financial knowledge, should be able to understand why the benchmark is considered critical and what are its characteristics, degree of use and the implications of being classified as critical.

202. For all types of benchmarks, the single identifier of the benchmark should be included, where available, as this is a relevant information for the public in order to easily identify a benchmark and indisputably distinguish it from others. The ISIN code of the benchmark should be used when available. Within the current international work stream on the “unique product identifier”, IOSCO and CPMI are working on an underlier ID that could also be included when it becomes available.

Update requirement

203. The empowerment received by ESMA in Article 27(3) of the BMR refers to further specification of “the cases in which an update of such statement is required”, and Article 4 of the draft RTS covers this topic.

204. Article 8(1) states that administrators should review and update the benchmark statement whenever the information it provides would no longer be considered correct or sufficiently precise. Article 8(2) specifies in particular that an update of the statement is needed in the following cases:

- the benchmark is no longer reliable to accurately measure the underlying market or economic reality;
- a change in the type of the benchmark;
- a significant change in the benchmark or in the methodology of its calculation;
- when fair and easy access to information is impaired as a consequence of a change in the information incorporated in the benchmark statement by reference.

205. This list of circumstances should be understood as non-exhaustive, identifying specific cases where the update is indispensable, but clearly administrators could be required to update the statement in other cases too, as per Article 8(1) of the draft RTS.

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

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.

9.4 Draft technical standards: Benchmark statement

COMMISSION DELEGATED REGULATION (EU) No .../..

of XXX

supplementing Regulation (EU) No 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the benchmark statement to be published by administrators of benchmarks

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 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 596/2014²⁵, and in particular Article 27(3) thereof,

Whereas:

- (1) In order to provide users of benchmarks with appropriate key information, administrators of benchmarks should publish and keep updated clear and concise benchmark statements. General rules with respect to the content of such benchmark statements regarding transparency, appropriateness and user caution require further specification. The more detailed requirements laid down under this Regulation are due to apply to all types of benchmarks, according to Regulation No 2016/1011. A proportional approach has been pursued, as appropriate and feasible, in order to moderate the burden on administrators in connection with the completion of the benchmark statements required to be drafted for all the benchmarks or families of benchmarks provided.
- (2) Particular attention has to be paid to information on discretionary elements in the benchmark's calculation to ensure transparency, investor and consumer protection.

²⁵ OJ L 171, 29.6.2016, p. 1

- (3) Different types of benchmarks (i.e. regulated-data benchmarks, interest rate benchmarks, commodity benchmarks, critical benchmarks, significant benchmarks, and non-significant benchmarks) can be subject to different requirements. It is important for administrators and users of a benchmark to know which provisions apply to a particular benchmark. Due to their potential systemic importance, information about critical benchmarks might also be of interest and relevance to the general public. Furthermore, disclosure requirements reflect differences between types of benchmarks to ease the regulatory burden for benchmarks that have not been deemed to be critical benchmarks.
- (4) For all types of benchmarks, the benchmark statement should include, where available, the benchmark's single identifier, as this represents unique source of information for the public in order to easily identify a benchmark and indisputably distinguish it from the others.
- (5) Information on the type of a benchmark is required to determine which regime applies to it under Regulation (EU) No 2016/1011. This should be reflected in the benchmark statement. Additionally, where a benchmark exhibits the characteristics of two different types of benchmarks (e.g. a commodity benchmark which is a regulated data benchmark), all specific provisions set up in this Regulation apply in parallel to provide the stakeholders with comprehensive information on the benchmark's characteristics.
- (6) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (7) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council²⁶,

HAS ADOPTED THIS REGULATION:

Article 1

Disclosure requirements

1. For the purpose of defining the market or economic reality measured by the benchmark the benchmark statement shall contain the following information:
 - a) general description of the measured market or economic reality;
 - b) geographical boundaries of the measured market or economic reality;
 - c) any other relevant information beneficial for a benchmark user to understand the relevant features of the measured market or economic reality. Subject to the availability of reliable data, the administrator shall consider including, *inter alia*:

²⁶ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- i. information on actual or potential participants of the measured market,
 - ii. barriers to market access,
 - iii. an indication of the size of the measured market or economic reality.
2. For the purpose of defining the circumstances in which the measurement of the relevant market or economic reality may become unreliable, the administrator shall take into account, inter alia, the following indicators, giving consideration to the methodology used for the specific benchmark:
 - a) the minimum size of the measured market or economic reality; and, where applicable, circumstances in which the administrator would lack sufficient input data to determine the benchmark according to the methodology;
 - b) where relevant, the degree of liquidity of the underlying market required to ensure the integrity and reliability of the benchmark determination according to the methodology, describing the environment that generally allows executing a transaction as a result of an active market having observable bona fide, arms-length transactions and taking into account a variety of factors, such as size, liquidity, market concentration and market dynamics;
 - c) any other relevant information, such as exceptional market events.
3. The benchmark statement shall:
 - a) identify each individual element of the benchmark calculation process that is, or may be subject to, or indispensably requires discretion, and describe, in relation to any such individual elements under what conditions, if any, discretion may or may not be used in accordance with the methodology of the benchmark;
 - b) indicate the position of each function or body who may exercise discretion in relation to each individual element of the benchmark calculation process;
 - c) outline each step of the ex-post evaluation process for the use of discretion, including a clear reference to the persons that evaluates any exercise of discretion and, where applicable, its role in the benchmark determination process.
4. The notice and advise of users pursuant to Article 27(1)(c) and (d) of Regulation (EU) No 2016/1011 shall be expressed in a clear and unambiguous manner. The benchmark statement shall:
 - a) indicate the method and the means by which users will be informed of a change to or the cessation of the benchmark. It shall include a clear and prominent description of the procedure envisaged under Article 28(1);
 - b) refer to, where appropriate, the process for public consultation on the material changes to the methodology, subject to disclosure pursuant to Article 13(1)(c);
 - c) to the extent known, indicate any expected impacts of changes to, or the cessation of the benchmarks upon the financial contracts, financial instruments that reference the benchmark or the measurement of the performance of investment funds.

5. In case a benchmark falls in more than one type of benchmarks, this shall be outlined in the benchmark statement and information shall be provided in accordance with Articles 2 to 7, as applicable.
6. Paragraph 2(c) shall not apply to significant benchmarks.
7. Paragraph 1(c), paragraph 2(b) and (c), paragraph 3(b) and (c) and paragraph 4(c) shall not apply to non-significant benchmarks. In respect of a non-significant benchmark the administrator may satisfy the requirements in paragraph 1(a) and (b) by providing a clear reference to other publicly available sources that include the same information.

Article 2

Regulated-data benchmarks

1. In respect of a regulated-data benchmark, the benchmark statement shall:
 - a) indicate the benchmark's qualification as a regulated-data benchmark;
 - b) include, where available, the single identifier of the benchmark;
 - c) state, in the description of the input data, the sources of the input data used and the sectoral disciplines applying to such sources.
2. Where appropriate and without prejudice to transparency and easy access of information, the benchmark statement may be limited to indicating relevant source documents, including when and where these have been disclosed to the public.

Article 3

Interest rate benchmarks

1. In respect of an interest rate benchmark, the benchmark statement shall:
 - a) indicate the benchmark's qualification as an interest rate benchmark;
 - b) include, where available, the single identifier of the benchmark;
 - c) refer to the enhanced regulatory regime applicable to interest rate benchmarks under Annex I of Regulation (EU) No 2016/1011 and specify which increased oversight mechanisms are applicable the benchmark;
 - d) include details on applicable time limits such as the delays in the publication of the benchmark or its re-determination, and provisions on the notification of users of such exceptional events or circumstances.
2. For any relevant additional or more detailed information, and without prejudice to transparency and easy access of information, references to other specific sources of information may be included. This applies in particular to the external audit report required according to Annex I (4) of Regulation (EU) No 2016/1011 and to the information provided on the administrator's website.

Article 4

Commodity benchmarks

In respect of a commodity benchmark, the benchmark statement shall:

- a) indicate the benchmark's qualification as a commodity benchmark;
- b) include, where available, the single identifier of the benchmark;
- c) indicate whether the benchmark falls under the regime of Title II or of Annex II of Regulation (EU) No 2016/1011;
- d) include in the definitions of key terms a concise description of the criteria that define the relevant underlying physical commodity;
- e) with respect to the explanations that the administrator has to publish for each benchmark calculation according to Annex II (7)(a) and (b) of Regulation (EU) No 2016/1011, indicate the source where such explanations may be found;
- f) outline, on an aggregate level, the professional profiles of the contributors to the benchmark and explain, where applicable, why the benchmark is predominantly based on contributions by non-supervised entities.

Article 5

Critical benchmarks

In respect of a critical benchmark, the benchmark statement shall:

- a) indicate the benchmark's qualification as a critical benchmark pursuant to Article 3(1)(25) with reference to either point (a),(b) or (c) of Article 20(1) of Regulation (EU) No 2016/1011;
- b) include, where available, the single identifier of the benchmark;
- c) refer to the enhanced regulatory regime applicable to critical benchmarks under Regulation (EU) No 2016/1011 and specify which increased oversight mechanisms are in force for the benchmark;
- d) contain information, to the extent available, on the most relevant types of financial instruments, financial contracts and investment funds that reference the critical benchmark;
- e) contain information, to the extent available, on the degree of use of the benchmark in one or more Member States and on the total reference value in respect of the critical benchmark;
- f) explain that the benchmark is subject to mandatory administration and mandatory contribution and to supervision by a college of supervisors including the national competent authority and ESMA;
- g) contain a list of the contributors, indicating their name, principal activity and location;

- h) in the event of a planned cessation, administrators of critical benchmarks shall provide details of how the users can contact the administrator or competent authority to provide further information on the adverse impact on the user should the benchmark cease to exist;
- i) include details on applicable time limits such as delays in the publication of the benchmark or its re-determination, and provisions on notification of users of such exceptional events or circumstances.

Article 6

Significant benchmarks

1. In respect of a significant benchmark, the benchmark statement shall indicate the benchmark's qualification as a significant benchmark pursuant to Article 3(1)(26), with reference to either point (a) or point (b) of Article 24(1) of Regulation (EU) No 2016/1011.
2. The benchmark statement shall include, where available, the single identifier of the benchmark.

Article 7

Non-significant benchmarks

1. In respect of a non-significant benchmark, the benchmark statement shall indicate the benchmark's qualification as a non-significant benchmark pursuant to Article 3(1)(27) of Regulation (EU) No 2016/1011.
2. The benchmark statement shall include, where available, the single identifier of the benchmark.

Article 8

Updates

1. The administrator shall review and update the benchmark statement whenever the information it provides is no longer correct or sufficiently precise.
2. An update of the benchmark statement is required in particular:
 - a) in case the benchmark is no longer reliable to accurately measure the underlying market or economic reality;
 - b) in case of a change in the type of the benchmark;
 - c) in case of a significant change in the benchmark or in the methodology of its calculation;
 - d) when fair and easy access to information is impaired as a consequence of a change in the information incorporated in the benchmark statement by reference.

3. In case a change occurred that impacted on a time period prior to the publication of the amendment to the benchmark statement, a clear indication of the relevant time period should be included in the update.

Article 9

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 January 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

*For the Commission
The President*

On behalf of the President

[Position]

10 Authorisation and registration of an administrator (Article 34 BMR)

10.1 Mandate

Article 34

[...]

8. ESMA shall develop draft regulatory technical standards to specify further the information to be provided in the application for authorisation and in the application for registration, taking into account that authorisation and registration are distinct processes where authorisation requires a more extensive assessment of the administrator's application, the principle of proportionality, the nature of the supervised entities applying for registration under point (b) of paragraph 1 and the costs to the applicants and competent authorities.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2017.

10.2 Background

206. ESMA sets out a proposed version of the RTS for an application for authorisation or registration, where it describes the information required from an applicant administrator by a competent authority. The purpose of the RTS is to set out what would be the information which is appropriate and sufficient in order for a competent authority to make a decision as to whether the applicant fulfils the requirements under the Regulation (EU) 2016/1011. Article 34(4) of the Regulation stipulates that “the applicant shall provide all information necessary to satisfy the competent authority that the applicant has established, at the time of authorisation or registration, all the necessary arrangements to meet the requirements laid down in this Regulation.”

207. Under the Regulation, the competent authority must deal with an application within an applicable time limit – 4 months for an application for authorisation and 45 days for an application for registration. To give the competent authority the ability to use the time allowed for its examination effectively, all the requisite information must be provided to the competent authority before the application can be considered complete in accordance with Article 34(5).

208. The mandate expressly recognises that authorisation and registration are distinct processes. The Regulation, in Article 34 (1), describes the circumstances in which an applicant would initiate one or the other of those processes.

209. Authorisation is a more extensive process which is appropriate, as stipulated in the Level 1, in relation to the importance of the benchmarks provided and whether the applicant is not already supervised. The RTS, in its Annex I, sets out in detail the required information for an authorisation application.

210. An application for registration would be a more streamlined process, which is appropriate where the applicant is already known to the relevant competent authority as a supervised entity (where the legal framework applicable to the entity does not prevent it from acting as an administrator and only where it does not intend to act as administrator to critical benchmarks), or in light of the importance of the benchmarks involved (i.e. non-significant benchmarks). Hence, in line also with the mandate, Annex II of the RTS sets out the applicable requirements, by reducing the volume/granularity of information required, as compared to an authorisation application. It should be noted that there is not a single set of requirements applicable to all applications for registration; the requirements vary depending on the particular circumstances entitling the applicant to initiate the registration process. The requirements set out in Annex II to the RTS are tailored for the following specific circumstances:

- supervised entity providing one or more significant and non-significant benchmarks
- supervised entity providing only non-significant benchmarks
- non-supervised entity providing only non-significant benchmarks.

In the circumstance where a supervised entity provides a mix of significant and non-significant benchmarks, the elements of information concerning the providing entity and the provision process remain the same, while those inherent to the particular benchmarks provided are subject to a different degree of granularity of required information, depending on the category to which the benchmarks belong to.

10.3 Analysis following feedback from stakeholders

211. ESMA's view, consistent with the mandate, is that the RTS should take into account the principle of proportionality, as well as the underlying costs to the applicants and competent authorities. It also takes into account the objective of ensuring that the requirements are appropriate for the diversity of profiles of benchmarks providers and the benchmarks themselves.

212. Feedback from the Discussion Paper indicated that a duplication of information should be avoided. ESMA agrees and the RTS provides that the information which would otherwise be required need not be provided to the applicant if the relevant competent authority would easily be in possession of it.

213. Also as a result of feedback to the DP, information can be provided at the level of families of benchmarks, so long as they fall within the applicable definition in the Regulation, and none of the benchmarks in the family is a critical benchmark.

214. It should be noted that authorisation and registration are adopted at the level of the applicant administrator and would be a “one-off” process. If an applicant is authorised or registered, then it would become subject to the Regulation and further developments, e.g. where the applicant adds new benchmarks, would be dealt with in accordance with the terms of the Regulation, e.g., Art 26(2) which requires an administrator to immediately notify its competent authority when the administrator’s non-significant benchmark exceeds the threshold and to comply with the requirements applicable to significant benchmarks within three months. Along the same lines, if an administrator that originally underwent a process of authorisation/registration and none of the benchmarks provided at that time were critical, takes over the provision of a critical benchmark, or if any of the benchmarks already provided hits any of the critical benchmarks relevant thresholds, that should be regarded, in ESMA’s view, as a material change to be notified to the competent authority in pursuance of Article 34(2) of the Regulation.

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

10.4 General information/ financial information

215. ESMA considers it appropriate to require information of a general nature from all applicants. This information would include basic information, such as name and address. It would also cover more comprehensive details about the operations of the applicant, both supervised and non-supervised in the European Economic Area, and its ownership, which information may prove useful for a consideration of the appropriateness of an applicant’s arrangements in different aspects, e.g. conflicts of interest.

216. Specific financial information is also listed. Where the applicant has existing operations, the requirement may be satisfied by providing its existing financial statements. For an applicant without such a financial history, a description of its plans would be required. For an application for authorisation, but not registration, financial forecasts and plans to access the financial markets over the following year would also be required. A supervised entity needs to provide evidence of compliance with its applicable regulatory capital requirements.

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

10.5 Organisational structure and governance/conflicts of interest/internal control structure/oversight and accountability frameworks

217. Information on organisation structure and governance will focus on how the business is conducted and on the senior management of the applicant. The requirements would also give the competent authority an indication of how the applicant has allocated its human

resources to the different parts of its business. All the organisational information requirements apply to both authorisation and registration processes, taking into account the need of a competent authority to have access to such information for its thorough review of the application.

218. ESMA considers that information on conflicts of interest is particularly important. All applicants should provide information regarding:

- a) the policies and procedures which will cover conflicts of interest and how they are handled, including a description of particular circumstances which apply to an applicant in relation to which potential conflicts could most likely arise, and
- b) how the remuneration policy is structured, particularly in relation to the calculation and marketing of a benchmark.

219. The requirement in b) may be satisfied by providing the remuneration policy, in which the criteria used to determine the remuneration of the persons involved directly or indirectly in the activity of provision of benchmarks is specified. This document should therefore allow the competent authority to assess that the remuneration of these persons does not depend on the level of the benchmarks provided.

220. For critical benchmarks only, an inventory of conflicts, together with mitigating measures, must be provided. This requirement was also suggested in the feedback to the DP.

221. For the purpose of allowing the competent authority to evaluate the pertinence and robustness of the internal control structure, and oversight and accountability frameworks, an applicant should provide to the competent authority, in a sufficient level of detail, policies and procedures for monitoring the activities of the provision of a benchmark or family of benchmarks, including information on:

- a) information technology systems
- b) incident management policies
- c) risk management policies
- d) the appointment, substitution or removal of individuals within the key functions
- e) the integrity and reliability of the benchmark's determinations
- f) the internal reporting of infringements.

222. For an application for registration a requirement for abbreviated information on internal control structure, as well as oversight and accountability frameworks would be required.

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

10.6 Description of benchmarks provided

223. For the purposes of allowing the competent authority to assess each benchmark's representativeness of the economic reality it intends to measure, the applicant should provide the competent authority with a description of each benchmark or family of benchmarks provided or intended to be provided and the type and category to which the applicant believes the benchmark belongs.
224. The category (critical, significant or non-significant) to which each benchmark belongs to is to be assessed to the best of the knowledge of the applicant administrator and should be provided along with an indication of the sources of data used.
225. ESMA, taking into account the comments from the DP, has recognised, in drafting the RTS, that where information is or will be required from the applicant by the Regulation apart from the application process, it can be provided by the applicant to satisfy both the requirements for information in the application and the requirements otherwise in the Regulation. To have the effect of reducing duplication, the relevant form – e.g. compliance statement, benchmark statement or methodology – needs to be provided to the competent authority as a part of a complete application under Article 34 (4)-(6).
226. If the applicant provides a compliance statement for its non-significant and/or significant benchmarks, along with the rationales behind the application of any exemption, then the information so provided does not have separately to be submitted to the competent authority as part of the application process.
227. The application should also clearly state to which type each benchmark belongs to: regulated-data benchmarks, interest-rate benchmarks or commodity benchmarks. ESMA's view is that there is no need to require specific additional information regarding the first category, as information otherwise required should be sufficient.
228. Specific information should be provided for interest-rate benchmarks, allowing the competent authority to assess whether the more stringent requirements set out in Annex I of the Regulation covering the contribution process for such benchmarks are fulfilled.
229. As set out in Article 19 of the Regulation, in case (i) the commodity benchmark is compiled from regulated data, or (ii) the majority of contributors to it are supervised entities, or (iii) the benchmark is critical and the underlying is a precious metal, the general requirements established in the Regulation will be applicable (under Title II). Otherwise, the requirements set out in Annex II of the Regulation would be applicable. ESMA has proposed that, apart from the addition of specific information for commodity benchmarks set out in Annex II of the Regulation, no other change needs to be made to the requirements for an application for a benchmark covered by the Annex.

230. ESMA is of the view that the information to be provided in the application should include an explanation of how the applicant administrator will be satisfied that there is sufficient input data to represent accurately and reliably the economic reality that the benchmark is intended to measure. This information overlaps with the information required by a benchmark statement; hence, as anticipated above, it may be submitted to the competent authority in the form of a benchmark statement.
231. In addition, the information in the application should also include the list of the key elements of a benchmark's methodology the applicant intends to publish and the media that will be used for publication of the benchmark's determinations. The information is likely to be covered by the methodology also required by the Regulation, Articles 12 and 13, and the related RTS, because the requirements are similar. An applicant can submit the methodology as a part of its application and then it would not need to duplicate the information elsewhere in the application.
232. The information requirements for input data do vary depending on whether the application is for authorisation or registration; for registration, there are more streamlined requirements.

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?

10.7 Other

233. ESMA considers that arrangements (if any) relating to outsourcing of any activity forming a part of the process for the provision of a benchmark justifies a separate section within the application. The arrangements involved may be important to an application and should cover, e.g., the details about the service provider, the outsourced functions and oversight of the outsourcing arrangements. But more streamlined requirements apply to registration – in particular, the outsourcing contracts need not be provided.
234. Article 34(1) of the Regulation provides for the authorisation of a natural person (as well as a legal person) located in the EU that intends to act as an administrator by a competent authority. The RTS sets out specific requirements which are viewed as non-appropriate to a natural person as applicant.

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

235. The Regulation, in Article 34(4), allows the relevant competent authority to request more information – even if it is not specifically described in the RTS – in order to satisfy the competent authority that the applicant has established the necessary arrangements to meet the Regulation's requirements.
236. Similarly, the RTS contemplate that an applicant can provide more information to its competent authority.

237. The form of the application for authorisation or registration to be submitted to the relevant competent authority is not part of the draft RTS as it is not mentioned in the mandate received by ESMA. However, ESMA considers that this is an important aspect and believes that some guidance could be needed in relation to the practical submission of the application for authorisation and registration to the relevant competent authority and therefore ESMA stands ready to use its powers under Regulation (EU) No. 1095/2010 to inform market participants in due time.

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

10.8 Draft technical standards: Authorisation and registration

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

[...]

supplementing Regulation (EU) No 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards on the information to be provided in the application for authorisation and in the application for registration

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 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 596/2014²⁷ and in particular Article 34(8) thereof,

Whereas:

- (1) This Regulation sets out the information that competent authorities should receive as part of an application for authorisation or registration to act as administrator of benchmarks, in order for a competent authority to assess whether the arrangements established by the applicant at the time of the request for authorisation or registration meet the requirements laid down in the Regulation No 2016/1011.
- (2) Certain information requested in this Regulation might not be applicable depending on the characteristics of the applicant or of the benchmarks provided and intended for use in the European Union.
- (3) In order for the competent authorities to assess that the applicant administrator has the financial means to implement the policies and procedures laid down in the Regulation No 2016/2011 and to exercise the activity of provision of benchmarks on an ongoing basis and in compliance with the requirements the Regulation No 2016/2011, the application shall cover financial information on the administrator, regarding mainly its ownership structure, its financial statements and its financial forecasts.
- (4) In order for competent authorities to assess if any conflicts of interest arising from the benchmark activity and business interests of the owners of an administrator might affect the independence of an administrator in the benchmark calculation and thus impair the accuracy and integrity of the benchmark, an administrator should be required to give

²⁷ OJ L 171, 29.6.2016, p. 1.

information regarding the activities of its owners and the ownership of its parent undertakings.

- (5) An applicant should provide information on the composition, functioning and independence, in the benchmark calculation, of its governing bodies in order for competent authorities to be able to assess whether the corporate governance structure ensures the independence of the administrator in the benchmark calculation and the avoidance of conflicts of interest and in addition an applicant should provide information on its senior management.
- (6) An applicant administrator should give information on its policies and procedures about the identification, management, mitigation and disclosure of conflicts of interests regarding its activity of provision of benchmarks. For critical benchmarks, giving their greater relevance, an applicant administrator should inform the competent authority with an up-to-date inventory of existing conflicts of interest, along with an explanation on how these are actually managed.
- (7) For the purposes of allowing the competent authority to evaluate the pertinence and robustness of the internal control structure, oversight and accountability framework, an applicant should provide the competent authority with the policies and procedures for monitoring the activities of the provision of a benchmark or family of benchmarks. The competent authority would therefore assess that these policies and procedures meet the requirements of the Regulation.
- (8) Information should also be included in the application to demonstrate to the competent authority that the controls on the input data on the basis of which are calculated the benchmarks provided by applicant are adequate to ensure the representativeness, accuracy and integrity of such data, and that the methodology applied for the calculation of the benchmarks present all the characteristics required by the Regulation (EU) No 2016/1011.
- (9) For the purposes of allowing the competent authority to assess the benchmark's representativeness of the economic reality it intends to measure, the applicant should provide the competent authority with a description of a benchmark or family of benchmarks provided or is intended to be provided and the types and categories to which they belong, in line with what is set out in the Regulation No 2016/1011. The type and category to which the benchmark belongs to is to be assessed to the best of the knowledge of the applicant administrator and should be provided along with an indication of the sources of data used, so as to allow the competent authority to understand the reliability and exhaustiveness of the underlying information.
- (10) This Regulation also specifically sets out the contents of an application for an authorisation or registration where the applicant is a natural person .
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (12) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the

Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council²⁸].

HAS ADOPTED THIS REGULATION:

Article 1

General requirements

1. The applicant shall provide the information that covers, but may not be limited to, the items:
 - a. listed in Annex I when applying for authorisation;
 - b. listed in Annex II when applying for registration;
 - c. listed in Annex III where the applicant is a natural person.

Applicants providing only commodity benchmarks shall provide the information listed in Annex I if it is a non-supervised entity, or the information listed in the first column of Annex II in case it is a supervised entity.

2. The application may provide information at the level of a family of benchmarks as long as it complies with the definition set out in Article 3(1)(4) of the Regulation No 2016/1011 and provided that none of the benchmarks within the family is a critical benchmark.
3. The application shall include an explanation for any requirement of this Regulation that does not apply to an applicant or to the benchmarks it provides that are intended for use in the Union.
4. The applicant shall not be required to provide some of the elements of information specified in Annex I as part of the application for an authorisation or registration, to the extent that the information is provided to the competent authority, along with the application, in the form of:
 - a. the benchmark statement envisaged by Article 27 of Regulation (EU) No 2016/1011;
 - b. the methodology subject to disclosure pursuant to Article 13 of Regulation (EU) No 2016/1011;
 - c. a compliance statement envisaged by Article 25 or 26 of Regulation (EU) No 2016/1011.

or when the information may easily be in the possession of the competent authority as the applicant already is a supervised entity, unless the particular element of information needs to be updated.

²⁸ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Article 2

Policies and procedures

1. Policies and procedures provided in an application shall contain or be accompanied by:
 - a. an indication who is responsible for the approval and maintenance of the policies and procedures;
 - b. a description of how compliance with the policies and procedures will be monitored and who is responsible for this;
 - c. a description of the measures undertaken in the event of a breach of the policies and procedures.

Article 3

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...]

For the Commission
The President

On behalf of the President

[Position]

ANNEX I

Information to be provided in the application for authorisation

1) General information

- a) Full name of the applicant and its Legal Entity Identifier (LEI), where available
- b) Address of the office within the European Union
- c) Legal Status
- d) Website
- e) With respect to the contact person for the purpose of the application:
 - (i) name;
 - (ii) title;
 - (iii) address;
 - (iv) e-mail address;
 - (v) telephone number.
- f) Where the applicant is a supervised entity, information about its current authorisation status, including the primary business for which it is authorised and its relevant competent authority in its home Member State.
- g) Description of the operations of the applicant administrator in the European Union, whether or not subject to financial regulation, that are potentially relevant for the activity of provision of benchmarks, along with a description of where these operations are conducted.
- h) Any deed of incorporation, articles of association or other constitutional documents
- i) Where the applicant is part of a group, its group structure along with the ownership chart, showing the links between any parent undertaking and subsidiaries. The undertakings and subsidiaries shown in the chart shall be identified by their full name, legal status and address of the registered office and head office.
- j) A self-declaration of good repute including details, if any, on any:
 - (i) proceedings of a disciplinary nature (unless dismissed);
 - (ii) refusal for authorisation or registration from a financial authority;
 - (iii) withdrawal of authorisation or registration from a financial authority.

2) Financial information

- a) Information on the applicant's ownership structure, including its shareholders and their relative holdings, as applicable
- b) Financial statements:

- (i) for the most recent 3 years, including – but not limited to - balance sheet, income statement, cash flow and audit reports to the extent available;
 - (ii) if the applicant has not yet produced financial statements, a description of how it plans to raise financial resources, including a business plan for the first three accounting years.
 - c) Financial forecasts for at least one year ahead
 - d) If the applicant is a supervised entity subject to the Directive No 2013/36/EU and the Regulation No 575/2013 (the capital requirements regulation and directive), information on the applicant’s compliance with its capital requirements at the most recent date available.
- 3) Organisational structure and governance
 - a) Internal organisation structure with respect to the board of directors, senior management committees, oversight function and any other internal body exercising significant management functions, including:
 - (i) number of members;
 - (ii) terms of reference; and
 - (iii) adherence to any governance codes or similar provisions.
 - b) With respect to the members of senior management:
 - (i) curriculum vitae;
 - (ii) a recent criminal-record file;
 - (iii) a self-declaration of good repute including details, if any, on any involvement in:
 - a. proceedings of a disciplinary nature (unless dismissed);
 - b. an undertaking whose authorisation was withdrawn by a regulatory authority;
 - c. the management of an undertaking which has gone into insolvency or liquidation.
 - (iv) detail on their other activities within and outside the applicant or (if the applicant is a part of a group) the group of which the applicant is a part.
 - c) With respect to the resources:
 - (i) the number of employees along with the senior managers per function/department;
 - (ii) the number of employees (temporary and permanent) involved in the benchmarks activities.
- 4) Conflicts of interest
 - a) Policies and procedures that cover:

- (i) how current and prospective conflicts of interest are or will be identified, recorded, managed, mitigated, prevented, disclosed and remedied;
 - (ii) the controls put in place including the controls implemented through information systems, along with any other part of the conflicts of interest management framework;
 - (iii) particular circumstances which apply to the applicant or to any particular benchmark provided by the applicant, in relation to which conflicts could most likely arise, including where judgment or discretion is exercised in the benchmark's determination process, where the applicant is within the same group as a user of such a benchmark and where the applicant is a participant in the market or economic reality that the benchmark intends to measure.
- b) For each critical benchmark, an up-to-date inventory of actual and potential conflicts of interest along with the relative mitigation measures.
 - c) The remuneration policy specifying the criteria used to determine the remuneration of the persons involved directly or indirectly in the activity of provision of benchmarks, particularly in relation to any connection with the calculation or marketing of a benchmark to be administered.

5) Internal control structure, oversight and accountability framework

- a) Policies and procedures for monitoring the activities of the provision of a benchmark, including:
 - (i) policies and procedures for applicable information technology systems and controls
 - (ii) policies and procedures for incident management, such as back-up systems and contingency and business continuity plans;
 - (iii) policies and procedures for risk management, and a mapping of risks which may arise, along with the relative mitigation measures;
 - (iv) policies and procedures for checking and monitoring contributors' adherence to the code of conduct;
 - (v) policies and procedures for the constitution, role and functioning of the oversight function, as described in Article 5 of the Regulation No 2016/1011 and further specified in Regulation [.../...] ²⁹, including procedures for the appointment, substitution or removal of individuals within the oversight function;
 - (vi) policies and procedures for the constitution, role and functioning of the control framework, as described in Article 6 of the Regulation No 2016/1011, including procedures for the appointment, substitution or removal of individuals who are responsible for this framework;

²⁹ See Section 2 – Characteristics and procedures of the oversight function.

(vii) policies and procedures for the accountability framework as described in Article 7 of the Regulation No 2016/1011, including procedures for the appointment, substitution or removal of individuals who are responsible for this framework.

- b) Fall-back systems and arrangements for determining and publishing a benchmark
- c) Procedures for the internal reporting of infringements of the Regulation No 2016/1011 by managers, employees and any other natural persons whose services are placed at the applicant's disposal or under the control of the applicant.

6) Description of benchmarks provided

- a) A description of the benchmarks provided or that are intended to be provided and the types and categories to which they belong, in line with what is set out in Regulation No 2016/1011.
- b) A description of the underlying market or economic reality that the benchmark intends to measure.

For the information specified under this point and previous point a), an indication of the sources used to provide the information required is also needed.

- c) A description of contributors to a benchmark, and for critical benchmarks, the identity of contributors (i.e. name and location)
- d) Information on measures to deal with corrections to a benchmark determination or publication
- e) Information on the procedure concerning the actions to be taken by the administrator in the event of changes to or the cessation of a benchmark in compliance with Article 28(1) of the Regulation No 2016/1011.
- f) With respect to any interest-rate benchmark, specific information on how the requirements set out in Annex I of Regulation No 2016/1011 are implemented.
- g) With respect to any commodity benchmark, specific information on how the requirements set out in Annex II of Regulation No 2016/1011 are implemented.
- h) Information on the means of publication of a benchmark's determinations that are used or intended to be used.

7) Input data and methodology

- a) With respect to input data, policies and procedures including:
 - (i) a description of the type of input data used, their priority of use and the exercise of expert judgment;
 - (ii) any processes for ensuring that input data is appropriate and verifiable;
 - (iii) an explanation on how the applicant administrator will be satisfied that there is sufficient input data to represent accurately and reliably the market or economic reality that the benchmark is intended to measure;

- (iv) the selection and evaluation process of the contributors;
 - (v) the evaluation of the contributor's input data and the process of validating input data
- b) With respect to the methodology, policies and procedures including:
- (i) a description of the methodology;
 - (ii) the measures taken to provide validation and review of the methodology, including any trials and/or back-testing performed;
 - (iii) a description of the consultation process on any proposed material change in the methodology.

8) Outsourcing

If any activity forming a part of the process for the provision of a benchmark is outsourced:

- a) the identity of the service provider, including where it is located and whether it is a supervised entity;
- b) details of the outsourced functions;
- c) the relevant contracts, including service-level agreements, which demonstrate compliance with Article 10 of the Regulation No 2016/1011;
- d) policy and procedures regarding the oversight of the outsourced activities

9) Others

- a) The applicant may provide any additional information relevant to its application which it considers appropriate.
- b) The applicant shall provide the requisite information in the manner and form the competent authority requests.

ANNEX II

Information to be provided in the application for registration

‘A’ means ‘Applicable’

‘N/A’ means ‘Not applicable’

Annex I Reference	Supervised entities providing at least one significant benchmark and supervised entities providing only commodity benchmarks	Supervised and Non-supervised entities providing only non-significant benchmarks
1) General information		
1(a)	Full name	A
1(b)	Address	A
1(c)	Legal status	A
1(d)	Website	A
1(e)	Contact person	A
1(f)	Current authorisation status	A ³⁰
		A ³⁰ to supervised entities - N/A to non-supervised entities
1(g)	Operations conducted	A ³⁰
1(h)	Constitutional documents	A ³⁰
1(i)	Group structure	A ³⁰
1(j)	Self-declaration of good repute	A ³⁰
2) Financial information		

³⁰ Unless the applicant is a supervised entity by the same competent authority as designated under the Regulation

2(a)	Ownership structure	A	N/A
2(b)	Financial statements	A ³⁰	A ³⁰
2(c)	Financial forecasts	N/A	N/A
2(d)	Capital requirements	A ³⁰	A ³⁰ to supervised entities - N/A to non-supervised entities
3) Organisational structure and governance			
3(a)	Internal organisational structure	A ³¹	A ³¹
3(b)	Senior management	A ³¹	A ³¹³²
3(c)	Human resources	A	N/A
4) Conflicts of interest			
4(a)	Policies and procedures	A	In the case of non-significant benchmarks, the elements of information specified in points 4(a), 4(b) and 4(c) shall be substituted by a synthetic description of the conflicts of interest policies and procedures adopted by the applicant.
4(b)	Up-to-date inventory	N/A	
4(c)	Remuneration policy	A	
5) Internal control structure, oversight and accountability framework			
5(a)	Policies and procedures for monitoring the activities of the	A	In the case of non-significant benchmarks, the elements of

³¹ If the applicant is supervised by the same competent authority as designated under the Regulation, the information shall be limited to the activity of provision of benchmarks.

³² The information mentioned under 3(b)(ii) are not required in case the applicant administrator provides only non-significant benchmarks.

	provision of a benchmark		information specified in points from 5(a) to 5(c) shall be substituted by a synthetic description of the internal control structure, oversight and accountability framework implemented by the applicant
5(b)	Internal arrangements for determining and publishing a benchmark	A	
5(c)	Internal reporting of infringements	A	
<i>6) Description of benchmarks provided</i>			
6(a)	Description	A	N/A
6(b)	Underlying market	A	N/A
6(c)	Contributors	A	N/A
6(d)	Corrections	A	N/A
6(e)	Changes to and cessation	A	N/A
6(f)	Interest rate benchmarks	A	N/A
6(g)	Commodity benchmarks	A	N/A
6(h)	Publication	A	N/A

In the case of non-significant benchmarks, the elements of information specified in points from 6(a) to 6(h) shall be substituted by a synthetic description of the benchmarks provided.

Also a supervised entity which provides at least one significant benchmark may elect to provide such information in a synthetic form with reference to the non-significant benchmarks it provides.

7) Input data and methodology

7(a)(i)	Description of input data used	A	A
7(a)(ii)	Verifiability	A	A
7(a)(iii)	Data sufficiency	A	A
7(a)(iv)	Contributors	A	N/A
7(a)(v)	Validation of input data	A	A
7(b)(i)	Methodology	A	A
7(b)(ii)	Validation/Review	A	A
7(b)(iii)	Material change	A	N/A

Where a supervised entity provides both significant and non-significant benchmarks, the applicant may choose under section 7 to provide the details requested by points 7(a)(i), 7(b)(iii) and 7(a)(iv) only for the significant benchmarks it provides.

8) Outsourcing

8(a)	Identity	A	A
8(b)	Outsourced functions	A	A
8(c)	Contracts	N/A	N/A
8(d)	Control	A	A

9) Others

9(a)	Additional information	A	A
9(b)	Form	A	A

ANNEX III

Information to be provided in the application by a natural person

‘A’ means ‘Applicable’

‘N/A’ means ‘Not applicable’

Annex I Reference	Natural persons	
1) General information		
1(a)	Full name	A
1(b)	Address	A
1(c)	Legal status	A
1(d)	Website	A
1(e)	Contact person	A
1(f)	Current authorisation status	N/A
1(g)	Operations conducted	A
1(h)	Constitutional documents	N/A
1(i)	Group structure	N/A
1(j)	Self-declaration of good repute	A
2) Financial information		
2(a)	Ownership structure	N/A
2(b)	Financial statements	A
2(c)	Financial forecasts	N/A
2(d)	Capital requirements	N/A

3) Organisational structure and governance		
3(a)	Internal organisational structure	A
3(b)	Senior management	A
3(c)	Human resources	A

For the element under point 2(b)(i), the applicant shall provide a statement, duly dated and signed, indicating the approximate amount of his/her estate at the most recent date, so that the competent authority can assess his/her financial strength.

For the elements described from Section 4 to Section 9 under Annex I, the information is to be provided according with what specified under Annex I and Annex II, respectively, for the case of an authorisation process or a registration process, and taking into consideration the type and category to which the benchmarks belong to.

11 Recognition of an administrator located in a third country (Article 32 BMR)

11.1 Mandate

Article 32

[...]

5. An administrator located in a third country intending to obtain prior recognition as referred to in paragraph 1 shall apply for recognition with the competent authority of its Member State of reference. The applicant administrator shall provide all information necessary to satisfy the competent authority that it has established, at the time of recognition, all the necessary arrangements to meet the requirements referred to in paragraph 2 and shall provide the list of its actual or prospective benchmarks which may be used in the Union and shall, where applicable, indicate the competent authority responsible for its supervision in the third country.

Within 90 working days of receipt of the application referred to in the first subparagraph of this paragraph, the competent authority shall verify that the conditions laid down in paragraphs 2, 3 and 4 are fulfilled.

[...]

9. ESMA may develop draft regulatory technical standards to determine the form and content of the application referred to in paragraph 5 and, in particular, the presentation of the information required in paragraph 6.

In the event that such draft regulatory technical standards are developed, ESMA shall submit them to the Commission.

Power is conferred on the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with the procedure laid down in Articles 10 to 14 of Regulation (EU) No 1095/2010.

11.2 Background

238. Third country benchmarks that are referenced in financial instruments, financial contracts and investment funds in the European Union as of 1 January 2020 shall be permitted for use by supervised entities only for such financial instruments, financial contracts and investment funds (Article 51 of Regulation (EU) No 2016/1011) but not for new ones.

239. If a third-country provider wants new financial instruments, financial contracts and investment funds in the European Union to start to reference its benchmarks after the above mentioned date, an equivalence decision adopted by the Commission according to

Article 30 of Regulation (EU) No 2016/1011 is necessary or the benchmarks need to be endorsed by a European administrator or supervised entity, in line with what is laid down by Article 33 of the mentioned Regulation, or the third-country provider is granted recognition, as envisaged in Article 32 of the same Regulation.

240. With particular regard to the process of recognition of a third-country benchmarks provider, a number of conditions are to be fulfilled and demonstrated in the context of the application. First of all it is required that the third-country provider complies with the requirements foreseen in the European Regulation for benchmarks, with the exclusion of the provisions of the Regulation respectively dealing with the input data representativeness of a benchmark's underlying market or economic reality, imposing obligations on European supervised contributors and addressing the peculiarities of European benchmarks declared critical.
241. The Regulation additionally provides that a third-country entity applying for recognition may alternatively fulfil the condition referred to above by demonstrating the compliance with the IOSCO Principles for Financial benchmarks (FR07/13, July 2013) or the IOSCO Principles for Price Reporting Agencies (FR06/12, 5 October 2012), as applicable, provided that the application of such principles is equivalent to compliance with the requirements established in the European Benchmarks Regulation.
242. Another condition for granting recognition is the establishment of a legal representative of the third-country provider in the EU (Article 32(3)), which can be either a natural person domiciled in the EU or a legal person with its registered office in the EU and has to perform the oversight function, within the provision process of benchmarks, together with the applicant third-country entity. The legal representative plays a key role as it shall act on behalf of the third-country entity vis-à-vis the EU authorities and any other person in the EU and shall be accountable to the competent authority of the Member State of reference.
243. There are some other essential conditions for the granting of recognition of a third-country benchmarks provider, that are not under the remit of the latter: (i) where the provider located in a third country is subject to supervision, the existence of a cooperation arrangement between the competent authority of the Member State of reference and the competent authority of the third country; (ii) the effective exercise by the competent authority of the Member State of reference of the supervisory functions assigned by Regulation (EU) No 2016/1011 is neither prevented by the laws, regulations or administrative provisions of the third country where the provider is located, nor by limitations in the supervisory and investigatory powers of that third country's supervisory authority.
244. While there is no request to specify anything as concerns the latter two conditions, ESMA may instead develop regulatory technical standards to specify the form and content of an application for recognition (Article 32(9)) covering all of the above said conditions on which the recognition is based. Notwithstanding the non-mandatory nature of the empowerment, ESMA has elected to draft regulatory technical standards in this field, with a view to ensure consistency of approach within the different Member States' competent

authorities, which is particularly relevant given the third-country provider, once it is granted recognition in one Member State, is entitled to passport for the provided benchmarks in the whole Union territory. Furthermore, a common approach at EU level would provide for legal certainty to potential third-country applicant providers.

245. The competent authority of the Member State of reference has 90 days to process the request for recognition and adopt a decision. However, such period of time is suspended for 30 days to allow ESMA to issue its advice on the eligibility of the benchmarks, declared by the third-country entity in the request for recognition, for the application of the regime set forth in the Regulation either for the significant benchmarks or for the non-significant ones.

246. The appraisal of the opportunity to apply one or the other regime is mainly based on the information provided by the applicant, which is due to be examined by both the competent authority of the Member State of reference and ESMA. For this reason, the empowerment in the Level 1 specify that in case ESMA decides for the development of regulatory technical standards, these should also elaborate on the presentation of the information supporting demonstration of the relevance of each benchmark provided and intended for use in the Union (significant vs. non-significant).

11.3 Analysis following feedback from stakeholders

247. In the Discussion Paper published on 15 February 2016 (ESMA/2016/288), ESMA preliminary identified the following essential elements of the application for the recognition of a third-country provider:

- a. all information necessary to assess that the applicant has established, at the time of recognition, all the necessary arrangements to meet the relevant requirements for the recognition referred to under Article 32(2);
- b. the list of its actual or prospective benchmarks which may be used in the Union; and
- c. the competent authority responsible for the supervision of the administrator in the third country, where applicable.

248. With particular reference to item (i), ESMA noted that Article 34(4) on Authorisation and registration of an administrator uses a very similar wording in requiring the applicant EU-based provider to demonstrate to the competent authority the establishment, at the time of authorisation or registration, of all the necessary arrangements to meet the requirements laid down in the Regulation. Consistently, it was proposed to align, though with due adaptations, the set of information to be provided in the application for authorisation/registration with that of the application for recognition.

249. The above said approach was regarded by many of the respondents to the consultation as appropriate and was therefore reflected in the draft of the technical standards. Some

other respondents suggested that demonstration of the compliance with IOSCO Principles should be sufficient for the sake of recognition and the information to be included in the application could be the presentation of an independent audit and local supervisor attestation as suggested by the Level 1 text. This has been duly reflected in the draft RTS but ensuring conformity to the Regulation: it has been explicitly mentioned the possibility that part of the information to be provided at the time of an application for recognition may be given by the applicant to the competent authority of the Member State of reference by way of submitting, along with the application, the assessment by an independent external auditor or, where applicable, the certification by the supervising competent authority of the third country.

250. Respondents to the consultation additionally suggest to include, within the information to be provided at the time of the application for recognition, the following elements: (a) the Legal Entity Identifier of the third-country applicant, where available, (b) the identity and the role of the legal representative established in the Member State of reference, as well as details of its involvement in the performing of the oversight function over the third-country benchmarks provision process.

251. Some other respondents highlighted the opportunity to provide additional clarity on the way to apply the criteria of Article 32, paragraph 4, of Regulation (EU) No 2016/1011. ESMA noted that this aspect is not covered by the mandate in paragraph 9 of the same article. The issue may be re-considered at a later stage, when ESMA will examine possible requests for guidance in connection with the application of the relevant provisions.

11.4 Proposal

252. Consistently with the approach followed in the draft RTS on the contents of the application for authorisation or registration, the contents of the application should cover, in addition to the general information on the providing entity, all information necessary to the competent authority to come to an understanding on whether the required arrangements for meeting the relevant requirements have been put in place.

253. However, in order not to make the process uselessly burdensome, it is recognised that in the specific context of the recognition of a provider located in a third country, the documents that should be produced and disclosed in the third country for the sake of compliance with the relevant IOSCO Principles, may be submitted as part of the application for recognition including a clear mention of the information needed for the assessment performed by the competent authority of the Member State of reference.

254. It is worth mentioning that the draft RTS specifies that the application for recognition should be redacted in one of the official languages of the Union and that the applicant's financial statements to be submitted (where available), should comply with the International Financial Reporting Standards or with local Generally Accepted Accounting Principles.

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?

255. ESMA additionally considered that the receiving competent authority should also satisfy itself that its jurisdiction is the Member State of reference on the basis of the application of the criteria laid down in Article 32(4) of Regulation (EU) No 2016/1011. As a consequence, it is considered of use that the applicant provides, as an essential element of the application, the documented evidence for the choice of the Member State of reference in accordance with the recalled paragraph 4 of Article 32.
256. The RTS currently cover also the information on the applicant LEI (where available) and on the identity and role performed by the legal representative, along the suggestions received by stakeholders.

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?

257. According to the Level 1: if, and to the extent that, an administrator is able to demonstrate that a benchmark it provides is a regulated-data benchmark or a commodity benchmark that is not based on submissions by contributors the majority of which are supervised entities, the requirements applicable in the provision process of such benchmarks are those laid down under Article 17 and Article 19 of Regulation (EU) No 2016/1011. Moreover, and as anticipated, benchmarks provided from a third-country may be entitled to the exemptions respectively applicable to significant and non-significant benchmarks. That premised, it is clear that a qualifying part of the application for recognition is constituted by information on the benchmarks that the third-country provider intends to offer in the Union territory, which is addressed, in the draft regulatory technical standards, in a separate section under the Annex detailing the contents of the application for recognition.
258. In this context, ESMA proposes that the applicant provides documented evidence of the nature and the relevance of the benchmarks it would want to offer in the EU. With particular reference to the information concerning the relevance of the benchmarks, the draft RTS requires the applicant to follow, to the extent possible, the indications laid down in the delegated act that the EU Commission is due to adopt pursuant to Article 20(6), to specify how to assess the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds that make reference to benchmark, including in the event of an indirect reference to any such benchmark within a combination of benchmarks.
259. ESMA also acknowledges that benchmarks provided from a third country and not yet used in the Union at the time of the application for recognition should be considered as

non-significant at that time, mindful that the granting of the regimes set forth in Articles 24, 25 and 26 of Regulation (EU) 2016/1011 also implies the duty of a third-country provider to notify the competent authority of the Member State of reference when a benchmark falls below or exceeds the threshold established in point (a) of Article 24(1) of the mentioned Regulation.

260. In line with what already put forward in the DP, ESMA also confirms the opportunity to request the applicant to indicate the provisions of the Regulation for which it believes it should be exempted, along with an explanation, as detailed as possible, of the reasons why it should be eligible for such exemptions.

261. ESMA also acknowledges that the applicant may have already drafted a compliance statement in its third country of location or, on a preventive basis, for the sake of disclosure according to Articles 25(7) and 26(3) of the benchmarks Regulation. In this context it is thus envisaged the possibility that the above said information and rationales are provided to the competent authority of the Member State of reference by submitting the compliance statement together with the application. When a compliance statement is not available, ESMA still considers useful that the information around the application of any exemption in the provision of significant or non-significant benchmarks from a third country is provided for in the format suggested in the implementing technical standards that ESMA is asked to draft by Articles 25(8) and 26(5) of Regulation (EU) No 2016/1011. Stakeholders resulted to be very much supportive, in reply to consultation on the DP, of the above described approach.

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?

262. Article 32(6) requires the competent authority of the Member State of reference to notify ESMA with an assessment supporting the exemption, based on the information provided by the administrator in the application for recognition. Once ESMA has received the assessment, it will have one month to produce an advice to the competent authority about the application of the exemptions from those specific requirements, with the final decision however resting with the national competent authority.

263. It is possible to think of three different scenarios: (a) a third-country provider applies for recognition with reference to all benchmarks already used in the Union; (b) it applies for recognition with reference to all benchmarks not already used in the Union; (c) it applies for recognition with reference to a mix of benchmarks respectively used and not yet used in the Union. It is ESMA's view that the relevance of a benchmark in terms of its degree of use may be consistently appraised only in the case of benchmarks already used in the Union and that the data and information to provide in the context of an application for recognition should therefore make reference to financial instruments, financial contacts an

investment funds referencing to any particular third-country benchmark in the Union. As a consequence, in the scenario (b) above, no data and information on the degree of use of such benchmarks may be provided by the applicant. However, as the benchmarks, even if already provided in the third-country, are not yet used in the Union, it should be considered that these are non-significant, at Union level, at the time of the application, and hence the applicant should indicate the exemptions it would want to benefit of and the rationales behind.

264. Therefore, and for the sake of clarity, it is worth specifying that given the third-country benchmarks will in all circumstances qualify for one or the other regime, the overall length of the recognition process shall be considered of 120 days (4 months, like in the case of the authorisation of a provider located within the Union).

11.5 Draft technical standards: Recognition

COMMISSION DELEGATED REGULATION (EU) No .../..

of **XXX**

[...]

supplementing Regulation (EU) No 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards on the form and content of the application for recognition with the competent authority of the Member State of reference

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 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 596/2014³³ and in particular Article 32(9) thereof,

Whereas:

- (1) For the purposes of an application for recognition under Article 32 of Regulation (EU) No 2016/1011, an applicant third-country provider should, in first instance, identify the Member State of reference, in application of the criteria provided for in paragraph 4 of the cited article and the competent authority designated for that Member State as indicated in the list of the competent authorities published by ESMA in accordance with Article 40 of the mentioned Regulation. For the purpose of allowing a competent authority to verify whether a legal representative for the applicant is established in its jurisdiction and other conditions required under Article 32, paragraph 4, of Regulation (EU) 2016/1011, which render the identification of a particular Member State of reference appropriate, an applicant third-country provider should be able to submit data corroborating the choice made and to provide evidence of the legal representative being established and acting as required under Article 32, paragraph 3, of Regulation (EU) 2016/1011.
- (2) This Regulation sets out the information that a competent authority is to receive as part of an application for recognition by a third-country provider, with a view to provide a comprehensive representation of the arrangements, policies and procedures established by the third-country provider in order to fulfil the applicable requirements set out in Regulation (EU) No 2016/1011 or the corresponding IOSCO Principles respectively

³³ OJ L 171, 29.6.2016, p. 1.

applicable for Financial Benchmarks (FR07/13, July 2013) or for Oil Price Reporting Agencies (FR06/12, 5 October 2012). This Regulation also avoids useless duplication of information which could make the process more burdensome for the applicant and the competent authority. However, the information needed for the competent authority of the Member State of reference to perform its assessment must be clearly identified in the set of documents. Moreover, certain information requested in this Regulation might not be applicable, depending on the characteristics of the applicant or of the benchmarks provided and intended for use in the European Union.

- (3) Any information submitted to a competent authority should be provided in a durable medium which enables its storage for future use. In order to facilitate the identification of the information submitted by an applicant provider, all documents should be identified by a reference number.
- (4) The competent authority should satisfy itself, as part of the process for granting recognition to a third-country provider, that the Member State of reference has been correctly identified, in connection with the criteria set out by Article 32(4) of Regulation (EU) No 2016/1011 and that a legal representative of the third-country provider is established in its jurisdiction and has the power to act as required by the mentioned Regulation, based on the information to be submitted by the applicant provider.
- (5) In order for the competent authorities to assess that the applicant administrator has the financial means to implement the policies and procedures laid down in the Regulation No 2016/2011 and to exercise the activity of provision of benchmarks on an ongoing basis and in compliance with the requirements the Regulation NO 2016/2011, the application shall cover financial information on the administrator, regarding mainly its ownership structure, its financial statements and its financial forecasts.
- (6) In order for a competent authority to assess if any conflicts of interest arising from the benchmark activity and business interests of the owners of an applicant might affect the independence of a provider in the benchmark calculation and thus impair the accuracy and integrity of any benchmark to be used in the Union territory, a third-country applicant should be required to give information regarding the activities of its owners and the ownership of its parent undertakings.
- (7) An applicant should provide information on the composition, functioning and independence, in the benchmark calculation, of its governing bodies in order for a competent authority to be able to assess whether the corporate governance structure ensures the independence of the provider in the benchmark calculation and the avoidance of conflicts of interest and, in addition, an applicant should provide the curriculum vitae, recent criminal record and self-declarations on the good repute of its senior management.
- (8) For the purposes of assessing how conflicts of interest are eliminated or managed and disclosed, an applicant should provide the competent authority with an explanation as to how any resulting conflicts of interest are identified, recorded, managed, mitigated, prevented and remedied.
- (9) For the purposes of allowing the competent authority to evaluate the pertinence and robustness of the internal control structure, oversight and accountability framework, an

applicant should provide the competent authority with the policies and procedures for monitoring the activities of the provision of a benchmark or family of benchmarks.

- (10) Information should also be included in the application to demonstrate to the relevant competent authority that the controls on the input data on the basis of which are calculated the benchmarks provided by the third-country applicant, that are used or intended to be used within the Union, are adequate to ensure the representativeness, accuracy and integrity of such data, and that the methodology applied for the calculation of the benchmarks present all the characteristics required by the Regulation (EU) No 2016/1011.
- (11) At the time a process for the recognition of a provider located in a third country is initiated, some of the benchmarks it provides might already be used in the Union as a reference in financial instruments, financial contracts or for measuring the performance of investment funds and may continue to be used only in such financial instruments, financial contracts and investment funds, if the use started prior to 1 January 2020, as required by Article 51, paragraph 5, of Regulation (EU) 2016/1011. Some other benchmarks it provides might not be used yet, but could be used in the Union after the provider acquires the recognition. It could also be possible that an applicant has no benchmarks already used in the Union or that it applies only for granting the continued use, also in new financial instruments or financial contracts or investment funds, of all benchmarks that are already used in the Union at the time of application. For the purpose of allowing the competent authority to evaluate whether the benchmarks provided by the applicant are suitable for their continued or prospective use in the Union, and with the final objective of their inclusion in the register of Article 36 of Regulation (EU) 2016/1011, a list and description of benchmarks already used in the Union or intended for (future) use in the Union needs to be provided along with the application for recognition with the competent authority of the Member State of reference.
- (12) Information on the nature and characteristics of the benchmarks provided by the third-country applicant, as well as of the underlying market or economic reality of the benchmarks, would prove relevant in the context of demonstrating to the competent authority of the Member State of reference whether the assessment of compliance with the requirements of Article 32(2) of Regulation (EU) 2016/1011 is to be conducted with reference to the special regimes applicable respectively to regulated-data benchmarks and to commodity benchmarks not based on submissions by contributors the majority of which are supervised entities, as set out in Regulation (EU) 2016/1011.
- (13) Information on the reference values of the benchmarks provided by the third-country applicant would prove useful for the competent authority of the Member State of reference to conduct a preliminary assessment of the opportunity to categorise any of the benchmarks provided by the third-country applicant that are already used in the Union, as either significant or non-significant, with the consequent possibility of application of the respective exemptions, as set out in Regulation (EU) 2016/1011. On the contrary, such information is not relevant in connection with those benchmarks that are not already used in financial instruments, financial contracts and investment funds in the Union, but that are described in the application for their inclusion under the register of Article 36 of Regulation (EU) 2016/1011 for reason of their prospective use in the Union. The latter should rather be considered as non-significant at the time of the application for recognition.

- (14) The type and category to which the provided benchmarks or families of benchmarks belong to is to be assessed to the best of the knowledge of the applicant and should be provided along with an indication of the sources of data used.
- (15) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (16) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council³⁴.

HAS ADOPTED THIS REGULATION:

Article 1

General requirements

1. An application for recognition shall be addressed to the competent authority of the Member State of reference to be determined by the applicant on the basis of the criteria laid down in Article 32, paragraph 4, of Regulation (EU) No 2016/1011.
2. In order for the competent authority of the Member State of reference to assess whether the arrangements established by an applicant at the time of the request for recognition meet the requirements laid down in Article 32, paragraph 2, of Regulation (EU) No 2016/1011, the applicant shall provide the information that covers, but may not be limited to, the items listed in Annex I.
3. The application shall include an explanation for any requirement of this Regulation that does not apply to an applicant or to the benchmarks it provides that are intended for use in the Union
4. The applicant shall not be required to provide information in accordance with Annex I to the extent that the information is contained in:
 - a. an assessment by an independent external auditor of compliance with the IOSCO Principles for financial benchmarks or for PRAs, as applicable;
 - b. the certification provided by the competent authority of the third country where the applicant is located, attesting compliance with the IOSCO Principles for financial benchmarks or for PRAs, as applicable.

³⁴ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Article 2

Format of the application

1. An application for recognition and all connected documents and information shall be submitted in English or in the official language, or one of the official languages, of the Member State of reference. On condition of the previous agreement between the applicant and the competent authority of the Member State of reference, an application for recognition and all connected documents and information may be submitted in another language.
2. An application for recognition shall be submitted in paper form, or by electronic means, if accepted by the relevant competent authority. Those electronic means shall ensure that completeness, integrity and confidentiality of the information are maintained during the transmission.
3. An applicant shall give a unique reference number to each document it submits. The applicant shall ensure that each document submitted clearly identifies to which specific requirement of this Regulation it refers.

Article 3

Policies and procedures

1. Policies and procedures established for fulfilling the requirements of Regulation (EU) No 2016/1011 and described in an application shall contain or be accompanied by:
 - a. an indication of who is responsible for the approval and maintenance of the policies and procedures;
 - b. a description of how compliance with the policies and procedures is enforced and monitored and who is responsible for this;
 - c. a description of the measures to be undertaken in the event of a breach of the policies and procedures.

Article 4

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.



Done at Brussels, [...]

*For the Commission
The President*

On behalf of the President

[Position]

ANNEX I

Information to be provided in the application for recognition under Article 32 of Regulation (EU) No. 2016/1011

SECTION A – INFORMATION ON THE PROVIDING PERSON AND ITS LEGAL REPRESENTATIVE IN THE UNION

1) General information

- a) Full name of the applicant and its Legal Entity Identifier (LEI), where available
- b) Address of the office in the third country of location
- c) Legal Status
- d) Website
- e) Where the applicant is supervised in the third country where it is located, information about its current authorisation status, including the primary business for which it is authorised, the name and address of the competent authority of the third country and the link to the register of such competent authority, where available; where more than one authority is responsible for supervision, the details of the respective areas of competence shall be provided.
- f) Description of the operations of the applicant in the European Economic Area and/or in third countries, whether or not subject to any European or extra-EU regulation, that are potentially relevant for the activity of provision of benchmarks.
- g) Where the applicant is part of a group, its group structure, along with the ownership chart, showing the links between any parent undertaking and subsidiaries. The undertakings and subsidiaries shown in the chart shall be identified by their full name, legal status and address of the registered office and head office.
- h) A self-declaration of good repute including details, if any, on any:
 - (i) proceedings of a disciplinary nature (unless dismissed);
 - (ii) refusal for authorisation or registration from a financial authority;
 - (iii) withdrawal of authorisation or registration from a financial authority.

2) Legal representative in the Member State of reference

- a) Documented evidence for the choice of the Member State of reference, by application of the criteria laid down in Article 32(4) of Regulation (EU) No 2016/1011
- b) With respect to the legal representative to be established according to Article 32(3) of Regulation (EU) No. 2016/1011:
 - (i) full name;
 - (ii) title, in case of a natural person, or legal status, in case of a legal person;

- (iii) deed of incorporation, articles of association or other constitutional documents, in case of a legal person and clarification on whether it is supervised;
- (iv) address;
- (v) e-mail address;
- (vi) telephone number;
- (vii) written confirmation of the authority of the legal representative to act on behalf of the applicant in accordance with Article 32(3) of Regulation (EU) No 2016/1011;
- (viii) details of the involvement of the legal representative in the oversight function relating to the provision of benchmarks that may be used in the Union;
- (ix) the name, title, address, e-mail address and telephone number of a contact person within the legal representative.

3) Financial information

- a) Information on the applicant ownership structure, including its shareholders and their relative holdings, as applicable;
- b) Financial statements:
 - (i) for the most recent 3 years, including – but not limited to - balance sheet, income statement, cash flow and audit reports, to the extent available, prepared in accordance with the International Financial Reporting Standards or with local Generally Accepted Accounting Principles;
 - (ii) if the applicant has not yet produced financial statements, a description of how it plans to raise financial resources, including a business plan for the first three accounting years.
- c) Financial forecasts for at least one year ahead.

4) Organisational structure and governance

- a) Internal organisation structure with respect to the board of directors, senior management committees, oversight function and any other internal body exercising significant management functions, including:
 - (i) number of members;
 - (ii) terms of reference; and
 - (iii) adherence to any governance codes or similar provisions.
- b) With respect to the members of senior management:
 - (i) curriculum vitae;
 - (ii) a recent criminal record file;
 - (iii) a self-declaration of good repute including details, if any, on any involvement in:
 - a. proceedings of a disciplinary nature (unless dismissed);

- b. an undertaking whose authorisation was withdrawn by a regulatory authority;
 - c. the management of an undertaking which has gone into insolvency or liquidation.
 - (iv) detail on their other activities within and outside the applicant or (if the applicant is a part of a group) the group of which the applicant is a part.
 - c) With respect to the resources:
 - (i) the number of employees along with the senior managers per function/department;
 - (ii) the number of employees (temporary and permanent) involved in the benchmarks activities.
- 5) Conflicts of interest
 - a) Policies and procedures that cover:
 - (i) how current and prospective conflicts of interest are or will be identified, recorded, managed, mitigated, prevented and remedied;
 - (ii) the controls put in place including the controls implemented through information systems, along with any other part of the conflicts of interest management framework;
 - (iii) particular circumstances which apply to the applicant or to any particular benchmark or family of benchmarks provided by the applicant and which may be used in the Union, in relation to which conflicts could most likely arise, including where judgment or discretion is exercised in the benchmark's determination process, where the applicant is within the same group as a user of such a benchmark or family of benchmarks and where the provider is a participant in the market or economic reality that the benchmark or family of benchmarks intend to measure.
 - b) The structure of the remuneration policy, particularly in relation to any connection with the calculation or the marketing in the Union of a benchmark provided by the applicant.
- 6) Internal control structure, oversight and accountability framework
 - a) Policies and procedures for monitoring the activities of the provision of a benchmark, including:
 - (i) policies and procedures for applicable information technology systems and controls;
 - (ii) policies and procedures for incident management, such as back-up systems and contingency and business continuity plans;
 - (iii) policies and procedures for risk management, and a mapping of risks which may arise, along with the relative mitigation measures;
 - (iv) policies and procedures for checking and monitoring contributors' adherence to the code of conduct;

- (v) policies and procedures for the constitution, role and functioning of the oversight function, as described in article 5 of the Regulation No 2016/1011 and further specified in Regulation [...] ³⁵ or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable, including procedures for the appointment, substitution or removal of individuals within the oversight function;
 - (vi) policies and procedures for the constitution, role and functioning of the control framework, as described in article 6 of the Regulation No 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable, including procedures for the appointment, substitution or removal of individuals who are responsible for this framework;
 - (vii) policies and procedures for the accountability framework as described in article 7 of the Regulation No 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable, including procedures for the appointment, substitution or removal of individuals who are responsible for this framework.
- b) Fall-back systems and arrangements for determining and publishing a benchmark;
 - c) Procedures for the internal reporting of infringements of the Regulation No 2016/1011 by managers, employees and any other natural persons whose services are placed at the provider's disposal or under the control of the provider.
- 7) Input data and methodology
- a) With respect to input data, policies and procedures including:
 - (i) a description of the type of input data used, their priority of use and the exercise of expert judgment;
 - (ii) the process for ensuring that input data is appropriate and verifiable;
 - (iii) an explanation on how the applicant provider will be satisfied that there is sufficient input data to represent accurately and reliably the market or economic reality that the benchmark is intended to measure;
 - (iv) the selection and evaluation process of the contributors;
 - (v) the evaluation of the contributor's input data and the process of validating input data.
 - b) With respect to the methodology, policies and procedures including:
 - (i) a description of the methodology;
 - (ii) the measures taken to provide validation and review of the methodology, including any trials and/or back-testing performed;
 - (iii) a description of the consultation process on any proposed material change in the methodology.

³⁵ See Section 2 – Characteristics and procedures of the oversight function.

8) Outsourcing

If any activity forming a part of the process for the provision of a benchmark is outsourced:

- a) the identity of the service provider, including where it is located and whether it is anyhow supervised;
- b) details of the outsourced functions;
- c) the relevant contracts, including service-level agreements, which demonstrate compliance with Article 10 of the Regulation No 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable;
- d) policy and procedures regarding the oversight of the outsourced activities.

9) Others

- a) The applicant may provide any additional information relevant to its application which it considers appropriate.
- b) The applicant shall provide the requisite information in the manner and form the competent authority requests.

SECTION B – INFORMATION ON THE BENCHMARKS PROVIDED

10) Description of the actual or prospective benchmarks that may be used in the Union

- a) A description of the benchmarks or families of benchmarks provided and that are already used in the Union.
- b) A description of the benchmarks or families of benchmarks that are intended to be marketed for their use in the Union.
- c) A description of the underlying market or economic reality that the benchmarks or the families of benchmarks described under the previous points intend to measure.
- d) For the information specified under this point and the previous two points a) and b), an indication of the sources used to provide the information required is also needed.
- e) A description of contributors to each benchmark or family of benchmarks described under previous points a) and b).
- f) The documented evidence that a benchmark or family of benchmarks described under points a) and b) may be considered regulated-data benchmarks, according to the definition laid down in Article 3(1)(24) of Regulation (EU) No 2016/1011, and thus entitled to the exemptions listed by Article 17(1) of the same Regulation.
- g) The documented evidence that a benchmark or family of benchmarks described under points a) and b) may be considered commodity benchmarks, according to the definition laid down in Article 3(1)(23) of Regulation (EU) No 2016/1011, and that each of these is not based on submissions by contributors the majority of which are supervised entities, along with evidence of the implementation of the special regime requirements as set out

by Article 19 and Annex II of the Regulation or the corresponding IOSCO Principles for PRAs.

- h) The documented evidence that a benchmark or family of benchmarks described under points a) and b) may be considered interest-rate benchmarks, according to the definition laid down in Article 3(1)(22) of Regulation (EU) No 2016/1011, along with evidence of the implementation of the special regime requirements as set out by Article 18 and Annex I of the Regulation.
- i) The documented evidence that a benchmark or family of benchmarks described under point a) have a degree of use within the Union territory which render those benchmarks to qualify either:
 - (i) as significant benchmarks as set out by Article 3(1)(26), with reference to either point (a) or point (b) of Article 24(1) of Regulation (EU) No 2016/1011; or
 - (ii) as non-significant benchmarks as set out by Article 3(1)(27) of Regulation (EU) No 2016/1011.

The information to be provided shall be determined, to the extent possible, on the basis of what is laid down in Regulation [...] ³⁶ for the assessment of the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds that make reference to the third-country benchmarks, within the Union, including in the event of an indirect reference to any such benchmark within a combination of benchmarks, adopted pursuant to Article 20(6) of Regulation No 2016/1011.

- j) The rationales behind the application of any of the exemptions listed under Article 25(1) and Article 26(1) of Regulation No 2016/1011 for the provided benchmarks that qualify as either significant or non-significant, according to the information and data under previous point h); the information shall be presented, to the extent possible, on the basis of the format established by the Regulation [...] ³⁷, adopted pursuant to Articles 25(8) and 26(5) of Regulation (EU) No 2016/1011.
- k) Information on measures to deal with corrections to a benchmark determination or publication.
- l) Information on the procedure concerning the actions to be taken by the provider in the event of changes to or the cessation of a benchmark, in compliance with Article 28(1) of the Regulation No 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable.
- m) Information on the means of publication in the Union territory of a benchmark's determinations that are used or intended to be used.

³⁶ The Delegated Act to be adopted by the Commission pursuant Article 20(6) (Measurement of the reference value to be compared to the quantitative thresholds)

³⁷ See Section 8 – Compliance statement for administrators of significant and non-significant benchmarks in relation to the ITS setting the format of the compliance statements for significant and non-significant benchmarks.

12 Annexes

12.1 Annex I - Summary of questions

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?

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

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

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.

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

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

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.

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?

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?

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

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

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.

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

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

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.

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

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.

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?

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

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

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

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.

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

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

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

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?

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

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

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?

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?

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?

12.2 Annex II – Preliminary high-level Cost Benefit Analysis

Section 1: Draft regulatory technical standards for the procedures and characteristics of the oversight function

ESMA is mandated by Article 5(5) to develop draft regulatory technical standards to specify the procedures regarding the oversight function and the characteristics of the oversight function including its composition, along with its positioning within the organisational structure of the administrator, so as to ensure the integrity of the benchmark and the absence of conflicts of interest. ESMA proposes certain requirements for oversight functions, with a non-exhaustive list of optional structures. Regarding the positioning, ESMA establishes the relationship between the oversight function and the management body of the administrator, as well as the instances in which the oversight function could be expected to act independently of the administrator. The procedures proposed are the minimum expected, allowing for proportionality depending on the size and nature of the benchmark.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>The main benefit of the proposed draft regulatory technical standards is to further specify key aspect of the oversight function, such as its functioning, its positioning in the administrator’s organization and its composition. In this way the draft standards expand the general procedures and characteristics of the oversight function so as to provide administrators with practical indication on how to implement Article 5 of the BMR in their organisations.</p> <p>Administrators would be the market participants who will benefit most from the proposed draft regulatory technical standards. Also investors and consumers would benefit from the draft standards, because of the standards’ focus on conflict of interest and hence the enhanced integrity of a benchmark provided under the scrutiny of an appropriate oversight function that is established in conformity with the draft standards.</p> <p>In general, the proposed standards have the advantage to further define the content of Article 5 of the BMR while, at the same time, leaving administrators with a balanced level of flexibility so as to adapt the oversight function to their idiosyncratic situation. The requirements included in the draft standards are non-exhaustive in the case of composition and the minimum expected with regards to the procedures of the oversight function, and administrator will be able to adjust them to their size and the nature of the benchmark(s) they provide.</p> <p>As requested by the empowerment received by ESMA, Article 1 of the draft standards include a non-exhaustive list of governance arrangement of the oversight function, composed by six types of arrangements. Although the list is non-exhaustive, it should represent a very useful tool</p>

	<p>for administrators in order to define the structure of their oversight function appropriate to their benchmarks. The elements included in the list represent different organizational solution to which most of the administrators should be able to relate their own specific situation. That is why administrators should be able to gain direct benefit from the implementation of the proposed draft standards. Without the non-exhaustive list of appropriate governance requirements there is a risk that administrators would apply Article 5 of the BMR in significantly diverging ways.</p> <p>In particular, the list defines a spectrum of possible structures of oversight functions that goes from a basic form, in which the oversight function is composed by a single natural person, to a structured form where a function is composed of multiple committees performing a subset of the oversight tasks. Administrators of multiple critical benchmarks will be able to decide whether each critical benchmark would need a separate committee or not operating within the overall structure of the oversight function.</p> <p>Investors and consumers should also benefit from the proposed draft standards, because thanks to them each administrator should be able to establish an appropriate oversight function, with positive effect in terms of integrity of the benchmarks and therefore with direct benefit for the ultimate users. In this context, the possibility of having independent members, external stakeholders, and also observers in the oversight function should improve even further the effectiveness of the oversight function and the quality of its actions.</p>
<p><i>Costs</i></p>	<p>Potential additional costs will be borne by administrators only.</p> <p>Depending on the structure of the oversight function chosen by the administrator, cost will vary. An independent oversight committee or an oversight function consisting of multiple committees possibly represent the costliest form of oversight function, as opposed to the oversight function composed by a single natural person. The proposed draft standards allow administrators to embed the oversight function within their organization rather than create an external committee: this flexibility should substantially minimise costs for administrators.</p> <p>Potential larger costs would be borne by administrators of critical benchmarks or regulated data benchmarks with a “reference” value above EUR 500 bn, as the proposed standards clarify that for them the simplest form of oversight function, composed by a single natural person, is not a viable organizational form (see Article 1(1) of the draft standards).</p>

	<p>Specific costs for administrators could arise from Article 3 of the proposed draft standards “Procedures governing the oversight function”. The Article is the specification of paragraph 2 of Article 5 of the BMR. In the text of level 1, administrators are requested to develop and maintain robust procedures regarding their oversight function, and Article 3 of the proposed standards identifies some thirteen elements to be included in the administrator’s procedures for oversight function. In particular, those relating to disclosure, and the ones requiring the administrator to create new policies could be considered a source of new costs.</p> <p>Finally, another source of cost could be represented by the requirement to record decisions and to notify the management body (see Article 2(3) and (4) of the proposed draft standards).</p>
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Section 2: Draft regulatory technical standards on input data

ESMA is mandated by Article 11(5) of the Regulation EU 2016/1011 to specify further how to ensure that input data is appropriate and verifiable as well as the internal oversight and verification procedures of a contributor that the administrator has to ensure are in place where the input data is contributed from a front office function. ESMA proposes, in its draft technical standards, organisational and procedural requirements that the administrator must fulfil to ensure what required by the level 1 provisions.

	Qualitative description
Benefits	<p>The proposed approach for ensuring appropriateness and verifiability of input data contributed as well as ensuring the internal oversight and verification procedures within a contributor would promote a common and consistent control framework across different administrators of benchmarks to the benefit of users.</p> <p>The evaluation and validation of input data aim at strengthening the reliability of the benchmark through ensuring the integrity and accuracy of the input data and reducing the opportunity to its manipulation.</p> <p>Furthermore, the internal oversight and verification procedures where input data are contributed from a front office function would allow to mitigate the specific risk of conflicts of interest that arises in this particular case, and to reduce the opportunity to manipulate data by implementing a robust internal oversight at the contributor level.</p>
Costs	<p>Potential costs arising from these draft technical standards will be borne by administrators and contributors of critical and significant benchmarks.</p> <p>The incremental costs stemming from the proposed approach in relation to input data are not expected to be significant. Indeed, the draft regulatory technical standards specify further the requirements already included in the Regulation (EU) 2016/1011 regarding the appropriateness and verifiability of input data and the internal oversight and verification procedures of contributors.</p> <p>Moreover, the draft technical standards have been designed in a way to minimise the burden on administrators, in accordance with the principle of proportionality which is a general requirement under Regulation (EU) 2016/1011. Where possible, the requirements in these draft technical standards have been</p>

	<p>reduced depending on the category of the benchmark and the size of the contributor. For example, the internal oversight is allowed to be aligned to pre-existing internal oversight structures and may be simplified depending on the size of the contributor.</p>
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Section 3: Draft regulatory technical standards on transparency of methodology

ESMA is mandated by Article 13(3) of Regulation EU 2016/1011 to specify further the information to be provided by an administrator in compliance with the requirements in relation to the transparency of the methodology of the benchmark. ESMA proposes in its draft RTS a minimum list of key elements to be disclosed by the administrator of the benchmark. Furthermore, ESMA is specifying the procedure for internal review and approval of the methodology and also the one to apply in case of material changes to the methodology of the benchmark.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>The proposed minimum list of key elements to be disclosed by administrators of benchmarks would promote common and consistent transparency principles across different administrators of benchmarks, to the principal benefit of users. This could turn out to prove beneficial also for administrators, as it has the potential to create a fairer competitive environment.</p> <p>The key elements of the methodology would be available to all markets participants who would have access to the minimum list of information required regarding all benchmarks and thus achieve a global and complete view on the possibilities of investments available in the market.</p> <p>As the procedure for internal review of the methodology is aimed at allowing administrators to ensure the continuous accuracy and representativeness of a benchmark, a common approach for the internal review of the methodology of benchmarks would facilitate national competent authorities' checks in relation to the function that conducts the internal review, which is independent from the one that has developed the methodology, and to the correct management of conflicts of interest. This would also give comfort to market participants regarding the reliability of the benchmark concerned and would help to ensure investors protection in the EU.</p> <p>Finally, the specific procedure to be applied in the case of a material change to the benchmark's methodology would ensure a common approach by all administrators of benchmarks that would consult market participants and in particular users of benchmarks before imposing any material change. This consultation would allow users to comment on these material changes and express any concern that they might have, thus contributing to increasing investors protection.</p>

<p><i>Costs</i></p>	<p>Potential costs arising from these draft RTS will be borne by administrators of critical and significant benchmarks.</p> <p>The incremental costs stemming from the proposed transparency of the methodology are not expected to be significant. Indeed, the draft RTS specify further the requirements already included in Regulation (EU) 2016/1011 regarding the publication of key elements of the methodology, reviewing the methodology and having a specific procedure for any material change to the methodology.</p> <p>Moreover, as known, most of the already established indices providers are already familiar with providing transparency of the methodology applied.</p> <p>Additionally, the draft RTS have been designed in a way to minimise the administrative burden of administrators, in accordance with the principle of proportionality which is a general requirement under Regulation (EU) 2016/1011. Only the necessary information to be disclosed has been included in these draft RTS. Furthermore, where the approach depends on the characteristics of the benchmarks and the discretion of the administrators is needed the draft RTS do not impose any additional requirement.</p>
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Section 4: Draft regulatory technical standards on elements to be included in the code of conduct

ESMA is mandated by Article 15(6) of the Regulation to develop draft regulatory technical standards to further specify the elements of the code of conduct referred to in paragraph 2 of Article 15. For each criterion of Article 15(2), ESMA in its draft technical standards proposes more detailed aspects to it.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>The code of conduct sets out the expectations that the administrator has for the behaviour of the contributors, so it is essential for maintaining integrity of the benchmark. In particular, the provisions of the code of conduct are designed to ensure that the right people are acting to be submitters to the benchmark, that those persons who are not permitted to do so do not submit input data to the benchmark and that minimum standards of behaviour are implemented and maintained within the business that contribute to the benchmark. Therefore these provisions are beneficial to the integrity and robustness of the benchmark which is beneficial to users and consumers as well as the administrator and contributor.</p> <p>Competent authorities would also benefit from the application of the proposed technical standards as they include the reporting of actual and suspected infringements to the administrator's competent authority and because the provisions in the code help distinguishing the responsibilities of the administrator and of contributors within the provision process. This will aid them in their duties where they supervise the contributors.</p>
<i>Costs</i>	<p>Responses to the discussion paper have highlighted the issue that as contribution to a benchmark is voluntary, should the provisions in the articles of the RTS be too onerous and costly to the contributors, the contributors may stop contributing to the benchmark which would be damaging to the robustness of the benchmark.</p> <p>Taking into consideration those concerns, ESMA has sought to not add unnecessary requirements to contributors whilst maintaining rules that mandate a high standard of integrity for all contributors to benchmarks.</p>

Section 5: Draft regulatory technical standards on governance and control requirements for supervised contributors

ESMA is mandated by Article 16(5) of the Benchmarks Regulation to specify further the requirements applying to supervised contributors concerning governance, systems and controls, and policies set out in paragraphs 1-3 of the same Article. ESMA in its draft technical standards proposes more detailed aspects to further clarify the requirements, including in relation to submitters of input data, and use of expert judgement.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>There will be benefits from the further specification of the requirements on supervised contributors both for supervised contributors, and for the administrators to which the contributors provide input data.</p> <p>The main benefit of the further level of specification of the requirements will be to ensure consistent application of the requirements throughout the Union. Without such further clarification, each supervised contributor would have to make its own judgement of the way in which it should comply with the high level requirements in the Benchmarks Regulation.</p> <p>Different interpretation of the requirements by different supervised contributors within a Member State would mean that each national competent authority would have to establish for itself criteria for judging compliance of contributors it supervised with the requirements. Even if each national competent authority established consistent application, a benchmark administrator could find that its contributors in different Member States were working to different standards.</p>
<i>Costs</i>	<p>In the absence of these technical standards, It is possible that some supervised contributors would interpret the requirements of Article 16 of the Benchmarks Regulation in a very limited way so as to minimise their costs. By specifying the requirements in more detail, these technical standards could add to the costs for such contributors.</p> <p>Some of the responses to the Discussion Paper identified areas where extra costs could arise based on the proposals in that, though without quantification. These were:</p> <ul style="list-style-type: none"> Operational requirements and IT investment

	<ul style="list-style-type: none">• Monitoring, supervision, record-keeping• Staff training, external auditors <p>Some pointed out that increased costs for contributors could lead to their withdrawal which in turn would lead to a reduction in the number and quality of benchmarks to the detriment of consumers.</p> <p>ESMA has therefore sought to keep the specification to the minimum needed to meet the objectives of the Benchmarks Regulation. It has built in flexibility, for example on the rules on sign-off. And it has where appropriate limited rules so that they apply only to supervised contributors to critical benchmarks.</p> <p>Through this Consultation Paper, ESMA is seeking further input from stakeholders on taking into account the different characteristics of benchmarks and supervised contributors, so as to be able to further reduce costs.</p>
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Section 6: Draft regulatory technical standards on criteria to be assessed by competent authorities when deciding to apply certain provisions to significant benchmarks

ESMA is mandated by Article 25(9) of the Regulation (EU) 2016/1011 to specify further nine criteria referred to in paragraph 3 of the same Article. Competent authorities should take into account these criteria when they assess whether it is appropriate to require an administrator of a significant benchmark to apply one or more of the provisions listed in Article 25(1) of the Regulation (EU) 2016/1011 although the administrator has chosen not to. For each criterion of Article 25(3), ESMA in its draft regulatory technical standards (RTS) proposes more detailed aspects to further clarify it and to give guidance for its assessments.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>Both administrators of significant benchmarks and national competent authorities would benefit from the application of the proposed RTS.</p> <p>The draft RTS contain a set of aspects to be taken into account by competent authorities: the application of these elements by competent authorities in their assessment would ensure that Article 25(3) of the Regulation (EU) 2016/1011 is applied consistently throughout the Union. Without such further clarification, competent authorities would have to base their assessment on the broader nine criteria alone. These criteria are very general in nature, and different competent authorities would possibly apply them differently in practice. Through the further specification of the nine criteria in the draft RTS, the competent authorities will have a pre-defined detailed framework based on which they can develop their assessment more easily and more rapidly, as they will not need to further specify the criteria of Level 1 by themselves.</p> <p>Also administrators of significant benchmarks would indirectly benefit from the application of RTS, as they provide administrators (and the public in general) with a better understanding of the elements on which a competent authority will ground its assessment. This, in turn, could help administrators of significant benchmarks to prepare a sound notification to the competent authority, including all the relevant information, to have their own assessment confirmed.</p> <p>An additional benefit is a fairer competition among administrators located in different Member States through increased consistency of the approaches followed by competent authorities.</p>

<p><i>Costs</i></p>	<p>The draft RTS concern activities to be performed by competent authorities only, so they would not create additional costs for administrators of significant benchmarks or market participants. The information required under Article 25(3) of the Regulation (EU) 2016/1011 is only intended to corroborate the administrator’s assessment and hence should not have to cover all criteria and the elements specified in these draft regulatory technical standards, so no additional burden or cost for administrators will result therefrom.</p> <p>From the perspective of a competent authority, the incremental costs stemming from the proposed set of elements are not material. The Regulation (EU) 2016/1011 requires competent authorities to prepare an assessment under Article 25(3). The draft RTS merely further specify the nine criteria already included in that provision.</p>
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Section 7: Draft implementing technical standards on compliance statement for administrators of significant and non-significant benchmarks

ESMA is mandated by Article 25(8) to develop a template for the compliance statement that administrators of significant benchmarks have to publish if they decide not to apply any of the requirements listed in Article 25(1). Similarly, ESMA is mandated by Article 26(5) to develop a template for the compliance statement that administrators of non-significant benchmarks have to publish and provide to the relevant NCA if they decide not to apply any of the requirements listed in Article 26(1). ESMA is proposing a template aiming at providing a detailed explanation regarding the decision of not applying some BMR requirements, while limiting the administrative effort that administrators will bear when developing and updating their compliance statement.

	Qualitative description
Benefits	<p>The main benefit in proposing, through the draft ITS, a common template for compliance statement to be used by administrators is to increase the clarity of the document published, the transparency of the reasons why the administrators have not applied some requirements of the BMR and comparability of compliance statements over different administrators/benchmarks.</p> <p>In relation to clarity, the use of a common template will facilitate the analysis of the compliance statements by NCAs as well as by users and other interested parties, and will enhance the comparability of information among different significant benchmarks with the objective of choosing the most appropriate one for the intended use.</p> <p>In addition, without a common template, administrators would be left with no guidance on how to publish the information about the decision of not applying some BMR requirements, in line with Articles 25(1) and 26(1). Under this scenario, each administrator would draft its own template which would entail the risk of omitting necessary information. Moreover, under the situation in which each administrator uses its own template, comparison between compliance statements of different administrators would be more difficult, as it is not sure that the same types of information are included by different administrators that are not required to use the same template. All these issues are solved by the use of a common compliance statement as the one proposed by ESMA.</p> <p>In relation to transparency, it is important that a compliance statement provides the public and NCAs with a comprehensible</p>

	<p>and exhaustive motivation of the appropriateness of not applying the provisions referred to in the compliance statement. This can be achieved by an organisation of the content of the statement that is clear and unambiguous. For this reason, the template proposed by ESMA is organised into sections that are internally divided into specific items. In particular, using the proposed template, three crucial factors would be immediately clear to the reader: (i) which requirements have been not applied by the administrator; (ii) in the provision of which benchmarks the requirements have not been applied; (iii) what are the exact reasons why the decision was taken by the administrator. Without a template to be used by administrators, there would be the risk that each administrator applies the provisions in the BMR differently, including different information in the compliance statement and / or organising it differently.</p>
<p>Costs</p>	<p>Potential additional costs will be borne by administrators of significant and non-significant benchmarks only.</p> <p>The incremental costs stemming from the proposed template for the compliance statement are minimal, if any. Indeed, it is the Benchmarks Regulation requiring the publication of a compliance statement. The draft ITS just provide a template for such publication. Moreover, the template has been designed in a way to minimise the administrative burden of administrators, in accordance with the general requirement under Regulation (EU) .../2016. The modular approach embedded in the template ensures the administrative work needed to draft the template will be limited to only strictly necessary information. In this context, it should be noted that duplications within the proposed template are completely avoided.</p>

Section 8: Draft regulatory technical standards on the benchmark statement

ESMA is mandated by Article 27(3) of the BMR to specify further the contents of a benchmark statement and the cases in which an update of such statement is required. ESMA proposes to specify the items included in Article 27(1) and (2) through the definition of more specific requirements, in terms of information to be included in the benchmarks statement, and criteria to be considered by the administrators when preparing the statement. The proposed draft RTS also differentiates the applicable requirements in terms of types of benchmarks.

	Qualitative description
Benefits	<p>The main benefit of proposing, through the regulatory technical standards (RTS), a further specification of the content of the benchmark statement to be published by administrators is to increase the clarity of the document published, and comparability of benchmarks statements produced by different administrators. Users of benchmarks and consumers will be the category of market participants who will benefit the most from the application of the draft RTS, but also administrators, required to publish the statement, will benefit as well.</p> <p>As Recital 43 explains, the goal of the benchmarks statement is to provide users of benchmarks with information in relation to what a given benchmark intends to measure and its susceptibility to manipulation, so that they can understand the risk profiles of different benchmarks and choose appropriately among them.</p> <p>Thanks to the requirements included in the RTS, the benchmark statements of different administrators will include the same types of information, making the comparability of the statement much easier. In particular, benchmark statements will have to provide a set of information in relation to any form of discretion in calculation of a benchmark. This information on discretionary elements of the benchmark's calculation is key to ensure transparency and investor/consumer protection because the susceptibility of the benchmarks to manipulation much depends on the level of discretion embedded in its calculation.</p> <p>Administrators should benefit as well from the RTS. Indeed, thanks to the RTS, the application of Article 27 of the Benchmarks Regulation should be easier for them, as it leaves less room for “wrong application” of the requirements they have to apply under Article 27.</p>

<p>Costs</p>	<p>Potential additional costs will be borne by administrators of benchmarks.</p> <p>The incremental costs stemming from the proposed RTS for the benchmark statement are considered minimal. Indeed, it is the BMR requiring the publication of a benchmark statement, and Article 27 of the Regulation already includes the main elements that the administrator has to publish as part of the statement. It is the obligation in Article 27 that is the main source of cost for administrators (i.e. the original obligation to publish a benchmark statement with a pre-defined content). The RTS <i>per se</i> does not include additional elements in the benchmark statement, but rather specifies how the elements in Article 27 must be incorporated in practice in the published benchmark statement.</p> <p>As the draft RTS takes into account the principle of proportionality and distinguishes different types of benchmarks, incremental costs are likely to be higher for administrators of interest rate benchmarks and commodity benchmarks, and administrators of critical benchmarks.</p>
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Section 9: Draft regulatory technical standards on the information to be provided in the application for authorisation and in the application for registration

ESMA is mandated in accordance with Article 34(8) of the Regulation (EU) 2016/1011 to specify further the information to be provided in the application for authorisation and in the application for registration. ESMA proposes in its draft technical standards the set of documents, data and information that the applicants located in the Union and that intend to act as administrators should include in their application for authorisation and in their application for registration.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>The draft regulatory technical standards specify the set of information to be submitted in the application for authorisation and in the application for registration to the competent authority of the Member State in which the administrator is located to demonstrate compliance with the requirements of Regulation (EU) No 2016/1011. This specification of all information to be provided in the application for authorisation and in the application for registration would promote a common and consistent process throughout the Union.</p> <p>These Technical Standards would benefit competent authorities in the different Member States who will have a pre-defined and common framework to conduct their assessment in accordance with Article 34(8) of the Regulation (EU) No 2016/1011. This assessment will not be based solely on the provisions of the mentioned article of the Regulation, which do not include the specific information to be provided for an applicant to be authorised or registered. Without this further clarification, each competent authority would define different requirements to be satisfied by applicants.</p> <p>In close connection, applicant entities would also benefit from these technical standards as they will know in advance which is the information to be submitted in order to obtain authorisation or registration.</p> <p>Finally, the specification of common and consistent information to be provided for authorisation or registration purposes would also increase investor protection as the final investors would be ensured that the benchmarks provided by an authorised or registered administrator throughout the Union have applied the same process and provided the same information for assessment by competent authorities.</p>

<p><i>Costs</i></p>	<p>The draft technical standards specify further the requirements already included in the Regulation (EU) 2016/1011 regarding the information to be provided in the application for authorisation and in the application for registration. Therefore, additional costs stemming from the application of the proposed technical standards are not expected to be material.</p> <p>Moreover, in drafting these technical standards ESMA tried to minimise the burden on administrators, in accordance with the principle of proportionality which is a general requirement under the Regulation (EU) 2016/1011. Where possible, the requirements in these draft technical standards have been reduced depending on the category and type of the benchmark. For example, for critical benchmarks an inventory of actual and potential conflict of interests is to be included in the corresponding policies and procedures while for significant and non-significant benchmarks only the conflicts of interests which could most likely arise would be included.</p> <p>Furthermore, these technical standards reduce also the burden on administrators by not requiring the duplicative submission of information to the competent authority when it is contained in other documents which are also due to be provided to the competent authority as result of the application of other parts of Regulation (EU) 2016/1011 (i.e. the benchmark statement, the methodology, the compliance statement). This non-duplication of the information provided in the application file aims at avoiding any additional costs for administrators.</p>
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Section 10: Draft regulatory technical standards on the form and content of the application for recognition of a third-country benchmarks provider

ESMA may, in accordance with Article 32(9) of the Regulation (EU) 2016/1011, specify the form and content of the application of a third-country provider to obtain recognition as envisaged in the mentioned Article 32. ESMA has decided to draft the regulatory technical standards in this context. Applicants from third countries should therefore conform to the requirements further developed by ESMA in this context.

	<i>Qualitative description</i>
<i>Benefits</i>	<p>The draft regulatory technical standards specify the set of documents, data and information to be submitted to the competent authority of the Member State of reference to demonstrate compliance with the requirements of Regulation (EU) No 2016/1011 or with the applicable IOSCO Principles, the nature and relevance of the benchmarks intended for offer in the Union territory, details of the legal representative established in the Member State of reference and the criteria applied to determine the Member State of reference.</p> <p>The specification of all pieces of information to be provided in the application for recognition would ensure that the process envisaged by Article 32 of the Regulation (EU) 2016/1011 is undertaken consistently throughout the Union. Without such further clarification, competent authorities in the different Member States will have to individually set the form and content of an application for recognition, based on the solely Level 1 provisions. As a consequence of the adoption of the regulatory technical standards, competent authorities will instead have a pre-defined detailed framework, based on which they can conduct their assessments, as required by Article 32, paragraphs 5 and 6, more easily and more rapidly and with less uncertainty about comprehensiveness of received information.</p> <p>Also third-country providers would benefit from the application of the draft technical standards as they will know in advance which are the documents, data and information to be submitted in order to obtain the recognition, irrespective of the Member State of reference and thus with no incentive to forum shopping.</p> <p>An additional indirect benefit is connected with the enhanced protection offered to final investors and consumers, as the benchmarks provided in third-countries by a recognised</p>

	<p>administrator will be all scrutinised on the basis of a consistent set of information.</p>
<p><i>Costs</i></p>	<p>The draft regulatory technical standards is aimed at detailing the contents of an application for recognition, on the basis of the requirements already provided for in the Level 1, but with a view to standardisation of an application contents. As the required information should nevertheless be provided, in order for the applicant to be granted the recognition in accordance with Article 32 of the Regulation (EU) 2016/1011, no additional burden or costs for administrators are foreseeable as a direct result of the application of these draft regulatory technical standards.</p> <p>From the perspective of EU competent authorities, there are no foreseeable incremental costs stemming from the application of the draft regulatory technical standards, as the latter would nonetheless be required to conduct the assessments, as required by Article 32, paragraphs 5 and 6, of the Regulation (EU) No 2016/1011, after the request of applicant third-country providers.</p>