CME Group

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Joint EBA-ESMA Task Force on Principles for Reference Rates
and other Benchmarks-Setting Processes in the EU
c/o European Securities and Markets Authority
103 Rue de Grenelle
75007 Paris
France

Re: CME Group Inc.'s Public Comment on Principles for Reference Rates and Other Benchmarks-Setting Processes in the EU

To the Joint EBA-ESMA Task Force:

CME Group Inc. and its subsidiaries (collectively, "CME Group") – including CME Clearing Europe ("CMECE"), our London-based clearing house – appreciate the opportunity to comment on the consultation paper issued by the Joint EBA-ESMA Task Force on Principles for Reference Rates and other Benchmarks-Setting Processes in the EU ("Task Force") published on 11 January 2013 (hereafter referred to as the "ESMA Consultation Paper" or "ESMA Draft Principles"). As a publisher and user of benchmarks, as well as a highly regulated group of exchanges and clearing houses, CME Group has a significantly vested interest in the ESMA Consultation Paper. This work is a vast endeavor that covers a broad array of issues across many different areas of the financial services industry. Any final work product has the potential to impact many users and administrators of benchmarks, as well as the underlying utility, quality, and reliability of those benchmarks. Because of these significant implications, it is incumbent on the Task Force to pay careful attention to the responses and issues raised by market participants.

I. ABOUT CME GROUP

As a central counterparty clearing house, CMECE clears over-the-counter ("OTC") transactions in a broad range of derivative products. It is a limited company registered in the United Kingdom ("U.K."), and it is approved by the U.K. Financial Services Authority ("FSA") as a Recognized Clearing House ("RCH"). CMECE is also a Designated Security Settlement System under the Financial Markets and Insolvency (Settlement Finality) Regulations 1999, which implement the Settlement Finality Directive (Directive 98/26/EC) of the European Parliament and of the Council of 19 May 1998. CMECE is a wholly-owned subsidiary of CME Group Inc.

CME Group Inc.'s clearing house in the United States ("U.S."), CME Clearing, is registered with the FSA as a Recognized Overseas Clearing House ("ROCH").[1] Additionally, CME Group is in the process of obtaining regulatory approval to launch a sixth derivatives exchange. If approved by the FSA, the new exchange will be based in London.[2] The five registered exchanges that CME Group currently owns and operates are registered as designated contract markets with the U.S. Commodity Futures Trading Commission ("CFTC").[3] Three of those exchanges are also registered with the FSA as Recognized Overseas Investment Exchanges.[4]

As the world's largest and most diverse derivatives marketplace, CME Group fits within several of the draft definitions listed in paragraph 11 of the ESMA Consultation Paper. In particular:

- Benchmark administrator: As registered exchanges, we list contracts that have daily settlement prices which are used by market participants as reference prices.

- Benchmark publisher: Through our joint ventures with (i) Dow Jones & Company, Inc., and (ii) The McGraw-Hill Companies, CME Group is a publisher of equity indices.

- Benchmark user: We license indices from third-parties and other benchmarks from price reporting agencies for many of our exchange listed contracts.

In these various roles, CME Group produces, submits data to, and uses benchmarks and indices for all major asset classes. The following is a representative, though not exhaustive, list of the benchmarks or indices used or produced in various asset classes.

- Interest Rates: CME and CBOT offer products based upon several major interest rate benchmarks, including LIBOR, Euribor, the daily effective federal funds rate, and ISDAFIX.

- Equities: CME and CBOT list products based upon major equity indices, including the Standard & Poor ("S&P") 500® index (and its sub-indices), NASDAQ 100 index, and Dow Jones Industrial Average.

[1] It is also registered with the U.S. Commodity Futures Trading Commission as a designated clearing organization ("DCO").

[2] The U.K. recognized investment exchange ("RIE") will, subject to regulatory approval, operate as CME Europe Ltd ("CMEEL").

[3] They are: Chicago Mercantile Exchange Inc. ("CME"); Board of Trade of the City of Chicago, Inc. ("CBOT"); New York Mercantile Exchange, Inc. ("NYMEX"); Commodity Exchange, Inc. ("COMEX"); and Board of Trade of Kansas City, Missouri, Inc. ("KCBT").

[4] CME, CBOT, and NYMEX.

- Physical Commodities: Prices of many physical commodity products offered on CME Group's exchanges serve as information sources for global benchmarks, including those listed for trading on CBOT (corn, wheat, soybean meal, soybean oil), CME (hogs), NYMEX (crude oil, natural gas, heating oil, gasoline), and COMEX (gold, silver, copper). Many of these prices are licensed to index firms as components of both narrow and broad-based commodity indexes, such as the S&P GSCI® and the Dow Jones-UBS Commodity Indexes℠.

  We also license index data from price reporting agencies ("PRAs") in connection with a number of physical commodity products. For example, among the more than 1,000 energy products that are traded through NYMEX and cleared through CME Clearing or CMECE, over 300 product offerings are based on price assessments provided by the industry's most prominent price reporting agencies, including Platts, Argus, ICIS-LOR, Oil Price Information Service (OPIS), and PetroChemWire. Similarly, CME Group's offerings include commodity index products based upon the S&P GSCI and the Dow-Jones-UBS Commodity Indexes.

- FX: CME lists an extensive suite of foreign exchange products including, for example, contracts based upon G10 and emerging market currency pairs.

- Miscellaneous: CME Group's exchanges are also regularly developing new products to meet the changing needs of a rapidly evolving marketplace. Recently, for example, we have been involved in development of products based upon coal, steel, scrap, and ferrous metals.

All the foregoing activities are highly regulated by our respective sovereign regulators, and therefore are subject to very rigorous requirements with respect to manipulation, fraud, conflicts of interest, supervision, and transparency.

II. CME GROUP'S RESPONSE TO THE ESMA CONSULTATION PAPER QUESTIONS

A. Prefatory Remarks

1. The multitude of benchmark consultations may undermine their intended utility because they overlap in scope and jurisdictional application, and therefore may impose contradictory regulatory requirements.

The ESMA Consultation Paper was issued on the same day as a similar consultation paper published by The International Organization of Securities Commissions ("IOSCO"). There are many similarities between the ESMA Consultation Paper and IOSCO's consultation, as both generally seek comments on policy issues related to the setting and operability of benchmarks. Both efforts are in addition to the Final Report of the IOSCO Board regarding Principles for Oil Price Reporting Agencies ("Oil PRA

Principles")[5] and The Wheatley Review of LIBOR: Final Report ("The Wheatley Review").[6] There is also industry guidance in the form of the CFTC's written decisions for the recent LIBOR enforcement actions,[7] as well as other efforts noted in paragraphs 18-20 of the ESMA Consultation Paper.

If and when all are finalized, each of the foregoing will purport to provide guidance for the operation, maintenance, creation, and use of benchmarks. However, none address the jurisdictional issues that are likely to result, or provide any guidance to market participants regarding which set of principles may or should take precedence over the others. This ambiguity will create uncertainties for market participants who are trying to follow the guidance.

An example of the overlapping jurisdictional issues and resulting confusion can be taken from the dozens of energy swaps that CMECE clears and which are based on benchmarks provided by third party PRAs.[8] Those swaps fall within the guidance set forth in at least three different consultations: the (1) Oil PRA Principles; (2) ESMA Draft Principles; and (3) IOSCO's consultation on financial benchmarks. If the final principles for any of those consultations are different from another (and they do not provide guidance on how to resolve those differences),[9] CMECE and other users and administrators of those benchmarks will be in the untenable position of having to choose between regulators' guidance. In other words, we will be forced to decide to comply with guidance from one regulator at the expense of potential non-compliance with the guidance from one or more other regulators.

This problem is exacerbated by the fact that the ESMA Consultation Paper posits, in paragraph 7, that its guidance will be used as an ostensible regulatory framework "until a potential formal regulatory and supervisory framework has been devised in the EU." While the Task Force in the next paragraph claims that its final guidance would "be without binding effect," CME Group questions the veracity of this statement as it seems likely that, should an issue arise, ESMA and other regulators will in all likelihood at least reference available final principles when assessing whether a market participant, such as CME Group, has acted properly. Moreover, it will take an extended period of time to finalize legislation in the EU, as it must be coordinated with other jurisdictions and then implemented by sovereign regulators.

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[5] OICU-IOSCO, "Principles for Oil Price Reporting Agencies – Final Report" ("Oil PRA Principles"), FR06/12, 5 October 2012.

[6] The Wheatley Review of LIBOR: final report ("The Wheatley Review"). Published September 2012.

[7] *See, e.g., In the Matter of: Barclays PLC, Barclays Bank PLC and Barclays Capital Inc.*, CFTC Docket No. 12-25 (27 June 2012), p. 31, *et seq*.; *In the Matter of: UBS AG and UBS Securities Japan Co., Ltd.*, CFTC Docket No. 13-09 (19 December 2012), p. 60, *et seq*.; *UBS AG*, Financial Services Authority Final Notice, FSA Reference No. 186958 (19 December 2012).

[8] A list of those products is available at: http://www.cmeclearingeurope.com/products/otc-commodity-derivatives.html.

[9] Which seems likely given the fact that even the basic definitions of "benchmark" differ between IOSCO's consultation on financial benchmarks and ESMA's Consultation Paper.

Thus, there appears to be a high probability that the interim regime that ESMA contemplates in paragraphs 7-8 will persist for an extended period of time.

2. The Task Force should coordinate its efforts and take into consideration other benchmark consultation efforts that are already underway.

In light of the foregoing, CME Group encourages the Task Force to coordinate its efforts with other regulators that are also pursuing principled guidance on benchmarks. Through that coordination, the Task Force and other regulators should work toward guidance that does not overlap, either in scope or jurisdictional application. If that cannot occur, the Task Force and other regulators should provide explicit guidance for market participants on how they should resolve conflicts in final guidance. CME Group further encourages the Task Force to avoid adopting a "one-size-fits-all" approach to any final guidance it promulgates. As further discussed below, each asset class is different (and even markets within asset classes are different), and therefore benchmarks must retain the flexibility needed to maximize their utility and effectiveness for a given market and its participants.

3. The Task Force should not adopt final principles based on an incorrect assumption that there are systemic problems "in the area of benchmarks."

In paragraphs 13-15 of the ESMA Consultation Paper, the Task Force makes specific reference to various investigations into LIBOR and Euribor benchmarks. Notwithstanding that no other specific misconduct is identified by the Task Force – nor is any known to CME Group – the ESMA Consultation Paper cites the LIBOR/Euribor investigations and then makes passing references to "other reference rates" to ostensibly substantiate the legal basis for issuing this broad consultation applicable to the full spectrum of benchmarks by stating, "[t]he principles to be developed by this Task Force are designed to address the problems in the area of benchmarks…."

The malfeasance that occurred with respect to LIBOR and Euribor is well known, and CME Group commends the CFTC, FSA, and other regulators for identifying and prosecuting that activity. However, there has never been any indication that the malfeasance that occurred with those benchmarks is, or has been, widespread or present in other benchmarks, let alone the entirety of all benchmarks. Accordingly, it would be helpful for the Task Force to provide additional information on the "problems" it has identified with other benchmarks so that market participants can specifically address those concerns in further responses. In the interim, CME Group respectfully cautions the Task Force from unduly extrapolating malfeasance from the LIBOR and Euribor investigations and then use that extrapolation as the primary legal basis for establishing a temporary regulatory regime that would be applicable to *all* benchmarks within its jurisdiction.

B. Responses to Specific Consultation Questions

In addition to our prefatory remarks above, CME Group's responses to the ESMA Consultation Paper's specific consultation questions can be categorized into several premises. The Task Force should:

(1) reduce the scope of the final principles (*e.g.*, break them down at least into separate asset classes) to maximize their utility;

(2) better define key concepts proposed in the Draft Principles, such as the definitions of "Benchmark", "Benchmark administrator", and "Benchmark publisher", to ensure sufficient flexibility and independence for entities to continue designing and implementing benchmarks that strike the appropriate balance between a robust regulatory framework and meeting the business needs of the marketplace; and

(3) protect existing regulatory and legal (*e.g.*, intellectual property) frameworks for regulated entities while ensuring a level playing field across jurisdictions.

Question 1: Definition of the activities of benchmark setting

Do you agree with the definitions provided in this section? Is this list of activities complete and accurate?

CME Group respectfully submits that the definitions of Benchmark, Benchmark administrator, and Benchmark publisher are too broad and therefore create uncertainty in application. The definitions need to be made more precise and with greater certainty (which, as noted above, would be aided by limiting the scope of the principles across asset classes).

To achieve broad acceptance, it is critical for the Task Force to first generate credibility in its definitions. In addition to simply being more deferential to work that is already well underway on these issues, the Task Force must consider that product markets behave differently and therefore any principles governing them need to be tailored so they are applied most effectively. Rather than trying to create a universal set of principles, a better starting point would be for the Task Force to work toward a set of principles that are applicable by asset class. For example:

- *Fixed income*. Benchmarks in these markets should be considered separate and apart from benchmarks in other areas. Any effort to provide further guidance on fixed income benchmarks should first leverage the guidance already provided by The Wheatley Review and the recent LIBOR enforcement actions taken by the FSA and CFTC.

- *Energy*. A considerable amount of work has already been dedicated to energy benchmarks through IOSCO's work on the Oil PRA Principles. Relevant stakeholders are already well underway in their efforts to implement those principles. Further, IOSCO itself has committed to giving the market 18 months to evaluate their effectiveness. Including them in this broad Consultation Paper only serves to undermine those efforts,

create confusion to the marketplace, and distort the credibility of the Task Force's efforts on this issue.

- *Equity Indices*. These markets should be considered separate and apart from the others. They operate much differently from other markets, and have different stakeholders. For example, unlike many fixed income markets, many equity indices are sourced through observable transaction data and therefore do not lend themselves to the same considerations regarding supervision, conflicts of interest and manipulation.

Even within any one of these asset classes, the Task Force should not adopt a "one-size-fits-all" approach for all benchmarks. Benchmarks fill a number of uses and have many different factors that influence them and therefore the final principles must offer sufficient flexibility to all stakeholders in order for them to remain relevant.

i. Definitions must be precisely tailored

A broad brush stroke approach to crafting definitions will, by nature, encapsulate more than definitions tailored with precision. More is not always better, though. In context of benchmarks, the definitions, and in turn the principles, need to be clear and credible order to provide guidance to and achieve broad acceptance by the marketplace. It is conceivable, for example, to interpret the Task Force's definition of "Benchmark" to encapsulate a published statistic used as a reference in a single financial transaction, and resultantly subject the publisher and user of that statistic to whatever principles or regulations that are adopted. The breadth of this challenges the credibility of everything the Task Force is attempting to achieve.

The Task Force can remedy this by sharpening the scope of its undertaking in at least two ways. First, it could limit its attention to benchmarks that are, by definition, financially consequential. Excluded from consideration would be the myriad statistics that are merely calculated periodically and made "accessible."[10] This shift of approach would promote – or at least not impede – healthy commercial creativity and competition. A published statistic is almost never born with benchmark status. On the rare occasion that a statistic does earn acceptance as a benchmark, it does so only in the fullness of time. If all statistics were held *ab initio* to the standards of governance, methodological rigor, and transparency of administration considered by the ESMA Consultation Paper, then there would be little incentive – and perhaps great disincentive – for the creative activity and experimentation necessary for worthy new candidates for benchmark status to be born.

Second, by observing its own definition more closely, the Task Force would be able to identify more clearly and constructively the boundary at which a statistic graduates to benchmark status. As discussed elsewhere in this response, the Task Force might acquire a clearer view as to the causes and circumstances by which a benchmark ceases to be a "benchmark". For either purpose, the Task Force

[10] Such exclusion would not be prejudicial. Many statistics that possess no definitional standing as benchmarks – perhaps most – are issued by the same price reporting agencies, index producers, or industry associations that also administer *bona fide* benchmarks.

should be encouraged to reconcile the elements of its Benchmark definition with the characteristics that conduce to the credibility that distinguishes a benchmark; this is more fully discussed on pages 13-14.

ii. The definition of Benchmark should more greatly consider user acceptance.

In addition to, and perhaps elaborating on, the foregoing, CME Group takes issue with the fact that the current definition of Benchmark does not contemplate the level, quantity, or breadth of acceptance necessary for a rate, index, price or figure to be included within its definition. Currently, any such item that is made available, calculated periodically and used for reference to measure the performance of a financial instrument will fall within the definition of Benchmark and ostensibly fall within the requirements of the final principles. Even if there is only one person that is using a given rate or index as a reference in a contract, that will be enough to pull it within the definition of Benchmark and thereby subject the administrator to all the regulatory obligations contemplated in the Consultation Paper and final principles. That is not a logical result, particularly when further considered in the context that the entity who publishes the given rate or index (perhaps with no profit motivation at all – such as a non-profit that is simply looking to educate the public) may not even know that someone has started using the rate or index as a reference in a financial transaction.

Take, for example, the University of Michigan Consumer Sentiment Index. Putting aside the fact that the University of Michigan is a non-profit public body and the Consultation Paper attempts to exclude public bodies from its work (a point of contention we address above), if one person decides to peg a financial transaction off that index, it will then fall within the definition of Benchmark, and the University of Michigan will be deemed a Benchmark administrator and therefore subject to all the regulatory strictures of the final principles. While CME Group promotes in this response a level playing field among administrators, bounds are still needed within any regime and the Task Force should avoid overly broad definitions of Benchmark, Benchmark administrator and Benchmark publisher that needlessly pull in entities or people that are not significant or active participants in the market for benchmarks, and who are not currently subject to regulatory oversight. Doing so will likely only result in them opting to no longer offer whatever rate, index, price, etc. that was being compiled, and participants would lose out on that benefit.

iii. Regulated Exchanges and Clearing Houses

The Task Force should clarify whether all contracts listed on regulated exchanges or cleared at regulated clearing houses are included within the definition of "Benchmark" set forth in subparagraph 11.i. If so, the Task Force should consider the fact that such markets are already subject to very rigorous regulatory oversight, and therefore assure itself that further guidance is necessary. If it does intend to include regulated exchanges and clearing houses within the scope of its guidance, then the Task Force should set explicit guidance on how any final guidelines will interact with the incumbent regulatory framework for a given exchange listed benchmark and the underlying market.

In its current form, daily settlement prices ("DSPs") and/or final settlement prices ("FSPs") on contracts listed for competitive trading on organized, regulated futures and options exchanges, such as those within the regulatory purview of the FSA or CFTC, ostensibly fall within the ESMA Consultation Paper's

definition of Benchmark. It also extends to DSPs (or daily closing prices) on corporate equity shares or other corporate assets, or options on such equity shares or other corporate assets, such as are listed for trading on organized, regulated securities exchanges, *e.g.*, those within the ambit of the FSA or U.S. Securities and Exchange Commission.

With one possible exception, such DSPs and FSPs should be removed from the ESMA Consultation Paper's scope, for at least two reasons:

- Redundancy. In at least some jurisdictions, such as the U.K. or the U.S., the administration, governance, calculation, and distribution of DSPs and FSPs is already a closely regulated activity. Exchanges domiciled in such jurisdictions already are held to high regulatory standards of transparency, methodological integrity, procedural robustness, and administrative accountability in the making of DSPs and FSPs.[11]

- Regulatory discord. If DSPs and FSPs are to remain within the Consultation's scope, then a potentially serious risk is that the recommendations made by the Task Force may contradict, misalign with, or conflict with applicable law and regulations already in place.

An exception might be granted for keeping an exchange's DSPs and FSPs within the Consultation's scope, to the extent they serve as data inputs to benchmarks administered by third parties that are unaffiliated with the exchange and lie outside the jurisdiction of the exchange's proximate regulator. Examples might include futures contract daily settlement prices that enter into the calculation of the S&P GSCI, or that may be employed in the creation and/or corroboration of interbank interest rate submissions made by LIBOR or Euribor contributor panel banks.

iv. Greater collaboration with market participants

The ESMA Consultation Paper would benefit from greater interaction and collaboration with relevant stakeholders in the area of benchmarks. CME Group commends the work performed by The Wheatley Review in engaging relevant stakeholders in that process. It also commends IOSCO for its work on the Oil PRA Principles in that it too engaged industry participants. While ESMA scheduled a roundtable discussion in Paris this past week, we do not believe that will be sufficient dialogue to adequately and most effectively consider all the topics at issue here. The sheer scope of these recommendations and extent of divergent issues are too broad to capture in a single roundtable. Additional roundtables should be held after the Task Force further collaborates with other regulators, as well as one-on-one consultations with significant stakeholders.

[11] In the U.S., for example, regulated exchanges are subject to Core Principle 8 for designated contract markets ("Daily Publication of Trading Information"), as set forth in the Commodity Exchange Act: "The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market." 7 U.S.C. § 7(d)(8).

CME Group notes that more substantive efforts were made by The Wheatley Review and IOSCO on the Oil PRA Principles, both of which were narrower in scope with respect to markets at issue. It is only logical that even greater efforts should be made here because the scope of the ESMA Consultation Paper is significantly greater than these other efforts. For example, the Oil PRA Principles note that its work began in 2011, or more than a year before its final report was issued. It first worked with various industry groups (International Energy Forum ("IEF"), International Energy Agency ("IEA"), and the Organization of Petroleum Exporting Countries ("OPEC")) before issuing an initial report in October 2011. It then met in January 2012 with industry participants, including representatives of three major PRAs, to discuss their processes generally, and "learn their views on matters raised by the October 2011 joint report."[12] Two months later, IOSCO released its initial consultation on the Oil PRAs. Thus, an extensive amount of work went into the development of the initial consultation paper, which does not appear to have occurred here, notwithstanding that these recommendations are substantially larger in scope and application.

Question 2: Principles for benchmarks

Would you consider a set of principles a useful framework for guiding benchmark setting activities until a possible formal regulatory and supervisory framework has been established in the EU?

As noted in the prefatory remarks, CME Group respectfully believes that the current trajectory of benchmark consultations – where multiple entities are looking to promulgate overlapping guidance on benchmarks – is problematic. It is particularly problematic to the extent they set forth conflicting guidance, and further troubling when there is no indication of malfeasance having occurred in any benchmarks outside of ones already subject to guidance and principles, as mentioned earlier. Additional interim guidance is not necessary or useful.

A more sensible approach would be for the respective authorities to coordinate and assign a designee to take the lead on developing a framework that can then be considered by relevant jurisdictions. IOSCO seems best positioned to do this, though, as CME Group posited in our 11 February 2013 response to its consultation on financial benchmarks,[13] it must be careful to set forth an appropriate framework. That framework should at least take into account the principles that IOSCO has already set forth in the Oil PRA Principles, and those markets should therefore be carved out of further guidance. IOSCO should then provide guidance for other markets without adopting a "one-size-fits-all" approach. Each asset class (and even markets within asset classes) should be considered separately and final guidance should be tailored specifically thereto. The relevant stakeholders for each benchmark should retain the flexibility to then set forth the methodology, oversight and other considerations most suitable for that

[12] Oil PRA Principles, p. 20.

[13] Attached as Annex A.

benchmark and the underlying market. Once all those principles have been set forth, other authorities can analyze the guidance to determine whether any additional guidance should be provided to account for jurisdictional or regional differences in application.

It is also critically important that any final version of the ESMA Draft Principles does not promote any change or requirement that causes the utility or acceptance of benchmarks to be diminished, or otherwise leads to more opaque markets. For example, the ESMA Draft Principles currently disincentivize certain market participants from participating in the benchmark submission process by subjecting them to "voluntary" regulatory oversight. Instead, as a general proposition, any benchmark principles should be incentivizing voluntary market participants to continue contributing data and information to benchmarks by providing certainty that they will not be subjected to unnecessary regulatory oversight.

To the extent that the final principles will lead to regulations that create barriers to entry to the creation or utilization of benchmarks, they may foster opaque rather than transparent markets. For instance, regulatory strictures on benchmark creation or maintenance may have the unintended effect of reducing the types of participants who can trade on a given market, or limiting the amounts of benchmark exposure that market participants can trade, or limiting the means by which they are able to trade the benchmark exposure. Insofar as such strictures reduce the number and quality of potential trade counterparties, they may lead to more opaque pricing and more risk (*e.g.*, in cases where a party is inadvertently impeded from hedging risk exposure). Among the potential consequences are that end users in the real economy will face higher and/or more volatile prices and reduced or limited access to certain goods and services.

In its current form, the ESMA Consultation Paper does not take into account cost-benefit analyses when considering final principles. When determining the appropriateness of new regulations for a given market activity, regulators and legislators need to be mindful of the risk of distorting the market in question, and should conduct an appropriate cost-benefit analysis before such new rules and regulations are finalized. For any benchmark, such regulations as apply to it should be tailored to address specific risks, must be proportionate to such risks, and must recognize and minimize unintended damage or distortion to the market that is gauged by the benchmark. CME Group believes that the costs associated with implementing any new regulatory standards need to be commercially supportable.

Finally, the ESMA Draft Principles should promote a level playing field among market participants and relevant stakeholders, and should not promote uncompetitive opportunities as a result of regulatory arbitrage. Accordingly, the Task Force should coordinate with other efforts on benchmarks. The existing lack of coordination – both in terms of timing and substantive proposals – creates significant uncertainty for the marketplace and is an inefficient mechanism for addressing these issues. The breadth of the ESMA Draft Principles creates serious uncertainties regarding jurisdictional, enforcement, regulatory, and other legal issues.

Question 3: General principles for benchmarks

Do you agree with the principles cited in this section? Would you add or change any of the principles?

CME Group believes that narrowing the scope of the ESMA Draft Principles would maximize their overall utility. We commend the Task Force for acknowledging that there are myriad benchmarks covering a number of different asset classes.[14] Similarly, we believe the Task Force appropriately recognizes that there are many types of inputs used to calculate benchmarks.[15] The ESMA Consultation Paper is also correct to note that participation and market liquidity may vary over time. These are all reasons why the Task Force should only adopt final principles that sufficiently consider and adhere to these varying market dynamics, and there should not be a "one-size-fits-all" approach that is applicable to the entire spectrum of benchmarks. Unfortunately, the ESMA Consultation Paper suggests just that: "Such principles would cover all types of benchmarks."[16]

CME Group strongly opposes a "one-size-fits-all" approach across all benchmarks for all asset classes. Among previous public consultations on the subject of benchmarks, those that have been most productive are focused upon narrowly delimited asset exposures, and upon the methodological, governance, and regulatory requirements of benchmarks germane to those asset exposures. Examples include The Wheatley Review[17], which dealt specifically with benchmarks applicable to interbank funding and money markets, and the Oil PRA Principles[18], which focused exclusively on benchmarks pertinent to energy markets. By comparison, the scope of the ESMA Consultation Report is overly broad and therefore risks leading to Task Force recommendations that will be too general or too unwieldy to be useful.

CME Group commends the Oil PRA Principles for being circumspect in its application and expressly avoiding the application of an overly broad, "one-size-fits-all" approach.[19] CME Group posits that if a

[14] *See, e.g.*, ESMA Consultation Paper ¶¶ 21-22 ("The existence of a large number and spectrum of different benchmarks is broadly recognized.").

[15] ESMA Consultation Paper ¶¶ 23-24.

[16] ESMA Consultation Paper ¶ 27.

[17] The Wheatley Review of LIBOR: final report ("The Wheatley Review"). Published September 2012.

[18] OICU-IOSCO, "Principles for Oil Price Reporting Agencies – Final Report" ("Oil PRA Principles"), FR06/12, 5 October 2012.

[19] Oil PRA Principles, p. 11. ("Although the principles articulate uniform expectations, the principles do not contemplate a "one-size-fits-all" *method* of implementation to achieve those expectations. For example, differences in methodological approach or in the specific measures implemented by PRAs to obtain *bona fide* data and other information are consistent with these principles, as long as the approaches and measures meet the objectives set out in the principles." (emphasis in original).

"one-size-fits-all" approach was not ripe for the smaller-scaled effort on behalf of petroleum benchmarks, then "one-size-fits-all" application cannot be suitable for an effort such as this that will apply to *all* benchmarks.

i. General framework for benchmark setting

With respect to the general framework for benchmark setting addressed on page 8 of the ESMA Consultation Paper, CME Group believes the design of a benchmark should clearly reflect the key characteristics of the underlying interest it seeks to measure. There is one caveat, however; the benchmarks cannot be tailored so narrowly that for opaque markets, or in momentary periods of illiquidity or market disruption, the alternative is to have no benchmark at all.

A benchmark that has broad acceptance typically earns that status over the course of time, and it is not doled out by regulators applying a rigid set of principles – whether across the entire market for benchmarks or even within asset classes, such as energy or fixed income. CME Group believes that several factors influence if, when, and how market participants decide to confer benchmark status upon any given index or statistic. They are:

a. *Clarity of Definition*: There should be a linkage between the benchmark and the asset exposure it gauges, and this linkage should be delineated as precisely as possible.

b. *Acceptability of Definition*: The benchmark mechanism should gauge its reference asset exposure in a manner that is broadly acceptable to practitioners, both in the reference asset market and in related or proximate asset markets.

c. *Applicability of Definition*: The benchmark mechanism should be widely accepted as comporting with market practices. For instance, there should be clear and ample evidence that market participants use the benchmark as a basis for making contracts and/or commercial agreements.

d. *Methodological Transparency*: The benchmark's methodological features – *e.g.*, its procedures for assemblage of data inputs and the computational methods applied to those inputs – should be explicable and easily accessible to any prospective user.

e. *Methodological Robustness*: The benchmark should be producible under the widest possible range of conditions in its reference market irrespective of whether market price volatility is high or low, or market transaction volumes are thick or thin.

f. *Reliability and Breadth of Distribution*: The benchmark must be produced timely and regularly. It should be published as widely, and with as little encumbrance to potential users, as is commercially feasible for the index provider.

g. *Regulatory Integrity*: The benchmark should be governed with sufficient transparency and rigor for potential users to accept it as an impartial gauge of its reference asset exposure. The benchmark should be subject to regulatory oversight and enforcement,

enough for those who use it as a basis for contractual or commercial agreements to be reasonably assured that its integrity can and will be protected.

h. *Lack of Excessive Regulatory Stricture*: The benchmark should not be subject to regulatory requirements that undermine (unintentionally or intentionally) the preceding criteria. For example, the integrity of the benchmark may suffer if it is held by regulation to procedural standards that cause it to be produced irregularly, *e.g.*, only in "orderly" conditions. Likewise, the benchmark's integrity will be damaged if it is subject to regulations that impose ad hoc or prejudicial restrictions as to the parties who may use the benchmark, or view it, or receive distribution of its values.

ii. Quality and integrity of Methodologies

CME Group's regulated exchanges and clearing houses are already subject to rigorous regulatory requirements with respect to ensuring the integrity of information submitted by market participants that are taken into consideration when determining settlement prices. Any final principles should take this into account and not impose additional regulatory oversight that will not provide additional regulatory value or would cause the underlying market to become more opaque.

CME Group further questions the ability to effectively adhere to these principles across all tenors, underlying assets, and submitters, most of which are not based on observable consummated transactions. CME Group strenuously believes that there is need for the exercise of judgment, particularly with respect to certain exchange traded products, OTC transactions, illiquid products, and in periods of market stress. There is no universal definition that can be applied to administrators of benchmarks, as their necessary roles and responsibilities will vary depending on the underlying market. The important point is for each administrator to have the flexibility to make independent judgments based on feedback from market participants. This has worked effectively at CME Group where our exchanges have the ability to employ the necessary level of judgment around our settlement prices. Further, exercise of judgment may prove essential in extraordinary circumstances. For instance, if a significant geo-political event were to occur at the end of the assessment period, strict reliance upon ordinary inputs may lead an administrator to a result not reflective of market value.

Question 4: Principles for firms involved in benchmark data submissions

Do you agree with the principles cited in this section? Would you add or change any of the principles?

CME Group generally opposes establishing additional obligations on submitters for non-exchange listed benchmarks. One exception would be the LIBOR and related markets where malfeasance is known to have occurred. In the absence of known malfeasance, the Task Force should be sure that additional obligations would not be likely to lead to negative consequences if voluntary participants were subjected to heightened regulatory oversight. The prospect of suddenly facing regulatory exposure,

when before there was none, may cause submitters to stop providing data, impacting the quality of the benchmark, which in turn can have other negative market impacts, such as a loss of market liquidity in products that reference that benchmark. Outside the context of LIBOR, there may be value in an enhanced level of self-imposed oversight through accountability procedures, but submitters to a given benchmark would make that ultimate determination.

The Wheatley Review has recognized that IOSCO, in the context of the Oil PRAs, has already done considerable work on the issue of submitters to non-exchange listed benchmarks.[20] The Task Force should similarly recognize and adhere to the guidance that IOSCO has already published in the Oil PRA Principles. Notably, the Oil PRA Principles state that voluntary submissions should not be converted to required submissions, or expanded to include more than what the submitters voluntarily choose to submit. In particular the Oil PRA Principles state:

> *It is important to understand that these principles recognize that there is no requirement on any physical market oil participant to submit transaction data to PRAs. Because data are submitted on a voluntary basis, precipitous regulation of PRAs or requirements that oil market participants who submit data to PRAs submit all of their transaction data potentially could result in some oil market participants to decrease or even cease their submission of data to PRAs.*
>
> *IOSCO's approach has therefore focused on creating incentives for PRAs to institute processes that IOSCO believes will enhance reliability of assessments that are indicators of the values in the physical oil underlying a derivatives contract.*[21]

Importantly, the Oil PRA Principles acknowledge that, while voluntary submissions may enable submitters to choose to submit more or less data, it is of greater importance to the markets and users that the benchmark continue to be able to function. And if greater restrictions are imposed on voluntary participants that may likely induce the negative consequence of reduced participation. Therefore, the Oil PRA Principles opted not to impose further restrictions on submitters, and the Task Force should adhere to that guidance.

With regard to submitters of data for exchange listed products where the market (as opposed to a regulator) has given an exchange listed contract benchmark status, any necessary regulatory oversight should be imposed on the administrators rather than the submitters. As is currently the case for CME Group's exchanges, there should be a principles based regulatory regime that is administered by a

[20] The Wheatley Review, Box 7.C, p. 59. It stated: "One area where significant work has already been done is in the oil market. Oil is not an exchange-traded product or a regulated market, and benchmark prices in this market tend to be compiled by third-party Price Reporting Agencies (PRAs). Work in this area is being conducted by IOSCO at the request of the G20."

[21] Oil PRA Principles, p. 8.

registered exchange with SRO powers overseen by a sovereign regulator. The current regulatory regime for U.S. derivatives exchanges that CME Group exchanges are subjected to is sufficiently robust and would serve as a useful example for other exchange benchmark administrators to replicate.[22] Doing so would help ensure that all exchanges are on a level playing field.

With respect to conflicts of interest provisions, we encourage the Task Force to ensure it does not publish final guidance that would conflict with the conflicts of interest guidance set forth in the Oil PRA Principles (Nos. 2.11 – 2.16).

One item that has been considered for submitters are codes of conduct. CME Group generally opposes codes of conduct for submitters if imposing them would disincentivize submitters who are voluntarily submitting information from continuing to participate in the benchmark submission process. Notwithstanding, we believe codes of conduct can have utility if universally accepted by the stakeholders, and they are able to agree on a uniform code of conduct within a specific asset class upon consultation and general acceptance by other stakeholders. Where such acceptance and consensus is achievable, a code of conduct should include an increasingly scalable level of responsibility that is correlated to the amount of subjectivity used in determining the benchmark. Thus, benchmarks established from observable consummated transactions would require less responsibility to be set forth in the code of conduct because determining the benchmark should be a relatively robust and objective process. Relying upon committed quotes may necessitate some judgment, and therefore a code of conduct for such benchmarks should be more stringent. Finally, benchmarks that rely exclusively, or at least primarily, on administrator judgment would ostensibly have the highest level of responsibility embedded within the code of conduct.

Question 5: Principles for benchmark administrators

Do you agree with the principles cited in this section? Would you add or change any of the principles?

i. Transparency of Benchmark methodologies

CME Group believes that a benchmark's methodological features, such as its procedures for assemblage of data inputs and the computational methods applied to those inputs, should be explicable and easily accessible to any prospective user. However, as noted above, CME Group opposes a "one-size-fits-all" prescriptive approach for all benchmarks. Rather, we favor a principles based approach and refer to the Oil PRA Principles, particularly items 1.1 through 1.4. While not all the principles in that document will be germane to other benchmarks and their users when assessing benchmark credibility, representativeness, relevance, and suitability, an administrator should consider them in the context of the creation and maintenance of a given benchmark.

[22] For example, CME Group's U.S. exchanges are subject to designated contract market core principles under the Commodity Exchange Act, 7 U.S.C. § 1, *et seq*.

With respect to the type of information used, as a general principle, a benchmark's governance mechanism will promote public confidence in the benchmark if it provides transparency with respect to the quality and integrity of both the benchmark's price reporting methodology and the price assessments on which the benchmark is based. This general principle will not be well served by governance guidelines that entail rigid adherence to prescriptive regulation. To the contrary, governance guidelines should allow for benchmark price reporting methodologies and price assessment bases to be tailored to the particular characteristics of each market.

CME Group supports requirements associated with clear definition of benchmark methodology and clear explanation of calculations and price evaluations, including the extent to which judgment is included among the elements that form that basis for a benchmark. Explanations may include which factors are more or less influential in arriving at a benchmark assessment.

ii. Transparency of contingency provisions for episodes of market disruption, illiquidity or other issues

An administrator should attempt to provide specificity regarding the measures it intends to use in conditions of market disruption, illiquidity, or other stresses prior to those conditions occurring. They should be disclosed in the published benchmark methodologies where reasonably practicable to do so. Contingency plans should take into account the dynamics of the underlying market, participants, and users when setting those measures and they should not be the same for every benchmark. An administrator should utilize reasonable means to publish any such decisions, including publication on its web site.

iii. Transparency over changes to the methodology

Generally speaking, there is significant value in having meaningful transparency for an administrator's consideration of changes to a benchmark. The benchmark should solicit some form of market input before adopting major changes to methodology. This is particularly important where the administrator is aware that its benchmark is being used by a regulated entity that has regulatory obligations to ensure that its contracts which reference the benchmark are not readily susceptible to manipulation or otherwise has to make representations about the benchmark to a sovereign regulator or the marketplace generally. It is critical in those situations for the regulated entity to be made aware of material changes so it can perform its regulatory analysis and make any necessary disclosures.

With respect to how notification of changes should be made, administrators should be afforded some level of flexibility here. However, its notification system should be commercially reasonable for all stakeholders, and should at the very least include prompt notification on the administrator's web site and, if possible, any sort of listserve email distribution.

iv. Frequency of review regarding representativeness of benchmark

As noted elsewhere, this question needs to be considered in the context of the benchmark at issue and the relevant characteristics of the underlying market(s), submitters, and market participants.

Additionally, as PRAs for petroleum products have noted, they calculate hundreds, if not thousands, of assessments on a daily basis. The application of an erroneously prescriptive stricture for a given benchmark may, in practice, be cost-prohibitive. Thus, an administrator should be free to make this determination based on its reasonable judgment and experience, taking into consideration input from submitters and market participants. All relevant and significant stakeholders, where practicable, should assess the commercial importance in reviewing the design and definition of the benchmark on a regular basis and the likelihood and potential velocity whereby its representativeness may lessen over time. In this vein, an administrator should employ a transparent and formal mechanism for submitters or market participants to provide feedback on the purported loss of representativeness of a benchmark and consider in advance whether such feedback should be made publicly available or known to other submitters.

v. Administrator oversight

CME Group does not believe that oversight committees should be established for each and every benchmark. Rather, the administrators should consider the value of adding an oversight committee and, if warranted, consider input from submitters and market participants. Where a benchmark does not utilize and oversight committee, the regulator and administrator should consider a process whereby potential conflicts of interest issues and questions can be referred by the administrator, submitters or market participants.

CME Group believes that a distinction needs to be made between benchmarks that are already subject to a formal regulatory regime – such as exchange-listed products – and those that are not. The former are already subject to a rigorous regulatory regime that addresses this and other issues. For example, CME Group is already subject to CFTC core principles covering conflicts of interest and is subject to reviews by the CFTC, as well as its own internal oversight mechanisms such as its Market Regulation Oversight Committee, which is comprised of independent members of its Board of Directors. The Task Force's concern should be ensuring a level playing field for regulated exchanges and clearing houses and across jurisdictions.

vi. Accountability of the administrator

CME Group believes such factors are generally appropriate; however, as noted elsewhere, there should remain sufficient flexibility for each benchmark administrator, in conjunction with significant stakeholders to the extent practicable, to determine the correct form and level of accountability based upon all relevant considerations for that market. Additionally, the ESMA Consultation Paper should maintain a level playing field for all administrators within an asset class. Regulators must be sure to apply such measures consistently among themselves so that their implementation of any reforms or rules do not create conditions that lead to non-competitive practices among administrators, regulatory arbitrage among jurisdictions or markets/benchmarks becoming opaque.

CME Group generally believes there is a place for external audits particularly with respect to the most heavily used benchmarks and/or those that impact a broad array of market participants. However, external audits should not be required for any benchmark that is already subject to rigorous regulatory oversight.

Detailed self-certification may be appropriate for certain benchmarks, particularly those not subject to external audit or other enhanced forms of regulatory oversight. Administrators should have the flexibility to determine the appropriate level and type of enhanced oversight for their benchmark(s), which should at least include considering the utility of self-certification and maintaining a published explanation for any decision to not maintain a self-certification if there is not already a process for external audit or regulatory oversight.

Question 6: Principles for benchmark calculation agents

Do you agree with the principles cited in this section? Would you add or change any of the principles?

As reflected in our response to Question 5, as a general principle, a benchmark's governance mechanism, including its calculation agents, will promote public confidence in the benchmark if it provides transparency with respect to the quality and integrity of the benchmark's price reporting methodology and price assessments on which the benchmark is based. Moreover, CME Group believes there should remain flexibility for each calculation agent to determine the correct form and level of accountability based on relevant considerations for that market. And while a code of conduct may achieve several goals, the respective calculation agent should have the flexibility to decide whether to utilize a code of conduct in the first place.

Question 7: Principles for benchmark publishers

Do you agree with the principles cited in this section? Would you add or change any of the principles?

As regulated entities under the FSA and CFTC, CME Group's clearing houses and exchanges are subject to stringent regulatory requirements with respect to their listed contracts. Notably, for purposes of this discussion, we have to comply with designated contract market Core Principle 3 of the Commodity Exchange Act in the U.S., which states that exchanges can only list contracts that are not readily susceptible to manipulation. Moreover, CME Group's U.S. exchanges must satisfy an extensive array of representations concerning Core Principle 3 when listing a new contract or validating the compliance of existing contract. In order to competently make these representations for products that rely on a third-party contract, the exchange must be privy to sufficient and robust data and information from the third-party.

Self-imposed controls, processes, and policies at the third-party administrators (*e.g.*, Oil PRAs) are a starting point. Adding codes of conduct, like the ones that the major petroleum PRAs have committed to go even further to increase the transparency and overall effectiveness of the process. Other suggestions by the Oil PRA Principles, such as maintaining audit trails that can be made available to regulators upon

request may also be appropriate. External audit reports will work well for some benchmarks, as has been recommended in the Oil PRA Principles, such as when data is produced voluntarily and judgment by the administrator comes into play. However, external audit reports would likely provide little value to equity indices since that data is largely based off of observable consummated transactions.

Question 8: Principles for users of benchmarks

Do you agree with the principles cited in this section? Would you add or change any of the principles?

Generally speaking, users should not be compelled to play a role in enhancing the quality of benchmarks beyond that of voluntarily providing insight into any proposed changes, revisions, or considerations. The Task Force certainly should not adopt a principle that recommends a compulsory role for users across all benchmarks. As noted above, benchmarks and markets must have the flexibility to determine what level of oversight is most appropriate. Playing a compulsory role in enhancing benchmark quality would likely be burdensome for at least some users taking on such responsibility. For example, it would not be feasible to expect all registered users of exchange listed benchmarks to play such a role. How would all exchange users know which of the thousands of exchange listed products fulfill a set of principles? Moreover, even if they were able to make such a determination, their ability to adhere to any such requirement would be further frustrated where, as discussed above, another entity's principles (*i.e.*, IOSCO) imposes a conflicting requirement? It is unreasonable to think that, for example, floor traders would have any wherewithal to track which exchange listed products are considered a benchmark under a particular set of principles, let alone multiple sets of principles, thus requiring some level of mandatory compliance.

Question 9: Practical application of the principles

Are there any areas of benchmarks for which the above principles would be inadequate? If so, please provide details on the relevant benchmarks and the reasons of inadequacy?

A benchmark that is based primarily upon "bona fide transactions" may be made operationally robust with respect to episodes of market stress, disruption, or sparseness of trade by incorporating the methodological flexibility to accommodate such episodes. For instance, the benchmark's data scope can be defined so as to incorporate a hierarchy of sources encompassing not only transaction prices but also, perhaps under stressed or disrupted circumstances, actionable price indications (bids, offers) and price information drawn from adjunct markets. The array of techniques for establishing daily settlement prices and final settlement prices for contracts listed on CME Group's exchanges exemplify this in the context of benchmarks based on trading activity on an organized regulated market. The framework set forth in the CFTC's separate enforcement actions against Barclays and UBS, which enables BBA LIBOR Contributor Panel members to reference related markets for ancillary information in the construction of

their daily LIBOR submissions, exemplifies the same in the context of benchmarks based on surveys of assessments or estimates of prices or rates.

CME Group would not support a prescriptive approach requiring that only transaction data be considered in the calculation of a benchmark (to the exclusion of, for example, bid or offered prices, or other sources of market information). The types of data necessary to determine the price of an asset or derivative may vary depending upon the characteristics of the market. From one market to another, different benchmarking mechanisms may be required to summarize the information in a way that would make such benchmarks useful to market participants. A benchmark structure that adequately indexes the features of one market may fail to do so when applied to those of another market. For instance, in the context of interest rate benchmarks:

- *Transaction-based measures*. These are likely to suit markets with consistently heavy transaction flows. Examples would include interest rate benchmarks for overnight unsecured interbank money markets, such as Eonia, Sterling Overnight Index Average or the US daily effective Federal Funds rate.

- *Committed quote-based measures*. These may suit certain institutional arrangements. For example, where a finance ministry or central bank oversees a cadre of designated primary dealers who furnish liquidity to the government's debt markets, it may construct daily price benchmarks for government securities issues on the basis of price quotes posted by the designated primary dealers. Another example would be the London Gold Fixing by which five leading bullion dealers participate in a twice-daily tâtonnement to determine the market clearing price.[23]

- Surveys of non-actionable quotes. These are suited to markets in which transaction flows are prone to be sparse or sporadic. Exemplars are LIBOR and Euribor.

The Wheatley Review of Libor, Initial Discussion Paper observed that "[a] benchmark that instills confidence and that can be used by market participants without question as to its integrity" should possess robust methodology, credible governance, and formal regulatory oversight, and should exhibit transparency.[24] We would concur, adding only that any such benchmark must feature regularity and reliability: in order to instill confidence, it must function in all seasons and under all conditions.

Consequently, CME Group believes that any regulatory requirements stemming from the ESMA Consultation Paper should contain clear language that there be no prescription of methodology, neither for benchmark creation nor for determination of market or price information on which the benchmark is based. The inclusion of such language would protect the efforts of market index creators to make benchmarks that are usefully representative of their object markets or asset exposures.

[23] http://www.goldfixing.com/.

[24] The Wheatley Review of Libor, Initial Discussion Paper, Section 5.20.

By way of example, the Task Force should consider the array of techniques that CME Group currently uses to establish daily settlement prices and final settlement prices for contracts listed on its exchanges. We strongly believe that they demonstrate the proven utility of adopting a flexible approach to benchmark setting. For any given contract, the method for establishing the daily settlement price depends on the asset price exposure reflected in the contract, level of trading activity and liquidity in the contract during the defined daily settlement (or "closing") time period, and the trading venue(s) on which the contract's daily settlement price is based. CME/CBOT/NYMEX Rule 813 ("Daily Settlement Price") details the various methodologies in use and shows, in a number of instances, the methodological flexibility that may be required to daily settlement price. As set forth in those rules, such methodologies may include (in pertinent part):

i. Midpoint of the Closing Range. In products that use this procedure, the first trade and all subsequent trades, higher bids and lower offers that are quoted during the established closing time period will be included in the closing range. The midpoint of the high and low quotes in the closing range will be the settlement price.

ii. Volume-Weighted Average Price ("VWAP") of the Closing Range. In products that use this procedure, all outright trades that occur during the defined closing time period are utilized to calculate the VWAP for specified contract months and the VWAP will be the settlement price. If the open outcry venue is used to determine the settlement price, the VWAP may be estimated. The calculated or estimated VWAP of relevant spread trades that occur during the closing time period may be used to determine the settlement price of deferred or less actively traded contract months in products that use this procedure.

iii. Bid/Ask Midpoint at the Close. In products that use this procedure, the midpoint of the bid/ask at the defined closing time will be the settlement price.

iv. Option Settlements. Option settlements are derived from available market information including, but not limited to, outright trades, bids or offers during the close, relevant spread trades, bids or offers during the close, the settlement price of the underlying future and relevant relationships based on option pricing theory using option pricing models employed by the exchange.

v. For all contract months not determined by one of the methods set forth above or pursuant to Section 6 below, relevant spread relationships between contract months will be used to derive the settlement.

vi. In the event the Exchange determines that the settlement price derived by one of the methods set forth above is not an accurate representation of the relevant market, the Exchange may determine the settlement price based on other market prices, including settlement prices for similar contracts trading on other exchanges.

vii. For all products that are settled with the delivery of, or by reference to, the same underlying instrument but which are offered in alternative contract sizes (mini or micro), a single settlement price will be applicable to all such contracts, with necessary adjustments made to round to the nearest tradable price increment eligible in all such contracts.

viii. For contracts cleared through ClearPort Clearing that are not otherwise settled by one of the methods set forth above, staff shall determine settlement prices for such contracts based upon a consideration of relevant market data, including, but not limited to, trading activity in such OTC products, pricing data obtained from OTC market participants, the settlement prices of related products and any other pricing data from sources deemed reliable by Staff. With respect to CDS products, in addition to the foregoing, the exchange may use a price quality auction in which bids and offers submitted by members may be "crossed" to effect trades and establish settlement prices for particular contracts.

The Task Force should be mindful that there are few benchmarks in the world, aside from exchange traded contracts, that would be able to survive if it became a requirement that they could only rely on observable transaction data. A better approach is for administrators to have the flexibility needed to choose the inputs, data and methodologies best suited for the market. Critical to this is having the flexibility to use judgment, if necessary, or other actionable price indications (*e.g.*, bids and offers) that hold the potential to become observable transactions. Their methodology should potentially consider inputs from other markets to ensure the benchmark is able to continue serving participants in periods of low liquidity or market disruption.

If prices made in a market characterized by sparse trade are intrinsically useful to market practitioners for the purpose of financial reckoning and/or risk management, then the availability of a reliable, valid, and transparently determined benchmark becomes all the more important, precisely because the market is sparsely traded. Section 2.14 of the Initial Discussion Paper by The Wheatley Review poses the issue clearly in the context of LIBOR (and, by extension, other such survey-based benchmarks): "Under the current definition of Libor a lower volume of trades is not necessarily a problem since there is no mechanical link from transactions to the Libor calculation.... However it might make the expert judgment required to determine the appropriate rate submission more difficult…."[25]

The determination of rate submissions by LIBOR contributor banks should not be "difficult," given (a) proper supervision, and (b) adequate latitude for judgment on the part of LIBOR submitters. The requisite latitude would be achieved, for instance, within the framework set forth in the CFTC's enforcement actions against Barclays[26] and UBS[27], which permits LIBOR submitters to reference related markets for ancillary information in the construction of their daily LIBOR submissions:

[25] The Wheatley Review of Libor, Initial Discussion Paper, Section 2.14.

[26] *Barclays*, CFTC Docket No. 12-25, p. 31, *et seq*.

(a) The ancillary information would comprise the prices of transactions involving the Libor contributor bank itself, third-party trades observed by the contributor bank, and third-party offers observed by the contributor bank*, e.g.*, as indicated by interbank brokers.

(b) The markets from which such ancillary information could be drawn would comprise (i) the London interbank market for unsecured placements of funds, (ii) other markets for unsecured bank funding, such as nonbank placements of funds, and banks' issuances of certificates of deposit ("CDs") or commercial paper, and (iii) related markets, such as the market for synthetic term funding by way of foreign exchange forward transactions, funding transactions conducted elsewhere than London (*e.g.*, interbank transactions in US federal funds, or intra-Eurozone interbank placements of euro-denominated funds), short-term interest rate futures, and repurchase agreements or other forms of collateralized borrowing or lending.

Question 10: Continuity of benchmarks

Which principles/criteria would you consider necessary to be established for the continuity of benchmarks in case of a change to the framework?

In promoting fair competition in any transfer regime, the final principles should protect the existing intellectual property and licensing rights of stakeholders. The ESMA Draft Principles do not substantively mention or consider intellectual property and licensing rights. To the extent that the final principles will include transition or continuity provisions, the scope of the work should be expanded to include principles that sufficiently protect the commercial interests of stakeholders with intellectual property and licensing rights.

In particular, existing license agreements may contain highly confidential and commercially sensitive information regarding the use of benchmark data. If a benchmark is ever transferred to a new administrator, it would likely lead to the inevitable transfer of existing license agreements as part of the transfer process. The rights transferred to, and licensed by, the new administrator should include the right to continue to use the original trademark and branding.

During the transfer process, it is important to maintain confidence as much as possible in existing licenses. For example, during the initial due diligence and selection phase, license terms, economic terms, and any other highly sensitive information contained in the licenses should be redacted, and only aggregated license income information should be furnished (provided that individual licensee revenue cannot reasonably be ascertained from such aggregated information).

[27] *In the Matter of: UBS AG and UBS Securities Japan Co., Ltd.*, CFTC Docket No. 13-09 (December 19, 2012), p. 60, *et seq*.

Additionally, more detailed information should be made available to the successful bidder only at the final stage of the transaction (provided that, if the successful bidder is a competitor of any licensor, then sharing of such information should be subject to additional measures, such as sharing with an external counsel's eyes – only basis until the conclusion of the transaction, and stringent continuing obligations of confidentiality).

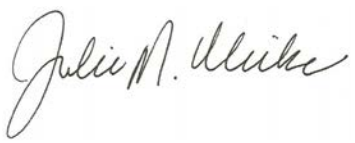
There should be a continuation of existing licenses on current terms during any transition in order to avoid prejudice to licensees arising out of the transition. And there should be clear and enforceable obligations on the new administrator, such that any new licenses (including renewals of existing licenses or otherwise renegotiated existing licenses) should not contain clauses that are commercially unreasonable, materially more onerous, or likely to prejudice the interests of the licensee than those in existing licenses, coupled with the right for licensees to be offered more favorable terms in the event these are offered to other licensees in similar circumstances (to avoid prejudicial treatment of any particular licensee). The new administrator should not be entitled to use its new appointment as an opportunity to obtain material commercial advantages over other market participants by simple virtue of its ability to provide the benchmark data.

As noted above, the current Article 30 MiFID proposal should also be taken into account in the regulatory treatment of benchmarks. In addition to definitional discrepancies, the Task Force should be mindful of the potential conflict between traditional intellectual property laws (including WTO TRIPs criteria typically applicable in compulsory licensing) and the MiFID proposal, particularly in relation to an intellectual property owners' ability to control and exploit its intellectual property. The need for clarity in this area is exacerbated by differences in actual intellectual property rights in relation to indexes and other databases, with the unique European *sui generis* database which is not available in other jurisdictions.

III. CONCLUSION

CME Group thanks the Task Force for this opportunity to comment on this important topic. We would be happy to further discuss the ESMA Consultation Paper and our responses in person or any other format should if that would be helpful to the Task Force. Should you have any questions in the meantime, please feel free to contact me at julie.winkler@cmegroup.com or (312) 634-8842, or Joe Adamczyk at joseph.adamczyk@cmegroup.com or (312) 648-3854.

Sincerely,



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