



July 20, 2017

European Commission

Re: European Commission Draft Delegated Acts on:

1. Technical Elements of the Definitions Set Out in the Benchmark Regulation
2. Conditions to Assess Impacts of Cessation or Changing of a Benchmark
3. Application of Qualitative Criteria for Critical Benchmarks
4. Calculation of Total Values of References to Benchmarks

Dear Sir/Madam:

The Global Financial Markets Association (“GFMA”)<sup>1</sup>, in partnership with FIA<sup>2</sup> and the International Swaps and Derivatives Association (“ISDA”)<sup>3</sup>, collectively “the Associations”, are pleased to provide comments on the Commission’s draft Delegated Acts under the Benchmark Regulation (“draft DAs”). We appreciate the European Commission’s (“EC”) initiative to solicit stakeholder views in order to facilitate the finalization of draft DAs supporting the implementation of the European Benchmarks Regulation (the “BMR”).

The Associations support the objectives of the BMR to provide a framework for benchmarks to be produced in a transparent and reliable manner. Such objectives contribute to well-functioning and stable markets, while providing a high level of investor protection. The Associations appreciate the EC’s efforts to develop draft DAs that provide further clarity on the following sections under the BMR:

- Technical Elements of the Definitions Set Out in the Benchmark Regulation;
- Conditions to Assess Impacts of Cessation or Changing of a Benchmark;

---

<sup>1</sup> 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, Brussels and Frankfurt, 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>.

<sup>2</sup> FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA’s membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries as well as technology vendors, lawyers and other professional serving the industry. For more information, visit <http://www.fia.org>

<sup>3</sup> Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 68 countries. These members comprise of a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers.

- Application of Qualitative Criteria for Critical Benchmarks; and
- Calculation of Total Values of References to Benchmarks.

We believe the draft DAs strike the appropriate balance, tailoring requirements for implementation by market participants while maintaining the overall goals of the BMR, to improve the governance and control over the benchmark process. These provisions increase investor confidence in the reliability of benchmarks at the same time enhancing the protection of users of benchmarks.

In particular, we welcome the EC's definitional clarifications. The guidance on 'made available to the public' in the definition of 'index' under Article 3.1(1) provides further clarity in the determination of what constitutes a benchmark under the BMR. We agree with the focus on figures that are made accessible to a 'potentially indeterminate number' of legal and natural persons. We welcome the EC's proposed definition under Article 2 stating that the administration of a benchmark implies both a) the ongoing management of its providers' structure and b) the setting, adaptation and ongoing maintenance of the methodology. Additional supervisory guidance may be needed at Level 3 to ensure unambiguous attribution of administrator role for every benchmark as well as to clarify how to make this determination when those two elements a) and b) are performed by two different entities.<sup>4</sup> Lastly, the removal of the definition of 'issuance of financial instrument' from the draft DA on 'Technical Elements of the Definitions Set out in the Benchmarks Regulation' clarifies that the EC is aligned with ESMA's view that Article 3.1(7)(a) refers only to transferable securities, money market instruments and UCITS covered under the BMR, and not to derivatives.

### Treatment of Third Countries

While the draft DAs generally provide some helpful clarity and we appreciate the EC's efforts to assist in that regard, the Associations reiterate<sup>5</sup> our significant concerns over the workability of the third country regime. We continue to believe that most third countries will not adopt broad benchmark regulations to achieve "equivalence" across the full spectrum of benchmark providers. We expect that the endorsement regime will only be achievable where the third country administrator has a local EU presence, as we do not think that unrelated parties will be incentivized to take that responsibility. Accordingly, recognition may be the predominant method by which many third country benchmark administrators could seek access for use of their

---

<sup>4</sup> For example, when an institution has outsourced the management of a benchmark to a separate entity or when an IP owner sold or transferred an index to another company, and may or may not have established exclusivity rights arrangement.

<sup>5</sup> See GFMA, FIA, and ISDA response to ESMA Discussion Paper on Benchmarks Regulation (February 15, 2016) available at: <https://www.esma.europa.eu/press-news/consultations/discussion-paper-benchmarks-regulation>. See also GFMA, FIA, and ISDA response to ESMA Consultation Paper on Technical Advice on Benchmarks Regulation (June 1, 2016) available at: <https://www.esma.europa.eu/press-news/consultations/consultation-paper-esma-technical-advice-benchmarks-regulation>. See also GFMA, FIA, and ISDA response to ESMA Consultation on Draft Technical Standards under the Benchmarks Regulation (September 29, 2016) available at: <https://www.esma.europa.eu/press-news/consultations/consultation-draft-technical-standards-under-benchmarks-regulation>.

benchmarks in the EU. Additional efforts to provide clarity as to the process and standards for third country benchmark administrators, particularly under the recognition regime, is necessary. The Associations emphasize that the BMR and any related guidance should seek to maximize the number of benchmark administrators that wish to apply for registration or authorization. The application process should be clearly defined and efficient to avoid reduced access to third country benchmarks and unintended consequences for EU markets.

We understand that the EC intends to issue at least one additional draft DA regarding the endorsement of benchmarks provided in a third country. We strongly support the EC preparing such draft DA to give market participants the time to respond well in advance of the approaching 1 January 2018 application date of the BMR.

#### Additional Provisions for Clarification

Other provisions of the BMR that would benefit from clarification include, but are not limited to, the following:

- Clarification that benchmark provided by both EU and non-EU central banks, public authorities, and CCPs, and other providers exempt under Article 2.2 will be exempt from the BMR registration, and that users and contributors are similarly exempt with respect to such benchmarks (including the requirements in Article 28(2));
- Clarification that the term ‘traded via a systematic internalizer (“SI”)’ in the BMR is definitionally aligned with MiFIR (Article 18);
- Clarification on the interpretation of ‘determination of the amount payable’ as used in the definition of ‘use of a benchmark’ in Article 3.1(7) in the context of derivatives;
- Clarification that Article 28.2 will apply prospectively as from 1 January 2018; and
- Clarification on the application of the transitional provisions to both EU and third country benchmarks.

We encourage the Commission, ESMA and National Competent Authorities to provide additional timely guidance on the various third country regime processes, as well as other remaining aspects of the BMR, to reduce uncertainty and frictions leading up to the implementation of the BMR requirements.

We appreciate this opportunity to provide feedback to you and we remain available to provide further information on any of the above matters. If you have any questions, please contact Sean Davy at +1.212.313.1118 or via e-mail at [sdavy@sifma.org](mailto:sdavy@sifma.org), Tessa Jones at +44.20.7519.1827 or via e-mail at [tjones@fia.org](mailto:tjones@fia.org), or Julia Rodkiewicz at +32.2.4018761 or via e-mail at [jrodkiewicz@isda.org](mailto:jrodkiewicz@isda.org).

Regards,

A handwritten signature in black ink that reads "Allison Parent". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Allison Parent  
Executive Director  
GFMA

A handwritten signature in black ink that reads "S. Puleston Jones". The signature is cursive and includes a horizontal underline.

Simon Puleston Jones  
Head of Europe  
FIA

A handwritten signature in blue ink that reads "Julia Rodkiewicz". The signature is cursive and includes a horizontal underline.

Julia Rodkiewicz  
Assistant Director, European Public Policy  
ISDA