CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice and Request for Comment
Proposed Amendments to Multilateral Instrument 25-102
Designated Benchmarks and Benchmark Administrators
and
Changes to Companion Policy 25-102
Designated Benchmarks and Benchmark Administrators

April 29, 2021

Introduction

Today, the securities regulatory authorities (each an **Authority** and collectively the **Authorities** or **we**) of the Canadian Securities Administrators (the **CSA**) in British Columbia, Alberta, Saskatchewan, Ontario, Québec, New Brunswick and Nova Scotia (the **Participating Jurisdictions**) published Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* (**MI 25-102** or the **Instrument**) and Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators* (the **CP**). Subject to obtaining all necessary Ministerial approvals, the Instrument will come into force and the CP will come into effect in each of the Participating Jurisdictions on July 13, 2021.[1]

At the same time, as detailed in this Notice, the Participating Jurisdictions are also publishing for a 90-day comment period:

- proposed amendments to MI 25-102, and
- proposed changes to the CP.

Together, the proposed amendments to the Instrument and the proposed changes to the CP are referred to as the **Proposed Amendments**. The Proposed Amendments incorporate provisions for a securities regulatory regime for commodity benchmarks and their administrators.

The text of the Proposed Amendments is contained in Annex A and Annex C of this Notice and will also be available on websites of the Participating Jurisdictions, including:

www.lautorite.qc.ca
www.albertasecurities.com
www.bcsc.bc.ca
nssc.novascotia.ca
www.fcnb.ca
www.osc.ca
www.fcaa.gov.sk.ca

[1] For further details, see the CSA Notice of Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy, dated April 29, 2021.

We are issuing this Notice to solicit comments on the Proposed Amendments. We welcome all comments on this publication and have also included specific questions in the "Request for Comments" section below.

Currently, MI 25-102 provides a comprehensive regime for the designation and regulation of specific benchmarks and their administrators, and the regulation of contributors and of certain users.[2] An overview of this regime was provided in the March 14, 2019 CSA Notice and Request for Comment on Proposed National Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy (the **March 14, 2019 CSA Notice**), and today, in the April 29, 2021 CSA Multilateral Notice accompanying the final published version of MI 25-102. The Proposed Amendments in this Notice are the amendments that were contemplated in the March 14, 2019 CSA Notice, under the heading "Expected Future Amendments for Commodity Benchmarks".

The Proposed Amendments intend to implement a comprehensive regime for:

- the designation and regulation of commodity benchmarks (**designated commodity benchmarks**), including specific requirements (or exemptions from requirements) for benchmarks dually designated as designated critical benchmarks and designated commodity benchmarks (**designated critical** and **designated commodity benchmarks** or **critical commodity benchmarks**), and for benchmarks dually designated as designated regulated-data benchmarks and designated commodity benchmarks (**designated regulated-data** and **designated commodity benchmarks** or **regulated-data commodity benchmarks**), and

- the designation and regulation of persons or companies that administer such benchmarks (**designated benchmark administrators** or **administrators**).

Currently, the Authorities do not intend to designate any administrators of commodity benchmarks. However, the Authorities may designate administrators and their associated commodity benchmarks in the future on public interest grounds, including where:

- a commodity benchmark is sufficiently important to commodity markets in Canada,

- a benchmark administrator applies for designation to allow its commodity benchmark to be referenced in financial instruments that are invested in by, or where a counterparty is, one or more European institutional investors pursuant to the EU BMR (defined below), and

- the Authorities become aware of activities of a benchmark administrator that raise concerns that align with the regulatory risks identified below in respect of such parties and conclude that the administrator and commodity benchmark in question should be designated.

[2] As explained in this "Introduction", the coming into force of MI 25-102 is still subject to Ministerial approvals in the Participating Jurisdictions.

Background

In 2011, the G20 Leaders requested the International Organization of Securities Commissions (**IOSCO**), in collaboration with other organizations, to prepare recommendations to improve the functioning and oversight of oil price reporting agencies (**PRAs**).[3] This request followed an earlier request by the G8 Finance Ministers in 2008, arising from concerns about oil price volatility, for IOSCO to produce recommendations intended to improve the efficiency and functioning of commodities markets.[4]

As outlined in the March 14, 2019 CSA Notice, in 2012, allegations of manipulation of the London inter-bank offered rate (**LIBOR**) led to the loss of market confidence in the credibility and integrity of not only LIBOR, but also in financial benchmarks in general. Although not on the scale of the LIBOR scandal, there have also been examples of manipulation or attempted manipulation of energy price indexes to benefit positions on futures exchanges.[5]

IOSCO PRA Principles

In October 2012, IOSCO published the *Principles for Oil Price Reporting Agencies* (the **IOSCO PRA Principles**),[6] setting out principles intended to enhance the reliability of oil price assessments that are referenced in derivative contracts subject to regulation by IOSCO members. This was followed by the publication in July 2013 of the *Principles for Financial Benchmarks* (together with the IOSCO PRA Principles, the **IOSCO Principles**). Although both sets of IOSCO Principles reflect similar concerns regarding the need for safeguards to ensure the integrity of benchmarks, the IOSCO PRA Principles were developed to focus on the specifics of the underlying physical oil markets.[7] Even though the IOSCO PRA Principles were developed in the context of PRAs in oil derivatives markets, IOSCO has encouraged the adoption of these principles more generally to any commodity derivatives contract that references a PRA-assessed price without regard to the nature of the underlying commodity.[8]

[3] PRAs are publishers and information providers who report prices transacted in physical and some derivatives markets and provide informed assessments of price levels at distinct points in time. See the IEA, IEF, OPEC and IOSCO October 2011 Report on *Oil Price Reporting Agencies*, specifically paragraph 1, available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD364.pdf.

[4] See the IOSCO March 2012 Consultation Report on the *Functioning and Oversight of Oil Price Reporting Agencies*, specifically Chapter 2, page 10, available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD375.pdf.

[5] For specific examples, see footnote 87 within IOSCO's September 2011 Final Report on the *Principles for the Regulation and Supervision of Commodity Derivatives Markets*, available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf.

[6] Available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD391.pdf.

[7] See the IOSCO September 2014 Report on the *Implementation of the Principles for Oil Price Reporting Agencies*, specifically Chapter 1, pages 1 and 2, available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD448.pdf.

[8] See page 7, *supra* note 6.

EU Benchmarks Regulation

Regulation in the European Union (**EU**) of commodity benchmarks is embedded within the EU's *Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds* (**EU BMR**).[9] A detailed overview of the EU BMR, including the regime applicable to third country administrators and specifics on the process of obtaining an EU equivalency decision, was provided in the March 14, 2019 CSA Notice.

The preamble of the EU BMR generally acknowledges that "[p]hysical commodity markets have unique characteristics which should be taken into account. Commodity benchmarks are widely used and can have sector-specific characteristics, so it [was] necessary to introduce specific provisions in [the EU BMR] for such benchmarks."[10] Annex II of the EU BMR sets out the provisions that are applicable to commodity benchmarks, and these provisions closely track the IOSCO PRA Principles.

Substance and Purpose

The Proposed Amendments were developed to establish an EU BMR-equivalent commodity benchmarks regulatory regime and to ensure the integrity of Canada's commodity and capital markets, thereby protecting Canadian investors and other Canadian market participants.

Although currently the Authorities have no intention of designating any commodity benchmarks or administrators of commodity benchmarks, as outlined earlier in this Notice, the Authorities may designate administrators and their associated commodity benchmarks in the future on public interest grounds, including in the case where an administrator applies for designation.

The proposed changes to the CP are meant to assist in the interpretation and application of the proposed amendments to MI 25-102.

EU Equivalency

It is desirable and important to have the EU recognize the proposed Canadian commodity benchmarks regime as equivalent since it would allow EU institutional market participants to continue to use any Canadian commodity benchmark designated under MI 25-102.

Although Canada-based administrators are able to directly apply for registration under the EU BMR, the Authorities are of the view that:

- Canadian securities regulators have a sovereign responsibility and are best positioned to directly regulate commodity benchmarks with a significant connection to Canada, including such commodity benchmarks' administrators, and

[9] The EU BMR that came into force on June 30, 2016 is available online at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1011&from=EN; the consolidated version of the EU BMR, as of 10/12/2019, is available online at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R1011-20191210&from=EN.

[10] See P(34) of the EU BMR that came into force on June 30, 2016, *supra* note 9.

- it would be prudent to implement a Canadian regime by, or soon after, the EU equivalency deadline (i.e., January 1, 2024) in the event that, for example, a non-EU registered benchmark administrator of a Canadian commodity benchmark would like the benefit of a Canadian domestic regime that has been recognized as equivalent by the EU.

Risk Reduction and Investor Protection

We believe that we should now amend MI 25-102 to establish and implement a regulatory regime for commodity benchmarks for the following reasons:

- commodity benchmarks may be subject to vulnerabilities arising from voluntary reporting of input data, relatively low liquidity in physically-settled contracts, and variation in methodologies both across benchmark administrators and within a single administrator (largely due to the complexities of the physical commodity markets),

- these vulnerabilities could create opportunities for manipulation of the input data (i.e., data on physically-settled trades) and for deliberate manipulation or attempted manipulation of a benchmark for the benefit of the contributor,

- methodologies generally use expert judgment, and without appropriate policies, procedures and controls in place, the price determination could be an unreliable indicator of the physical commodity market it is attempting to measure, and in turn make commodity derivatives contracts more susceptible to manipulation,

- many factors that have resulted in benchmark-related misconduct in other jurisdictions are also present in Canada,[11]

- a commodity benchmark that does not accurately and reliably represent the value of the underlying interest of the commodity benchmark for that part of the market the benchmark is intended to represent, either because of deliberate misconduct or because of inadequate controls to ensure the integrity of that benchmark, could adversely impact investors, market participants, and the reputation and confidence in, Canada's commodity and capital markets, and

- a commodity benchmark regime would clarify, strengthen and specify the legal basis upon which Canadian securities regulators may take enforcement and other regulatory action against benchmark administrators in the event of misconduct involving a commodity benchmark that harms (or threatens to harm) investors, market participants, and commodity and capital markets in general.

We are of the view that amending MI 25-102 to incorporate the commodity benchmark provisions would codify international best practices, as articulated under the IOSCO PRA Principles.

[11] For example, in 2008, the Commodity Futures Trading Commission obtained a $10 million civil monetary penalty in a consent order settling charges against Energy Transfer Partners, L.P., of Dallas, Texas and three subsidiaries. They were charged with attempting to manipulate natural gas prices at the Houston Ship Channel delivery hub. For further details, see footnote 46 in the IOSCO Final Report on PRAs, *supra* footnote 6.

Summary of the Proposed Amendments to the Instrument

Designated Commodity Benchmarks and Benchmark Administrators

Under the securities legislation of each of the Participating Jurisdictions, a benchmark administrator can apply for designation as a designated benchmark administrator and request the designation of a commodity benchmark. Alternatively, the regulator can also apply for a benchmark administrator or commodity benchmark to be designated under securities legislation, or in Québec or Alberta the securities regulatory authority may designate a benchmark administrator or commodity benchmark on its own initiative. The proposed definition of a commodity benchmark is found in section 40.1 of the proposed amendments to the Instrument.

The CP explains that when applying for designation, a benchmark administrator should provide the same information as is set out in Form 25-102F1 and Form 25-102F2, with respect to the administrator and the benchmark, respectively. The CP also provides guidance on what factors a regulator or securities regulatory authority would consider in determining if a benchmark, including a commodity benchmark, should also be designated as a critical benchmark or a regulated-data benchmark.

When designating a commodity benchmark, a securities regulatory authority will issue a decision document designating the commodity benchmark as a designated commodity benchmark. If applicable, the decision document will also indicate if the designated commodity benchmark is dually designated as a designated critical benchmark or a designated regulated-data benchmark.

As explained below, a regulated-data benchmark that is also a commodity benchmark may be designated only as a regulated-data benchmark, or dually designated as a regulated-data commodity benchmark. Such benchmarks, whether they receive a single or dual designation, would not also be designated as critical benchmarks. This is in contrast to the possible dual designation of a financial benchmark as a designated regulated-data and designated critical benchmark.

In summary, the possible designations for a commodity benchmark are as follows:

	Designation			
Type of benchmark	**Designated commodity benchmark**	**Designated commodity and designated critical benchmark**	**Designated regulated-data benchmark**	**Designated regulated-data and designated commodity benchmark**
Commodity benchmark	X	X		X
Critical benchmark		X		

Regulated-data benchmark (type 1)[12]			X	
Regulated-data benchmark (type 2)[13]				X

General Requirements for Administrators of Commodity Benchmarks

Both the IOSCO PRA Principles and the regulations under Annex II of the EU BMR were developed by considering the characteristics of physical commodity markets without focusing on the regulation of contributors of input data, largely because of the voluntary nature of market participants' contributions of input data and the concern that overregulation of potential contributors could discourage such participants from providing their data. The approach has been to create incentives for PRAs or benchmark administrators to institute processes designed to enhance the reliability of assessments that are indicators of the price or value of the physical commodity that underlies a derivatives contract.[14]

Designated benchmark administrators of commodity benchmarks have to comply with some requirements that are applicable to all administrators, and some, as provided under proposed Part 8.1 of MI 25-102, that are specific to administrators of commodity benchmarks. These requirements include:

- delivering audited annual financial statements and certain forms (e.g., Form 25-102F1 *Designated Benchmark Administrator Annual Form* and Form 25-102F2 *Designated Benchmark Annual Form*) to Canadian securities regulators (Part 2);

- maintaining a control framework to manage operational risk and to ensure that there are controls in place with respect to business continuity and disaster recovery plans, and contingency procedures in the event of a disruption to the provision of the designated commodity benchmark (section 40.4);

- maintaining appropriate controls and oversight over the process of the provision of a commodity benchmark (subsection 5(1)), including specifying the responsibilities of a compliance officer (section 6) and the requirements and responsibilities of benchmark individuals (section 40.11);

- maintaining an appropriate accountability and control framework to address conflicts of interest (section 40.13), complaints (section 12), reporting of contraventions (section 11) and outsourcing (section 13);

[12] Regulated-data benchmark that meets the definition of a commodity benchmark under section 40.1, but not the criteria under subsection 40.2(3).
[13] Regulated-data benchmark that meets the definition of a commodity benchmark under section 40.1 and the criteria under subsection 40.2(3).
[14] See specifically page 8 of the October 2012 IOSCO paper, *supra* note 6.

- applying policies, procedures and controls relating to input data (section 40.10), as well as complying with obligations relating to the benchmark methodology used by the administrator (sections 40.5, 40.7 and 40.8) and any changes to such methodology (section 17);

- publishing information about the administration of its designated commodity benchmarks, including publishing:

    - key elements of the methodology and other required information about the methodology or the determination of a designated commodity benchmark (sections 40.5, 40.6 and 40.9),

    - the procedures relating to a significant change or cessation of a benchmark (sections 17, 20 and 22), and

    - a specified benchmark statement (section 19);

- keeping specified books, records and other documents for a period of 7 years (section 40.12); and

- engaging a public accountant to provide an assurance report on the administrator's compliance with certain key sections, including proposed sections of MI 25-102 and the methodology for the commodity benchmark and publishing a copy of the assurance report (section 40.14).

Additional Administrator Requirements for Critical Commodity Benchmarks

Where a commodity benchmark is also designated as a critical benchmark and the underlying commodity is gold, silver, platinum or palladium, then it is proposed that Part 8.1 not apply. Typically, such commodities function as stores of value, and their benchmarks, if critical, closely resemble financial, rather than commodity benchmarks. Thus, the requirements under Parts 1 through 8 would apply to such benchmarks, including the additional requirements under Part 8, Division 1, specifically sections 27 to 33 of MI 25-102.

If the underlying commodity is not gold, silver, platinum or palladium, then a dually-designated critical commodity benchmark would be subject to proposed Part 8.1, which provides for some exemptions from Part 8, Division 1 requirements. The additional requirements that would apply include:

- that the administrator provide specific notice to securities regulators and comply with other requirements if it intends to cease administering the critical commodity benchmark,

- that the administrator take reasonable steps to ensure that users have direct access to the critical commodity benchmark on a fair, reasonable, transparent and non-discriminatory basis, and

- that the administrator provide securities regulators with an assessment at least once in each 24-month period of the capability of the critical commodity benchmark to accurately and reliably represent that part of the market the critical commodity benchmark is intended to represent.

Exemptions for Regulated-Data Commodity Benchmarks

Under the Proposed Amendments, a commodity benchmark designated as a regulated-data benchmark is subject to the requirements under Parts 1 to 8, including the exemptions under section 40.

However, if a commodity benchmark is determined from input data arising from transactions of the commodity that is the underlying interest of the benchmark and the parties to those transactions, in the ordinary course of business, make or take physical delivery of the commodity, and that benchmark also meets the requirements of a regulated-data benchmark, then it is proposed that such a benchmark be dually designated as a designated commodity and a designated regulated-data benchmark. Such dually-designated benchmarks would be subject to Part 8.1 requirements, but exempted from certain requirements as provided by subsection 40.2(4). Fundamentally, this subset of regulated-data benchmarks, determined from transactions where, in the ordinary course of business, parties make or take physical delivery of the commodity, would maintain a closer link to the commodity markets, rather than the financial markets, and should be treated as commodity benchmarks. In contrast, regulated-data benchmarks based on financial transactions where counterparties hedge their exposure in underlying physical contracts or speculate on the movement of the price of a commodity, would more closely resemble financial benchmarks, and should be subject to the requirements under Parts 1 to 8.

To the extent possible, the proposed exemptions under subsection 40.2(4) would ensure that administrators of benchmarks dually designated as commodity and regulated-data benchmarks would receive comparable treatment under Part 8.1 as administrators of designated regulated-data benchmarks receive under Parts 1 to 8. Administrators of such dually designated benchmarks would be exempted from certain requirements, including requirements for:

- systems and controls for detecting manipulation or attempted manipulation,
- policies, procedures and controls relating to the contribution of input data and the accuracy, reliability and completeness of such data, and the publication of certain explanations for each determination of a benchmark, and
- the engagement of a public accountant to provide an assurance report on the administrator's compliance with certain key sections of MI 25-102, and the methodology for the commodity benchmark.

Summary of the Proposed Changes to the CP

The proposed changes to the CP, found under Annex C, provide interpretational guidance on elements of the proposed amendments to MI 25-102.

Anticipated Costs and Benefits of the Proposed Amendments to MI 25-102

The integrity and reliability of commodity benchmarks is important to the functioning of commodity derivatives markets. Currently, the Authorities do not intend to designate any administrators of commodity benchmarks, but as outlined earlier in this Notice, we may do so in the future based on public interest grounds, including in the case where an administrator applies for designation or if we become aware of activities that raise risk or investor protection concerns. The proposed requirements under Part 8.1 of MI 25-102 are substantially similar to the requirements under Annex II of the EU BMR, which generally codify international best practices, as articulated under the IOSCO PRA Principles. Such regulation is meant to ensure that commodity benchmarks have adequate protections against potential manipulation and that the provision of these benchmarks is subject to appropriate systems and controls, with administrators having in place appropriate standards of corporate governance. Where appropriate, such as in the case of certain regulated-data benchmarks, we have tailored the requirements to the Canadian commodity markets.

The proposed regulation of commodity benchmarks should enhance the confidence of stakeholders in the Canadian commodity markets and minimize the potential costs that may be borne by the Canadian commodity and financial markets, including investors, in the event of the unreliability or manipulation of designated commodity benchmarks.

Overall, the Authorities are of the view that the regulatory costs of the Proposed Amendments are proportionate to the benefits that would be realized by impacted market participants and the broader Canadian commodity market.

Unpublished Materials

In developing the Proposed Amendments, we have not relied on any significant unpublished study, report or other written materials.

Local Matters

Where applicable, Annex F provides additional information required by the local securities legislation.

Request for Comments

We welcome your comments on the Proposed Amendments and also invite comments on the specific questions set out in Annex E of this Notice. Please submit your comments in writing on or before July 28, 2021. If you are not sending your comments by email, an electronic file containing the submissions should also be provided in Microsoft Word format.

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the Autorité des marchés financiers at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Address your submission to the following CSA jurisdictions:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

Deliver your comments **only** to the addresses below. Your comments will be distributed to the other participating CSA jurisdictions.

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Contents of Annexes:

This Notice includes the following Annexes:

Annex A: Proposed amendments to Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators*[15]

[15] The proposed amendments and the proposed changes, and blacklines provided, are with respect to the final versions of the Instrument and CP published by the Authorities today, on April 29, 2021. For further details, see the

Annex B: Blackline of Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* showing proposed amendments

Annex C: Proposed changes to Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators*

Annex D: Blackline of Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators* showing proposed changes

Annex E: Specific Questions of the Authorities Relating to the Proposed Amendments

Annex F: Local Matters (where applicable)

Questions

Please refer your questions to any of the following:

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ANNEX A

PROPOSED AMENDMENTS TO MULTILATERAL INSTRUMENT 25-102 *DESIGNATED BENCHMARKS AND BENCHMARK ADMINISTRATORS*

1. Multilateral Instrument 25-102 Designated Benchmarks and Benchmark Administrators is amended by this Instrument.[1]

2. Subsection 1(1) is amended

(a) by adding the following definition:

"designated commodity benchmark" means a benchmark that is designated for the purposes of this Instrument as a "commodity benchmark" by a decision of the securities regulatory authority;***, and***

(b) in the definition of "subject requirements" by

(i) deleting "and***" at the end of paragraph (d),***

(ii) adding "and***" at the end of paragraph (e), and***

(iii) adding the following paragraph:

(f) paragraphs 40.14(1)(a) and (b);**.**

3. Paragraph 6(3)(a) is amended by adding "in the case of a benchmark that is not a designated commodity benchmark,***" before "***monitor***".***

4. Subsection 6(3) is amended by adding the following paragraph:

(a.1) in the case of a designated commodity benchmark, monitor and assess compliance by the designated benchmark administrator and its DBA individuals with subsection 5(1), section 40.4 and securities legislation relating to benchmarks;**.**

5. Subparagraph 6(3)(b)(i) is amended by adding "or (a.1), as applicable***" before ",".***

[1] The proposed amendments are with respect to the final version of the Instrument published by the Authorities today, on April 29, 2021. For further details, see the CSA Notice of Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy, dated April 29, 2021.

6. Subparagraph 6(3)(b)(ii) is amended

(a) by adding "in the case of a benchmark that is not a designated commodity benchmark,***" before "***compliance***", and***

(b) by deleting "and***" at the end of the subparagraph.***

7. Paragraph 6(3)(b) is amended by adding the following subparagraph:

(ii.1) in the case of a designated commodity benchmark, compliance by the designated benchmark administrator and its DBA individuals with subsection 5(1), section 40.4 and securities legislation relating to benchmarks, and**.**

8. The Instrument is amended by adding the following part:

PART 8.1
DESIGNATED COMMODITY BENCHMARKS

Interpretation

40.1. In this Part, "commodity benchmark" means a benchmark that is determined by reference to or an assessment of an underlying interest that is a commodity, but does not include a benchmark that has, as an underlying interest, a currency or a commodity that is intangible.

Application – dual-designated benchmarks

40.2.(1) Sections 30 to 33 do not apply to a designated benchmark administrator or to a benchmark contributor in relation to a designated commodity benchmark that is also a designated critical benchmark.

(2) This Part does not apply to a designated benchmark administrator in relation to a designated commodity benchmark if

(a) the benchmark is also a designated critical benchmark, and

(b) the underlying interest of the benchmark is gold, silver, platinum or palladium.

(3) The provisions set out in subsection (4) do not apply to a designated benchmark administrator in relation to a designated commodity benchmark if all of the following apply:

(a) the benchmark is determined from input data arising from transactions of the commodity that is the underlying interest of the benchmark;

(b) the commodity is of a type in respect of which parties to the transactions referred to in paragraph (a), in the ordinary course of business, make or take physical delivery of the commodity;

(c) the benchmark is also a designated regulated-data benchmark.

(4) For the purposes of subsection (3), the following provisions do not apply:

(a) subsections 11(1) and (2);

(b) section 40.9;

(c) section 40.10, other than subparagraph (1)(f)(ii);

(d) paragraph 40.12(2)(a);

(e) section 40.14.

Provisions of this Instrument not applicable to designated commodity benchmarks

40.3. The following provisions do not apply to a designated benchmark administrator, a benchmark contributor or a specified person or company in relation to a designated commodity benchmark:

(a) Part 3, other than subsection 5(1) and sections 6, 11, 12 and 13;

(b) Part 4, other than section 17;

(c) sections 18 and 21;

(d) Part 6;

(e) Part 7.

Control framework

40.4.(1) A designated benchmark administrator must establish, document, maintain and apply policies, procedures and controls that are reasonably designed to ensure that a designated commodity benchmark is provided in accordance with this Instrument.

(2) Without limiting the generality of subsection (1), a designated benchmark administrator must ensure that its policies, procedures and controls address all of the following:

(a) management of operational risk, including any risk of financial loss, disruption or damage to the reputation of the designated benchmark

administrator from any failure of its information technology systems;

(b) business continuity and disaster recovery plans;

(c) contingencies in the event of a disruption to the provision of the designated commodity benchmark or the process applied to provide the designated commodity benchmark.

Methodology

40.5.(1) A designated benchmark administrator must not follow a methodology for determining a designated commodity benchmark unless

(a) the methodology is sufficient to provide a designated commodity benchmark that accurately and reliably represents the value of the underlying interest of the designated commodity benchmark for that part of the market that the benchmark is intended to represent, and

(b) the accuracy and reliability of the designated commodity benchmark determined using the methodology is verifiable.

(2) A designated benchmark administrator must establish, document and publish the elements of the methodology of a designated commodity benchmark, including, for greater certainty, the following:

(a) all criteria and procedures used to determine a designated commodity benchmark, including, but not limited to the following:

(i) how the designated benchmark administrator will use input data, including, for greater certainty, how it will use the volume of transactions, concluded and reported transactions, bids, offers and any other market information used to determine the designated commodity benchmark;

(ii) the reason that a specific reference unit will be used;

(iii) how input data will be obtained;

(iv) identification of how and when expert judgment may be exercised in the determination of the designated commodity benchmark;

(v) the assumptions and the model or method that will be used for the extrapolation and interpolation of input data;

(b) procedures reasonably designed to ensure that benchmark individuals exercise expert judgment in a consistent manner;

(c) the relative importance assigned to the criteria used to determine the designated commodity benchmark, including, for greater certainty, the type of input data used and how and when expert judgment may be exercised;

(d) any minimum quantity of transaction data to be used to determine the designated commodity benchmark;

(e) if minimum quantity thresholds referred to in paragraph (d) are not provided, the rationale as to why minimum requirements are not provided;

(f) procedures for the determination of a designated commodity benchmark in circumstances in which the input data does not meet the minimum threshold for either the quantity of the transaction data or the quality of the input data, including, for greater certainty,

(i) any alternative methods to determine the designated commodity benchmark, including any theoretical estimation models, and

(ii) procedures to be used in circumstances if no transaction data exists;

(g) the time period when input data must be provided;

(h) the means of contribution of input data, whether electronically, by telephone or by other means;

(i) procedures for how a designated commodity benchmark is determined if one or more benchmark contributors contribute input data that constitutes a significant proportion of the total input data for the determination of the designated commodity benchmark, including specifying what constitutes a significant proportion for the determination of the benchmark;

(j) the circumstances in which transaction data may be excluded in the determination of the designated commodity benchmark.

Additional information about the methodology

40.6. A designated benchmark administrator must, with respect to the methodology used for a designated commodity benchmark, publish the following:

(a) the rationale for adopting the methodology, including

(i) the rationale for any price adjustment techniques, and

(ii) a description of why the time period for the acceptance of input data is adequate for the input data to accurately and reliably represent the value of the underlying interest of the designated commodity

benchmark;

(b) the process for the internal review and the approval of the methodology and the frequency of such reviews;

(c) the process referred to in section 17 for making significant changes to the methodology.

Review of methodology

40.7. A designated benchmark administrator must, at least once in every 12-month period, carry out an internal review of the methodology for each designated commodity benchmark that it administers to ensure that the designated commodity benchmark determined under the methodology accurately and reliably represents the value of the underlying interest of the designated commodity benchmark for that part of the market the benchmark is intended to represent.

Quality and integrity of the determination of a designated commodity benchmark

40.8.(1) A designated benchmark administrator must specify and document a description of the commodity that is the underlying interest of a designated commodity benchmark.

(2) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to ensure the quality and integrity of each determination of a designated commodity benchmark, including for greater certainty, policies and procedures that

(a) ensure that input data is used in accordance with the order of priority specified in the methodology of the designated commodity benchmark;

(b) identify transaction data that a reasonable person would conclude is anomalous or suspicious;

(c) ensure that the designated benchmark administrator maintains records of each decision, including the reasons for the decision, to exclude transaction data from the determination of the designated commodity benchmark;

(d) do not discourage benchmark contributors from contributing all of their input data that meets the designated benchmark administrator's criteria for the determination of the designated commodity benchmark;

(e) to the extent that is reasonable, ensure that

(i) input data contributed is representative of the benchmark contributors' concluded transactions relating to the underlying

interest of the designated commodity benchmark, and

(ii) benchmark contributors comply with the designated benchmark administrator's quality and integrity standards for input data.

Transparency of determination of a designated commodity benchmark

40.9. A designated benchmark administrator must publish for each determination of a designated commodity benchmark, as soon as reasonably practicable, the following:

(a) a plain language explanation of how the designated commodity benchmark was determined, which explanation includes, for greater certainty, all of the following:

(i) the number and the volume of the transactions submitted;

(ii) with respect to each type of input data, the range of volumes and the average volume, the range of prices and the average price and the indicative percentage;

(b) a plain language explanation of the extent to which, and the basis upon which, expert judgment was used in the determination of the designated commodity benchmark, including, if applicable, the reasons for not giving priority to concluded and reported transactions.

Integrity of the process for contributing input data

40.10.(1) A designated benchmark administrator must establish, document, maintain and apply policies, procedures, controls and criteria reasonably designed to ensure the integrity of the process for contributing input data for a designated commodity benchmark including, for greater certainty, the following:

(a) criteria that determine who may contribute input data;

(b) procedures to verify the identity of a benchmark contributor and a contributing individual and the authorization of such contributing individuals to contribute input data on behalf of the benchmark contributor;

(c) criteria that determine which contributing individuals are permitted to contribute input data on behalf of a benchmark contributor;

(d) criteria that determine the appropriate contribution of transaction data by the benchmark contributor;

(e) if transaction data is contributed from any front office of a benchmark

contributor, procedures to confirm the reliability of the input data, and the criteria upon which the reliability is measured, in accordance with its policies;

(f) procedures that

(i) identify any communications between contributing individuals and benchmark individuals that might involve manipulation or attempted manipulation of the determination of the designated commodity benchmark for the benefit of any trading position of the benchmark contributor, any contributing individual or third party,

(ii) identify any attempts to cause a benchmark individual to not apply or follow the designated benchmark administrator's policies, procedures and controls,

(iii) identify benchmark contributors or contributing individuals that engage in a pattern of contributing transaction data that a reasonable person would consider is anomalous or suspicious, and

(iv) ensure that the appropriate supervisors within the benchmark contributor are notified, to the extent possible, of questions or concerns by the designated benchmark administrator.

(2) In this section, "front office" means any department, division or other internal grouping of a benchmark contributor, or any employee or agent of a benchmark contributor, that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring or brokerage activities on behalf of the benchmark contributor.

Governance and control requirements

40.11.(1) A designated benchmark administrator must establish and document an organizational structure.

(2) The organizational structure referred to in subsection (1) must establish well-defined roles and responsibilities for each person or company involved in the provision of a designated commodity benchmark administered by the administrator, and include, as necessary, segregated reporting lines, to ensure that the administrator complies with the provisions of this Instrument.

(3) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to ensure the integrity and reliability of the determination of a designated commodity benchmark including, for greater certainty, policies and procedures to ensure

(a) that each of its benchmark individuals has the necessary skills, knowledge, experience, reliability and integrity for the duties assigned to the individual,

(b) that the provision of the designated commodity benchmark can be made on a consistent and regular basis,

(c) that succession plans exist to ensure

(i) that each of its benchmark individuals continues to have the necessary skills, knowledge, experience, reliability and integrity for the duties assigned to the individual, and

(ii) the provision of the designated commodity benchmark on a consistent and regular basis,

(d) that each of its benchmark individuals is subject to adequate management and supervision to ensure that the methodology of the designated commodity benchmark is properly applied, and

(e) a procedure for obtaining the approval of an individual holding a position senior to that of a benchmark individual prior to each publication of the designated commodity benchmark.

Books, records and other documents

40.12.(1) A designated benchmark administrator must keep such books, records and other documents that are necessary to account for its activities as a designated benchmark administrator, its business transactions and its financial affairs relating to its designated commodity benchmarks.

(2) A designated benchmark administrator must keep books, records and other documents of the following:

(a) all input data, including how the data was used;

(b) each decision to exclude a particular transaction from input data that otherwise met the requirements of the methodology applicable to the determination of a designated commodity benchmark, and the rationale for doing so;

(c) the methodology applicable to the determination of each designated commodity benchmark administered by the designated benchmark administrator;

(d) any exercise of expert judgment by the designated benchmark administrator in the determination of the designated commodity benchmark, including the

basis for the exercise of expert judgment;

(e) changes in or deviations from policies, procedures, controls or methodologies;

(f) the identities of contributing individuals and of benchmark individuals;

(g) all documents relating to a complaint.

(3) A designated benchmark administrator must keep the records referred to in subsection (2) in a form that

(a) identifies the manner in which the determination of a designated commodity benchmark was made, and

(b) enables an audit, review or evaluation of any input data, calculation, or exercise of expert judgment, including in connection with any limited assurance report on compliance or reasonable assurance report on compliance.

(4) A designated benchmark administrator must retain the books, records and other documents required to be maintained under this section

(a) for a period of 7 years from the date the record was made or received by the designated benchmark administrator, whichever is later,

(b) in a safe location and a durable form, and

(c) in a manner that permits those books, records and other documents to be provided promptly on request to the regulator or securities regulatory authority.

Conflicts of interest

40.13.(1) A designated benchmark administrator must establish, document, maintain and apply policies and procedures that are reasonably designed to

(a) identify and eliminate or manage conflicts of interest involving the designated benchmark administrator and its managers, benchmark contributors, benchmark users, DBA individuals and any affiliated entity of the designated benchmark administrator,

(b) ensure that any expert judgment exercised by the benchmark administrator or DBA individuals is independently and honestly exercised,

(c) protect the integrity and independence of the provision of a designated

commodity benchmark, including, for greater certainty, by

(i) ensuring that the provision of a designated commodity benchmark is not influenced by the existence of, or potential for, financial interests, relationships or business connections between the designated benchmark administrator or its affiliates, its personnel, clients, any market participant or persons connected with them,

(ii) ensuring that each benchmark individual does not have any financial interests, relationships or business connections that adversely affect the integrity of the designated benchmark administrator, including outside employment, travel, and acceptance of entertainment, gifts and hospitality provided by the designated benchmark administrator's clients or other commodity market participants,

(iii) keeping separate, operationally, the business of the designated benchmark administrator relating to the designated commodity benchmark it administers, and its benchmark individuals, from any other business activity of the designated benchmark administrator if the designated benchmark administrator becomes aware of a conflict of interest or a potential conflict of interest involving the business of the designated benchmark administrator relating to any designated commodity benchmark, and

(iv) ensuring that each of its benchmark individuals does not contribute to a determination of a designated commodity benchmark by way of engaging in bids, offers or trades on a personal basis or on behalf of market participants, except as permitted under the policies and procedures of the designated benchmark administrator,

(d) ensure that an officer referred to in section 6, or any DBA individual that reports directly to the officer, does not receive compensation or other financial incentive from which conflicts of interest arise or that otherwise adversely affect the integrity of the benchmark determination,

(e) protect the confidentiality of information provided to or produced by the designated benchmark administrator, subject to the disclosure requirements under sections 19, 20, 40.5, 40.6 and 40.9, and

(f) identify and eliminate or manage conflicts of interest that exist between the provision of a designated commodity benchmark by the designated benchmark administrator, including all benchmark individuals who participate in the determination of the designated commodity benchmark, and any other business of the designated benchmark administrator.

(2) A designated benchmark administrator must ensure that its other businesses have appropriate policies, procedures and controls designed to minimize the likelihood that a conflict of interest will adversely affect the integrity of the provision of a designated commodity benchmark.

(3) In establishing an organizational structure, as required under subsections 40.11(1) and (2), a designated benchmark administrator must ensure that the responsibilities for each person or company involved in the provision of a designated commodity benchmark administered by the designated benchmark administrator do not cause a conflict of interest or a perception of conflict of interest.

(4) A designated benchmark administrator must promptly publish a description of a conflict of interest, or a potential conflict of interest, in respect of a designated commodity benchmark

(a) if a reasonable person would consider the risk of harm to any person or company arising from the conflict of interest, or the potential conflict of interest, is significant, and

(b) on becoming aware of the conflict of interest, or the potential conflict of interest, including, for greater certainty, a conflict or potential conflict arising from the ownership or control of the designated benchmark administrator.

(5) If a designated benchmark administrator fails to apply or follow a policy or procedure referred to in paragraph (1)(e), and a reasonable person would consider the failure to be significant, the designated benchmark administrator must promptly provide written notice of the significant failure to the regulator or securities regulatory authority.

Assurance report on designated benchmark administrator

40.14.(1) A designated benchmark administrator must engage a public accountant to provide a limited assurance report on compliance or a reasonable assurance report on compliance, in respect of each designated commodity benchmark it administers, regarding the designated benchmark administrator's

(a) compliance with subsection 5(1) and sections 11 to 13, 40.4, 40.5, 40.7, 40.8, and 40.10 to 40.13, and

(b) following of the methodology applicable to the designated commodity benchmark.

(2) A designated benchmark administrator must ensure an engagement referred to in subsection (1) occurs once in every 12-month period.

(3) A designated benchmark administrator must, within 10 days of the receipt of a report provided for in subsection (1), publish the report and deliver a copy of the report to the regulator or securities regulatory authority..

9. This Instrument comes into force on ●.

ANNEX B

BLACKLINED MULTILATERAL INSTRUMENT 25-102
DESIGNATED BENCHMARKS AND BENCHMARK ADMINISTRATORS

Note: The text box in this Instrument located after subsection 1(6) refers to terms defined in securities legislation. This text box does not form part of this Instrument.

PART 1
DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1.(1) In this Instrument,

"benchmark individual" means any DBA individual who participates in the provision of, or overseeing the provision of, a designated benchmark;

"board of directors" includes, in the case of a person or company that does not have a board of directors, a group that acts in a capacity similar to a board of directors;

"contributing individual" means an individual who contributes input data, as an employee or agent, on behalf of a benchmark contributor;

"CSAE 3000" means Canadian Standard on Assurance Engagements 3000 *Attestation Engagements Other than Audits or Reviews of Historical Financial Information*, as amended from time to time;

"CSAE 3001" means Canadian Standard on Assurance Engagements 3001 *Direct Engagements*, as amended from time to time;

"CSAE 3530" means Canadian Standard on Assurance Engagements 3530 *Attestation Engagements to Report on Compliance*, as amended from time to time;

"CSAE 3531" means Canadian Standard on Assurance Engagements 3531 *Direct Engagements to Report on Compliance*, as amended from time to time;

"DBA individual" means an individual who is

(a) a director, officer or employee of a designated benchmark administrator, or

(b) an agent of a designated benchmark administrator who performs services on behalf of the designated benchmark administrator;

"designated benchmark" means a benchmark that is designated for the purposes of this Instrument by a decision of the securities regulatory authority;

"designated benchmark administrator" means

(a) in Québec, a benchmark administrator that is subject to securities legislation by a decision of the securities regulatory authority, and

(b) in every other jurisdiction, a benchmark administrator that is designated for the purposes of this Instrument by a decision of the securities regulatory authority;

"designated commodity benchmark" means a benchmark that is designated for the purposes of this Instrument as a "commodity benchmark" by a decision of the securities regulatory authority;

"designated critical benchmark" means a benchmark that is designated for the purposes of this Instrument as a "critical benchmark" by a decision of the securities regulatory authority;

"designated interest rate benchmark" means a benchmark that is designated for the purposes of this Instrument as an "interest rate benchmark" by a decision of the securities regulatory authority;

"designated regulated-data benchmark" means a benchmark that is designated for the purposes of this Instrument as a "regulated-data benchmark" by a decision of the securities regulatory authority;

"expert judgment" means the discretion exercised by

(a) a designated benchmark administrator with respect to the use of input data in determining a benchmark, and

(b) a benchmark contributor with respect to input data;

"input data" means data in respect of any measurement of one or more assets, interests or elements, including, but not limited to, the value or price of the asset, interest or element, if that data is contributed, or otherwise obtained, by a designated benchmark administrator for the purpose of determining a designated benchmark;

"ISAE 3000" means International Standard on Assurance Engagements 3000 (Revised), *Assurance Engagements Other than Audits or Reviews of Historical Financial Information*, as amended from time to time;

"limited assurance report on compliance" means

(a) a public accountant's limited assurance report, on management's statement that a person or company complied with the applicable subject requirements, if the report is prepared in accordance with CSAE 3000 and CSAE 3530 or ISAE 3000, or

(b) a public accountant's limited assurance report, on the compliance of a person or company with the applicable subject requirements, if the report is prepared in accordance with CSAE 3001 and CSAE 3531 or ISAE 3000;

"management's statement" means a statement of management of a designated benchmark administrator or a benchmark contributor, as applicable;

"methodology" means a document describing how a designated benchmark administrator determines a designated benchmark;

"reasonable assurance report on compliance" means

(a) a public accountant's reasonable assurance report, on management's statement that a person or company complied with the applicable subject requirements, if the report is prepared in accordance with CSAE 3000 and CSAE 3530 or ISAE 3000, or

(b) a public accountant's reasonable assurance report, on the compliance of a person or company with the applicable subject requirements, if the report is prepared in accordance with CSAE 3001 and CSAE 3531 or ISAE 3000;

"subject requirements" means

(a) paragraphs 32(1)(a) and (b),

(b) paragraphs 33(1)(a) and (b),

(c) paragraphs 36(1)(a) and (b),

(d) paragraphs 37(1)(a) and (b), ~~and~~

(e) paragraphs 38(1)(a), (b) and (c), and

(f) paragraphs 40.14(1)(a) and (b);

"transaction data" means the data in respect of a price, rate, index or value representing transactions

(a) between persons or companies each of which is not an affiliated entity of one another, and

(b) occurring in an active market subject to competitive supply and demand forces.

(2) Terms defined in National Instrument 21-101 *Marketplace Operation* and used in this Instrument have the respective meanings ascribed to them in that Instrument.

(3) For the purposes of this Instrument, input data is considered to have been contributed to a designated benchmark administrator if

(a) it is not reasonably available to

(i) the designated benchmark administrator, or

(ii) another person or company, other than the benchmark contributor, for the purpose of providing the input data to the designated benchmark administrator, and

(b) it is provided to the designated benchmark administrator or the other person or company referred to in subparagraph (a)(ii) for the purpose of determining a benchmark.

(4) For the purposes of this Instrument, a designated benchmark administrator is considered to have provided a designated benchmark if any of the following apply:

(a) the administrator collects, analyzes, processes or otherwise uses the input data for the purposes of determining the benchmark;

(b) the administrator determines the benchmark through the application of the methodology applicable to the benchmark;

(c) the administrator administers any other arrangements for determining the benchmark.

(5) Subject to subsections (6), (7) and (8), Appendix A contains definitions of terms used in this Instrument.

(6) Subsection (5) does not apply in Alberta, New Brunswick, Nova Scotia, Ontario or Saskatchewan.

Note: In Alberta, New Brunswick, Nova Scotia, Ontario and Saskatchewan, the terms in Appendix A are defined in securities legislation.

(7) In British Columbia, the definitions of "benchmark" and "benchmark contributor" in the *Securities Act* (British Columbia) apply to this Instrument.

(8) In Québec, the definitions of "benchmark" and "benchmark administrator" in the *Securities Act* (Québec) apply to this Instrument.

(9) In this Instrument, a person or company is an affiliated entity of another person or company if either of the following applies:

(a) one is the subsidiary of the other;

(b) each is a subsidiary of, or controlled by, the same person or company.

(10) For the purposes of paragraph (9)(b), a person or company (first person) controls another person or company (second person) if any of the following apply:

(a) the first person beneficially owns, or controls or directs, directly or indirectly, securities of the second person carrying votes that, if exercised, would entitle the first person to elect a majority of the directors of the second person, unless that first person holds the voting securities only to secure an obligation;

(b) the second person is a partnership, other than a limited partnership, and the first person holds more than a 50% interest in the partnership;

(c) the second person is a limited partnership and the general partner of the limited partnership is the first person;

(d) the second person is a trust and the first person is a trustee of the trust.

PART 2
DELIVERY REQUIREMENTS

Information on a designated benchmark administrator

2.(1) In this section, the following terms have the same meaning as in section 1.1 of National Instrument 52-107 *Acceptable Accounting Principles and Auditing Standards*:

(a) "accounting principles";

(b) "auditing standards";

(c) "U.S. GAAP";

(d) "U.S. PCAOB GAAS".

(2) In this section, "parent issuer" means an issuer in respect of which a designated benchmark administrator is a subsidiary.

(3) A designated benchmark administrator must deliver to the regulator or securities regulatory authority

(a) information that a reasonable person would consider describes the designated benchmark administrator's organization, structure and administration of benchmarks, including, for greater certainty, a description of its policies and procedures required under this Instrument, conflicts of interest and potential conflicts of interest, any person or company referred to in section 13 to which a designated benchmark administrator has outsourced a function, service or activity in the provision of a designated benchmark, benchmark individuals, the officer referred to in section 6 and sources of revenue, and

(b) annual financial statements for the designated benchmark administrator's most recently completed financial year that include all of the following:

(i) a statement of comprehensive income, a statement of changes in equity and a statement of cash flows for

(A) the most recently completed financial year, and

(B) the financial year, if any, immediately preceding the most recently completed financial year;

(ii) a statement of financial position at the end of each of the periods referred to in subparagraph (i);

(iii) notes to the annual financial statements.

(4) For the purposes of paragraph (3)(b), if a designated benchmark administrator is a subsidiary of a parent issuer, the designated benchmark administrator may instead deliver consolidated annual financial statements, for the most recently completed financial year of the parent issuer, that include all of the following:

(a) a statement of comprehensive income, a statement of changes in equity and a statement of cash flows for

(i) the most recently completed financial year, and

(ii) the financial year, if any, immediately preceding the most recently completed financial year;

(b) a statement of financial position at the end of each of the periods referred to in paragraph (a);

(c) notes to the annual financial statements.

(5) The annual financial statements delivered under paragraph (3)(b) or subsection (4) must be audited.

(6) The notes to the annual financial statements delivered under paragraph (3)(b) or subsection (4) must identify the accounting principles used to prepare the annual financial statements.

(7) The annual financial statements delivered under paragraph (3)(b) or subsection (4) must

(a) be prepared in accordance with one of the following accounting principles:

(i) Canadian GAAP applicable to publicly accountable enterprises;

(ii) Canadian GAAP applicable to private enterprises, if

(A) the financial statements consolidate any subsidiaries and account for significantly influenced investees and joint ventures using the equity method, and

(B) the designated benchmark administrator or parent issuer, as applicable, is a "private enterprise" as defined in the Handbook;

(iii) IFRS;

(iv) U.S. GAAP,

(b) be audited in accordance with one of the following auditing standards:

(i) Canadian GAAS;

(ii) International Standards on Auditing;

(iii) U.S. PCAOB GAAS, and

(c) be accompanied by an auditor's report that,

(i) if subparagraph (b)(i) or (ii) applies, expresses an unmodified opinion,

(ii) if subparagraph (b)(iii) applies, expresses an unqualified opinion, and

(iii) identifies the auditing standards used to conduct the audit.

(8) The information required under subsection (3) must be provided for the periods set out in,

and be prepared in accordance with, Form 25-102F1 *Designated Benchmark Administrator Annual Form* and must be delivered

(a) on or before the 30th day after the designated benchmark administrator is designated, and

(b) no later than 90 days after the end of each completed financial year of the designated benchmark administrator.

(9) If any of the information delivered by a designated benchmark administrator under paragraph (3)(a) becomes inaccurate, and a reasonable person would consider the inaccuracy to be significant, the designated benchmark administrator must promptly deliver a completed amended Form 25-102F1 *Designated Benchmark Administrator Annual Form* that includes the accurate information.

Information on a designated benchmark

3.(1) A designated benchmark administrator must, for each designated benchmark that it administers, deliver to the regulator or securities regulatory authority

(a) information about the provision and distribution of the designated benchmark, including, for greater certainty, its procedures, methodologies and distribution model, and

(b) the code of conduct, if any, for the benchmark contributors.

(2) The information required under subsection (1) must be provided for the periods set out in, and be prepared in accordance with, Form 25-102F2 *Designated Benchmark Annual Form* and must be delivered

(a) on or before the 30th day after the designated benchmark is designated, and

(b) no later than 90 days after the end of each completed financial year of the designated benchmark administrator.

(3) If any of the information delivered by a designated benchmark administrator under paragraph (1)(a) in respect of a designated benchmark it administers becomes inaccurate, and a reasonable person would consider the inaccuracy to be significant, the designated benchmark administrator must promptly deliver a completed amended Form 25-102F2 *Designated Benchmark Annual Form* that includes the accurate information.

Submission to jurisdiction and appointment of agent for service of process

4.(1) A designated benchmark administrator must, if the designated benchmark administrator is

incorporated or organized under the laws of a foreign jurisdiction, submit to the non-exclusive jurisdiction of the judiciary and quasi-judicial and other administrative bodies of the local jurisdiction and appoint an agent for service of process in Canada in a jurisdiction in which the designated benchmark administrator is designated**.**

(2) The submission to jurisdiction and appointment required under subsection (1) must be prepared in accordance with Form 25-102F3 *Submission to Jurisdiction and Appointment of Agent for Service of Process* and must be delivered on or before the 30th day after the designated benchmark administrator is designated.

(3) A designated benchmark administrator, or a benchmark administrator referred to in subsection (4), must deliver an amended Form 25-102F3 *Submission to Jurisdiction and Appointment of Agent for Service of Process* containing updated information at least 30 days before the effective date of any change that would result in a change to the information provided in the Form.

(4) Subsection (3) applies to a benchmark administrator until the date that is 6 years after the date on which the benchmark administrator ceases to be a designated benchmark administrator.

PART 3
GOVERNANCE

Accountability framework requirements

5.(1) A designated benchmark administrator must establish, document, maintain and apply an accountability framework of policies and procedures that are reasonably designed to

(a) ensure and evidence compliance with securities legislation relating to benchmarks, and

(b) for each designated benchmark it administers, ensure and evidence that the designated benchmark administrator follows the methodology applicable to the designated benchmark.

(2) An accountability framework referred to in subsection (1) must specify how the designated benchmark administrator complies with each of the following:

(a) Part 7;

(b) subsection 2(5), paragraph 18(1)(c), sections 32 and 36 and subsection 39(7) as they relate to internal review or audit, a public accountant's limited assurance report on compliance or a reasonable assurance report on compliance;

(c) the policies and procedures referred to in section 12.

Compliance officer

6.(1) A designated benchmark administrator must designate an officer to be responsible for monitoring and assessing compliance by the designated benchmark administrator and its DBA individuals with securities legislation relating to benchmarks.

(2) A designated benchmark administrator must not prevent or restrict the officer referred to in subsection (1) from directly accessing the designated benchmark administrator's board of directors or a member of the board of directors.

(3) An officer referred to in subsection (1) must do all of the following:

(a) ~~monitor and assess compliance by~~in the case of a benchmark that is not a designated commodity benchmark, monitor and assess compliance by the designated benchmark administrator and its DBA individuals with the accountability framework referred to in section 5, the control framework referred to in section 8 and securities legislation relating to benchmarks;

(a.1) in the case of a designated commodity benchmark, monitor and assess compliance by the designated benchmark administrator and its DBA individuals with subsection 5(1), section 40.4 and securities legislation relating to benchmarks;

(b) at least once every 12 months, submit a report to the designated benchmark administrator's board of directors that describes

(i) the officer's activities referred to in paragraph (a) or (a.1), as applicable,

(ii) in the case of a benchmark that is not a designated commodity benchmark, compliance by the designated benchmark administrator and its DBA individuals with the accountability framework referred to in section 5, the control framework referred to in section 8 and securities legislation relating to benchmarks,

(ii.1) in the case of a designated commodity benchmark, compliance by the designated benchmark administrator and its DBA individuals with subsection 5(1), section 40.4 and securities legislation relating to benchmarks, and

(iii) whether the designated benchmark administrator has followed the methodology applicable to each designated benchmark it administers;

(c) submit a report to the designated benchmark administrator's board of directors as soon as reasonably possible if the officer becomes aware of any circumstances indicating that the designated benchmark administrator or its DBA individuals might not be in compliance with securities legislation relating to benchmarks and any of the following apply:

(i) a reasonable person would consider that the suspected non-compliance, if actual, poses a significant risk of financial loss to a benchmark user or to any other person or company;

(ii) a reasonable person would consider that the suspected non-compliance, if actual, poses a significant risk of harm to the integrity of capital markets;

(iii) a reasonable person would consider that the suspected non-compliance, if actual, is part of a pattern of non-compliance.

(4) An officer referred to in subsection (1) must not participate in any of the following:

(a) the provision of a designated benchmark;

(b) the determination of compensation for any DBA individuals, other than for a DBA individual who reports directly to the officer.

(5) An officer referred to in subsection (1) must certify that a report submitted under paragraph (3)(b) is accurate and complete.

(6) A designated benchmark administrator must not provide a payment or other financial incentive to an officer referred to in subsection (1), or any DBA individual who reports directly to the officer, if the payment or other financial incentive would create a conflict of interest.

(7) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to ensure compliance with subsection (6).

(8) A designated benchmark administrator must deliver to the regulator or securities regulatory authority, promptly after it is submitted to the board of directors, a report referred to in paragraph (3)(b) or (c).

Oversight committee

7.(1) In this section, "oversight committee" means the committee referred to in subsection (2).

(2) A designated benchmark administrator must establish and maintain a committee to oversee the provision of a designated benchmark.

(3) The oversight committee must not include any individual who is a member of the board of directors of the designated benchmark administrator.

(4) The oversight committee must provide a copy of its recommendations on benchmark oversight to the board of directors of the designated benchmark administrator.

(5) A designated benchmark administrator must establish, document, maintain and apply policies and procedures regarding the structure and mandate of the oversight committee.

(6) The board of directors of a designated benchmark administrator must appoint the members of the oversight committee.

(7) A designated benchmark administrator must not distribute information relating to a designated benchmark unless its board of directors has

(a) approved the policies and procedures referred to in subsection (5), and

(b) approved the procedures referred to in paragraph (8)(d).

(8) The oversight committee must, for each designated benchmark that the designated benchmark administrator administers, do all of the following:

(a) review the methodology of the designated benchmark at least once every 12 months and consider if any changes to the methodology are required;

(b) oversee any changes to the methodology of the designated benchmark, including requesting that the designated benchmark administrator consult with benchmark contributors or benchmark users on any significant changes to the methodology of the designated benchmark;

(c) oversee the management and operation of the designated benchmark, including the designated benchmark administrator's control framework referred to in section 8;

(d) review and approve procedures for any cessation of the designated benchmark, including procedures governing consultations about a cessation of the designated benchmark;

(e) oversee any person or company referred to in section 13 to which a designated benchmark administrator has outsourced a function, service or activity in the provision of the designated benchmark, including calculation agents and dissemination agents;

(f) assess any report resulting from an internal review or audit, or any public accountant's limited assurance report on compliance or reasonable assurance report on compliance;

(g) monitor the implementation of any remedial actions relating to an internal review or audit, or any public accountant's limited assurance report on compliance or reasonable assurance report on compliance;

(h) keep minutes of its meetings;

(i) if the designated benchmark is based on input data from a benchmark contributor,

(i) oversee the designated benchmark administrator's establishment, documentation, maintenance and application of the code of conduct referred to in section 23,

(ii) monitor each of the following:

(A) the input data;

(B) the contribution of input data by the benchmark contributor;

(C) the actions of the designated benchmark administrator in challenging or validating contributions of input data,

(iii) take reasonable measures regarding any breach of the code of conduct referred to in section 23 to mitigate the impact of the breach and prevent additional breaches in the future, if a reasonable person would consider that the breach is significant, and

(iv) promptly notify the board of directors of the designated benchmark administrator of any breach of the code of conduct referred to in section 23, if a reasonable person would consider that the breach is significant.

(9) If the oversight committee becomes aware that the board of directors of the designated benchmark administrator has acted or intends to act contrary to any recommendations or decisions of the oversight committee, the oversight committee must record that fact in the minutes of its next meeting.

(10) If the oversight committee becomes aware of any of the following, the oversight committee must promptly report it to the regulator or securities regulatory authority:

(a) any misconduct by the designated benchmark administrator in relation to the provision of a designated benchmark, if a reasonable person would consider that the misconduct is significant;

(b) any misconduct by a benchmark contributor in respect of a designated benchmark that is based on input data from the benchmark contributor, if a reasonable person would consider that the misconduct is significant;

(c) any input data that

(i) a reasonable person would consider is anomalous or suspicious, and

(ii) is used in determining the benchmark or is contributed by a benchmark contributor.

(11) The oversight committee, and each of its members, must carry out its, and their, actions and duties under this Instrument with integrity.

(12) A member of the oversight committee must disclose in writing to the committee the nature and extent of any conflict of interest the member has in respect of the designated benchmark or the designated benchmark administrator.

Control framework

8.(1) In this section, "control framework" means the policies, procedures and controls referred to in subsections (2), (3) and (4).

(2) A designated benchmark administrator must establish, document, maintain and apply policies, procedures and controls that are reasonably designed to ensure that a designated benchmark is provided in accordance with this Instrument.

(3) Without limiting the generality of subsection (2), a designated benchmark administrator must ensure that its control framework includes controls relating to all of the following:

(a) management of operational risk, including any risk of financial loss, disruption or damage to the reputation of the designated benchmark administrator from any failure of its information technology systems;

(b) business continuity and disaster recovery plans;

(c) contingency procedures in the event of a disruption to the provision of the designated benchmark or the process applied to provide the designated benchmark.

(4) A designated benchmark administrator must establish, document, maintain and apply policies, procedures and controls reasonably designed to

(a) ensure that benchmark contributors comply with the code of conduct referred to in section 23 and the standards for input data in the methodology of the designated benchmark,

(b) monitor input data before any publication relating to the designated benchmark, and

(c) validate input data after publication to identify errors and anomalies.

(5) A designated benchmark administrator must promptly provide written notice to the regulator or securities regulatory authority describing any security incident or any systems issue relating to a designated benchmark it administers, if a reasonable person would consider that the security incident or systems issue is significant.

(6) A designated benchmark administrator must review and update its control framework on a reasonably frequent basis and at least once every 12 months.

(7) A designated benchmark administrator must make its control framework available, on request and free of charge, to any benchmark user.

Governance requirements

9.(1) A designated benchmark administrator must establish and document its organizational structure.

(2) The organizational structure referred to in subsection (1) must establish well-defined roles and responsibilities for each person or company involved in the provision of a designated benchmark administered by the designated benchmark administrator.

(3) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to ensure that each of its benchmark individuals

(a) has the necessary skills, knowledge, experience, reliability and integrity for the duties assigned to the individual, and

(b) is subject to adequate management and supervision.

(4) A designated benchmark administrator must ensure that any information published by the benchmark administrator relating to a designated benchmark is approved by a manager of the designated benchmark administrator.

Conflicts of interest

10.(1) A designated benchmark administrator must establish, document, maintain and apply policies and procedures that are reasonably designed to

(a) identify and eliminate or manage conflicts of interest involving the designated benchmark administrator and its managers, benchmark contributors, benchmark users, DBA individuals and any affiliated entity of the designated benchmark administrator,

(b) ensure that the exercise of expert judgment by the benchmark administrator or DBA

individuals is independently and honestly exercised,

(c) protect the integrity and independence of the provision of a designated benchmark,

(d) ensure that an officer referred to in section 6, or any DBA individual who reports directly to the officer, does not receive compensation or other financial incentive from which conflicts of interest arise or that otherwise adversely affect the integrity of the benchmark determination, and

(e) ensure that each of its benchmark individuals is not subject to undue influence, undue pressure or conflicts of interest, including, for greater certainty, ensuring that each of the benchmark individuals

(i) is not subject to compensation or performance evaluations from which conflicts of interest arise or that otherwise adversely affect the integrity of the benchmark determination,

(ii) does not have any financial interests, relationships or business connections that adversely affect the integrity of the designated benchmark administrator,

(iii) does not contribute to a determination of a designated benchmark by way of engaging in bids, offers or trades on a personal basis or on behalf of market participants, except as permitted under the policies and procedures of the designated benchmark administrator, and

(iv) is subject to policies and procedures to prevent the exchange of information that might affect a designated benchmark with the following, except as permitted under the policies and procedures of the designated benchmark administrator:

(A) any other DBA individual if that individual is involved in an activity that results in a conflict of interest or a potential conflict of interest,

(B) a benchmark contributor or any other person or company.

(2) A designated benchmark administrator must establish, document, maintain and apply policies and procedures that are reasonably designed to keep separate, operationally, the business of a designated benchmark administrator relating to the designated benchmark it administers, and its benchmark individuals, from any other business activity of the designated benchmark administrator if the designated benchmark administrator becomes aware of a conflict of interest or a potential conflict of interest involving the business of the designated benchmark administrator relating to any designated benchmark.

(3) A designated benchmark administrator must promptly publish a description of a conflict of interest, or a potential conflict of interest, in respect of a designated benchmark

(a) if a reasonable person would consider the risk of harm to any person or company arising from the conflict of interest, or the potential conflict of interest, is significant, and

(b) on becoming aware of the conflict of interest, or the potential conflict of interest, including, for greater certainty, a conflict or potential conflict arising from the ownership or control of the designated benchmark administrator.

(4) A designated benchmark administrator must ensure that the policies and procedures referred to in subsection (1)

(a) take into account the nature and categories of the designated benchmarks it administers and the risks that each designated benchmark poses to capital markets and benchmark users,

(b) protect the confidentiality of information provided to or produced by the designated benchmark administrator, subject to the disclosure requirements under Part 5, and

(c) identify and eliminate or manage conflicts of interest, including, for greater certainty, those that arise as a result of

(i) expert judgment or other discretion exercised in the benchmark determination process,

(ii) the ownership or control of the designated benchmark administrator or any affiliated entity of the designated benchmark administrator, and

(iii) any other person or company exercising control or direction over the designated benchmark administrator in relation to determining the designated benchmark.

(5) If a designated benchmark administrator fails to apply or follow a policy or procedure referred to in subsection (4), and a reasonable person would consider the failure to be significant, the designated benchmark administrator must promptly provide written notice of the significant failure to the regulator or securities regulatory authority.

Reporting of contraventions

11.(1) A designated benchmark administrator must establish, document, maintain and apply systems and controls reasonably designed to detect and promptly report to the regulator or securities regulatory authority any conduct by a DBA individual or a benchmark

contributor that might involve the following:

(a) manipulation or attempted manipulation of a designated benchmark;

(b) provision or attempted provision of false or misleading information in respect of a designated benchmark.

(2) A designated benchmark administrator must establish, document, maintain and apply policies and procedures for its DBA individuals to report any contravention of securities legislation relating to benchmarks to the officer referred to in section 6.

(3) A designated benchmark administrator must promptly provide written notice to the regulator or securities regulatory authority describing any conduct that it, or any of its DBA individuals, becomes aware of that might involve the following:

(a) manipulation or attempted manipulation of a designated benchmark;

(b) provision or attempted provision of false or misleading information in respect of a designated benchmark.

Complaint procedures

12.(1) A designated benchmark administrator must establish, document, maintain, apply and publish policies and procedures reasonably designed to ensure that the designated benchmark administrator receives, investigates and resolves complaints relating to a designated benchmark, including, for greater certainty, complaints in respect of each of the following:

(a) whether a determination of a designated benchmark accurately and reliably represents that part of the market or economy the benchmark is intended to represent;

(b) whether a determination of a designated benchmark was made in accordance with the methodology of the designated benchmark;

(c) the methodology of a designated benchmark or any proposed change to the methodology.

(2) A designated benchmark administrator must do all of the following:

(a) provide a written copy of the complaint procedures at no cost to any person or company on request;

(b) investigate a complaint in a timely and fair manner;

(c) communicate the outcome of the investigation of a complaint to the complainant within a reasonable period;

(d) conduct the investigation of a complaint independently of persons who might have been involved in the subject matter of the complaint.

Outsourcing

13.(1) A designated benchmark administrator must not outsource a function, service or activity relating to the administration of a designated benchmark in such a way as to significantly impair any of the following:

(a) the designated benchmark administrator's control over the provision of the designated benchmark;

(b) the ability of the designated benchmark administrator to comply with securities legislation relating to benchmarks.

(2) A designated benchmark administrator that outsources a function, service or activity in the provision of a designated benchmark must establish, document, maintain and apply policies and procedures reasonably designed to ensure that

(a) the person or company performing the function or activity or providing the service has the ability, capacity, and any authorization required by law, to perform the outsourced function or activity, or provide the service, reliably and effectively,

(b) the designated benchmark administrator maintains records documenting the identity and the tasks of the person or company performing the function or activity or providing the service and that those records are available in a manner that permits them to be provided to the regulator or, in Québec, the securities regulatory authority, in a reasonable period,

(c) the designated benchmark administrator and the person or company to which a function, service or activity is outsourced enter into a written agreement that

(i) imposes service level requirements on the person or company,

(ii) allows the designated benchmark administrator to terminate the agreement when appropriate,

(iii) requires the person or company to disclose to the designated benchmark administrator any development that may have a significant impact on the

person or company's ability to perform the outsourced function or activity, or provide the outsourced service, in compliance with applicable law,

(iv) requires the person or company to cooperate with the regulator or securities regulatory authority regarding a compliance review or investigation involving the outsourced function, service or activity,

(v) allows the designated benchmark administrator to directly access

(i) the books, records and other documents related to the outsourced function, service or activity, and

(ii) the business premises of the person or company, and

(vi) requires the person or company to keep sufficient books, records and other documents to record its activities relating to the designated benchmark and to provide the designated benchmark administrator with copies of those books, records and other documents on request,

(d) the designated benchmark administrator takes reasonable measures if the administrator becomes aware of any circumstances indicating that the person or company to which a function, service or activity is outsourced might not be performing the outsourced function or activity, or providing the outsourced service, in compliance with this Instrument or with the agreement referred to in paragraph (c),

(e) the designated benchmark administrator conducts reasonable supervision of the outsourced function, service or activity and manages any risks to the designated benchmark administrator or to the accuracy or reliability of the designated benchmark resulting from the outsourcing,

(f) the designated benchmark administrator retains the expertise that a reasonable person would consider necessary to conduct reasonable supervision of the outsourced function, service or activity and to manage any risks to the designated benchmark administrator or to the accuracy or reliability of the designated benchmark resulting from the outsourcing, and

(g) the designated benchmark administrator takes steps, including developing contingency plans, that a reasonable person would consider necessary to avoid or mitigate operational risk related to the person or company performing the function or activity or providing the service.

(3) A designated benchmark administrator that outsources a function, service or activity in the provision of a designated benchmark must ensure that the regulator or securities regulatory authority has reasonable access to

(a) the applicable books, records and other documents of the person or company performing the function or activity or providing the service, and

(b) the applicable business premises of the person or company performing the function or activity or providing the service.

PART 4
INPUT DATA AND METHODOLOGY

Input data

14.(1) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to ensure that all of the following are satisfied in respect of input data used in the provision of a designated benchmark:

(a) the input data, in aggregate, is sufficient to provide a designated benchmark that accurately and reliably represents that part of the market or economy the designated benchmark is intended to represent;

(b) the input data will continue to be reliably available;

(c) if appropriate transaction data is available to satisfy paragraphs (a) and (b), the input data is transaction data;

(d) if appropriate transaction data is not available to satisfy paragraphs (a) and (b), the designated benchmark administrator uses, in accordance with the methodology of the designated benchmark, relevant and appropriate estimated prices, quotes or other values as input data;

(e) the input data is capable of being verified as being accurate, reliable and complete.

(2) A designated benchmark administrator must establish, document, maintain and apply policies, procedures and controls that are reasonably designed to ensure that input data for a designated benchmark is accurate, reliable and complete and that include all of the following:

(a) criteria for determining who may act as benchmark contributors and contributing individuals;

(b) a process for determining benchmark contributors and contributing individuals;

(c) a process for assessing a benchmark contributor’s compliance with the code of conduct referred to in section 23;

(d) a process for applying measures that a reasonable person would consider appropriate in the event of a benchmark contributor failing to comply with the code of conduct referred to in section 23;

(e) if appropriate, a process for stopping a benchmark contributor from contributing further input data;

(f) a process for verifying input data to ensure its accuracy, reliability and completeness.

(3) If a reasonable person would consider that the input data results in a designated benchmark that does not accurately and reliably represent that part of the market or economy the designated benchmark is intended to represent, the designated benchmark administrator must do either of the following:

(a) within a reasonable time, change the input data, the benchmark contributors or the methodology of the designated benchmark in order to ensure that the designated benchmark accurately and reliably represents that part of the market or economy the designated benchmark is intended to represent;

(b) cease to provide the designated benchmark.

(4) A designated benchmark administrator must promptly provide written notice to the regulator or securities regulatory authority if the designated benchmark administrator is required to take an action under paragraph (3)(a) or (b).

(5) A designated benchmark administrator must publish both of the following:

(a) the policies and procedures referred to in subsection (1) regarding the types of input data, the priority of use of the different types of input data and the exercise of expert judgment in the determination of a designated benchmark;

(b) the methodology of the designated benchmark.

Contribution of input data

15.(1) For the purpose of paragraph 14(1)(a) in respect of a designated benchmark that is based on input data from benchmark contributors, the designated benchmark administrator must obtain, if a reasonable person would consider it to be appropriate, input data from a representative sample of benchmark contributors.

(2) A designated benchmark administrator must not use input data from a benchmark contributor if

(a) a reasonable person would consider that the benchmark contributor has breached the code of conduct referred to in section 23, and

(b) a reasonable person would consider that the breach is significant.

(3) If the circumstances referred to in subsection (2) occur, and if a reasonable person would consider it to be appropriate, a designated benchmark administrator must obtain alternative representative data in accordance with the policies and procedures referred to in subsection 16(3).

(4) If input data is contributed from any front office of a benchmark contributor, or of an affiliated entity of a benchmark contributor, that performs any activities that relate to or might affect the input data, the designated benchmark administrator must

(a) obtain information from other sources, if reasonably available, that confirms the accuracy, reliability and completeness of the input data in accordance with its policies and procedures, and

(b) ensure that the benchmark contributor has in place internal oversight and verification procedures that a reasonable person would consider adequate.

(5) In this section, "front office" means any department, division or other internal grouping of a benchmark contributor, or any employee or agent of a benchmark contributor, that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring or brokerage activities on behalf of the benchmark contributor.

Methodology

16.(1) A designated benchmark administrator must not follow a methodology for determining a designated benchmark unless all of the following apply:

(a) the methodology is sufficient to provide a designated benchmark that accurately and reliably represents that part of the market or economy the designated benchmark is intended to represent;

(b) the methodology identifies how and when expert judgment may be exercised in the determination of the designated benchmark;

(c) the accuracy and reliability of the methodology, with respect to determinations made under it, is capable of being verified, including, if appropriate, by back-testing;

(d) the methodology is reasonably designed to ensure that a determination under the methodology can be made in all reasonable circumstances, without compromising

the accuracy and reliability of the methodology;

(e) a determination under the methodology is capable of being verified as being accurate, reliable and complete.

(2) A designated benchmark administrator must not implement a methodology for a designated benchmark unless the methodology,

(a) when it is prepared, takes into account all of the applicable characteristics of that part of the market or economy the designated benchmark is intended to represent,

(b) if applicable, determines what constitutes an active market for the purposes of the designated benchmark, and

(c) establishes the priority to be given to different types of input data.

(3) A designated benchmark administrator must establish, document, maintain, apply and publish policies and procedures that

(a) identify the circumstances in which the quantity or quality of input data falls below the standards necessary for the methodology to provide a designated benchmark that accurately and reliably represents that part of the market or economy the designated benchmark is intended to represent, and

(b) indicate whether and how the designated benchmark is to be determined in those circumstances.

Proposed significant changes to methodology

17.(1) In this section, "significant change" means a change that a reasonable person would consider to be significant.

(2) A designated benchmark administrator must not implement a significant change to a methodology for determining a designated benchmark, unless all of the following apply:

(a) the designated benchmark administrator has published notice of the proposed significant change to the methodology of a designated benchmark;

(b) the designated benchmark administrator has provided a means for benchmark users and other members of the public to comment on the proposed significant change and its effect on the designated benchmark;

(c) the designated benchmark administrator has published

(i) any comments received, unless the commenter has requested that its comments be held in confidence,

(ii) the name of each commenter, unless a commenter has requested that its name be held in confidence, and

(iii) the designated benchmark administrator's response to the comments that are published;

(d) the designated benchmark administrator has published notice of implementation of any significant change to the methodology of the designated benchmark.

(3) For the purposes of subsection (2),

(a) the notice under paragraph (2)(a) must be published on a date that provides benchmark users and other members of the public with reasonable time to consider and comment on the proposed change,

(b) the publication of comments under paragraph (2)(c) may permit a part of a written comment to be excluded from publication if both of the following apply:

(i) the designated benchmark administrator considers that disclosure of that part of the comment would be seriously prejudicial to the interests of the designated benchmark administrator or would contravene privacy laws;

(ii) the designated benchmark administrator includes, with the publication, a description of the nature of the comment, and

(c) the notice under paragraph (2)(d) must be published sufficiently before the effective date of the change to provide benchmark users and other members of the public with reasonable time to consider the implementation of the significant change.

PART 5
DISCLOSURE

Disclosure of methodology

18.(1) A designated benchmark administrator must publish all of the following in respect of the methodology of a designated benchmark:

(a) the information that

(i) a reasonable benchmark contributor might need in order to carry out its responsibilities as a benchmark contributor, and

(ii) a reasonable benchmark user might need in order to evaluate whether the designated benchmark accurately and reliably represents that part of the market or economy the designated benchmark is intended to represent;

(b) an explanation of all of the elements of the methodology, including, for greater certainty, the following:

(i) a description of the designated benchmark and of that part of the market or economy the designated benchmark is intended to represent;

(ii) the currency or other unit of measurement of the designated benchmark;

(iii) the criteria used by the designated benchmark administrator to select the sources of input data used to determine the designated benchmark;

(iv) the types of input data used to determine the designated benchmark and the priority given to each type;

(v) a description of the benchmark contributors and the criteria used to determine the eligibility of a benchmark contributor;

(vi) a description of the constituents of the designated benchmark and the criteria used to select and give weight to them;

(vii) any minimum liquidity requirements for the constituents of the designated benchmark;

(viii) any minimum requirements for the quantity of input data, and any minimum standards for the quality of input data, used to determine the designated benchmark;

(ix) provisions that identify how and when expert judgment may be exercised in the determination of the designated benchmark;

(x) whether the designated benchmark takes into account any reinvestment of dividends paid on securities that are included in the designated benchmark;

(xi) if the methodology may be changed periodically to ensure the designated benchmark continues to accurately and reliably represent that part of the market or economy the designated benchmark is intended to represent, all of the following:

(A) any criteria to be used to determine when such a change is

necessary;

(B) any criteria to be used to determine the frequency of such a change;

(C) any criteria to be used to rebalance the constituents of the designated benchmark as part of making such a change;

(xii) the potential limitations of the methodology and details of any methodology to be used in exceptional circumstances, including in the case of an illiquid market or in periods of stress or if transaction data may be inaccurate, unreliable or incomplete;

(xiii) a description of the roles of any third parties involved in data collection for, or in the calculation or dissemination of, the designated benchmark;

(xiv) the model or method used for the extrapolation and any interpolation of input data;

(c) the process for the internal review and approval of the methodology and the frequency of such reviews and approvals;

(d) the process referred to in section 17 for making significant changes to the methodology;

(e) examples of the types of changes that may constitute a significant change to the methodology.

(2) A designated benchmark administrator must provide written notice to the regulator or securities regulatory authority of a proposed significant change to the methodology of a designated benchmark referred to in section 17 at least 45 days before the significant change is implemented.

(3) Subsection (2) does not apply with respect to a proposal to make a significant change to a methodology of a designated benchmark referred to in section 17 if

(a) the proposal is intended to be implemented within 45 days of the decision to make the change,

(b) the proposal is intended to preserve the integrity, accuracy or reliability of the designated benchmark or the independence of the designated benchmark administrator, and

(c) the designated benchmark administrator promptly, after making the decision to

make the significant change, provides written notice to the regulator or securities regulatory authority of the proposed significant change.

Benchmark statement

19.(1) In this section, "benchmark statement" means a written statement that includes all of the following:

(a) a description of that part of the market or economy the designated benchmark is intended to represent, including, for greater certainty, the following:

(i) the geographical area, if any, of that part of the market or economy the designated benchmark is intended to represent;

(ii) any other information that a reasonable person would consider to be useful to help existing or potential benchmark users to understand the relevant features of that part of the market or economy the designated benchmark is intended to represent, including both of the following, to the extent that accurate and reliable information is available:

(A) information on existing or potential participants in that part of the market or economy the designated benchmark is intended to represent;

(B) an indication of the dollar value of that part of the market or economy the designated benchmark is intended to represent;

(b) an explanation of the circumstances in which the designated benchmark might, in the opinion of a reasonable person, not accurately and reliably represent that part of the market or economy the designated benchmark is intended to represent;

(c) information that sets out all of the following:

(i) the elements of the methodology of the designated benchmark in relation to which expert judgment may be exercised by the designated benchmark administrator or any benchmark contributor;

(ii) the circumstances in which expert judgment would be exercised by the designated benchmark administrator or any benchmark contributor;

(iii) the job title of the individuals who are authorized to exercise expert judgment;

(d) whether the expert judgment referred to in paragraph (c) will be evaluated by the designated benchmark administrator or the benchmark contributor and the parameters that will be used to conduct the evaluation;

(e) notice that factors, including external factors beyond the control of the designated benchmark administrator, could necessitate changes to, or the cessation of, the designated benchmark;

(f) notice that changes to, or the cessation of, the designated benchmark could have an impact on contracts and instruments that reference the designated benchmark or on the measurement of the performance of an investment fund that references the designated benchmark;

(g) an explanation of all key terms used in the statement that relate to the designated benchmark and its methodology;

(h) the rationale for adopting the methodology for determining the designated benchmark;

(i) the procedures for the review and approval of the methodology of the designated benchmark;

(j) a summary of the methodology of the designated benchmark, including, for greater certainty, the following, if applicable:

(i) a description of the types of input data to be used;

(ii) the priority given to different types of input data;

(iii) the minimum data needed to determine the designated benchmark;

(iv) the use of any models or methods of extrapolation of input data;

(v) any criteria for rebalancing the constituents of the designated benchmark;

(vi) any other restrictions or limitations on the exercise of expert judgment;

(k) the procedures that govern the provision of the designated benchmark in periods of market stress or when transaction data might be inaccurate, unreliable or incomplete, and the potential limitations of the designated benchmark during those periods;

(l) the procedures for dealing with errors in input data or in the determination of the designated benchmark, including when a re-determination of the designated benchmark is required;

(m) potential limitations of the designated benchmark, including its operation in illiquid or fragmented markets and the possible concentration of input data.

(2) No later than 15 days after the designation of a designated benchmark, the designated

benchmark administrator of the designated benchmark must publish a benchmark statement.

(3) A designated benchmark administrator must, with respect to each designated benchmark it administers, review the applicable benchmark statement at least every 2 years.

(4) If there is a change to the information required under this section in a benchmark statement, and if a reasonable person would consider the change to be significant, the designated benchmark administrator must promptly update the benchmark statement to reflect the change.

(5) If the benchmark statement is updated under subsection (4), the designated benchmark administrator must promptly publish the updated benchmark statement.

Changes to and cessation of a designated benchmark

20.(1) A designated benchmark administrator must not cease to provide a designated benchmark, unless the designated benchmark administrator has provided notice of the cessation on a date that provides benchmark users and other members of the public with reasonable time to consider the impact of the cessation.

(2) A designated benchmark administrator must publish, simultaneously with the benchmark statement referred to in subsection 19(2), the procedures it will follow in the event of a significant change to the methodology or provision of the designated benchmark it administers, or the cessation of the designated benchmark, including procedures for advance notice of the implementation of a significant change or a cessation.

(3) If a designated benchmark administrator makes a significant change to the procedures referred to in subsection (2), the designated benchmark administrator must promptly publish the changed procedures.

Registrants, reporting issuers and recognized entities

21.(1) If a person or company uses a designated benchmark, and if a significant change to the methodology or provision of the benchmark, or the cessation of the benchmark, could have a significant impact on the person or company, a security issued by the person or company or a derivative to which the person or company is a party, the person or company must establish and maintain a written plan setting out the actions that the person or company will take in the event of any of the following:

(a) a significant change to the methodology or provision of the designated benchmark;

(b) a cessation of the designated benchmark.

(2) Subsection (1) does not apply unless the person or company is any of the following:

(a) a registrant;

(b) a reporting issuer;

(c) a recognized exchange;

(d) a recognized quotation and trade reporting system;

(e) a recognized clearing agency within the meaning of National Instrument 24-102 *Clearing Agency Requirements*.

(3) Subsection (1) does not apply with respect to a security issued or a derivative entered into before the date this Instrument comes into force.

(4) If a reasonable person would consider it appropriate, a person or company referred to in subsection (1) must

(a) identify, in the plan referred to in subsection (1), one or more benchmarks suitable as substitutes for the designated benchmark, and

(b) indicate why the substitution would be suitable.

(5) If a reasonable person would consider it appropriate, a person or company referred to in subsection (1) must refer to the plan referred in subsection (1) in any security issued by the person or company, or any derivative to which the person or company is a party, that references the designated benchmark.

Publishing and disclosing

22. If, under this Instrument, a designated benchmark administrator is required to publish a document or information, or disclose a document or information to a benchmark user or benchmark contributor, the designated benchmark administrator must publicly include the document or information on the designated benchmark administrator's website in a prominent manner and, for greater certainty, free of charge.

PART 6
BENCHMARK CONTRIBUTORS

Code of conduct for benchmark contributors

23.(1) If a designated benchmark is determined using input data from a benchmark contributor, the designated benchmark administrator of the designated benchmark must establish, document, maintain and apply a code of conduct that specifies the responsibilities of the benchmark contributor with respect to the contribution of input data.

(2) A designated benchmark administrator must include in the code of conduct referred to in

subsection (1) all of the following:

(a) a description of the input data to be provided and the requirements necessary to ensure that input data is provided in accordance with sections 14 and 15;

(b) the method by which a benchmark contributor will confirm the identity of each contributing individual who might contribute input data;

(c) the method by which the designated benchmark administrator will confirm the identity of a benchmark contributor and any contributing individual;

(d) the procedures that a benchmark contributor will use to determine who is suitable to be authorized as a contributing individual;

(e) the procedures that a benchmark contributor will use to ensure that the benchmark contributor contributes all relevant input data;

(f) a description of the procedures, systems and controls that a benchmark contributor will establish, document, maintain and apply, including the following:

(i) procedures for contributing input data;

(ii) specifying whether input data is transaction data;

(iii) confirming whether input data conforms to the designated benchmark administrator's requirements;

(iv) procedures for the exercise of expert judgment in contributing input data;

(v) if the designated benchmark administrator requires the validation of input data before it is contributed, the requirement;

(vi) a requirement to maintain records relating to its activities as a benchmark contributor;

(vii) a requirement that the benchmark contributor report to the designated benchmark administrator any instance when a reasonable person would consider that a contributing individual, acting on a behalf of the benchmark contributor or any other benchmark contributor, has contributed input data that is inaccurate, unreliable or incomplete;

(viii) a requirement to identify and eliminate or manage conflicts of interest and potential conflicts of interest that may affect the integrity, accuracy or reliability of the designated benchmark;

(ix) a procedure for the designation of an officer of the benchmark contributor who is to be responsible for monitoring and assessing compliance by the benchmark contributor and its employees with the code of conduct and securities legislation relating to benchmarks;

(x) a requirement that the benchmark contributor's officer referred to in subparagraph (ix) and the benchmark contributor's chief compliance officer not be prevented or restricted from directly accessing the benchmark contributor's board of directors.

(3) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to, at least once every 12 months and promptly after any change to the code of conduct referred to in subsection (1), assess whether each benchmark contributor to a designated benchmark that it administers is complying with the code of conduct.

Governance and control requirements for benchmark contributors

24.(1) Except in Québec, a benchmark contributor to a designated benchmark must establish, document, maintain and apply policies and procedures reasonably designed to ensure all of the following:

(a) input data contributed by the benchmark contributor is not affected by any conflict of interest or potential conflict of interest involving the benchmark contributor or its employees, officers, directors or agents, if a reasonable person would consider that the input data might be inaccurate, unreliable or incomplete;

(b) if expert judgment is exercised by the benchmark contributor in contributing input data, the benchmark contributor exercises the expert judgment independently, in good faith and in compliance with the code of conduct referred to in section 23.

(2) Except in Québec, a benchmark contributor to a designated benchmark must establish, document, maintain and apply policies, procedures and controls reasonably designed to ensure the accuracy, reliability and completeness of each contribution of input data, including policies, procedures and controls governing all of the following:

(a) the manner in which the input data is contributed in compliance with this Instrument and the code of conduct referred to in section 23;

(b) who may contribute input data, including, as applicable, a process for approval by an individual holding a position senior to that of a contributing individual;

(c) training for contributing individuals with respect to compliance with this Instrument;

(d) the identification and elimination or management of conflicts of interest and potential conflicts of interest, including, for greater certainty,

(i) policies, procedures and controls that are reasonably designed to keep separate, operationally or otherwise, contributing individuals from employees or agents whose responsibilities include transacting in a contract, derivative, instrument or security that uses the designated benchmark for reference;

(ii) policies, procedures and controls that are reasonably designed to prevent contributing individuals from receiving compensation or other financial incentive from which conflicts of interest arise, including for greater certainty, conflicts of interest that adversely affect the accuracy, reliability and completeness of each contribution of input data.

(3) Except in Québec, before a benchmark contributor contributes input data for a designated benchmark, the benchmark contributor must

(a) establish, document, maintain and apply policies and procedures reasonably designed to establish criteria, including any restrictions or limitations, for the exercise of expert judgment, and

(b) if expert judgment is exercised in relation to input data, retain records that record the rationale for any decision made to exercise that expert judgment, the rationale applied in the exercise of the expert judgment and the manner of the exercise of the expert judgment.

(4) Except in Québec, a benchmark contributor that contributes input data for a designated benchmark must keep, for a period of 7 years from the date the record was made or received by the designated benchmark administrator, whichever is later, records relating to all of the following:

(a) communications, including, for greater certainty, telephone conversations, in relation to the contribution of input data;

(b) all information used or considered by the benchmark contributor in making each contribution, including details of contributions made and the names of contributing individuals;

(c) the records relating to expert judgment referred to in paragraph 3(b);

(d) all documentation relating to the identification and elimination or management of conflicts of interest and potential conflicts of interest;

(e) a description of the potential for financial loss or gain of the benchmark contributor and each contributing individual to financial instruments that reference the designated benchmark for which it acts as a benchmark contributor;

(f) any internal or external review of the benchmark contributor, including, for greater certainty, each limited assurance report on compliance or reasonable assurance report on compliance required under this Instrument.

(5) Except in Québec, a benchmark contributor that contributes input data for a designated benchmark must

(a) cooperate with the designated benchmark administrator in the review and supervision of the provision of the designated benchmark, including, for greater certainty, cooperation in connection with any limited assurance report on compliance or reasonable assurance report on compliance required under this Instrument, and

(b) make available the records kept in accordance with subsection (4) to all of the following:

(i) the designated benchmark administrator;

(ii) a public accountant involved with the preparation of a limited assurance report on compliance or reasonable assurance report on compliance required under this Instrument.

Compliance officer for benchmark contributors

25.(1) Except in Québec, a benchmark contributor that contributes input data for a designated benchmark must designate an officer of the benchmark contributor who is to be responsible for monitoring and assessing compliance by the benchmark contributor and its employees with the code of conduct referred to in section 23, this Instrument and securities legislation relating to benchmarks.

(2) Except in Québec, a benchmark contributor must not prevent or restrict the officer referred to in subsection (1) and its chief compliance officer from directly accessing the benchmark contributor's board of directors or a member of the board of directors.

PART 7
RECORD KEEPING

Books, records and other documents

26.(1) A designated benchmark administrator must keep the books, records and other documents

that are necessary to account for its activities as a designated benchmark administrator, its business transactions and its financial affairs relating to its designated benchmarks.

(2) A designated benchmark administrator must keep books, records and other documents of the following:

(a) all input data, including how the data was used;

(b) if data is rejected as input data for a designated benchmark despite the data conforming to the methodology of the designated benchmark, the rationale for rejecting the input data;

(c) the methodology of each designated benchmark administered by the designated benchmark administrator;

(d) any exercise of expert judgment by the designated benchmark administrator in the determination of a designated benchmark, including the basis for the exercise of expert judgment;

(e) changes in or deviations from policies, procedures, controls or methodologies;

(f) the identities of contributing individuals and of benchmark individuals;

(g) all documents relating to a complaint;

(h) communications, including, for greater certainty, telephone conversations, between any benchmark individual and benchmark contributors or contributing individuals in respect of a designated benchmark administered by the designated benchmark administrator.

(3) A designated benchmark administrator must keep the records referred to in subsection (2) in a form that

(a) identifies the manner in which the determination of a designated benchmark was made, and

(b) enables an audit, review or evaluation of any input data, calculation, or exercise of expert judgment, including in connection with any limited assurance report on compliance or reasonable assurance report on compliance.

(4) A designated benchmark administrator must retain the books, records and other documents required to be maintained under this section

(a) for a period of 7 years from the date the record was made or received by the

designated benchmark administrator, whichever is later,

(b) in a safe location and a durable form, and

(c) in a manner that permits those books, records and other documents to be provided promptly on request to the regulator or securities regulatory authority.

PART 8
DESIGNATED CRITICAL BENCHMARKS, DESIGNATED INTEREST RATE BENCHMARKS AND DESIGNATED REGULATED-DATA BENCHMARKS

DIVISION 1 – DESIGNATED CRITICAL BENCHMARKS

Administration of a designated critical benchmark

27.(1) If a designated benchmark administrator decides to cease providing a designated critical benchmark, the designated benchmark administrator must

(a) promptly notify the regulator or securities regulatory authority, and

(b) not more than 4 weeks after notifying the regulator or securities regulatory authority, submit a plan to the regulator or securities regulatory authority for how the designated critical benchmark can be transitioned to another designated benchmark administrator or cease to be provided.

(2) Following the submission of the plan referred to paragraph (1)(b), a designated benchmark administrator must continue to provide the designated critical benchmark until one or more of the following have occurred:

(a) the provision of the designated critical benchmark has been transitioned to another designated benchmark administrator;

(b) the designated benchmark administrator receives notice from the regulator or securities regulatory authority authorizing the cessation;

(c) the designation of the designated benchmark has been revoked or varied to reflect that the designated benchmark is no longer a designated critical benchmark;

(d) 12 months have elapsed from the submission of the plan referred to in paragraph (1)(b), unless, before the expiration of the period, the regulator or securities regulatory authority has provided written notice that the written notice has been extended.

Access

28. A designated benchmark administrator of a designated critical benchmark must take reasonable steps to ensure that benchmark users and potential benchmarks users have direct access to the designated critical benchmark on a fair, reasonable, transparent and non-discriminatory basis.

Assessment

29. A designated benchmark administrator of a designated critical benchmark must, at least once every 2 years, submit to the regulator or securities regulatory authority an assessment of the capability of the designated critical benchmark to accurately and reliably represent that part of the market or economy the designated critical benchmark is intended to represent.

Benchmark contributor to a designated critical benchmark

30.(1) Except in Québec, if a benchmark contributor to a designated critical benchmark decides it will cease contributing input data, it must promptly notify in writing the designated benchmark administrator that administers the designated critical benchmark.

(2) Except in Québec, a benchmark contributor that is required to give notice under subsection (1) must continue contributing input data until the earlier of

(a) the date referred to in subparagraph (3)(b)(ii), and

(b) 6 months after the notice referred to in subsection (1) is received by the designated benchmark administrator that administers the designated critical benchmark.

(3) If a designated benchmark administrator receives a notice referred to in subsection (1), the designated benchmark administrator must

(a) promptly notify the regulator or securities regulatory authority of the decision referred to in subsection (1), and

(b) no later than 14 days after receipt of the notice,

(i) submit to the regulator or securities regulatory authority an assessment of the impact of the benchmark contributor ceasing to contribute input data on the capability of the designated critical benchmark to accurately and reliably represent that part of the market or economy the designated benchmark is intended to represent, and

(ii) notify in writing the benchmark contributor of the date after which the designated benchmark administrator no longer requires the benchmark contributor to contribute input data, if that date is less than 6 months after the date the designated benchmark administrator received the notice referred

to in subsection (1).

Oversight committee

31.(1) For a designated critical benchmark, at least half of the members of the oversight committee referred to in section 7 must be independent of the designated benchmark administrator and any affiliated entity of the designated benchmark administrator.

(2) For the purposes of subsection (1), a member of the oversight committee is not independent if any of the following apply:

(a) other than as compensation for acting as a member of the oversight committee, the member accepts any consulting, advisory or other compensatory fee from the designated benchmark administrator or any affiliated entity of the designated benchmark administrator;

(b) the member is a DBA individual or an employee or agent of any affiliated entity of the designated benchmark administrator;

(c) the member has a relationship with the designated benchmark administrator that may, in the opinion of the board of directors of the designated benchmark administrator, be expected to interfere with the exercise of the member's independent judgment.

(3) The oversight committee referred to in section 7 must

(a) publish details of its membership, declarations of any conflicts of interest of its members, and the processes for election or nomination of its members, and

(b) hold at least one meeting every 4 months.

Assurance report on designated benchmark administrator

32.(1) A designated benchmark administrator must engage a public accountant to provide, as specified by the oversight committee referred to in section 7, either a limited assurance report on compliance or a reasonable assurance report on compliance, in respect of each designated critical benchmark it administers, regarding the designated benchmark administrator's

(a) compliance with sections 5, 8 to 16 and 26, and

(b) following of the methodology applicable to the designated critical benchmark.

(2) A designated benchmark administrator must ensure an engagement referred to in subsection (1) occurs once every 12 months.

(3) A designated benchmark administrator must, within 10 days of the receipt of a report referred to in subsection (1), publish the report and deliver a copy of the report to the regulator or securities regulatory authority.

Assurance report on benchmark contributor

33.(1) Except in Québec, if required by the oversight committee referred to in section 7 as a result of a concern with the conduct of a benchmark contributor to a designated critical benchmark, the benchmark contributor must engage a public accountant to provide, as specified by the oversight committee, either a limited assurance report on compliance or a reasonable assurance report on compliance regarding the conduct of the benchmark contributor and its

(a) compliance with section 24, and

(b) following of the methodology applicable to the designated critical benchmark.

(2) Except in Québec, a benchmark contributor must, within 10 days of the receipt of a report referred to in subsection (1), deliver a copy of the report to

(a) the oversight committee referred to in section 7,

(b) the board of directors of the designated benchmark administrator, and

(c) the regulator or securities regulatory authority.

DIVISION 2 – DESIGNATED INTEREST RATE BENCHMARKS

Order of priority of input data

34. For the purposes of subsection 14(1) and paragraph 14(5)(a), if a designated interest rate benchmark is based on a contribution of input data from a benchmark contributor, input data for the determination of the designated interest rate benchmark must be used by the designated benchmark administrator in accordance with the order of priority specified in the methodology of the designated interest rate benchmark.

Oversight committee

35.(1) For a designated interest rate benchmark, at least half of the members of the oversight committee referred to in section 7 must be independent of the designated benchmark administrator and any affiliated entity of the designated benchmark administrator.

(2) For the purposes of subsection (1), a member of the oversight committee is not independent if any of the following apply:

(a) other than as compensation for acting as a member of the oversight committee, the

member accepts any consulting, advisory or other compensatory fee from the designated benchmark administrator or any affiliated entity of the designated benchmark administrator;

(b) the member is a DBA individual or an employee or agent of any affiliated entity of the designated benchmark administrator;

(c) the member has a relationship with the designated benchmark administrator that may, in the opinion of the board of directors of the designated benchmark administrator, be expected to interfere with the exercise of the member's judgment.

(3) The oversight committee referred to in section 7 must

(a) publish details of its membership, any declarations of any conflicts of interest of its members, and the processes for election or nomination of its members, and

(b) hold at least one meeting every 4 months.

Assurance report on designated benchmark administrator

36.(1) A designated benchmark administrator must engage a public accountant to provide, as specified by the oversight committee referred to in section 7, a limited assurance report on compliance, or a reasonable assurance report on compliance, in respect of each designated interest rate benchmark it administers, regarding the designated benchmark administrator's

(a) compliance with sections 5, 8 to 16, 26 and 34, and

(b) following of the methodology of the designated interest rate benchmark.

(2) A designated benchmark administrator must ensure an engagement referred to in subsection (1) occurs for the first time 6 months after the introduction of a code of conduct for benchmark contributors referred to in section 23 and subsequently once every 2 years.

(3) A designated benchmark administrator must, within 10 days of the receipt of a report referred to in subsection (1), publish the report and deliver a copy of the report to the regulator or securities regulatory authority.

Assurance report on benchmark contributor required by oversight committee

37.(1) Except in Québec, if required by the oversight committee referred to in section 7 as a result of a concern with the conduct of a benchmark contributor to a designated interest rate benchmark, the benchmark contributor must engage a public accountant to provide, as specified by the oversight committee, either a limited assurance report on compliance or a reasonable assurance report on compliance, regarding the conduct of the benchmark contributor and its

(a) compliance with sections 24 and 39, and

(b) following of the methodology of the designated interest rate benchmark.

(2) Except in Québec, the benchmark contributor must, within 10 days of the receipt of a report referred to in subsection (1), deliver a copy of the report to

(a) the oversight committee referred to in section 7,

(b) the board of directors of the designated benchmark administrator, and

(c) the regulator or securities regulatory authority.

Assurance report on benchmark contributor required at certain times

38.(1) Except in Québec, a benchmark contributor to a designated interest rate benchmark must engage a public accountant to provide, as specified by the oversight committee referred to in section 7, a limited assurance report on compliance, or a reasonable assurance report on compliance, regarding the conduct and input data of the benchmark contributor and its

(a) compliance with sections 24 and 39,

(b) following of the methodology of the designated interest rate benchmark, and

(c) following of the code of conduct referred to in section 23.

(2) Except in Québec, a benchmark contributor must ensure an engagement referred to in subsection (1) occurs for the first time 6 months after the introduction of a code of conduct for benchmark contributors referred to in section 23 and subsequently once every 2 years.

(3) Except in Québec, the benchmark contributor must, within 10 days of the receipt of a report referred to in subsection (1), deliver a copy of the report to

(a) the oversight committee referred to in section 7,

(b) the board of directors of the designated benchmark administrator, and

(c) the regulator or securities regulatory authority.

Benchmark contributor policies and procedures

39.(1) Subsections (2) to (7) do not apply to a person or company except in respect of a designated interest rate benchmark.

(2) Except in Québec, a contributing individual of the benchmark contributor and a manager

of that contributing individual must provide a written statement to the benchmark contributor and the designated benchmark administrator that the contributing individual and the manager will comply with the code of conduct referred to in section 23.

(3) Except in Québec, a benchmark contributor must establish, document, maintain and apply policies, procedures and controls reasonably designed to ensure the following:

(a) that there is an outline of responsibilities within the benchmark contributor's organization, including internal reporting lines and accountabilities;

(b) the maintenance of a current list of the names and locations of contributing individuals and managers and their alternates;

(c) that there are internal procedures governing contributions of input data and the approval of contributions of input data, including keeping a record for each daily or other contribution of input data that shows:

(i) how the procedures were applied, and

(ii) all qualitative and quantitative factors, including market data and expert judgment, used for each contribution of input data;

(d) that there are disciplinary procedures to address the following conduct of a person or company, including, for greater certainty, a person or company that is external to the process governing contributions of input data:

(i) the manipulation or attempted manipulation of a designated benchmark, or the failure to report the manipulation or attempted manipulation of a designated benchmark, to which the person or company is a benchmark contributor;

(ii) the provision or attempted provision of false or misleading information in respect of a designated benchmark, or the failure to report the provision or attempted provision of false or misleading information in respect of a designated benchmark, to which the person or company is a benchmark contributor;

(e) that there are conflict of interest identification and management procedures and communication controls, both within the benchmark contributor's organization and among benchmark contributors and other third parties, reasonably designed to avoid any external influence over those responsible for contributing input data, if a reasonable person would consider that the external influence might adversely affect the accuracy, reliability or completeness of the input data;

(f) that there is a requirement that contributing individuals employed by the benchmark contributor work in locations physically separated from interest rate derivatives traders;

(g) the prevention or control of the exchange of information between persons or companies engaged in activities involving a conflict of interest or a potential conflict of interest, if a reasonable person would consider that the exchange of that information might adversely affect the accuracy, reliability or completeness of the input data contributed by a benchmark contributor;

(h) that there are requirements to avoid collusion

(i) among benchmark contributors, and

(ii) among benchmark contributors and the designated benchmark administrator;

(i) that there are measures to prevent, or limit, any person from exercising influence over the way a contributing individual contributes input data, if a reasonable person would consider that the influence might adversely affect the accuracy, reliability or completeness of the input data;

(j) the removal of any direct connection between the remuneration of an employee involved in the contribution of input data and the remuneration of, or revenues generated by, a person or company engaged in another activity, if a conflict of interest exists or might arise in relation to the other activity;

(k) that there are controls to identify a reverse transaction subsequent to the contribution of input data.

(4) Except in Québec, a benchmark contributor must keep, for a period of 7 years from the date the record was made or received by the benchmark contributor, whichever is later, records of all of the following:

(a) all details of contributions of input data that a reasonable person would consider relevant to demonstrate the accuracy, reliability and completeness of the input data;

(b) the process governing input data determination and the approval of contributions of input data, including the records referred to in paragraph (3)(c);

(c) the name of each contributing individual and the individual's responsibilities;

(d) any communications, including, for greater certainty, telephone conversations, between the contributing individuals and other persons or companies, including

internal and external traders and brokers, in relation to the determination or contribution of input data;

(e) any interaction of contributing individuals with the designated benchmark administrator or any calculation agent;

(f) any queries regarding the input data and the outcome of those queries;

(g) sensitivity analysis for interest rate swap trading books and any other derivative trading books with an exposure to interest rate fixings in respect of input data, if a reasonable person would consider that the exposure is significant;

(h) the written statements referred to in subsection (2);

(i) the policies, procedures and controls referred to in subsection (3).

(5) Except in Québec with respect to benchmark contributors, a benchmark contributor and a designated benchmark administrator must keep their records in a medium that allows records to be accessible and with a documented audit trail.

(6) Except in Québec, the benchmark contributor's officer referred to in section 25 or the benchmark contributor's chief compliance officer must report all the following to the benchmark contributor's board of directors on a reasonably frequent basis:

(a) breaches of the code of conduct referred to in section 23;

(b) the failure to follow or apply the policies, procedures and controls referred to in subsection (3);

(c) reverse transactions subsequent to the contribution of input data.

(7) Except in Québec, a benchmark contributor that contributes input data to a designated interest rate benchmark must conduct, on a reasonably frequent basis, internal reviews of the benchmark contributor's input data and procedures.

(8) Except in Québec, a benchmark contributor to a designated interest rate benchmark must make available the information and records kept in accordance with subsection (4) to each of the following:

(a) the designated benchmark administrator in connection with the assessment under subsection 23(3) or for the purposes of paragraph 24(5)(a);

(b) a public accountant involved with the preparation of a limited assurance report on compliance or reasonable assurance report on compliance required under this

Instrument.

DIVISION 3 – DESIGNATED REGULATED-DATA BENCHMARKS

Non-application to designated regulated-data benchmarks

40. A designated regulated-data benchmark is exempt from the following:

(a) subsections 11(1) and (2);

(b) subsection 14(2);

(c) subsections 15(1), (2) and (3);

(d) sections 23, 24 and 25;

(e) paragraph 26(2)(a).

PART 8.1
DESIGNATED COMMODITY BENCHMARKS

Interpretation

40.1. In this Part, "commodity benchmark" means a benchmark that is determined by reference to or an assessment of an underlying interest that is a commodity, but does not include a benchmark that has, as an underlying interest, a currency or a commodity that is intangible.

Application – dual-designated benchmarks

40.2.(1) Sections 30 to 33 do not apply to a designated benchmark administrator in relation to a designated commodity benchmark that is also a designated critical benchmark.

(2) This Part does not apply to a designated benchmark administrator in relation to a designated commodity benchmark if

(a) the benchmark is also a designated critical benchmark, and

(b) the underlying interest of the benchmark is gold, silver, platinum or palladium.

(3) The provisions set out in subsection (4) do not apply to a designated benchmark administrator in relation to a designated commodity benchmark if all of the following apply:

(a) the benchmark is determined from input data arising from transactions of the

commodity that is the underlying interest of the benchmark;

(b) the commodity is of a type in respect of which parties to the transactions referred to in paragraph (a), in the ordinary course of business, make or take physical delivery of the commodity;

(c) the benchmark is also a designated regulated-data benchmark.

(4) For the purposes of subsection (3), the following provisions do not apply:

(a) subsections 11(1) and (2);

(b) section 40.9;

(c) section 40.10, other than subparagraph (1)(f)(ii);

(d) paragraph 40.12(2)(a);

(e) section 40.14.

Provisions of this Instrument not applicable to designated commodity benchmarks

40.3. The following provisions do not apply to a designated benchmark administrator, a benchmark contributor or a specified person or company in relation to a designated commodity benchmark:

(a) Part 3, other than subsection 5(1) and sections 6, 11, 12 and 13;

(b) Part 4, other than section 17;

(c) sections 18 and 21;

(d) Part 6;

(e) Part 7.

Control framework

40.4.(1) A designated benchmark administrator must establish, document, maintain and apply policies, procedures and controls that are reasonably designed to ensure that a designated commodity benchmark is provided in accordance with this Instrument.

(2) Without limiting the generality of subsection (1), a designated benchmark administrator

must ensure that its policies, procedures and controls address all of the following:

(a) management of operational risk, including any risk of financial loss, disruption or damage to the reputation of the designated benchmark administrator from any failure of its information technology systems;

(b) business continuity and disaster recovery plans;

(c) contingencies in the event of a disruption to the provision of the designated commodity benchmark or the process applied to provide the designated commodity benchmark.

Methodology

40.5.(1) A designated benchmark administrator must not follow a methodology for determining a designated commodity benchmark unless

(a) the methodology is sufficient to provide a designated commodity benchmark that accurately and reliably represents the value of the underlying interest of the designated commodity benchmark for that part of the market that the benchmark is intended to represent, and

(b) the accuracy and reliability of the designated commodity benchmark determined using the methodology is verifiable.

(2) A designated benchmark administrator must establish, document and publish the elements of the methodology of a designated commodity benchmark, including, for greater certainty, the following:

(a) all criteria and procedures used to determine a designated commodity benchmark, including, but not limited to the following:

(i) how the designated benchmark administrator will use input data, including, for greater certainty, how it will use the volume of transactions, concluded and reported transactions, bids, offers and any other market information used to determine the designated commodity benchmark;

(ii) the reason that a specific reference unit will be used;

(iii) how input data will be obtained;

(iv) identification of how and when expert judgment may be exercised in the determination of the designated commodity benchmark;

(v) the assumptions and the model or method that will be used for the extrapolation and interpolation of input data;

(b) procedures reasonably designed to ensure that benchmark individuals exercise expert judgment in a consistent manner;

(c) the relative importance assigned to the criteria used to determine the designated commodity benchmark, including, for greater certainty, the type of input data used and how and when expert judgment may be exercised;

(d) any minimum quantity of transaction data to be used to determine the designated commodity benchmark;

(e) if minimum quantity thresholds referred to in paragraph (d) are not provided, the rationale as to why minimum requirements are not provided;

(f) procedures for the determination of a designated commodity benchmark in circumstances in which the input data does not meet the minimum threshold for either the quantity of the transaction data or the quality of the input data, including, for greater certainty,

(i) any alternative methods to determine the designated commodity benchmark, including any theoretical estimation models, and

(ii) procedures to be used in circumstances if no transaction data exists;

(g) the time period when input data must be provided;

(h) the means of contribution of input data, whether electronically, by telephone or by other means;

(i) procedures for how a designated commodity benchmark is determined if one or more benchmark contributors contribute input data that constitutes a significant proportion of the total input data for the determination of the designated commodity benchmark, including specifying what constitutes a significant proportion for the determination of the benchmark;

(j) the circumstances in which transaction data may be excluded in the determination of the designated commodity benchmark.

Additional information about the methodology

40.6. A designated benchmark administrator must, with respect to the methodology used for a designated commodity benchmark, publish the following:

(a) the rationale for adopting the methodology, including

(i) the rationale for any price adjustment techniques, and

(ii) a description of why the time period for the acceptance of input data is adequate for the input data to accurately and reliably represent the value of the underlying interest of the designated commodity benchmark;

(b) the process for the internal review and the approval of the methodology and the frequency of such reviews;

(c) the process referred to in section 17 for making significant changes to the methodology.

Review of methodology

40.7. A designated benchmark administrator must, at least once in every 12-month period, carry out an internal review of the methodology for each designated commodity benchmark that it administers to ensure that the designated commodity benchmark determined under the methodology accurately and reliably represents the value of the underlying interest of the designated commodity benchmark for that part of the market the benchmark is intended to represent.

Quality and integrity of the determination of a designated commodity benchmark

40.8.(1) A designated benchmark administrator must specify and document a description of the commodity that is the underlying interest of a designated commodity benchmark.

(2) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to ensure the quality and integrity of each determination of a designated commodity benchmark, including for greater certainty, policies and procedures that

(a) ensure that input data is used in accordance with the order of priority specified in the methodology of the designated commodity benchmark;

(b) identify transaction data that a reasonable person would conclude is anomalous or suspicious;

(c) ensure that the designated benchmark administrator maintains records of each decision, including the reasons for the decision, to exclude transaction data from the determination of the designated commodity benchmark;

(d) do not discourage benchmark contributors from contributing all of their input data

that meets the designated benchmark administrator's criteria for the determination of the designated commodity benchmark;

(e) to the extent that is reasonable, ensure that

(i) input data contributed is representative of the benchmark contributors' concluded transactions relating to the underlying interest of the designated commodity benchmark, and

(ii) benchmark contributors comply with the designated benchmark administrator's quality and integrity standards for input data.

Transparency of determination of a designated commodity benchmark

40.9. A designated benchmark administrator must publish for each determination of a designated commodity benchmark, as soon as reasonably practicable, the following:

(a) a plain language explanation of how the designated commodity benchmark was determined, which explanation includes, for greater certainty, all of the following:

(i) the number and the volume of the transactions submitted;

(ii) with respect to each type of input data, the range of volumes and the average volume, the range of prices and the average price and the indicative percentage;

(b) a plain language explanation of the extent to which, and the basis upon which, expert judgment was used in the determination of the designated commodity benchmark, including, if applicable, the reasons for not giving priority to concluded and reported transactions.

Integrity of the process for contributing input data

40.10.(1) A designated benchmark administrator must establish, document, maintain and apply policies, procedures, controls and criteria reasonably designed to ensure the integrity of the process for contributing input data for a designated commodity benchmark including, for greater certainty, the following:

(a) criteria that determine who may contribute input data;

(b) procedures to verify the identity of a benchmark contributor and a contributing individual and the authorization of such contributing individuals to contribute input data on behalf of the benchmark contributor;

(c) criteria that determine which contributing individuals are permitted to contribute input data on behalf of a benchmark contributor;

(d) criteria that determine the appropriate contribution of transaction data by the benchmark contributor;

(e) if transaction data is contributed from any front office of a benchmark contributor, procedures to confirm the reliability of the input data, and the criteria upon which the reliability is measured, in accordance with its policies;

(f) procedures that

(i) identify any communications between contributing individuals and benchmark individuals that might involve manipulation or attempted manipulation of the determination of the designated commodity benchmark for the benefit of any trading position of the benchmark contributor, any contributing individual or third party,

(ii) identify any attempts to cause a benchmark individual to not apply or follow the designated benchmark administrator's policies, procedures and controls,

(iii) identify benchmark contributors or contributing individuals that engage in a pattern of contributing transaction data that a reasonable person would consider is anomalous or suspicious, and

(iv) ensure that the appropriate supervisors within the benchmark contributor are notified, to the extent possible, of questions or concerns by the designated benchmark administrator.

(2) In this section, "front office" means any department, division or other internal grouping of a benchmark contributor, or any employee or agent of a benchmark contributor, that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring or brokerage activities on behalf of the benchmark contributor.

Governance and control requirements

40.11.(1) A designated benchmark administrator must establish and document an organizational structure.

(2) The organizational structure referred to in subsection (1) must establish well-defined roles and responsibilities for each person or company involved in the provision of a designated commodity benchmark administered by the administrator, and include, as necessary, segregated reporting lines, to ensure that the administrator complies with the provisions of this Instrument.

(3) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to ensure the integrity and reliability of the determination of a designated commodity benchmark including, for greater certainty, policies and procedures to ensure

(a) that each of its benchmark individuals has the necessary skills, knowledge, experience, reliability and integrity for the duties assigned to the individual,

(b) that the provision of the designated commodity benchmark can be made on a consistent and regular basis,

(c) that succession plans exist to ensure

(i) that each of its benchmark individuals continues to have the necessary skills, knowledge, experience, reliability and integrity for the duties assigned to the individual, and

(ii) the provision of the designated commodity benchmark on a consistent and regular basis,

(d) that each of its benchmark individuals is subject to adequate management and supervision to ensure that the methodology of the designated commodity benchmark is properly applied, and

(e) a procedure for obtaining the approval of an individual holding a position senior to that of a benchmark individual prior to each publication of the designated commodity benchmark.

Books, records and other documents

40.12.(1) A designated benchmark administrator must keep such books, records and other documents that are necessary to account for its activities as a designated benchmark administrator, its business transactions and its financial affairs relating to its designated commodity benchmarks.

(2) A designated benchmark administrator must keep books, records and other documents of the following:

(a) all input data, including how the data was used;

(b) each decision to exclude a particular transaction from input data that otherwise met the requirements of the methodology applicable to the determination of a designated commodity benchmark, and the rationale for doing so;

(c) the methodology applicable to the determination of each designated commodity benchmark administered by the designated benchmark administrator;

(d) any exercise of expert judgment by the designated benchmark administrator in the determination of the designated commodity benchmark, including the basis for the exercise of expert judgment;

(e) changes in or deviations from policies, procedures, controls or methodologies;

(f) the identities of contributing individuals and of benchmark individuals;

(g) all documents relating to a complaint.

(3) A designated benchmark administrator must keep the records referred to in subsection (2) in a form that

(a) identifies the manner in which the determination of a designated commodity benchmark was made, and

(b) enables an audit, review or evaluation of any input data, calculation, or exercise of expert judgment, including in connection with any limited assurance report on compliance or reasonable assurance report on compliance.

(4) A designated benchmark administrator must retain the books, records and other documents required to be maintained under this section

(a) for a period of 7 years from the date the record was made or received by the designated benchmark administrator, whichever is later,

(b) in a safe location and a durable form, and

(c) in a manner that permits those books, records and other documents to be provided promptly on request to the regulator or securities regulatory authority.

Conflicts of interest

40.13.(1) A designated benchmark administrator must establish, document, maintain and apply policies and procedures that are reasonably designed to

(a) identify and eliminate or manage conflicts of interest involving the designated benchmark administrator and its managers, benchmark contributors, benchmark users, DBA individuals and any affiliated entity of the designated benchmark administrator,

(b) ensure that any expert judgment exercised by the benchmark administrator or DBA individuals is independently and honestly exercised,

(c) protect the integrity and independence of the provision of a designated commodity benchmark, including, for greater certainty, by

(i) ensuring that the provision of a designated commodity benchmark is not influenced by the existence of, or potential for, financial interests, relationships or business connections between the designated benchmark administrator or its affiliates, its personnel, clients, any market participant or persons connected with them,

(ii) ensuring that each benchmark individual does not have any financial interests, relationships or business connections that adversely affect the integrity of the designated benchmark administrator, including outside employment, travel, and acceptance of entertainment, gifts and hospitality provided by the designated benchmark administrator's clients or other commodity market participants,

(iii) keeping separate, operationally, the business of the designated benchmark administrator relating to the designated commodity benchmark it administers, and its benchmark individuals, from any other business activity of the designated benchmark administrator if the designated benchmark administrator becomes aware of a conflict of interest or a potential conflict of interest involving the business of the designated benchmark administrator relating to any designated commodity benchmark, and

(iv) ensuring that each of its benchmark individuals does not contribute to a determination of a designated commodity benchmark by way of engaging in bids, offers or trades on a personal basis or on behalf of market participants, except as permitted under the policies and procedures of the designated benchmark administrator,

(d) ensure that an officer referred to in section 6, or any DBA individual that reports directly to the officer, does not receive compensation or other financial incentive from which conflicts of interest arise or that otherwise adversely affect the integrity of the benchmark determination,

(e) protect the confidentiality of information provided to or produced by the designated benchmark administrator, subject to the disclosure requirements under sections 19, 20, 40.5, 40.6 and 40.9, and

(f) identify and eliminate or manage conflicts of interest that exist between the provision of a designated commodity benchmark by the designated benchmark administrator, including all benchmark individuals who participate in the

determination of the designated commodity benchmark, and any other business of the designated benchmark administrator.

(2) A designated benchmark administrator must ensure that its other businesses have appropriate policies, procedures and controls designed to minimize the likelihood that a conflict of interest will adversely affect the integrity of the provision of a designated commodity benchmark.

(3) In establishing an organizational structure, as required under subsections 40.11(1) and (2), a designated benchmark administrator must ensure that the responsibilities for each person or company involved in the provision of a designated commodity benchmark administered by the designated benchmark administrator do not cause a conflict of interest or a perception of conflict of interest.

(4) A designated benchmark administrator must promptly publish a description of a conflict of interest, or a potential conflict of interest, in respect of a designated commodity benchmark

(a) if a reasonable person would consider the risk of harm to any person or company arising from the conflict of interest, or the potential conflict of interest, is significant, and

(b) on becoming aware of the conflict of interest, or the potential conflict of interest, including, for greater certainty, a conflict or potential conflict arising from the ownership or control of the designated benchmark administrator.

(5) If a designated benchmark administrator fails to apply or follow a policy or procedure referred to in paragraph (1)(e), and a reasonable person would consider the failure to be significant, the designated benchmark administrator must promptly provide written notice of the significant failure to the regulator or securities regulatory authority.

Assurance report on designated benchmark administrator

40.14.(1) A designated benchmark administrator must engage a public accountant to provide a limited assurance report on compliance or a reasonable assurance report on compliance, in respect of each designated commodity benchmark it administers, regarding the designated benchmark administrator's

(a) compliance with subsection 5(1) and sections 11 to 13, 40.4, 40.5, 40.7, 40.8, and 40.10 to 40.13, and

(b) following of the methodology applicable to the designated commodity benchmark.

(2) A designated benchmark administrator must ensure an engagement referred to in subsection (1) occurs once in every 12-month period.

(3) A designated benchmark administrator must, within 10 days of the receipt of a report provided for in subsection (1), publish the report and deliver a copy of the report to the regulator or securities regulatory authority.

PART 9
DISCRETIONARY EXEMPTIONS

Exemptions

41.(1) The regulator or securities regulatory authority may grant an exemption from the provisions of this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) Despite subsection (1), in Ontario, only the regulator may grant an exemption.

(3) Except in Alberta and Ontario, an exemption referred to in subsection (1) is granted under the statute referred to in Appendix B of National Instrument 14-101 *Definitions* opposite the name of the local jurisdiction.

PART 10
EFFECTIVE DATE

Effective date

42.(1) This Instrument comes into force on July 13, 2021.

(2) In Saskatchewan, despite subsection (1), if this Instrument is filed with the Registrar of Regulations after July 13, 2021, this Instrument comes into force on the day on which it is filed with the Registrar of Regulations.

APPENDIX A
TO
MULTILATERAL INSTRUMENT 25-102
DESIGNATED BENCHMARKS AND BENCHMARK ADMINISTRATORS

Definitions Applying in Certain Jurisdictions
(subsections 1(5) to (8))

"benchmark" means a price, estimate, rate, index or value that is

(a) determined from time to time by reference to an assessment of one or more underlying interests,

(b) made available to the public, including, for greater certainty, either free of charge or on payment, and

(c) used for reference for any purpose, including for greater certainty,

  (i) determining the interest payable, or other sums that are due, under a contract, derivative, instrument or security,

  (ii) determining the value of a contract, derivative, instrument or security or the price at which it may be traded,

  (iii) measuring the performance of a contract, derivative, investment fund, instrument or security, or

  (iv) any other use by an investment fund;

"benchmark administrator" means a person or company that administers a benchmark;

"benchmark contributor" means a person or company that engages or participates in the provision of information for use by a benchmark administrator for the purpose of determining a benchmark;

"benchmark user" means a person or company that, in relation to a contract, derivative, investment fund, instrument or security, uses a benchmark.

FORM 25-102F1
DESIGNATED BENCHMARK ADMINISTRATOR
ANNUAL FORM

Instructions

(1) Terms used but not defined in this form have the meaning given to them in the Instrument.

(2) Unless otherwise specified, the information in this form must be presented as at the last day of the designated benchmark administrator's most recently completed financial year. If necessary, the designated benchmark administrator must update the information provided so it is not misleading when it is delivered. For information presented as at any date other than the last day of the designated benchmark administrator's most recently completed financial year, specify the relevant date in the form.

(3) Designated benchmark administrators are reminded that it is an offence under securities legislation to give false or misleading information on this form.

Item 1. Name of Designated Benchmark Administrator
State the name of the designated benchmark administrator.

Item 2. Organization and Structure of Designated Benchmark Administrator
Describe the organizational structure of the designated benchmark administrator, including, as applicable, an organizational chart that identifies the ultimate and intermediate parent companies, subsidiaries, and material affiliated entities of the designated benchmark administrator (if any); an organizational chart showing the divisions, departments, and business units of the designated benchmark administrator; and an organizational chart showing the managerial structure of the designated benchmark administrator, including the officer referred to in section 6 of the Instrument and the oversight committee referred to in section 7 of the Instrument. Provide detailed information regarding the designated benchmark administrator's legal structure and ownership.

Item 3. Designated Benchmark
Provide the name of the designated benchmark.

Item 4. Policies and Procedures re Confidential Information
Unless previously provided, attach a copy of the most recent written policies and procedures established and maintained by the designated benchmark administrator to prevent the misuse of confidential information.

Item 5. Policies and Procedures re Conflicts of Interest
Unless previously provided, attach a copy of the most recent written policies and procedures established and maintained with respect to conflicts of interest and potential conflicts of interest.

Item 6. Conflicts of Interest Arising from the Control or Ownership Structure of the Applicant

(a) Describe any conflict of interest or potential conflict of interest that arises from the control or ownership structure of the designated benchmark administrator, or from any other activities of the designated benchmark administrator or any affiliated entity of the designated benchmark administrator, in relation to a designated benchmark administered by the designated benchmark administrator.

(b) Describe the designated benchmark administrator's policies and procedures to identify and eliminate or manage each conflict of interest or potential conflict of interest described in paragraph (a).

Item 7. Policies and Procedures re Control Framework

Describe the designated benchmark administrator's control framework referred to in section 8 of the Instrument and policies and procedures designed to ensure the quality of the designated benchmark.

Item 8. Policies and Procedures re Complaints

Describe the designated benchmark administrator's policies and procedures regarding complaints.

Item 9. Policies and Procedures re Books, Records and Other Documents

Describe the designated benchmark administrator's policies and procedures regarding record keeping.

Item 10. Outsourcing

Describe the designated benchmark administrator's policies and procedures regarding outsourcing and disclose the following information about any person or company referred to in section 13 of the Instrument to which a designated benchmark administrator has outsourced a function, service or activity in the provision of a designated benchmark (the "provider") and the individuals who supervise the provider:

- the identity of the provider and each of its key individual contacts;
- the total number of individuals who supervise the provider;
- a general description of the minimum qualifications required of the provider for any outsourcing;
- a general description of the minimum qualifications required of individuals who supervise the provider for any outsourcing, including education level and work experience.

Item 11. Benchmark Individuals

Disclose the following information about the benchmark individuals of the designated benchmark administrator and the individuals who supervise the benchmark individuals:

- the total number of benchmark individuals;
- the total number of supervisors of benchmark individuals;
- a general description of the minimum qualifications required of the benchmark individuals, including education level and work experience (if applicable, distinguish between junior, mid, and senior level benchmark individuals);
- a general description of the minimum qualifications required of the supervisors of benchmark individuals, including education level and work experience.

Item 12. Compliance Officer

Disclose the following information about the officer of the designated benchmark administrator referred to in section 6 of the Instrument:

- name;
- employment history;
- post-secondary education;
- whether employed full-time or part-time by the designated benchmark administrator.

Item 13. Specified Revenue

Disclose the following information, as applicable, regarding the designated benchmark administrator's aggregate revenue for the most recently completed financial year:

- revenue from determining the designated benchmark;
- revenue from determining any other benchmarks administered by the designated benchmark administrator (which may be provided as an aggregate number for all other benchmarks administered by the designated benchmark administrator);
- revenue from granting licences or rights to publish information about the designated benchmark;
- revenue from granting licences or rights to publish information about any other benchmarks administered by the designated benchmark administrator (which may be provided as an aggregate number for all other benchmarks administered by the designated benchmark administrator).

Include financial information on the revenue of the designated benchmark administrator divided into fees from benchmark and non-benchmark activities, including a comprehensive description of each.

This information is not required to be audited, but any disaggregation of revenue must be determined using the same accounting principles as the annual financial statements required by section 2 of the Instrument.

Item 14. Financial Statements
Attach a copy of the annual financial statements required under section 2 of the Instrument.

Item 15. Verification Certificate
Include a certificate of the designated benchmark administrator in the following form:

> The undersigned has executed this Form 25-102F1 *Designated Benchmark Administrator Annual Form* on behalf of, and on the authority of, [the designated benchmark administrator]. The undersigned, on behalf of [the designated benchmark administrator], represents that the information and statements contained in this Form, including appendices and attachments, all of which are incorporated into and form part of this Form, are true and correct.
>
> _____ _____
> (Date) (Name of the Designated Benchmark Administrator)
>
> By: _____
> (Print Name and Title)
>
> _____
> (Signature)

FORM 25-102F2
DESIGNATED BENCHMARK ANNUAL FORM

Instructions

(1) Terms used but not defined in this form have the meaning given to them in the Instrument.

(2) Unless otherwise specified, the information in this form must be presented as at the last day of the designated benchmark administrator's most recently completed financial year. If necessary, the designated benchmark administrator must update the information provided so it is not misleading when it is delivered. For information presented as at any date other than the last day of the designated benchmark administrator's most recently completed financial year, specify the relevant date in the form.

(3) Designated benchmark administrators are reminded that it is an offence under securities legislation to give false or misleading information on this form.

Item 1. Name of Designated Benchmark Administrator
State the name of the designated benchmark administrator.

Item 2. Designated Benchmark
Provide the name of the designated benchmark and whether it is also any of the following:

- interest rate benchmark;
- critical benchmark;
- regulated-data benchmark.

Item 3. Benchmark Distribution Model
Describe how the designated benchmark administrator makes the designated benchmark readily accessible for free or for a fee. If a person must pay a fee to obtain information about the designated benchmark made readily accessible by the designated benchmark administrator, provide a fee schedule or describe the prices charged.

Item 4. Procedures and Methodologies
Describe the procedures and methodologies used by the designated benchmark administrator to determine the designated benchmark. The description must be sufficiently detailed to provide an understanding of the processes employed by the designated benchmark administrator in determining the designated benchmark, including the following, as applicable:

- the public and non-public sources of information used in determining the designated benchmark, including information provided by benchmark contributors;

- procedures for monitoring, reviewing, and updating the designated benchmark,

- the methodologies, policies and procedures described in the Instrument.

A designated benchmark administrator may provide the location on its website where additional information about the methodologies, policies and procedures is located.

Item 5. Code of Conduct for Benchmark Contributors
Unless previously provided, attach a copy of any code of conduct for benchmark contributors.

Item 6. Verification Certificate
Include a certificate of the designated benchmark administrator in the following form:

> The undersigned has executed this Form 25-102F2 *Designated Benchmark Annual Form* on behalf of, and on the authority of, [the designated benchmark administrator]. The undersigned, on behalf of [the designated benchmark administrator], represents that the information and statements contained in this Form, including appendices and attachments, all of which are incorporated into and form part of this Form, are true and correct.
>
> _____ _____
> (Date) (Name of the Designated Benchmark Administrator)
>
> By: _____
> (Print Name and Title)
>
> _____
> (Signature)

FORM 25-102F3
Submission to Jurisdiction and Appointment of Agent for Service of Process

1. Name of the designated benchmark administrator (the "DBA"):

2. Jurisdiction of incorporation, or equivalent, of the DBA:

3. Address of principal place of business of the DBA:

4. Name, email address, phone number and fax number of contact person at principal place of business of the DBA:

5. Name of agent for service of process (the "Agent"):

6. Agent's address in Canada for service of process:

7. Name, email address, phone number and fax number of contact person of the Agent:

8. The DBA designates and appoints the Agent at the address of the Agent stated in Item 6 as its agent on whom may be served any notice, pleading, subpoena, summons or other process in any action, investigation or administrative, criminal, quasi-criminal, penal or other proceeding (a "proceeding") arising out of, relating to or concerning the determination of a designated benchmark administered by the DBA or the obligations of the DBA as a designated benchmark administrator, and irrevocably waives any right to raise as a defence in any proceeding any alleged lack of jurisdiction to bring a proceeding.

9. The DBA irrevocably and unconditionally submits to the non-exclusive jurisdiction of

   (a) the judiciary and quasi-judicial and other administrative bodies of each of the provinces and territories of Canada in which it is a designated benchmark administrator, and

   (b) any judicial, quasi-judicial and other administrative proceeding in any such province or territory,

   in any proceeding arising out of or related to or concerning the determination of a

designated benchmark administered by the DBA or the obligations of the DBA as a designated benchmark administrator.

10. This submission to jurisdiction and appointment of agent for service of process is governed by and construed in accordance with the laws of [insert province or territory of above address of Agent].

_____ _____

Signature of Designated Benchmark Administrator Date

_____

Print name and title of signing officer
of Designated Benchmark Administrator

AGENT

The undersigned accepts the appointment as agent for service of process of [insert name of DBA] under the terms and conditions of the appointment of agent for service of process set out in this document.

_____ _____

Signature of Agent Date

_____

Print name of person signing and, if Agent
is not an individual, the title of the person

ANNEX C

PROPOSED CHANGES TO COMPANION POLICY 25-102 *DESIGNATED BENCHMARKS AND BENCHMARK ADMINISTRATORS*

1. Companion Policy 25-102 Designated Benchmarks and Benchmark Administrators is changed by this Document.[1]

2. Part 1 is changed

(a) in the first bullet of the second paragraph under the subheading of "Designation of Benchmarks and Benchmark Administrators" by adding "or commodity***" after "***financial***",***

(b) by adding after the second paragraph under the subheading of "Categories of Designation" the following paragraph:

Designated commodity benchmarks, benchmarks dually designated as commodity and regulated-data benchmarks or dually designated as commodity and critical benchmarks are subject to the requirements as specified under Part 8.1 of the Instrument.**,**

(c) in the second sentence of the third paragraph under the subheading of "Categories of Designation" by

(i) replacing "or***" with ",***" before "***a designated regulated-data benchmark***", and***

(ii) adding "or a designated commodity benchmark***" before the period,***

(d) in the bullets of the third paragraph under the subheading of "Categories of Designation"

(i) by deleting "and***" in the first bullet,***

(ii) by replacing "." with ", but not if it is a commodity benchmark,***" in the second bullet, and***

(iii) by adding after the second bullet the following two bullets:

- a designated commodity benchmark may also be designated as a

[1] The proposed changes are with respect to the final version of CP published by the Authorities today, on April 29, 2021. For further details, see the CSA Notice of Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy, dated April 29, 2021.

designated regulated-data benchmark, and

- a designated commodity benchmark may also be designated as a designated critical benchmark.***, and***

(e) in the fourth paragraph under the subheading of "Categories of Designation" by

(i) replacing "or***" with ","*** ***before "***a regulated-data benchmark***", and***

(ii) adding "or a commodity benchmark***" before the period.***

3. Subsection 1(1) with the heading of "Definition of designated critical benchmark" is changed

(a) in the first paragraph by adding at the end of that first paragraph the following sentence:

However, if a designated commodity benchmark is also designated as a critical benchmark, then subsections 40.2(1) and (2) of the Instrument will specify the requirements applicable to such a benchmark.***, and***

(b) in first sentence of the second paragraph by adding "or commodity***" before "***markets***".***

4. Subsection 1(1) with the heading of "Definition of designated regulated-data benchmark" is changed by adding at the end of the first paragraph the following sentence:

However, if a commodity benchmark is dually designated as a commodity benchmark and a regulated-data benchmark, then subsections 40.2(3) and (4) of the Instrument will specify the requirements applicable to such a benchmark.**.**

5. The Companion Policy is changed by adding the following part:

PART 8.1
DESIGNATED COMMODITY BENCHMARKS

Section 40.1 – Definition of commodity benchmark

The Instrument defines a "commodity benchmark" to ensure, to the extent possible, a consistent interpretation of this term across the various CSA jurisdictions, despite possible differences in statutory definitions of "commodity". The definition specifically excludes a benchmark that has, as an underlying interest, a currency, or an intangible commodity that can only be delivered in digital format, including crypto and digital assets.

Subsections 40.2(1) and (2) – Dual designation as a commodity benchmark and a critical benchmark

A designated commodity benchmark may also be designated as a critical benchmark and, in such case, would still be subject to the requirements under Part 8.1. As there are no specific requirements under Part 8.1 for benchmark contributors, such dually-designated benchmarks would not be subject to the requirements under sections 30 to 33 of the Instrument.

If the underlying commodity is gold, silver, platinum or palladium, then rather than being subject to the requirements under Part 8.1, the requirements under Parts 1 to 8 would apply.

Subsections 40.2(3) and (4) – Dual designation as a commodity benchmark and a regulated-data benchmark

If a commodity benchmark is designated as a regulated-data benchmark, then it is not subject to Part 8.1, rather the requirements under Parts 1 to 8 would apply. However, some commodity benchmarks may be determined from transactions where the parties, in the ordinary course of business, make or take physical delivery of the commodity, and those same commodity benchmarks may also meet the requirements for regulated-data benchmarks. Generally, these transactions would also be arm's length transactions. Regulated-data benchmarks determined from such transactions would more closely resemble commodity benchmarks, rather than financial benchmarks, and they would be dually designated as commodity and regulated-data benchmarks. Benchmark administrators of such dually-designated benchmarks would be subject to the requirements under Part 8.1.

However, as provided by subsection 40.2(4), such benchmark administrators would be exempted from certain policy and control requirements relating to the process of contributing input data, from the requirement to publish certain explanations for each determination of the benchmark, and from the requirement for an assurance report. The exemptions under subsection 40.2(4) are meant to ensure that administrators of benchmarks dually designated as commodity and regulated-data benchmarks receive comparable treatment under Part 8.1 as administrators of designated regulated-data benchmarks under Parts 1 to 8.

Given the interpretation provided by paragraph 1(3)(a) of the Instrument as to when input data is considered to have been "contributed", as described earlier in this Policy, input data for regulated-data benchmarks would not generally be considered to be contributed. Therefore, certain requirements that are only applicable if there is a contributor or if input data is contributed, would not apply to a benchmark that is dually designated as a commodity benchmark and a regulated-data benchmark. Examples include the requirements in paragraphs 40.5(2)(g), (h) and (i), and paragraphs 40.8(2)(d) and (e).

For clarity, we would not designate a regulated-data benchmark that is also a commodity benchmark, whether dually designated as such or only as a regulated-data benchmark, as a critical benchmark.

Section 40.3 – Non-application to designated commodity benchmarks

Physical commodity markets have unique characteristics which have been taken into account in determining which requirements should be imposed on designated benchmark administrators in respect of designated commodity benchmarks. Consequently, section 40.3 includes a number of exemptions from certain requirements for such benchmark administrators, either because some are not suitable or because more appropriate substituted requirements are provided under Part 8.1 of the Instrument. Requirements that are relevant to designated benchmark administrators of designated commodity benchmarks have been excepted from the exemptions in section 40.3, and include, among others, the requirements for:

- policies and procedures as set out in subsection 5(1),
- a compliance officer as set out in section 6,
- reporting on contraventions in section 11,
- policies and procedures regarding complaints, as set out in section 12,
- outsourcing under section 13,
- the publishing of a benchmark statement under section 19, and
- providing notice of changes to and cessation of a benchmark, as provided under section 20.

In addition to the guidance provided in this Policy with respect to paragraph 12(2)(c), we expect disputes as to pricing determinations that are not formal complaints to be resolved by the designated benchmark administrator of a commodity benchmark with reference to its appropriate standard procedures. In general, we would expect that if a complaint results in a change in price, whether the complaint is formal or informal, then the details of that change in price will be communicated to stakeholders as soon as possible.

With respect to section 13, for the purposes of securities legislation, a designated benchmark administrator remains responsible for compliance with the Instrument despite any outsourcing arrangement.

Paragraph 19(2)(a) of the Instrument provides that a required element of the benchmark statement for a designated benchmark is a description of the part of the market the designated benchmark is intended to represent. This relates to the benchmark's purpose. A commodity benchmark may be intended to reflect the characteristics and operations of the referenced underlying physical commodity market and may be used as a reference price for a commodity and for commodity derivative contracts.

Section 40.5 – Methodology to ensure the accuracy and reliability of a designated commodity benchmark

We expect that the methodology established and used by a designated benchmark administrator will be based on the applicable characteristics of the relevant underlying interest of the designated commodity benchmark for that part of the market that the designated commodity benchmark is intended to represent, such as the grade and quality of the commodity, its geographical location, seasonality, etc., and will be sufficient to provide an accurate and reliable benchmark. For example, the methodology for a crude oil benchmark should reflect the following, but not be limited to, the specific crude grade (e.g., sweet or heavy), the location (e.g., Edmonton or Hardisty), the time period within which transactions are completed during the trading day, the month of delivery, and the assessment method used such as a volume-weighted average.

Subparagraph 40.5(2)(a)(i) – Reference to concluded transactions

In a number of instances, under Part 8.1, we refer to concluded transactions. For clarity, by concluded transactions, we mean transactions that are executed but not necessarily settled.

Subparagraph 40.5(2)(a)(ii) – Specific reference unit used in the methodology

The specific reference unit used in the methodology will vary depending on the underlying commodity. Examples of possible reference units include barrels of oil or cubic meters (m^3) in respect of crude oil, and gigajoules (GJ) or one million British Thermal Units (MMBTU) in respect of natural gas.

Paragraph 40.5(2)(c) – Relative importance assigned to each criterion used in the determination of a designated commodity benchmark

The requirement in paragraph 40.5(2)(c) regarding the relative importance assigned to each criterion, including the type of input data used and how and when expert judgment may be exercised, is not intended to restrict the specific application of the relevant methodology, but to ensure the quality and integrity of the determination of the designated commodity benchmark.

Section 40.7 – Review of methodology

We expect that a designated benchmark administrator will determine the appropriate frequency for carrying out an internal review of a designated commodity benchmark's methodology based on the specific nature of the benchmark (such as the complexity, use and vulnerability of the benchmark to manipulation) and the applicable characteristics of the part of the market (or changes thereto) that the benchmark is intended to represent. In any event, the administrator must review the methodology at least once in every 12-month period.

Paragraph 40.8(2)(a) – Order of priority of input data specified in the methodology

While we recognize a benchmark administrator's flexibility to determine its own methodology and use of market data, we expect an administrator to use input data in accordance with the order of priority specified in its methodology. We further expect that, where consistent with such methodology, priority will be given to input data in the following order: (1) concluded and reported transactions, (2) bids and offers, and (3) other information.

Furthermore, we expect that the designated benchmark administrator will employ measures reasonably designed to ensure that input data contributed and considered in the determination of a designated commodity benchmark is *bona fide*. By *bona fide* we mean that parties contributing the input data have executed or are prepared to execute transactions generating such input data and that concluded transactions were executed between parties at arm's length. If the latter is not the case, then particular attention should be paid to transactions between affiliated entities and consideration given as to whether this affects the quality of the input data to any extent.

Section 40.9 – Transparency of determination of a designated commodity benchmark

We expect that, in providing a plain language explanation of the extent to which, and the basis upon which, expert judgment was used in the determination of a designated commodity benchmark, a designated benchmark administrator will address the following:

(a) the extent to which a determination is based on transactions or spreads, and interpolation or extrapolation of input data;

(b) whether greater priority was given to bids and offers or other market data than to concluded and reported transactions, and, if so, the reason why.

Section 40.9 requires a designated benchmark administrator to publish the specified explanations for each determination of a designated commodity benchmark. However, we recognize that, to the extent that there have been no significant changes, a standard explanation may be acceptable, and any exceptions in the explanation must then be noted for each determination. We generally expect that the required explanations will be provided contemporaneously with the determination of a benchmark, but recognize that unforeseen circumstances may cause delays, in which case, we still expect that explanation to be published as soon as reasonably practicable.

Section 40.10 – Policies, procedures, controls and criteria of the designated benchmark administrator to ensure the integrity of the process of contributing input data

There are no specific requirements under Part 8.1 for benchmark contributors with respect to commodity benchmarks, as under Part 6 for financial benchmarks, nor, consequently, obligations on designated benchmark administrators to ensure that the benchmark

contributors adhere to such requirements. However, section 40.10 does require an administrator to ensure the integrity of the process for contributing input data. We are of the view that such policies, procedures, controls and criteria will promote the accuracy and integrity of the determination of the commodity benchmark.

Paragraph 40.10(1)(d) – Criteria relating to the contribution of transaction data

In establishing criteria that determine the appropriate contribution of transaction data by benchmark contributors, we would expect that the criteria would include encouraging benchmark contributors to contribute transaction data from the back office of the benchmark contributor. We would consider the back office of a benchmark contributor to be any department, division, group or personnel that performs any administrative and support functions, including, as applicable, settlements, clearances, regulatory compliance, maintaining of records, accounting and information technology services. In general, we consider back office staff to be the individuals who support the generation of revenue for the benchmark contributor.

Subsection 40.11(3) – Governance and control requirements

To foster confidence in the integrity of a designated commodity benchmark, we are of the view that benchmark individuals involved in the determination of a commodity benchmark should be subject to the minimum controls set out in subsection 40.11(3). A designated benchmark administrator must decide how to implement its own specific measures to achieve the objectives set out in paragraphs (a) to (e).

Section 40.12 – Books, records and other documents

Subsection 40.12(2) sets out the minimum records that must be kept by a designated benchmark administrator. We expect an administrator to consider the nature of its benchmarks-related activity when determining the records that it must keep.

In addition to the record keeping requirements in the Instrument, securities legislation generally requires market participants to keep such books, records and other documents as may reasonably be required to demonstrate compliance with securities law of the jurisdiction.

Section 40.13 – Conflicts of interest

We expect the policies and procedures required under subsection 40.13(1) for managing conflicts of interest to provide the parameters for a designated benchmark administrator to

- identify conflicts of interest,
- determine the level of risk, to both the benchmark administrator and users of its commodity benchmarks, that a conflict of interest raises, and
- respond appropriately to conflicts of interest.

In establishing an organizational structure, as required under subsections 40.11(1) and (2),

that addresses the conflict of interest requirements under subsection 40.13(3), the designated benchmark administrator should ensure that persons responsible for the determination of the designated commodity benchmark:

- are located in a secure area apart from persons that carry out other business activity, and
- report to a person that reports to an executive officer that does not have responsibility relating to other business activities of the administrator.

Section 40.14 - Assurance report on designated benchmark administrator

Under Part 8.1, there is no requirement for an oversight committee, as provided by section 7. Therefore, for purposes of section 40.14, there is no oversight committee to specify whether a limited assurance report on compliance or a reasonable assurance report on compliance needs to be provided by a public accountant. We would expect the designated benchmark administrator to determine which report is appropriate, based on the specific nature of the designated commodity benchmark, including the complexity, use and vulnerability of the benchmark to manipulation, and the applicable characteristics of the market that the benchmark is intended to represent, or other relevant factors regarding the administration of the benchmark.

6. These changes become effective on ●.

ANNEX D

BLACKLINED COMPANION POLICY 25-102
DESIGNATED BENCHMARKS AND BENCHMARK ADMINISTRATORS

PART 1
GENERAL COMMENTS

Introduction

This companion policy (the "Policy") provides guidance on how the Canadian Securities Administrators ("we") interpret various matters in Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* (the "Instrument").

Except for Parts 1 and 8, the numbering and headings of Parts, sections and subsections in this Policy generally correspond to the numbering and headings in the Instrument. Any general guidance for a Part or section appears immediately after the Part or section name. Any specific guidance on a section or subsection follows any general guidance. If there is no guidance for a Part or section, the numbering in this Policy will skip to the next provision that does have guidance.

Introduction to the Instrument

Designation of Benchmarks and Benchmark Administrators

Securities legislation provides for the designation of a benchmark and a benchmark administrator. In all Canadian jurisdictions that have adopted the Instrument, a benchmark administrator or a regulator may apply to a securities regulatory authority to request the designation of a benchmark or a benchmark administrator. In Alberta, British Columbia and Québec, the securities regulatory authority may make the designation on its own initiative. In Québec, the decision of the securities regulatory authority to designate a benchmark has the legal effect of the benchmark administrator becoming subject to the *Securities Act* (Québec). "Regulator" and "securities regulatory authority" are defined in National Instrument 14-101 *Definitions*.

We expect that a regulator may apply to a securities regulatory authority to request the designation of a benchmark or benchmark administrator, or in Alberta, British Columbia or Québec, the securities regulatory authority may make the designation on its own initiative, on public interest grounds, including where:

- a benchmark is sufficiently important to financial or commodity markets in Canada, or

- we become aware of activities of a benchmark administrator, benchmark contributor or benchmark user that raise public interest concerns and conclude that the administrator and benchmark in question should be designated.

Where the regulator intends to apply for the designation of a benchmark or benchmark administrator, or in Alberta, British Columbia or Québec, the securities regulatory authority intends to make the designation on its own initiative, we generally expect to give the affected benchmark administrator reasonable notice of our intention and the reasons for it. In addition, in certain jurisdictions, securities legislation provides the benchmark administrator with an opportunity to be heard and, where necessary, to provide documents before the securities regulatory authority makes its decision. Furthermore, we would generally not expect that a designation would be made without the applicable regulator or securities regulatory authority publishing an advance notice to the public.

Categories of Designation

The Instrument contains requirements that apply to designated benchmark administrators, benchmark contributors and certain benchmark users in respect of a designated benchmark. In addition to requirements in the Instrument that generally apply in respect of any designated benchmark, there are additional requirements in the Instrument that apply to designated critical benchmarks and designated interest rate benchmarks.

The Instrument also includes a number of exemptions from certain provisions for designated benchmarks administrators and benchmark contributors in respect of designated regulated-data benchmarks. In addition to these specific exemptions, given the interpretation provided by subsection 1(3) of the Instrument as to when input data is considered to have been "contributed", as described later in this Policy, input data for regulated-data benchmarks would not generally be considered to be contributed. Therefore, certain requirements that are only applicable if there is a contributor or if input data is contributed would not apply to a benchmark that is designated as a regulated-data benchmark.

Designated commodity benchmarks, benchmarks dually designated as commodity and regulated-data benchmarks or dually designated as commodity and critical benchmarks are subject to the requirements as specified under Part 8.1 of the Instrument.

When designating a benchmark, a securities regulatory authority will issue a decision document designating the benchmark as a designated benchmark. If applicable, the decision document will indicate if the benchmark is also designated as a designated critical benchmark, a designated interest rate benchmark ~~or~~, a designated regulated-data benchmark or a designated commodity benchmark. It is possible that a designated benchmark will receive more than one designation. For example,

- a designated interest rate benchmark may also be designated as a designated critical benchmark,

- a designated regulated-data benchmark may also be designated as a designated critical benchmark, but not if it is a commodity benchmark,
- a designated commodity benchmark may also be designated as a designated regulated-data benchmark, and
- a designated ~~regulated-data~~commodity benchmark may also be designated as a designated critical benchmark.

As discussed below, we expect a benchmark administrator that applies for designation of a benchmark to provide written submissions on whether the administrator considers the benchmark to be a critical benchmark, an interest rate benchmark ~~or~~, a regulated-data benchmark or a commodity benchmark.

When designating a benchmark or benchmark administrator, a securities regulatory authority will issue a decision document that may designate the benchmark administrator as a designated benchmark administrator of one or more designated benchmarks.

We expect that a benchmark administrator that applies under securities legislation for the designation of the administrator or a benchmark will provide written submissions that contain the same information as that required by Form 25-102F1 *Designated Benchmark Administrator Annual Form* and Form 25-102F2 *Designated Benchmark Annual Form* in a format that is consistent with those forms.

If we consider it would be in the public interest, or not be prejudicial to the public interest, to do so, we may also apply for a change in the designation of a designated benchmark. In some jurisdictions, such a change may be made by the securities regulatory authority without application. For example, if a designated benchmark is initially designated as a designated interest rate benchmark but over time it becomes more significant to Canadian financial markets, we may apply for it to also be designated as a critical benchmark. If this were to occur, securities legislation in certain jurisdictions would provide the designated benchmark administrator with an opportunity to be heard and, where necessary, to provide documents before a decision to make such a change is made. Accordingly, we would not expect that a change in the category of designation would be made without reasonable notice being provided to the affected benchmark administrator. Furthermore, we would generally not expect that a change in the category of designation would be made without the applicable regulator or securities regulatory authority publishing an advance notice to the public.

Suspending, Revoking or Cancelling a Designation or Amending or Revoking Terms and Conditions

Securities legislation also provides that a securities regulatory authority may cancel or revoke, and in Alberta and Québec the securities regulatory authority may also suspend, the designation of a designated benchmark administrator or designated benchmark or may amend or revoke the terms and conditions relating to designation. However, before doing

so, securities legislation in certain jurisdictions provides the benchmark administrator with an opportunity to be heard or a right to be heard and, where necessary, to provide documents. Accordingly, we would not expect a designation would be cancelled, revoked or suspended or that terms or conditions would be amended or revoked without reasonable notice being provided to the affected benchmark administrator. Additionally, in jurisdictions where the regulator may apply to the securities regulatory authority for the cancellation or revocation of a designation of a designated benchmark administrator or designated benchmark or the amendment or revocation of terms and conditions, we would not expect to make such an application unless it would be in the public interest. Furthermore, we would generally not expect that a cancellation or revocation of a designation would be made without the applicable regulator or securities regulatory authority publishing an advance notice to the public.

Definitions and Interpretation

Subsection 1(1) – Definition of designated critical benchmark

"Designated critical benchmark" is a benchmark that is designated for the purposes of the Instrument as a "critical benchmark" by a decision of the securities regulatory authority. In addition to general requirements in the Instrument that apply in respect of any designated benchmark, there are specific requirements in Division 1 of Part 8 of the Instrument that apply to designated critical benchmarks. However, if a designated commodity benchmark is also designated as a critical benchmark, then subsections 40.2(1) and (2) of the Instrument will specify the requirements applicable to such a benchmark.

Staff of a securities regulatory authority may recommend that the securities regulatory authority designate a benchmark as a "critical benchmark" if the benchmark is critical to financial or commodity markets in Canada or a region of Canada. The following two factors are among those that will be considered:

(a) the benchmark is used directly or indirectly within a combination of benchmarks as a reference for instruments or contracts or for measuring the performance of investment funds, having a total value in Canada of at least $400 billion on the basis of the range of maturities or tenors of the benchmark, where applicable; or

(b) the benchmark satisfies all of the following criteria:

    (i) the benchmark is used directly or indirectly within a combination of benchmarks as a reference for instruments or contracts or for measuring the performance of investment funds having a total value in one or more jurisdictions of Canada that is significant, on the basis of all the range of maturities or tenors of the benchmark, where applicable;

    (ii) the benchmark has no, or very few, appropriate market-led substitutes;

(iii) in the event that the benchmark is no longer provided, or is provided on the basis of input data that is no longer sufficient to provide a benchmark that accurately represents that part of the market or economy the designated benchmark is intended to record, or on the basis of unreliable input data, there would be significant and adverse impacts on

(A) market integrity, financial stability, the real economy, or the financing of businesses in one or more jurisdictions of Canada, or

(B) a significant number of market participants in one or more jurisdictions of Canada.

For the purpose of paragraph (a) and subparagraph (b)(i), staff of a securities regulatory authority will consider, among other things, the outstanding principal amount of any debt securities that reference the benchmark, the outstanding notional amount of any derivatives that reference the benchmark, and the outstanding net asset value of any investment funds that use the benchmark to measure performance.

We note that the above list is not a complete list of factors and the existence of one of these factors by itself will not necessarily determine whether a benchmark is a critical benchmark. Instead, staff intend to follow a holistic approach where all relevant factors are considered.

We expect that a benchmark administrator that applies under securities legislation for the designation of a benchmark will provide, with its application, written submissions on whether the securities regulatory authority should designate the benchmark as a critical benchmark.

Subsection 1(1) – Definition of designated interest rate benchmark

"Designated interest rate benchmark" is a benchmark that is designated for the purposes of the Instrument as an "interest rate benchmark" by a decision of the securities regulatory authority. In addition to general requirements in the Instrument that apply in respect of any designated benchmark, there are specific requirements in Division 2 of Part 8 of the Instrument that apply to designated interest rate benchmarks.

Staff of a securities regulatory authority may recommend that the securities regulatory authority designate a benchmark as an "interest rate benchmark" if the benchmark is used to set interest rates of debt securities or is otherwise used as a reference in derivatives or other instruments. Factors that will be considered include the following:

(a) the benchmark is determined on the basis of the rate at which financial institutions may lend to, or borrow from, other financial institutions, or market participants other than financial institutions, in the money market; or

(b) the benchmark is determined from a survey of bid-side rates contributed by financial institutions that routinely accept bankers' acceptances issued by borrowers and are market makers in bankers' acceptances either directly or through an affiliate.

We note that the above list is not exhaustive.

We expect that a benchmark administrator that applies under securities legislation for the designation of a benchmark will provide, with its application, written submissions on whether the securities regulatory authority should designate the benchmark as an interest rate benchmark.

Subsection 1(1) – Definition of designated regulated-data benchmark

"Designated regulated-data benchmark" is a benchmark that is designated for the purposes of the Instrument as a "regulated-data benchmark" by a decision of the securities regulatory authority. Benchmark administrators of regulated-data benchmarks are exempted from certain governance and control requirements relating to the contribution of input data (see Division 3 of Part 8 of the Instrument). However, if a commodity benchmark is dually designated as a commodity benchmark and a regulated-data benchmark, then subsections 40.2(3) and (4) of the Instrument will specify the requirements applicable to such a benchmark.

Staff of a securities regulatory authority may recommend that the securities regulatory authority designate a benchmark as a "regulated-data benchmark" if the benchmark is determined by the application of a formula from any of the following:

(a) input data contributed entirely, or almost entirely, from

(i) any of the following, but only with reference to transaction data relating to securities or derivatives:

(A) a recognized exchange in a jurisdiction of Canada or an exchange that is subject to appropriate regulation in a foreign jurisdiction;

(B) a recognized quotation and trade reporting system in a jurisdiction of Canada or a quotation and trade reporting system that is subject to appropriate regulation in a foreign jurisdiction;

(C) an alternative trading system that is registered as a dealer in a jurisdiction of Canada and is a member of a self-regulatory entity or an alternative trading system that is subject to appropriate regulation in a foreign jurisdiction;

(D) an entity that is similar or analogous to the entities referred to in clause (A), (B) or (C) and that is subject to appropriate regulation in a jurisdiction of Canada or a foreign jurisdiction;

(ii) a service provider to which the designated benchmark administrator of the designated benchmark has outsourced the data collection in accordance with section 13 of the Instrument, if the service provider receives the data entirely and directly from an entity referred to in subparagraph (i);

(b) net asset values of investment funds that are reporting issuers in a jurisdiction of Canada or subject to appropriate regulation in a foreign jurisdiction.

We expect that a benchmark administrator that applies under securities legislation for the designation of a benchmark will provide, with its application, written submissions on whether the regulator or the securities regulatory authority should designate the benchmark as a regulated-data benchmark.

Subsection 1(1) – Definition of expert judgment

"Expert judgment" is the discretion exercised by:

- a designated benchmark administrator with respect to the use of input data in determining a benchmark, and
- a benchmark contributor with respect to input data.

Expert judgment may involve various activities, including:

- extrapolating values from prior or related transactions,
- adjusting values for factors that might influence the quality of data such as market data, economic factors, market events or impairment of a buyer or seller's credit quality, or
- assigning a greater weight to data relating to bids or offers than the weight assigned to a relevant concluded transaction.

Subsection 1(1) – Definition of input data

"Input data" is the data in respect of any measurement of one or more assets, interests or elements that is contributed, or otherwise obtained, by a designated benchmark administrator for the purpose of determining a designated benchmark. For example, input data may include estimated prices, quotes, committed quotes or other values.

The reference to "or otherwise obtained" would include the following scenarios where data is "reasonably available" (within the meaning of s. 1(3) of the Instrument) on a source's website (free of charge or behind a paywall):

- "Active" scenario – the source takes deliberate action to provide the data to a benchmark administrator.
- "Passive" scenario – the source simply publishes the data and is not aware that the benchmark administrator is using it as input data.

Subsection 1(1) – Definitions of limited assurance report on compliance and reasonable assurance report on compliance

A "limited assurance report on compliance" and a "reasonable assurance report on compliance" must be prepared in accordance with the applicable Canadian Standard on Assurance Engagements (CSAE) or the applicable International Standard on Assurance Engagements (IASE). The CSAE and ISAE require that any public accountant that prepares such a report be independent.

Subsection 1(1) – Definition of transaction data

"Transaction data" means the data in respect of a price, rate, index or value representing transactions between unaffiliated parties in an active market subject to competitive supply and demand forces.

We consider that:

- transaction data would include published or onscreen data available to the public generally or by subscription, and
- the reference to "active market subject to competitive supply and demand forces" would include a market in which transactions take place, or are reported, between arm's length parties with sufficient frequency and volume to provide pricing information on an ongoing basis. This reference is separate and different from any definition for accounting purposes.

Subsection 1(1) – Interpretation of certain definitions

Definitions of each of the following terms are considered to apply only in respect of the designated benchmark to which they pertain:

- "benchmark administrator";
- "benchmark contributor";
- "benchmark individual";

- "benchmark user";
- "contributing individual";
- "DBA individual";
- "designated benchmark administrator";
- "input data";
- "transaction data".

Subsection 1(3) – Interpretation of contribution of input data

There are provisions in the Instrument that apply to (i) all input data or (ii) only input data that is contributed.

Subsection 1(3) of the Instrument provides that input data is considered to have been "contributed" if

(a) it is not reasonably available to

  (i) the designated benchmark administrator, or

  (ii) another person or company, other than the benchmark contributor, for the purpose of providing the input data to the designated benchmark administrator, and

(b) it is provided to the designated benchmark administrator or the other person or company referred to in subparagraph (a)(ii) above for the purpose of determining a benchmark.

We consider that the reference to "not reasonably available" would include situations where input data is not published or otherwise available to a designated benchmark administrator or another person or company, other than the benchmark contributor, using reasonable effort, on reasonable terms or a reasonable cost and the designated benchmark administrator therefore needs to obtain the input data from a benchmark contributor who has access to that data. For example, an interest rate benchmark may be based on a survey by a benchmark administrator of bid-side rates contributed by benchmark contributors that are financial institutions which routinely accept bankers' acceptances issued by borrowers and are market makers in bankers' acceptances either directly or through an affiliate.

Where a benchmark administrator engages the services of an agent to aggregate input data from multiple sources, we would not consider this input data to be contributed by the data

aggregator, as an agent of the benchmark administrator, provided that the input data is collected from one or more reasonably available sources.

Input data for regulated-data benchmarks would generally not be considered to be contributed because the nature of this data is that it is reasonably available and not created for the purpose of determining the benchmark.

Subsections 1(5) to (8) – Definitions of benchmark, benchmark administrator, benchmark contributor and benchmark user in Appendix A

Subsection 1(5) of the Instrument indicates that, for purposes of the Instrument, the definitions in Appendix A apply. Appendix A contains definitions of "benchmark", "benchmark administrator", "benchmark contributor" and "benchmark user". However,

- Subsection 1(6) indicates that subsection 1(5) does not apply in Alberta, New Brunswick, Nova Scotia, Ontario or Saskatchewan. In these jurisdictions, the terms in Appendix A are defined in securities legislation.
- Subsection 1(7) provides that, in British Columbia, the definitions of "benchmark" and "benchmark contributor" in the *Securities Act* (British Columbia) apply.
- Subsection 1(8) provides that, in Québec, the definitions of "benchmark" and "benchmark administrator" in the *Securities Act* (Québec) apply.

The definition of benchmark refers to a "price, estimate, rate, index or value". We consider that "index" would include any indicator that is:

- made available to the public, and
- regularly determined
    - entirely or partially by the application of a formula or any other method of calculation, and
    - on the basis of the measurement of one or more assets, interests or elements, including, but not limited to, the value or price of the asset, interest or element.

Public authorities

Where public authorities (for example, national statistics agencies, universities or research centres) contribute data to, or provide or have control over the provision of, a benchmark for public policy purposes, we would generally not designate such a benchmark as a "designated benchmark" or its administrator as a "designed benchmark administrator". In this regard, we would generally consider a "public authority" to include a government, a government agency or an entity performing public functions, having public responsibilities or providing public services under the control of a government or a government agency.

Use of "reasonable person"

Certain provisions of the Instrument use the concept of a "reasonable person" to introduce an objective test, rather than a subjective test. In these provisions, the test will turn on what a "reasonable person" would believe, consider, conclude or determine or what the opinion of a "reasonable person" would be, in the circumstances.

PART 2
DELIVERY REQUIREMENTS

Section 2 – References to Canadian GAAP, Canadian GAAS, Handbook, IFRS and International Standards on Auditing

There are references in section 2 of the Instrument to "Canadian GAAP", "Canadian GAAS", "Handbook", "IFRS" and "International Standards on Auditing", which are defined in National Instrument 14-101 *Definitions*.

Subparagraph 2(7)(a)(ii) – Canadian GAAP applicable to private enterprises

Subject to certain conditions, subparagraph 2(7)(a)(ii) of the Instrument permits audited annual financial statements of a designated benchmark administrator to be prepared using Canadian GAAP applicable to private enterprises, which is Canadian accounting standards for private enterprise in Part II of the Handbook.

Subsection 2(8) – Information on designated benchmark administrator

Subsection 2(8) requires that certain information be provided on Form 25-102F1 *Designated Benchmark Administrator Annual Form* and delivered on or before the 30th day after the designated benchmark administrator is designated. A benchmark administrator that provided a completed Form 25-102F1 with their application for designation does not need to re-file the form within the 30 day period after designation.

Subsection 3(2) – Information on designated benchmark

Subsection 3(2) requires that certain information be provided on Form 25-102F2 *Designated Benchmark Annual Form* and delivered on or before the 30th day after the designated benchmark is designated. A benchmark administrator that provided a completed Form 25-102F2 with their application for designation does not need to re-file the form within the 30 day period after designation.

Subsection 4(2) – Submission to jurisdiction and appointment of agent for service of process

Subsection 4(2) requires that certain information be provided on Form 25-102F3 *Submission to Jurisdiction and Appointment of Agent for Service of Process* and delivered on or before the 30th day after the designated benchmark administrator is designated. A benchmark administrator that provided a completed Form 25-102F3 with their application for designation does not need to re-file the form after designation.

PART 3
GOVERNANCE

Board of directors

The Instrument has various obligations for the board of directors of a designated benchmark administrator. The Instrument does not include requirements as to the composition of the board of directors as this will be generally dictated by the corporate laws under which the benchmark administrator is organized. In addition to independence requirements under applicable corporate or other laws with respect to the composition of the board of directors of the benchmark administrator, there are several provisions of the Instrument that foster independence in the oversight of a designated benchmark and the proper management of potential conflicts of interest, including:

- **subsection 6(6)** – a designated benchmark administrator must not provide a payment or other financial incentive to a compliance officer referred to in subsection 6(1), or any DBA individual that reports directly to the officer, if the payment or other financial incentive would create a conflict of interest. Such a payment would compromise the independence of the compliance officer or the DBA individual;
- **subsections 7(2) and (3)** – a designated benchmark administrator must establish an oversight committee, the members of which must not be members of the board of directors;
- **subsections 7(4) and (9)** – the oversight committee must provide a copy of its recommendations on benchmark oversight to the board of directors of the designated benchmark administrator and, if the oversight committee becomes aware that the board of directors has acted or intends to act contrary to any recommendations or decisions of the oversight committee, the oversight committee must record that fact in the minutes of its next meeting;
- **subsection 10(1)** – a designated benchmark administrator must establish, document, maintain and apply policies and procedures that are reasonably designed to, among other things, ensure that any expert judgment exercised by the benchmark administrator or DBA individuals is independently and honestly exercised and protect the integrity and independence of the provision of a designated benchmark;

- **subsection 12(2)** – a benchmark administrator must conduct the investigation of a complaint independently of persons who might have been involved in the subject matter of the complaint; and
- **subsections 31(1) and 35(1)** – for a designated critical benchmark and a designated interest rate benchmark, respectively, at least half of the members of the oversight committee of the designated benchmark administrator must be independent of the designated benchmark administrator and any affiliated entity of the designated benchmark administrator.

Subsection 6(1) – Reference to securities legislation relating to benchmarks

Subsection 6(1) of the Instrument refers to "securities legislation relating to benchmarks", which would include the Instrument and benchmark provisions in local securities legislation. "Securities legislation" is defined in National Instrument 14-101 *Definitions*.

Paragraph 6(4)(b) – Determining compensation for DBA individuals

Paragraph 6(4)(b) of the Instrument prohibits the compliance officer of a designated benchmark administrator from participating in the determination of compensation for any DBA individuals, other than for a DBA individual who reports directly to the compliance officer. We expect that a designated benchmark administrator will consider compliance, including past compliance issues and how compensation policies may be used to manage conflicts of interest, when establishing compensation policies and determining compensation of any DBA individuals and we do not consider this to be prohibited by paragraph 6(4)(b) of the Instrument, even if the compliance officer is providing input in relation to a DBA individual.

Subsection 7(3) – Oversight committee must not include members of board of directors

While subsection 7(3) of the Instrument prohibits the oversight committee from including individuals that are members of the board of directors of the designated benchmark administrator, we do not consider this provision to prohibit a member of the board of directors from being invited, when appropriate, to an oversight committee meeting, provided that the member of the board of directors does not perform or influence the independent performance of the roles of the oversight committee set out in section 7 of the Instrument.

Subsection 7(7) – Information relating to a designated benchmark

We consider that the reference to "information relating to a designated benchmark" in subsection 7(7) of the Instrument would include a daily or periodic determination under the methodology of a designated benchmark and any other information.

Subsection 7(8) – Required actions for oversight committee of a designated benchmark administrator

Subsection 7(8) of the Instrument requires the oversight committee of a designated benchmark administrator to carry out certain actions. We expect that the oversight committee will carry out these actions in a manner that reasonably reflects the specific nature of the designated benchmark, including the complexity, use and vulnerability of the designated benchmark.

Paragraph 7(8)(e) – Calculation agents and dissemination agents

Paragraph 7(8)(e) of the Instrument requires the oversight committee of a designated benchmark administrator to oversee any service provider involved in the provision of the designated benchmark, including calculation agents or dissemination agents. We consider that

- a "dissemination agent" is a person or company with delegated responsibility for disseminating a designated benchmark to benchmark users in accordance with the instructions provided by the designated benchmark administrator for the designated benchmark, including any review, adjustment and modification to the dissemination process, and
- a "calculation agent" is a person or company with delegated responsibility for determining a designated benchmark through the application of a formula or other method of calculating the information or expressions of opinions provided for that purpose, in accordance with the methodology set out by the designated benchmark administrator for the designated benchmark.

A dissemination agent would not include:

- a publisher that pays a licensing fee to publish a benchmark under a non-exclusive publishing license, or
- a publisher that pays a licensing fee to publish a benchmark under an exclusive publishing license if the benchmark administrator also makes the benchmark publicly available through other means.

We understand that a designated benchmark administrator may establish lines of supervision of service providers as contemplated by section 13 of the Instrument, where supervision is performed by certain DBA individuals and the oversight committee receives and reviews reports on this supervision. We would consider an oversight committee to satisfy its obligations under paragraph 7(8)(e) of the Instrument if it oversees the supervision of the service providers referred to in the paragraph, for example, through the receipt and review of regular reporting from those responsible for the supervision contemplated by section 13 of the Instrument.

Subparagraph 7(8)(i)(ii) – Monitoring of input data

Subparagraph 7(8)(i)(ii) of the Instrument requires the oversight committee of a designated benchmark administrator to monitor the input data, the contribution of input data by the benchmark contributor, and the actions of the designated benchmark administrator in challenging or validating contributions of input data. We understand that a designated benchmark may have several lines of monitoring where real-time monitoring is performed by certain DBA individuals and the oversight committee receives and reviews reports on this monitoring. We would consider an oversight committee to satisfy its obligations under subparagraph 7(8)(i)(ii) of the Instrument if it oversees the monitoring of items in the subparagraph, for example, through the receipt and review of regular reporting from those responsible for real-time monitoring.

Subparagraph 7(8)(i)(iii) – Significant breaches of code of conduct for a benchmark contributor

We consider that the reference in subparagraph 7(8)(i)(iii) of the Instrument to a "breach" of a code of conduct that is "significant" would include non-trivial breaches that could affect the designated benchmark, as determined, or the integrity or reputation of the designated benchmark or the designated benchmark administrator.

Section 8 – Control framework

Section 8 of the Instrument requires a designated benchmark administrator to establish a control framework to ensure that a designated benchmark is provided in accordance with the Instrument. Similarly, except in Québec, subsection 24(2) of the Instrument requires a benchmark contributor to a designated benchmark to establish controls reasonably designed to ensure the accuracy, reliability and completeness of each contribution of input data to the designated benchmark administrator, including controls that the input data is provided in accordance with the Instrument.

We expect that the control framework provided for under subsection 8(2) of the Instrument and the controls provided for under subsection 24(2) of the Instrument will be proportionate to all of the following:

- the level of conflicts of interest identified in relation to the designated benchmark, the designated benchmark administrator or the benchmark contributor,
- the extent of expert judgment in the provision of the designated benchmark,
- the nature of the input data for the designated benchmark.

In establishing the control framework required under subsection 8(2) of the Instrument, we would expect a designated benchmark administrator to consider what controls have been established by benchmark contributors under subsection 24(2) of the Instrument.

The control framework and the controls used should be consistent with guidance published by a body or group that has developed the guidance through a process that includes the broad distribution of the proposed guidance for public comment.

Examples of suitable guidance that a designated benchmark administrator or a benchmark contributor could follow include:

(a) the *Risk Management and Governance: Guidance on Control* (COCO Framework) published by the Chartered Professional Accountants of Canada;

(b) the *Internal Control – Integrated Framework* (COSO Framework) published by The Committee of Sponsoring Organizations of the Treadway Commission (COSO); and

(c) the *Guidance on Risk Management, Internal Control and Related Financial and Business Reporting* published by U.K. Financial Reporting Council.

These examples of suitable guidance include, in the definition or interpretation of "internal control", controls for compliance with applicable laws and regulations.

Subsection 8(5) – Reporting of significant security incident or systems issue

Subsection 8(5) of the Instrument provides that a designated benchmark administrator must promptly provide written notice to the regulator or securities regulatory authority describing any security incident or any systems issue relating to a designated benchmark it administers, if a reasonable person would consider that the security incident or systems issue is significant. We consider a failure, malfunction, delay or other incident or issue to be a "significant security incident" or a "significant systems issue" if the designated benchmark administrator would, in the normal course of operations, escalate the matter to or inform senior management ultimately accountable for technology.

Subsection 10(2) – Conflict of interest requirements for designated benchmark administrators

Subsection 10(2) of the Instrument provides that a designated benchmark administrator must establish, document, maintain and apply policies and procedures that are reasonably designed to keep separate, operationally, the business of the designated benchmark administrator relating to a designated benchmark, and its benchmark individuals, from any other business activity of the designated benchmark administrator if the designated benchmark administrator becomes aware of a conflict of interest or a potential conflict of interest involving the business of the designated benchmark administrator relating to any designated benchmark.

We expect that, when contemplating the nature and scope of such a conflict of interest, a designated benchmark administrator would consider a variety of matters, including the following:

- the provision of benchmarks often involves discretion in the determination of benchmarks and is inherently subject to certain types of conflicts of interest, which implies the existence of various opportunities and incentives to manipulate benchmarks, and
- in order to ensure the integrity of designated benchmarks, designated benchmark administrators should implement adequate governance arrangements to control such conflicts of interest and to safeguard confidence in the integrity of benchmarks.

For example, if the designated benchmark administrator does identify such a conflict of interest, the administrator should ensure that persons responsible for the administration of the designated benchmark:

- are located in a secure area apart from persons that carry out other business activity, and
- report to a person that reports to an executive officer that does not have responsibility relating to other business activities.

Subsection 11(1) – Reporting of contraventions

Subsection 11(1) of the Instrument provides that a designated benchmark administrator must establish, document, maintain and apply systems and controls reasonably designed to detect and promptly report to the regulator or securities regulatory authority any conduct by a DBA individual or a benchmark contributor that might involve:

- manipulation or attempted manipulation of a designated benchmark, or
- provision or attempted provision of false or misleading information in respect of a designated benchmark.

As part of that reporting to the regulator or securities regulatory authority, we expect that the benchmark administrator's systems and controls would enable the designated benchmark administrator to provide all relevant information to the regulator or securities regulatory authority.

Paragraph 12(2)(c) – Complaint procedures

Paragraph 12(2)(c) of the Instrument provides that a designated benchmark administrator must communicate the outcome of the investigation of a complaint to the complainant within a reasonable period.

We expect that, in establishing the policies and procedures for complaints relating to the designated benchmark required by subsection 12(1) of the Instrument, the designated benchmark administrator would include a target timetable for investigating complaints.

A designated benchmark administrator may, on a case-by-case basis, apply for exemptive relief from paragraph 12(2)(c) of the Instrument if such a communication to the complainant would be seriously prejudicial to the interests of the designated benchmark administrator or would violate confidentiality provisions.

Section 13 – Outsourcing

Section 13 of the Instrument sets out requirements on outsourcing by a designated benchmark administrator. For purposes of securities legislation, a designated benchmark administrator remains responsible for compliance with the Instrument despite any outsourcing arrangement.

Section 13 does not apply to the oversight committees contemplated by the Instrument.

Paragraph 13(2)(c) – Written agreement for outsourcing

Paragraph 13(2)(c) of the Instrument provides that the policies and procedures of a designated benchmark administrator in relation to outsourcing must be reasonably designed to ensure that the designated benchmark administrator and the service provider enter into a written agreement that covers the matters set out in subparagraphs 13(2)(c)(i) to (vi). We consider the reference to "written agreement" to include one or more written agreements.

Where a benchmark administrator of a designated regulated-data benchmark uses the services of an agent to facilitate delivery of aggregate input data from multiple sources, we would not consider this to be outsourcing a function, service or activity in the provision of the designated benchmark. While such an arrangement would not be subject to section 13 of the Instrument, the benchmark administrator would still be required to comply with other applicable provisions of the Instrument, including the accountability framework in section 5 and the control framework in section 8, so it should have appropriate agreements in place with the agent.

PART 4
INPUT DATA AND METHODOLOGY

Subsection 15(2) – Significant breaches of code of conduct for a benchmark contributor

We consider that the reference in subsection 15(2) of the Instrument to a "breach" of a code of conduct that is "significant" would include non-trivial breaches that could affect the designated benchmark, as determined, or the integrity or reputation of the designated benchmark or the designated benchmark administrator.

Subsection 15(3) – Requirement to obtain alternative representative data

Subsection 15(3) of the Instrument provides that, in the event of a breach referred to in subsection 15(2), if a reasonable person would consider it to be appropriate, a designated benchmark administrator must obtain alternative representative data in accordance with the guidelines referred to in subsection 16(3) of the Instrument. However, those guidelines may contemplate the circumstances in which the designated benchmark administrator may conclude that the other benchmark contributors from which it obtained input data are a sufficient representative sample of benchmark contributors for purposes of subsection 15(1) of the Instrument.

Subsection 15(4) – Verification of input data from front office of a benchmark contributor

Paragraph 15(4)(a) of the Instrument requires that, if input data is contributed from any front office of a benchmark contributor, or an affiliated entity that performs any activities that relate to or might affect the input data, the designated benchmark administrator must obtain information from other sources, if reasonably available, that confirms the accuracy and completeness of the input data in accordance with the benchmark administrator's policies and procedures.

There may be instances where there are no other sources of information reasonably available to the designated benchmark administrator to confirm the accuracy and completeness of the input data. We expect the designated benchmark administrator to consider the steps it would take to confirm the accuracy and completeness of such input data in such instances when establishing the policies, procedures and controls required under section 8 of the Instrument.

Subsection 15(5) – Front office of a benchmark contributor

Subsection 15(5) of the Instrument provides that "front office" of a benchmark contributor or an applicable affiliated entity means any department, division, group, or personnel that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring, or

brokerage activities. In general, we consider front office staff to be the individuals who generate revenue for the benchmark contributor or the affiliated entity.

Paragraph 16(1)(e) – Capability to verify determination under the methodology

Paragraph 16(1)(e) of the Instrument provides that a determination under the methodology of a designated benchmark must be capable of being verified as being accurate, reliable and complete.

A determination under a methodology that is based on information such as input data would be verified as being accurate, reliable and complete if:

- it can be clearly linked to the original information, and
- it can be linked to complementary, but separate information.

For example, in the case of an interest rate benchmark that is determined daily and calculated as the arithmetic average of bid-side rates contributed by financial institutions that routinely accept bankers' acceptances and are market-makers in bankers' acceptances, the daily determination would be verified as being accurate, reliable and complete if:

- the calculation can be clearly linked to the rates contributed by the financial institutions and recorded by the benchmark administrator, and
- the benchmark administrator's record of the rates contributed by the financial institutions can be matched to the records of those rates maintained by the applicable financial institutions.

In the case of an interest rate benchmark, we recognize that any verification done by a designated benchmark administrator or a public accountant would require access to the records of benchmark contributors pursuant to subsection 39(8) of the Instrument and may only be feasible if based on samples of rates on certain dates.

Paragraph 16(2)(a) – Applicable characteristics to be considered for the methodology

Paragraph 16(2)(a) of the Instrument provides that a designated benchmark administrator must take into account, in the preparation of the methodology of a designated benchmark, all of the applicable characteristics of that part of the market or economy the designated benchmark is intended to represent.

In this context, we consider that "applicable characteristics" include:

- the size and reasonably expected liquidity of the market,
- the transparency of trading and the positions of participants in the market,
- market concentration,
- market dynamics, and
- the adequacy of any sample to reasonably represent that part of the market or economy the designated benchmark is intended to represent.

Subsection 17(2) – Proposed or implemented significant changes to methodology

Subsection 17(2) of the Instrument provides that a designated benchmark administrator must provide for public notice of and comment on a proposed or implemented significant change to the methodology of a designated benchmark.

As part of the methodology disclosure required under section 18, paragraph 18(1)(e) of the Instrument provides that a designated benchmark administrator must publish examples of the types of changes that may constitute a significant change to the methodology of the designated benchmark.

In general, we would consider a change to the methodology of a designated benchmark to be significant if, in the opinion of a reasonable person, it would have a significant effect on the provision of the designated benchmark (within the meaning of subsection 1(4) of the Instrument).

We consider publication on the designated benchmark administrator's website of a proposed or implemented change to the methodology of a designated benchmark, accompanied by a news release advising of the publication of the proposed or implemented change, as sufficient notification in these contexts. We consider it good practice for a designated benchmark administrator to establish a voluntary subscription-based email distribution list for those parties who wish to receive notice of such a publication by email. In addition to, or as an alternative to, a news release, a designated benchmark administrator may want to consider other ways of helping to ensure that stakeholders and members of the public are aware of the publication of the proposed or implemented change to the methodology of a designated benchmark on the designated benchmark administrator's website, such as postings on social media or internet platforms, media advisories, newsletters, or other forms of communication.

Subparagraph 18(1)(b)(v) – Methodology disclosure

As part of the methodology disclosure required under section 18, subparagraph 18(1)(b)(v) of the Instrument provides that a designated benchmark administrator must publish a complete explanation of all elements of the methodology, including the benchmark contributors and the criteria used to determine eligibility of a benchmark contributor. This disclosure would include a list of existing benchmark contributors and may include a description of persons who may be benchmark contributors in the future.

Compliance with methodology

Several requirements in the Instrument foster a designated benchmark administrator's compliance with its own benchmark methodology, including:

- paragraph 5(1)(b) – a designated benchmark administrator must establish, document, maintain and apply an accountability framework of policies and procedures that are reasonably designed to, for each designated benchmark it administers, ensure and evidence that it follows the methodology applicable to the designated benchmark;
- paragraph 6(3)(b) – at least once every 12 months, the compliance officer must submit a report to the designated benchmark administrator's board of directors that describes whether the designated administrator has followed the methodology applicable to each designated benchmark it administers;
- paragraph 8(4)(a) – a designated benchmark administrator must establish, document, maintain and apply policies, procedures and controls that are reasonably designed to ensure that benchmark contributors comply with the standards for input data in the methodology of the designated benchmark;
- paragraph 16(1)(c) – the accuracy and reliability of a methodology, with respect to determinations made under it, must be capable of being verified, including, if appropriate, by back-testing; and
- paragraph 18(1)(c) – a designated benchmark administrator must publish the process for the internal review and approval of the methodology and the frequency of such reviews and approvals.

When complying with these requirements, a designated benchmark administrator should generally attempt to ensure that compliance with a benchmark methodology is monitored by staff that are independent of staff that determine and apply the methodology.

PART 5
DISCLOSURE

Subsection 19(1) – Benchmark statement

The elements of the benchmark statement, set out in paragraphs 19(1)(a) through (m) of the Instrument, are designed to provide transparency to benchmark users to understand the purpose or intention of the benchmark, the limitations of the benchmark, and how the designated benchmark administrator will apply the methodology to provide the benchmark. In preparing the benchmark statement, a designated benchmark administrator should attempt to ensure that benchmark users have sufficient information to understand what the benchmark is intended to represent and to make a decision on whether to use, or continue to use, the benchmark.

Paragraph 19(1)(a) – Applicable part of the market or economy for purposes of the benchmark statement

Paragraph 19(1)(a) of the Instrument provides that a required element of the benchmark statement for a designated benchmark is a description of that part of the market or economy the designated benchmark is intended to represent. This relates to the benchmark's purpose.

For example, an interest rate benchmark may be intended to represent the cost of unsecured interbank lending and may be intended to be used as a benchmark interest rate in interbank loan agreements. In this example, we consider it problematic if

- the type of prime bank lending rate the benchmark is intended to record is unclear, or
- the calculation method does not work well in periods of low liquidity.

Subsection 20(2) – Significant change to designated benchmark

Subsection 20(2) of the Instrument provides that a designated benchmark administrator must publish the procedures it will follow in the event of a significant change to or the cessation of a designated benchmark it administers, including procedures for advance notice of the implementation of a significant change or a cessation. We would consider a change in the person or company acting as the benchmark administrator of a designated benchmark to be an example of a significant change. Consequently, we would expect the designated benchmark administrator's procedures to include procedures in the event of a change in the administrator of a designated benchmark it administers, including procedures for advance notice of the change in administrator.

PART 6
BENCHMARK CONTRIBUTORS

General

Part 6 of the Instrument contains provisions that apply in respect of benchmark contributors to a designated benchmark. There are also specific requirements that apply to:

- benchmark contributors to a designated critical benchmark (see sections 30 and 33 of the Instrument), and
- benchmark contributors to a designated interest rate benchmark (see sections 37, 38 and 39 of the Instrument).

Securities legislation defines "benchmark contributor" as a person or company that engages or participates in the provision of information for use by a benchmark administrator for the purpose of determining a benchmark. This definition includes a person or company that provides information in respect of a designated benchmark, whether voluntarily, by way of contract or otherwise.

In Alberta, British Columbia, New Brunswick, Nova Scotia, Ontario and Saskatchewan, securities legislation provides that the securities regulatory authority may, in response to an application by the regulator or, in Alberta or British Columbia, on its own initiative, require a person or company to provide information to a designated benchmark administrator in relation to a designated benchmark if it is in the public interest to do so. For example, a person or company may be required to provide information to a designated benchmark administrator for the purpose of determining a designated critical benchmark. In such a case, the person or company would be a benchmark contributor, and would therefore be subject to the provisions of the Instrument applicable to benchmark contributors generally and the provisions applicable to benchmark contributors to a designated critical benchmark. However, certain of those provisions only apply if input data is considered to have been contributed within the meaning of subsection 1(3) of the Instrument.

Certain provisions in the Instrument relating to benchmark contributors have not been adopted in Québec as amendments to the *Securities Act* (Québec) are required to adopt these provisions.

Subsection 23(1) – Code of conduct for benchmark contributors

The requirement in subsection 23(1) of the Instrument for a designated benchmark administrator to establish, document, maintain and apply a code of conduct that specifies the responsibilities of benchmark contributors with respect to the contribution of input data for the designated benchmark only applies if a designated benchmark is determined using input data from benchmark contributors. Subsection 1(3) of the Instrument sets out when input data is considered to have been contributed and Part 1 of this Policy provides further guidance on subsection 1(3) of the Instrument and when input data is considered to have been contributed.

Subparagraph 23(2)(f)(v) – Validation of input data before contribution

In considering any requirement for procedures, systems and controls under subparagraph 23(2)(f)(v), we expect a designated benchmark administrator to consider the specific nature of the designated benchmark, including the complexity, use and vulnerability of the designated benchmark and what systems and controls would ensure the accuracy and completeness of input data. For example, depending on the specific nature of the designated benchmark, it may be appropriate to require an individual with appropriate knowledge holding a position senior to that of the contributing individual to sign-off on input data before it is contributed to the designated benchmark administrator.

Subparagraph 23(2)(f)(vii) – Input data that is inaccurate, unreliable or incomplete

Subparagraph 23(2)(f)(vii) of the Instrument requires that a code of conduct for a benchmark contributor include a reporting requirement for any instance when a reasonable person would consider that a contributing individual, acting on behalf of the benchmark contributor or any other benchmark contributor, has contributed input data that is inaccurate, unreliable or incomplete. In establishing these requirements, we expect the designated benchmark administrator to consider providing indicators that could be used to identify input data that is inaccurate, unreliable or incomplete, based on past experience. The indicators should reasonably reflect the specific nature of the designated benchmark, including the complexity, use and vulnerability of the designated benchmark.

Subparagraph 23(2)(f)(x) – Access to board of directors

Subparagraph 23(2)(f)(x) of the Instrument requires that a code of conduct for a benchmark contributor include a requirement that the benchmark contributor's designated officer referred to in subparagraph 23(2)(f)(ix) and the benchmark contributor's chief compliance officer not be prevented or restricted from directly accessing the benchmark contributor's board of directors. In some instances, the designated officer under subparagraph 23(2)(f)(ix) and the chief compliance officer will be the same person. However, if they are different persons, each must be provided with direct access to the benchmark contributor's board of directors. However, we realize that there may be situations where the designated officer under subparagraph 23(2)(f)(ix) and the chief compliance officer may jointly or separately report to the benchmark contributor's board of directors on a matter.

Subsection 23(3) – Assessment of compliance with code of conduct

In establishing the policies and procedures required under subsection 23(3) of the Instrument, we expect the designated benchmark administrator to consider the specific nature of the designated benchmark, including the complexity, use and vulnerability of the designated benchmark. For example, the policies and procedures may include the use of verification certificates signed by an officer of the benchmark contributor and on-site inspections by internal compliance staff that are independent from the business unit whose activities are subject to the code of conduct.

Paragraph 24(1)(a) – Conflict of interest requirements for benchmark contributors

Except in Québec, paragraph 24(1)(a) of the Instrument provides that a benchmark contributor to a designated benchmark must establish, document, maintain and apply policies and procedures reasonably designed to ensure input data contributed by the benchmark contributor is not affected by any conflict of interest or potential conflict of interest involving the benchmark contributor and its employees, officers, directors or agents, if a reasonable person would consider that the input data might be inaccurate, unreliable or incomplete.

We expect that, when establishing these policies and procedures, a benchmark contributor would consider the following:

- benchmark contributors of input data to benchmarks can often exercise discretion and are potentially subject to conflicts of interest, and so risk being a source of manipulation, and
- consequently, conflicts of interest must be managed or mitigated to ensure they do not affect input data.

For example, if the benchmark contributor does identify such a conflict of interest involving other business activity, the contributor should ensure that persons responsible for the contribution of input data to a designated benchmark administrator for the purpose of determining a designated benchmark:

- are located in a secure area apart from persons that carry out the other business activity, and
- report to a person that reports to an executive officer that does not have responsibility relating to the other business activity.

Subsection 24(2) – Accuracy, reliability and completeness of input data

In establishing the policies, procedures and controls required under subsection 24(2) of the Instrument, subject to any requirements set out in the code of conduct established under section 23 of the Instrument, we expect a benchmark contributor to consider the specific nature of the designated benchmark, including the complexity, use and vulnerability of the designated benchmark and what systems and controls would ensure the accuracy, reliability and completeness of input data. For example, depending on the specific nature of the designated benchmark, it may be appropriate to require an individual with appropriate knowledge holding a position senior to that of the contributing individual to sign-off on input data before it is contributed to the designated benchmark administrator.

In addition, as contemplated by subparagraph 24(2)(d)(i) of the Instrument, the extent of organizational separation of contributing individuals from employees whose responsibilities include transacting in a contract, derivative, instrument or security that uses the designated benchmark for reference should be appropriate to avoid the conflicts of interest or mitigate the risks resulting from conflicts of interest. Depending on the specific nature of the designated benchmark and the related conflicts of interest and risks, this may involve restricting access to certain information or restricting access to certain areas of the organization.

Subsection 24(3) – Exercise of expert judgment

In establishing the policies and procedures required under paragraph 24(3)(a), we expect a benchmark contributor to consider the specific nature of the designated benchmark,

including the complexity, use and vulnerability of the designated benchmark and the nature of its input data.

As described in Part 1 of this Policy, expert judgment may involve various activities. Except in Québec, paragraph 24(3)(b) of the Instrument requires that, if expert judgment is exercised in relation to input data, the benchmark contributor must retain records that record the rationale for any decision made to exercise that expert judgment, the rationale applied in the exercise of the expert judgment and the manner of the exercise of the expert judgment. The records should take into consideration the benchmark contributor's policies and procedures for the exercise of expert judgment.

Subsection 24(4) – Record keeping by benchmark contributor

The reference to "communications" in paragraph 24(4)(a) of the Instrument includes telephone conversations, email and other electronic communications. We consider this to require a benchmark contributor to a designated benchmark to keep audio recordings of all phone conversations and voicemail messages in relation to the contribution of input data. Furthermore, a benchmark contributor to a designated benchmark should retain records of call logs and notes of phone conversations or voicemail messages in relation to the contribution of input data.

The records kept by a benchmark contributor under subsection 24(4) of the Instrument may be required to be made available to the designated benchmark administrator under subsection 24(5). Given that the records may contain confidential, sensitive or proprietary information, we expect that a designated benchmark administrator will only request such records in connection with the review and supervision of the provision of the designated benchmark and will take appropriate steps to ensure the confidential treatment of such information.

Section 25 – Compliance officer for benchmark contributors

Except in Québec, subsection 25(1) of the Instrument provides that a benchmark contributor that contributes input data for a designated benchmark must designate an officer to be responsible for monitoring and assessing compliance by the benchmark contributor and its employees with the code of conduct referred to in section 23, the Instrument and securities legislation relating to benchmarks. The officer can conduct these activities on a part-time basis but should be independent from persons involved in determining or contributing input data.

Except in Québec, subsection 25(2) of the Instrument requires a benchmark contributor to not prevent or restrict the designated officer referred to in subsection 25(1) and the benchmark contributor's chief compliance officer from directly accessing to the benchmark contributor's board of directors. In some instances, the designated officer under subparagraph 25(1) and the chief compliance officer will be the same person. However, if

they are different persons, each must be provided with direct access to the benchmark contributor's board of directors. However, we realize that there may be situations where the designated officer under subparagraph 25(1) and the chief compliance officer may jointly or separately report to the benchmark contributor's board of directors on a matter.

PART 7
RECORD KEEPING

Section 26 – Record keeping by designated benchmark administrator

The reference to "communications" in paragraph 26(2)(h) of the Instrument includes telephone conversations, email and other electronic communications. We consider this to require a designated benchmark administrator to keep audio recordings of all phone conversations and voicemail messages with benchmark contributors in relation to the contribution of input data. Furthermore, a designated benchmark administrator should retain records of call logs and notes of phone conversations or voicemail messages with benchmark contributors in relation to the contribution of input data.

In addition to the record keeping requirements in the Instrument, securities legislation generally requires market participants to keep such books, records and other documents as may reasonably be required to demonstrate compliance with securities law of the jurisdiction.

PART 8
DIVISION 1 – DESIGNATED CRITICAL BENCHMARKS

Section 30 – Ceasing to contribute input data to a designated critical benchmark

Except in Québec, section 30 of the Instrument provides the process for a benchmark contributor to cease to contribute input data to a designated critical benchmark. After the benchmark contributor has provided notice to the designated benchmark administrator that it will cease to contribute input data, subsection 30(2) of the Instrument requires the benchmark contributor to continue contributing input data for a period not exceeding 6 months. This is to provide a transition to protect the accuracy and integrity of the designated critical benchmark.

Subparagraph 30(3)(b)(ii) of the Instrument permits the designated benchmark administrator to notify the benchmark contributor that it must continue contributing input data for a period of less than 6 months. We expect that a designated benchmark administrator will determine the date of expiry of this period by considering the assessment, submitted to the regulator or securities regulatory authority under subparagraph 30(3)(b)(i) of the Instrument, of the impact of the benchmark contributor ceasing to contribute input data on the capability of the designated critical benchmark to

accurately and reliably represent that part of the market or economy the designated benchmark is intended to represent. We also expect that the period for which a benchmark contributor must continue contributing input data will be as short as practical while ensuring that the designated benchmark still accurately represents that part of the market or economy the designated benchmark is intended to represent.

Securities legislation in certain jurisdictions also provides the securities regulatory authority with the ability to require a benchmark contributor to provide information to a designated benchmark administrator in relation to a designated benchmark if it would be in the public interest or not prejudicial to the public interest to do so.

DIVISION 2 – DESIGNATED INTEREST RATE BENCHMARKS

Section 34 – Order of priority of input data

Section 34 of the Instrument requires that, if a designated interest rate benchmark is based on a contribution of input data from a benchmark contributor, input data for the determination of the designated interest rate benchmark must be used by the designated benchmark administrator in accordance with the order of priority specified in the methodology of the designated interest rate benchmark. We would generally expect that the methodology of such a designated interest rate benchmark would use the following types of input data, as applicable, in the order of priority set out below:

(a) a benchmark contributor's transaction data in the underlying market that the designated interest rate benchmark intends to represent;

(b) if the input data referred to in paragraph (a) is not available, executable quotes in the market described in paragraph (a);

(c) if the input data referred to in paragraphs (a) and (b) is not available, indicative quotes in the market described in paragraph (a);

(d) if the input data referred to in paragraphs (a), (b) and (c) is not available, a benchmark contributor's observations of third-party transactions in markets related to the market described in paragraph (a);

(e) in any other case, expert judgments.

We consider an "executable quote" (also known as a "committed quote") to be a quote that is actionable for the other party to the potential transaction. The party that provides that quote announces their willingness to enter into transactions at the relevant bid and ask prices and agree that if they do transact, they will do so at the quoted price up to the maximum quantity specified in the quote.

We consider "indicative quote" to be a quote that is not immediately actionable by the other party to the potential transaction. Indicative quotes are usually provided before the parties negotiate the price or quantity at which the potential transaction will occur.

A designated interest rate benchmark may be based on contributions of input data from benchmark contributors that represent the interest rate at which the benchmark contributor is willing to lend funds to its customers.

In the context of section 34 of the Instrument, for the purposes of subsections 14(1) and (3) of the Instrument, input data for a designated interest rate benchmark may be adjusted, if contemplated by the methodology for the designated interest rate benchmark, to more accurately represent that part of the market or economy that the designated interest rate benchmark is intended to represent, including, but not limited to, where:

(a) the time of the transactions that are the basis for the input data is not sufficiently proximate to the time of contribution of the input data;

(b) a market event occurs between the time of the transactions and the time of contribution of the input data and the market event might, in the opinion of a reasonable person, have a significant impact on the designated interest rate benchmark;

(c) there have been changes in the credit risk of the benchmark contributors and other market participants that might, in the opinion of a reasonable person, have a significant impact on the designated interest rate benchmark.

Subsection 36(1) – Assurance report for designated interest rate benchmark

Subsection 36(1) of the Instrument provides that a designated benchmark administrator must engage a public accountant to provide, as specified by the oversight committee referred to section 7, a limited assurance report on compliance, or a reasonable assurance report on compliance, regarding the designated benchmark administrator's compliance with certain sections of the Instrument and following of the methodology of each designated interest rate benchmark it administers.

We note that the report required by subsection 36(1) is separate and different from the compliance report of the officer of the designated benchmark administrator required by paragraph 6(3)(b) of the Instrument. A designated benchmark administrator for a designated interest rate benchmark must comply with the requirement in paragraph 6(3)(b) and with the requirement in subsection 36(1).

Subsection 39(4) – Record keeping by benchmark contributor

The reference to "communications" in paragraph 39(4)(d) of the Instrument includes telephone conversations, email and other electronic communications. We consider this to require a benchmark contributor to a designated benchmark to keep audio recordings of all phone conversations and voicemail messages in relation to the contribution of input data. Furthermore, a benchmark contributor to a designated benchmark should retain records of call logs and notes of phone conversations or voicemail messages in relation to the contribution of input data.

PART 8.1
DESIGNATED COMMODITY BENCHMARKS

Section 40.1 – Definition of commodity benchmark

The Instrument defines a "commodity benchmark" to ensure, to the extent possible, a consistent interpretation of this term across the various CSA jurisdictions, despite possible differences in statutory definitions of "commodity". The definition specifically excludes a benchmark that has, as an underlying interest, a currency, or an intangible commodity that can only be delivered in digital format, including crypto and digital assets.

Subsections 40.2(1) and (2) – Dual designation as a commodity benchmark and a critical benchmark

A designated commodity benchmark may also be designated as a critical benchmark and, in such case, would still be subject to the requirements under Part 8.1. As there are no specific requirements under Part 8.1 for benchmark contributors, such dually-designated benchmarks would not be subject to the requirements under sections 30 to 33 of the Instrument.

If the underlying commodity is gold, silver, platinum or palladium, then rather than being subject to the requirements under Part 8.1, the requirements under Parts 1 to 8 would apply.

Subsections 40.2(3) and (4) – Dual designation as a commodity benchmark and a regulated-data benchmark

If a commodity benchmark is designated as a regulated-data benchmark, then it is not subject to Part 8.1, rather the requirements under Parts 1 to 8 would apply. However, some commodity benchmarks may be determined from transactions where the parties, in the ordinary course of business, make or take physical delivery of the commodity, and those same commodity benchmarks may also meet the requirements for regulated-data benchmarks. Generally, these transactions would also be arm's length transactions. Regulated-data benchmarks determined from such transactions would more closely resemble commodity benchmarks, rather than financial benchmarks, and they would be

dually designated as commodity and regulated-data benchmarks. Benchmark administrators of such dually-designated benchmarks would be subject to the requirements under Part 8.1.

However, as provided by subsection 40.2(4), such benchmark administrators would be exempted from certain policy and control requirements relating to the process of contributing input data, from the requirement to publish certain explanations for each determination of the benchmark, and from the requirement for an assurance report. The exemptions under subsection 40.2(4) are meant to ensure that administrators of benchmarks dually designated as commodity and regulated-data benchmarks receive comparable treatment under Part 8.1 as administrators of designated regulated-data benchmarks under Parts 1 to 8.

Given the interpretation provided by paragraph 1(3)(a) of the Instrument as to when input data is considered to have been "contributed", as described earlier in this Policy, input data for regulated-data benchmarks would not generally be considered to be contributed. Therefore, certain requirements that are only applicable if there is a contributor or if input data is contributed, would not apply to a benchmark that is dually designated as a commodity benchmark and a regulated-data benchmark. Examples include the requirements in paragraphs 40.5(2)(g), (h) and (i), and paragraphs 40.8(2)(d) and (e).

For clarity, we would not designate a regulated-data benchmark that is also a commodity benchmark, whether dually designated as such or only as a regulated-data benchmark, as a critical benchmark.

Section 40.3 – Non-application to designated commodity benchmarks

Physical commodity markets have unique characteristics which have been taken into account in determining which requirements should be imposed on designated benchmark administrators in respect of designated commodity benchmarks. Consequently, section 40.3 includes a number of exemptions from certain requirements for such benchmark administrators, either because some are not suitable or because more appropriate substituted requirements are provided under Part 8.1 of the Instrument. Requirements that are relevant to designated benchmark administrators of designated commodity benchmarks have been excepted from the exemptions in section 40.3, and include, among others, the requirements for:

- policies and procedures as set out in subsection 5(1),
- a compliance officer as set out in section 6,
- reporting on contraventions in section 11,
- policies and procedures regarding complaints, as set out in section 12,
- outsourcing under section 13,
- the publishing of a benchmark statement under section 19, and

- providing notice of changes to and cessation of a benchmark, as provided under section 20.

In addition to the guidance provided in this Policy with respect to paragraph 12(2)(c), we expect disputes as to pricing determinations that are not formal complaints to be resolved by the designated benchmark administrator of a commodity benchmark with reference to its appropriate standard procedures. In general, we would expect that if a complaint results in a change in price, whether the complaint is formal or informal, then the details of that change in price will be communicated to stakeholders as soon as possible.

With respect to section 13, for the purposes of securities legislation, a designated benchmark administrator remains responsible for compliance with the Instrument despite any outsourcing arrangement.

Paragraph 19(2)(a) of the Instrument provides that a required element of the benchmark statement for a designated benchmark is a description of the part of the market the designated benchmark is intended to represent. This relates to the benchmark's purpose. A commodity benchmark may be intended to reflect the characteristics and operations of the referenced underlying physical commodity market and may be used as a reference price for a commodity and for commodity derivative contracts.

Section 40.5 – Methodology to ensure the accuracy and reliability of a designated commodity benchmark

We expect that the methodology established and used by a designated benchmark administrator will be based on the applicable characteristics of the relevant underlying interest of the designated commodity benchmark for that part of the market that the designated commodity benchmark is intended to represent, such as the grade and quality of the commodity, its geographical location, seasonality, etc., and will be sufficient to provide an accurate and reliable benchmark. For example, the methodology for a crude oil benchmark should reflect the following, but not be limited to, the specific crude grade (e.g., sweet or heavy), the location (e.g., Edmonton or Hardisty), the time period within which transactions are completed during the trading day, the month of delivery, and the assessment method used such as a volume-weighted average.

Subparagraph 40.5(2)(a)(i) – Reference to concluded transactions

In a number of instances, under Part 8.1, we refer to concluded transactions. For clarity, by concluded transactions, we mean transactions that are executed but not necessarily settled.

Subparagraph 40.5(2)(a)(ii) – Specific reference unit used in the methodology

The specific reference unit used in the methodology will vary depending on the underlying commodity. Examples of possible reference units include barrels of oil or cubic meters

(m^3) in respect of crude oil, and gigajoules (GJ) or one million British Thermal Units (MMBTU) in respect of natural gas.

Paragraph 40.5(2)(c) – Relative importance assigned to each criterion used in the determination of a designated commodity benchmark

The requirement in paragraph 40.5(2)(c) regarding the relative importance assigned to each criterion, including the type of input data used and how and when expert judgment may be exercised, is not intended to restrict the specific application of the relevant methodology, but to ensure the quality and integrity of the determination of the designated commodity benchmark.

Section 40.7 – Review of methodology

We expect that a designated benchmark administrator will determine the appropriate frequency for carrying out an internal review of a designated commodity benchmark's methodology based on the specific nature of the benchmark (such as the complexity, use and vulnerability of the benchmark to manipulation) and the applicable characteristics of the part of the market (or changes thereto) that the benchmark is intended to represent. In any event, the administrator must review the methodology at least once in every 12-month period.

Paragraph 40.8(2)(a) – Order of priority of input data specified in the methodology

While we recognize a benchmark administrator's flexibility to determine its own methodology and use of market data, we expect an administrator to use input data in accordance with the order of priority specified in its methodology. We further expect that, where consistent with such methodology, priority will be given to input data in the following order: (1) concluded and reported transactions, (2) bids and offers, and (3) other information.

Furthermore, we expect that the designated benchmark administrator will employ measures reasonably designed to ensure that input data contributed and considered in the determination of a designated commodity benchmark is *bona fide*. By *bona fide* we mean that parties contributing the input data have executed or are prepared to execute transactions generating such input data and that concluded transactions were executed between parties at arm's length. If the latter is not the case, then particular attention should be paid to transactions between affiliated entities and consideration given as to whether this affects the quality of the input data to any extent.

Section 40.9 – Transparency of determination of a designated commodity benchmark

We expect that, in providing a plain language explanation of the extent to which, and the basis upon which, expert judgment was used in the determination of a designated commodity benchmark, a designated benchmark administrator will address the following:

(a) the extent to which a determination is based on transactions or spreads, and interpolation or extrapolation of input data;

(b) whether greater priority was given to bids and offers or other market data than to concluded and reported transactions, and, if so, the reason why.

Section 40.9 requires a designated benchmark administrator to publish the specified explanations for each determination of a designated commodity benchmark. However, we recognize that, to the extent that there have been no significant changes, a standard explanation may be acceptable, and any exceptions in the explanation must then be noted for each determination. We generally expect that the required explanations will be provided contemporaneously with the determination of a benchmark, but recognize that unforeseen circumstances may cause delays, in which case, we still expect that explanation to be published as soon as reasonably practicable.

Section 40.10 – Policies, procedures, controls and criteria of the designated benchmark administrator to ensure the integrity of the process of contributing input data

There are no specific requirements under Part 8.1 for benchmark contributors with respect to commodity benchmarks, as under Part 6 for financial benchmarks, nor, consequently, obligations on designated benchmark administrators to ensure that the benchmark contributors adhere to such requirements. However, section 40.10 does require an administrator to ensure the integrity of the process for contributing input data. We are of the view that such policies, procedures, controls and criteria will promote the accuracy and integrity of the determination of the commodity benchmark.

Paragraph 40.10(1)(d) – Criteria relating to the contribution of transaction data

In establishing criteria that determine the appropriate contribution of transaction data by benchmark contributors, we would expect that the criteria would include encouraging benchmark contributors to contribute transaction data from the back office of the benchmark contributor. We would consider the back office of a benchmark contributor to be any department, division, group or personnel that performs any administrative and support functions, including, as applicable, settlements, clearances, regulatory compliance, maintaining of records, accounting and information technology services. In general, we consider back office staff to be the individuals who support the generation of revenue for the benchmark contributor.

Subsection 40.11(3) – Governance and control requirements

To foster confidence in the integrity of a designated commodity benchmark, we are of the view that benchmark individuals involved in the determination of a commodity benchmark should be subject to the minimum controls set out in subsection 40.11(3). A designated benchmark administrator must decide how to implement its own specific measures to achieve the objectives set out in paragraphs (a) to (e).

Section 40.12 – Books, records and other documents

Subsection 40.12(2) sets out the minimum records that must be kept by a designated benchmark administrator. We expect an administrator to consider the nature of its benchmarks-related activity when determining the records that it must keep.

In addition to the record keeping requirements in the Instrument, securities legislation generally requires market participants to keep such books, records and other documents as may reasonably be required to demonstrate compliance with securities law of the jurisdiction.

Section 40.13 – Conflicts of interest

We expect the policies and procedures required under subsection 40.13(1) for managing conflicts of interest to provide the parameters for a designated benchmark administrator to

- identify conflicts of interest,
- determine the level of risk, to both the benchmark administrator and users of its commodity benchmarks, that a conflict of interest raises, and
- respond appropriately to conflicts of interest.

In establishing an organizational structure, as required under subsections 40.11(1) and (2), that addresses the conflict of interest requirements under subsection 40.13(3), the designated benchmark administrator should ensure that persons responsible for the determination of the designated commodity benchmark:

- are located in a secure area apart from persons that carry out other business activity, and
- report to a person that reports to an executive officer that does not have responsibility relating to other business activities of the administrator.

Section 40.14 - Assurance report on designated benchmark administrator

Under Part 8.1, there is no requirement for an oversight committee, as provided by section 7. Therefore, for purposes of section 40.14, there is no oversight committee to specify whether a limited assurance report on compliance or a reasonable assurance report on compliance needs to be provided by a public accountant. We would expect the designated

benchmark administrator to determine which report is appropriate, based on the specific nature of the designated commodity benchmark, including the complexity, use and vulnerability of the benchmark to manipulation, and the applicable characteristics of the market that the benchmark is intended to represent, or other relevant factors regarding the administration of the benchmark.

ANNEX E

SPECIFIC QUESTIONS OF THE AUTHORITIES RELATING TO THE PROPOSED AMENDMENTS[1]

Interpretation

1. The definition for "commodity benchmark" excludes a benchmark that has, as an underlying interest, a currency or a commodity that is intangible. Is the scope of the proposed definition, and the guidance in the CP, appropriate to cover the commodity benchmark industry in Canada? Please explain with concrete examples.

Applicable Requirements from the Financial Benchmarks Regime

2. Despite a different proposed regime for commodity benchmarks, the Authorities expect that certain requirements, applicable to financial benchmarks, would also be applicable, sometimes with minor modifications, to commodity benchmarks. These include, for example, the requirements to report contraventions (section 11), the requirement for a control framework (section 40.4), and governance and control requirements (section 40.11). Are these requirements appropriate in the context of commodity benchmarks? Please explain with concrete examples.

Dual Designation as a Commodity Benchmark and a Critical Benchmark

3. Where the underlying commodity is gold, silver, platinum or palladium, a benchmark dually designated as a commodity benchmark and a critical benchmark would be subject to the requirements applicable to critical financial benchmarks, rather than critical commodity benchmarks. Do you think that there are benchmarks in Canada that could be dually designated as critical commodity benchmarks where the underlying is gold, silver, platinum or palladium, and is there a need to provide for the specific regulation of such benchmarks?

Dual Designation as a Commodity Benchmark and a Regulated-Data Benchmark

4. Subsection 40.2(4) provides for certain exemptions for benchmarks dually designated as commodity and regulated-data benchmarks, where such benchmarks are determined from transactions in which the transacting parties, in the ordinary course of business, make or take physical delivery of the commodity. Is carving out such a subset of dually-designated benchmarks necessary for appropriate regulation of commodity benchmarks in Canada? If so, are the exemptions provided for, which generally mirror exemptions for regulated-data benchmarks from Parts 1 to 8 requirements, appropriate? Please explain with concrete examples.

[1] The specific questions are with respect to the Proposed Amendments published by the Authorities today, on April 29, 2021. For further details, see the CSA Notice of Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy, dated April 29, 2021.

Input Data

5. We have distinguished between input data that is "contributed" for the purposes of the Instrument (see subsection 1(3)), and data that is otherwise obtained by the administrator. Certain provisions in Part 8.1 impose requirements on a designated benchmark administrator if input data is "contributed", whereas other obligations are imposed irrespective of how input data is obtained. Where the word "contributed" is not specifically used or implied,[2] we mean all the input data, not only "contributed" data. Taking into consideration the obligations imposed on designated benchmark administrators of commodity benchmarks, through the use or lack of use of "contributed", are the obligations imposed under the provisions of Part 8.1 appropriate?[3] Please explain with concrete examples.

6. The guidance on paragraph 40.8(2)(a) of the CP states that, where consistent with the methodology, we expect the administrator to give priority to input data in a certain order. Does the order of priority of use of input data for purposes of determination of a commodity benchmark, as stated in the CP, reflect the methodology used for your commodity benchmarks? Are there any other types of input data that should be specified in the order of priority?

Methodology

7. Under the Proposed Amendments, designated administrators are expected to ensure that particular requirements are met whenever their methodology is implemented and a designated benchmark is determined. Are the elements of the methodology that we propose to regulate, specifically within section 40.5, sufficiently clear such that an administrator would be able to comply with the requirements?

Conflicts of Interest

8. Paragraphs 40.13(1)(a), (b) and (d) mirror the conflict of interest requirements under paragraphs 10(1)(a), (b) and (d) of the Instrument, to ensure that certain overarching requirements apply to all designated benchmark administrators. Is this approach appropriate? Do commodity benchmark administrators face potential conflicts of interest that are not addressed by these or the other conflict of interest provisions?

Assurance Report on Designated Benchmark Administrator

9. Subsection 40.14(2) requires a designated benchmark administrator of a designated commodity benchmark, whether or not the benchmark is also designated as a critical benchmark, to engage a public accountant to provide a limited or reasonable assurance

[2] For example, in paragraph 40.5(2)(g), it is implied that input data is "contributed", within the meaning of subsection 1(3) of the Instrument.

[3] See for example subparagraphs 40.5(2)(a)(i) and (iii), which apply in respect of all input data, while paragraphs 40.5(2)(g), (h) and (i) apply in respect of contributed data.

report on compliance once in every 12-month period. In contrast, pursuant to subsection 36(2), an administrator of a designated interest rate benchmark is required to engage a public accountant to provide such a report, once in every 24-month period, albeit a report is required 6 months after the introduction of a code of conduct for benchmark contributors. Given the general risks raised by the activities of administrators of commodity benchmarks versus of interest rate benchmarks, are the proposed requirements appropriate? Please explain your response.

Concentration Risk

10. Pursuant to subsection 20(1), designated benchmark administrators of designated commodity benchmarks would be subject to certain obligations when they cease to provide a designated commodity benchmark. However, market users may potentially have more limited benchmarks to utilize for purposes of their transactions (concentration risk) where a designated benchmark administrator that administers a number of designated commodity benchmarks unexpectedly delays in providing or ceases to provide those benchmarks. Do you think that additional requirements should be added under Part 8.1 to address this concentration risk? If yes, what requirements should be added?

Designated Benchmarks

11. If your organization is a benchmark administrator of commodity benchmarks, please:

    a) advise if you intend to apply for designation under MI 25-102,
    b) advise of any benchmark you intend to also apply for designation under MI 25-102, and
    c) indicate the rationale for your intention.

Anticipated Costs and Benefits

12. The Notice sets out the anticipated costs and benefits of the Proposed Amendments (in Ontario, additional detail is provided in Annex F). Do you believe the costs and benefits of the Proposed Amendments have been accurately identified and are there any other significant costs or benefits that have not been identified in this analysis? Please explain and/or identify furthers costs or benefits.

ANNEX F

LOCAL MATTERS

There are no local matters in Alberta to consider at this time.

To: British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

23 July 2021

Ref: CSA Proposed Amendments to Multilateral Instrument 25-102, Designated Benchmarks and Benchmark Administrators, and Changes to Companion Policy 25-102, Designated Benchmarks and Benchmark Administrators

A. Introduction:

Argus Media Limited (Argus) welcomes the initiative by the Canadian Securities Administrators (CSAs) to consult on the implementation of a Canadian regulatory regime for commodity benchmarks.

Argus is an independent media organisation serving global physical commodity, power and emissions markets. Its main activities comprise the publication of market reports containing price assessments, market commentary and news, and business intelligence reports that analyse market and industry trends.

The Argus group has almost 1,100 staff globally and offices in each of the world's principal commodity centres. We opened a Calgary office in 2009. Companies in 140 countries around the world use Argus data to index physical trade and as benchmarks in financial derivative markets, as well as for analysis and planning purposes.

Argus' price assessments identify prevailing open-market spot prices in a wide range of specific bulk physical commodity markets. All price assessment activity is conducted strictly according to detailed public methodologies (www.argusmedia.com/methodology) and within a rigorous governance, compliance and controls framework (please see www.argusmedia.com/en/about-us/governance-compliance for further details).

A small number of Argus' published price assessments have been adopted by exchanges for use as independent benchmarks against which to settle commodity derivatives contracts.
We strongly support the CSA's expressed intention to align the Canadian regime with IOSCO's Principles for Price Reporting Agencies and with the EU's Benchmark Regulation (BMR)[1] .

We also support the creation of a voluntary designation option, which could provide an attractive means of bestowing additional international credibility on commodity benchmark administrators, as well as bringing further reassurance for their benchmark users.

However, these positive consequences would only be delivered if the Canadian market regime is, in fact, in full alignment with IOSCO's PRA Principles.

The Consultation Paper acknowledges in several places that this would not be the case by proposing to add requirements from its regime for financial benchmarks. The thrust of our response to the Consultation Paper is to explain why such additional requirements are inappropriate, a conclusion also reached by IOSCO itself

[1] In particular, for following their leads in not extending regulation to contributors to commodity benchmarks.

when it considered the application of any other regime to commodity benchmarks, and also by the EU when it developed the BMR . If adopted, the proposals would bring Canada's regime into conflict with both the EU BMR and IOSCO's PRA Principles.

As the CSAs are aware[2], IOSCO's PRA Principles were the product of a lengthy process of discussion and consideration by IOSCO, the International Energy Association (IEA) the International Energy Federation (IEF), the Organisation of Petroleum Exporting Countries (Opec), as well as public consultations with market stakeholders. The PRA Principles have become recognized as the international gold standard for PRA commodity benchmarks. In the years that followed their finalization, IOSCO and others have acknowledged that they have been implemented effectively by the PRAs and are working well. Informally, it has been reported to us that the IOSCO PRA Principles are regarded as one of IOSCO's most successful initiatives.

During the later workstream on IOSCO's Principles for Financial Benchmarks, consideration was given to creating a uniform set of principles for all benchmark administrators, including administrators of commodity benchmarks. In the event, and after careful consideration, IOSCO reaffirmed that the PRAs should continue to comply with the separate PRA Principles.[3]

The EU benchmark workstream also began by considering whether to merge financial and commodity benchmark regimes, before deciding to retain separate regimes. The BMR's Annex II for commodity benchmarks is largely a "copy and paste" of IOSCO's PRA Principles, apart from the introduction of new requirements on outsourcing.

In contrast, the CSA Consultation Paper proposes applying to commodity benchmarks the provisions relating to governance, control and reporting obligations that apply under the separate regime for financial benchmarks. We note that no explanation is given for these proposed departures from international best practice.

Question 2 asks whether the requirements are "appropriate in the context of commodity benchmarks". Respectfully—and as we endeavour to explain in greater detail below—our response is that they are not appropriate. In our opinion, they are:

- disproportionate;
- unworkable; and
- in breach of constitutional protections for journalism.

Even in those areas of the regulation where there is no intention to diverge from IOSCO's Principles, we note that the CSAs' text, unlike the EU's approach, includes extensive rewriting of the IOSCO Principles. We do not think such revisions can be justified.

In summary, we respectfully request the CSAs to reconsider its proposals and to bring them into alignment with IOSCO's PRA Principles. An accurate Canadian regulatory underpinning of the IOSCO PRA Principles would, in our opinion, be welcomed internationally and should deliver the positive benefits we have already alluded to above.

[2] Argus remains grateful to the Alberta Securities Commission, the Ontario Securities Commission and the Autorité des Marchés Financiers Québec for their participation in IOSCO's Committee 7 workstream on the PRA Principles.

[3] IOSCO Principles for Financial Benchmarks Final Report, page 6

B: Argus' responses to the Specific Questions:

Question 1: Interpretation

On the proposed definition of a "commodity benchmark", Argus would urge the CSAs to align their definition with the EU BMR, and would suggest that for a commodity benchmark to become subject to the Canadian regime it must also be "used" for defined financial services purposes, such as those listed in EU BMR Article 3(7), reproduced below:

> *(7) 'use of a benchmark' means:*
> *(a) issuance of a financial instrument which references an index or a combination of indices;*
> *(b) determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices;*
> *(c) being a party to a financial contract which references an index or a combination of indices;*
> *(d) providing a borrowing rate as defined in point (j) of Article 3 of Directive 2008/48/EC calculated as a spread or mark-up over an index or a combination of indices and that is solely used as a reference in a financial contract to which the creditor is a party;*
> *(e) measuring the performance of an investment fund through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio, or of computing the performance fees.*

The mere publication of a price assessment for information purposes only does not, of course, constitute the creation of a benchmark. The definition should make it clear that an established linkage to some kind of trading purpose is required to fulfil the definition, in alignment with IOSCO's PRA Principles and the EU BMR.

Question 2: Applicable Requirements from the Financial Benchmarks Regime:

This question invites comments on the appropriateness of extending to administrators of commodity benchmarks certain requirements from the financial benchmarks regime, citing the following examples:

- Requirements to report contraventions (section 11);
- Requirement for a control framework (section 40.4); and
- Governance and control requirements (section 40.11)

As we have already indicated, we do not believe these extensions are appropriate, and there is no basis to change or overlay requirements that were designed by IOSCO specifically for commodity benchmarks. In order to help explain this position, we would first ask the CSAs to have regard to the following points:

- **PRAs operate in a competitive information market where product substitutability is generally available**

There is competition in the PRA market[4], an additional safeguard that underpins the quality of PRA benchmarks. A PRA's commercial success depends upon the markets' perception of the reliability of the information its journalists provide, as compared to the information provided by its competitors.

The competitive context around PRA benchmarks contrasts with the single provider model frequently encountered in the case of financial benchmarks, such as LIBOR.

[4] See for example "*Pricing benchmarks in gas and electricity markets - a call for evidence*" Page 9, Note 9
https://www.ofgem.gov.uk/ofgem-publications/40363/pricing-benchmarks-gas-and-electricity-markets.pdf

- **PRAs have no "skin in the game"**

As media publishers, it is immaterial to PRAs whether market prices go up or down. PRAs are wholly independent and do not trade in markets they report on. Their clients' subscription costs remain the same, whichever way the market moves. PRAs have no interest in distorting or manipulating prices. The reality is exactly the reverse. Nothing could cause greater commercial damage to a PRA than a market perception that its price assessments do not reflect market reality.

The unconflicted nature of PRA benchmark activities contrasts with financial benchmarks, where conflicts are frequently encountered. To cite one notorious example, LIBOR was produced by the British Bankers Association, whose members both used and contributed to the benchmarks. Conflicts were all around. The contrast with PRA benchmarks could not be greater.

- **PRA Benchmarks do not pose systemic risks**

The notional values of financial instruments referencing PRA benchmarks are low, frequently not exceeding the €100m threshold below which the EU's BMR exempts commodity benchmarks from regulation. They do not pose systemic risks.

Once again, this contrasts with financial benchmarks where some are "critical" and many others "significant"[5].

- **Revenues generated from benchmarks are not material in the overall context of PRA publishing revenues**

Income from licensing commodity benchmarks for use as a settlement basis for financial derivatives represents a small percentage of PRA revenue streams, the overwhelming majority of which comes from the sale of subscription licences to market and news reports. This is relevant because of proportionality: one of the extra burdens the CSAs propose to place on commodity benchmark administrators is a requirement to submit detailed financial statements, which we would argue is a cost on administrators with no material benefit to market transparency.

- **Most widely used Commodity Benchmarks are produced by journalists**

PRAs, which produce the most widely used commodity benchmarks, are editorial operations staffed by journalists. Their editorial processes are integrated across the entire news operation: the same journalists who produce the (small minority of) price assessments used as benchmarks also produce the (majority of) price assessments that are not used as benchmarks, as well as news and commentary on commodities markets. IOSCO defined PRAs as:

"Publishers and information providers who report prices transacted in physical and some derivatives markets, and give an informed assessment of price levels at distinct points in time. PRAs also report news stories relevant to commodity markets"[6].

[5] To use the BMR terminology

[6] IOSCO PRA Principles page 37.

The PRA Principles themselves refer to the "Integrity of the reporting process" [7] and to the "editorial decisions in relation to the benchmark calculation processes"[8] (emphasis added)

PRA benchmarks are not produced in journalistic silos. They are merely one output of the many reporting activities in which their journalists participate.

The environment in which PRA benchmarks are produced, and the processes used to create them, are entirely different to those involved in the creation of financial benchmarks.

Turning now to the specific points raised by Question 2, we would comment as follows:

- **Requirements to report contraventions (section 11)**

Argus strongly opposes the proposal to extend this provision to PRA benchmark administrators. Instead, it requests the CSAs to implement the approach advocated in IOSCO's PRA Principles[9] which is replicated in BMR Annex II paragraph 8(d).

The IOSCO text on this point covers one of the most sensitive and difficult areas—the relationship between a PRA and its contributors. Its drafting was the result of extensive and careful consideration and requires the administrator to escalate any apparently anomalous or suspicious behaviour it detects within the contributor's company. It does not require the administrator to inform a regulator.

In developing its approach IOSCO took account of a number of factors, including:

1. The relationships between PRA journalists and their sources are protected by longstanding constitutional safeguards;

2. Contributions to PRA benchmarks are entirely voluntary. Reluctance is frequently encountered among contributors, which the PRAs have to devote considerable energies to overcome in order to maintain the integrity of their benchmarks. Great care was, therefore, taken by IOSCO to avoid recommending any approach that might discourage contributions. Hence, the absence of any IOSCO regulatory obligations on contributors. Hence also, the absence of any third-party reporting obligations on PRAs in relation to their contributors.

3. IOSCO took this into account in drawing up its PRA Principles, as cited above.

From time to time, there will be examples of market behaviour that at first sight appear anomalous but which, after inquiry, turn out to have rational/legitimate reasons for them. If it were to become an obligation on a PRA to notify each such example to the regulator the IOSCO conclusion was that this would discourage contributions, leading in turn to less reliable benchmarks.

As we have explained, the greater the reliability of their benchmarks, the more commercially successful PRAs will be. As noted above, any market perception that a price published by a PRA is being manipulated is harmful to that PRA's business and can in fact destroy it. For this reason, PRAs have every incentive to address and prevent abuse.

[7] Heading of Paragraph 8;
[8] Paragraph 16(a);
[9] Section 2.4(d)

So, we request the CSAs to withdraw this proposal and to align with IOSCO's PRA Principles.

- **Requirement for a Control Framework (section 40.4)**

This requirement is not present in either IOSCO's PRA Principles or the EU's BMR Annex II for commodity benchmarks.

As a responsible media publisher, operating in a competitive market, Argus already operates policies, procedures and controls, which address the points listed in sub-section 40(4)(2), and in ways that respond to the particular editorial context in which its services are produced.

Argus is also already subject to a rigorous external audit against IOSCO's PRA Principles. We believe that such audits, carried out each year and published, should provide the CSAs and stakeholders in the markets with sufficient reassurance.

- **Governance and control requirements (section 40.11)**

Again, these requirements are not present in either IOSCO's PRA Principles or the EU's Annex II for commodity benchmarks.

The requirements, which are similar to those set out in Section 9 for financial benchmarks, would impose on editorial operations, staffed by journalists, control requirements that have been designed for financial firms. References in Section 40(11), and everywhere else in the draft Regulation, to "benchmark individuals" will, in the context of PRA benchmarks, mean their journalists.

As we have endeavoured to explain above:

> *"[PRA] editorial processes are integrated across the entire news operation: the same journalists who produce the (small minority of) price assessments used as benchmarks also produce the (majority of) price assessments that are not used as benchmarks, as well as news and commentary on commodities markets".*

None of these price assessments are created as benchmarks. Rather, they fall into that category if an exchange chooses to use a price assessment in connection with a derivative/financial instrument. The legislative framework has to be proportionate in relation to these facts. It is neither practical, nor desirable, to impose on an editorial operation a governance regime that has been designed for financial firms, particularly as the provision of benchmarks is a relatively small part of a PRA's overall editorial activities.

Argus already operates controls right across its editorial operation that have been developed over many years with the benefit of extensive experience.

It sees no need for the CSAs to legislate in this area. Indeed, it believes it would be entirely inappropriate and unhelpful for this to take place.

Once again, the external audits that are carried out each year should provide the CSAs and markets with sufficient reassurance. IOSCO has continued to support the principles for PRAs and there is no basis to depart from those international principles and/or apply national securities regulations to global commodity benchmarks. Few commodity markets have purely regional importance, and therefore the application of a specific national regime is already problematic.

One further consideration is perhaps worth highlighting:

- **Extending financial regulatory oversight over journalists would be incompatible with editorial freedoms**

The proposals would regard any journalist who participates in the "provision of a benchmark" as a "benchmark individual", who would become subject to direct regulatory oversight10.

Since a majority of PRA journalists will participate from time to time in "the provision of a benchmark", the entire news operation could become subject to direct regulatory oversight.

There is no jurisdiction in the western world that subjects individual journalists to direct oversight by financial services regulation and this would be incompatible with constitutional safeguards for journalism.

Question 3: Dual Designation as a Commodity Benchmark and a Critical Benchmark

Argus respectfully suggests that the CSAs simply follow the approach of IOSCO's PRA Principles, and the EU BMR.

Question 4: Dual Designation as a Commodity Benchmark and a Regulated-Data Benchmark

Argus respectfully suggests that the CSAs simply follow the approach of IOSCO's PRA Principles, and the EU BMR.

Questions 5 and 6 Input Data

Argus respectfully suggests that the CSAs simply follow the approach of IOSCO's PRA Principles, notably Principle 2.2 which states:

> *2.2 A PRA should:*
> *a) Specify with particularity the criteria that define the physical commodity that is the subject of a particular methodology;*
> *b) Utilize its market data, giving priority in the following order, where consistent with the PRA's approach to ensuring the quality and integrity of a price assessment:*
> *1. Concluded and reported transactions;*
> *2. Bids and offers;*
> *3. Other market information.*
> *Nothing in this provision is intended to restrict a PRA's flexibility in using market data consistent with its methodologies. However, if concluded transactions are not given priority, the reasons should be explained …*

Question 7: Methodology

Argus requests that the CSAs simply follow the approach of IOSCO's PRA Principles. Given the stated objective of the CSAs – that the requirements are sufficiently clear such that an administrator would be able to comply with the requirements – it is difficult to see why any other approach would be adopted. Currently, PRAs are able to comply, and have demonstrated compliance, with the Principles.

[10] The CSA proposes extending regulation to any "individual who participates in the provision of, or overseeing the provision of a designated benchmark "

Question 8: Conflicts of Interest

The CSAs proposals in paragraphs 40.13(1)(a), (b) and (d) represent substantive additions to the conflicts of interest provisions in IOSCO's PRA Principles, which were later copied into the BMR's Annex II with minimal amendment.

The CSAs' proposed additions are drawn from its conflict of interest regime for administrators of financial benchmarks, where, of course, conflicts are often present.

The CSAs do not explain why it should be necessary to impose these requirements on PRAs. They seem disproportionate as they take no account of the very different editorial context in which PRA benchmarks are produced and in which such conflicts are not present.

We request the CSAs to align with the text of IOSCO's Principles, as the EU BMR has done in its Annex II.

Finally in response to the CSA's specific question, we do not agree that "commodity benchmark administrators face potential conflicts of interest that are not addressed by these or other conflict of interest provisions."

Question 9: Assurance Report on Designated Benchmark Administrator

Subsection 40.14(2) requires a designated commodity benchmark administrator to engage a public accountant to provide an annual assurance report evidencing compliance with the provisions of the Canadian benchmark regime.

Although the final paragraph of the EU's BMR Annex II contains a similar provision, the EU quickly came to understand that international regulators, trading venues and other market participants expect PRAs to carry out assurance audits against IOSCO's PRA Principles. As a result, the EU accepted this as an alternative option. Accordingly, ESMA provided clarification by way of a Question and Answer[11]:

> *Q: Is the annual review of IOSCO principles for PRAs sufficient for the purpose of paragraph 18 of Annex II of BMR?*
>
> *A: The BMR introduces specific provisions for commodity benchmarks since such benchmarks are widely used and can have sector-specific characteristics. Pursuant to Article 19 of the BMR, for those commodity benchmarks applying Annex II of the BMR instead of Title II of BMR, ESMA considers that an annual review of IOSCO principles for PRAs by an independent external auditor is sufficient to ensure compliance with paragraph 18 of Annex II of BMR.*

We suggest the CSAs follow this precedent by providing for the alternative option of an assurance report based on compliance with IOSCO's PRA Principles. It would not be feasible, or proportionate, for designated commodity benchmark administrators to have to undergo separate audits annually against both IOSCO's PRA Principles and Canada's benchmark regime.

We empathise strongly with the CSAs' query as to whether it is, in fact, reasonable for administrators of commodity benchmarks to be required to undergo annual audits, when administrators of interest rate benchmarks are required to do so (only) every 2 years. However, we are where we are. IOSCO's PRA Principles require annual audits and this is what the international community has come to expect.

[11] Q&A No.7 https://www.esma.europa.eu/sites/default/files/library/esma70-145-114_qas_on_bmr.pdf

Question 10: Concentration Risk

We do not believe that additional requirements are necessary to address concentration risk

PRAs operate in a competitive information market[12] where product substitutability is generally available.

Question 11 Designated Benchmarks

Argus is already authorised as a Benchmark Administrator in the Netherlands under the EU BMR. We therefore have no immediate intention of applying for designation in Canada. However, as we state in our introductory comments, we believe the best approach for the CSAs would be to pursue full alignment with IOSCO's PRA Principles, which would make the Canadian regime more attractive.

Question 12 Anticipated Costs and Benefits

We have no comments on this Question.

[12] See for example "Pricing *benchmarks in gas and electricity markets - a call for evidence*" Page 9, Note 9
https://www.ofgem.gov.uk/ofgem-publications/40363/pricing-benchmarks-gas-and-electricity-markets.pdf

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July 28, 2021

VIA ELECTRONIC MAIL

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Re: Comments on Proposed Amendments to Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Changes to Companion Policy 25-102

Dear Sir or Madam:

I. INTRODUCTION

On behalf of The Canadian Commercial Energy Working Group (the "**Working Group**"), Eversheds Sutherland (US) LLP submits this letter in response to the request for public comment from the Canadian Securities Administrators ("**CSA**") on Proposed Amendments to Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* ("**MI 25-102**") and the related Changes to Companion Policy 25-102

(collectively, the "**Proposed Amendments**").[1] The Working Group welcomes the opportunity to provide comments on the Proposed Amendments and looks forward to working with Canadian regulators throughout the rulemaking process.

The Working Group is a diverse group of commercial firms that are active in the Canadian energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are producers, processors, merchandisers, and owners of energy commodities. The Working Group considers and responds to requests for comment regarding developments with respect to the trading of energy commodities, including derivatives, in Canada.

II. COMMENTS OF THE WORKING GROUP

The Working Group appreciates the efforts of the Canadian regulators to amend MI 25-102 to account for the unique aspects of commodities markets and supports the contemplated framework in the Proposed Amendments, which provides an appropriate level of oversight without imposing undue burdens on commodity benchmark contributors and users. Further, the Working Group is pleased that the Proposed Amendments generally relieve commodity benchmark contributors and users from obligations imposed on contributors to and users of other types of benchmarks that are not necessarily appropriate in the commodities context.

The Working Group is supportive of the regulatory framework that the Proposed Amendments would establish and appreciates the CSA's efforts to model the Proposed Amendments on the ISOCO Principles for Oil Price Reporting Agencies and the European Union's benchmark regulation, which do not focus on the regulation of contributors of input data.[2]

As the CSA is aware, under the Proposed Amendments, certain provisions of MI 25-102 would not apply to a designated benchmark administrator, benchmark contributor, or a specified person or company in relation to a designated commodity benchmark.[3] Additionally, benchmark contributors would not be required to comply with governance and control requirements or designate a compliance officer.[4] These changes to MI 25-102 are appropriate for commodities benchmarks given the wide range of entities that are users of and contributors to commodities benchmarks.

Further, failure to amend MI 25-102 in the manner contemplated by the Proposed Amendments could have material adverse consequences for the representativeness of any commodities benchmark designated under MI 25-102. Specifically, there is concern among participants in certain commodity markets that participation rates in price index formation are in danger of being low enough to raise concerns that the resulting prices may not accurately represent market realities. To the extent that additional regulatory obligations are imposed on contributors to such benchmarks, that concern would likely be exacerbated. As such, the

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1 *See* CSA Notice and Request for Comment, Proposed Amendments to Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Changes to Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators* (Apr. 29, 2021) ("**CSA Notice**"), https://www.albertasecurities.com/securities-law-and-policy/-/media/EB29E0392B404412836D920A01DCBD92.ashx.

2 CSA Notice at 7.

3 CSA Notice at 72; See also Proposed Section 40.3 of MI 25-102.

4 CSA Notice at 72; *See also* Proposed Section 40.3 of MI 25-102.

Working Group fully supports the common sense changes to MI 25-102 set out in the Proposed Amendments.

III. CONCLUSION

The Working Group appreciates this opportunity to comment on and support the Proposed Amendments.

If you have any questions, please contact the undersigned.

Respectfully submitted,
/s/ Alexander S. Holtan
Alexander S. Holtan
Kimberly R. Thomasson

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British Columbia Securities Commission
Alberta Securities Commission Financial and Consumer Affairs
Authority of Saskatchewan
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

28 July 2021

Via electronic mail to navdeep.gill@asc.ca; comment@osc.gov.on.ca; consultation-en-cours@lautorite.qc.ca

RE: Specific Questions of the Authorities Relating to the Proposed Amendments

Dear Sir/Madam,

Introduction:

We are grateful for the opportunity to respond to the specific questions of the Authorities relating to the Proposed Amendments to the Multilateral Instrument 25-102 and Companion Policy 25-102 regarding commodity benchmarks.

S&P Global Platts (Platts), a division of S&P Global Inc, is the leading publisher of price assessments for the physical commodities markets including the oil markets.

At Platts we share the goal of ensuring integrity and transparency in commodity benchmarks. We seek to ensure availability of sound price assessments based on data derived from orderly and transparent trading in the commodity physical and futures markets and fully recognize the need for confidence among all stakeholders in the processes and outcomes associated with commodity benchmarks. As such, our price assessment processes are underpinned by robust governance and control systems.

Platts does not participate directly or indirectly in the markets it observes. Its proprietary price assessments use information received directly from market participants, transactional data (e.g., physical transaction and futures prices from exchanges) using editorial judgement in conformance with its published methodologies.

Platts has been fully adherent to the IOSCO's Principles for Oil Price Reporting published in October 2012 (PRA Principles) and which are the globally recognized standards for commodity benchmark administration. As per IOSCO's request when it disseminated the PRA Principles, Platts price assessments licensed for use in derivative contracts in all commodities globally are in scope for its IOSCO adherence process, not just in oil. Currently around 250 of its assessments are in scope for IOSCO. As part of Platts' long established efforts to demonstrate its commitment to these principles, which are broadly aligned to our editorial beliefs, Platts has completed annual assurance reviews demonstrating alignment with these principles since 2013.

Platts also currently publishes 7 assessments that are in scope for the European Benchmarks

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Regulation, Regulation (EU) 2016/1011 (BMR). Platts Benchmark B.V. is the administrator for Platts EU Benchmarks under the BMR and since 2020 has been supervised by the Dutch Authority for Financial Markets (AFM). Because Title II of the BMR does not apply to Article 19 benchmark administrators, the applicable provisions of the BMR to commodity benchmark administrators found in Annex II are nearly identical to the IOSCO PRA Principles. Importantly, these are intentionally distinct from the principles found in the IOSCO Principles for Financial Benchmarks published in July 2013 and Title II of the BMR given the sector specific characteristics of commodity benchmarks as recognized by the Authorities in citing the preamble of the BMR in the Notice.

As per ESMA guidance published in its Q&A for Benchmark Regulation, the annual IOSCO assurance review report by Platts' independent external auditor is used by the AFM to ensure compliance with the requirements of the BMR.

While the Authorities have indicated no intent to designate commodity benchmarks at this time, Platts nevertheless thinks it is important to engage to draw attention to some issues the Notice raises. This is also important because Platts is unclear as to what the jurisdictional nexus is for being in scope. For example, while the Authorities have laid out that there must be an impact on Canadian commodity and or financial markets, and we understand that there is a voluntary process to become supervised, unlike the BMR there does not seem to be a requirement that financial instruments based on a benchmark are traded on a Canadian trading venue.

In this regard, we offer some key points below for your consideration which aim to summarize the spirit of our response to the consultation:

- Platts believes that should the Authority find it is necessary to include commodity benchmarks in the Measures, then like the BMR the requirements should align fully with requirements of the IOSCO Principles and not go beyond those requirements. The Authorities state in the Notice that "it is of the view that amending MI 25-102 to incorporate the commodity benchmark provisions would codify international best practices, as articulated under the IOSCO PRA Principles." Platts agrees completely. A consistent approach will result in more choices for investors by encouraging broader participation in the Canadian markets by qualified benchmark administrators. Further, if a stated goal of the Authority's approach is to achieve equivalence with the BMR, then there is no need to go beyond the requirements of the BMR. Some of the requirements that would be applicable to all benchmark providers (see Notice Pages 7-8) go beyond what's required of commodity benchmark administrators under the BMR.

- Platts believes the Authority should provide greater clarity and transparency in terms of the assessment and/or method it will adopt to designate benchmark administrators and/or benchmarks in the future in order to avoid market disruption and ensure continued innovation in Canada's benchmarking industry.

- Platts has developed a robust governance framework which includes responsibility for monitoring and overseeing the calculation of its IOSCO and BMR benchmarks and the development and maintenance of their methodologies, a framework which has been deemed acceptable by its existing supervisor and has been reviewed by an external auditor annually since 2013. Requiring a benchmark administrator to re-write its control and oversight frameworks for benchmarks designated by the Authority would be counter-productive and disproportionate to the associated risks. Requirement pertaining to governance or oversight functions should not be inconsistent

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with existing regulatory frameworks and need to be sufficiently flexible to allow benchmark administrators to select a structure most appropriate for their businesses rather than prescribed regardless of the type of commodity benchmark or organizational structure of the existing benchmark administrator.

- Physical commodity markets vary in liquidity. Any particular market analyzed on its own will typically demonstrate rising and falling levels of transactional activity through time. Platts is committed to providing an assessment of value for every market that it covers, equally well in times of heightened or reduced liquidity. All information received by a price reporting agency is processed through a verification process seeking to ensure the appropriateness of the data. These and other safeguards against manipulation are specifically designed to ensure rigour in the price assessment process used to publish our benchmarks while not causing a retreat from participation in the price assessment and index formation process, which could occur if benchmark administrators are required to make a judgement call in identifying communications that might involve manipulation or attempted manipulation of a designated commodity benchmark. As was agreed with IOSCO, a more calibrated approach has been for PRAs to identify anomalous data, as opposed to suspicious data. The dual designation of commodity and regulated data commodity benchmarks (See Notice Pages 9-10) is confusing and we believe unnecessary. Importantly, for example, it is unclear what is mean when Authorities indicates that dually-designated benchmarks would be subject to Part 8.1 requirements, but exempted from certain requirements as provided by subsection 40.2(4) because that subset of regulated-data benchmarks is determined from transactions where, in the ordinary course of business, parties make or take physical delivery of the commodity…" Many physical commodity price assessments are markets where parties take physical delivery, regardless of whether the data are regulated. We would be happy to engage further on the Authority's objectives for these designations and why they are taking a different approach from the BMR in order to provide more focused feedback.

- Similarly, the criteria for designating a commodity benchmark as "critical" are unclear and do not appear consistent with the BMR. We would welcome additional clarity on the Authority's goal here and how it differs from the EU's objectives.

Interpretation

1. **The definition for "commodity benchmark" excludes a benchmark that has, as an underlying interest, a currency or a commodity that is intangible. Is the scope of the proposed definition, and the guidance in the CP, appropriate to cover the commodity benchmark industry in Canada? Please explain with concrete examples.**

   The definition of a "commodity benchmark" in the Proposed Amendments is not clear and therefore leads to regulatory uncertainty. Unlike in the BMR, there is no indication what the use of the commodity price assessment or index would be in order to come into scope. The definition should provide additional clarity in order for price reporting agencies and other stakeholders to understand which benchmarks could be designated as designated commodity benchmarks under the Proposed Instrument.

Applicable Requirements from the Financial Benchmarks Regime

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2. Despite a different proposed regime for commodity benchmarks, the Authorities expect that certain requirements, applicable to financial benchmarks, would also be applicable, sometimes with minor modifications, to commodity benchmarks. These include, for example, the requirements to report contraventions (section 11), the requirement for a control framework (section 40.4), and governance and control requirements (section 40.11). Are these requirements appropriate in the context of commodity benchmarks? Please explain with concrete examples.

It is important to recognize that because Title II of the BMR does not apply to Article 19 commodity benchmark administrators, the requirements are different as well in that they remain consistent with the IOSCO PRA Principles as per Annex II of the BMR. These differences include the governance structure and control framework applicable to commodity benchmark providers. Any requirement pertaining to the composition of any governance or oversight function and control framework in the Proposed Amendments should not be prescribed but instead be flexible enough to allow benchmark administrators to select a structure most appropriate to their businesses. This flexibility is also recognized in both the BMR and the IOSCO Principles for commodity benchmark administrators. The guiding principles that have been established in most legislative frameworks for benchmarks are proportionality and the avoidance of excessive administrative burden.

As an example, Platts has adopted a three-tier risk governance framework often described as the three lines of defense model, which distinguishes between the management, control, and assurance of risk and compliance management. Platts' governance structure consists of multiple committees and functions, each performing a subset of the oversight responsibilities and tasks. Certain functions are responsible for governing the methodologies for provision of our benchmarks. These individuals have the skills and expertise to assess and challenge the editorial decisions made during the benchmark determination process. Other functions and committees are responsible for ensuring those who govern the benchmarks and corresponding methodologies comply with Platts policies, procedures and best practices. Physical commodity markets are complex and many transactions are non-standardized and, as such, the ability to properly monitor data inputs is best managed by individuals with market expertise and good knowledge of the requirements of the methodology employed to generate an assessment or index. The inclusion of requirements to report contraventions by market participants could deter the voluntary nature of commodity market participation with price reporting agencies. Price reporting agencies such as Platts have editorial protocols and corresponding controls that filter out input data that could result in price distortions. These issues were discussed at length during the IOSCO process and Level 1 BMR process, with recognition that it is important not to deter the voluntary contribution of market data to price reporting agencies. Additional regulatory requirements such as reporting contraventions however could make it increasingly difficult for Platts to assess value, particularly in less liquid markets and to adapt quickly and institute methodology changes in the face of changing market conditions. Over time this could erode the quality of physical price benchmarks.

<u>Dual Designation as a Commodity Benchmark and a Critical Benchmark</u>

3. Where the underlying commodity is gold, silver, platinum or palladium, a benchmark dually designated as a commodity benchmark and a critical benchmark would be subject to the requirements applicable to critical financial benchmarks, rather than critical commodity benchmarks. Do you think that there are benchmarks in Canada that could be dually designated as critical commodity benchmarks where the underlying is gold, silver, platinum or palladium, and is there a need to provide for the specific regulation of such benchmarks?

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Platts is not aware of any such benchmarks. Further, Platts is of the view that multiple designations could cause market confusion and be very difficult for benchmark administrators to administer.

Dual Designation as a Commodity Benchmark and a Regulated-Data Benchmark

4. **Subsection 40.2(4) provides for certain exemptions for benchmarks dually designated as commodity and regulated-data benchmarks, where such benchmarks are determined from transactions in which the transacting parties, in the ordinary course of business, make or take physical delivery of the commodity. Is carving out such a subset of dually-designated benchmarks necessary for appropriate regulation of commodity benchmarks in Canada? If so, are the exemptions provided for, which generally mirror exemptions for regulated-data benchmarks from Parts 1 to 8 requirements, appropriate? Please explain with concrete examples:**

No. It is inconsistent and disproportionate for the Authority to have powers to designate regulated data benchmarks as commodity benchmarks and vice versa. The BMR has created discrete regulation applicable to each since the two are considered mutually exclusive. Platts sees no reason for a dual designation regime, which could cause market confusion and would be very difficult for benchmark administrators to implement and administer.

While it is true that certain commodity benchmarks use regulated data, all dimensions of a commodity market combine to represent value of the underlying commodity and hence dual designation is unnecessary and cumbersome, with an unclear regulatory objective. Given the reduced regulatory burden placed on regulated data benchmarks under the BMR, it would be more straightforward to have a regime that applies to commodity benchmarks regardless of whether they use regulated data.

Input Data

5. **We have distinguished between input data that is "contributed" for the purposes of the Instrument (see subsection 1(3)), and data that is otherwise obtained by the administrator. Certain provisions in Part 8.1 impose requirements on a designated benchmark administrator if input data is "contributed", whereas other obligations are imposed irrespective of how input data is obtained. Where the word "contributed" is not specifically used or implied, we mean all the input data, not only "contributed" data. Taking into consideration the obligations imposed on designated benchmark administrators of commodity benchmarks, through the use or lack of use of "contributed", are the obligations imposed under the provisions of Part 8.1 appropriate? Please explain with concrete examples.**

6. **The guidance on paragraph 40.8(2)(a) of the CP states that, where consistent with the methodology, we expect the administrator to give priority to input data in a certain order. Does the order of priority of use of input data for purposes of determination of a commodity benchmark, as stated in the CP, reflect the methodology used for your commodity benchmarks? Are there any other types of input data that should be specified in the order of priority?**

The distinction between requirements for contributed and non-contributed data for commodity benchmarks (not regulated data benchmarks) is unnecessary. Platts' objective is to ensure that all input data that editors use to inform price assessments is of the highest quality. The focus is

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therefore on controls and management of input data, rather than whether it is contributed or non-contributed. For example, Platts endeavors to transparently publish all information received that meets Platts editorial standards so that it can be fully tested by the market at large. Platts excludes data in the price assessment process that cannot be verified in the market to the extent deemed appropriate.

Platts sets out its approach to prioritizing data here platts-assessments-methodology-guide.pdf (spglobal.com). Platts believes its approach is sound and consistent with regulatory objectives, including under the IOSCO PRA Principles and BMR.

Methodology

7. **Under the Proposed Amendments, designated administrators are expected to ensure that particular requirements are met whenever their methodology is implemented and a designated benchmark is determined. Are the elements of the methodology that we propose to regulate, specifically within section 40.5, sufficiently clear such that an administrator would be able to comply with the requirements?**

Broadly speaking an administrator would be able to comply with the requirements where they align to those of the globally-accepted IOSCO PRA Principles. The requirement in draft Section 40.5(1) stating that "*a designated benchmark administrator must not follow a methodology for determining a designated commodity benchmark unless the accuracy and reliability of the designated commodity benchmark determined using the methodology is verifiable*" is vague and seemingly tautological. In order to maintain confidence in a benchmark, an administrator's priority is to follow a published methodology. An administrator of a commodity benchmark should be required to regularly examine its methodologies for the purpose of ensuring they reliably reflect the physical market under assessment and any change should include a process for taking into account the views of relevant users. This is consistent with the IOSCO and BMR approach. The key is transparency and market consultation when material changes are being made to a benchmark methodology, which is a practice followed by Platts and other PRAs who adhere to the IOSCO PRA Principles.

Conflicts of Interest

8. **Paragraphs 40.13(1)(a), (b) and (d) mirror the conflict of interest requirements under paragraphs 10(1)(a), (b) and (d) of the Instrument, to ensure that certain overarching requirements apply to all designated benchmark administrators. Is this approach appropriate? Do commodity benchmark administrators face potential conflicts of interest that are not addressed by these or the other conflict of interest provisions?**

It is appropriate to identify and avoid conflicts of interest where an individual directly involved in the provision of a commodity benchmark may be compromised due to a personal relationship or personal financial interests. The objective is to protect the integrity and independence of the provision of the benchmark. Platts maintains and strictly enforces its Conflicts of Interest policy, as is expected under the IOSCO PRA Principles and BMR. The requirements found there are fit for purpose and Platts would suggest appropriate for the Proposed Instrument.

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Assurance Report on Designated Benchmark Administrator

9. **Subsection 40.14(2) requires a designated benchmark administrator of a designated commodity benchmark, whether or not the benchmark is also designated as a critical benchmark, to engage a public accountant to provide a limited or reasonable assurance report on compliance once in every 12-month period. In contrast, pursuant to subsection 36(2), an administrator of a designated interest rate benchmark is required to engage a public accountant to provide such a report, once in every 24-month period, albeit a report is required 6 months after the introduction of a code of conduct for benchmark contributors. Given the general risks raised by the activities of administrators of commodity benchmarks versus of interest rate benchmarks, are the proposed requirements appropriate? Please explain your response.**

   Yes. The BMR recognizes the IOSCO PRA Principles and as such requires an annual review of IOSCO's Principles for Oil Price Reporting by an independent external auditor to demonstrate compliance with the requirements of the BMR. This approach is efficient and sound.

Concentration Risk

10. **Pursuant to subsection 20(1), designated benchmark administrators of designated commodity benchmarks would be subject to certain obligations when they cease to provide a designated commodity benchmark. However, market users may potentially have more limited benchmarks to utilize for purposes of their transactions (concentration risk) where a designated benchmark administrator that administers a number of designated commodity benchmarks unexpectedly delays in providing or ceases to provide those benchmarks. Do you think that additional requirements should be added under Part 8.1 to address this concentration risk? If yes, what requirements should be added?**

    No additional requirements are needed under Part 8.1 to address concentration risk. As per the BMR, a benchmark administrator should be required to maintain a certain level of continuity, but such an approach should be proportional. The Authorities should avoid excessive administrative burden on administrators whose benchmarks poses less cessation risk to the wider financial system, including where there are alternatives available from competitors, which is generally the case with regard to commodity benchmarks.

Designated Benchmarks

11. **If your organization is a benchmark administrator of commodity benchmarks, please: a) advise if you intend to apply for designation under MI 25-102, b) advise of any benchmark you intend to also apply for designation under MI 25- 102, and c) indicate the rationale for your intention**

    Platts is unsure what the jurisdictional nexus is for the Proposed Amendments as it is unclear what contacts the benchmark administrator must have with Canada in order for the measures to apply. It is unclear whether the Proposed Amendments reach beyond the EU institutional market participants that the Authority holds important. Platts does not intend to voluntarily apply for designation as a benchmark administrator under the Proposed Instrument.

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Anticipated Costs and Benefits

12. **The Notice sets out the anticipated costs and benefits of the Proposed Amendments (in Ontario, additional detail is provided in Annex F). Do you believe the costs and benefits of the Proposed Amendments have been accurately identified and are there any other significant costs or benefits that have not been identified in this analysis? Please explain and/or identify furthers costs or benefits.**

    The Proposed Instrument provides no acknowledgement or framework for those benchmark administrators based outside of Canada. Therefore, the example does not include one of the most significant costs which will be faced by those benchmark administrators subject to other benchmark regulations. Where the Authorities designate benchmarks that are also regulated in the EU for example the benchmark administrator will be subject to dual supervision and have to comply with the regulation in both jurisdictions. Such costs can be reduced by explicitly excluding commodity benchmarks, or if not making the requirements as close as possible to the IOSCO PRA Principles and BMR to reduce administrative burden and implementation costs given the demonstrated success of those other regimes.

Yours faithfully,

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Financial and Consumer Affairs Authority of Saskatchewan
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

26 July 2021

Ref: **CSA Proposed Amendments to Multilateral Instrument 25-102, Designated Benchmarks and Benchmark Administrators, and Changes to Companion Policy 25-102, Designated Benchmarks and Benchmark Administrators**

A. INTRODUCTION

Fastmarkets is grateful for the opportunity to comment on the Canadian Securities Administrators (CSA)'s proposed amendments, which incorporate provisions for a Canadian regulatory regime for commodity benchmarks and their administrators. We hope that our submission will be helpful to the Authorities.

Fastmarkets is an independent media company and Price Reporting Agency (PRA) with over 130 years of specialist commodity news, analysis, events and price reporting expertise. Since 1882, we have worked with those involved in the buying, selling and trading of commodities to deliver market-reflective prices and insights. In October 2018, we have rebranded to unify our news and pricing businesses (Metal Bulletin. American Metal Markets, Fastmarkets, Industrial Minerals, RISI, FOEX, Random Length, etc) under the umbrella name of Fastmarkets.

Although Fastmarkets does not have a physical presence in Canada – its parent company Euromoney Institutional Investor plc does – some of its price assessments are Canada-based including some wood panel and pulp prices.

Our global editorial team of over 160 price reporters publish news reports, analysis and over 5,000 proprietary prices, which are used as reference or benchmark in physical trades, inventory valuation and financial derivatives contracts. A small number of Fastmarkets prices are used for settlement by global exchanges in cash-settled contracts but none of our benchmarks are critical or even significant in value terms.

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Our pricing activities are backed by transparent methodologies (www.Fastmarkets.com/methodology) and robust governance and pricing processes. Fastmarkets applies IOSCO's Oil PRA Principles to all its price assessments. The few price assessments that are used as benchmarks as well as the key prices that are used as reference in physical contracts, are externally audited each year for compliance with these Principles.

Fastmarkets operates in a competitive marketplace in all markets it covers (agriculture, metals & mining, forest products), which is an additional safeguard that underpins the quality of PRA benchmarks.

B. SHORT SUMMARY OF FASTMARKETS' KEY POINTS:

We ask the Authorities to always keep in mind, when assessing the appropriateness of their proposals for commodity benchmarks, that the Regulation's defined term "benchmark individual" in Section 1.(1) will, in the cases of Fastmarkets and other PRAs, apply to their journalists who produce PRA price assessments as well as the market commentaries, news and other information. This is a very different world to financial benchmarks.

Moreover, Fastmarkets does not have a separate dedicated team of "benchmark individuals" who focus exclusively - or even primarily - on the provision of benchmarks. All journalists can be expected at various times to participate in the provision of benchmarks.

This means that the governance and other requirements that the Authorities are proposing adding from the regime for administrators of financial benchmarks, could cover Fastmarkets' entire editorial operation.

This would be unprecedented.

Our main points are:

- We are concerned about the proportionality of a number of the Authorities' proposals and commend to them IOSCO's guidance for regulators in its opening "*Summary of the Principles*":

  > "*…the application and implementation of the Principles should be proportional to the size and risks posed by each Benchmark and/or Administrator and the Benchmark setting process*".[1]

[1] Although included in the Summary to IOSCO's Principles for Financial Benchmarks [page 9] this is of general application.

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In particular, the additional requirements listed in Question 2, which are not present in the IOSCO PRA Principles or EU's Benchmark Regulation, are in our view disproportionate and not "*appropriate in the context of commodity benchmarks"*;

- We suggest the Authorities offer administrators of commodity benchmarks the option of an assurance report based on compliance with IOSCO's PRA Principles, as an alternative to the proposed assurance report based on compliance with the Canadian regime;

- We support the Authorities' proposal to offer a voluntary designation option for administrators of commodity benchmarks but suggest that this option could extend to other third country jurisdictions and not, as is proposed, limited only to the EU;

- Our strong preference is for the text of the Regulation, as it relates to commodity benchmarks, to align as closely as possible to the text of IOSCO's PRA Principles, as the EU's Annex II for commodity benchmarks has done. Regulators and markets participants have a good understanding of the PRA Principles and their implementation by the PRAs. We query whether the frequent minor variations from the IOSCO text are necessary. A "plainer vanilla" regulatory underpinning of IOSCO's PRA Principles, aligning closely to its text, could lend greater credibility and international recognition to a Canadian commodities benchmark regime.

In summary, we respectfully request the CSAs to reconsider its proposals and to bring them into alignment with IOSCO's PRA Principles.

C. RESPONSES TO CONSULTATION QUESTIONS

Question 1: Interpretation: Definition of "benchmark"

We suggest that the definition of benchmark in Section 40.1 be narrowed to apply only to price assessments that are linked to derivatives contracts. As now drafted, the definition would apply to price assessments that are used for non-trading purposes, which could create uncertainties for many users of price assessments.

The Authorities could consider adopting the definition of "benchmark" used in the EU's BMR.

Question 2: Adding in Requirements from the Financial Benchmarks Regime:

The Authorities propose applying to commodity benchmark administrators several requirements that are taken from the regulatory regime for financial benchmarks. Question 2 asks whether this is "appropriate": We do not believe that this is appropriate and consider it would cause damage to commodity benchmarks if confirmed.

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The Authorities are not the first to have considered applying financial benchmark requirements to administrators of commodity benchmarks. This was reviewed during the workstream on IOSCO's Financial Benchmarks, which concluded at page 6 in its Final Report published in July 2013 that the regimes should be kept separate. The point was considered again in IOSCO's "Report on the Implementation of the Principles for Price Reporting Agencies" published in September 2014. The conclusion on page 16 was emphatic

> "*IOSCO does not believe that further alignment of PRA Principles with those for Financial Benchmarks is justified"*

In the same report IOSCO recorded that:

> *"the majority of stakeholders held the view that attempts to extend the financial Benchmark Principles…would be disruptive*" [2].

The EU Benchmark workstream also reviewed the scope for further alignment, before concluding, as IOSCO had done, that this was not appropriate.

We now consider each of the proposed additions from the Financial Benchmarks regime:

Section 11 Requirements to report contraventions

This section would require a PRA to report to the regulator any

> "*conduct by…. a benchmark contributor that might* involve the following:
>
> *(a) Manipulation or attempted manipulation of a designated benchmark;*
> *(b) Provision or attempted provision of false or misleading information in respect of a designated benchmark."*

We strongly oppose this proposal and commend to the Authorities the approach set out in Section 2.4(d) of IOSCO's PRA Principles, which has been applied by the EU. The approach requires the PRA to escalate any suspicions of abuse within the contributor's company, and not to the regulator.

Our reasons are

- **the approach is disproportionate**: Price contributions can often appear anomalous, but this does not signify abuse. There can be entirely legitimate reasons. Placing a PRA under an obligation to report to the Authorities any conduct by a contributor that "might" be abusive is excessive;
- **it would discourage contributions**. As IOSCO reminded us in the Introduction to the PRA Principles:

[2] Page 12;

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> *"It is important to understand these principles recognize that there is no requirement on any physical oil market participant to submit transaction data to PRAs"*

IOSCO's 2014 Implementation Report added [3]:

> *"The PRAs and stakeholders are conscious of increasing risks around the quality and quantity of submitted data used in price assessments. Consequently, IOSCO has concluded that this is a particularly important development to analyse, given the …..the potential for data submitters to regard submission to PRAs as representing a significant regulatory risk"*

During the IOSCO PRA workstream, a number of warnings were made about the risk that regulatory intervention could discourage the voluntary contributions to PRA benchmarks, leading in turn to less reliable benchmarks. This was why neither IOSCO's PRA Principles nor the EU's Benchmark Regulation impose obligations on contributors to commodity benchmarks.

Requiring PRAs to report to the Authorities any anomalous contributions would have precisely these negative consequences. Contributors would be unwilling to incur avoidable additional regulatory risk. Their contributions would dry up.

The dangers inherent in the Authorities' proposed approach were well summarized by Ofgem, the UK energy regulator:

> *"Some types of regulation may introduce risks to the process. In particular, greater regulatory scrutiny of the information flows could introduce a perception of risk (irrespective of whether the risk is real) to those providing the information. Regulation should increase the quality of the information provided, but could reduce the willingness of parties to provide it. Information is provided on a voluntary basis and the simplest way to mitigate this risk may be to withdraw cooperation and decline to provide it. This in turn can lead to a breakdown in the quality of the price assessment process, with negative consequences for the market and for consumers."*[4]

We cannot overstate the efforts that PRAs have to make to encourage contributors to provide price information, which many contributors regard as an unrewarded chore. We ask the Authorities not to make that task harder still.

- **the requirement would be inconsistent with the important legal safeguards under Canadian and international law that protect contacts between journalists and their sources**.

PRAs are editorial entities staffed by journalists. It is not the role of journalists to report their sources to the Authorities, or to have to configure their editorial systems and controls to facilitate this as the Authorities suggest in Annex D

[3] Page 15;
[4] "Pricing benchmarks in gas and electricity markets-a call for evidence" 2013 p 13

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> "*we expect the benchmark administrator's systems and controls would enable the designated benchmark administrator to provide all relevant information to the regulator or securities regulatory authority".*

We ask the Authorities to uphold these safeguards for journalists, which are essential to their vital role in bringing transparency to commodity markets.

For the above reasons, we request the Authorities to follow the approach recommended by IOSCO and adopted by the EU.

Section 40 (4) Control Framework

We do not believe it appropriate to apply these aspects, also taken from the regime for financial benchmarks.

As with the Authorities' proposed reporting obligations, these requirements have no place in either IOSCO's PRA Principles or the EU's Benchmark Regulation's Annex II regime for administrators of commodity benchmarks.

- **they are unnecessary and disproportionate:**

In its "Second Implementation Review of the PRA Principles" published in September 2015, IOSCO concluded at page 12:

> *"Based on the totality of inputs considered, and in particular the external assurance reviews conducted under the higher reasonable standard, IOSCO concludes that the PRAs have made the PRA Principles an integral part of their management policies and operational practices";*

In the context of the requirements in Section 40.4(1), the Authorities should be able to rely on PRAs implementing all the necessary controls since, at the end of the day, this will be scrutinized in the annual assurance report.

In relation to the requirements set out in Section 40(4)(2), the Authorities should again be able to rely on PRAs implementing whatever controls and procedures are necessary and proportionate, keeping in mind that their benchmark activities:

- take place in a competitive benchmark market characterized by product substitutability from competing suppliers;
- Do not pose systemic risks; and
- represent a small percentage of a PRA's overall activities and business income.

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- **The Authorities should not interfere in the governance of media companies**

With respect, it is not appropriate for financial regulators to seek to impose control frameworks on media companies

Section 40.11 Governance and Control Requirements

Once again, we ask the Authorities always to keep in mind, when assessing the appropriateness of their proposals for commodity benchmarks, and especially in the context of this particular Section, that the Regulation's defined term "*benchmark individual*" in Section 1(1) means for Fastmarkets and other PRAs the journalists who produce PRA price assessments. Every reference to a "*benchmark individual*" in Section 40.11(3) is a reference to a journalist.

With regards to Sections 40.11 (1) and (2), we respectfully ask the Authorities not to intervene in the organizational structures of what are editorial operations. We invite them to leave this to the PRAs who have extensive experience in producing editorially-based services. Fastmarkets' journalists operate according to a Code of Conduct that sets rigorous standards appropriate for an editorial operation. The Code of Conduct, which is reviewed and updated as necessary, is underpinned by a continuous program of training. The Code is published here.

With regards to the provisions in Section 40(11)(3), these are intended to mirror Sections 2.5-2.8 of IOSCO's PRA Principles and are therefore, in principle, appropriate. However, as is so often the case, the Authorities have redrafted these provisions to align them more closely to the language used for financial benchmarks. Our preference is to retain IOSCO's language as the EU's Benchmark Regulation has done in Annex II. IOSCO's text was carefully crafted to take account of the particular characteristics of PRAs and their price assessment activities.

Question 3: Dual Designation as a Commodity Benchmark and a Critical Benchmark

We have no comments on this Question. None of Fastmarkets' benchmarks are "critical".

Question 4: Dual Designation as a Commodity Benchmark and a Regulated Data Benchmark

We have no comments.

Questions 5 and 6: Input Data

Fastmarkets respectfully suggests that the CSAs simply follow the approach of IOSCO's PRA Principles (especially Principle 2.2) and the EU BMR, and queries whether the variations from the IOSCO text are necessary.

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Question 7: Methodology

Fastmarkets respectfully suggests that the CSAs simply follow the approach of IOSCO's PRA Principles and queries whether the variations from the IOSCO text are necessary.

Question 8: Conflicts of Interest

We do not believe that it is appropriate to amend the conflict-of-interest provisions in IOSCO's PRA Principles to align them more closely with the regime for financial benchmarks. The PRA editorial model is not susceptible to conflicts of interest as financial benchmarks often are. Moreover, PRAs have no financial interest in whether market prices rise or fall, as their service revenues are subscription-based.

As Ofgem, the UK energy regulator has commented:

> *"PRAs sell services to subscribers in a competitive environment and may be deemed to have a strong commercial incentive ensure that their customers retain confidence in their products."*[5]

We also return to IOSCO's guidance referred to earlier in this response:

> "*…the application and implementation of the Principles should be proportional to the size and risks posed by each Benchmark and/or Administrator and the Benchmark setting process*"

We request the Authorities to implement the proportionate approach taken in IOSCO's PRA Principles, as the EU BMR has done in Annex II. It works well and there is no reason to amend it.

Question 9: Assurance Report on Designated Benchmark Administrator

As we suggested in our opening summary, we suggest the Authorities offer administrators of commodity benchmarks the option of an assurance report based on compliance with IOSCO's PRA Principles, as an alternative to an assurance report based on compliance with the Canadian regime. This is because the expectation among trading venues and other market participants internationally is that PRAs will be audited against IOSCO's PRA Principles.

The European Securities and Markets Authority (ESMA) has clarified that it will accept this option as an alternative to an assurance report based on the EU's Benchmark Regulation.

Regarding the query raised by the Authorities on the differences between the frequency of assurance reports for administrators of commodity and interest rate benchmarks, we agree that seems anomalous that PRA benchmark administrators should be audited more frequently. However, this is what the markets have come to expect and we doubt it can be changed.

[5] "Pricing Benchmarks in gas and electricity markets-a call for evidence" June 2013 page 15.

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Question 10: Concentration Risk

We do not believe there is any need for additional requirements to Part 8.1.

As Ofgem made clear in the passage quoted in our answer to Question 8 "*PRAs sell services to subscribers in a competitive environment*".

Question 11: Designated Benchmarks

Fastmarkets is authorized in Finland as a benchmark administrator for the purposes of the EU's Benchmark Regulation.

Although we have no plans to seek authorization in any other jurisdictions, we intend to keep the development of the Canadian benchmark regime under review. The proposed voluntary designation option could, in principle, prove attractive for administrators of commodity benchmarks seeking international regulatory credibility for their benchmarks. However, the Canadian benchmark regime would have to be aligned closer to IOSCO's PRA Principles than is currently proposed for this to be a viable option.

Question 12: Anticipated Costs and Benefits

We have no comments on this Question.

July 28, 2021

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

Attn: Navdeep Gill
Manager, Legal, Market Regulation
Alberta Securities Commission

Re: CSA Notice and Request for Comments (the "Notice") - Proposed Amendments to Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* ("MI 25-102") and Proposed Changes to Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators* ("25-102 CP")

Dear Sirs/ Mesdames:

ICE NGX Canada Inc. ("ICE NGX"), appreciates the opportunity to comment on the Canadian Securities Administrators (the "Authorities") proposed amendments to MI 25-102 and proposed changes to 25-102 CP relating to a proposed regime for designating commodity benchmarks and regulating designated commodity benchmarks and designated benchmark administrators (the "Proposal").

ICE NGX is a wholly-owned, indirect subsidiary of Intercontinental Exchange, Inc. ("ICE"). ICE operates regulated equities and derivatives exchanges and clearing houses located in Canada, Europe, Singapore and the United States, as well as global data services across financial and commodity markets. ICE NGX affiliate ICE Benchmark Administration Limited is authorized and regulated by the United Kingdom ("UK") Financial Conduct Authority ("UK FCA") to carry out the regulated activity of administering a benchmark and is authorized as a benchmark administrator under the UK Benchmarks Regulation ("UK BMR"). ICE NGX affiliate ICE Data Indices, LLC is recognized as a third country benchmark administrator by the UK FCA under the UK BMR.

ICE NGX is recognized by the Alberta Securities Commission as an exchange and clearing agency and is authorized to operate in other jurisdictions of Canada and in Europe, the UK and the United States. Since inception in 1994, ICE NGX has developed the AB-NIT ("AB-NIT" or "AECO") hub into one of the most liquid energy markets in North America and is Canada's preeminent provider of energy commodity indices. ICE NGX currently provides:

- natural gas indices, including the AB-NIT indices and the Alberta Market Price, based on physically settled trades in natural gas futures executed on the ICE NGX exchange;
- Alberta Electricity RRO Indices, based on trading in financially settled products for the regulated rate option market in Alberta; and

- crude oil indices based on physically settled crude oil transactions executed via a regulated broker.

ICE NGX respectfully offers the following comments regarding the framework for regulating designated commodity benchmarks outlined in the Proposal; this includes comments on the application of provisions of MI 25-102 not proposed to be amended by the Proposal, but that are proposed to be applied to designated commodity benchmarks. This comment letter first sets out general comments on the Proposal, followed by comments on specific proposed provisions and finally responses to selected specific questions posed by the Authorities in the Notice.

Executive Summary

ICE NGX supports the Proposal and the Authorities' dual objectives of promoting the continued provision of fair and transparent commodity benchmarks and facilitating a determination of equivalence with certain foreign regulations. To facilitate these objectives, ICE NGX recommends the Authorities make certain changes and clarifications in any final rules. As described more fully below, ICE NGX believes the Proposal would be improved by:

- reducing the regulatory burden through a combination of a risk-based approach to regulating designated regulated data commodity benchmarks, and a more principles-based approach that aligns with the EU BMR (as defined below);

- clarifying the Authorities' expectations of the minimum absolute or proportionate transaction volume thresholds represented in a benchmark in order for the Authorities to consider an application for designation of the benchmark; and

- regulating under Part 8.1 benchmarks on products that are closely related to the functioning of the physical commodity market, in a like manner as benchmarks on the related physical commodities - for example:

    - environmental commodities such as carbon credits, emissions offsets and renewable energy certificates;

    - transportation and capacity commodities such as shipping capacity, pipeline capacity and, in the power markets, financial transmission rights, congestion revenue rights and similar instruments;

    - storage commodities such as natural gas storage and carbon capture storage; and

    - weather and climate.

General Comments

Appropriateness of IOSCO PRA Principles for non-assessed benchmarks

As described in the Notice, the Proposal was developed, in part, to establish a commodity benchmarks regulatory regime that is equivalent to Annex II (i.e., the provisions applicable to commodity benchmarks) the *Regulation on indices used as benchmarks in financial instruments*

and financial contracts or to measure the performance of investment funds adopted by the European Union (the "EU") (the "EU BMR").[1] The EU BMR was brought into United Kingdom law as the UK BMR as part of the UK's transition out of the EU.[2] The Notice also notes that the provisions of Annex II of the EU BMR closely track the *Principles for Oil Price Reporting Agencies* published in October 2012 by the International Organization of Securities Commissions ("IOSCO") (the "IOSCO Oil PRA Principles"). As a result, the Proposal also tracks the IOSCO Oil PRA Principles.

ICE NGX recognizes the foundational role of the IOSCO Oil PRA Principles in the evolution of regulatory oversight of commodities benchmarks. Nevertheless, ICE NGX is of the view that the IOSCO Oil PRA Principles are directed primarily toward survey-style, "assessed" benchmarks. Commodity benchmarks that are assessed based on judgment and surveys of contributors' transactions - typically bilateral contracts executed over-the-counter ("OTC"), without any requirement for contribution of full data sets - can play an important role in certain commodity markets. ICE NGX is further of the view that some of the potential for manipulation of these survey-style, assessed benchmarks is inherently mitigated in respect of benchmarks that are determined based on transactions executed on an exchange. Mitigants include: the source of input data (i.e., transactions executed on the exchange), that trading on the exchange is monitored for market manipulation, and the processes for systematically collecting the input data and systematically calculating the benchmark.

ICE NGX appreciates the proposed distinction in MI 25-102 for designated regulated data commodity benchmarks, and strongly supports retaining that concept in Part 8.1 to facilitate appropriate regulation of designated commodity benchmarks determined on the basis of transactions executed on an exchange.

Nevertheless, ICE NGX is also of the view that some of the same safeguards are present in commodity benchmarks determined based on physically settled transactions executed via regulated broker, where the benchmark methodology does not involve expert judgement in the ordinary course. Specifically, the type of input data (i.e., all executed transactions that are, in normal course, physically settled) and the systematic processes for collecting input data and calculating the benchmark can be helpful mitigants against some of the selective reporting issues and potential attempted manipulation that may occur with a survey-style, assessed benchmark. ICE NGX encourages the Authorities to contemplate, in the guidance or in a future CSA notice, that exemptions from certain requirements in Part 8.1 may be appropriate for a designated commodity benchmark that is determined based on physically settled transactions executed via regulated broker where the transaction data is input and calculated systematically and the methodology does not involve expert judgement in the ordinary course.

Designation of commodity benchmarks

The Notice states that the Authorities do not currently intend to designate any commodity benchmarks. Nevertheless, it should be anticipated that administrators of commodity benchmarks

[1] Consolidated version, as of 10/12/ 2019, is available online at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R1011- 20191210&from=EN.
[2] See the website of the UK Financial Conduct Authority, Benchmarks page, online at https://www.fca.org.uk/markets/benchmarks.

may seek designation under MI 25-102, because such administrators may view designation as important from a competitive perspective relative to other benchmarks in a particular market. Accordingly, ICE NGX recommends that the Authorities provide guidance on their expectations in considering an application for designation, including with respect to the minimum thresholds of absolute transaction volume or estimated proportionate volume of the relevant market, that a commodity benchmark represents. That said, ICE NGX's comment below in respect of clause 19.(1)(a)(ii)(B) notes the difficulties with estimating the overall size of a market for which a benchmark administrator may not have complete information.

Furthermore, we expect that the Authorities will publish notice of an application for designation of a commodity benchmark or for designation of a benchmark administrator of a commodity benchmark. Public notice should be required regardless of whether the application for designation is made or initiated by the benchmark administrator, by the relevant regulator or securities regulatory authority, or by any other person. ICE NGX believes that such public notice may help mitigate some of the competitive concerns discussed in this letter.

Comments on the Proposed Amendments

Section 11 - Reporting of contraventions

ICE NGX believes that the application of subsection 11(1) in respect of designated commodity benchmarks goes beyond what should be required to establish equivalence with Annex II of the EU BMR. We acknowledge that subsection 11(1) does not apply with respect to regulated-data benchmarks, including regulated-data commodity benchmarks. However, the corresponding requirement in the EU BMR does not apply with respect to regulated data benchmarks or to commodity benchmarks regulated under Annex II of the EU BMR. ICE NGX encourages the Authorities to align with the EU BMR by exempting designated commodity benchmarks from the application of subsection 11(1).

If the Authorities do not align with the EU BMR on this point and section 11 is applied to designated commodity benchmarks as proposed, ICE NGX asks the Authorities to limit the scope of subsections 11(1) and (2) by focusing the requirement on monitoring the input data for the designated commodity benchmark(s) that are administered by the designated benchmark administrator.

Section 19. - Benchmark Statement

ICE NGX acknowledges that the proposed approach is to apply certain baseline requirements to designated commodity benchmarks in a standardized manner across all types of designated benchmarks. However, ICE NGX is of the view that certain requirements in section 19 are duplicative, overly granular and are not appropriate for the regulation of commodity benchmarks and in particular regulated data commodity benchmarks. ICE NGX encourages the Authorities to provide additional guidance in 25-102 CP on the expected detail or content of each of the required fields.

Moreover, ICE NGX encourages the Authorities to either (i) exempt from the application of section 19 a designated regulated data commodity benchmark, or (ii) create a distinct, streamlined provision in Part 8.1 that would apply to designated commodity benchmarks, with appropriate

exemptions for designated regulated data commodity benchmarks. If option (ii) is the preferred approach, ICE NGX further submits that certain requirements are not appropriate for designated regulated data commodity benchmarks or for designated commodity benchmarks determined on the basis of transactions executed on via regulated broker. Specifically, ICE NGX notes the following.

19.(1)(a)(ii)(B) - This provision requires a designated benchmark administrator to indicate, in writing for public consumption, "the dollar value of the part of the market or economy the designated benchmark is intended to represent". We read this as requiring the benchmark administrator to make a written statement on the size of the overall relevant market - including all market activity that is not included in the data on which the benchmark is determined. Absent publicly available data, ICE NGX believes it is not appropriate to require a benchmark administrator to indicate, in writing, the size of a market for which it does not have full information. The administrator of a benchmark based on executed transactions has information on the size of market activity represented by those transactions; it may not, however, have information on transactions that are executed outside of its market and for which public reporting is not available. Further, a requirement to measure and publicly state the size of the relevant overall market, or the proportionate volume of the overall market that is included in the calculation of the benchmark, may lead to different benchmark administrators using different measures of the relevant market or their proportion thereof.

If the above interpretation is incorrect and the requirement is to publicly state the dollar value of the part of the market that is included in the calculation of the benchmark, and not the dollar value of the overall market, ICE NGX encourage the Authorities to clarify this in 25-102 CP, or at least in the public summary of responses to the comments on the Proposal.

19.(1)(b) - As part of the benchmark statement, this provision requires a benchmark administrator to explain the circumstances in which the designated benchmark might, in the opinion of a reasonable person, not accurately and reliably represent that part of the market or economy the designated benchmark is intended to represent. ICE NGX submits that this provision is an unnecessary regulatory burden in respect of a designated regulated data commodity benchmark. If the benchmark administrator clearly discloses (i) the methodology and (ii) the market activity represented in each determination of the benchmark, market participants will have sufficient information to make their own determination of whether the benchmark adequately represents the part of the market that the designated benchmark is intended to represent.

19.1(c) - ICE NGX submits that the requirements of this paragraph are duplicative of the requirements relating to disclosure of the methodology. We acknowledge the value gained by the market from setting out the methodology, including methodology related to the exercise of expert judgement. However, duplicative disclosure requirements do not add additional value for market participants and create an additional risk of divergence between documents.

19.1(e) - This provision requires the benchmark statement to provide notice that factors, including external factors beyond the control of the designated benchmark administrator, could necessitate changes to, or the cessation of, the designated benchmark. ICE NGX submits that the benefit of this requirement to designated commodity benchmark users does not outweigh the additional regulatory burden. In light of the requirement in section 17(2) to publish and seek comment on any significant change to the methodology of a designated commodity benchmark, it is unclear

what additional risk paragraph 19.1(e) is intended to mitigate. The users of a designated commodity benchmark are sophisticated market participants, that will carefully select their preferred benchmark from a number of pricing tools available in the market. These sophisticated users are capable of determining on their own that changes to or the cessation of a benchmark may be necessary.

Section 40.1 Definition of commodity benchmark

ICE NGX does not believe that the concept of "intangible commodity," as currently proposed, appropriately distinguishes between (a) instruments and products that are closely related to the functioning of the physical commodity market - in particular, the physical energy commodity market - and (b) cryptocurrencies and other digital assets that are not closely related to the functioning of the physical commodity market.

Please see our response to Question 1 below under Responses to selected specific questions of the Authorities relating to the Proposed Amendments for more detail.

Section 40.3 - Provisions of this Instrument not applicable to designated commodity benchmarks

ICE NGX encourages the Authorities to improve the readability of MI 25-102 by specifying in section 40.3 that Divisions 2 and 3 of Part 8 are not applicable to designated commodity benchmarks.

40.8(2)(a) - Expected input data

With respect to designated regulated data commodity benchmarks, ICE NGX is of the view that the default expectation of a methodology should be that all executed transactions that qualify as input data for a particular determination should be included in the determination. ICE NGX encourages the authorities to state this expectation in paragraph 40.8(2)(a) or in the related guidance in 25-102 CP.

40.8(2)(d) and (e) - Quality and integrity of the determination of a designated commodity benchmark

ICE NGX is of the view that the policies and procedures required under these paragraphs are not relevant in respect of designated regulated data commodity benchmarks. To streamline the compliance burden, ICE NGX encourages the Authorities to explicitly exempt these types of designated commodity benchmarks from the application of these paragraphs.

40.10 - Integrity of the process for contributing input data

ICE NGX believes that section 40.10 is not relevant or appropriate to designated regulated data commodity benchmarks, as all the input data for such a benchmark is from transactions executed on an exchange and collected systematically. To streamline the compliance burden, ICE NGX encourages the Authorities to exempt designated regulated data commodity benchmarks from the application of this section.

Further, ICE NGX encourages the Authorities to clarify their expectations in 25-102 CP regarding how section 40.10 would apply in respect of a designated commodity benchmark determined solely on the basis of transactions executed via regulated broker where the transaction data is collected systematically for input into the determination of the designated commodity benchmark.

40.11(3) - Policies and procedures reasonably designed to ensure the integrity and reliability of the determination of a designated commodity benchmark

Please refer to ICE NGX's comments in this response regarding the additional regulatory burden from incremental policies and procedures requirements. ICE NGX encourages the Authorities to review the paragraphs in subsection 40.11(3) with an eye to appropriately reducing the regulatory burden in respect of a designated commodity benchmark.

40.11(3)(a) and (c) - ICE NGX submits that these provisions go beyond what is required to establish a regulatory regime that satisfies the dual objectives of the Authorities, namely to promote the continued provision of commodity benchmarks that are free from manipulation and to facilitate a determination of equivalence with certain foreign regulations. Specific requirements in respect of, for example, succession planning, are not required under BMR, and inappropriately place the Authorities in the position of regulating the effective management of a designated benchmark administrator's human resources.

40.11(3)(e) - ICE NGX submits that the requirement in paragraph 40.11(3)(e) is unduly burdensome in a normal course determination of a designated regulated data commodity benchmark, where the input data (i.e., executed transactions) is collected systematically for input into the determination. By normal course, ICE NGX means each determination where the minimum volume thresholds set out in the methodology disclosed under section 40.5 are met and no expert judgement or alternative data was involved in the determination.

ICE NGX encourages the Authorities to adopt a risk-based approach to balance the benefit of senior level approvals of determinations and processes with the regulatory burden imposed by requiring senior-level approval of each determination. This is particularly relevant where the same input data and processes are used to calculate a number of benchmarks - i.e., a benchmark "family". Specifically, we encourage the Authorities to clarify that, for a designated regulated data commodity benchmark where the input data (i.e., executed transaction data) is collected systematically for input into the determination, senior-level approval of each determination

- may be made at the benchmark family level, rather than at the level of each specific designated benchmark within the same market and calculated based on the same input data; and

- is required at the level of each specific designated benchmark on an exceptions basis only - i.e., in the case of a particular determination that was based on alternative data, expert judgement or any other input permitted under the methodology as disclosed under section 40.5, including as a result of transaction volume that does not meet the minimum volume thresholds set out in the methodology.

40.14(3) - Publication of assurance report on designated benchmark administrator

ICE NGX is of the view that the 10-day publication period is unreasonably short. We note that both the EU BMR and UK BMR require publication within three months after the audit is completed. ICE NGX encourages the Authorities to align the required publication timing to the corresponding requirement in the EU BMR and UK BMR, in respect of designated commodity benchmarks or at least certain types thereof taking a risk-based approach.

Responses to selected specific questions of the Authorities relating to the Proposed Amendments

Interpretation

1. The definition for "commodity benchmark" excludes a benchmark that has, as an underlying interest, a currency or a commodity that is intangible. Is the scope of the proposed definition, and the guidance in the CP, appropriate to cover the commodity benchmark industry in Canada? Please explain with concrete examples.

ICE NGX believes it is important for administrators of commodity benchmarks to have a consistent set of regulations for designated commodity benchmarks based on trades in the physical commodity and those based on trades in products that are closely related to the functioning of the physical commodity market.

We do not think that whether a particular commodity is intangible or can be delivered digitally are appropriate characteristics for distinguishing between (a) instruments and products that are closely related to the functioning of the physical commodity market and (b) cryptocurrencies and other digital assets that are not closely related to the functioning of a physical commodity market.

For example, the following products are actively traded and are closely related to the functioning of the physical commodity market. However, the proposed "tangible/ intangible" distinction in the Proposal means a benchmark based on these products would not qualify for regulation under Part 8.1 alongside benchmarks based on the related physical commodity market.

- environmental commodities such as carbon credits, emissions offsets and renewable energy certificates;
- transportation and capacity commodities such as shipping capacity, pipeline capacity and, in the power markets, financial transmission rights, congestion revenue rights and similar instruments;
- storage commodities such as natural gas storage and carbon capture storage; and
- weather and climate.

ICE NGX believes that a benchmark based on any of the above, if regulated, should be regulated as a designated commodity benchmark in line with a benchmark for the physical commodity market to which it closely relates.

To that end, ICE NGX encourages the Authorities to look to the purpose of the underlying commodity, or the purpose of transacting in the underlying commodity. For example, a commodity whose purpose is the transport or storage of another commodity (e.g., energy or grains), or the reduction of environmental harm from the production or consumption of another commodity, should be grouped with that other commodity for purposes of the regulation of designated benchmarks.

If the aim of the Authorities is to carve out digital currencies and digital coins, ICE NGX believes it is incumbent on the Authorities to more clearly define the types of benchmarks and underlying instruments that are intended to be excluded from the designated commodity benchmarks regulatory regime.

Applicable Requirements from the Financial Benchmarks Regime

2. Despite a different proposed regime for commodity benchmarks, the Authorities expect that certain requirements, applicable to financial benchmarks, would also be applicable, sometimes with minor modifications, to commodity benchmarks. These include, for example, the requirements to report contraventions (section 11), the requirement for a control framework (section 40.4), and governance and control requirements (section 40.11). Are these requirements appropriate in the context of commodity benchmarks? Please explain with concrete examples.

ICE NGX recognizes that a set of baseline requirements applied in a standard manner in respect of all designated benchmarks, regardless of type of benchmark, will promote consistency and best practices among benchmark administrators. Nevertheless, ICE NGX is of the view that certain of the standard requirements are unnecessarily prescriptive and difficult to comply with, at least in respect of regulated data commodity benchmarks. ICE NGX included these comments related to particular provisions above under Comments on the Proposed Amendments.

Dual Designation as a Commodity Benchmark and a Regulated-Data Benchmark

4. Subsection 40.2(4) provides for certain exemptions for benchmarks dually designated as commodity and regulated-data benchmarks, where such benchmarks are determined from transactions in which the transacting parties, in the ordinary course of business, make or take physical delivery of the commodity. Is carving out such a subset of dually-designated benchmarks necessary for appropriate regulation of commodity benchmarks in Canada? If so, are the exemptions provided for, which generally mirror exemptions for regulated-data benchmarks from Parts 1 to 8 requirements, appropriate? Please explain with concrete examples.

ICE NGX strongly agrees with the proposed approach of carving out a subset of commodity benchmarks determined based on transactions executed on an exchange, in which the transacting parties in the ordinary course of business make or take physical delivery of the commodity. This risk-based approach appropriately reduces regulatory burden in those areas while still appropriately addressing the regulatory concerns applicable to survey-style indices that are based on assessments of bilateral, OTC transaction information. Nevertheless, as discussed elsewhere in this letter, ICE NGX believes that designated regulated data commodity benchmarks should be exempted from the application of certain additional provisions.

Further, ICE NGX encourages the Authorities to consider flexibility in the application of subsection 40.2(3), in order to facilitate appropriate, risk-based regulation under Part 8.1 of benchmarks based on trading in financially-settled products directly tied to the pricing or functioning of a physical commodity market.

Assurance Report on Designated Benchmark Administrator

9. Subsection 40.14(2) requires a designated benchmark administrator of a designated commodity benchmark, whether or not the benchmark is also designated as a critical benchmark, to engage a public accountant to provide a limited or reasonable assurance report on compliance once in every 12-month period. In contrast, pursuant to subsection 36(2), an administrator of a designated interest rate benchmark is required to engage a public accountant to provide such a report, once in every 24-month period, albeit a report is required 6 months after the introduction of a code of conduct for benchmark contributors. Given the general risks raised by the activities of administrators of commodity benchmarks versus of interest rate benchmarks, are the proposed requirements appropriate? Please explain your response.

ICE NGX is of the view that a designated regulated data commodity benchmark should not be subject to a more frequent reasonable assurance report requirement than is applied to designated financial benchmarks.

Where a commodity benchmark is determined based on transactions executed on an exchange, where the transaction data is collected systematically for input into the determination of the benchmark, there is less likelihood of manipulation of the underlying transaction data. Accordingly, we believe that the additional regulatory burden of a more frequent assurance report requirement for designated regulated data commodity benchmarks would outweigh any incremental benefit to users of a designated regulated data commodity benchmark.

Concentration Risk

10. Pursuant to subsection 20(1), designated benchmark administrators of designated commodity benchmarks would be subject to certain obligations when they cease to provide a designated commodity benchmark. However, market users may potentially have more limited benchmarks to utilize for purposes of their transactions (concentration risk) where a designated benchmark administrator that administers a number of designated commodity benchmarks unexpectedly delays in providing or ceases to provide those benchmarks. Do you think that additional requirements should be added under Part 8.1 to address this concentration risk? If yes, what requirements should be added?

ICE NGX believes that the requirements under subsection 20(1) strike an appropriate balance for designated benchmark administrators, including in respect of commodity benchmarks. We note that the potential cessation of certain financial benchmarks could have farther-reaching effects than the cessation of commodity benchmarks generally. Moreover, ICE NGX is of the view that a market participant who utilizes a benchmark for purposes of their transactions bears the responsibility to ensure it has made provision for a fallback, or backup, benchmark in its contracts.

Anticipated Costs and Benefits

12. The Notice sets out the anticipated costs and benefits of the Proposed Amendments (in Ontario, additional detail is provided in Annex F). Do you believe the costs and benefits of the Proposed Amendments have been accurately identified and are there any other significant costs or benefits that have not been identified in this analysis? Please explain and/or identify furthers costs or benefits.

ICE NGX submits that the anticipated costs and benefits analysis does not adequately assess expected potential costs. The brief discussion relies in large part on (i) the Authorities' current intention to not designate any commodity benchmarks, and (ii) the Proposal being based on the IOSCO PRA Principles which, as discussed above, are directed primarily toward assessed, survey-style commodity benchmarks. If an analysis of anticipated costs and benefits is to be provided, the analysis should focus on the costs of seeking designation of a benchmark administrator and a commodity benchmark and ongoing compliance with the rule.

With respect to the further analysis provided as local matters in Ontario, we note that the analysis focuses on incremental costs to a benchmark administrator that is already subject to regulation in the EU or UK, and not on the anticipated costs to a commodity benchmark administrator located in Canada that is not already subject to regulation in the EU or UK.

The Notice and the anticipated costs and benefit analysis appear to not anticipate the potential competitive impact of establishing a regime for regulating designated commodity benchmarks, even where there is no current intention to designate a commodity benchmark. It should be anticipated that the establishment of a regulatory regime may elicit applications for regulatory oversight for competitive purposes, particularly absent an indication of minimum absolute or proportionate transaction volume thresholds in order for the Authorities to consider an application for designation.

Conclusion

ICE NGX appreciates the opportunity to comment on the Proposal. ICE NGX would be pleased to discuss any of the issues in our comments with the Authorities and their staff as the Authorities consider the final amendments to MI 25-102 in respect of commodity benchmarks.

Respectfully submitted,

Greg Abbott
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