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| 29 September 2016 |

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| Reply form for the  Consultation Paper on Benchmarks Regulation |
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| Date: 29 September 2016 |

Responding to this paper

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

*Instructions*

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

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

Responses are most helpful:

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

**Naming protocol**

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

ESMA\_CP\_BMR \_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

ESMA\_CP\_BMR \_XXXX\_REPLYFORM or

ESMA\_CP\_BMR \_XXXX\_ANNEX1

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

***Deadline***

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

All contributions should be submitted online at [www.esma.europa.eu](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>

Intercontinental Exchange (“ICE”) appreciates the opportunity to provide comments and recommendations on the ESMA Consultation Paper on the draft technical standards under the Benchmarks Regulation. ICE operates a leading network of global futures, options and equity exchanges. ICE further provides world class clearing, data across financial and commodity markets.

ICE Benchmark Administration (“IBA”), based in London, was established in 2013 for the purpose of administering benchmarks and is a wholly-owned, independently capitalised subsidiary of Intercontinental Exchange. It administers the following three systemically important benchmarks: ICE LIBOR, ICE Swap Rate and the LBMA Gold Price. In 2015, IBA successfully transitioned the LBMA Gold Price and ICE Swap Rate to new, transparent IOSCO-compliant calculation methodologies. Today, the LBMA Gold Price is based on an electronic auction process and ICE Swap Rate is derived from tradable quotes from regulated trading venues.

Since assuming the administration of LIBOR in 2014, IBA has implemented a number of improvements across governance, surveillance and technology to enhance the integrity of the benchmark. In March 2016, IBA published a Roadmap which outlines further enhancements, incorporating transaction data into the LIBOR methodology to the greatest extent possible.

The UK already has a well-established regulatory regime for financial benchmarks. The legislative framework was introduced following the 2012 Wheatley Review of LIBOR. This regulatory regime sets a number of specific requirements for administrators of, and submitters to, specified benchmarks, including the implementation of effective governance and oversight measures, monitoring of benchmark submissions, identification of any breaches of the practice standards, and having arrangements in place to identify and manage conflicts of interest. Under the UK provisions, firms that either contribute to or administer any specified benchmark must be authorised by the FCA. Initially applied exclusively to LIBOR, the regulatory regime now covers eight benchmarks specified by HM Treasury in secondary legislation, including the ICE Brent Index which is administered by ICE Futures Europe (IFEU).

Authorised and regulated by the Financial Conduct Authority (FCA), IBA is required to comply with the FCA’s rules for benchmark administrators (MAR 8) as is IFEU in its capacity of the administrator of the ICE Brent Index. IBA has been formally assessed in respect of ICE LIBOR against the IOSCO Principles for Financial Benchmarks. In addition, based on the review of LIBOR, IBA has undertaken a self-assessment of its compliance with the IOSCO Principles in respect of ICE Swap Rate and the LBMA Gold Price.

Based in multiple locations across the United States, ICE Data Services (IDS) is a relatively new benchmark index provider with a line of indices known as the ICE U.S. Treasury Bond Index SeriesTM which were launched in January 2016 and ICE US Corporate Bond Indices**,** which were launched in October 2016. We envision an aggressive schedule over the following quarters to add significantly more products for our clients globally.

In addition, ICE Data Services ETF & Index Services include data, operational outsourcing, design support and distribution of index valuation data, as well as supplying valuations for various Exchange-Traded Products (“ETPs”), covering the majority of the Fixed Income ETP marketplace in the United States. We estimate that ICE Data Services supplies valuations for approximately 80% of the Fixed Income ETP marketplace in the United States.

The NYSE Global Index Group has been providing proprietary indices for over 25 years, dating back to the roots of the business at the American Stock Exchange. The group primarily produces equity-based indices, with a small subset of indices containing options, Treasury bonds, and futures.

Well-known indices within the NYSE Index Family include the NYSE Composite Index, NYSE Arca Gold Miners Index, NYSE Arca Gold BUGS Index, NYSE Arca Biotechnology Index, and Intellidex and StrataQuant Index Families. The NYSE Arca Gold Miners and Biotechnology Indices are widely tracked as one of the leading benchmarks for their respective industries. The Intellidex and StrataQuant Indices were innovations when launched, expanding indexing from traditional, market-cap weighted indices to fundamentally-weighted indices.

The indices within the NYSE family have been licensed out for numerous products, including ETPs, mutual funds, structured products, futures, options, and swaps. The vast majority of these products are issued and traded in the U.S. However, there are numerous structured products and swaps issued by European entities and several ETPs tracking NYSE indices that are listed and traded on exchanges in the U.K. and across continental Europe.

The NYSE is currently engaged in continuing to develop proprietary indices for clients across the globe. The Group also provides other index services such as calculations of iNAVs for ETP issuers and third party index calculation services for index providers around the world.

ICE supports any regulatory efforts by ESMA to bring additional investor protection and transparency to the market

<ESMA\_COMMENT\_ CP\_BMR\_1>

1. 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>

Yes, although we recommend some tightening or clarification of the drafting to minimise the potential for ambiguity. We furthermore have specific comments related to the different sections of the draft RTS on the ‘Characteristics and procedures of the oversight function’:

* Recital (8) - This recital states that, “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”.

We agree that persons convicted of financial services-related offences should be prohibited from becoming members of an oversight function. Indeed, we would go further than this and incorporate the following:

* No individual may serve as part of the oversight function if he /she has been charged with an offence relating to a benchmark or has been criticised in an official public report concerning a benchmark unless such allegations or criticism has been proven to be false.”
* An individual who is being considered for appointment to an oversight function must inform the administrator if he /she expects to be charged with an offence relating to a benchmark or to be criticised in a public report concerning a benchmark.
* Recital (9) - This recital states that, “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. [..]”.

We agree that Observers should not have a vote or be deemed to be party to any formal decision taken by the oversight function. However, we do not agree that Observers’ presence is not permanent. For example, the LIBOR Oversight Committee has representatives of the following as Observers: the Bank of England; the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York; and the Swiss National Bank. These Observers joined the committee shortly after IBA became the administrator and are regarded as ‘permanent’ appointments. We therefore strongly recommend ESMA to allow Observers to participate in the oversight function on a permanent basis.

* Recital (10) - We note the statement that, “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”.

Whilst we agree that final decisions with regards to the business of the administrator lie with the management body, at ICE Benchmark Administration (IBA) we value the perspective that independent committees bring. The composition of each of our oversight committees includes Independent Non-executive directors as well as senior staff of the administrator as well as users and Benchmark Submitters. We believe that representation from diverse interests, including from users and market participants, ensures that committee deliberations are well balanced.

Under the current UK regime for systemically important (“specified”) benchmarks, oversight committees are responsible, inter alia, for considering matters of definition and scope of the benchmark. Part of the role of an oversight committee is to ensure that the benchmark is governed with the interests of different stakeholders in mind.

Our oversight committees are committees of the administrator but have independence that means that they are not “embedded within the organisation of the administrator”. The board of IBA could, for example, challenge an oversight committee decision where this might adversely affect the longer term sustainability of the entity.

* Recital (11) - This provides that, “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”.

We agree, subject to it being clear (as stated in Recital (10)) that final decisions with regards to the business of the administrator lie with the management body.

* Article 4(1)(a) - We consider it unnecessary and excessive to require disclosure of conflicts ahead of the discussion of each agenda item during meetings of the oversight function. IBA’s current practice is to ask at the beginning of each oversight committee meeting whether there are any conflicts to be disclosed; we regard this as sufficient.

We propose that ESMA rephrases Article 4(1)(a) of the draft RTS to: Require members to disclose conflicts before discussions take place on the related agenda item in the meetings of the oversight function.

* Annex (2) - In our view, there is a material and fundamental conflict of interest where an administrator is wholly owned or controlled by contributors to the benchmark or supervised entities that use it.

<ESMA\_QUESTION\_CP\_BMR\_1>

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

<ESMA\_QUESTION\_CP\_BMR\_2>

We consider that it would be difficult but not impossible for one individual to carry out the oversight function for an administration of non-systemically relevant benchmarks. Back-up arrangements would need to be in place to cover holidays and sickness. We also suggest that there be a finite, and relatively short, term of office for an oversight individual to ensure that a good level of challenge is maintained.

<ESMA\_QUESTION\_CP\_BMR\_2>

1. Do you support the concept of observers and their inclusion in the oversight function?

<ESMA\_QUESTION\_CP\_BMR\_3>

At IBA we have appointed Observers to the LIBOR Oversight Committee and we find that they add a very valuable perspective to the committee. The basis on which we appoint Observers is that they are encouraged to participate actively in the discussions of the Oversight Committee and to play a full part in all of its deliberations except that:

* Observers do not have a vote,  and;
* Observers are not deemed to be party to any formal decision taken by the Committee.

Observers’ attendance at meetings of the Committee is recorded in the meeting Minutes.

<ESMA\_QUESTION\_CP\_BMR\_3>

1. 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>

Yes, we support ESMA’s proposed approach.

<ESMA\_QUESTION\_CP\_BMR\_4>

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

<ESMA\_QUESTION\_CP\_BMR\_5>

We have the following additional specific remarks on the draft RTS on the Oversight function:

* Article 2(3) - This requires the oversight function to act independently of the administrator where required by Article 5(3)(i) of the BMR which concerns “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”.

It would of course be necessary for the oversight function to act independently in reporting misconduct of the administrator. However, reporting of allegations of misconduct by contributors should be made by the administrator itself; otherwise the administrator could be faced with sharing highly sensitive data with other contributors, thereby creating a conflict of interest.

Article 5(3) of the BMR allows an administrator to adjust the responsibilities of the oversight function based on the complexity, use and vulnerability of the benchmark. As benchmarks based on input data sourced from contributors are more vulnerable to certain types of conflicts of interests, ICE strongly urges ESMA to explicitly mandate the administrator to report allegations of misconduct by contributors.

* Article 3(1) - With reference to publication of the minutes of the meetings or decisions of the oversight function, we advocate that only a summary or redacted minutes should be published. Article 4(1)(d) already alludes to redaction of minutes.
* Article 3(1)(b) - This refers to the criteria to select members of the oversight function and to “identify appropriate observers that may be permitted to join some meetings of the oversight function”.

As stated above in our response to Question 1 (in the context of Recital (9)), we do not agree that Observers’ presence is not permanent or that they should only join some meetings of the oversight function.

<ESMA\_QUESTION\_CP\_BMR\_5>

1. 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>

We agree with ESMA that:

* 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;
* verifiability is the characteristic allowing the material plausibility of input data to be checked, and;
* each of the RTS should be self-standing even where this means repeating the list of records.

We however question the applicability of the requirements of the evaluation of input data for regulated data benchmarks as detailed in Article 3 (1) of the draft Technical Standards on input data. The requirement would impose the obligation on providers of regulated data benchmarks to introduce formal checks on individual transactions and quotes which are sourced from a highly regulated trading environment.

The introduction of additional formal checks on input data do not appear well suited for providers of regulated data benchmarks and would impose burdensome and duplicative requirements. Regulated exchanges are already subject to stringent regulatory standards concerning market integrity, orderly and transparent price formation, and the operation of proper markets (i.e. MiFID). Moreover, their compliance with such regulations is subject to close and continual oversight by the relevant regulatory authorities.

We therefore believe that the exemptions applicable to regulated data benchmark providers need to be extended to include all validation as well as evaluation requirements.

<ESMA\_QUESTION\_CP\_BMR\_6>

1. 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>

Paragraph 65 states the administrator shall verify that 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.

We suggest that it is usually within the remit of a firm’s regulator to satisfy itself that such arrangements are in place. We would caution against blurring the roles of the administrator and those of the regulator.

<ESMA\_QUESTION\_CP\_BMR\_7>

1. 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>

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<ESMA\_QUESTION\_CP\_BMR\_8>

We agree that the administrator should disclose “the definition of the benchmark and of the market or economic reality it intends to measure” in order to allow users to understand the objective of the index and the underlying market it intends to measure.

It needs to be recognised that an estimate of the size of the underlying market may be difficult for an administrator to assess, particularly if the inputs to the benchmark calculation do not represent the market in entirety. For example, in the case of ICE LIBOR, IBA knows the volume of transactions of the LIBOR panel banks but we do not know the total potential volume of transactions that could underpin the benchmark if every bank that is active in the unsecured wholesale deposit and other related markets were compelled to be benchmark submitters. Because of this ‘known unknown’, an estimate of the size of the underlying market could even be misleading to users.

With reference to “c. the unit of measurement of the benchmark”, we would appreciate clarification as to what is proposed by ESMA.

Paragraph 89 of the draft RTS provides that “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”. For systemically relevant benchmarks, we suggest that the priority given to different types of input data and the minimum quantity or quality of input data required needs to be transparent whether or not the administrator has discretion in the selection and composition of inputs.

We support in principle the inclusion of contingency measures during conditions of market stress or when thresholds for minimum quantity and quality of input data are not met. However, it needs to be recognised that planned contingency measures might not be effective in all circumstances, depending mostly on the cause and severity of the stress in particular circumstances. It is important that an administrator has flexibility to act in the best interests of the benchmark and its users, without being constrained by actions dictated by a generic policy that will not foresee all eventualities.

We also support in principle reference to limitations of the methodology, including in illiquid markets. Here it needs to be recognised that an administrator will not be aware of a user’s specific circumstances which may mean that the benchmark has idiosyncratic limitations for some users.

Paragraph 91 of the draft RTS comments that these contingency elements “would allow users to understand how the methodology of the benchmark would react to adverse conditions of the market”. This is too strong since transparency of contingency measures elements should help users to understand how the methodology of the benchmark is expected to react to adverse conditions of the market.

In addition we suggest adding the timing and method of publication of the benchmark.

It would be helpful to clarify whether administrators will be expected to reference every element in Article 1 or only those that are applicable to the benchmark.

<ESMA\_QUESTION\_CP\_BMR\_8>

1. 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>

We consider that publishing the bodies or functions which have approved methodology changes is appropriate. This could be in a general document describing the administrator’s consultation process and/or in documents relating to specific methodology changes.

It should be sufficient to refer to, for example, the particular oversight committee if its remit and composition are also published together with the general procedures for their nomination and removal. We do not agree that “the roles performed by the persons involved in reviewing and approving the methodology” should additionally be published.

<ESMA\_QUESTION\_CP\_BMR\_9>

1. Do you agree with the procedure for consultation on material changes to the methodology?

<ESMA\_QUESTION\_CP\_BMR\_10>

No. We do not agree that an administrator should be required to consult if a change to a benchmark’s methodology is mandated by a competent authority. A more logical sequence would be to hold a public consultation (when appropriate) in advance of the competent authority decision to mandate material changes to a benchmark methodology. Once a competent authority decision is imposed on an administrator, a notification by the administrator to end users and other stakeholders about the mandated material changes to the benchmark should be sufficient.

We note that ESMA cannot support the publication of a summary of consultation comments because of the risk of selecting comments and biasing the publication to users and stakeholders. We would, however, observe that consultation responses can be lengthy and technical; it may not be in the interests of users to have to read through all responses.

It should also be recognised that benchmark users are likely to receive many consultation documents and that ‘consultation fatigue’ may set in.

Finally, we concur with the comment made by several respondents that in certain circumstances an administrator may need to implement material changes to the methodology rapidly. Our view is that, in such an eventuality, the administrator should be permitted (if agreed by the national competent authority), to make changes as a matter of urgency on a temporary basis but subject to subsequent consultation.

Article 3 (Procedure for consultation on material changes to the methodology) states at 1(c) that an administrator shall “ 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”. The words “that stakeholders are able to assess” could lead to challenge to an administrator if a stakeholder felt that they did not have sufficient information – we would prefer, “that stakeholders should be able to assess”. We would also observe that the rationale for a proposed change should be of minimal importance to a user compared with their ability to assess the potential impact of a change and we would therefore question why this is necessary.

Also, the reference to “its intended use” suggests that the intended use is known, whereas this does not appear to be included within the elements of the methodology to be disclosed.

<ESMA\_QUESTION\_CP\_BMR\_10>

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

<ESMA\_QUESTION\_CP\_BMR\_11>

Yes. We agree that, since the code of conduct RTS and the input data RTS could be waived independently, each RTS should have sufficient detail to enable it to stand alone; we accept that this means that there are some provisions that may be found across both RTS.

<ESMA\_QUESTION\_CP\_BMR\_11>

1. 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>

Yes, we agree that the regulatory nature of contributors should be taken into consideration.

<ESMA\_QUESTION\_CP\_BMR\_12>

1. 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>

We suggest that the substantial exposures of individual traders or trading desks should apply to all types of benchmarks for all contributors, unless the national competent authority deems otherwise in the case of specific benchmarks.

<ESMA\_QUESTION\_CP\_BMR\_13>

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

<ESMA\_QUESTION\_CP\_BMR\_14>

We suggest that it is not clear whether the code of conduct must require suspicious data to be reported to each or any of the following:

a) the contributor’s compliance function

b) the administrator, and/or

c) the relevant competent authorities via the means specified by those authorities.

We consider that a contributor should report suspicious transactions to the competent authority rather than to the administrator. However, where the suspicions affect a submission that is about to be made to the administrator, the contributor should inform the administrator promptly if the contributor is unable to submit using its established methodology (if, for example the contributor will exclude one or more inputs to its submission).

<ESMA\_QUESTION\_CP\_BMR\_14>

1. 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>

We consider that the RTS seek to introduce flexibility as appropriate.

<ESMA\_QUESTION\_CP\_BMR\_15>

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

<ESMA\_QUESTION\_CP\_BMR\_16>

ICE supports the changes made by ESMA with regard to the role of submitters. In particular, ICE supports ESMA’s proposal whereby contributors appoint and evaluate submitters. We would however want to stress that the costs, burdens and risks imposed on contributors in relation to the code of conduct will be substantial. Competent authorities will need to be prepared to exercise their powers of compulsion under Article 14 of the BMR. Otherwise, some benchmarks will cease to be viable.

ESMA may wish to consider producing a model code of conduct that could be adopted by administrators according to the specific of their benchmark(s). This could be of particular benefit to administrators of benchmarks that are not deemed critical.

We furthermore have the following additional specific remarks on the draft RTS on the Elements to be included in the code of conduct:

• Article 1(1)(b) - It would be useful to specify the components of the framework. Also, it is not clear whether the “procedures for adjustments to, and standardisation of, the input data and to address potential errors in contributions” are intended to be internal procedures for the contributor or procedures for communicating adjustments or errors to the administrator.

• Article 5 - This suggests that software update checks must be made by a contributor each time prior to contributing input data. It should be clarified that, once a system is fully tested and is in production, a contributor would not have to test the software prior to each day’s submissions.

• Article 9 - Staff involved in the contribution process should also be trained when there are significant changes to an administrator’s code of conduct.

<ESMA\_QUESTION\_CP\_BMR\_16>

1. 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>

We have the following specific remarks on the draft RTS on the Governance and control requirements for supervised contributors:

• Paragraph 134 - Notwithstanding the provisions of Article 16(4) BMR, the RTS should specify that information about breaches and audits should be made available to the administrator.

• Article (1)(4) - In the case of benchmarks that are not deemed critical, it may be proportionate to exclude the requirement for establishing systems capable of producing alerts in line with predefined parameters.

<ESMA\_QUESTION\_CP\_BMR\_17>

1. 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>

As previously stated in our response to question 16, the costs, burdens and risks imposed on contributors will be substantial. Competent authorities will need to be prepared to exercise their powers of compulsion under Article 14 of the BMR or some benchmarks will cease to be viable.

It would also be advisable to consider what will happen when, following the exercise of the powers conferred under Article 14 of the BMR, the maximum two year compulsory contribution period comes to an end.

<ESMA\_QUESTION\_CP\_BMR\_18>

1. Do you agree with ESMA’s specifications of the criteria?

<ESMA\_QUESTION\_CP\_BMR\_19>

ICE generally supports the proposed specifications of the criteria.

We, however, want to stress that we disagree with the proposed differentiation in treatment of input data as opposed to transaction data in Article 1, point (a), (b) & (f) of the draft RTS. Certain exclusions are exclusively available for benchmarks based on transaction data. Benchmarks based on other forms of input data become subject to more stringent requirements,

This proposed dichotomy does not seem to be in line with the BMR level 1 provisions. The definition of ‘regulated data benchmarks’ is based on the premises that all forms of input data could classify as regulated data (the most reliable form of input data) if it is entirely and directly sourced from a regulated environment.

We would recommend that the RTS align with this principle and would distinguish between benchmarks based on data sourced from a regulated environment and benchmarks based on input data from a non-regulated environment whereby the use of judgement and/or discretion is likely to play a role.

<ESMA\_QUESTION\_CP\_BMR\_19>

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

<ESMA\_QUESTION\_CP\_BMR\_20>

ICE agrees that administrators of non-significant benchmarks should have less burdensome compliance statements than administrators of significant benchmarks.

<ESMA\_QUESTION\_CP\_BMR\_20>

1. Do you agree with the proposed specifications of the contents of a benchmark statement?

<ESMA\_QUESTION\_CP\_BMR\_21>

In our response to the ESMA Discussion Paper on the BMR we expressed our reservations about including an unqualified reference to “Information about the degree of utilisation of the benchmark in general and also with regard to different Member States”. The reason for our reservations was the lack of comprehensive information about the degree of utilisation of the benchmark in general and particularly with regard to different Member States. In the draft RTS ESMA has added that a benchmark statement has to contain information on the degree of use ‘to the extent available’. ICE welcomes this explicit caveat in relation to data availability.

ESMA also may wish to consider producing a model benchmark statement that could be adopted by administrators according to the specific of their benchmark(s). Without such a model, widely different benchmark statements are likely to be produced, depending on the administrators’ interpretations of the requirements, and this unlikely to be helpful to users or promote the unified regulatory framework for benchmarks.

In addition, we have the following specific comments regarding the draft RTS on the Benchmarks statement:

• Recital (4) - This refers, for all types of benchmarks, to a “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”. It would be helpful to provide an example of such an identifier.

• Article 1(3)(b) - This states that the benchmark statement shall “indicate the position of each function or body who may exercise discretion in relation to each individual element of the benchmark calculation process”. Again, it would be helpful to provide an example.

• Article 1(3)(c) - This requires that the benchmark statement “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”. An example would be helpful here too.

• Article 2(1)(c) - It would be helpful to elaborate on what is meant practically by “sectoral disciplines”.

• Article 5(h) - This states that, “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”. What further information on the adverse impact on the user is envisaged?

<ESMA\_QUESTION\_CP\_BMR\_21>

1. 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>

Article 8(2)(a) of the RTS on the Benchmark statement refers to the circumstances in which an update of a benchmark statement is required, including “in case the benchmark is no longer reliable to accurately measure the underlying market or economic reality”. An assessment of a benchmark’s reliability to accurately measure the underlying market or economic reality can depend on a number of factors as well as on subjective judgement. Different assessments may lead to different conclusions. Accordingly, we recommend that the Article be qualified to refer to an assessment by the administrator, the relevant competent authority or, where applicable, the college of regulators.

Article 8(3) of the RTS furthermore states that if a change occurred that impacted 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. It would be helpful to set expectations as to what would constitute a “clear indication of the relevant time period”.

<ESMA\_QUESTION\_CP\_BMR\_22>

1. 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>

Yes, we agree with the general approach.

We do however want to stress the importance for benchmark providers to get clarity on by which date they have to apply for authorisation or registration. Due to the differing views on the interpretation of the transitional arrangements as laid down in article 51 of the BMR, benchmark providers are currently faced with considerable uncertainties as to when they are required to apply.

In our view Article 51(1) of the BMR aims to “grandfather” existing benchmark providers. Given that authorisation pertains to an administrator in general, and not to specific benchmarks, the grandfathering of existing providers would allow existing providers to introduce a new benchmark without requiring immediate authorisation. We thereby believe that under the BMR transitional arrangements benchmark providers (on the date of the entry into force) would be allowed to wait with authorisation until 1 January 2020, whilst being able to introduce new benchmarks in the transitional period.

A more restrictive interpretation of the transitional arrangements would effectively deprive an existing benchmark provider of the benefit of the time extension. It would furthermore create an unexpected and undesirable distinction between two existing benchmark providers, one on which needs to change its benchmark or introduce a new benchmark due to market demand (and so would trigger the requirement to apply) and the other which does not (and so would not). In this scenario, there would actually be an incentive for existing benchmark providers not to respond to market demand or to refrain from implementing major reforms, in line with the BMR objectives, aimed at improving the accuracy, robustness and integrity of the benchmark determination process, so as to protect the transitional period.

Transitional arrangements in other recent EU measures have also provided for an extension of the time with respect to authorisation requirements for entities already providing the relevant services. For example, under the European Markets Infrastructure Regulation (“EMIR”), a person within the EU intending to provide clearing services as a central counterparty must apply for authorisation. Under the EMIR transitional provisions, there was no suggestion or implication that central counterparties taking advantage of the transitional provisions would lose the benefit of the extension of time if they varied their activities (for example, by adding new classes of financial instruments), provided that they continued to be authorised in accordance with their national laws.

<ESMA\_QUESTION\_CP\_BMR\_23>

1. Are the general and financial information requirements described appropriate for authorisation applications? Are the narrower requirements appropriate for registration applications?

<ESMA\_QUESTION\_CP\_BMR\_24>

We have the following specific comments to the draft RTS on Authorisation and registration:

• Recital (1) - This refers to the competent authority’s assessment of whether the arrangements established by the applicant at the time of the request for authorisation or registration meet the BMR requirements. In the case of a new applicant, should this refer to the arrangements at the time of actual authorisation or registration (as opposed to the time of request)?

• Article 1(3) - The current wording is: “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”.

This suggests that, where an RTS provision is not applicable, an applicant would nevertheless have to include an explanation of why the provision does not apply. We do not believe that this can be the intention. We believe this section rather refers to those provisions in the BMR which an administrator may choose not to apply on the condition that the administrator provides the national competent authority with an explanation about how it would be able to meet the objectives of the BMR through different means, Providing an explanation for any requirement of this Regulation that does not apply to an applicant would be tremendously burdensome, particularly for those applicants able to benefit from a more proportionate application of the Regulation.

• Annex I (2)(c) - This states that an applicant must provide “Financial forecasts for at least one year ahead“. Is it for the applicant to decide whether the forecast or for one or more years ahead? (If not, what are criteria for deciding the period of time?)

• Annex I (3)(b)(iv) - To ask in respect of an applicant’s senior managers for “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” is very wide. Presumably this relates only to business activities that could reasonably have a bearing on the applicant’s benchmark activities?

• Annex I (5)(b) - This refers to “Fall-back systems and arrangements for determining and publishing a benchmark”. We see this as relating to business continuity arrangements to address an administrator’s temporary inability to publish a benchmark using its usual arrangements, owing (for example) to a building evacuation. We see these short term measures as an essential element of an administrator’s arrangements.

However, we do not think that the arrangements should cater for the possibility of an administrator being unable to follow its usual arrangements in the longer term (perhaps for several months or longer) or require production of an alternative rate. An administrator could not commit to providing an alternative rate, not least because the underlying cause for a longer term dislocation would be likely to apply to any alternative rate.

• Annex I (6)(a) and (b) - The following wording from Recital (9) should be reiterated here: “The type and category to which the benchmark belongs 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”. As stated in our response to the Discussion Paper, there is a lack of comprehensive information about the degree of utilisation of some benchmarks in general and particularly with regard to different Member States.

• Annex I (8)(c) - An administrator should be permitted to redact commercial information relating to third-party outsourcing contracts where the information is not required in order to demonstrate compliance with the BMR.

• Annex I (9) - A uniform template for use across the Union would also be desirable to ensure consistency of approach between competent authorities.

<ESMA\_QUESTION\_CP\_BMR\_24>

1. Are the requirements covering the information on the applicant’s internal structure and functions appropriate?

<ESMA\_QUESTION\_CP\_BMR\_25>

Yes, the requirements proposed by ESMA are appropriate. It will of course be important that competent authorities seek to apply the requirements with a similar level of granularity.

<ESMA\_QUESTION\_CP\_BMR\_25>

1. 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>

Yes. For commodity benchmarks, it may be useful to clarify the expectations in respect of the requirements to “outline, on an aggregate level, the professional profiles of the contributors to the benchmark”.

It would also be useful to clarify the intended meaning of a “synthetic description” in the following text, “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”.

<ESMA\_QUESTION\_CP\_BMR\_26>

1. Is the specific treatment for a natural person as applicant appropriate?

<ESMA\_QUESTION\_CP\_BMR\_27>

This seems light for the authorisation procedures of administrators of systemically relevant benchmarks and we would expect at least the following information to be required to establish a person’s credentials:

• a full CV

• an analysis of relevant qualifications, skills, experience and suitability

• an analysis of potential conflicts of interest

• description of ‘locum’ arrangements to apply if the person is unavailable

• analysis of the robustness of the locum arrangements

• self-declaration of repute

• third-party references

• arrangements for appointment and removal of the individual, and

• where the person is not otherwise employed by the administrator, the applicable contractual arrangements (other than the commercial terms of the engagement) .

We note that ‘Senior management’ and ‘Human resources’ are applicable to a natural person. These would not seem to be applicable unless they are intended to refer to locum arrangements.

<ESMA\_QUESTION\_CP\_BMR\_27>

1. Do you agree with the proposals outlined for requirements for other information?

<ESMA\_QUESTION\_CP\_BMR\_28>

Where the relevant competent authority requests information that is not specifically described in the RTS, the request should be accompanied by a clear explanation of why the competent authority needs the information and how it relates to the Regulation’s requirements. This is important to ensure that consistent standards are applied across the Union.

We note that the form of the application for authorisation or registration to be submitted to the relevant competent authority is not part of the draft RTS but, as previously stated, we suggest that a standard approach would be desirable.

<ESMA\_QUESTION\_CP\_BMR\_28>

1. 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>

Yes, we agree with the proposed approach.

<ESMA\_QUESTION\_CP\_BMR\_29>

1. 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>

Yes, we agree with the proposed approach.

<ESMA\_QUESTION\_CP\_BMR\_30>

1. 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>

Recital (2) comments that this draft 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”. However, later Recitals – for example the following Recitals – seem to introduce duplication where an administrator seeks recognition on the basis of adherence with the IOSCO Principles:

- (7): information on the composition, functioning and independence, in the benchmark calculation, of its governing bodies

- (8): management of conflicts of interest.

With reference to Recital (13), it should not be necessary for a third-country applicant to provide information on the reference values of the benchmarks if the administrator is not seeking to use the exemptions for significant or non-significant benchmarks.

Article 1(3) states that, “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”. We consider that this should not be required where an administrator seeks recognition on the basis of adherence with the IOSCO Principles.

Article 1(4)(a) refers to “an assessment by an independent external auditor of compliance with the IOSCO Principles for financial benchmarks or for PRAs, as applicable”. It is our understanding that the approach taken by independent external auditors is generally is to test the arrangements that an administrator has put in place in order to comply with the Principles rather than to assess an administrator’s compliance as such.

Article 3 concerns an administrator’s policies and procedures and states that “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”.

Again, we consider that this should not be required where an administrator seeks recognition on the basis of adherence with the IOSCO Principles.

We furthermore have the following specific comments to Annex 1 of the draft RTS on Recognition:

• Section (3)(a) (Financial Information) seeks “Information on the applicant ownership structure, including its shareholders and their relative holdings, as applicable”.

Section (1)(g) already asks, where the applicant is part of a group, for “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”. This appears to be duplication unless financial information about group companies is being sought.

If financial information about group companies is indeed being sought, this should be set out in more detail as an applicant would not expect to have to provide financial information for all group companies or shareholders; the latter would indeed be impossible for administrators admitted to Listing.

• Section (3)(b) specifies that the financial statements to be provided include but are not limited to the balance sheet, income statement, cash flow and audit reports. Please clarify what other documents may be requested.

• Section (3)(c) refers to financial forecasts for at least one year ahead. Is this one year ahead from the date of application or expected authorisation?

• Sections (5) (Conflicts of interest) and (6) (Internal control structure, oversight and accountability framework) are duplicative where an administrator seeks recognition on the basis of adherence with the IOSCO Principles.

• Section (6)(b) refers to Fall-back systems and arrangements for determining and publishing a benchmark. As previously stated, we see such arrangements as relating to business continuity to address a temporary inability to publish a benchmark, owing (for example) to a building evacuation.

We do not think that the arrangements should cater for the possibility of an administrator being unable to follow its usual arrangements in the longer term (perhaps for several months or longer) or require production of an alternative rate. We believe that an administrator could not commit to providing an alternative rate, not least because the underlying cause for a longer term dislocation would be likely to apply to any alternative rate.

<ESMA\_QUESTION\_CP\_BMR\_31>