

MEMO# 30201

September 2, 2016

EU Benchmarks Regulation - Analysis of Technical Standards - Request for Expressions of Interest for Member Contributions

[30201]

September 2, 2016

TO: ICI GLOBAL EXCHANGE TRADED FUNDS COMMITTEE No. 5-16
ICI GLOBAL REGULATED FUNDS COMMITTEE No. 58-16
ICI GLOBAL TRADING & MARKETS COMMITTEE No. 38-16
INTERNATIONAL COMMITTEE No. 46-16
EQUITY MARKETS ADVISORY COMMITTEE No. 31-16
FIXED-INCOME ADVISORY COMMITTEE No. 27-16 RE: EU BENCHMARKS REGULATION -
ANALYSIS OF TECHNICAL STANDARDS - REQUEST FOR EXPRESSIONS OF INTEREST FOR
MEMBER CONTRIBUTIONS

The European Securities and Market Authority (ESMA) is developing draft technical standards under the EU's Benchmarks Regulation ("the Regulation"). [\[1\]](#) ESMA plans to consult on the draft technical standards in Q4 2016 [\[2\]](#) and submit its final recommendations to the European Commission by 1 April 2017.

ESMA has appointed Europe Economic Research Limited ("Europe Economics") [\[3\]](#) – a consultancy specialising in the application of economics to public and business policy issues – to conduct cost/benefit analysis of the draft technical standards.

Europe Economics has approached ICI Global to seek member input, including through interviews, in parallel with ESMA's consultation.

We are seeking: (i) input from members regarding the details and benefits of certain requirements; and (ii) expressions of interest from members to participate in bilateral interviews with Europe Economics.

We would like to provide contributions to the analysis once ESMA publishes its consultation on the draft technical standards (expected in Q4 2016). The high-level areas where ESMA has a mandate to develop technical standards are outlined in more detail below.

Please advise Giles Swan on +44 207 961 0832 or at giles.swan@iciglobal.org if you are interested in contributing to this work, including participating in interviews with Europe Economics, or if you require any further information.

Technical Standards under the Benchmark Regulation

ESMA is required to develop technical standards under the Regulation in the following eight areas that are potential relevance to regulated funds and asset managers, as users of benchmarks.

Oversight function requirements (Article 5)

Under the Regulation, benchmark administrators are required to establish and maintain a permanent and effective oversight function to ensure oversight of all aspects of the provision of their benchmarks.

ESMA is required to develop draft regulatory technical standards (RTS) for the oversight function to specify: (i) its procedures, characteristics and composition; (ii) its positioning within the of the organisational structure of the administrator; and (iii) the appropriate governance arrangements by means of which it can be carried out. When developing the draft RTS, ESMA is required to distinguish between the different types of benchmarks and sectors, the principle of proportionality, [4] differences in the ownership and control structure of administrators, the risk and impact of the benchmark, and international supervisory practices.

We are seeking input from members on the draft oversight function requirements, including the extent to which the requirements may provide additional assurance to regulated funds and asset managers.

Appropriateness and verification of input data (Article 11)

Under the Regulation, input data for a benchmark shall be: (i) verifiable; and (ii) sufficient to accurately and reliably represent the market or economic reality that the benchmark is intended to measure. ESMA is required to develop draft RTS to specify: (i) how to ensure that input data is appropriate and verifiable; and (ii) the internal oversight and verification procedures for data contributors in order to ensure the integrity and accuracy of input data.

When developing the draft RTS, ESMA is required to take account of different types of benchmarks and sectors, the principle of proportionality, the vulnerability of the benchmarks to manipulation and international supervisory practice.

We are seeking input from members as to the requirements that should apply to input data for benchmarks.

Transparency of Benchmark methodology (Article 13)

Under the Regulation, certain aspects of the methodology for a benchmark must be published or made available, including: (i) key elements of the methodology; (ii) details and frequency of the internal review and approval process; and (iii) procedures for making material changes. ESMA is required to develop draft RTS to specify the information to be published or made available by Benchmark administrators to allow users to understand: (i) how a benchmark is provided and to assess its representativeness; (ii) its relevance to particular users; (iii) its appropriateness as a reference for financial instruments and contracts.

We are seeking input from members as to the information that should be published or made available by Benchmark administrators to regulated funds and asset managers as benchmark users.

Code of Conduct for contributors (Article 15)

Where a benchmark is based on input data from contributors [\[5\]](#), the Regulation requires its administrator to develop a code of conduct specifying contributors' responsibilities with respect to the contribution of input data. The Regulation specifies elements of the code of conduct including: (i) a description of the input data; (ii) the identification of the persons that may contribute input data; and (iii) policies, systems and controls for contributors. ESMA is required to develop draft RTS to further specify the elements of the code of conduct for different types of benchmarks, taking into account differences in input data and methodologies, the risks of input data of being manipulated and international supervisory practices.

We are seeking input from members regarding a code of conduct for benchmark contributors, and the elements of a code of conduct that should be developed.

Governance and control requirements for supervised contributors (Article 16)

Supervised contributors [\[6\]](#) to Benchmarks are subject to governance, systems and controls and internal policy requirements under the Regulation. ESMA is required to develop draft RTS to further specify these requirements, taking into account various factors including: (i) differences in input data provided and methodologies used; (ii) the risks of manipulation of the input data; (iii) the activities carried out by the supervised contributors; and (iv) international supervisory practices.

We are seeking input from members regarding the requirements for supervised contributors.

Compliance Statement (Article 25 and Article 26)

Administrators may choose not to apply certain aspects of the Regulation's requirements, including those relating to governance and conflicts of interest, input data and the contributor's code of conduct, if they consider these to be disproportionate or inappropriate. The requirements that an administrator may choose not to apply depend on whether the benchmark is significant [\[7\]](#) or not. [\[8\]](#) In the event that an administrator chose not to apply any of the requirements, it must publish and maintain a compliance statement that clearly states why it is appropriate for that administrator not to comply with those provisions. ESMA is required to develop draft implementing technical standards (ITS) that specify a template for the compliance statement.

We are seeking input from members regarding the compliance statement and the information that should be included in the statement.

Benchmark Statement (Article 27)

An administrator must publish a statement, which is fairly and easily accessible, setting out information for each benchmark that can be used in the EU. The Regulation contains an exhaustive list of information that must be included in the statement. ESMA is required to develop draft RTS further specifying the contents of this statement and when updates are required, taking into account the principle of proportionality and differences between types

of benchmarks and sectors.

We are seeking input from members on the requirement for a benchmark statement, and the information that should be included in the statement.

Equivalence of third country Benchmarks (Article 30 and Article 32)

In order for a Benchmark provided by an administrator located in a third country to be used in the EU (e.g. by a fund for performance measurement), the Benchmark and the administrator must be included in an ESMA register and meet certain conditions. These conditions include: (i) recognising the third country's legal and supervisory practices as equivalent; and (ii) establishing cooperation arrangements between ESMA and the third country's regulator. ESMA must develop draft RTS to specify: (i) the form and content of the registration application for third country administrators; and (ii) the minimum content of the cooperation arrangements between ESMA and third country regulators.

To establish the importance of ensuring continued use of benchmarks that are provided by administrators located in third countries, we are seeking to understand the extent of member's use of these benchmarks, including for measuring performance of investment funds that are domiciled in the EU.

Giles Swan
Director of Global Funds Policy - ICI Global

endnotes

[1] Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds ("Benchmark Regulation"), available from <http://eur-lex.europa.eu/eli/reg/2016/1011/oj>

[2] Some aspects of the technical standards were included in ESMA's earlier discussion paper concerning the delegated acts under the Regulation, on which ESMA had been requested to provide advice to the European Commission (https://www.esma.europa.eu/sites/default/files/library/2016-288_discussion_paper_benchmarks_regulation.pdf)

[3] Appointment of Europe Economics as a consultant for Benchmarks Regulation cost-benefit analysis, available from http://www.europe-economics.com/attachments/esma_cba_letter_for_europe_economics_interviews_and_data_collection_-_benchmarks_regulation_1467888036.pdf

[4] i.e. the nature, scale and complexity of the provision of the benchmark

[5] Defined as a natural or legal person contributing input data (Article 3(1)(9), Benchmark Regulation)

[6] Defined as a supervised entity that contributes input data to an administrator located in the Union (Article 3(1)(10), Benchmark Regulation)

[7] Article 25(1), Benchmark Regulation, specifies the full list of requirements that the

administrator of a significant benchmark may chose not to apply.

[\[8\]](#) Article 26(1), Benchmark Regulation, specifies the full list of requirements that the administrator of a non-significant benchmark may chose not to apply.

Copyright © by the Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice.