



European Securities and  
Markets Authority

## Reply form for the Consultation Paper on Benchmarks Regulation



## Responding to this paper

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

### *Instructions*

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

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type < ESMA\_QUESTION\_CP\_BMR\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

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

### **Naming protocol**

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

ESMA\_CP\_BMR\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

ESMA\_CP\_BMR\_XXXX\_REPLYFORM or

ESMA\_CP\_BMR\_XXXX\_ANNEX1

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

### **Deadline**

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

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input/Consultations’.



### ***Publication of responses***

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

### ***Data protection***

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the headings 'Legal notice' and 'Data protection'.



## Introduction

**Please make your introductory comments below, if any:**

<ESMA\_COMMENT\_CP\_BMR\_1>

*The IIA appreciates the opportunity to share its view on ESMA's Consultation Paper.*

*Many of the leading independent index providers in the world are members of the IIA, including Barclays, the Chicago Booth Center for Research in Security Prices (CRSP), FTSE Russell, ICE Data Services, Markit, Morningstar, MSCI Inc., NASDAQ OMX, S&P Dow Jones Indices LLC, SGX and STOXX Limited. IIA members administer millions of indices for their clients, covering a number of different asset classes, including equities, fixed income, and commodities. Part of the IIA's mission is to consider ways to promote best practices for index providers, which makes it a natural supporter of appropriate and proportionate industry standards. (The IIA's Best Practices can be found at [www.indexindustry.org](http://www.indexindustry.org)).*

*Our members are dedicated to promoting transparency, sound operational practices, intellectual property rights, education, and effective index management practices. IIA emphasizes that its members take the inputs for their indexes from a regulated exchange, or are constituted from actual market data from other sources, or consist of an objective estimate anchored by actual market information, as opposed to an estimate or opinion of a price at which a transaction might take place. Moreover, our members make publicly available to their clients methodologies, explain how their indices are created, calculated, or maintained. For more information: <http://www.indexindustry.org/>*

<ESMA\_COMMENT\_CP\_BMR\_1>

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

<ESMA\_QUESTION\_CP\_BMR\_1>

The Index Industry Association (“IIA”) supports flexibility in the governance arrangements, in order for the Benchmarks Regulation to be workable. A single structure would not be practical, as administrators have many organizational structures, and many different types of products with distinct methods of input data. The IIA firmly believes the main potential risk of the Benchmarks Regulation is to introduce new risk and conflicts of interest where none exist today. Point 13 of ESMA’s Consultation Paper – “...*should consider including representatives of their input data sources...*” – requires clarification from the perspective of regulated data benchmark administrators Does this refer to the pricing services administrators buy the data from or the trading venue that collects it, or from brokers or the end customer? Each introduces a level of conflict of interest that independent benchmark administrators do not have face. Therefore, IIA would suggest that referencing independent benchmark administrators in Article 4(2) would be a way of mitigating this conflict of interests.

<ESMA\_QUESTION\_CP\_BMR\_1>

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

<ESMA\_QUESTION\_CP\_BMR\_2>

The oversight function should not be mandated to be a natural person who is otherwise not employed by the administrator. Administrators may employ staff with regulatory and compliance skills who will also have industry knowledge far exceeding those of an outside person. These employees would also not be involved with the management of the decisions for the benchmark. Assuming adequate safeguards and procedures are in place; this should be an acceptable solution to get the best oversight of a benchmark.

<ESMA\_QUESTION\_CP\_BMR\_2>

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

<ESMA\_QUESTION\_CP\_BMR\_3>

The concept of observers may make sense if appropriate expertise is not available from the members of the oversight committee. However, this should not be mandated in all cases but left for discretion.

<ESMA\_QUESTION\_CP\_BMR\_3>

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

<ESMA\_QUESTION\_CP\_BMR\_4>

The IIA supports the added references made to “proportionality” in this Consultation Paper and believes they are consistent with the Benchmarks Regulation.

<ESMA\_QUESTION\_CP\_BMR\_4>

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

<ESMA\_QUESTION\_CP\_BMR\_5>

As stated in our response to question 3, the IIA does not believe a one size fits all approach necessarily leads to better oversight given the complexity and breadth of different benchmarks. Staff members of benchmark administrators may have valuable expertise and knowledge to help provide oversight, as long as they do not have daily front office oversight of the benchmarks. Not all administrators have large staffs or all asset classes have “outside expertise”, and therefore mandating the fact that they would not be able to participate may not be helpful in all situations.

<ESMA\_QUESTION\_CP\_BMR\_5>

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

<ESMA\_QUESTION\_CP\_BMR\_6>

The IIA supports the approach used in the IOSCO Principles for dealing with the appropriateness of input data. Administrators should be responsible for selecting input data that represents the market or economic reality the benchmark is supposed to measure. Administrators should select data that is available and represents the reality. For example, IIA is supportive of the IOSCO Principles that allow, in some benchmarks, for a hierarchical approach that is transparent through a methodology statement.

The IIA's main issue regarding input data relates to the meaning of *"readily available to an administrator"*. Neither the Benchmarks Regulation, the recitals, nor the RTS appear sufficiently consistent in dealing with *"readily available data"* and we are concerned National Competent Authorities may not be consistent in the interpretation. The IIA could support the interpretation suggested by ESMA at the Open Hearing earlier in November, which stated that input data is prepared exclusively for the purpose of contributing to the benchmark and, therefore, any other input data falls into the category of *"readily available to an administrator."*

<ESMA\_QUESTION\_CP\_BMR\_6>

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

<ESMA\_QUESTION\_CP\_BMR\_7>

The IIA agrees the draft RTS does provide additional proportionality and clarity. In particular, point 72 is a practical improvement on how the industry operates. We would add that proportionality should be observed; for example, a benchmark with many contributors does not pose the same risk as a benchmark with a highly concentrated number of contributors.

<ESMA\_QUESTION\_CP\_BMR\_7>

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

<ESMA\_QUESTION\_CP\_BMR\_8>

In general, the IIA agrees with the proposed language of key elements being provided as long as the intellectual property rights of the index creator/administrator is respected. The IIA has always been supportive of the fact that users should understand the methodology of a benchmark.

<ESMA\_QUESTION\_CP\_BMR\_8>

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

<ESMA\_QUESTION\_CP\_BMR\_9>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_BMR\_9>

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

<ESMA\_QUESTION\_CP\_BMR\_10>

In general, the IIA agrees with the procedure for consultation. An area of concern, however, is how to handle a material change in methodology based on a market disruption event, rather than a normal



change. The market may be required to have a very quick response based on a change in the market that would not permit a long consultation process. Also, administrators should have the right to summarize the responses received rather than publish all responses. A response could contain non-public information and not be appropriate to be published. Administrators could make all responses available to the relevant regulators if requested.

<ESMA\_QUESTION\_CP\_BMR\_10>

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

<ESMA\_QUESTION\_CP\_BMR\_11>

The IIA has always felt that the best solution is for codes of conduct to be based on the asset classes. IIA does not believe codes of conduct should be required for input data that is “readily available” for the same reason that they are not required for regulated data. Clarifying this would help ensure consistency of interpretation across all National Competent Authorities.

<ESMA\_QUESTION\_CP\_BMR\_11>

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

<ESMA\_QUESTION\_CP\_BMR\_12>

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<ESMA\_QUESTION\_CP\_BMR\_12>

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

<ESMA\_QUESTION\_CP\_BMR\_13>

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<ESMA\_QUESTION\_CP\_BMR\_13>

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

<ESMA\_QUESTION\_CP\_BMR\_14>

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<ESMA\_QUESTION\_CP\_BMR\_14>

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

<ESMA\_QUESTION\_CP\_BMR\_15>

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<ESMA\_QUESTION\_CP\_BMR\_15>

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

<ESMA\_QUESTION\_CP\_BMR\_16>

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<ESMA\_QUESTION\_CP\_BMR\_16>

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

<ESMA\_QUESTION\_CP\_BMR\_17>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_CP\_BMR\_17>

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

<ESMA\_QUESTION\_CP\_BMR\_18>  
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<ESMA\_QUESTION\_CP\_BMR\_18>

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

<ESMA\_QUESTION\_CP\_BMR\_19>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_CP\_BMR\_19>

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

<ESMA\_QUESTION\_CP\_BMR\_20>  
It is unfortunate for market participants that ESMA does not feel it has the authority to improve disclosure by combining the benchmark statement and methodology. Market users will have to go to two places to piece together information they may desire to have in a simpler form. It also unnecessarily increases the costs of compliance of the regulation.  
<ESMA\_QUESTION\_CP\_BMR\_20>

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

<ESMA\_QUESTION\_CP\_BMR\_21>  
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<ESMA\_QUESTION\_CP\_BMR\_21>

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

<ESMA\_QUESTION\_CP\_BMR\_22>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_CP\_BMR\_22>

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

<ESMA\_QUESTION\_CP\_BMR\_23>



The IIA agrees there should be minimal duplication; therefore registration and authorization should be a “one-off process.” We would encourage ESMA to make sure where non-independent benchmark authorization exists they should not be allowed to shortcut the process, even if they are a supervised entity elsewhere. In some cases, more conflicts may exist than with independent administration.  
<ESMA\_QUESTION\_CP\_BMR\_23>

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

<ESMA\_QUESTION\_CP\_BMR\_24>

The IIA does not believe full disclosure of financial information is proportionate or justified by the level 1 text of the Benchmarks Regulation, except in the cases of a critically important benchmark. Financial information provided in the administrator’s regularly filed reports should be sufficient for National Competent Authorities to assess the applicant’s suitability for authorisation.  
<ESMA\_QUESTION\_CP\_BMR\_24>

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

<ESMA\_QUESTION\_CP\_BMR\_25>

The IIA would like to make sure that any information provided to the National Competent Authorities in the assessment process is not made public since the application may contain confidential, proprietary information. We would also ask that ESMA would allow the information contained in an IOSCO audit demonstrating compliance with the organisational structure and governance, conflicts of interests, internal controls, and methodology to be sufficient for all administrators regardless of their location. This would help reduce the duplication of information and reduce the burden of the compliance costs.  
<ESMA\_QUESTION\_CP\_BMR\_25>

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

<ESMA\_QUESTION\_CP\_BMR\_26>

IIA agrees with ESMA that commodity benchmarks based on regulated data are fundamentally different and should be treated differently than commodities benchmarks based on contributed data.  
<ESMA\_QUESTION\_CP\_BMR\_26>

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

<ESMA\_QUESTION\_CP\_BMR\_27>

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<ESMA\_QUESTION\_CP\_BMR\_27>

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

<ESMA\_QUESTION\_CP\_BMR\_28>

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<ESMA\_QUESTION\_CP\_BMR\_28>

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

<ESMA\_QUESTION\_CP\_BMR\_29>

IIA appreciates ESMA recognising that an independent audit of compliance to the IOSCO Principles can substitute for the required information in the Annex (Article 1(4) of the RTS). We support the goal in point 253 on reducing “uselessly burdensome” efforts. We also support point 244 which helps provide for legal certainty and consistency across Member States. However, we are concerned that some information required in Annex 1 does lack proportionality and we specifically question the usefulness of *“full disclosure of financial information that includes forecasts”* which we believe moves well beyond the mandate from the level 1 text.

<ESMA\_QUESTION\_CP\_BMR\_29>

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

<ESMA\_QUESTION\_CP\_BMR\_30>

In general, the IIA believes that the approach is consistent with Article 32(4) and (5) of the Benchmarks Regulation.

<ESMA\_QUESTION\_CP\_BMR\_30>

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

<ESMA\_QUESTION\_CP\_BMR\_31>

The IIA is concerned about the requirement of a third country administrator to notify the relevant regulator as to when a benchmark falls or exceeds the threshold for AUMs. Independent administrators do not necessarily know the AUMs of a benchmark since they do not directly create the product that investors use. The product providers are not compelled to disclose that information based on contractual arrangements. An administrator must therefore be held to a best efforts standard in dealing with these thresholds.

<ESMA\_QUESTION\_CP\_BMR\_31>