



S&P Global Response to ESMA Consultation on Guidelines on Internal Controls for Benchmark Administrators, Credit Rating Agencies and Market Transparency Infrastructures

S&P Global, Inc. welcomes the opportunity to provide feedback to the ESMA Consultation Paper (CP) on Internal Controls (IC) for certain supervised entities.

S&P Global notes that supervised entities are subject to detailed requirements under specific sectoral EU legislative frameworks. While we acknowledge ESMA's intent to provide greater clarity to supervised entities, the intent to apply the draft Guidelines to all existing and future supervisory mandates may prejudice, and may not have sufficient due regard to, the EU legislative process or the requirements of existing regulatory frameworks. We would urge ESMA to avoid the introduction of undue costs and administrative burden which are not specifically required by the underlying EU regulatory frameworks.

If it would be useful to explore any aspect of our response in more detail please contact David Henry Doyle, Vice President of Government Affairs & Public Policy, EMEA (davidhenry.doyle@spglobal.com).

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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.

S&P Global welcomes ESMA's intention to align its guidelines with established principles such as the IC Framework developed by COSO, as noted in paragraph 19 and footnote 16 of the CP. It is important that any new Guidelines for ESMA supervised entities do not create divergent expectations in the EU from international practice or with the underlying EU regulatory frameworks governing regulated activities.

S&P Global also welcomes ESMA's statement in paragraph 17 that it will apply the final guidelines in a proportionate manner and will take account of the supervised entity's nature, scale, and complexity. It is important to ensure that the nature, scale, and complexity of a supervised entity is considered when determining how to apply IC principles, especially when that entity is part of a larger group. It should be recognized that it may be appropriate for a supervised entity to make use of shared services and, where appropriate, centralized functions for certain operational aspects.

Equally, we believe that it is also important that ESMA's IC guidelines do not diverge from the requirements of the regulatory framework which govern specific and distinct supervised activities, for example the EU Benchmarks Regulation (BMR). We believe there may be some inconsistencies between the proposed Guidelines and Level 1 regulation.

For example, Paragraph 22 of the CP states that accountability for the internal control framework sits with the management body. This contradicts Article 5(3)(c) of the BMR which allocates such responsibility to the oversight function. The expectation of the management body in this context risks creating a conflict with the Level 1 text of the BMR.

S&P Global believes it is important for ESMA to take account of the specific nature of distinct regulated activities and the specific wording of their regulatory frameworks when determining appropriate IC

frameworks. Authorized benchmark administrators have expended significant time and resources over the past decade to ensure compliance with the BMR. However, the proposed draft Guidelines would alter the supervisory expectations and requirements without corresponding changes having been made to the BMR at Level 1 or Level 2. The justification for additional expectations from ESMA beyond the requirements in the existing regulatory frameworks is therefore unclear. The proposed additional expectations would potentially involve significant costs and resources.

In our view, a common approach which does not account for important differences in distinct legislative frameworks established for specific sectors would likely be overly prescriptive and may prejudice the IC requirements for specific regulated activities. We would note that a more specific alignment to the actual IC requirements of each specific regulatory framework for each sector would be more proportionate and supported by decisions reached during the EU legislative process regarding individual sectors.

For example, paragraph 11 of the CP states that ESMA aims “to take a consistent approach to its supervisory assessment of internal control practices across the entities it supervises” and that it “proposes to build on and replace the Guidelines on Internal Controls for CRAs”. However, CRA Guidelines are not necessarily transferable or applicable to other supervised entities. Furthermore, a consistent approach between benchmark administrators may not be possible nor desirable given the broad spectrum of benchmarks and benchmark administrators covered by the BMR.

While we recognize the benefits of the proposed IC Framework in principle, we would like to raise concerns that, unless clarified, the application of the draft Guidelines as drafted may not be fully aligned to the regulatory requirements of the primary and secondary legislation governing certain regulated activities described in the CP.

As certain regulated activities described in the CP will be supervised both by ESMA and by National Competent Authorities (NCAs) there is also a risk of a material divergence in the supervision of entities supervised by ESMA and entities which will remain supervised by NCAs. This is the case for Benchmark Administrators under the BMR. It would create an unlevel playing field if ESMA’s IC Guidelines created significantly more compliance cost for supervised entities than for supervised entities performing the same regulated activities which remain supervised at national level.

Moreover, on the application of the draft guidelines to supervised entities under the BMR it is particularly important that ESMA take account of the recent legislative review of that regulatory framework. For example, according to the European Commission the driving justification for the BMR review was “to reduce the administrative and regulatory burden imposed [...] on EU benchmark administrators”.¹ It would be difficult to reconcile the addition of new supervisory requirements for Benchmark Administrators, which do not appear in the BMR (as revised), in the context of a political decision to reduce the administrative and regulatory burden overall.

The final interinstitutional agreement on BMR also makes clear that the revised legislation is intended to reduce the burden on Benchmark Administrators. For example, Recital 1 states that “it is important to streamline [the BMR’s] requirements in order to ensure that they fulfil the purpose for which they were intended and to limit the administrative burden.”²

¹ European Commission, Frequently Asked Questions: Benchmarks Regulation, 17 October 2023 – [Link](#).

² European Parliament, Provisional Agreement resulting from Interinstitutional Negotiations on the BMR, 7 January 2025 – [Link](#).

We would therefore urge ESMA not to impose additional supervisory measures in the form of Guidelines which are not aligned to the actual regulatory framework, or which are not aligned to the application of the regulation in question by NCAs.

If additional supervisory measures in the form of Guidelines are pursued, ESMA should acknowledge that significant time and resources may be required to align to such Guidelines, in certain cases while the implementation of a review of primary legislation is being implemented. In this context, we note that ESMA has not proposed an implementation period for the measures proposed in the draft Guidelines. To take account of this, an implementation period of three years should be considered to allow for a reasonable transition period.

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

The CP states that ESMA intends to apply the draft Guidelines to all supervised entities, as well as potential future applicants. Again, a common approach to future supervised activities which does not account for important differences in distinct legislative frameworks established for specific sectors may be overly prescriptive and may prejudice the IC requirements for specific regulated activities. A more direct alignment to the actual IC requirements of each specific regulatory framework for each sector would be more proportionate and supported by decisions reached during the EU legislative process regarding individual sectors.

The CP also notes that the regulations governing specific activities establish the minimum requirements for internal control systems and that the draft Guidelines are intended to set out ESMA's expectations in practice. However, this raises questions as to whether the application of the draft Guidelines is aligned to the requirements of the regulatory frameworks under which supervised entities are authorized.

For example, the draft Guidelines state that they will apply to third-country benchmark administrators, recognized by ESMA under the BMR. However, for Benchmark Administrators that pursue recognition the BMR does not require a supervised entity in the EU. Article 32(3) requires that a Benchmark Administrator should have a legal representative located in the Union, which can be a natural or legal person. As a result, it is unclear how the draft Guidelines would apply to third country administrators which use recognition.

Equally, Article 33 of the BMR specifies that the endorsement route is contingent on the endorsing administrator being:

“... able to demonstrate on an on-going basis to its competent authority that the provision of the benchmark or family of benchmarks to be endorsed fulfils, on a mandatory or on a voluntary basis, requirements which are at least as stringent as **the requirements of this Regulation**”.

The endorsement regime in Article 11 of the EU ESG Ratings Activities Regulation (ESGRAR) contains similar provisions relating to the requirements for the products being endorsed into the Union:

“... the ESG rating provider established in the Union has verified and is able to demonstrate on an ongoing basis to ESMA that the issuance and distribution of endorsed ESG ratings fulfils requirements which are at least as stringent as **the requirements of this Regulation**”.

However, ESMA's draft Guidelines are not requirements established under these regulations. It is unclear how the draft Guidelines are intended to apply to any third country administrator, either

under recognition or endorsement, and it is questionable whether they should apply. The application of these draft Guidelines should therefore not be a requirement for a third country entity pursuing recognition and should only apply to the endorsing Benchmark Administrator in the EU which is facilitating access for the third country entity, but not to the third country entity.

Under the ESGRAR, the same outcome should be the case for a third country entity whose products were endorsed into the EU by an authorized entity which is an ESG Ratings provider. The draft Guidelines should apply to the supervised entity in the EU, but not to the third country entity.

S&P Global would welcome clarification from ESMA on these points in the final Guidelines.

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

S&P Global welcomes ESMA's acknowledgement that supervised entities may wish to "outsource the operational tasks of an IC function to group level", in paragraph 42 of the CP, and that "activities may be carried out at group level or by other legal entities within a corporate structure", in paragraph 43. These are important considerations for entities which may be part of a larger group, as noted under our response to Question 1.

We also welcome ESMA's intended calibration of the application of the draft Guidelines to the nature, scale, and complexity of a given supervised entity as outlined in the principles cited in paragraphs 46-55 of the CP.

When applying the draft Guidelines, it would be important for ESMA to also take account of the specific role that a supervised entity may have within a group or due to the requirements of EU regulation. For example, a supervised entity's primary function may be to facilitate third country access to the EU for activities conducted outside the EU. In such circumstances, a proportionate approach should be taken to account for the nature of the operations of the group to which the supervised entity belongs, which may be global, as well as the group's overall IC framework, functions, and resourcing.

We would urge ESMA to consider explicitly stating that certain IC functions may be complimentary. For example, it may be appropriate for the Compliance and Risk Management functions to be combined due to the nature, scale, and complexity of a supervised entity.

We would also urge ESMA to clarify its expectations regarding the proposed Information Security Management Function. This is an area where group functions play a key role in ensuring operational resilience. ESMA states in paragraph 63 of the CP that "supervised entities operate ICT infrastructures through which they process sensitive information and disseminate it to the authorities and the public".

However, a supervised entity may not necessarily be operating such infrastructure, particularly within the context of a group. A supervised entity may also be able to avail of outsourcing arrangements under the regulatory framework applicable to its specific regulated activity. It would therefore not be proportionate to require all supervised entities to have a dedicated Information Security Management Function.

The CP also states that the draft Guideline regarding the proposed Information Security Management Function is “only for supervised entities not subject to DORA”. However, it is not clear under what mandate the draft Guideline is proposed to be a requirement for supervised entities which are not subject to DORA, or which are specifically excluded from DORA.

Equally, a supervised entity may not itself be subject to DORA but may be part of a group which is subject to DORA. An additional supervisory expectation for the non-DORA scoped entity to have a separate Information Security Management Function would be disproportionate. In this context, we note that in paragraph 65 of the CP in relation to the audit function ESMA states that audit “activities could be assigned to a group level internal audit function”. We would urge ESMA to recognize that this rationale also applies to the Information Security Management Function. We would therefore welcome ESMA clarifying that the “activities [of the Information Security Management Function] could be assigned to a group level [Information Security Management Function]”.

The CP calls for an oversight function for Benchmark Administrators using the requirements that have been established for critical benchmarks and applying those to all benchmark administrators. The requirement that the oversight function is wholly independent from any function of the Benchmark Administrator conflicts with the requirements of the BMR, would be overly burdensome, and disproportionate.

It is unclear why the Guidelines apply different requirements for the oversight function to those that have been established under the regulatory text and it undermines concepts of proportionality set out in the CP and the Regulation. We would urge ESMA to clarify this and ensure that any guidelines are aligned to the requirements of the BMR.

4. Do you have any comments on ESMA’s approach to proportionality for Internal Control Functions?

S&P Global welcomes ESMA’s intent to apply proportionality in the application of these Guidelines, specifically regarding the scale, complexity and overall risk profile of the supervised entity in question. We also welcome ESMA’s statement in paragraph 79 that “it is not expected that the Guidelines will require any supervised entity to fundamentally re-structure its internal organizational structure”.

However, as laid out in our response to Question 3, there is scope for more proportionality and flexibility from ESMA regarding the stated objective of creating a common approach and the intended expansion to future supervisory mandates.

In addition to taking a risk-based in approach, the IC functions of current and future supervised entities should be aligned to the sectoral regulation of the specific regulated activities in question. In our view, a common approach which does not account for important differences in distinct legislative frameworks established for specific sectors, or the fact that the risk profile of firms can differ within sectors, would be overly prescriptive.

We believe ESMA underestimates the potential scale of the costs associated with certain requirements in the draft Guidelines. We also note that there does not appear to be an impact assessment on the costs of the draft Guidelines. We also note the absence of a benchmarking exercise between ESMA supervisory expectations and existing supervisory practice by NCAs for the same regulated activities. The costs for potential future applicants or supervised entities may be significantly higher than those incurred through supervision by an NCA for the same regulated activity.

We would therefore encourage ESMA to avoid a simple one size fits all approach under its current or future supervisory mandate and relate the requirements for different sectors more specifically to their respective sectoral regulatory frameworks.

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

S&P Global notes ESMA's intent to provide greater clarity to supervised entities. However, there is scope for a more proportionate approach from ESMA regarding the objective of creating common expectations for all supervised entities and the expansion of these internal controls to future supervisory mandates. We note that the intent to apply the expectations to future supervisory mandates may also prejudice, and not have sufficient due regard to, the EU legislative process.

In particular, supervised entities may be subject to specific requirements under sectoral legislative frameworks. These sector-specific requirements should apply, and we would welcome ESMA's explicit statement that "any specific requirements stipulated in primary or secondary legislation will prevail over any supervisory expectation" laid out in the draft Guidelines.

We would therefore urge ESMA to avoid the introduction of undue costs and regulatory burden which are not required by the underlying regulatory frameworks and to calibrate supervisory expectations to the size, complexity, activity, and sectoral legislation of the specific firm in question.