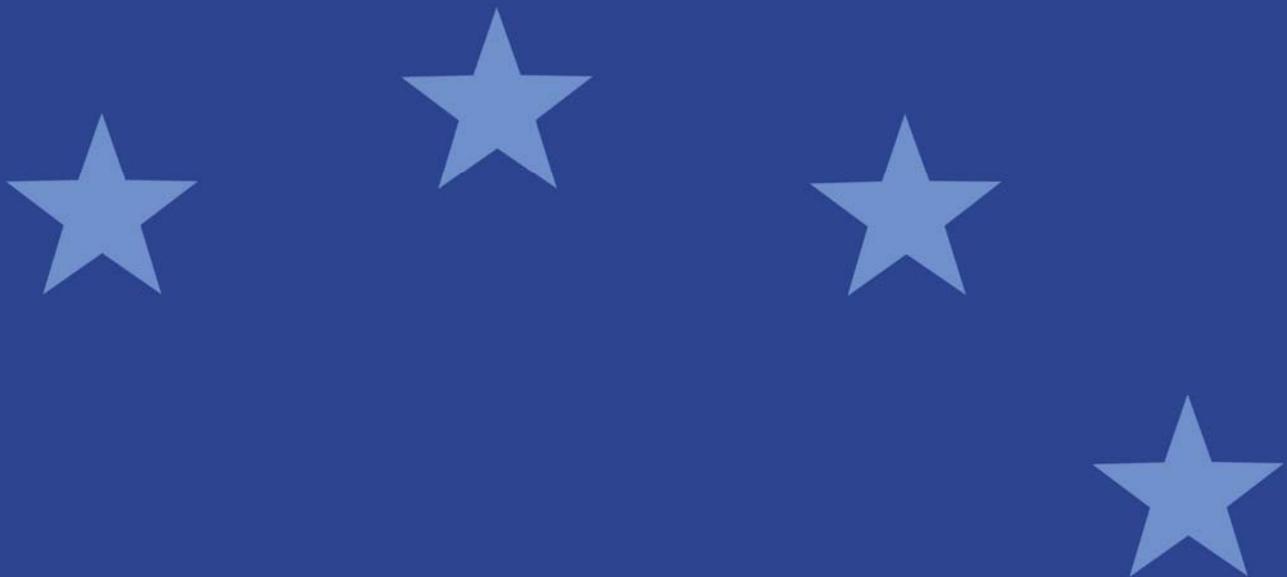


Response form for the Consultation Paper on draft guidelines on non-significant benchmarks



Responding to this paper

ESMA invites responses to the questions set out throughout this Consultation Paper. Responses are most helpful if they:

- respond to the question stated;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all responses received by 30 November 2017.

Instructions

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

- Insert your responses to the questions in the Consultation Paper in the form “Response form_Consultation Paper on scrutiny and approval”, available on ESMA’s website alongside the present Consultation Paper (www.esma.europa.eu → ‘Your input – Open consultations’ → ‘Consultation on technical advice under the new Prospectus Regulation’).
- Please do not remove tags of the type <ESMA_QUESTION_GBMR_1>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
- When you have drafted your response, name your response form according to the following convention: ESMA_GBMR_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_GBMR_ABCD_RESPONSEFORM.
- Upload the form containing your responses, in Word format, to ESMA’s website (www.esma.europa.eu under the heading ‘Your input – Open consultations’ → ‘Consultation on technical advice under the new Prospectus Regulation’).

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly indicate by ticking the appropriate checkbox on the website submission page if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confi-



dential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Data protection'.

Who should read this Consultation Paper

This Consultation Paper may be of particular interest to administrators of benchmarks, contributors to benchmarks and users of benchmarks as well as to any market participant who is affected by the Benchmarks Regulation.



General information about respondent

Name of the company / organisation	GFMA/ISDA/FIA
Activity	Banking sector
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	International

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_GBMR_1>

The Global Financial Markets Association (“GFMA”)¹, in partnership with FIA² and the International Swaps and Derivatives Association (“ISDA”)³, collectively “the Associations”, are pleased to provide comments on ESMA’s Consultation Paper on Guidelines detailing the obligations which apply to non-significant benchmarks under the Benchmarks Regulation (the “Consultation Paper”). We appreciate ESMA’s desire to solicit stakeholder views in order to facilitate the finalization of the draft guidelines (“GL”) on non-significant benchmarks supporting the implementation of the Benchmarks Regulation (the “BMR”).

The Associations support the objectives of the BMR to ensure that benchmarks are produced in a transparent and reliable manner and so contribute to well-functioning and stable markets, and investor protection.

While the Associations support the broad goals of the BMR to provide a harmonised regulatory framework for non-significant benchmarks in the European Union (“EU”), we would emphasize the need for greater proportionality in several aspects of the draft guidelines. In many cases there appears to be little or no meaningful difference in the treatment of non-significant compared to that of significant and critical benchmarks, such as (by way of example only) in the context of the non-exhaustive list of governance arrangements of the governance function.

Furthermore, Article 26 of the BMR exempts non-significant benchmarks from certain requirements based on a comply or explain framework for compliance. In particular, the intent of these exemptions was to introduce scaled compliance requirements amongst critical, significant, and non-significant benchmarks. While ESMA states that the guidelines are intended to provide proportionate rules for non-significant benchmarks administrators under Articles 5,11,13 and 16 BMR, the Associations are highly concerned that the draft guidelines introduce additional requirements for non-significant benchmarks that would otherwise be exempt under the Level 1 BMR text. In doing so, the GL undermines the intended proportionality by introducing new requirements.

ESMA has indeed made a number of proposals that the Associations believe strike the correct balance in applying proportional requirements for non-significant benchmarks. However, we continue to believe that ESMA should eliminate or reduce some of the requirements of the draft GL, to achieve a more proportionate, principles-based and balanced approach, particularly where the draft GL covers obligations similar to those which are not applicable to non-significant benchmarks under the BMR. Based on the principle of proportionality, very strongly present in the BMR, including under Articles 5,11,13 and 16, ESMA has been charged with the task of establishing proportionate rules for non-significant benchmarks administrators. While ESMA has made numerous positive proposals to try to ensure such approach, we believe a more proportionate approach is more appropriate in many areas.



The introduction in the draft GL of new requirements, which were seemingly covered by exemptions under the Level 1 BMR text, has, therefore, created confusion and legal uncertainty. Our members are unclear how to view these apparently conflicting requirements and have requested more clarity from ESMA as to whether the GL are effectively intended to become the governing requirements, overriding the contents of the Level 1 text. If so, we would question the use of the GL in this manner. We do not believe the Article 26 language should be read as giving ESMA the flexibility to impose, especially at this late stage, obligations substantially similar to those for significant benchmarks in contradiction of the distinction between different categories of benchmarks which is pervasive through the BMR. We believe the GL should more often be principles based and we have provided more detailed comments below in that regard. We urge ESMA to reconsider the level of proportionality intended under the BMR and whether the requirements under the draft GL achieve the appropriate balance. In any event, additional legal clarification is needed to both under the application of the BMR and the guidelines to remove the uncertainty created by these new requirements.

While answers are provided to certain questions within the Consultation Paper, based on the importance of the membership of the Associations, the fact that a question is not answered in great detail should not be interpreted as agreement with each position outlined in a specific section of the Consultation Paper.

If you have any questions, please contact Sean Davy at +1.212.313.1118 or via e-mail at sdavy@sifma.org, Robert Barnes at +44.207.090.1347 or via e-mail at rbarnes@fia.org, or Julia Rodkiewicz at +32.2.4018761 or via e-mail at jrodkiewicz@isda.org.

Regards,

GFMA

FIA

ISDA

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, 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>.

2 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>

3 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.

<ESMA_COMMENT_GBMR_1>



Q1 : Do you have any views on the content of the draft guidelines on the oversight function for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA_QUESTION_GBMR_1>

Support:

The Associations are generally supportive of ESMA's view that in relation to the composition of the oversight function, it will not require the inclusion of independent members in the oversight function mandatory for non-critical benchmarks. However, ESMA has left it to the administrators to decide on the most appropriate composition of the oversight function for the benchmarks they produce, as long as any conflict of interest of external members of the oversight function is adequately mitigated. We also generally agree with the role and positioning of the governance arrangements for the oversight function, but we have a few concerns with certain provisions as stated below.

Objections/Concerns:

Composition of the oversight function

ESMA notes that for non-significant benchmarks, the staff of the administrator is allowed membership on the oversight function but without voting right if they are directly involved in the provision of the respective benchmark. However, the GL state that staff from the legal or compliance departments would be able to sit on the oversight functions, and to do so in a voting capacity.

We believe that the administrators of non-significant benchmarks should instead be permitted to have staff involved in the provision of the benchmark in a voting capacity so long as such members do not represent a majority. Such approach would still provide appropriate protection as regards the management of conflicts but also permit for flexibility, especially for smaller administrators. Non-significant benchmarks will often have a small market footprint and finding committee members with sufficient competence to contribute meaningfully will be extremely challenging. In this regard, we believe that flexibility should be given to firms to establish voting procedures that are appropriate and proportionate to the risk posed by the benchmark in question.

Procedures governing the oversight function

While we are supportive of many basic aspects to be covered by procedures, we are concerned by the broad requirement to have members disclose any conflicts of interest before discussion of an agenda item during a meeting of the oversight function. The Associations suggest that ESMA clarify, consistent with other aspects of the BMR, that members are required to disclose only material conflicts of interest.

Additionally, the Associations note that while market infrastructure operators could play a valuable role in the overall structure and composition of the oversight function, their participation is less likely for non-significant benchmarks. Given the sheer number of benchmarks that exist in the marketplace which likely number in the tens of thousands, it could be difficult for market infrastructure operators to be represented broadly across the oversight functions of so many benchmarks. Such market infrastructure operators may also be competitively positioned with an administrator and thus their participation would not be in the administrators' interests.

<ESMA_QUESTION_GBMR_1>

Q2 : Do you have any views on the content of the draft guidelines on input data for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA_QUESTION_GBMR_2>

Support:

The Associations generally support ESMA's view that if an administrator has chosen not to apply a specific paragraph of Article 11 of the BMR (i.e. point (b) of Article 11(1) BMR on the verifiability of input data or Article 11(3) BMR on the additional checks the administrator should impose on contributors from the front office functions), then the corresponding part of the ESMA guidelines will not apply either.

We generally support ESMA's view that the requirements included in the RTS in relations to the internal reporting for any operational problems and the physical presence of a staff member from the second level of control function should not apply to the contribution to non-significant benchmarks.

We generally support ESMA's view that the procedure should only cover the material conflicts of interest for non-significant benchmark and should include: the identification and disclosure of actual or potential material conflicts of interest in relation to the contributor's front office staff who are involved in the contribution process, as well as the separation of the remuneration of a submitter from the benchmark related determinations that might give rise to a conflict of interest linked to the contribution to the benchmark.

Objections/Concerns:

The Associations believe it is unnecessary to require second level controls for surveillance of communications between front office function staff directly involved in contributions and other internal functions or external bodies. In keeping with the theme of proportionality, we suggest that ESMA clarify that the requirement to surveil communications applies when concerns or issues (red flags) about the process arise rather than surveilling on an ongoing basis. Other regulatory recordkeeping requirements provide sufficient means to conduct backward looking surveillance as necessary, rather than introducing new requirements which could be burdensome and costly for firms to implement, costs which could eventually be passed on to the consumer.

Additionally, we note that some elements of the GL related to input data seem to be overly prescriptive and do not allow for differences in product types and for developments in technology. The Associations recommend that ESMA consider a more proportionate, principles based approach to the requirements for non-significant benchmarks that allows firms an appropriate degree of flexibility in their approach to compliance.

<ESMA_QUESTION_GBMR_2>

Q3 : Do you think the proposal to include in the guidelines a requirement for the three levels of control functions appropriate for administrator of non-significant benchmarks?

<ESMA_QUESTION_GBMR_3>

The Associations note that the GL for internal oversight and verification procedures of contributed input data from a front office function are substantially similar to those for significant benchmark in the BMR and thus quite prescriptive. We do not believe that ESMA has sufficiently simplified the requirement and achieved reasonable proportionality. We suggest that distinguishing between of control functions could be unnecessary and burdensome for non-significant benchmarks: instead, the control function could reasonably be one function that is independent.

<ESMA_QUESTION_GBMR_3>

Q4 : Do you agree with the content of the draft guidelines on the transparency of the methodology for administrators of non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA_QUESTION_GBMR_4>

The Associations note that the draft GL have removed a number of requirements regarding the transparency of methodology for non-significant benchmarks on the grounds of proportionality. However, we remain highly concerned the GL do not provide enough flexibility for administrators of non-significant benchmarks with proprietary indices that have a limited market footprint. As a result, the Associations believe ESMA should make an affirmative statement that administrators should be allowed the flexibility to balance the level of information disclosed on a benchmark's methodology with the confidentiality of such information so as not to compromise their intellectual property or competitive positioning within the marketplace.

<ESMA_QUESTION_GBMR_4>

Q5 : Do you think the proposal to include in the guidelines a requirement for publishing or making available to the public "a description of specific events that may give rise to an internal review including any mechanism used by the administrator to determine whether the methodology is traceable and verifiable" is appropriate for administrator of non-significant benchmarks?

<ESMA_QUESTION_GBMR_5>

The Associations believe that the existence and acknowledgement of an internal review process should be sufficient and that a detailed description of the elements of such process is not necessary or proportionate for non-significant benchmarks. Given the range of products impacted by the BMR and the potential for both the product and related technology/infrastructure to develop over time, it would be helpful to provide administrators with greater flexibility to apply concepts of appropriateness and proportionality when deciding the types of information to make available to users.

<ESMA_QUESTION_GBMR_5>



Q6 : Do you agree with the content of the draft guidelines on governance and control requirements for supervised contributors to non-significant benchmarks? Would you suggest to include any additional elements or to delete one or more of the elements proposed? Please explain.

<ESMA_QUESTION_GBMR_6>

The Associations generally favor ESMA's view that for contribution to non-significant benchmarks, there is no need to specify a process for sign-off of a contribution by a natural person senior to the submitter. As ESMA correctly notes, if a sign-off is requested by the applicable code of conduct under Article 15 of the BMR, the supervised contributor will nevertheless have to comply with the code and therefore establish a process for sign-off. Therefore, under this approach, it would be up to the code of conduct, defined by the administrator of the non-significant benchmark, to decide whether a sign-off process is needed or not.

<ESMA_QUESTION_GBMR_6>

Q7 : Do you think that the proposal to include in the guidelines a requirement of establishing, where appropriate, a physical separation of submitters from other employees of the supervised contributor is suitable also for supervised contributors to non-significant benchmarks?

<ESMA_QUESTION_GBMR_7>

We do not believe that physical separation is necessary or proportionate to manage conflicts and the GL should rather state that policies and procedures can effectively accomplish the same goals for non-significant benchmarks and should be stated as an additional alternative in such cases.

<ESMA_QUESTION_GBMR_7>