31 March 2016

European Securities and Markets Authority ("ESMA")

For online submission at www.esma.europa.eu

Re: Consultation Response to ESMA's Discussion Paper Benchmarks Regulation

Dear Sir:

The Global Financial Markets Association[1] ("GFMA"), in partnership with FIA and the International Swaps and Derivatives Association ("ISDA"), collectively "the Associations", are pleased to provide comments on ESMA's Discussion Paper[2] on Benchmarks Regulation[3] (the "Discussion Paper"). We appreciate ESMA's desire to solicit third party views in order to facilitate the development of technical advice to the European Commission (the "Commission") as well as to draft the technical standards supporting the implementation of the Benchmarks Regulation (the "BMR").

The Associations support the objectives of the BMR to improve the governance and control over the benchmark process, thereby ensuring their reliability and protecting users.[4]

The Associations agree with global efforts underway to improve financial benchmarks. GFMA was an early proponent of reform efforts with the publication in November 2012 of its Best Practices for Financial Benchmarks[5]. The Associations later participated in the different consultations conducted by ESMA/European Banking Authority[6] as well as by the International Organization of Securities Commission ("IOSCO") regarding the market standards and principles for benchmarks.

The Associations endorse IOSCO's Principles for Financial Benchmarks (the "IOSCO Principles")[7] which has become a global market standard and is a foundational element underpinning the BMR.

The Associations support the broad goals of the BMR to provide a regulatory framework for benchmarks in the European Union ("EU").[8] The implementation of the BMR should not, however, create an

[1] The Global Financial Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA. For more information, visit http://www.gfma.org.

[2] Open Hearing on Benchmarks Regulation

[3] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on indices used as benchmarks in financial instruments and financial contracts - Approval of the final compromise text, http://data.consilium.europa.eu/doc/document/ST-14985-2015-INIT/en/pdf

[4] Press Release 15 February 2016, ESMA Consults on Implementation of the Benchmarks Regulation

[5] GFMA's Best Practices for Financial Benchmarks, GFMA Provides its Updated Principles for Financial Benchmarks to the Global Regulatory Community | Correspondence | GFMA

[6] http://www.esma.europa.eu/databases-library/esma-library

[7] IOSCO Principles for Financial Benchmarks, http://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf

environment where the requirements are so burdensome and the implementation so complex that contributors will be incentivized to withdraw from providing the necessary input data, thus undermining the stability, confidence and efficiency of the financial markets and benchmarks that the BMR is intended to protect.

ESMA has already put forward technical advice and drafted technical standards under Markets in Financial Instruments Directive ("MiFID") to provide a common broad framework covering financial markets and instruments across the EU. We strongly support that any technical standards developed for the BMR leverage ESMA's prior work, so that there is alignment of definitions, scope and intent among the various regulations.

Scope of the BMR

We understand that the scope of the BMR is intended to be "as broad as necessary to create a preventive regulatory framework".[9] In this regard, ESMA proposes a broad definition of what constitutes "making available to the public" and also that an index's characteristics should be defined in an open manner, reflecting current channels and modalities of publication.

Such an interpretation may, however, capture customised indices and bespoke instruments that are not broadly licensed, apply to a limited number of financial products, and are intended for professional investors and not the general retail public.

While the Associations appreciate the desire to promote a regulatory framework that provides for investor protection, we suggest that the same concept of proportionality be applied in the application of the definition "making available to the public" as there is recognition of other standards within existing EU legislation with regard to this concept. For example, within Directive 2001/29/EC, there is a concept of "communicating or making available to the public" with regard to copyright and rights within our information society.[10] Through case law of the Court of Justice and the European Union, it has been established that the concept of communication to the public applies when it is directed to a large number of recipients. Copyright protection under this Directive also gives the owner of the intellectual property exclusive rights to make available to the public copyrighted works.[11]

The Associations propose that "available to the public" be defined as a benchmark that is available on an unrestricted basis to the general public including retail clients. In this regard, the *availability and/or* the *publication channel* for a benchmark would be a critical determinant in establishing whether a benchmark is "available to the public".

[8] Paragraph 6; Regulation 14985/15; "Therefore to ensure the proper functioning of the internal market and to improve the condition of its functioning, in particular with regard to financial markets, and to ensure a high level of consumer and investor protection, it is therefore appropriate to lay down a regulatory framework for benchmarks at the Union level."
[9] Paragraph 8; Regulation 14985/15
[10] Paragraph 23; Directive 2001/29/EC; on the harmonization of certain aspects of copyright and related rights in the information society
[11] Paragraph 25: Directive 2001/29/EC; on the harmonization of certain aspects of copyright and related rights in the information society

Under our proposal, the following aspects would categorize a benchmark as **not** "being available to the public":

- Availability: indices created in collaboration with clients for their sole proprietary use;
- Availability and Publication: indices available to a limited number of subscribers who, in turn, are not authorized to onward license to a broader set of investors; or
- Publication: a) indices not published on a regular basis, nor on the same frequency as the index calculation; or b) indices not intended for general distribution and not published in sufficient detail to make them feasible for use as benchmarks.

ESMA also represents that "benchmarks that are currently not widely used may be so used in the future, so that, in their regard, even a minor manipulation may have significant impact."[12] Considering that every two years benchmarks will be evaluated as to their criticality[13], this provides a framework to calibrate the scope of the BMR without casting such a wide net from day one to capture those indices, such as customised indices and bespoke products, which do not pose a near-term risk to the real economy. This approach to the BMR would reflect a better balance between the implementation costs and the benefits in managing risks and protecting the real economy. It would also provide for consistency in definitions and an approach comparable to that followed for other EU legislation.

Proportionality

While the BMR recognizes the breadth of benchmarks with their different characteristics, vulnerabilities, and risks[14], many of the proposed standards outlined in the Discussion Paper appear geared towards submission-based benchmarks and are not proportional or representative of the larger share of the benchmark universe.

We recognize that the BMR provides certain exemptions (as with regulated data benchmarks) in line with IOSCO Principles. That said, the Associations support more efforts to apply the concept of proportionality particularly in relation to the size and significance of the benchmark. For example, greater flexibility should be offered with respect to membership within an oversight function and the manner in which a contributor is permitted to demonstrate an effective control framework.

Regulatory Alignment/Issuance of a Financial Instrument and Use of a Benchmark

We suggest that the development of any technical standards also consider other European regulatory requirements. In general, we strongly urge that that the technical standards within the BMR align with other well established regulatory requirements and market practices across the EU.

This is particularly important with regard to ESMA's proposed definition of "issuance of a financial instrument" that is outlined in the Discussion Paper.[15] While we recognize that there is no legal

[12] Paragraph 20; Discussion Paper

[13] Article 13; Regulation 14985/15

[14] Paragraph 29; Regulation 14985/15

[15] Paragraph 29; Discussion Paper; "concept of issuance of financial instruments should not be limited to securities and should extent to financial instruments that are created for trading also in execution or trading venues other than regulated markets."

definition of issuance within the EU, as outlined within Directive 2003/17/EC, the concept of issuance is in relation to when securities are offered to the public or admitted to trading. The Associations consider it inappropriate to extend the concept of issuance, so far limited to securities, to other financial instruments, including derivatives, given the precedent nature and unforeseeable consequences. We also note that under Article 3(1) (5) (b) of the BMR, derivatives will in any case be captured under the definition of index.

As a separate matter, the Associations encourage ESMA to refine the definition of "use of a benchmark" to offer clarity to stakeholders regarding coverage, and to align to relevant definitions in other EU regulation. On a particular point in this regard, we encourage ESMA to offer clarity that the concept of usage will indeed encompass the circumstance where an exchange or trading facility incorporates a third-party administered benchmark into a contract specification.

Benchmark Administrators

Administrators play an important role in overseeing a benchmark in terms of its (i) calculation, (ii) determination and application of methodology, and (iii) dissemination. We appreciate that the recent juris-linguist draft recognizes the role of third parties in performing important functions (calculation, publication)[16] on behalf of/under standards set by the Administrator. There is, however, a need for clarity on the application of the requirements under the BMR for those global organizations that operate centres of competencies for the administration of benchmark services in multiple jurisdictions, some outside the EU.

The Discussion Paper also outlines a number of responsibilities for administrators that are more akin to "first line of defence" duties and therefore undermine administrators' ability to oversee and provide constructive challenge. For example, administrators are expected to identify individual submitters and approve their role[17]. We would suggest that contributors are in the best position to evaluate the capabilities of the individuals within their organization in keeping with their first line of defence responsibilities.

While we recognize the importance of administrators in overseeing a benchmark, the integrity of the process depends on clarity of roles and responsibilities for all parties, the importance of contributors to ensure integrity in the submissions process, and, ultimately, the role of national competent authorities to provide regulatory oversight of both administrators and contributors.

Input Data

The primary and supporting data requirements specified in the Discussion Paper are quite extensive and geared to submission-based benchmarks.[18] Some of the requirements go beyond submission data and include trading desk exposures and relevant communications. This information is commercially sensitive, and these requirements likely will discourage contributors from participating in the

[16] Paragraph 16; February 2016 Juris Linguist draft EU Benchmarks Regulation
[17] Paragraphs 159, 160; Discussion Paper
[18] Paragraph 70; Discussion Paper

determination process. The requirements will also be costly and impractical to implement and are not proportional to the size and significance of a benchmark.

Contributors have responsibilities to ensure the integrity of their submissions in line with their first line of defence responsibilities as well as in keeping with their acknowledged codes of conduct and ongoing obligations under required data retention requirements as supervised entities. Market integrity is maintained through the right of administrators to request information from contributors on an *as needed* basis and the oversight provided by national competent authorities to ensure market conduct standards are maintained by contributors as well as benchmark administrators. Data requirements and record-keeping standards should therefore align with IOSCO Principles which ensure the integrity of the benchmark setting process. Markets in Financial Instruments Directive II ("MiFID II")[19] will also establish extensive requirements for disclosure of information through post-trade transparency and provide a regulatory framework to instil confidence in the financial markets and market integrity without necessitating additional data gathering requirements.

Oversight Functions

Supervised entities, under MiFID, already have legal, compliance, risk control and internal audit functions without the need to establish additional requirements for oversight functions and new organizational requirements.

The Associations have advocated in an earlier consultation regarding the IOSCO Principles that application should be proportional to the particular characteristics of the benchmark, its administrator, and the benchmark process. We recommend that administrators and contributors be left the discretion to establish the appropriate oversight roles in keeping with IOSCO Principles, to fulfil their obligations as supervised entities in a manner proportional to the indices under management.

Critical Benchmarks

The BMR defines a quantitative cut-off for critical benchmarks and places the responsibility on administrators to gather the required data of linkages with different financial products to determine criticality. Benchmark administrators may not necessarily have line of sight to this data, and there is a danger of inconsistency in data definitions and measurements. The Associations strongly believe that ESMA must take a coordinating role with respect to data definitions and data gathering, leveraging information it will have available through trade repositories established under the European Market Infrastructure Regulation and post-trade transparency obligations under MiFID II.

The Associations consider it is vitally important that the relevant assessment, for determination of a critical benchmark, be sufficiently defined and robust so that it does not yield different results following each biennial reassessment. We, therefore, fully support ESMA's view that the approach for the test should be relative rather than absolute. We believe that the relative impact approach and suggested ratios are appropriate but should be subject to significant further refinement through bilateral discussion with national competent authorities.

[19] MiFID II Directive (Directive 2014/65/EU)

Endorsement/Recognition/Third Country Administrator

As there are unlikely to be "equivalent" regimes for benchmarks established, at least in the short-term, outside the EU, it is critically important that the Commission and ESMA provide practical solutions for evaluation of third-country benchmarks to avoid an adverse impact on the real EU economy.

The provision of clear guidelines on third-country benchmarks has been a long standing position of GFMA with the recommendation to base such an approach on IOSCO Principles.[20]

The BMR outlines a mechanism for a European administrator to endorse a third country administrator in order to permit the third country benchmark to be registered for trading within the EU. While we appreciate the flexibility this provides, there may be practical difficulties in implementation considering the liability risks this entails for sponsoring parties. Even for large global firms with the expectation of legal separateness among affiliates, it is questionable as to whether a national competent authority would want to transfer risks onto the EU sponsoring firm.

In the spirit of proportionality, the BMR should incentivise non-EU administrators to apply for recognition in the EU by calibrating the requirements to the scope, nature and sector of their benchmarks. We believe that it is particularly important that ESMA apply proportionality where the value of financial contracts, financial instruments, and investment funds referencing a benchmark is lower than the threshold for significant benchmarks and the third country administrator can demonstrate a robust governance and control framework in line with IOSCO Principles. We encourage ESMA to collaborate with national competent and third country authorities to achieve consistency on the interpretation and application of the IOSCO Principles to ensure continued availability of third-country administered benchmarks within the EU.

ESMA should move forward quickly to prioritize engagement with third country supervisory authorities on covered cooperation agreements in order to maintain continued access to third country benchmarks, thus avoiding an adverse impact, including from potential contract frustration, to the real economy within the EU.

Authorisation and Registration

While we appreciate that many of the organizational and controls elements listed in the Discussion Paper[22] may be important in establishing a new administrator, much of the required information will be already known by national competent authorities of supervised entities. For an administrator that is part of a supervised entity, authorisation should be tailored to the specific additional requirements relating to benchmarks, namely to focus on benchmark statements and methodologies (which generally are publicly available) and the particular governance and control framework supporting benchmark administration.

[20] http://gfma.org/correspondence/item.aspx?id=560; GFMA's comments on proposed EU benchmark regulation November 2013

[22] Paragraphs 286, 294; Discussion Paper

It is important for market innovation that there is a streamlined approach for the introduction of new benchmarks by registered administrators. It is also critical to define what is meant by creating a new benchmark. For example, the Associations believe that applying a currency conversion to an existing benchmark would not be creating a wholly new benchmark but would be considered a "use of benchmark". It is important that ESMA refines the concepts of *provision* and *use*, within the technical standards, in order not to inadvertently capture a large number of indices that in reality do not fundamentally represent new benchmarks to the market.

Transitional Provisions

While the latest juris-linguist text provides a transition period of 42-months after entry into force[23] to register or authorise a financial benchmark, the BMR provides no transitional provision covering new EU benchmarks created after the date that the BMR comes into force. This places EU-based administrators at a competitive disadvantage compared to their global competitors. We request that ESMA consider outlining additional transition periods for these types of situations for market competitiveness.

The Discussion Paper has also outlined a definition of "Force Majeure event".[24] While we generally agree with the definition, it is important to ensure that adaptation of a benchmark to conform to the BMR, or changes in a methodology to adjust to the underlying market would not be considered Force Majeure events.

Lastly, the Discussion Paper lists two options (time or quantitative limit) for the continued use of a benchmark that does not meet the requirements of the BMR or is considered "non-compliant". As an alternative we encourage ESMA to consider grandfathering certain benchmarks, on an indefinite basis, to provide for their continued use in existing contracts and minimize the risk of contract frustration. ESMA could put forward a process whereby national competent authorities periodically re-evaluate the continued use of such benchmarks without putting in place fixed timeframes or measures.

[23] Article 52, Juris-Liguist draft of the BMR

[24] Paragraph 346; Discussion Paper; "'Force Majeure event' means an extraordinary, unforeseeable, external set of circumstances beyond the control of the contracting parties of a financial contract or a financial instrument, that has not been considered by such parties at the time the contract was concluded and that cannot be prevented even through the use of utmost due diligence and technical and financial reasonable means which makes it impossible for either party to perform its obligations under the financial contract or the financial instrument despite all reasonable efforts to the contrary."

Conclusion

The Associations support the overall objectives of the BMR to improve market integrity in the provision of financial benchmarks. We strongly endorse the development of global standards as outlined by the IOSCO Principles as well as publication of the GFMA Best Practices.

The Associations continue to advocate for a regulatory framework that not only will protect consumers and investors but also will not be so burdensome that it discourages market innovation and the participation of contributors in the benchmark-setting process.

In this context, we encourage ESMA to have particular regard to:

- applying the principle of proportionality in respect of non-critical benchmarks;
- retaining consistency with other EU regulation, notably in respect of the concept of issuance of financial instruments;
- maximising leverage of existing or already-planned sources of economic, market and instrument data, and reporting arrangements, when establishing processes for the various periodic quantitative analyses required under the BMR; and
- establishing clear and efficient authorisation and registration processes, as well as provisions for use of third-country benchmarks.

We are pleased to put forward this consultative response and to assist ESMA in the development of technical standards that will provide for a smooth implementation of the BMR.

Regards,

The Global Financial Markets Association

FIA

International Swaps and Derivatives Association

Appendix I: Response to Questions within the Discussion Paper

Note: While answers are provided to certain questions within the Discussion Paper based on the importance to the membership of the Associations, the fact that a question is ***not*** answered should not be interpreted as agreement with the position outlined in the Discussion Paper.

2.0 – Definitions

Q1: Do you agree that an index's characteristic of being "made available to the public" should be defined in an open manner, possibly reflecting the current channels and modalities of publication of existing benchmarks, in order not to unduly restrict the number of benchmarks in scope?

Q2: Do you have any proposals on which aspects of the publication process of an index should be considered in order for it to be deemed as having made the index available to the public, for the purpose of the BMR?

(Responses to Q1 and Q2 are combined.)

We understand that the scope of the BMR is intended to be "as broad as necessary to create a preventive regulatory framework". In this regard, ESMA proposes a broad definition of what constitutes "making available to the public" and also that an index's characteristics should be defined in an open manner, reflecting current channels and modalities of publications.

Such an interpretation may, however, capture customised indices and bespoke products that are not broadly licensed, apply to a limited number of financial products, and are intended for professional investors and not the general retail public.

While the Associations appreciate the desire to provide a regulatory framework that provides for investor protection, we suggest that the same concept of proportionality be applied in the application of the definition and there is recognition of other standards within existing EU legislation with regard to the concept of "making available to the public." For example, within Directive 2001/29/EC, there is a concept of "communicating or making available to the public" with regard to copyright and rights within our information society. Through case law of the Court of Justice and the European Union, it has been established that the concept of communication to the public is when it is directed to a large number of recipients. Copyright protection under this Directive also gives the owner of the intellectual property exclusive rights to make available to the public copyright works.

The Associations propose that "available to the public" should be defined as a benchmark that is available on an unrestricted basis to the general public, including retail clients. In this regard, the availability and/or the publication channel for a benchmark would be a critical determinant in establishing whether a benchmark is "available to the public".

Under our proposal, the following aspects would categorize a benchmark as not "being available to the public":

- Availability: indices created in collaboration with clients for their sole proprietary use;
- Availability and Publication: indices available to a limited number of subscribers who, in turn, are not authorized to onward license to a broader set of investors; or
- Publication: a) indices not published on a regular basis, nor on the same frequency as the index calculation; or b) indices not intended for general distribution and not published in sufficient detail to make them feasible for use as benchmarks.

ESMA also represents that "benchmarks that are currently not widely used may be so used in the future, so that, in their regard, even a minor manipulation may have significant impact." Considering that every two years benchmarks will be evaluated as to their criticality, this provides a framework to calibrate the scope of the BMR without casting such a wide net from day one to capture those indices, such as customised indices and bespoke products, which do not pose a near-term risk to the real economy. This approach to the BMR would reflect a better balance between the implementation costs and the benefits in managing risks and protecting the real economy. It would also provide for consistency in definitions and comparable approach with other EU legislation.

Q3: Do you agree with ESMA's proposal to align the administering the arrangements for determining a benchmark with the IOSCO principle on the overall responsibility of the administrator? Which other characteristics/activities would you regard as covered by Article 3(1) point 3(a)?

We fully support aligning ESMA's requirements with IOSCO Principles, which are recognized global standards for the administration of benchmarks. We agree that the role of the administrator should be to determine the appropriate governance and accountability frameworks as well as ensuring a benchmark's quality and integrity are maintained in line with its methodology.

At the same time, we call for flexibility in how an administrator carries out this responsibility, considering the large volume of benchmark producers, the multiplicity of benchmark types, and the diversity of benchmark users.[25]

Within the IOSCO Principles, there is recognition of the value of third parties in the determination process – to collect inputs, perform calculation functions or act as publication agents.[26] This element needs to be more clearly recognized in the technical standards per Article 6 of the BMR, in which administrators maintain appropriate oversight and control frameworks to ensure that third parties are performing in line with agreed standards.

There is also a need for clarity on the application of the requirements under the BMR for those global firms that operate centres of competency for benchmark administration across multiple jurisdictions.

[25] GFMA Consultation response dated 15 February 2013 regarding Principles for Benchmarks-Setting Process in the EU.
[26] Principle 2; IOSCO Principles

Finally, we would like to provide some views on administering in relation to "provision of a benchmark", specifically as it is defined to include "determining a benchmark through an application of a formula or other method of calculation."[27]

The Associations believe that applying a currency conversion to an existing benchmark would not be *provisioning* a wholly new benchmark but would be considered a *use of* a benchmark.

It is important that ESMA refine the concepts of *provision* and *use*, within the technical standards, in order not to inadvertently capture a large number of indices that in reality do not fundamentally represent new benchmarks for the market.

Q4: Do you agree with ESMA's proposal for a definition of issuance of a financial instrument? Are there additional aspects that this definition should cover?

The development of the BMR's technical standards should align with other European regulatory requirements. This is particularly important with regard to ESMA's proposed definition of "issuance of a financial instrument" that is outlined in the Discussion Paper. While we recognize that there is no legal definition of issuance within the EU, per Directive 2003/17/EC, the concept of issuance pertains to when securities are offered to the public or admitted to trading.

The view of the Associations is it is inappropriate to extend the concept of issuance, so far limited to securities, to other financial instruments, including derivatives, given the precedent nature and unforeseeable consequences. We also note that, under Article 3(1) (5) (b) of the BMR, derivatives will be in any case captured under the definition of index.

The Associations encourage ESMA to refine the definition of "use of a benchmark" to offer clarity to stakeholders regarding coverage, and to align to relevant definitions in other EU regulation. On a particular point in this regard, we encourage ESMA to offer clarity that the concept of usage will indeed encompass the circumstance where an exchange or trading facility incorporates a third-party administered benchmark into a contract specification. In general, we strongly urge that that the technical standards within the BMR align with other well established regulatory requirements and market practices across the EU.

[27] Paragraph 21; Discussion Paper

3.0 – Oversight Functions

Q9: Do you agree that an administrator could establish one oversight function for all the benchmarks it provides? Do you think it is appropriate for an administrator to have multiple oversight functions where it provides benchmarks that have different methodologies, users or seek to measure very different markets or economic realities?

The Associations recognize the value of an oversight function in providing constructive challenge and ensuring integrity of the benchmark determination process. We believe, however, that the composition of such membership within the oversight function should consider the importance and criticality of the benchmark.

Smaller benchmarks where the administrator is controlled by a contributor can establish effective independence within their oversight functions with membership from the organization's risk, legal, compliance, or audit functions, without requiring third party representatives, as specified in paragraph 43 of the Discussion Paper. We also note that it is not uncommon for these functions to be geographically dispersed and managed as a shared resource within global firms.

Therefore, we do not think that ESMA needs to state a list of organizing structures and should rely on IOSCO Principle 5.[28] An administrator should be left the discretion to establish the appropriate oversight function, which fulfils its obligations as a supervised entity and is appropriate for the benchmarks under management, in keeping with the IOSCO Principles.

[28] IOSCO Principles; Principle 5 Internal Oversight, "An Administrator should develop and maintain robust procedures regarding its oversight function, which should be documented and available to relevant Regulatory Authorities, if any. The main features of the procedures should be Made Available to Stakeholders. These procedures should include: a) The terms of reference of the oversight function; b) Criteria to select members of the oversight function; c) The summary details of membership of any committee or arrangement charged with the oversight function, along with any declarations of conflicts of interest and processes for election, nomination or removal and replacement of committee members. The responsibilities of the oversight function include: a) Oversight of the Benchmark design… b) Oversight of the integrity of Benchmark determination and control framework."

4.0 – Input data

Q19: Do you agree with the list of records to be kept by the administrator for input data verification? If not, please specify which information is superfluous/which additional information is needed and why.

While we agree that robust record keeping practices are important for sound benchmarks, we consider that current data retention rules for supervised entities, as well as the IOSCO Principle 18 regarding audit trails, provide a solid foundation for supporting the benchmark determination process.

Many of the requirements within paragraph 70 of the Discussion Paper go beyond providing submission data and include trading desk exposures and relevant communications.[29] This information is commercially sensitive, and a requirement to provide it will discourage contributors from participating in the determination process. Such a requirement will also be costly and impractical to implement and is not proportional to the size and significance of a benchmark.

Contributors have responsibilities to ensure the integrity of their submissions in line with their first line of defence responsibilities, as well as their acknowledged codes of conduct and ongoing obligations of required data retention as supervised entities. Market integrity is maintained through the right of administrators to request information from contributors on an *as needed* basis and the oversight provided by national competent authorities to ensure market conduct standards are maintained by contributors as well as benchmark administrators. Data requirements and record-keeping standards should therefore align with IOSCO Principles which ensure the integrity of the benchmark-setting process.

Q27: Do you agree to the three lines of defence-principle as an ideal type of internal oversight architecture?

We recognize that the three lines of defence-principle is a highly effective and widely-used risk management model useful for maximizing the accuracy and integrity of input data. For large, supervised entities, a three lines of defence model is likely to exist, so management of the data input process through the model may not pose an unreasonable financial burden. As noted in paragraph 93 of the consultation document, it may, however, be impractical for smaller contributors to implement three functionally separate lines of defence for the input data submission process. We, therefore, request flexibility in the creation and implementation of internal oversight structures and suggest that smaller contributors should be permitted to rely on independent reviews by the compliance or internal audit functions or an external firm to bolster their internal oversight architectures.

Q28: Do you identify other elements that could improve oversight at contributor level?

As stated previously in these comments, MiFID requires that supervised entities have robust compliance, risk control, and internal audit functions to ensure market integrity. We support reliance on these functions without additional requirements for oversight functions as the primary oversight at the

[29] Paragraph 70; Discussion Paper

contributor level. In addition, we support periodic independent reviews of the input data contribution process by a contributor's compliance or internal audit function or another external firm.

We also note that IOSCO Principle 14 already provides a substantial framework for control at the contributor level. Principle 14 calls for a code of conduct that requires contributors to adhere to a number of measures, including conflicts of interest and recordkeeping policies, procedures for submitting inputs, and methodologies to determine eligible inputs. IOSCO Principle 14 also requires administrators to monitor and record contributors' adherence to these measures, making the code of conduct a powerful mechanism for protecting the integrity of the benchmark determination process.

Q29: Do you agree with the list of elements contained in a conflict of interest policy? If not, please state which elements should be added/which elements you consider superfluous and why.

While we generally agree with the measures in paragraph 97, we disagree with the requirement for contributors to publicly disclose the conflicts of interest policy per paragraph 98. Given liability issues, we are concerned that highly prescriptive measures would dissuade contributors from continuing to participate in a benchmark.

As an alternative, contributors will attest to their compliance with the administrator's code of conduct, where a conflicts of interest policy is required, in keeping with IOSCO Principle 14. An administrator's responsibilities include overseeing a contributor's adherence to standards, as outlined by the code of conduct, and recommending remedies in those situations of non-compliance (which could include removal in situations of continued non-compliance. This attestation, therefore, provides a high measure of confidence in the integrity of the benchmark without specifically calling for public declaration regarding conflicts of interest.

Q31: Do you agree to the list of criteria that can justify differentiation? If not, please specify why you disagree.

We generally agree with the list of measures for which differentiation may or may not be applied. We are pleased that ESMA recognizes differentiation in the case of supervised contributors.[30] However, we encourage ESMA to rely on existing supervisory mechanisms to evaluate the effectiveness of a contributor's organization rather than creating new regulatory requirements.

[30] Paragraph 109; Discussion Paper

5.0 – Transparency of Methodology

Q37: Do you agree with ESMA's proposal about the information to be made public concerning the internal review of the methodology? Please suggest any other information you consider useful to disclose on the topic.

We support robust and frequent internal review of the methodology to ensure financial benchmarks accurately represent a specific market and acknowledge the flexibility that ESMA affords administrators in choosing the frequency of internal review. We are concerned, however, about ESMA's statement in paragraph 127 that governance considerations should include procedures for selecting members of those functions involved in determining and reviewing benchmark methodology.

When establishing requirements for the transparency of benchmark review governance procedures, we encourage ESMA to consider the spirit of paragraph 119, which states that the transparency of the methodology should not be meant as the publication of the formula applied for the determination of a certain benchmark (which may include protected intellectual property), but rather as the disclosure of the critical elements sufficient to allow *stakeholders* to understand the benchmark. In this regard, *stakeholder* should be interpreted as the index licensee (in the case of subscription-based indices) and not the general public, to ensure intellectual property is protected.

Likewise, we propose that administrators publish the general qualifications required of individuals reviewing benchmark methodologies, rather than potentially confidential procedures regarding appointment, removal from oversight bodies, and names and titles of individuals. To do otherwise could, in the end, discourage individuals from joining oversight bodies.

Q38: Do you agree with the above proposals to specify the information to be provided to benchmark users and more in general, stakeholders regarding material changes in benchmark methodology?

We support procedures to govern changes in the benchmark methodology, including stakeholder consultation, in keeping with the IOSCO Principles. In particular, we appreciate that ESMA allows administrators to define material change and determine practical aspects of the consultation procedure at their discretion. We recommend that the governance of the consultation process be set by the administrator and that the application of proportionality be applied in relation to the significance of a benchmark.

6.0 – Code of Conduct

Q43: Do you agree that a benchmark administrator could have a standard code for all types of benchmarks? If not, should there be separate codes depending on whether a benchmark is critical, significant or non-significant? Please take into account your answer to this question when responding to all subsequent questions.

An administrator could have one standard code for multiple types of benchmark. However, the code should account for proportionality and differences in purpose, scope, and complexity among benchmarks. In some cases, it may be simpler for an administrator to have multiple codes of conduct for several different benchmarks. Discretion should be left to the administrator to determine what is needed considering the importance of the benchmark.

We note that IOSCO Principle 14 establishes that an administrator (with benchmarks based on submissions as opposed to contributions[31]) is expected to maintain a code which is to be confirmed annually. For these reasons, the code is a powerful mechanism to confirm compliance with the administrator's standards. We encourage ESMA and national authorities to rely on the code, rather than on public disclosure of confidential policies and processes.

Q51: Do you think that the listed procedures for submitting input data are comprehensive? If not, what is missing?

We support measures to ensure the integrity of the contribution process, but ESMA's proposed process for submitting input data gives new powers and responsibilities to the administrator. Paragraph 160 requires the administrator to have procedures "to evaluate the identity of the submitters who will contribute to a benchmark on behalf of a contributor and ensure, to the fullest extent possible that they fulfil the administrator's expectations." While we agree with the principle of confirming the identity of contributors as part of establishing a control framework for the benchmark determination process, it is not in keeping with an administrator's second-line duties to evaluate the qualifications of the submitter.[32] This is a first line responsibility of the contributor.

[31] Paragraph 148; Discussion Paper
[32] Paragraph 165; Discussion Paper

7.0 – Governance and Control Requirement for Supervised Contributors

Q60: Do you agree with the above list of requirements? Do you think that those requirements are appropriate for all benchmarks? If not what do you think should be the criteria we should use?

We believe that ESMA should align the standards of the BMR with IOSCO Principles whenever possible, as IOSCO is an already well established framework. While the suggested requirements for supervised contributors may not be unreasonable, we believe a better approach would be to reference IOSCO Principle 14. Principle 14 outlines similar requirements for the submitter's code of conduct. This approach has the additional benefit of providing a framework for judging whether third-country regimes can be deemed equivalent with the BMR.

Q62: Do you think that the external audit covering benchmark activities, where available, should also be made available, on request, to the Benchmark Administrator?

We agree that supervised contributors should have an effective control framework, but some of the requirements outlined in the consultative report to achieve an effective control framework, including external audits, may be overly costly to implement and exceed accepted business standards. As an alternative, we recommend periodic independent reviews, as required by the administrator, of the input data contribution process by a contributor's compliance function, internal audit function, or an external firm. This is in keeping with GFMA's earlier position, where we "recommend that the principles call for an independent review, which, depending on the nature of the benchmark, may be able to be satisfied by an administrator's compliance department or a third party that is not an auditor."[33] Calling for an independent review instead of an external audit is consistent with the concept that the application of the principles should be proportional to the particular characteristics of the benchmark, the benchmark process and the terms of reference set by the administrator in its code of conduct.

[33] GFMA May 2013 response letter to IOSCO Principles

8.0 – Critical Benchmarks

Q78: Do you agree with the 'relative impact' approach, i.e. define one or more value and "ratios" for each of the five areas (markets integrity; or financial stability; or consumers; or the real economy; or the financing of households and corporations) that need to be assessed according to Article 13(1)(c), subparagraph (iii)? If not, please elaborate on other options that you consider more suitable.

We support the relative impact approach to evaluate the five areas in relation to the total size of the market in the jurisdiction, rather than on an absolute basis. Doing so reveals material dependencies on a benchmark within specific member states that may not be apparent if a benchmark is considered on an absolute basis.

Given the implications of being classified as a critical benchmark, it is of vital importance that the relevant assessment be sufficiently defined and robust so that it does not yield different results following each biennial reassessment. We therefore fully support ESMA's view that the approach for the test should be relative rather than absolute. This is of particular importance given that the relevant elements of the qualitative test are intended to measure the impact of a potential, unquantifiable and unknown event. Whilst the results of cessation or unreliability can be hypothesised, they cannot be known or measured. This means that the assessment must ensure with a high level of certainty that the risks associated with a particular benchmark are so undeniable as to be able to predict the expected results.

We believe that the suggested ratios are appropriate but should be subject to significant further refinement, which could possibly be done through bilateral discussion with national competent authorities. In addition, it remains unclear how the values suggested will be calculated and we therefore seek further clarification on whether these values will simply follow those relied on for the quantitative test (which could lead to duplication of errors) or whether independent analysis will be conducted in order to take account of the increased scope of the assessment. We also recommend that proportionality be applied in terms of the relative impact of a given benchmark in the context of the underlying financial securities, instruments, or funds.

Lastly, this question raises the need for a central registry to house and track information beyond the purview of any particular administrator. We believe ESMA should play a coordinating role in creating such a central registry and in specifying the data sets to be captured (including the elements envisaged under Q82). ESMA should also identify and establish linkages to key data sources, including central counterparties, exchanges and financial institutions. Where feasible, ESMA should rely in the first instance on existing centralised sources of data, including data made available to ESMA and national competent authorities under MiFID II, to ensure consistency with other EU regulation and to minimise additional or duplicative reporting from individual financial institutions.

11.0 – Benchmark Statement

Q87: Do you agree that the statement for commodity benchmarks should be delimited as described? Otherwise, what other information would be essential in your opinion?

The key elements to be published with each benchmark should not be so burdensome that providing them would delay the publication of the benchmark. Where the benchmark determination follows the same pattern every time a benchmark is determined, it should also be possible to refer to former publications as there is no added value in renewing the statement every time. Furthermore, we believe that the professional profile of contributors (referred to in paragraph 271 of the Discussion Paper) should refer to the nature of the activity rather than the personal profile of the individuals making the contribution.

We also believe that IOSCO has already gone a long way together with Price Reporting Agencies to establish a standard for Benchmark Statements for Commodity Benchmarks. We encourage ESMA to follow the example of the IOSCO-Compliance Statements of Price Reporting Agencies.

Q90: Do you agree with the suggested additional requirements for significant benchmarks? Which of the three options proposed you prefer, and why?

We appreciate the flexibility for administrators of significant benchmarks not to apply certain requirements, and we suggest that administrators disclose in the compliance statement the elements of information described in option one: the indication that the administrator has lawfully decided not to apply some provisions of the BMR and the location of the compliance statement. Transparency is maintained as the information will be contained in the compliance statement. This would represent a more streamlined approach to disclosure and not unduly raise the cost of issuance.

12.0 – Authorisation and Registration of an Administrator

Q93: Do you agree with the approach outlined above regarding information of a general nature and financial information? Do you see any particular cases, such as certain types of providers, for which these requirements need to be adapted?

While we appreciate that many of the organizational and control elements listed in the Discussion Paper[35] may be important in establishing a new administrator, much of the required information will already be well known by national competent authorities overseeing supervised entities. For these entities, authorisation/registration should be tailored to the specific additional requirements relating to benchmarks, namely benchmark statements and methodologies and the particular governance and control framework supporting benchmark administration.

We also note that these requirements could be onerous for administrators of smaller benchmarks of a less critical nature. ESMA should consider applying proportionality in relation to the size of the benchmark.

Q97: Do you agree with the proposed approach towards registration? How should the information requirements for registration deviate from the requirements for authorisation?

As outlined in our response to Q93, we agree that supervised entities should have a streamlined registration process since these entities are known by the relevant competent authority and subject to ongoing supervision (as noted in paragraph 306 of the Discussion Paper). The focus of the registration process should be on the benchmark methodology and oversight supporting benchmark administration.

It is particularly important for market innovation that there also be a streamlined approach for the introduction of a new benchmark by registered administrators. This could potentially entail introducing a third form of registration, i.e. for already registered administrators with a new index offering.

[35] Paragraphs 286, 294; Discussion Paper

13.0 – Recognition and Endorsement of Third Country Administrators and Benchmarks

Q102: Do you consider that there are any other elements that could be taken into consideration to substantiate the 'objective reason' for the provision and endorsement for use in the Union of a third country benchmark or family of benchmarks?

As there are unlikely to be "equivalent" regimes for benchmarks established, at least in the short-term, outside the EU, it is critically important that the Commission and ESMA provide practical solutions for evaluation of third-country benchmarks to avoid an adverse impact on the real EU economy.

The provision of clear guidelines on third-country benchmarks has been a long-standing position of GFMA. Our recommendation continues to be to base such an approach on IOSCO Principles.[36]

The BMR allows a benchmark provided by a third country administrator to qualify for use in the EU provided it is endorsed by an authorised administrator. The endorsing entity will have to have a clear role within the accountability framework and be in a position to monitor the provision of the benchmark.[37] On a practical basis, this may not be so easy to put into place. As the endorsing entity is responsible for compliance with the BMR, this raises concerns about liability risk, potentially discouraging an entity from endorsing a third country benchmark. Even for large global firms with the expectation of legal separateness among affiliates, it is questionable as to whether a national competent authority would want to transfer risks onto the EU sponsoring firm.

In the spirit of proportionality, the Commission and ESMA should incentivise non-EU administrators to apply for recognition in the EU by calibrating the requirements to the scope, nature and sector of their benchmarks. We believe that it is particularly important that ESMA apply proportionality where the value of financial contracts, financial instruments, and investment funds referencing a benchmark is lower than the threshold for significant benchmarks and the third country administrator can demonstrate a robust governance and control framework in line with IOSCO Principles. We encourage ESMA to collaborate with national and third country competent authorities to achieve consistency on the interpretation and application of the IOSCO Principles to ensure continued availability of third-country administered benchmarks.

ESMA should move forward quickly to put in place longer term cooperation arrangements with third country authorities in order to maintain continued access to third country benchmarks, thus avoiding an adverse impact, including from potential contract frustration, to the real economy within the EU.

[36] http://gfma.org/correspondence/item.aspx?id=560; GFMA's comments on proposed EU benchmark regulation November 2013

[37] Paragraph 319; Discussion Paper

14.0 – Transitional Provisions

Q106: Are the two envisaged options (with respect to the terms until which a non-compliant benchmark may be used) adequate: i.e. either (i) fix a time limit until a non-compliant benchmark may be used or (ii) fix a minimum threshold which will trigger prohibition to further use a non-compliant benchmark in existing financial instruments/financial contracts.

The Associations are pleased with recent clarification in the juris-linguist text of a longer transition period of 42 months after entry into force of the BMR, to provide administrators and contributors more time to comply with the requirements of the BMR.[38] We note, however, that the BMR provides no transitional provision covering new EU benchmarks created after the date the BMR comes into force. This places EU-based administrators at a competitive disadvantage compared to their global competitors. We request that ESMA consider outlining additional transition periods for these types of situations for market competitiveness.

The Discussion Paper has also outlined a definition of "Force Majeure event". While we generally agree with the definition, it is important to ensure that adaptation of a benchmark to conform to the BMR or changes in a methodology to adjust to the underlying market, which is an ongoing responsibility of an Administrator in line with IOSCO Principle 6, would not be considered as a Force Majeure event.[39]

We consider both alternatives to be valid in certain circumstances. Thus benchmarks of less criticality may be permitted indefinitely if they fall below defined thresholds, while longer time frames should be provided for more important benchmarks.

Nevertheless, we encourage ESMA to consider grandfathering certain benchmarks on an indefinite basis to provide for their continued use in existing contracts and minimize the risk of contract frustration. ESMA could put forward a mechanism whereby national competent authorities periodically re-evaluate the continued use of such benchmarks without putting in place fixed time frames or measures.

Q111: Do you agree that the different users of a benchmark that are supervised entities should liaise directly with the competent authority of the administrator and not with the respective competent authority (if different)?

The Associations do not agree with this approach and recommend that supervised entities continue to liaise with their respective competent authority. ESMA's proposal raises many legal and practical concerns, such as differences in national law, treatment of users, and confidentiality and privacy laws.

[38] Article 39; Regulation 14985/15

[39] IOSCO Principles; Principle 6: Benchmark Design; Principle 10: Periodic Review