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| Response Form to the Consultation Paper |
| Guidelines on Internal Controls for CRAs |

**Responding to this paper**

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

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

ESMA will consider all comments received by **16/03/2020.**

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

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA\_QUESTION\_ICG\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA\_ICG\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_ICG\_ABCD\_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading “Your input – Open consultations” 🡪 “Consultation on Position limits and position management in commodities derivatives”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

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**Who should read this paper**

This document will be of interest to asset managers managing retail funds and their trade associations, as well as institutional and retail investors investing into such funds and their associations.

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | S&P Global Ratings Europe Limited |
| Activity | Other Financial service providers |
| Are you representing an association? |  |
| Country/Region | Europe |

**Introduction**

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

<ESMA\_COMMENT\_ICG>

S&P Global Ratings welcomes the opportunity to submit comments on the Consultation Paper concerning Guidelines on Internal Controls for CRAs (“Proposed Guidelines”). We understand ESMA’s objective is to clarify the characteristics and components of an effective internal control system for Credit Rating Agencies (“CRAs”), and that, in pursuing this objective, ESMA considered a range of EU and international requirements practices and standards.

S&P Global Ratings is generally supportive of ESMA clarifying the requirements of Regulation 1060/2009 (as amended, the “CRAR”). We agree with ESMA in paragraph 55 that the Consultation Paper “should not recommend specific organisational structures” but instead should “recommend a number of principles that a CRA’s internal controls system should adhere to in order to meet the objectives of the regulation”.

However, instead of setting out principles, in our view the Proposed Guidelines are often overly prescriptive when describing certain components of the internal controls framework (“IC Framework”) and internal control functions (“IC Functions”). If adopted as proposed, the final Guidelines could require CRAs to make significant and impractical changes to the way such functions are currently organised and may trigger process changes at CRAs creating unnecessary burdens and disruption. By being overly prescriptive, we are concerned that the Proposed Guidelines do not appropriately recognize that the principles of an effective internal control system are achievable in various ways and whose successful implementation should be measured by results.

We are equally concerned that some of the Proposed Guidelines would effectively rewrite certain provisions of the CRAR. For example, when describing the role of a CRA’s administrative or supervisory board (the “Board”), the Proposed Guidelines give the Board a role which goes well beyond its supervisory function set out in Annex I Section A of the CRAR. By blurring the line between the respective duties of a CRA’s senior management and its Board, the Proposed Guidelines effectively impose new corporate governance standards, instead of providing guidance on the Board’s supervisory role within the CRAR and other regulatory requirements.

<ESMA\_COMMENT\_ICG>

**Questions**

1. : Do you have any comments on the proposed Guidelines under the section on IC Framework? In providing your comments please refer to the general principle, component and/or characteristic that you are commenting on.

<ESMA\_QUESTION\_ICG\_1>

**Internal Control Framework - Section 3.1 of the Proposed Guidelines**

The Proposed Guidelines (i) appear to redefine certain aspects of CRAs’ corporate governance set out in Annex I Section A of the CRAR, including the roles and responsibilities of the Board, and (ii) lack clarity in distinguishing the duties of senior management in their management capacity from their role as board members.

**The Board’s supervisory role under the CRAR**

S&P Global Ratings believes that the Board, including its independent non-executive directors (“INEDs”), is responsible for overseeing the CRA’s implementation of the regulatory requirements under the CRAR including monitoring the effectiveness of policies and controls put in place by the CRA to ensure compliance with the CRAR.

Section A of Annex I of the CRAR distinguishes between (i) the tasks that the CRA’s board members “*shall ensure*” are performed as referred to in point one and (ii) in addition to the overall responsibility of the Board, the specific tasks of the INEDs in monitoring any of the matters referred to in the sixth paragraph of that point.

By suggesting that the Board should be “*accountable for all components of the IC Framework*” (paragraph 9) or for the “*adequacy and effectiveness of the control environment*” (paragraph 12) the Proposed Guidelines do not reflect, and perhaps conflict with, the Board’s supervisory role set out in the CRAR, including its role in overseeing or monitoring the framework’s implementation and effectiveness. The Proposed Guidelines do not sufficiently distinguish between the supervisory role of the Board and the executive function and responsibilities of the CRA’s senior management.

The role of the Board as defined in the Proposed Guidelines is also not in line with established industry practice, in particular with those cited in the Consultation Paper. For example, the framework adopted by The Committee of Sponsoring Organizations of the Treadway Commission (COSO) states that a board is responsible for **overseeing** *[emphasis added]* the system of internal control. Similarly, the European Banking Authority’s “Guidelines on internal governance under Directive 2013/36/EU” dated 26 September 2017, state in paragraph 24 that the board in its supervisory function “***oversees and challenges*** *[emphasis added] the management function and provides appropriate advice*”. Also, it is stated in paragraph 4 that “*the oversight roles include reviewing the performance of the management function and the achievement of* *objectives, challenging the strategy, and* ***monitoring and scrutinising*** *[emphasis added] the systems that ensure the integrity of financial information as well as the soundness and effectiveness of risk management and internal controls*.” In addition, recital 14 of Commission Recommendation 2005/162/EC of 15 February 2005 states that the “*key responsibilities of the (supervisory) board [include]* ***monitor[ing****] [emphasis added] the procedures established for the evaluation and management of risks*”. Furthermore, point 4.1 of Annex I of the Recommendation states that the board (or, where in place, the audit committee), should “*review at least annually the internal control and risk management systems, with a view to ensuring that the main risks (including those related to compliance with existing legislation and regulations) are properly identified, managed and disclosed*.”

The final Guidelines should reflect the CRAR’s requirements and provide guidance on how CRAs can effectively comply with these, rather than extra-legislatively expand the scope of the CRAR on this fundamental area of corporate governance beyond the requirements of the CRAR and previous interpretation provided by ESMA such as ESMA’s letter regarding “*The role of independent non-executive directors in credit rating agencies*” dated 1 April 2016.

We therefore suggest that in Section 3.1 (IC Framework), whenever referring to the roles of the Board, ESMA should clarify that the Board should monitor and oversee relevant aspects of the IC Framework, instead of stating that the Board should be “accountable” and/or “responsible”, or “retain ultimate accountability and responsibility”, for those. For instance, in paragraph 9 we suggest that the Board *“… should monitor all components of the IC Framework as well as ensuring that they are subject to monitoring and regular update*“. Furthermore, in the final sentence of pa 12, we suggest that the board should “*…. oversee the adequacy and effectiveness of the control environment*”. The final Guidelines should emphasize the specific role of the INEDs in line with point 2(b) of Section A of Annex I which states that they “*shall have the specific task of monitoring: …(b) the effectiveness of the internal quality control system of the credit rating agency in relation to credit rating activities”*

**Prescriptiveness of ESMA’s Proposed Guidelines when defining certain components of the IC Framework**

ESMA states in its cost benefit analysis (Annex I of the Consultation Paper) that it does “*not recommend specific organisational structures*” and instead “*recommend a number of principles that a CRA’s internal control system should adhere to*”. Yet, in important respects, the Proposed Guidelines are not at all principles-based because they leave CRAs no discretion on how to comply in the framework of their own internal control arrangements and corporate frameworks. We provide examples of this further below. We consider that the final Guidelines should more closely follow the COSO framework by stating principles and then providing examples of how those principles might be implemented by CRAs rather than by imposing a one-size-fits-all approach.

<ESMA\_QUESTION\_ICG\_1>

1. : Are there any other comments you wish to raise on this section?

<ESMA\_QUESTION\_ICG\_2>

**Paragraph 9 of the Proposed Guidelines**

As explained above, we believe that the following wording would better reflect the rules set out in Annex I Section A of the CRAR” *The Board should monitor relevant components of the IC Framework as well as that they are subject to monitoring and regular update*.”

Instead of using terms like “*written* *internal control policies*” or “*mechanisms*”, we suggest referring to CRAs’ “*internal policies and procedures related to the CRA’s compliance with the CRA Regulation*” for consistency with the description of “*internal policies and procedures*” in ESMA’s Guidelines on the submission of periodic information to ESMA by Credit Rating Agencies.

Furthermore, we suggest that ESMA should avoid bringing into scope “*any internal document that governs or directs how the CRA or its staff should perform activities*” (paragraph 7) as such documents can cover a very wide and diverse range of documents concerning operational and technical matters. In our view, the CRA’s management should not reasonably be expected to be responsible for “*developing and implementing*” such technical and operational documents (as suggested in paragraph 10). In this respect, we also have concerns about ESMA’s statement that the “*board should be accountable for the implementation and approval of these policies and procedures …[and] for ensuring that [these] … are subject to ongoing monitoring and regular update*.”

In our view, the same objective would be achieved as in ESMA’s statement that “*there should be a clear, transparent and documented decision-making process for the monitoring and updating of these policies and procedures.*” This would give each CRA the opportunity to determine how it addresses the policies and procedures development and approval.

In this regard, S&P Global Ratings has established a hierarchy of policies, standard operating procedures (“SOPs”) and other, more operational and technical documents that aim to satisfy this goal.

S&P Global Ratings’ policy development and review process is managed by the Compliance function through its Policy Governance Group (“PGG”). Policies are not approved until each of the Compliance and Risk management function, the Legal department and relevant stakeholders sign off. S&P Global Ratings’ In-Business Control function uses a similar approval process for SOPs.

S&P Global Ratings’ policy documents currently include a policy statement, internal procedures and controls, and jurisdictional supplements addressing specific regulatory requirements.

Furthermore, we suggest amending the second sentence of paragraph 9 as follows “*In order to support the components of the IC framework, CRA’s senior management should be responsible for developing and implementing internal controls, within the CRA’s set of policies and procedures.*”

**Component 1.1 – Control Environment**

In line with Annex I Section A of the CRAR, we believe that in its supervisory role the Board should monitor executive management’s setting the appropriate “tone at the top” regarding the importance of internal controls and its establishing a strong culture of ethics and compliance within the CRA. With the support of its INEDs, the Board is also in charge of assessing the adequacy and effectiveness of the control environment as stated in Annex I Section A point 2(b) of the CRAR. We therefore suggest clarifying paragraph 12 and point 1.1.1 as follows “*The Board should monitor that the senior management sets the tone at the top regarding the importance of internal control and exercises oversight of the development and performance of internal controls. The Board should also oversee the adequacy and effectiveness of the control environment.*” and “*The Board should monitor that the senior management establishes a strong culture of ethics and compliance within the CRA through the implementation of policies and procedures that govern the conduct of the CRA’s staff”*.

Under point 1.1.2 of the Proposed Guidelines, we also consider that the Board including its INEDs should monitor how the CRA’s policies and procedures meet all objectives set in points (i) (ii) (iii). Under point 1.1.3, we believe that the Board should monitor that the CRA maintains, reviews and regularly updates internal controls within its policy and procedures framework in line with Annex I Section A point 2(a) of the CRAR. Finally, under point 1.1.4, and in line with article 9 of the CRAR, we also consider that the oversight responsibilities of the Board should include the monitoring of activities outsourced by the CRA on a risk-based approach.

We therefore suggest the following wording for the respective points 1.1.2, 1.1.3 and 1.1.4: “*The CRA’s Board should monitor that the CRA’s policies and procedures…”*, “*The Board should monitor that the CRA establishes, maintains and regularly updates adequate internal controls within its policies and procedures framework”* and *“The Board should monitor activities that the CRA has outsourced to external service providers or to a group level function within the CRA’s group*”.

**Component 1.3 Control Activities**

Point 1.3.2 (Documented Controls) sets out a general principle under which “*CRAs should document the controls they put in place to ensure their business activities adhere to their policies and procedures*” but provides an exhaustive and prescriptive list on how these controls should be documented. We believe that this list should be only indicative and CRAs could have a risk-based approach to identify how key controls should be documented. We suggest amending point 1.3.2 as follows: “*The documentation of these controls should set out as appropriate: …”*

Point 1.3.3 (Segregation of duties) provides a general principle to be followed but then prescribes very specific areas in which duties should be segregated. S&P Global Ratings believe that segregation of duties is an important principle within an internal control framework, particularly when it relates to conflicts of interest. While ESMA may cite in the final report, points (i), (ii) and (iii) as examples of how segregation of duties could be implemented in a CRA, we suggest not including these examples in the final Guidelines to allow flexibility in how each CRA can best implement this principle within their existing systems*.* A similar approach should also prevail for point 1.3.6 where the final Guidelines could simply state: *“The CRAs should implement measures to detect and act upon inappropriate, non-authorised, erroneous or fraudulent behaviour in its credit rating activities and ~~the~~ related processes.”*

Should ESMA maintain a prescriptive list in point 1.3.3, S&P Global Ratings would request a clarification of the following terms:

“*implementation*” in the point (ii), when it says that the persons “*Responsible for the development of credit rating methodologies, models or key rating assumptions are not involved in their implementation*”. We are concerned that the use of the word ‘implementation’ may be viewed as prohibiting activities that support the principles of segregation of duties and the management of conflicts of interest. S&P Global Ratings’ Methodology function is not involved in the application of methodology to credit ratings but is involved in the implementation of a model to make it available for business use. We do not believe that ESMA intends to prohibit the activities of the Methodology function of a CRA from developing and implementing methodologies, models and key ratings assumptions prior to their use in the process of credit ratings. Accordingly, we request that the term ‘*implementation*’ for the purposes of 1.3.3 be restricted solely to application of methodologies, models and key ratings assumptions after they are approved for use.

“*involved*” in point (iii), when it says that the persons “*responsible for the validation, assessment or review of a credit rating methodology, model or key rating assumption are not involved in their development, implementation or approval*.” S&P Global Ratings’ Criteria and Model Validation function (“Review Function”) is independent from methodology and model development and implementation. We are concerned that the use of the word ‘involved’ in the context of the words ‘*implementation*’ and ‘*approval*’ in (iii) may be misinterpreted so as to prohibit activities that support the principles of segregation of duties and the management of conflicts of interest. Staff members of S&P Global Ratings’ Review Function are involved in independent reviews of criteria and models. They are involved in presenting their review findings to S&P Global Ratings Criteria and Model Governance Committee (CMGC) and the U.S. Board of Managers as part of the approval process. Separately S&P Global Ratings’ Global Head of its Review Function participates as a voting member of CMGC in the review and approval of criteria and models. Staff members of the Review Function are not involved in the development of methodologies or in the application of methodologies in the process of issuing ratings.

We believe that the ‘*involvement*’ of Review Function staff in the process of approval of criteria and models prior to their use in the process of issuing credit ratings should not be problematic as their involvement in the process of independent review serves to support robustness of the model and criteria development process. Separately, we note that the participation of Review Function staff in the approval of methodologies, models and key ratings assumptions is acknowledged as a component of internal controls in paragraph 22 (point 2.2.4) of the Proposed Guidelines. For these reasons, we suggest that ESMA clarify in (iii) that the persons responsible for the validation, assessment or review of a credit rating methodology, model or key rating assumption are not excluded from involvement in (a) the approval process of methodologies, models and key ratings assumptions and (b) the implementation process for methodologies, models and key ratings assumptions prior to their approval for use the rating process.

<ESMA\_QUESTION\_ICG\_2>

1. : Do you have any comments on the proposed Guidelines under this section? In providing your comments please refer to the general principle, component and/or characteristic that you are commenting on.

<ESMA\_QUESTION\_ICG\_3>

**Component 2.1 – Compliance Function**

The Proposed Guidelines add new responsibilities to the Compliance function which do not reflect Annex I Section A (5)(6) of the CRAR and ESMA’s previous guidance in its 2016 letter entitled “the Role of Compliance function”.

S&P Global Ratings disagrees with paragraph 21 of the Proposed Guidelines when it describes the Compliance function as being *”responsible for following changes on the law and regulation applicable to its activities*”. We believe that it is the role of regulatory lawyers or other similarly-qualified individuals to follow and interpret changes on the law and regulation applicable to the CRA’s activities. The Proposed Guidelines suggest that a CRA’s Compliance function should consist of individuals with legal qualifications and regulatory expertise, which is not a requirement under the CRAR. In our view, ESMA should clarify that in performing its responsibilities with respect to the CRAR, which includes reflecting legal and regulatory requirements in relevant policies and procedures and training programs, the Compliance function may seek and rely on legal advice from the CRA’s legal department or outside counsel as appropriate. In our view, each CRA should determine the most appropriate structure to monitor regulatory developments and advise senior management and the Board accordingly. We suggest the following amendments to the Proposed Guidelines:

In paragraph 21: “*The CRA should designate a function that is responsible for following changes on the law and regulation applicable to its activities*.” ….“*The Compliance function should be free to update [non-lawyers shouldn’t be “advising on laws”] the administrative or supervisory Board on laws and regulations and standards that the CRA needs to comply with and assess the possible impact of any changes in the legal or regulatory environment on the CRA’s activities*.” ; and

In point 2.1.3 : **“***The Compliance function or another designated function as appropriate, should assess the possible impact of any changes in the legal or regulatory environment on the CRA’s activities and communicate, as appropriate, with the risk management function on the CRA’s compliance risk.”;* and finally

In point 2.1.6, we believe that the reference to “*decision-making*” within the risk management process is not correct. We suggest referring, instead, to risk assessment processes:***“****The findings of the compliance function should be taken into account by the Board and the risk management function within their risk assessment processes.”*

**Component 2.2 – Review Function**

S&P Global Ratings disagrees with ESMA’s suggestion in paragraph 22 that the independent review function of a CRA should review “*models* *and key rating assumptions on at least an annual basis*“. Annex I point 9 of the CRAR sets out that the review function is “responsible for periodically reviewing its methodologies, models and key rating assumptions”, while Article 8(5) of the CRAR specifically requires that CRAs “review credit ratings and methodologies on an ongoing basis and at least annually”. Furthermore, ESMA has clarified on page 13 of its Final report on Guidelines on the submission of periodic information dated 5 February 2019 that CRA’s should not include any models in their report of their methodologies reviewed annually. We therefore suggest removing the reference to models and key rating assumptions in that sentence, in line with article 8.5 of the CRAR which only refer to annual reviews of credit ratings and methodologies.

In point 2.2.1,ESMA should clarify what “*repor*t” means when it states that the” *review function … should report to the independent members of the Board*”. In our view, the review function should provide reports and regular updates to the Board and its independent members. S&P Global Ratings would disagree with the Proposed Guidelines if they were to require the review function to have a direct reporting line to the independent members. This would actually require significant organizational changes for S&P Global Ratings and presumably for other CRAs without ESMA providing a clear rationale.

In point 2.2.3, S&P Global Ratings disagrees, unless clarified similar to below, with the proposal that “*analytical staff should not vote in committees approving methodologies, models and key rating assumptions*” despite being able to participate in such committees.

Some members of S&P Global Rating’s analytical staff are able to vote in the committees developing methodologies. The risk of the analytical function or staff unduly influencing the approval of methodologies is addressed by the fact that new or materially changed methodologies must not only be unanimous but cannot occur without Review Function approval. Our experience shows that where development and review occurs in a vacuum away from real-world analytical expertise, the results can, at a minimum, fail to reflect important analytical nuances and, at worse, be impracticable or even unworkable. Excluding analytical staff from the development and testing of methodologies may result in methodologies that are less robust and less sensitive to relevant and nuanced credit drivers in a given sector and go directly to rating quality.

S&P Global Ratings does not consider that this exclusion is necessary to mitigate any possible conflict of interests given the involvement of the Review Function. We believe that so long as risk of undue influence is managed and mitigated, the involvement of the analytical function is essential to methodology quality.

In point 2.2.4, we disagree with the suggestion that the independent review function should have a majority vote in the approval of methodologies, models and key rating assumptions. First, there is no such requirement in the CRAR. Second, as explained above, at S&P Global Ratings the Review Function already has effective veto power. The approval process for methodologies and models requires unanimity: all participating parties must agree before new or materially changed criteria or models can be applied. If any voting member of the Review Function does not support new or materially changed criteria or models, they will not be approved.

**Component 2.4 Information Security Function**

In paragraph 24, we suggest that ESMA clarify the phrase “*relevant third parties*”. The CRAR uses the term “*related third party”*.

**Component 2.5 - Internal Audit Function**

Within S&P Global Inc. (“SPGI”), of which S&P Global Ratings is a division, the Internal Audit (IA) function incorporates S&P Global Ratings in their annual risk-based internal audit plan. IA is independent of S&P Global Ratings’ management, and its Compliance and In-Business Control functions.

The SPGI Chief Auditor reports to the Audit Committee of the SPGI Board of Directors on a functional basis, and administratively to the Chief Risk Officer. The Chief Auditor has responsibility for IA’s regional and functional teams, overseeing the IA execution process by providing day-to-day direction. IA reports audit results including the status of audit tracking to the board of Directors of SPGRE, the SPGI Audit Committee and applicable Boards.

The final Guidelines should reflect that certain CRAs, such as S&P Global Ratings, have a global IA function as part of their corporate structure. IA’s charter, the audit plan and audit programme can be approved at group or global level and reviewed by the SPGRE Board.

We suggest amending point 2.5.1, 2.5.4 and 2.5.5 as follows:

* “*Internal audit function should be governed by an internal audit charter that defines its role and responsibilities and is approved by the Board or, for group of CRAs, by a Board within its corporate group structure”***;**
* **“***The internal audit function should establish at least once a year, on the basis of the annual internal audit control objectives, an audit plan and a detailed audit programme, which is approved by the Board or, for group of CRAs, by a Board within its corporate group structure*.”;
* **“***The internal audit function should report directly to the independent members of the Board or, for group of CRAs, to independent members of a Board within the corporate group structure – INEDs or to the Audit Committee, if in place*;”

<ESMA\_QUESTION\_ICG\_3>

1. : Are there any other comments you wish to raise on this section?

<ESMA\_QUESTION\_ICG\_4>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_ICG\_4>

1. : Do you agree with the cost benefit analysis as it has been described?

<ESMA\_QUESTION\_ICG\_5>

S&P Global Ratings notes the apparent contradiction between the provision in paragraph 55 of the Proposed Guidelines stating: *“The guidelines have also been drafted in such a way that they do not recommend specific organisational structures. Rather they recommend a number of principles that a CRA’s internal control system should adhere to in order to demonstrate it meets the objectives of the regulation. As such it is not expected that the guidelines will require any CRA to fundamentally re-structure their internal organisational structure* “ and the highly-prescriptive nature of certain of the Proposed Guidelines.

In our view, certain sections of the Proposed Guidelines (documented controls section – point 1.3.2, segregation of duties – point 1.3.3) are prescriptive rather than being principles-based. International standards on internal controls, such as COSO’s, achieve the same result without imposing impractical and unnecessary internal organisational structures upon CRAs if they do not meet the, granularity, structure and reporting lines described under Section 3.2 Internal Control functions.

<ESMA\_QUESTION\_ICG\_5>

1. : Do you have any comments on the proportionality for smaller CRAs provided in the Guidelines?

<ESMA\_QUESTION\_ICG\_6>

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<ESMA\_QUESTION\_ICG\_6>