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⁽¹⁾ Text with EEA relevance.

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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⁽¹⁾ Text with EEA relevance.

II

(Non-legislative acts)

REGULATIONS

COMMISSION DELEGATED REGULATION (EU) 2018/1637

of 13 July 2018

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the procedures and characteristics of the oversight function**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 ⁽¹⁾, and in particular Article 5(5) thereof,

Whereas:

- (1) Article 5 of Regulation (EU) 2016/1011 requires administrators of benchmarks to establish a permanent and effective oversight function which should be carried out by a separate committee or by means of another appropriate governance arrangement.
- (2) Administrators have the discretion to design the most appropriate oversight function for the benchmarks they provide to fulfil the requirements of Article 5 of Regulation (EU) 2016/1011. This Regulation sets out a non-exhaustive list of appropriate governance arrangements.
- (3) Entrusting external stakeholders with an oversight function can provide valuable expertise and their participation can increase the effectiveness of the oversight function. Conflicts of interest within that oversight function may arise due to the conflicting interests of those members or due to relationships between members of the oversight function and their clients or other stakeholders. To mitigate such conflicts, independent members that are free from conflicts of interest should, where possible, be included in those overseeing critical benchmarks due to their importance for market integrity, financial stability, consumers, the real economy and the financing of households and businesses in Member States. Where such independent members are not required in accordance with this Regulation, administrators should adopt other procedures to address potential conflicts of interest such as excluding members from certain discussions or removing voting rights of specific members.
- (4) Persons that are directly involved in the provision of the benchmark may sit on the oversight function in a non-voting capacity as they can provide useful insight into the work of the administrator. Their status as non-voting members is appropriate to ensure that the administrator does not hold undue influence over the decisions of the oversight function.
- (5) The oversight function can include committees with specific, dedicated competencies, for different benchmarks or families of benchmarks or it can include multiple functions carrying out different tasks when persons with appropriate expertise cannot all sit on one committee, for example when they are based in different geographical

⁽¹⁾ OJ L 171, 29.6.2016, p. 1.

regions. Those oversight functions need to have a single natural person or a committee in charge of the direction of the oversight function and responsible for interaction with the management body of the administrator and with the competent authority to facilitate the centralisation of oversight.

- (6) For some lesser used and less vulnerable significant benchmarks, it may be possible for a single natural person to act as the oversight function, where the natural person can commit an appropriate amount of time to the oversight of the relevant benchmarks. Where the oversight function is a natural person, it is exempt from certain procedures which are only appropriate for a committee. Due to the high degree of use of critical benchmarks and the risks they might cause in certain instances, critical benchmarks should not be overseen by a natural person.
- (7) To fulfil the responsibilities of the oversight function, members need to have expert knowledge of the benchmark provision process but also of the underlying market that the benchmark seeks to measure. Such expertise may be sourced from users and contributors active in the markets or from providers of regulated data. An oversight function may benefit from the expertise of contributors, as long as appropriate measures are taken to ensure the absence of conflicts of interest, and users have an interest in ensuring the benchmark is robust. It is therefore appropriate that contributors and users be considered as members for such benchmarks.
- (8) The oversight function is an essential tool for managing conflicts of interest at the level of the administrator and in order to ensure the integrity of the function, persons that have been sanctioned for breaches of rules on financial services, in particular manipulation or attempted manipulation under Regulation (EU) No 596/2014 of the European Parliament and of the Council ⁽¹⁾, should be prohibited from becoming members of an oversight function.
- (9) External stakeholders can have an interest in the benchmark where it is widely used in their markets and they can provide additional expertise. Administrators may establish procedures that allow for them to participate as observers to the oversight function.
- (10) Independent committees cannot be completely separated from the organisation of the administrator as the final decisions with regards to the business of the administrator lie with the management body, and a separate committee could take decisions without fully appreciating the potentially detrimental impact of such decisions on the business of the administrator. An oversight function embedded within the organisation of the administrator, or of the parent company of the group to which it belongs to, is therefore best placed to challenge the decisions of the administrator with respect to the benchmarks it provides.
- (11) In order for the oversight body to perform its function assigned to it by Regulation (EU) 2016/1011, it is important that it has the ability to fully assess and to challenge the decisions of the management body of the administrator and that, in case of a disagreement, the deliberations of the oversight function in this regard are recorded.
- (12) Procedures on the criteria for selection of members and observers, on conflicts of interest management and, in case the oversight function is a committee, procedures covering dispute resolution are necessary to ensure that the oversight function can operate without impediment. There may be other procedures appropriate to the oversight function for certain types of benchmarks or administrators which are not set out in this Regulation but are necessary and appropriate for the correct governance of their benchmarks. Administrators may therefore introduce alternative procedures provided that those procedures achieve the appropriate level of oversight.
- (13) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (14) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 ⁽²⁾.
- (15) Administrators should be given sufficient time to ensure compliance with the requirements of this Regulation. This Regulation should therefore start to apply two months after it enters into force,

⁽¹⁾ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).

⁽²⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

Article 1

Composition of the oversight function

1. The structure and composition of the oversight function shall be proportionate to the ownership and control structure of the administrator and shall, as a general rule, be determined in accordance with one or more appropriate governance arrangements listed in the Annex to this Regulation. Administrators shall provide competent authorities with a justification for any deviation from such arrangements.
2. Where the benchmark is a critical benchmark, the oversight function shall be carried out by a committee with at least two independent members. Independent members shall be natural persons sitting on the oversight function who are not directly affiliated with the administrator other than through their involvement in the oversight function, and shall have no conflicts of interest, particularly at the level of the relevant benchmark.
3. The oversight function shall be composed of members who together have the skills and expertise appropriate to the oversight of the provision of a particular benchmark and to the responsibilities that the oversight function is required to fulfil. Members of the oversight function shall have appropriate knowledge of the underlying market or economic reality that the benchmark seeks to measure.
4. Administrators of regulated-data benchmarks shall include, as members of the oversight function, representatives from the entities listed in the definition of a regulated-data benchmark at point (a) of Article 3(1)(24) of Regulation (EU) 2016/1011 and, where applicable, from entities contributing net asset values of investment funds to regulated-data benchmarks. Administrators shall provide competent authorities with a justification for any exclusion of representatives from these entities.
5. Where a benchmark is based on contributions and representatives of its contributors or of supervised entities that use the benchmark are members of the oversight function, the administrator shall ensure that the number of members with conflicts of interest does not amount to or exceed a simple majority. Before the appointment of members, administrators shall also identify and take into account the conflicts arising from relationships between potential members and other external stakeholders, in particular resulting from a potential interest at the level of the relevant benchmarks.
6. Persons directly involved in the provision of the benchmark that may be members of the oversight function, shall have no voting rights. Representatives of the management body shall not be members or observers but may be invited to attend meetings by the oversight function in a non-voting capacity.
7. Members of the oversight function shall not include persons who have been subject to sanctions of administrative or criminal nature relating to financial services, in particular manipulation or attempted manipulation under Regulation (EU) No 596/2014.

Article 2

Characteristics and positioning of the oversight function

1. The oversight function shall constitute a part of the organisational structure of the administrator, or of the parent company of the group to which it belongs, but be separate from the management body and other governance functions of the benchmark administrator.
2. The oversight function shall assess, and where appropriate challenge, the decisions of the management body of the administrator with regards to benchmarks provision to ensure the fulfilment of the requirements of Regulation (EU) 2016/1011. Without prejudice to point (i) of Article 5(3) of Regulation (EU) 2016/1011, the oversight function shall address all recommendations on benchmark oversight to the management body.
3. Where the oversight function becomes aware that the management body has acted or intends to act contrary to any recommendations or decisions of the oversight function, it shall record that fact clearly in the minutes of its next meeting, or in its record of decisions where an oversight function has been established in accordance with the third governance arrangement set out in the Annex to this Regulation.

Article 3

Procedures governing the oversight function

1. An oversight function shall have procedures at least relating to the following areas:
 - (a) its terms of reference, the frequency of its regular meetings, the recording of minutes of the meetings and of its decisions and the periodic information sharing with the management body of the administrator;

- (b) the criteria to select its members, including criteria to evaluate the potential members' expertise, skills and whether they can meet the time commitments required. Those criteria shall take into account in particular potential members' role in any other oversight function;
 - (c) the criteria to select observers who may be permitted to join a meeting of the oversight function;
 - (d) the election, nomination or removal and replacement of its members;
 - (e) where applicable, the criteria for choosing the person or committee responsible for its overall direction and coordination and for acting as the contact point for the management body of the administrator and for the competent authority, in accordance with the appropriate governance arrangements for oversight functions consisting of multiple committees as set out in the Annex;
 - (f) the public disclosure of summary details of its members, along with any declarations of conflicts of interest and of any measures taken to mitigate them;
 - (g) the suspension of voting rights of external members for decisions that would have a direct business impact on the organisations they represent;
 - (h) requiring members to disclose any conflict of interest before discussion of an agenda item during meetings of the oversight function and their recording in the minutes of the meeting;
 - (i) the exclusion of members from specific discussions in respect of which they have a conflict of interest and the recording of the exclusion in the minutes of the meeting;
 - (j) its access to all documentation necessary to carry out its duties;
 - (k) the management of disputes within it;
 - (l) measures to be taken in respect of breaches of the code of conduct;
 - (m) the notification to the competent authority of any suspected misconduct by contributors or by the administrator and of any anomalous or suspicious input data;
 - (n) the prevention of improper disclosure of confidential or sensitive information received, produced or discussed by the oversight function.
2. Where the oversight function is carried out by a natural person:
- (a) points (e), (g), (i), and (k) of paragraph 1 do not apply;
 - (b) the administrator shall appoint an alternate appropriate body or natural person to ensure that duties of the oversight function can be consistently carried out in case of the absence of the person responsible for the oversight function.

Article 4

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 25 January 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 July 2018.

For the Commission
The President
Jean-Claude JUNCKER

ANNEX

Non-exhaustive list of appropriate governance arrangements

1. An independent oversight committee consisting of a balanced representation of stakeholders including supervised entities that use the benchmark, contributors to the benchmarks and other external stakeholders such as market infrastructure operators and other input data sources, as well as independent members and staff of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities;
 2. Where the administrator is not wholly owned or controlled by contributors to the benchmark or supervised entities that use it and no other conflicts of interest exist at the level of the oversight function, an oversight committee shall include:
 - (a) at least two persons involved in the provision of the relevant benchmarks in a non-voting capacity;
 - (b) at least two members of staff representing other parts of the organisation of the administrator that are not directly involved in the provision of the relevant benchmarks or any related activities; or
 - (c) where such appropriate staff members are not available, at least two independent members;
 3. Where a benchmark is not critical and unless its complexity, degree of use or vulnerability indicate otherwise, a natural person who is a staff member of the administrator or any other natural person whose services are placed at the administrator's disposal or under the control of the administrator, who is not directly involved in the provision of any relevant benchmark and is free from conflicts of interest, particularly those resulting from a potential interest in the level of the benchmark;
 4. An oversight function consisting of multiple committees, each responsible for the oversight of a benchmark, type of benchmarks or family of benchmarks, provided that a single person or committee is designated as responsible for the overall direction and coordination of the oversight function and for interaction with the management body of the benchmark administrator and the competent authority;
 5. An oversight function consisting of multiple committees, each performing a subset of the oversight responsibilities and tasks, provided that a single person or committee is designated as responsible for the overall direction and coordination of the oversight function and for interaction with the management body of the benchmark administrator and the competent authority.
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COMMISSION DELEGATED REGULATION (EU) 2018/1638**of 13 July 2018**

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further how to ensure that input data is appropriate and verifiable, and the internal oversight and verification procedures of a contributor that the administrator of a critical or significant benchmark has to ensure are in place where the input data is contributed from a front office function

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 ⁽¹⁾, and in particular the fourth subparagraph of Article 11(5) thereof,

Whereas:

- (1) Article 11(1) of Regulation (EU) 2016/1011 requires the input data used for a benchmark to be appropriate to represent accurately and reliably the market or economic reality that the benchmark is intended to measure, and it also requires the data to be verifiable. In addition, where the input data is contributed from a front office function, Article 11(3)(b) of that Regulation requires the administrator to ensure that the contributor has adequate internal oversight and verification procedures in place.
- (2) The correct calculation of a benchmark requires not only that the accurate values of the input data are submitted but also that they are in the unit of measurement and reflect the relevant features of the underlying assets.
- (3) Whether input data is verifiable is linked to its level of accuracy, which in turn is highly dependent on the type of input data used. Input data which is neither transaction data nor comes from a regulated data source listed in point (24) of Article 3(1) of Regulation (EU) 2016/1011 may still meet the requirement of being verifiable if sufficient information is available to the administrator to enable it to conduct sufficient checks on the data. The administrator should therefore be required to ensure that it has available to it the information necessary to enable it to carry out the appropriate checks.
- (4) In order to ensure that input data is appropriate and verifiable, the administrator should be required to monitor input data on a regular basis, to a degree that reflects the vulnerability of the particular input data type. In the case of regulated data, existing regulation and supervision of the relevant data provider already ensure the integrity of regulated data. That type of data should therefore be subject to less extensive monitoring requirements. Other types of input data require more verification and should be subject to more extensive checks, notably input data that is not transaction data and especially if it is contributed from a front-office function.
- (5) When input data is contributed, one important monitoring check is to ensure that the contributions are provided within a time-period set by the administrator. This is to ensure consistency between contributions from different contributors. When input data is not contributed, the time at which the input data is considered also has to be checked in order to ensure consistency between different input data. The administrator should therefore be required to check that input data is contributed, or selected from a specified source, within the time-period set by it.
- (6) It is of particular importance that core features such as the currency, the tenor and the time to maturity of the underlying asset or the types of counterparties as specified by the benchmark methodology are properly checked.

⁽¹⁾ OJ L 171, 29.6.2016, p. 1.

- (7) Effective internal oversight of the contribution of input data from a front office function relies on the establishment and maintenance of appropriate structures within the contributor's organisation. These structures should normally include three levels of control unless the size of the contributor's organisation does not reasonably allow for that number. The first level of control should include processes to ensure the effective checking of input data.
- (8) Contributions from a front office function present a particular risk as a result of the inherent conflict of interest that exists between the commercial role of the front office and its role in contributing input data for a benchmark. It is therefore important for the contributor to establish, maintain and operate a conflict of interest policy as part of its second level of control, and to perform regular checks on the input data used. In addition, a notable tool that may be useful in bringing to light and escalating any misconduct, or in detecting activities potentially affecting the integrity of the benchmark, is the establishment of a whistle-blowing procedure that permits any staff member to report any instance of misconduct to the relevant compliance function or other appropriate internal function. The administrator should therefore be satisfied that the internal oversight and verification procedures of a contributor include the establishment, maintenance and operation of a conflict of interest policy and the establishment and maintenance of a whistle-blowing procedure.
- (9) This Regulation applies to administrators of critical and significant benchmarks. In accordance with the principle of proportionality, it avoids putting an excessive burden on administrators of significant benchmarks by allowing these administrators to choose to apply the conflict of interest requirements solely for actual or potential conflicts of interest that are or would be material. In addition, administrators should be afforded additional discretion in how they ensure internal oversight and verification procedures at contributor level. In particular, they should be allowed to relax certain requirements for those procedures, having regard to the nature, scale and complexity of the contributor's organisation.
- (10) Administrators should be given sufficient time to ensure compliance with the requirements of this Regulation. This Regulation should therefore start to apply two months after it enters into force.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (12) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽¹⁾,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

This Regulation does not cover or apply to administrators of non-significant benchmarks.

Article 2

Ensuring appropriate and verifiable input data

1. The administrator of a benchmark shall ensure that it has available to it all information necessary to enable it to check the following matters in relation to any input data that it uses for the benchmark, insofar as these matters are applicable to the input data in question:
 - (a) whether the submitter is authorised to contribute the input data on behalf of the contributor in accordance with any requirement for authorisation under Article 15(2)(b) of Regulation (EU) 2016/1011;
 - (b) whether the input data is provided by the contributor, or selected from a source specified by the administrator, within the time-period prescribed by the administrator;

⁽¹⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (c) whether the input data is provided by the contributor in a format specified by the administrator;
- (d) whether the source of the input data is one of the sources listed Article 3(1)(24) of Regulation (EU) 2016/1011;
- (e) whether the source of the input data is reliable;
- (f) whether the input data meets the requirements set out in the methodology of the benchmark, in particular the requirements on the currency or unit of measurement, the tenor, and the types of counterparties;
- (g) whether any relevant thresholds for the quantity of the input data and any relevant standards for the quality of the input data are met in accordance with the methodology;
- (h) whether the priority of use of different types of input data is applied in accordance with the methodology;
- (i) whether any discretion or judgement exercised in contributing the input data is exercised in accordance with the clear rules set out in the methodology and with the policies required to be established by the code of conduct for the benchmark.

2. Administrators shall conduct the checks listed in paragraph 1 on a regular basis. Administrators of critical benchmarks shall conduct the checks listed in points (a), (b), (c) and (d) of paragraph 1 prior to any publication of the benchmark or any instance when the benchmark is made available to the public.

Article 3

Internal oversight and verification procedures of a contributor

1. The internal oversight and verification procedures of a contributor that the administrator has to ensure are in place in compliance with Article 11(3)(b) of Regulation (EU) 2016/1011 shall include at least the following:

- (a) establishment and maintenance of an internal function to serve as the first level of control for the contribution of input data and to be responsible for carrying out the following duties:
 - (i) undertaking an effective check of input data prior to its contribution, including ensuring compliance with any requirement for the validation of input data to which the contributor is subject pursuant to Article 15(2)(d)(iii) of Regulation (EU) 2016/1011, and reviewing input data prior to its contribution with respect to its integrity and accuracy;
 - (ii) checking that the submitter is authorised to contribute input data on behalf of the contributor in accordance with any requirement imposed under Article 15(2)(b) of Regulation (EU) 2016/1011;
 - (iii) ensuring that access to contributions of input data is restricted to persons involved in the contribution process, except where access is necessary for audit purposes, investigation purposes or purposes required by law;
- (b) establishment and maintenance of an internal function to serve as the second level of control for the contribution of input data and to be responsible for carrying out the following duties:
 - (i) conducting a review of input data after its contribution, independent of the review carried out by the first level control function, in order to confirm the integrity and accuracy of the contribution;
 - (ii) establishing and maintaining a whistle-blowing procedure that includes appropriate safeguards for whistle-blowers;
 - (iii) establishing and maintaining procedures for the internal reporting of any attempted or actual manipulation of the input data, for any failure to comply with the contributor's own benchmark-related policies and for the investigation of such events as soon as they become apparent;
 - (iv) establishing and maintaining internal reporting procedures for reporting any operational problems in the contribution process as soon as they arise;
 - (v) ensuring regular presence in person of a staff member from the second level control function in the office area where the front office function is based;
 - (vi) maintaining oversight of relevant communications between front office function staff directly involved in contributing input data and also of relevant communications between such staff and other internal functions or external bodies;
 - (vii) establishing, maintaining and operating a conflict of interest policy that ensures:
 - the identification and disclosure to the administrator of actual or potential conflicts of interest concerning any of the contributor's front office function staff who are involved in the contribution process,

- the absence of any direct or indirect link between the remuneration of a submitter and the value of the benchmark, the value of specific submissions made or the performance of any activity carried on by the contributor that might give rise to a conflict of interest related to the contribution of input data to the benchmark,
 - a clear segregation of duties between front office function staff involved in contributing input data and other front office function staff,
 - a physical separation between front office function staff involved in contributing input data and other front office function staff,
 - effective controls over the exchange of information between front office function staff and other staff of the contributor involved in activities that may create a risk of conflicts of interest, insofar as the information being exchanged is information that may affect the input data contributed,
 - the existence of contingency provisions in case of temporary disruption of the controls regarding the exchange of information referred to in the fifth indent,
 - the taking of measures to prevent any person from exercising inappropriate influence over the way in which front office function staff involved in contributing input data carry out their activities;
- (c) establishment and maintenance of an internal function, independent from the first and second level control functions, to serve as the third level of control for the contribution of input data and to be responsible for performing checks, on a regular basis, on the controls exercised by the other two control functions;
- (d) procedures governing:
- (i) the means of cooperation and flow of information between the three control functions required by points (a), (b) and (c) of this paragraph;
 - (ii) regular reporting to the senior management of the contributor on the duties carried out by those three control functions;
 - (iii) communication to the administrator, upon request, of information requested by the administrator relating to the contributor's internal oversight and verification procedures.
2. The administrator may choose to waive any of the requirements specified in point (b)(v) or in the third, fourth or sixth indents of point (b)(vii) of paragraph 1, having regard to the following matters:
- (a) the nature, scale and complexity of the activities of the contributor;
 - (b) the likelihood of a conflict of interest arising between the contribution of input data to the benchmark and trading activity or other activities performed by the contributor;
 - (c) the level of discretion involved in the process of contribution.
3. Having regard primarily to the small size of a contributor's organisation and also to the matters listed in points (a), (b) and (c) of paragraph 2, the administrator may permit the contributor to have in place a simpler organisational control structure than the one required by paragraph 1. The simpler control structure shall, however, ensure that all the duties listed in points (a), (b) and (c) of that paragraph 1 are performed, except for any duties in respect of which a waiver is granted under paragraph 2. Points (i) and (ii) of point (d) of paragraph 1 shall be applied in a manner reflecting the simpler control structure.
4. An administrator of a significant benchmark may choose to apply the requirements specified in paragraph 1(b)(vii) in relation solely to actual or potential conflicts of interest that are or would be material conflicts of interest.

Article 4

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 25 January 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 July 2018.

For the Commission

The President

Jean-Claude JUNKER

COMMISSION DELEGATED REGULATION (EU) 2018/1639**of 13 July 2018****supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the elements of the code of conduct to be developed by administrators of benchmarks that are based on input data from contributors****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 ⁽¹⁾, and in particular the fourth subparagraph of Article 15(6) thereof,

Whereas:

- (1) Article 15 of Regulation (EU) 2016/1011 requires the administrator of a benchmark that is based on input data from contributors to develop a code of conduct for that benchmark clearly specifying the contributors' responsibilities with respect to the contribution of input data. If an administrator provides a family of benchmarks consisting of more than one benchmark based on input data from contributors, a single code of conduct may be developed for the family of benchmarks. Paragraph 2 of Article 15 of that Regulation lists elements that must be included, as a minimum, in each code of conduct developed under that Article. No code of conduct is required if the benchmark is a regulated-data benchmark as defined in Article 3(1)(24) of that Regulation.
- (2) In order to ensure that the benchmark is determined correctly, it is crucial that the input data provided by contributors has all the features required by the methodology and is complete. The code of conduct should therefore describe those features in sufficient detail and specify what data has to be taken into account by the contributor, what data the contributor may exclude and how the contributor is to transmit the input data to the administrator.
- (3) A key factor in ensuring the integrity of a benchmark based on input data contributions is that the persons appointed by a contributor to submit the input data have the correct knowledge, skills, training and experience to perform the role. The code of conduct should therefore contain provision requiring each contributor to undertake a number of checks in respect of those who are to become submitters, prior to authorising them as submitters.
- (4) The reliability of a benchmark depends to a large extent on the correctness of its input data. It is therefore crucial that contributors check data before and after submission for any suspicious entries and also to confirm compliance with the requirements of the code of conduct. The code of conduct should therefore contain provisions requiring contributors to carry out pre- and post-contribution checks of the data.
- (5) The risk of error or manipulation is arguably greatest in cases where contributors can exercise discretion in the contribution of input data. The code of conduct should therefore require contributors to establish policies that specify when, how and by whom discretion may be exercised.
- (6) The code of conduct should contain provisions requiring contributors to keep records of the data that was considered for each contribution and any related exercise of discretion. Such records are an essential tool in establishing whether a contributor has adhered to the policies required by the code of conduct which seek to ensure that all the relevant input data is provided.

⁽¹⁾ OJ L 171, 29.6.2016, p. 1.

- (7) The proper identification and management of conflicts of interest at the level of the contributors is a necessary step towards the integrity and accuracy of the benchmark. For this reason, the code of conduct should contain provisions requiring a contributor's systems and controls to include a register of conflicts of interest in which the contributor should record identified conflicts of interest and the measures taken to manage them.
- (8) In accordance with the principle of proportionality, this Regulation avoids putting an excessive administrative burden on administrators and contributors with respect to significant and non-significant benchmarks by allowing administrators of significant or non-significant benchmarks to develop codes of conducts that are less detailed than those required for critical benchmarks.
- (9) Administrators should be given sufficient time to prepare codes of conduct that comply with the requirements of this Regulation. This Regulation should therefore start to apply two months after it enters into force.
- (10) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (11) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽¹⁾,

HAS ADOPTED THIS REGULATION:

Article 1

Description of input data

The code of conduct to be developed by the administrator under Article 15(1) of Regulation (EU) 2016/1011 ('the code of conduct') shall include a clear description of, and requirements with respect to, at least the following matters concerning the input data to be provided:

- (a) the type or types of input data to be provided;
- (b) the required standards to be met regarding the quality and accuracy of the input data;
- (c) the minimum quantity of input data to be provided;
- (d) the order of priority, if any, in which the different types of input data are to be contributed;
- (e) the format in which the input data is to be provided;
- (f) the frequency of submission of the input data;
- (g) the timing of submission of the input data;
- (h) the procedures, if any, that each contributor is required to have in place for adjustments to and standardisation of the input data.

Article 2

Submitters

1. The code of conduct shall include provision ensuring that a person is only permitted to act as a submitter of input data on behalf of a contributor if the contributor is satisfied that the person has the necessary skills, knowledge, training and experience for the role.

2. The code of conduct shall describe the due diligence process that a contributor is required to undertake in order to be satisfied that a person has the necessary skills, knowledge, training and experience to submit input data on its behalf. The description of that process shall include a requirement to undertake checks to verify:

- (a) the person's identity;

⁽¹⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (b) the person's qualifications; and
 - (c) the person's reputation, including whether the person has previously been excluded from submitting input data to a benchmark for reasons of misconduct.
3. The code of conduct shall specify the process and means of communication to be used by a contributor to notify the administrator of the identity of any person submitting input data on its behalf, so as to allow the administrator to check that the submitter is authorised to submit the data on the contributor's behalf.

Article 3

Policies to ensure that a contributor provides all relevant input data

The code of conduct shall include provisions requiring contributors to have in place and comply with at least the following policies:

- (a) an input data policy that includes at least a description of:
 - (i) the data to be taken into account in determining the input data contribution; and
 - (ii) the data that the contributor may exclude from a contribution of input data, together with the reason or reasons for which that data may be excluded;
- (b) a policy on the transmission of data to the administrator that includes at least:
 - (i) a description of the process to be used for the secure transfer of data; and
 - (ii) contingency plans for submitting input data in the event of technical or operational difficulties, the temporary absence of a submitter or the unavailability of the input data required by the methodology.

Article 4

Systems and controls

1. The code of conduct shall include provisions ensuring that the systems and controls referred to in Article 15(2)(d) of Regulation (EU) 2016/1011 include, among other things, the following elements:

- (a) pre-contribution checks to identify any suspicious input data, including checks in the form of a review of the data by a second person;
- (b) post-contribution checks to confirm that the input data has been contributed in accordance with the requirements of the code of conduct and to identify any suspicious input data;
- (c) monitoring of the transfer of input data to the administrator in accordance with the applicable policies.

2. The code of conduct may permit a contributor to use an automated system for the contribution of input data, in which natural persons are not able to modify the contribution of input data, only if the code of conduct makes such permission subject to the following conditions:

- (a) the contributor is able to monitor the proper functioning of the automated system on a continuous basis; and
- (b) the contributor checks the automated system following any update or change to its software, before new input data is contributed.

In such a case, the code of conduct does not need to require the contributor to establish the checks referred to in paragraph 1.

3. The code of conduct shall define the procedures that a contributor must have in place to address any errors in the contributed input data.

4. The code of conduct shall require a contributor to review the systems and controls established by it concerning the contribution of input data on a regular basis and, in any event, at least annually.

*Article 5***Policies on the use of discretion when contributing input data**

If the code of conduct provides for a contributor to use discretion in contributing input data, it shall require the contributor to establish policies on the use of discretion that specify at least the following:

- (a) the circumstances in which the contributor may exercise discretion;
- (b) the individuals within the contributor's organisation who are permitted to exercise discretion;
- (c) the internal controls that regulate the exercise of the contributor's discretion in accordance with its policies;
- (d) the individuals within the contributor's organisation who are authorised to conduct an *ex post* evaluation of the exercise of discretion.

*Article 6***Record-keeping policies**

1. The code of conduct shall include provisions requiring contributors to establish record-keeping policies that ensure that a record is kept by the contributor of all relevant information necessary to check the contributor's adherence to the code of conduct, including a record of at least the following information:

- (a) the contributor's policies and procedures governing the contribution of input data and any material changes to those policies or procedures;
- (b) the register of conflicts of interest referred to in Article (8)(1)(b) of this Regulation;
- (c) any disciplinary action taken against any of the contributor's staff in respect of benchmark-related activities;
- (d) a list of submitters and persons performing checks in respect of contributions, including their names and roles within the contributor's organisation and the dates when they were authorised and, where applicable, ceased to be authorised to carry out their submission-related roles;
- (e) in respect of each contribution of input data:
 - (i) the input data contributed;
 - (ii) the data taken into account in determining the input data contribution, and any data that was excluded;
 - (iii) any use of discretion;
 - (iv) any input data checks undertaken;
 - (v) any communications in relation to the contribution of input data between the submitter and anyone within the contributor's organisation performing checks in respect of contributions.

2. The code of conduct shall require the record-keeping policies to provide that information be kept for a minimum of five years, or three years where the records are of telephone conversation or electronic communications, and be stored on a medium that allows the information to be accessible for future reference.

3. The administrator may choose to omit the requirement in point (iv) of paragraph 1(e) in the case of a contributor contributing input data to a significant benchmark.

4. The administrator may choose to omit either or both of the requirements in points (iv) and (v) of paragraph 1(e) in the case of a contributor contributing input data to a non-significant benchmark.

*Article 7***Reporting of suspicious input data**

1. The code of conduct shall require a contributor to establish documented internal procedures that provide for its staff to report any suspicious input data to the contributor's compliance function, if any, and to the contributor's senior management.

2. The code of conduct shall specify the conditions under which a contributor must report suspicious input data to the administrator, and shall specify the process and means of communication to be used by the contributor in order to contact the administrator.

Article 8

Conflicts of interest

1. The code of conduct shall require a contributor to establish systems and controls concerning the management of conflicts of interest that include at least the following elements:

(a) establishment of a conflicts of interest policy that addresses:

- (i) the process for identifying and managing conflicts of interest, including any internal escalation of conflicts of interest;
- (ii) steps to prevent, or minimise the risk of, conflicts of interest in the process for recruiting submitters;
- (iii) steps to prevent, or minimise the risk of, conflicts of interest in the remuneration policies for the contributor's staff;
- (iv) steps to prevent, or minimise the risk of, conflicts of interest arising from the contributor's management structure;
- (v) requirements with respect to communications between submitters and other staff within the contributor's organisation;
- (vi) any physical or organisational separation between submitters and other staff of the contributor required to prevent, or minimise the risk of, conflicts of interest;
- (vii) rules and measures to address any financial exposure that the contributor may have to a financial instrument or financial contract which references the benchmark to which the contributor contributes input data;

(b) establishment of a register of conflicts of interest to be used to record any conflicts of interest identified and any measures taken to manage them, together with requirements to keep the register up-to-date and to provide internal or external auditors with access to it.

2. The code of conduct shall require that members of a contributor's staff who are involved in the contribution process be trained in all policies, procedures and controls relating to the identification, prevention and management of conflicts of interest.

3. The administrator may choose to omit one or more of the requirements in points (iii), (v), (vi) and (vii) of paragraph 1(a) in the case of a contributor contributing input data to a non-significant benchmark.

Article 9

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 25 January 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 July 2018.

For the Commission
The President
Jean-Claude JUNCKER

COMMISSION DELEGATED REGULATION (EU) 2018/1640**of 13 July 2018****supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the governance and control requirements for supervised contributors****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 ⁽¹⁾, and in particular the fourth subparagraph of Article 16(5) thereof,

Whereas:

- (1) Article 16 of Regulation (EU) 2016/1011 imposes certain governance and control requirements on supervised contributors, including a requirement to have in place a control framework to ensure the integrity, accuracy and reliability of input data and a requirement to have in place effective systems and controls to ensure the integrity and reliability of all contributions of input data. Some of these requirements are already addressed in Articles 11 and 15 of Regulation (EU) 2016/1011 and the corresponding delegated regulations. However, in certain respects the provision of this Commission Delegated Regulation go beyond those in Articles 11 and 15 of Regulation (EU) 2016/1011 and certain supervised contributors might not be subject to the provisions of Articles 11 and 15 because they are contributing data to benchmarks provided by administrators who are exempted from the scope of Regulation (EU) 2016/1011. In order to avoid legal uncertainty, the requirements set forth by this Commission Delegated Regulation are without prejudice to Articles 11 and 15 of Regulation (EU) 2016/1011 and the corresponding delegated regulations and are therefore applicable only to the extent they complement the aforementioned provisions.
- (2) The control framework established by a supervised contributor should include a procedure for detecting and managing breaches of Regulation (EU) 2016/1011 and breaches of the applicable code of conduct, and policies on whistle-blowing, oversight and periodic review of the process for contributing input data. This is so that supervised contributors can ensure that they are acting lawfully and submitting input data that is accurate and reliable.
- (3) The training that submitters employed by a supervised contributor are required to have pursuant to Article 16(2)(b) of Regulation (EU) 2016/1011 should also include training in how the benchmark is intended to measure the underlying market or economic reality and training in all the elements of the code of conduct applicable to the contribution of input data. This is an essential tool in ensuring that submitters act appropriately and in line with the methodology of the benchmark.
- (4) The measures for the management of conflicts of interest that a supervised contributor is required to have in place pursuant to Article 16(2)(c) of Regulation (EU) 2016/1011 should include measures for the separation of submitters from other employees of the contributor and measures on the contributor's remuneration policy for submitters in order to minimise the incentives on submitters to manipulate the contribution of input data.
- (5) The record-keeping systems that a supervised contributor is required to have in place pursuant to Article 16(2)(d) of Regulation (EU) 2016/1011 should include the requirement to keep records of communications in relation to the provision of input data, including the names of the submitters. This is in order to provide an adequate level of transparency.
- (6) Allowing contributors to use discretion creates a risk that different experts use it differently or that even the same expert uses it differently over time. Discretion also increases the vulnerability of the relevant benchmark to manipulation. It is therefore necessary that the policies established pursuant to Article 16(3) of Regulation (EU) 2016/1011 include a framework to ensure consistency in the use of judgement or the exercise of discretion and

⁽¹⁾ OJ L 171, 29.6.2016, p. 1.

to reduce the risk of manipulation. Such a framework should impose an obligation to conduct regular internal reviews of the application of expert judgement. It should also identify types of information to be considered or not to be considered in order to frame the margin for discretion appropriately.

- (7) Administrators should be given sufficient time to ensure compliance with the requirements of this Regulation. This Regulation should therefore start to apply two months after it enters into force.
- (8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (9) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽¹⁾,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

This Regulation does not cover or apply to supervised contributors which contribute data only for non-significant benchmarks.

The requirements imposed under this Regulation are without prejudice to those imposed under Articles 11 and 15 of the Regulation (EU) 2016/1011 and the regulatory technical standards adopted under Article 11(5) and Article 15(6) of Regulation (EU) 2016/1011 ⁽²⁾.

Article 2

Control framework

The control framework that a supervised contributor is required to have in place pursuant to Article 16(1) of Regulation (EU) 2016/1011 shall include the establishment and maintenance of at least the following controls:

- (a) an effective oversight mechanism for overseeing the process for contributing input data that includes a risk management system, the identification of senior personnel who are responsible for the data contribution process and the involvement of any compliance and internal audit functions within the contributor's organisation;
- (b) a policy on whistle-blowing, including appropriate safeguards for whistle-blowers;
- (c) a procedure for detecting and managing breaches of Regulation (EU) 2016/1011 and breaches of the applicable code of conduct developed under Article 15 of that Regulation, including a procedure for investigating any detected breach and recording the actions taken as a consequence;
- (d) periodic reviews of the process for contributing data, to be conducted at least annually and whenever there is a change in the applicable code of conduct.

⁽¹⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

⁽²⁾ Commission Delegated Regulation (EU) 2018/1638 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further how to ensure that input data is appropriate and verifiable, and the internal oversight and verification procedures of a contributor that the administrator of a critical or significant benchmark has to ensure are in place where the input data is contributed from a front office function (see page 6 of this Official Journal); and Commission Delegated Regulation (EU) 2018/1639 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the elements of the code of conduct to be developed by administrators of benchmarks that are based on input data from contributors (see page 11 of this Official Journal).

*Article 3***Controls on submitters**

1. The systems and controls that a supervised contributor is required to have in place pursuant to Article 16(2)(a) of Regulation (EU) 2016/1011 shall include a documented and effective process for contributing data, and shall include at least the following:

- (a) a process for the designation of submitters and procedures for making contributions when a submitter is unexpectedly unavailable, including the designation of alternates;
- (b) procedures and systems for monitoring the data used for the contributions, and the contributions themselves, that are capable of producing alerts in line with parameters predefined by the contributor.

2. Without prejudice to any requirement imposed under Article 15 of Regulation (EU) 2016/1011, the contributor shall have regard to the following criteria in determining for the purposes of Article 16(2)(a) of that Regulation whether it is proportionate to have in place a process for sign-off by a natural person holding a position senior to that of the submitter:

- (a) the level of discretion involved in the process of contribution;
- (b) the nature, scale and complexity of the supervised contributor's activities;
- (c) whether conflicts of interest may rise between the contribution of input data to the benchmark and any trading or other activities performed by the contributor.

3. Where the controls put in place by a supervised contributor include a process for sign-off by a natural person holding a position senior to that of the submitter, those controls shall include clear rules about the timing of the sign-off and, if they include the possibility of sign-off after submission of the input data, they shall specify the circumstances in which sign-off after submission is permitted and the maximum time-period within which such sign-off is to occur.

*Article 4***Training for submitters**

1. The systems and controls that a supervised contributor is required to have in place pursuant to Article 16(2)(b) of Regulation (EU) 2016/1011 shall include training programmes to ensure that each submitter has:

- (a) adequate knowledge and experience of how the benchmark is intended to measure the underlying market or economic reality;
- (b) adequate knowledge of all the elements of the applicable code of conduct developed under Article 15(1) of that Regulation, if any.

2. The knowledge of submitters referred to in points (a) and (b) of paragraph 1 and of the requirements of Regulation (EU) 2016/1011 as well as Regulation (EU) No 596/2014 of the European Parliament and of the Council ⁽¹⁾, to the extent applicable to the tasks of the submitters, shall be re-assessed periodically, and in any event at least annually, to verify that it is still appropriate for each of them to act as submitters.

3. Paragraph 2 shall not apply in the case of supervised contributors of significant benchmarks.

*Article 5***Conflicts of interest**

1. The measures for the management of conflicts of interest that a supervised contributor is required to have in place pursuant to Article 16(2)(c) of Regulation (EU) 2016/1011 shall include at least the following measures:

- (a) a register of conflicts of interest, that shall be kept up to date and used to record any conflicts of interest identified and any measures taken to manage them. The register shall be accessible to internal or external auditors;

⁽¹⁾ Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1).

- (b) physical separation of submitters from other employees of the contributor, where such separation is appropriate taking into account the level of discretion involved in the process of contribution, the nature, scale and complexity of the contributor's activities and whether conflicts of interest may arise between the contribution of input data to the benchmark and any trading or other activities performed by the contributor;
 - (c) appropriate internal oversight procedures including, in a case where there is no organisational or physical separation of employees, rules governing the interaction of submitters with front office employees.
2. The measures for the management of conflict of interest shall also include remuneration policies in relation to submitters that ensure that the remuneration of a submitter is not linked to any of the following:
- (a) the value of the benchmark;
 - (b) the specific values of the submissions made; and
 - (c) the performance of any specific activity of the supervised contributor that may give rise to a conflict of interest with the contribution of input data to the benchmark.

Article 6

Record-keeping

1. The records to be kept pursuant to Article 16(2)(d) of Regulation (EU) 2016/1011 of communications in relation to provision of input data shall include records of the contributions made and the names of the submitters.
2. The records to be kept pursuant to Article 16(2)(d) of Regulation (EU) 2016/1011 of the contributor's exposure to financial instruments that use the benchmark as a reference shall include records of the type of activity carried on by the supervised contributor that gives rise to the exposure.
3. The records to be kept pursuant to Article 16(2)(e) of Regulation (EU) 2016/1011 of internal and external audits shall include records of the audit brief, the audit report and any actions taken in response to each audit.
4. Paragraph 3 shall not apply in the case of supervised contributors of significant benchmarks.

Article 7

Expert judgement

The policies that a supervised contributor is required to establish pursuant to Article 16(3) of Regulation (EU) 2016/1011 where the input data relies on expert judgement shall include at least the following elements:

- (a) a framework for ensuring consistency between different submitters, and consistency over time, in relation to the use of judgement or the exercise of discretion;
- (b) identification of the types of information that can, or cannot, be taken into account in the use of judgement or the exercise of discretion;
- (c) procedures for the review of any use of judgement or exercise of discretion.

Article 8

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 25 January 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 July 2018.

For the Commission

The President

Jean-Claude JUNKER

COMMISSION DELEGATED REGULATION (EU) 2018/1641**of 13 July 2018****supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the information to be provided by administrators of critical or significant benchmarks on the methodology used to determine the benchmark, the internal review and approval of the methodology and on the procedures for making material changes in the methodology****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 ⁽¹⁾, and in particular the third subparagraph of Article 13(3) thereof,

Whereas:

- (1) Article 13(1) of Regulation (EU) 2016/1011 requires the administrator of a benchmark or, where applicable, family of benchmarks to publish or make available the key elements of the methodology used by it to determine the benchmark or, where applicable, benchmarks in a family of benchmarks, details of the internal review and approval of the methodology, and the procedures for consulting on and notifying users of material changes to the methodology. This Regulation specifies further the information to be provided by administrators in respect of their significant and critical benchmarks. It does not apply to administrators which only provide non-significant benchmarks. Where administrators provide non-significant as well as significant or critical benchmarks they should comply with this Regulation for their significant and critical benchmarks. ESMA may issue guidelines on the same subject for administrators of non-significant benchmarks.
- (2) Benchmark methodologies differ hugely. The key elements specified by this Regulation should therefore have to be published or made available only insofar as they are relevant to the particular benchmark in question.
- (3) Two key elements of the methodology that should be disclosed in order to ensure the reliability and accuracy of a critical or significant benchmark are the minimum quantity and the minimum quality of the input data required to apply the methodology and perform the calculation. In addition, the use of discretion in determining benchmarks increases their vulnerability to manipulation. Therefore, in order to minimise this risk of manipulation, the administrator should disclose, as part of the key elements of its methodology, the clear rules that it has identified about how and when discretion may be exercised.
- (4) To help potential users to choose the most appropriate benchmark from amongst a range of potentially suitable benchmarks, they should be given information to allow them to understand what a benchmark aims to measure, what input data is used and how it is selected, what the constituents of the benchmark are, who is involved in the data collection and benchmark calculation, when and to what extent discretion may be used, and what the limitations of the methodology are and when and how the benchmark might be changed.
- (5) In order for users and potential users to have sufficient information about the administrator's process for reviewing the methodology internally, the administrator should publish its policies and procedures relating to this process, together with details of the bodies involved and the relevant governance arrangements in place in accordance with Article 4 of Regulation (EU) 2016/1011.
- (6) In order for users and potential users to understand how an administrator will consult on a proposed material change to a critical or significant benchmark and the rationale of such a change, the administrator should disclose certain information, including how it will assess the impact of the proposed change.

⁽¹⁾ OJ L 171, 29.6.2016, p. 1.

- (7) In accordance with the principle of proportionality, this Regulation avoids putting an excessive burden on administrators of significant (as opposed to critical) benchmarks by allowing them to choose to reduce disclosure to a more limited set of elements, or to disclose fewer details of certain elements, with respect to their significant benchmarks.
- (8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (9) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽¹⁾.
- (10) In order to be consistent with the Delegated Regulation specifying further the elements of the code of conduct to be developed by administrators of benchmarks that are based on input data from contributors it is appropriate to delay the application of this Delegated Regulation by two months,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

This Regulation does not cover or apply to administrators of non-significant benchmarks.

Article 2

Key elements of the methodology used to determine a critical or significant benchmark

1. The information to be provided by an administrator of a benchmark or, where applicable, family of benchmarks in compliance with the requirement laid down in Article 13(1)(a) of Regulation (EU) 2016/1011 shall include at least the following elements, insofar as they are relevant to that benchmark or family of benchmarks or to the input data used to determine it:
 - (a) a definition and description of the benchmark or family of benchmarks and of the market or economic reality that it is intended to measure;
 - (b) the currency or other unit of measurement of the benchmark or family of benchmarks;
 - (c) the criteria used by the administrator for selecting the sources of input data used to determine the benchmark or family of benchmarks;
 - (d) the types of input data used to determine the benchmark or family of benchmarks and the priority given to each type;
 - (e) the composition of any panel of contributors and the criteria used to determine eligibility for panel membership;
 - (f) a description of the constituents of the benchmark or family of benchmarks and the criteria used for selecting and weighting them;
 - (g) any minimum liquidity requirements for the constituents of the benchmark or family of benchmarks;
 - (h) any minimum requirements for the quantity of input data, and any minimum standards for the quality of input data, used to determine the benchmark or family of benchmarks;
 - (i) the clear rules identifying how and when discretion may be exercised in the determination of the benchmark or family of benchmarks;
 - (j) whether the benchmark or family of benchmarks takes into account any reinvestment of dividends or coupons paid by its constituents;

⁽¹⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (k) if the methodology may be changed periodically to ensure the benchmark or family of benchmarks remains representative of the relevant market or economic reality:
 - (i) any criteria to be used to determine when such a change is necessary;
 - (ii) any criteria to be used to determine the frequency of such a change; and
 - (iii) any criteria to be used to rebalance the constituents of the benchmark or family of benchmarks as part of making such a change;
 - (l) 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 where transaction data sources may be insufficient, inaccurate or unreliable;
 - (m) a description of the roles of any third parties involved in data collection for, or in calculation or dissemination of, the benchmark or family of benchmarks;
 - (n) the model or method used for the extrapolation and any interpolation of benchmark data.
2. Administrators may opt to publish or make available the information referred to in points (m) and (n) of paragraph 1 for their critical benchmarks only.

Article 3

Details of the internal review and approval of the methodology

1. The information to be provided by an administrator of a benchmark or, where applicable, a family of benchmarks in compliance with the requirement laid down in Article 13(1)(b) of Regulation (EU) 2016/1011 shall include at least the following:
- (a) the policies and procedures relating to the internal review and approval of the methodology;
 - (b) details of any specific events that may give rise to an internal review, including details of any mechanism used by the administrator to determine whether the methodology is traceable and verifiable;
 - (c) the bodies or functions within the administrator's organisational structure that are involved in reviewing and approving the methodology;
 - (d) the roles performed by any persons involved in reviewing or approving the methodology;
 - (e) a description of the procedure for nominating and removing persons involved in reviewing or approving the methodology.
2. Administrators may opt to publish or make available the information referred to in points (d) and (e) of paragraph 1 for their critical benchmarks only.

Article 4

Material changes to the methodology

1. The information to be provided by an administrator of a benchmark or, where applicable, family of benchmarks in compliance with the requirement laid down in Article 13(1)(c) and (2) of Regulation (EU) 2016/1011 shall include at least the following:
- (a) a description of the information to be disclosed by the administrator at the start of each consultation exercise, including a requirement to disclose the key elements of the methodology that would, in its view, be affected by the proposed material change;
 - (b) the administrator's standard time frame for consultations;
 - (c) the circumstances in which a consultation may take place within a shorter time frame and a description of the procedures to be followed when undertaking a consultation within a shorter time frame.

2. The rationale to be provided by an administrator in compliance with the requirement laid down in Article 13(1)(c) of Regulation (EU) 2016/1011 shall include, among other things, whether the representativeness of the benchmark or family of benchmarks, and its appropriateness as a reference for financial instruments and contracts, would be put at risk if a proposed material change were not made.

Article 5

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 25 January 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 July 2018.

For the Commission
The President
Jean-Claude JUNCKER

COMMISSION DELEGATED REGULATION (EU) 2018/1642**of 13 July 2018****supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the criteria to be taken into account by competent authorities when assessing whether administrators of significant benchmarks should apply certain requirements****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 of the European Parliament and of the Council ⁽¹⁾, and in particular the third subparagraph of Article 25(9) thereof,

Whereas:

- (1) Article 25(1) of Regulation (EU) 2016/1011 allows the administrator of a significant benchmark to choose not to apply certain provisions of that Regulation. If an administrator chooses not to apply one or more of those provisions, the competent authority has power to decide that the administrator should nonetheless apply one or more of them. Article 25(3) of that Regulation specifies criteria that a competent authority must take into account in assessing whether it would be appropriate for the administrator to apply those provisions.
- (2) The criteria that a competent authority is required to take into account should take into consideration the nature of the provisions under Regulation (EU) 2016/1011 that administrators of significant benchmarks may choose not to apply. Administrators of significant benchmarks may choose not to apply certain provisions that require them to put in place organisational measures to reduce the risk of conflicts of interest resulting from their employees' involvement in the provision of the benchmark. When taking into account the criteria specified in points (a), (c) and (i) of Article 25(3) of that Regulation, competent authorities should therefore also consider whether other adequate means are in place to protect the benchmark's integrity, instead of the organisational measures that are required by those provisions.
- (3) When taking into account the criteria specified in Article 25(3) of Regulation (EU) 2016/1011, competent authorities should also consider the benchmark's impact on one or more specific markets, the economy more generally and the benchmark's importance in ensuring financial stability. For this purpose, competent authorities should use information which is in the public domain or has been made available to them through disclosure by the administrator or otherwise.
- (4) When taking into account the criterion specified in point (f) of Article 25(3) of Regulation (EU) 2016/1011, competent authorities should also consider whether the administrator has adequate alternative technical means and control mechanisms in place to maintain the continuity of the provision of the benchmark and its robustness, taking into account the nature of the provisions that the administrator has chosen not to apply.
- (5) Administrators should be given sufficient time to prepare applications and to ensure compliance with the requirements of this Regulation. This Regulation should therefore start to apply two months after it enters into force.
- (6) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (7) The ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽²⁾,

⁽¹⁾ OJ L 171, 29.6.2016, p. 1.

⁽²⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

HAS ADOPTED THIS REGULATION:

Article 1

Vulnerability of the benchmark to manipulation

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the vulnerability of the benchmark to manipulation shall include at least the following:

- (a) whether the benchmark is based on transaction data;
- (b) whether the contributors are supervised entities;
- (c) whether measures apply that increase the robustness of the input data;
- (d) whether the administrator's organisational structure reduces incentives to manipulation;
- (e) whether the administrator has a financial interest in financial instruments, financial contracts or investment funds referencing the benchmark;
- (f) whether there are proven cases of manipulation of the same benchmark or a benchmark with a similar methodology provided by an administrator of similar size and organisational structure.

Article 2

Nature of the input data

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the nature of the input data shall include at least the following:

- (a) in cases where the input data is transaction data, whether the administrator is a participant in the market or economic reality that the benchmark is intended to measure;
- (b) in cases where the input data is provided by contributors, whether the contributors have a financial interest in financial instruments or financial contracts referencing the benchmark or could profit from the performance of an investment fund that is measured by the benchmark;
- (c) in cases where the input data is sourced from exchanges or trading systems located in a third country, whether a regulatory and supervisory framework applies to those exchanges or trading systems that maintains the integrity of the input data;
- (d) in cases where the input data consists of quotes, whether the quotes are committed or indicative and whether adequate control mechanisms apply to them.

Article 3

Level of conflicts of interest

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the level of conflicts of interest shall include at least the following:

- (a) whether the administrator has a financial interest in financial instruments or financial contracts referencing the benchmark or could profit from the performance of an investment fund that is measured by the benchmark;
- (b) in cases where the benchmark is based on input data contributions, whether the administrator's relationship with the contributors is governed by adequate control mechanisms;
- (c) whether the administrator has controls or other measures in place that mitigate potential conflicts of interest effectively.

Article 4

Degree of discretion of the administrator

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the degree of discretion of the administrator shall include at least the following:

- (a) in cases where the benchmark methodology allows for expert judgement by the administrator, whether the use of judgement or exercise of discretion is sufficiently transparent;

- (b) in cases where the benchmark is based on estimates, the effectiveness of the internal control measures that the administrator has in place.

Article 5

Impact of the benchmark on markets

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the impact of the benchmark on markets shall include at least the following:

- (a) in cases where the benchmark has particular relevance for a specific market or markets, whether the unreliability of the benchmark would have a disruptive effect on the functioning of that market or those markets and whether there are adequate substitutes for that benchmark;
- (b) in cases where the benchmark qualifies as a significant benchmark by virtue of point (b) of Article 24(1) of Regulation (EU) 2016/1011, and where the information is known to the competent authority, any relevant quantitative relation of financial instruments, financial contracts, or investment funds referencing the benchmark to the total value of the respective instruments in a Member State.

Article 6

Nature, scale and complexity of the provision of the benchmark

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the nature, scale and complexity of the provision of the benchmark shall include at least the following:

- (a) the degree to which the input data is based on contributions, whether the input data is transaction data and how this degree is reflected in the control mechanisms that the administrator has in place;
- (b) the amount of input data to be processed and the number of data sources;
- (c) whether the administrator has sufficient technical means to process the input data continuously and robustly;
- (d) whether the methodology gives rise to operational risks in processing the input data;
- (e) the extent to which the administrator relies on contributors for the determination of the benchmark.

Article 7

Importance of the benchmark to financial stability

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the importance of the benchmark to financial stability shall include at least an assessment of the relationship between the total value of the financial instruments, financial contracts and investment funds referencing the benchmark and the value of the total assets of the financial sector and of the banking sector in a Member State, where that information is known to the competent authority.

Article 8

Value of financial instruments, financial contracts and investment funds that reference the benchmark

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the value of financial instruments, financial contracts or investment funds that reference the benchmark shall include at least the following:

- (a) the total value of all financial instruments, financial contracts and investment funds referencing the benchmark on the basis of all the ranges of maturities or tenors of the benchmark, where known to the competent authority;
- (b) whether the use of the benchmark is concentrated in individual categories of financial instrument, financial contract or investment fund;
- (c) in cases where the benchmark is a significant benchmark by virtue of point (a) of Article 24(1) of Regulation (EU) 2016/1011, and where known to the competent authority, how close the total value of financial instruments, financial contracts and investment funds that reference the benchmark is to the thresholds referred to in Article 20(1)(a) and (c)(i) of that Regulation.

*Article 9***The administrator's size, organisational form or structure**

The further criteria to be considered by the competent authority under Article 25(3) of Regulation (EU) 2016/1011 in taking into account the administrator's size, organisational form or structure shall include at least the following:

- (a) in cases where the provision of benchmarks is not the administrator's principal business activity, whether the provision of the benchmark is organisationally separate or whether other appropriate means are in place to avoid conflicts of interest;
- (b) in cases where the administrator is part of a group and one or more entities within the group are actual or potential users of the benchmark, whether the administrator is acting independently and whether the administrator has in place other appropriate means to avoid conflicts of interest.

*Article 10***Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 25 January 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 July 2018.

For the Commission
The President
Jean-Claude JUNKER

COMMISSION DELEGATED REGULATION (EU) 2018/1643**of 13 July 2018****supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the contents of, and cases where updates are required to, the benchmark statement to be published by the administrator of a benchmark****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 ⁽¹⁾, and in particular the fourth subparagraph of Article 27(3) thereof,

Whereas:

- (1) Article 27(1) of Regulation (EU) 2016/1011 requires administrators to publish a benchmark statement for the benchmark or, where applicable, for a family of benchmarks if it may be used in the Union.
- (2) Benchmark statements should include comprehensive information regarding the market or economic reality that the benchmark or family of benchmarks is intended to measure, together with an explanation of when the measurement of that market or economic reality may become unreliable. This is because users and potential users rely on such information in order to understand fully the benchmark or family of benchmarks.
- (3) Benchmark statements should indicate the discretionary elements in the benchmark's methodology, as well as the process for any *ex post* evaluation of the use of such discretion. That information is key to ensuring that users and potential users have an understanding of the susceptibility of the benchmark or family of benchmarks to manipulation.
- (4) Different types of benchmark (namely, regulated-data benchmarks, interest rate benchmarks, commodity benchmarks, critical benchmarks, significant benchmarks and non-significant benchmarks) are subject to different requirements under Regulation (EU) 2016/1011. The benchmark statement should therefore identify clearly and unambiguously the type or types of benchmark to which the benchmark or family of benchmarks belongs.
- (5) In relation to critical benchmarks, the benchmark statement should include additional information explaining why the benchmark is recognised under Regulation (EU) 2016/1011 as critical, so that users and potential users have at their disposal the information needed to understand the basis upon which the benchmark has been recognised as critical.
- (6) The use of regulated data releases administrators and their contributors from certain obligations under Regulation (EU) 2016/1011. For regulated-data benchmarks, administrators should therefore be required to indicate their data sources and what qualifies the benchmark as a regulated data benchmark.
- (7) Due to their particular nature, interest rate benchmarks and commodity benchmarks have to comply with the provisions of specific annexes to Regulation (EU) 2016/1011 instead of or in addition to complying with Title II of that Regulation. Administrators of such benchmarks should indicate that fact in the benchmark statement so that users and potential users are aware of it.
- (8) Administrators of critical benchmarks have to comply with an enhanced regulatory regime under Regulation (EU) 2016/1011. It is therefore important that users and potential users are appropriately informed of this fact.

⁽¹⁾ OJ L 171, 29.6.2016, p. 1.

- (9) Where a benchmark exhibits the characteristics of different types of benchmark, the specific provisions in this Regulation in relation to those different types of benchmark should apply in parallel and in addition to the general disclosure requirements, so as to provide users and potential users with comprehensive information on all of the benchmark's characteristics.
- (10) In accordance with the principle of proportionality, this Regulation avoids putting an excessive administrative burden on administrators of significant and non-significant benchmarks by requiring a more limited set of information to be included in the benchmark statement for significant and non-significant benchmarks.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (12) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽¹⁾.
- (13) In order to be consistent with the Delegated Regulation specifying further the elements of the code of conduct to be developed by administrators of benchmarks that are based on input data from contributors it is appropriate to delay the application of this Delegated Regulation by two months,

HAS ADOPTED THIS REGULATION:

Article 1

General disclosure requirements

1. The benchmark statement shall state:
 - (a) the date of publication of the statement and, where applicable, the date of its last update;
 - (b) where available, the international securities identification number (ISIN) of the benchmark or benchmarks; alternatively, for a family of benchmarks, the statement may provide details of where the ISINs are publicly accessible free of charge;
 - (c) whether the benchmark, or any benchmark in the family of benchmarks, is determined using contributions of input data;
 - (d) whether the benchmark or any benchmark in the family of benchmarks qualifies as one of the types of benchmarks listed under Title III of Regulation (EU) 2016/1011, including the specific provision by virtue of which the benchmark qualifies as that type.
2. In defining the market or economic reality, the benchmark statement shall include at least the following information:
 - (a) a general description of the market or economic reality;
 - (b) the geographical boundaries, if any, of the market or economic reality;
 - (c) any other information that the administrator reasonably considers to be relevant or useful to help users or potential users of the benchmark to understand the relevant features of the market or economic reality, including at least the following elements insofar as reliable data on these elements is available:
 - (i) information on actual or potential participants in the market;
 - (ii) an indication of the size of the market or economic reality.
3. In defining the potential limitations of the benchmark and the circumstances in which the measurement of the market or economic reality may become unreliable, the benchmark statement shall include at least:
 - (a) a description of the circumstances in which the administrator would lack sufficient input data to determine the benchmark in accordance with the methodology;

⁽¹⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (b) where relevant, a description of instances when the accuracy and reliability of the methodology used for determining the benchmark can no longer be ensured, such as when the administrator deems the liquidity in the underlying market as insufficient;
 - (c) any other information that the administrator reasonably considers to be relevant or useful to help users and potential users to understand the circumstances in which the measurement of the market or economic reality may become unreliable, including a description of what might constitute an exceptional market event.
4. In specifying the controls and rules that govern any exercise of judgement or discretion by the administrator or any contributors in calculating the benchmark or benchmarks, the benchmark statement shall include an outline of each step of the process for any *ex post* evaluation of the use of discretion, together with a clear indication of the position of any person(s) responsible for carrying out the evaluations.
5. In specifying the procedures for review of the methodology, the benchmark statement shall at least outline the procedures for public consultation on any material changes to the methodology.
6. Point (c) of paragraph 3, and paragraph 5, shall not apply to the benchmark statement:
- (a) for a significant benchmark; or
 - (b) for a family of benchmarks that does not include any critical benchmarks and does not consist solely of non-significant benchmarks.
7. In the case of a benchmark statement for a non-significant benchmark or for a family of benchmarks that consists solely of non-significant benchmarks:
- (a) the following provisions of this Article shall not apply:
 - (i) point (c) of paragraph 2;
 - (ii) points (b) and (c) of paragraph 3,
 - (iii) paragraphs 4 and 5; and
 - (b) the requirements of points (a) and (b) of paragraph 2 may be satisfied alternatively by including a clear reference in the benchmark statement to a published document that includes the same information and is accessible free of charge.
8. Administrators may include additional information at the end of their benchmark statements provided that, if this is done by referring to a published document containing the information, the document shall be one that is accessible free of charge.

Article 2

Specific disclosure requirements for regulated-data benchmarks

In addition to the information to be included pursuant to Article 1, for a regulated-data benchmark or, where applicable, family of regulated-data benchmarks, the benchmark statement shall state at least the following in its description of the input data:

- (a) the sources of the input data used;
- (b) for each source, the relevant type, as listed in Article 3(1)(24) of Regulation (EU) 2016/1011.

Article 3

Specific disclosure requirements for interest rate benchmarks

In addition to the information to be included pursuant to Article 1, for an interest rate benchmark or, where applicable, family of interest rate benchmarks, the benchmark statement shall include at least the following information:

- (a) a reference alerting users to the additional regulatory regime applicable to interest rate benchmarks under Annex I to Regulation (EU) 2016/1011;
- (b) a description of the arrangements that have been put in place to comply with that Annex.

*Article 4***Specific disclosure requirements for commodity benchmarks**

In addition to the information to be included pursuant to Article 1, for a commodity benchmark or, where applicable, family of commodity benchmarks, the benchmark statement shall at least:

- (a) indicate whether the requirements of Title II of, or Annex II to, Regulation (EU) 2016/1011 apply to the benchmark, or family of benchmarks as prescribed by Article 19 of that Regulation;
- (b) include an explanation as to why Title II of or, as the case may be, Annex II to that Regulation applies;
- (c) include in the definitions of key terms a concise description of the criteria that define the relevant underlying physical commodity;
- (d) where applicable, indicate where the explanations are published that the administrator is required to publish under paragraph 7 of Annex II to that Regulation.

*Article 5***Specific disclosure requirements for critical benchmarks**

In addition to the information to be included pursuant to Article 1, for a critical benchmark, or, where applicable, a family of benchmarks that contains at least one critical benchmark, the benchmark statement shall include at least the following information:

- (a) a reference alerting users to the enhanced regulatory regime applicable to critical benchmarks under Regulation (EU) 2016/1011;
- (b) a statement indicating how users will be informed of any delay in the publication of the benchmark or of any re-determination of the benchmark, and indicating the (expected) duration of measures.

*Article 6***Updates**

In addition to the cases referred to in the third subparagraph of Article 27(1) of Regulation (EU) 2016/1011, an update of the benchmark statement shall be required whenever the information contained in the statement ceases to be correct or sufficiently precise, and including in any event in the following cases:

- (a) whenever there is a change in the type of the benchmark;
- (b) whenever there is a material change in the methodology used for determining the benchmark or, if the benchmark statement is for a family of benchmarks, in the methodology used for determining any benchmark within the family of benchmarks.

*Article 7***Entry into force and application**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 25 January 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 July 2018.

For the Commission
The President
Jean-Claude JUNCKER

COMMISSION DELEGATED REGULATION (EU) 2018/1644**of 13 July 2018****supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards determining the minimum content of cooperation arrangements with competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 ⁽¹⁾, and in particular the third subparagraph of Article 30(5) thereof,

Whereas:

- (1) Article 30 of Regulation (EU) 2016/1011 sets out conditions for allowing benchmarks provided by an administrator located in a third country to be used in the Union. One of those conditions is that an equivalence decision has been adopted recognising the legal framework and supervisory practices of the third country as equivalent. Paragraph (4) of Article 30 requires ESMA to establish cooperation arrangements with the competent authority of any third country in respect of which an equivalence decision has been adopted.
- (2) The cooperation arrangements should allow ESMA and the competent authority of the third country to exchange all information relevant to the fulfilment of their respective supervisory tasks. The Commission may adopt a number of equivalence decisions, and benchmarks provided by administrators located in each of the relevant countries may then be eligible for use by supervised entities in the Union. It is therefore important that each set of cooperation arrangements contains the same minimum requirements regarding the forms and procedures to be used for the exchange of information, including the same confidentiality provisions and the same terms governing the use of information obtained under the cooperation arrangements.
- (3) Competent authorities of third countries whose legal framework and supervisory practices have been recognised as equivalent will have adequate knowledge of all relevant events and changes of circumstance likely to affect benchmark administrators in their jurisdiction. If supervised entities use benchmarks provided by administrators from those jurisdictions in the Union, it is appropriate that the competent authorities in those jurisdictions keep ESMA informed of such events and changes. Cooperation arrangements should therefore include provision for ESMA to be notified of all such events and changes.
- (4) Similarly, competent authorities of third countries need to be kept informed of the activities of the administrators that they are supervising. Cooperation arrangements should therefore provide for ESMA to inform the competent authority of a third country if administrators supervised by that authority notify ESMA of their consent to their benchmarks being used by supervised entities in the Union.
- (5) With the exception of its obligation under Article 31 of Regulation (EU) 2016/1011 to withdraw the registration of administrators located in third countries, ESMA has no direct supervisory powers over administrators located in third countries. It relies instead on supervision by, and cooperation with, the competent authority of the third country. Cooperation arrangements should therefore include provisions setting out the respective roles of the parties involved in supervisory cooperation, including on-site inspections.
- (6) Point (a) of the third subparagraph of Article 32(5) of Regulation (EU) 2016/1011 requires cooperation arrangements between competent authorities of third countries and competent authorities of Member States of reference to have the same minimum content as cooperation arrangements between ESMA and competent authorities of third countries. It is therefore necessary to ensure that, in setting the minimum content for cooperation arrangements with ESMA, the content is also appropriate for cooperation arrangements required by Article 32(5).

⁽¹⁾ OJ L 171, 29.6.2016, p. 1.

- (7) This Regulation is based on the draft regulatory technical standards submitted by ESMA to the Commission.
- (8) ESMA has not conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, nor has it analysed the potential related costs and benefits, as ESMA concluded that this would have been disproportionate in relation to the scope and impact of the draft regulatory technical standards, taking into account the fact that the regulatory technical standards would only be of direct concern to the competent authorities of third countries, the competent authorities of Member States and ESMA, and not to market participants.
- (9) ESMA has requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽¹⁾.
- (10) Administrators should be given sufficient time to ensure compliance with the requirements of this Regulation. This Regulation should therefore start to apply two months after it enters into force,

HAS ADOPTED THIS REGULATION:

Article 1

Scope of the cooperation arrangements

The cooperation arrangements referred to in Article 30(4) of Regulation (EU) 2016/1011 ('cooperation arrangements') shall clearly set out their scope of application. That scope shall include cooperation by the parties on at least the following matters:

- (a) the exchange of information and provision of notifications relevant to the fulfilment of their respective supervisory tasks;
- (b) any issues that may be relevant to the operations, activities or services of administrators covered by the cooperation arrangements in question, including the provision to ESMA of information on the laws and regulations to which those administrators are subject in the third country and any material changes to those laws or regulations;
- (c) any regulatory or supervisory actions taken, or approvals given, by the competent authority of the third country in relation to any administrator which has given its consent to the use of benchmarks in the Union, including changes to the obligations or requirements to which the administrator is subject that may have an impact on the administrator's continued compliance with applicable laws and regulations.

Article 2

Exchange of information and notifications

Cooperation arrangements shall contain at least the following provisions with respect to any information or notifications to be exchanged or provided under the arrangements:

- (a) a provision requiring requests for information to contain at least the information sought by the authority requesting it and brief details describing the subject matter of the request, the purpose for which the information is sought and the relevant laws and regulations applicable to benchmarks activity;
- (b) details of the mechanism or mechanisms by which information and notifications are to be exchanged or provided;
- (c) a provision requiring information and notifications to be exchanged or provided in writing;
- (d) a provision requiring measures to be taken to ensure that any exchange or provision of information takes place in a secure manner;
- (e) a provision requiring information and notifications to be provided promptly and, where applicable, in accordance with the relevant time scale specified in the arrangements;

⁽¹⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

*Article 3***Supervisory cooperation**

1. Cooperation arrangements shall specify a framework for the coordination of supervisory activities of the parties in the area of benchmarks supervision, including at least the following requirements:

- (a) a requirement that a signatory wishing to undertake a supervisory activity make an initial written request with respect to the activity;
- (b) a requirement that the request set out the factual and legal background to, and an estimated time frame for, the activity in question;
- (c) a requirement that the other signatory acknowledges receipt of the request in writing within 10 working days of receipt.

2. For the purposes of coordinating on-site inspections in the competent authority's jurisdiction in the third country, cooperation arrangements shall set out a procedure for the parties to reach an understanding on the terms governing such on-site inspections, including at least terms stating their respective roles and responsibilities, the right of the competent authority of the third country to accompany any on-site inspection and any duty on that authority to assist in reviewing, interpreting and analysing the contents of public and non-public books and records and in obtaining information from directors and senior management of any administrator covered by the arrangements.

*Article 4***Confidentiality, use of information and data protection**

1. Cooperation arrangements shall require the parties to refrain from disclosing information exchanged or provided to them under the cooperation arrangements, except where the party which had provided the information has given its prior written consent or where the disclosure of data is a necessary and proportionate obligation required under Union or national law, in particular in the context of investigations or subsequent judicial proceedings.

2. Cooperation arrangements shall require information obtained by an authority under the arrangements to be securely stored, and shall permit the information to be used solely for the purpose set out by that authority in its request for the information or, if the information was provided other than by means of a request, solely for the purpose of enabling that authority to exercise its regulatory and supervisory functions. That authority may, however, use the information for another purpose if it has obtained prior written consent to do so from the authority that provided the information under the arrangements.

3. Where cooperation arrangements allow for personal data to be exchanged, they shall contain provisions to ensure adequate means for the protection of such data that complies with all applicable data protection legislation in the jurisdictions of the competent authorities which are party to the respective cooperation arrangement.

*Article 5***Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 25 January 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 July 2018.

For the Commission
The President
Jean-Claude JUNCKER

COMMISSION DELEGATED REGULATION (EU) 2018/1645**of 13 July 2018****supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the form and content of the application for recognition with the competent authority of the Member State of reference and of the presentation of information in the notification to European Securities and Markets Authority (ESMA)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 ⁽¹⁾, and in particular Article 32(9) thereof,

Whereas:

- (1) A benchmark administrator located in a third country can apply for recognition in the Union. In the application for recognition that administrator has to provide a comprehensive representation of the arrangements, policies and procedures it has established in order to fulfil the applicable requirements set out in Regulation (EU) 2016/1011. This Regulation aims to ensure that the competent authorities across the Union receive uniform and consistent information by benchmark administrators in non-EU countries that apply for recognition.
- (2) The application for recognition should include information related to the choice of Member State of reference, pursuant to Article 32(4) of Regulation (EU) 2016/1011, and to the legal representative in the Member State of reference. That information should enable the competent authority of the Member State of reference to satisfy itself that the Member State of reference has been correctly identified and that a legal representative of the administrator in a non-EU country is established in that Member State and has the power to act as required by Regulation (EU) 2016/1011.
- (3) In order for the competent authority to assess whether there are conflicts of interest arising from the business interests of the applicant's owners that might affect the independence of the applicant, and thus impair the accuracy and integrity of its benchmarks, the applicant should provide information regarding the activities of its owners and the ownership of its parent undertakings.
- (4) The applicant should provide information on the composition, functioning and degree of independence of its governing bodies, in order for the competent authority to assess whether the corporate governance structure ensures the independence of the administrator in the benchmark calculation and the avoidance of conflicts of interest.
- (5) For the purposes of assessing how conflicts of interest are eliminated, or managed and disclosed, the applicant should provide the competent authority with an explanation as to how any resulting conflicts of interest are identified, recorded, managed, mitigated, prevented and remedied.
- (6) For the purposes of enabling the competent authority to evaluate the pertinence and robustness of the internal control structure, oversight and accountability framework, the applicant provider should provide the competent authority with the policies and procedures for monitoring the activities of the provision of a benchmark or family of benchmarks.
- (7) The application for recognition should include information demonstrating that the controls on the input data, on the basis of which the benchmarks provided by the applicant are calculated, are adequate to ensure the representativeness, accuracy and integrity of such data.

⁽¹⁾ OJ L 171, 29.6.2016, p. 1.

- (8) For the purpose of enabling the competent authority to evaluate whether the benchmarks provided by the applicant are suitable for their continued or prospective use in the Union, with the final objective of their inclusion in the register of Article 36 of Regulation (EU) 2016/1011, a list of all benchmarks provided by the applicant which are already used in the Union or intended for future use in the Union and a description of them should be provided within the application for recognition.
- (9) Information on the nature and characteristics of the benchmarks provided by the applicant is relevant in order to demonstrate to the competent authority whether the assessment of compliance with the applicable requirements of Regulation (EU) 2016/1011 is to be conducted with reference to any of the special regimes applicable, to regulated-data benchmarks and to commodity benchmarks not based on submissions by contributors the majority of which are supervised entities, as set out in Regulation (EU) 2016/1011.
- (10) Where the applicant considers one or more of its benchmarks as significant or non-significant, it should include in the application for recognition information on the degree of use of such benchmark(s) in the Union, so that the competent authority could assess whether the categorisation as significant or non-significant is correct. Benchmarks provided by the applicant that are not yet used in the Union and that are included in the application for recognition for reason of their prospective use in the Union are in accordance with point (27) of Article 3(1) of Regulation (EU) 2016/1011 considered as non-significant benchmarks.
- (11) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (12) The ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽¹⁾.
- (13) Administrators should be given sufficient time to prepare applications and to ensure compliance with the requirements of this Regulation and the regulatory technical standards referred to in the Annex. This Regulation should therefore start to apply two months after it enters into force,

HAS ADOPTED THIS REGULATION:

Article 1

General requirements

1. An administrator located in a third country shall when applying for recognition pursuant to Article 32 of Regulation (EU) 2016/1011 provide the information listed in the Annex.
2. Where the applicant has left out any of the required information, the application shall include an explanation as to why that information has not been provided.

Article 2

Format of the application

1. The application for recognition shall be submitted in the official language or one of the official languages of the Member State of reference, unless otherwise indicated in the Annex. The documents referred to in point 8 of the Annex shall be submitted in a language customary in the sphere of international finance or in the official language or one of the official languages of the Member State of reference.
2. The application for recognition shall be submitted by electronic means or, if accepted by the relevant competent authority, in paper form. Those electronic means shall ensure that completeness, integrity and confidentiality of the information are maintained during the transmission. The applicant shall ensure that each submitted document clearly identifies to which specific requirement of this Regulation it refers.

⁽¹⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

*Article 3***Specific information concerning policies and procedures**

1. Any policies and procedures established to comply with requirements of Regulation (EU) 2016/1011 and described in an application shall contain or be accompanied by:
 - (a) an indication of the identity of the person or persons responsible for the approval and maintenance of the policies and procedures;
 - (b) a description of how compliance with the policies and procedures is monitored and the identity of the person or persons responsible for this monitoring;
 - (c) a description of the measures to be taken in the event of a breach of the policies and procedures.
2. Where an applicant is a company within a group, it may comply with paragraph 1 by submitting the policies and procedures of its group where they relate to the provision of benchmarks.

*Article 4***Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 25 January 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 July 2018.

For the Commission
The President
Jean-Claude JUNCKER

ANNEX

Information to be provided in the application for recognition under Article 32 of Regulation (EU) 2016/1011**SECTION A — INFORMATION ON THE PROVIDING PERSON AND ITS LEGAL REPRESENTATIVE IN THE UNION****1. GENERAL INFORMATION**

- (a) Full name of the applicant and its Legal Entity Identifier (LEI).
- (b) Address of the office in the country of location.
- (c) Legal Status.
- (d) Website, if any.
- (e) Where the applicant is supervised in the non-EU country where it is located, information about its current authorisation status, including the activities for which it is authorised, the name and address of the competent authority of the non-EU country and the link to the register of such competent authority, where available; where more than one authority is responsible for supervision, the details of the respective areas of competence shall be provided.
- (f) A description of the operations of the applicant in the EU and in non-EU countries, whether or not subject to any EU or extra-EU financial regulation, that are relevant for the activity of provision of benchmarks, along with a description of where these operations are conducted.
- (g) Where the applicant is part of a group, its group structure, along with the ownership chart, showing the links between any parent undertaking and subsidiaries. The undertakings and subsidiaries shown in the chart shall be identified by their full name, legal status and address of the registered office and head office.
- (h) A self-declaration of good repute including details, if applicable, of any:
 - (i) past and pending proceedings of a disciplinary nature against it (unless dismissed);
 - (ii) refusal of authorisation or registration by a financial authority;
 - (iii) withdrawal of authorisation or registration by a financial authority.

2. LEGAL REPRESENTATIVE IN THE MEMBER STATE OF REFERENCE

- (a) Documented evidence supporting the choice of the Member State of reference, by application of the criteria laid down in Article 32(4) of Regulation (EU) 2016/1011.
- (b) With respect to the legal representative established in the Member State of reference as set out in Article 32(3) of Regulation (EU) 2016/1011, its:
 - (i) full name;
 - (ii) title, in case of a natural person, or legal status, in case of a legal person;
 - (iii) deed of incorporation, articles of association or other constitutional documents, in case of a legal person, and clarification of whether it is supervised by a supervisory authority;
 - (iv) address;
 - (v) email address;
 - (vi) telephone number;
 - (vii) written confirmation of the authority of the legal representative to act on behalf of the applicant in accordance with Article 32(3) of Regulation (EU) 2016/1011;
 - (viii) details of the performance of the oversight function by the legal representative relating to the provision of benchmarks that may be used in the Union;
 - (ix) the name, title, address, email address and telephone number of a contact person within the legal representative.

3. ORGANISATIONAL STRUCTURE AND GOVERNANCE

- (a) Internal organisational structure with respect to the board of directors, senior management committees, oversight function and any other internal body exercising significant management functions involved in the provision of a benchmark, including their:
 - (i) terms of reference or summary thereof; and
 - (ii) adherence to any governance codes or similar provisions.
- (b) Procedures ensuring that the employees of the administrator and any other natural persons whose services are placed at its disposal or under its control and who are directly involved in the provision of a benchmark have the necessary skills, knowledge and experience for the duties assigned to them and operate in respect of the provisions under Article 4(7) of Regulation (EU) 2016/1011.
- (c) The number of employees (temporary and permanent) involved in the provision of a benchmark.

4. CONFLICTS OF INTEREST

- (a) Policies and procedures that address:
 - (i) how current and potential conflicts of interest are or will be identified, recorded, managed, mitigated, prevented or remedied;
 - (ii) particular circumstances which apply to the applicant or to any particular benchmark provided by the applicant and which may be used in the Union, in relation to which conflicts of interest are most likely to arise, including where expert judgment or discretion is exercised in the benchmark's determination process, where the applicant is within the same group as a user of a benchmark and where the provider is a participant in the market or economic reality that the benchmark intends to measure.
- (b) For a benchmark or a family of benchmarks, a list of any material conflicts of interests identified, along with the respective mitigation measures.
- (c) The structure of the remuneration policy, specifying the criteria used to determine the remuneration of the persons involved directly or indirectly in the activity of provision of benchmarks.

5. INTERNAL CONTROL STRUCTURE, OVERSIGHT AND ACCOUNTABILITY FRAMEWORK

- (a) Policies and procedures for monitoring the activities of the provision of a benchmark or a family of benchmarks, including those relating to:
 - (i) the information technology systems;
 - (ii) the risk management, together with a mapping of risks which may arise and which may impact the accuracy, integrity and representativeness of the benchmarks provided or the continuity of the activity of provision, along with the respective mitigation measures;
 - (iii) the constitution, role and functioning of the oversight function, as described in Article 5 of Regulation (EU) 2016/1011 and further specified in the regulatory technical standards adopted under Article 5(5) of Regulation (EU) 2016/1011 ⁽¹⁾ or the corresponding principles on financial benchmarks agreed by the International Organization of Securities Commissions (IOSCO) on 17 July 2013 ('IOSCO principles for financial benchmarks'), or the Principles for Oil Price Reporting Agencies agreed by the IOSCO on 5 October 2012 ('IOSCO principles for PRAs'), as applicable, including procedures for the appointment, substitution or removal of individuals within the oversight function;
 - (iv) the constitution, role and functioning of the control framework, as described in Article 6 of Regulation (EU) 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable, including procedures for the appointment, substitution or removal of individuals who are responsible for this framework;
 - (v) the accountability framework as described in Article 7 of the Regulation (EU) 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable, including procedures for the appointment, substitution or removal of individuals who are responsible for this framework.

⁽¹⁾ Commission Delegated Regulation (EU) 2018/1637 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the procedures and characteristics of the oversight function (see page 1 of this Official Journal).

- (b) Contingency plans for determining and publishing a benchmark on a temporary basis.
- (c) Procedures for the internal reporting of infringements of Regulation (EU) 2016/1011 by managers, employees and any other natural persons whose services are placed at the provider's disposal or under the control of the provider.

6. OUTSOURCING

Where any activity forming a part of the process for the provision of a benchmark or family of benchmarks is outsourced:

- (a) the outsourcing arrangements, including service-level agreements, which demonstrate compliance with Article 10 of the Regulation (EU) 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable;
- (b) details of the outsourced functions, unless this information is already included in the relevant contracts;
- (c) policies and procedures regarding the oversight of the outsourced activities unless this information is already included in the relevant contracts.

7. COMPLIANCE WITH IOSCO PRINCIPLES

- (a) Where available, an assessment by an independent external auditor of compliance with the Principles for financial benchmarks agreed by the International Organization of Securities Commissions (IOSCO) on 17 July 2013 or the Principles for Oil Price Reporting Agencies agreed by IOSCO on 5 October 2012, as applicable.
- (b) Where available, in cases where the applicant is subject to supervision, a certification provided by the competent authority of the non-EU country where the applicant is located, attesting compliance with the IOSCO principles referred to in letter (a).

8. OTHER INFORMATION

- (a) The applicant may provide any additional information relevant to its application that it considers appropriate.
- (b) The applicant shall provide this information in a manner and form stipulated by the competent authority.

SECTION B – INFORMATION ON THE BENCHMARKS

9. DESCRIPTION OF THE ACTUAL OR PROSPECTIVE BENCHMARKS OR FAMILIES OF BENCHMARKS THAT MAY BE USED IN THE UNION

- (a) A list including all the benchmarks provided by the applicant that are already used in the Union and, where available, their International Securities Identification Numbers (ISINs).
- (b) A description of the benchmark or family of benchmarks provided and that are already used in the Union, including a description of the underlying market or economic reality that the benchmark or the family of benchmarks is intended to measure, along with an indication of the sources used to provide these descriptions, and a description of contributors, if any, to this benchmark or family of benchmarks.
- (c) A list including all the benchmarks that are intended to be marketed for their use in the Union and, where available, their ISINs.
- (d) A description of the benchmark or family of benchmarks that are intended to be marketed for its use in the Union, including a description of the underlying market or economic reality that the benchmark or the family of benchmarks is intended to measure, along with an indication of the sources used to provide these descriptions, and a description of contributors, if any, to this benchmark or family of benchmarks.
- (e) Any documented evidence that a benchmark or family of benchmarks described under points (b) and (d) may be considered regulated-data benchmarks, in accordance with the definition set out in point (24) of Article 3(1) of Regulation (EU) 2016/1011, and is thus entitled to the exemptions listed by Article 17(1) of the same Regulation.
- (f) Any documented evidence that a benchmark or family of benchmarks described under points (b) and (d) may be considered commodity benchmarks, in accordance with the definition set out in point (23) of Article 3(1) of Regulation (EU) 2016/1011, and that it is not based on submissions by contributors the majority of which are supervised entities, along with any evidence of the implementation of the special regime requirements as set out by Article 19 and Annex II of the Regulation or the corresponding IOSCO Principles for PRAs.
- (g) Any documented evidence that a benchmark or family of benchmarks described under points (b) and (d) may be considered interest rate benchmarks, in accordance with the definition set out in point (22) of Article 3(1) of Regulation (EU) 2016/1011, along with any evidence of the implementation of the special regime requirements as set out by Article 18 and Annex I of the Regulation.

- (h) Any documented evidence that a benchmark or family of benchmarks described under point (b) has a degree of use within the Union territory which qualifies this benchmark or all the benchmarks included in that family of benchmarks either as significant benchmarks, as defined by point (26) Article 3(1) of Regulation (EU) 2016/1011, or as non-significant benchmarks, as defined by point (27) of Article 3(1) of Regulation (EU) 2016/1011. The information to be provided shall be determined, to the extent possible, on the basis of the provisions in Commission Delegated Regulation (EU) 2018/66 ⁽¹⁾ for the assessment of the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds that make reference to the non-EU-country benchmarks, within the Union, including in the event of an indirect reference to any such benchmark within a combination of benchmarks.
- (i) The rationale behind the administrator's application of any of the exemptions listed under Article 25(1), for significant benchmarks, and Article 26(1), for non-significant benchmarks, of Regulation (EU) 2016/1011 in respect of the benchmark; the information shall be presented, to the extent possible, on the basis of the format established by the implementing technical standards adopted under Articles 25(8) and 26(5) of Regulation (EU) 2016/1011 ⁽²⁾.
- (j) Information on measures to deal with corrections to a benchmark determination or publication.
- (k) Information on the procedure to be undertaken by the provider in the event of changes to or the cessation of a benchmark, in compliance with Article 28(1) of the Regulation (EU) 2016/1011 or the corresponding IOSCO Principles for financial benchmarks or for PRAs, as applicable.

10. INPUT DATA AND METHODOLOGY

- (a) For each benchmark or family of benchmarks, policies and procedures with respect to input data, including those relating to:
 - (i) the type of input data used, their priority of use and any exercise of discretion or expert judgment;
 - (ii) any process for ensuring that input data is sufficient, appropriate and verifiable;
 - (iii) the criteria that determine who may contribute input data to the administrator and the selection process of the contributors;
 - (iv) the evaluation of the contributor's input data and the process of validating input data.
- (b) For each benchmark or family of benchmarks, with respect to the methodology:
 - (i) a description of the methodology, highlighting the key elements of the methodology in accordance with Article 13 of the Regulation (EU) 2016/1011, and further specified in the regulatory technical standards adopted under Article 13(3) of Regulation (EU) 2016/1011 ⁽³⁾;
 - (ii) Policies and procedures, including those relating to:
 - the measures taken to provide validation and review of the methodology, including any trials or back-testing performed;
 - the consultation process on any proposed material change in the methodology.

⁽¹⁾ Commission Delegated Regulation (EU) 2018/66 of 29 September 2017 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council specifying how the nominal amount of financial instruments other than derivatives, the notional amount of derivatives and the net asset value of investment funds are to be assessed (OJ L 12, 17.1.2018, p. 11).

⁽²⁾ Commission Implementing Regulation (EU) 2018/1106 of 8 August 2018 laying down implementing technical standards with regard to templates for the compliance statement to be published and maintained by administrators of significant and non-significant benchmarks pursuant to Regulation (EU) 2016/1011 of the European Parliament and of the Council (OJ L 202, 9.8.2018, p. 9).

⁽³⁾ Commission Delegated Regulation (EU) 2018/1641 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the information to be provided by administrators of critical or significant benchmarks on the methodology used to determine the benchmark, the internal review and approval of the methodology and on the procedures for making material changes in the methodology (see page 21 of this Official Journal).

COMMISSION DELEGATED REGULATION (EU) 2018/1646**of 13 July 2018****supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the information to be provided in an application for authorisation and in an application for registration****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 ⁽¹⁾, and in particular Article 34(8) thereof,

Whereas:

- (1) This Regulation sets out the information that the competent authority should receive with an application for authorisation or registration of an administrator of benchmarks, depending on the characteristics of the applicant or of the benchmarks provided and intended for use in the Union. That specification of the information to be provided in the application for authorisation and in the application for registration promotes a common and consistent process throughout the Union.
- (2) It is important for the competent authority to receive the information laid down in this Regulation to be able to assess whether the arrangements established by the applicant for authorisation or registration meet the requirements laid down in the Regulation (EU) 2016/1011.
- (3) In order for the competent authority to assess whether any conflicts of interest arising from the benchmark activity and business interests of applicant's owners might affect the independence of that applicant in the benchmark calculation and thus impair the accuracy and integrity of the benchmark, the applicant should be required to submit information regarding the activities of its owners and the ownership of its parent undertakings.
- (4) The applicant should provide information on the composition, functioning and independence, in the benchmark calculation, of its governing bodies in order for the competent authority to be able to assess whether the corporate governance structure ensures the independence of the applicant in the benchmark calculation and the avoidance and management of conflicts of interest.
- (5) The applicant should provide information on its policies and procedures regarding the identification, management, mitigation and disclosure of conflicts of interests in relation to its activity of provision of benchmarks or families of benchmarks. For critical benchmarks, given their greater systemic importance, an applicant should provide the competent authority with an up-to-date inventory of existing conflicts of interest, along with an explanation of how they are managed.
- (6) For the purposes of allowing the competent authority to evaluate the pertinence and robustness of the internal control structure, oversight and accountability framework, the applicant should provide the policies and procedures for monitoring the activities of the provision of a benchmark or family of benchmarks. That information is necessary for the competent authority to assess whether those policies and procedures meet the requirements of the Regulation (EU) 2016/1011.
- (7) Information should also be included in the application to demonstrate to the competent authority that the controls on the input data used to determine the benchmarks provided by the applicant are adequate to ensure the representativeness, accuracy and integrity of such data, and that the methodology applied for the calculation of the benchmarks have all the characteristics required by the Regulation (EU) 2016/1011.
- (8) For the purposes of allowing the competent authority to assess the benchmark's representativeness of the economic reality that it intends to measure, the applicant should provide the competent authority with

⁽¹⁾ OJ L 171, 29.6.2016, p. 1.

a description of the benchmark or family of benchmarks provided or intended to be provided and the type of benchmark to which they belong, in line with the provisions of Regulation (EU) 2016/1011. The type to which the benchmark belongs is to be assessed to the best of the knowledge of the applicant and should be provided along with an indication of the sources of data used, so as to allow the competent authority to understand the reliability and exhaustiveness of the underlying information.

- (9) The contents of an application for authorisation or registration where the applicant is a natural person should be set out specifically as the organisational set-up of the administrator will very different from those of legal persons.
- (10) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority to the Commission.
- (11) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ⁽¹⁾.
- (12) Administrators should be given sufficient time to prepare applications and to ensure compliance with the requirements of this Regulation and the regulatory technical standards referred to in the Annex. This Regulation should therefore start to apply two months after it enters into force,

HAS ADOPTED THIS REGULATION:

Article 1

General requirements

1. An application pursuant to Article 34 of Regulation (EU) 2016/1011 shall contain, as appropriate, information that includes the following:
 - (a) items listed in Annex I, when the applicant is a legal person applying for authorisation;
 - (b) items listed in Annex II, when the applicant is a legal person applying for registration;
 - (c) items listed in Annex I, when the applicant is a natural person applying for authorisation, with the exception of the information listed at points (c), (f), (h) and (i) of paragraph 1 of Annex I;
 - (d) items listed in Annex II, when the applicant is a natural person applying for registration, with the exception of the information listed at points (c), (f), (h) and (i) of paragraph 1 of Annex II.
2. The application may contain information at the level of a family of benchmarks only where none of the benchmarks within the family is included in the list of critical benchmarks established in accordance with Article 20(1) of Regulation (EU) 2016/1011.
3. Where the applicant has omitted to provide any of the required information the application shall include an explanation as to why that information has not been provided.
4. The applicant shall not be required to provide the information listed under points (f) to (j) of paragraph 1 of Annex I or Annex II, as applicable, to the extent that the applicant is already supervised in the Member State by the same competent authority for other activities than the provision of benchmarks.

Article 2

Information to be provided for types of benchmarks

1. An applicant may submit for any non-significant benchmark that it provides the information required by paragraph 6 of Annex I or, where applicable, paragraph 6 of Annex II in the form of a summary.
2. Non-supervised entities providing critical and significant benchmarks shall submit the information listed in Annex I.

⁽¹⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

3. Supervised entities providing only non-critical benchmarks shall submit the information listed in the first column of Annex II.
4. An applicant providing only non-significant benchmarks shall submit the information listed in the second column of Annex II.
5. Without prejudice to paragraphs 1 to 4, an applicant providing only regulated-data benchmarks shall not submit the information listed in points 5(c), 6(a)(iii) and 6(a)(iv) of Annex I and Annex II.
6. An applicant providing only interest rate benchmarks shall submit the information listed in the Annexes of this Regulation and shall specify how the specific requirements set out in Annex I of Regulation (EU) 2016/1011 are implemented where the provisions in Annex I of Regulation (EU) 2016/1011 apply in addition to, or as a substitute for, the requirements in Title II of Regulation (EU) 2016/1011, pursuant to Article 18 of that Regulation.
7. An applicant providing only commodity benchmarks shall provide the information listed in Annex I of this Regulation if it is a non-supervised entity or if it provides a critical benchmark. If it is a supervised entity and none of the benchmarks it provides is a critical benchmark, it shall provide the information listed in the first column of Annex II. The applicant shall specify how the requirements set out in Annex II of Regulation (EU) 2016/1011 are implemented for any commodity benchmark subject to Annex II instead of Title II of Regulation (EU) 2016/1011 pursuant to Article 19 of Regulation (EU) 2016/1011.

Article 3

Specific information concerning policies and procedures

1. Any policies and procedures provided in an application shall contain or be accompanied by:
 - (a) an indication of the identity of the person or persons responsible for the approval and maintenance of the policies and procedures;
 - (b) a description of how compliance with the policies and procedures is monitored and the identity of persons responsible for this monitoring;
 - (c) a description of the measures to be taken in the event of a breach of the policies and procedures.
2. An applicant that is part of a group may comply with paragraph 1 by submitting the policies and procedures of its group where they relate to the provision of benchmarks.

Article 4

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 25 January 2019.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 July 2018.

For the Commission
The President
Jean-Claude JUNCKER

ANNEX I

Information to be provided in an application for authorisation under Article 34 of Regulation (EU) 2016/1011

1. GENERAL INFORMATION

- (a) Full name of the applicant and its Legal Entity Identifier (LEI).
- (b) Address of the office within the European Union.
- (c) Legal status.
- (d) Website, if any.
- (e) With respect to the contact person for the purpose of the application:
 - (i) name;
 - (ii) title;
 - (iii) address;
 - (iv) email address;
 - (v) telephone number.
- (f) Where the applicant is a supervised entity, information about its current authorisation status, including the activities for which it is authorised and its relevant competent authority in its home Member State.
- (g) A description of the operations of the applicant in the European Union, whether or not subject to financial regulation, that are relevant for the activity of provision of benchmarks, along with a description of where these operations are conducted.
- (h) Any deed of incorporation, articles of association or other constitutional documents.
- (i) Where the applicant is part of a group, its group structure along with the ownership chart, showing the links between any parent undertaking and subsidiaries. The undertakings and subsidiaries shown in the chart shall be identified by their full name, legal status and address of the registered office and head office.
- (j) A self-declaration of good repute including details, if applicable, of any:
 - (i) proceedings of a disciplinary nature against it (unless dismissed);
 - (ii) refusal of authorisation or registration by a financial authority;
 - (iii) withdrawal of authorisation or registration by a financial authority.
- (k) Number of benchmarks provided.

2. ORGANISATIONAL STRUCTURE AND GOVERNANCE

- (a) Internal organisational structure with respect to the board of directors, senior management committees, oversight function and any other internal body exercising significant management functions involved in the provision of a benchmark, including their:
 - (i) terms of reference or a summary thereof; and
 - (ii) adherence to any governance codes or similar provisions.
- (b) Procedures ensuring that the employees of the administrator and any other natural persons whose services are placed at its disposal or under its control and who are directly involved in the provision of a benchmark have the necessary skills, knowledge and experience for the duties assigned to them and operate in respect of the provisions under Article 4(7) of the Regulation (EU) 2016/1011.
- (c) The number of employees (temporary and permanent) involved in the provision of a benchmark.

3. CONFLICTS OF INTEREST

- (a) Policies and procedures that address:
 - (i) how current and potential conflicts of interest are or will be identified, recorded, managed, mitigated, prevented or remedied;
 - (ii) particular circumstances which apply to the applicant or to any particular benchmark provided by the applicant, in relation to which conflicts of interest are most likely to arise, including where expert judgment or discretion is exercised in the benchmark's determination process, where the applicant is within the same group as a user of a benchmark and where the applicant is a participant in the market or economic reality that the benchmark intends to measure.
- (b) For a benchmark or a family of benchmarks, a list of any material conflicts of interests identified, along with the respective mitigation measures. For each critical benchmark, an up-to-date inventory of actual and potential conflicts of interest along with the respective mitigation measures.
- (c) The structure of the remuneration policy, specifying the criteria used to determine the remuneration of the persons involved directly or indirectly in the activity of provision of benchmarks.

4. INTERNAL CONTROL STRUCTURE, OVERSIGHT AND ACCOUNTABILITY FRAMEWORK

- (a) Policies and procedures for monitoring the activities of the provision of a benchmark or a family of benchmarks, including those relating to:
 - (i) the information technology systems;
 - (ii) risk management, together with a mapping of risks which may arise and which may impact the accuracy, integrity and representativeness of the benchmark provided or the continuity of the activity of provision, along with the respective mitigation measures;
 - (iii) the constitution, role and functioning of the oversight function, as described in Article 5 of Regulation (EU) 2016/1011 and further specified in the regulatory technical standards adopted under Article 5(5) of Regulation (EU) 2016/1011 ⁽¹⁾, including procedures for the appointment, substitution or removal of individuals within the oversight function;
 - (iv) the constitution, role and functioning of the control framework, as described in Article 6 of Regulation (EU) 2016/1011, including procedures for the appointment, substitution or removal of individuals responsible for this framework;
 - (v) the accountability framework as described in Article 7 of Regulation (EU) 2016/1011, including procedures for the appointment, substitution or removal of individuals who are responsible for this framework.
- (b) Contingency plans for determining and publishing a benchmark on a temporary basis, including business continuity, and disaster recovery plans.
- (c) Procedures for the internal reporting of infringements of Regulation (EU) 2016/1011 by managers, employees and any other natural persons whose services are placed at the applicant's disposal or under the control of the applicant.

5. DESCRIPTION OF BENCHMARKS OR FAMILIES OF BENCHMARKS PROVIDED

- (a) A description of a benchmark or family of benchmarks provided or that the applicant intends to provide and the type to which the benchmark belongs, to the best of the knowledge of the applicant and taking into account the provisions of Regulation (EU) 2016/1011, along with an indication of the sources used to determine the type of the benchmark.
- (b) A description of the underlying market or economic reality that the benchmark or family of benchmarks is intended to measure, along with an indication of the sources used to provide this description.
- (c) A description of contributors to a benchmark or family of benchmarks, along with the code of conduct as described in Article 15 of the Regulation (EU) 2016/1011 and for critical benchmarks, the name and location of contributors.

⁽¹⁾ Commission Delegated Regulation (EU) 2018/1637 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the procedures and characteristics of the oversight function (see page 1 of this Official Journal).

- (d) Information on measures to deal with corrections to the determination or publication of a benchmark or family of benchmarks.
- (e) Information on the procedure to be undertaken by the administrator in the event of changes to or the cessation of a benchmark or a family of benchmarks in compliance with Article 28(1) of the Regulation (EU) 2016/1011.

6. INPUT DATA AND METHODOLOGY

- (a) For each benchmark or family of benchmarks, policies and procedures with respect to input data including those relating to:
 - (i) the type of input data used, their priority of use and any exercise of discretion or expert judgment;
 - (ii) any processes for ensuring that input data is sufficient, appropriate and verifiable;
 - (iii) the criteria that determine who may contribute input data to the administrator and the selection process of the contributors;
 - (iv) the evaluation of the contributor's input data and the process of validating input data.
- (b) For each benchmark or family of benchmarks, with respect to the methodology:
 - (i) a description of the methodology highlighting the key elements of the methodology in accordance with Article 13 of the Regulation (EU) 2016/1011 and further specified in the regulatory technical standards adopted under Article 13(3) of Regulation (EU) 2016/1011 ⁽¹⁾;
 - (ii) Policies and procedures including those relating to:
 - (1) the measures taken to provide validation and review of the methodology, including any trials or back-testing performed;
 - (2) the consultation process on any proposed material change in the methodology.

7. OUTSOURCING

Where any activity forming a part of the process for the provision of a benchmark or family of benchmarks is outsourced:

- (a) the relevant outsourcing arrangements, including service-level agreements, which demonstrate compliance with Article 10 of the Regulation (EU) 2016/1011;
- (b) details of the outsourced functions unless this information is already included in the relevant contracts;
- (c) policies and procedures regarding the oversight of the outsourced activities.

8. OTHER INFORMATION

- (a) The applicant may provide any additional information relevant to its application that it considers appropriate.
- (b) The applicant shall provide the requisite information in the manner and form stipulated by the competent authority.

⁽¹⁾ Commission Delegated Regulation (EU) 2018/1641 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the information to be provided by administrators of critical or significant benchmarks on the methodology used to determine the benchmark, the internal review and approval of the methodology and on the procedures for making material changes in the methodology (see page 21 of this Official Journal).

ANNEX II

Information to be provided in an application for registration under Article 34 of Regulation (EU) 2016/1011

'A' means 'Applicable'

'N/A' means 'Not applicable'

Item in Annex I		Supervised entities providing only non-critical benchmarks	Entities providing only non-significant benchmarks
(1) General information			
1(a)	Full name	A	A
1(b)	Address	A	A
1(c)	Legal status	A	A
1(d)	Website	A	A
1(e)	Contact person	A	A
1(f)	Current authorisation status	A ⁽¹⁾	A ⁽¹⁾ to supervised entities N/A to non-supervised entities
1(g)	Operations conducted	A ⁽¹⁾	A ⁽¹⁾
1(h)	Constitutional documents	A ⁽¹⁾	A ⁽¹⁾
1(i)	Group structure	A ⁽¹⁾	A ⁽¹⁾
1(j)	Self-declaration of good repute	A ⁽¹⁾	A ⁽¹⁾
1(k)	Number of benchmarks	A	A
(2) Organisational structure and governance			
2(a)	Internal organisational structure	A	A
2(b)	Employees	A	A
2(c)	Human resources	A	N/A
(3) Conflicts of interest			
3(a)	Policies and procedures	A ⁽²⁾	A ⁽²⁾ in the form of a summary
3(b)	Material conflicts of interest	A	N/A
3(c)	Remuneration structure	A	A
(4) Internal control structure, oversight and accountability framework			
4(a)	Policies and procedures for monitoring the activities of the provision of a benchmark	A	A ⁽³⁾ in the form of a summary
4(b)	Internal arrangements for determining and publishing a benchmark	A	A in the form of a summary
4(c)	Internal reporting of infringements	A	A in the form of a summary

Item in Annex I		Supervised entities providing only non-critical benchmarks	Entities providing only non-significant benchmarks
(5) Description of benchmarks provided			
5(a)	Description	A ⁽⁴⁾	A in the form of a summary
5(b)	Underlying market	A ⁽⁴⁾	A in the form of a summary
5(c)	Contributors	A ⁽⁴⁾	A in the form of a summary
5(d)	Corrections	A ⁽⁴⁾	A in the form of a summary
5(e)	Changes to and cessation	A ⁽⁴⁾	A in the form of a summary
(6) Input data and methodology			
6(a)(i)	Description of input data used	A ⁽⁴⁾	A in the form of a summary
6(a)(ii)	Input data — sufficient, appropriate and verifiable	A ⁽⁴⁾	A ⁽⁵⁾ in the form of a summary
6(a)(iii)	Contributors	A ⁽⁴⁾	A in the form of a summary
6(a)(iv)	Evaluation of contributor's input data and validation of input data	A ⁽⁶⁾	N/A
6(b)(i)	Description of the methodology	A ⁽⁴⁾	A in the form of a summary
6(b)(ii)(1)	Validation/Review	A ⁽⁴⁾	A in the form of a summary
6(b)(ii)(2)	Material change	A ⁽⁶⁾	N/A
(7) Outsourcing			
7(a)	Contracts	A ⁽⁶⁾	N/A
7(b)	Outsourced functions	A ⁽⁶⁾	A in the form of a summary
7(c)	Control	A ⁽⁶⁾	A in the form of a summary
(8) Others			
8(a)	Additional information	A	A
8(b)	Form	A	A

⁽¹⁾ Unless already supervised by the same competent authority for other activities than the provision of benchmarks

⁽²⁾ An applicant may choose not to provide information relating to point 3(a)(iii) of Annex I, in respect of a significant or non-significant benchmark it provides.

⁽³⁾ An applicant may omit to provide information relating to point 4(a)(iii) of Annex I — with the exception of information on the establishment and maintenance of a permanent oversight function — points 4(a)(iv) and 4(a)(v) of Annex I — for some of the information to be provided on the control and accountability framework — in respect of a non-significant benchmark it provides.

⁽⁴⁾ A supervised entity which provides both significant and non-significant benchmarks may provide such information in the form of a summary with reference to its non-significant benchmarks.

⁽⁵⁾ An applicant may choose not to provide information relating to input data being verifiable in respect of a non-significant benchmark that it provides.

⁽⁶⁾ A supervised entity which provides both significant and non-significant benchmarks may provide such information only for the significant benchmarks it provides.

COMMISSION IMPLEMENTING REGULATION (EU) 2018/1647**of 31 October 2018****authorising the placing on the market of egg membrane hydrolysate as a novel food under Regulation (EU) 2015/2283 of the European Parliament and of the Council and amending Commission Implementing Regulation (EU) 2017/2470****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2015/2283 of the European Parliament and of the Council of 25 November 2015 on novel foods, amending Regulation (EU) No 1169/2011 of the European Parliament and of the Council and repealing Regulation (EC) No 258/97 and Commission Regulation (EC) No 1852/2001 ⁽¹⁾, and in particular Article 12 thereof,

Whereas:

- (1) Regulation (EU) 2015/2283 provides that only novel foods authorised and included in the Union list may be placed on the market within the Union.
- (2) Pursuant to Article 8 of Regulation (EU) 2015/2283, Commission Implementing Regulation (EU) 2017/2470 ⁽²⁾ establishing a Union list of authorised novel foods was adopted.
- (3) Pursuant to Article 12 of Regulation (EU) 2015/2283, the Commission is to decide on the authorisation and on the placing on the Union market of a novel food and on updating the Union list.
- (4) On 5 August 2016, the company Biova, LLC ('the Applicant') made a request to the competent authority of Denmark to place egg membrane hydrolysate on the Union market as a novel food ingredient within the meaning of point (e) of Article 1(2) of Regulation (EC) No 258/97 of the European Parliament and of the Council ⁽³⁾. The application seeks to have egg membrane hydrolysate to be used in food supplements for the general adult population.
- (5) Pursuant to Article 35(1) of Regulation (EU) 2015/2283, any request for placing a novel food on the market within the Union submitted to a Member State in accordance with Article 4 of Regulation (EC) No 258/97, and for which the final decision has not been taken before 1 January 2018, shall be treated as an application submitted under Regulation (EU) 2015/2283.
- (6) While the request for placing egg membrane hydrolysate on the market as a novel food within the Union was submitted to a Member State in accordance with Article 4 of Regulation (EC) No 258/97, the application also meets the requirements laid down in Regulation (EU) 2015/2283.
- (7) On 7 June 2017, the competent authority of Denmark issued its initial assessment report. In that report, it concluded that egg membrane hydrolysate meets the criteria for a novel food ingredient set out in Article 3(1) of Regulation (EC) No 258/97.
- (8) On 12 June 2017, the Commission forwarded the initial assessment report to the other Member States. Reasoned objections were raised by other Member States within the 60-day period laid down in the first subparagraph of Article 6(4) of Regulation (EC) No 258/97 with regard to the manufacturing process, composition, toxicological data and potential drug interaction between the novel food and medication taken by people with joint pain.
- (9) In a subsequent application submitted on 5 January 2018, the Applicant made a request to the Commission for protection of proprietary data for a number of studies submitted in support of the application namely, a detailed manufacturing process description, the Generally Recognized as Safe (GRAS) Status of BiovaFlex. Expert Panel

⁽¹⁾ OJ L 327, 11.12.2015, p. 1.

⁽²⁾ Commission Implementing Regulation (EU) 2017/2470 of 20 December 2017 establishing the Union list of novel foods in accordance with Regulation (EU) 2015/2283 of the European Parliament and of the Council on novel foods (OJ L 351, 30.12.2017, p. 72).

⁽³⁾ Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 concerning novel foods and novel food ingredients (OJ L 43, 14.2.1997, p. 1).

Report ⁽¹⁾, an analysis of solubilized egg shell membrane using Radioallergosorbent Test Inhibition ⁽²⁾, quantitative egg allergen test results ⁽³⁾, an *in vitro* mammalian cell micronucleus assay in TK6 cells ⁽⁴⁾, an acute oral toxicity study ⁽⁵⁾, a bacterial reverse mutation assay ⁽⁵⁾, a human clinical safety and efficacy pilot ⁽⁶⁾, guinea pig sensitization (Buehler) study ⁽⁷⁾, and a haematology and blood biochemistry data and study report ⁽⁸⁾.

- (10) The Commission consulted the European Food Safety Authority ('the Authority') on 20 April 2018, asking it to carry out an additional assessment for egg membrane hydrolysate as a novel food in accordance with Regulation (EU) 2015/2283.
- (11) On 27 June 2018, the Authority adopted 'Scientific Opinion on the safety of egg membrane hydrolysate as a novel food pursuant to Regulation (EU) 2015/2283' ⁽⁹⁾. This opinion is in line with the requirements of Article 11 of Regulation (EU) 2015/2283.
- (12) That opinion gives sufficient grounds to establish that egg membrane hydrolysate, in the proposed uses and use levels when used as an ingredient in food supplements, complies with Article 12(1) of Regulation (EU) 2015/2283.
- (13) In its opinion on egg membrane hydrolysate as a novel food, the Authority considered that the data on the manufacturing process served as a basis to assess the safety of egg membrane hydrolysate. Therefore, the Authority considers that the conclusions on the safety of egg membrane hydrolysate, could not have been arrived at without the data from the unpublished report of this process.
- (14) Following the receipt of the Authority's opinion, the Commission requested the Applicant to further clarify the justification provided with regard to their proprietary claim over the studies and to clarify their claim to an exclusive right of reference to those studies, as referred to in points (a) and (b) of Article 26(2) of Regulation (EU) 2015/2283.
- (15) The Applicant also declared to hold proprietary and exclusive rights to the studies under national law at the time the application was submitted, and that therefore third parties could not lawfully access or use those studies. The Commission has assessed all the information provided by the Applicant and considers that the Applicant has sufficiently substantiated the fulfilment of the requirements laid down in Article 26(2) of Regulation (EU) 2015/2283.
- (16) Accordingly, as provided for under Article 26(2) of Regulation (EU) 2015/2283, the detailed manufacturing process description contained in the Applicant's file and without which the novel food could not have been assessed by the Authority should not be used by the Authority for the benefit of a subsequent applicant for a period of five years from the date of entry into force of this Regulation. As a consequence, the placing on the market within the Union of the novel food authorised by this Regulation should be restricted to the Applicant for a period of five years.
- (17) However, restricting the authorisation of this novel food and of the reference to the detailed manufacturing process description contained in the Applicant's file for the sole use of the Applicant does not prevent other applicants from applying for an authorisation to place on the market the same novel food provided that their application is based on legally obtained information supporting the authorisation under this Regulation.
- (18) As the source of the novel food comes from eggs, which is listed in Annex II to Regulation (EU) No 1169/2011 of the European Parliament and of the Council ⁽¹⁰⁾ as one of a number of substances or products which cause allergies or intolerances, food supplements containing egg membrane hydrolysate should be appropriately labelled following the requirements of Article 21 of that Regulation.

⁽¹⁾ Biova, LLC; February 2015 (unpublished).

⁽²⁾ Food Allergy Research and Resource Program, University of Nebraska, Lincoln; April 2014 (unpublished).

⁽³⁾ Food Allergy Research and Resource Program, University of Nebraska, Lincoln; February 2008b (unpublished).

⁽⁴⁾ BioReliance Corporation, Rockville (MD) for NIS Labs, Klamath Falls (OR); January 2016 (unpublished).

⁽⁵⁾ ST&T Consultants, San Francisco (CA) for Biova LLC, Johnston (IA); January 2009a (unpublished).

⁽⁶⁾ ST&T Consultants, San Francisco (CA) for Biova LLC; July 2009c (unpublished).

⁽⁷⁾ ST&T Consultants, San Francisco (CA) for Biova LLC, Johnston (IA); February 2009a (unpublished).

⁽⁸⁾ ST&T Consultants, San Francisco (CA); July 2009c (unpublished).

⁽⁹⁾ EFSA Journal 2018; 16(7):5363

⁽¹⁰⁾ Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ L 304, 22.11.2011, p. 18).

- (19) Directive 2002/46/EC of the European Parliament and of the Council ⁽¹⁾ lays down requirements on food supplements. The use of egg membrane hydrolysate should be authorised without prejudice to that Directive.
- (20) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plants, Animals, Food and Feed,

HAS ADOPTED THIS REGULATION:

Article 1

1. Egg membrane hydrolysate as specified in the Annex to this Regulation shall be included in the Union list of authorised novel foods established in Implementing Regulation (EU) 2017/2470.
2. For a period of five years from the date of entry into force of this Regulation only the initial Applicant:
Company: Biova, LLC
Address: 5800 Merle Hay Rd, Suite 14 PO Box 394 Johnston 50131, Iowa USA;
is authorised to place on the market within the Union the novel food referred to in paragraph 1, unless a subsequent applicant obtains authorisation for the novel food without reference to the data protected pursuant to Article 2 of this Regulation or with the agreement of Biova, LLC.
3. The entry in the Union list referred to in the first paragraph shall include the conditions of use and labelling requirements laid down in the Annex to this Regulation.
4. The authorisation provided for in this Article shall be without prejudice to the provisions of Directive 2002/46/EC.

Article 2

The study contained in the application file on the basis of which the novel food referred to in Article 1 has been assessed by the Authority, claimed by the applicant as fulfilling the requirements laid down in Article 26(2) of Regulation (EU) 2015/2283, shall not be used for the benefit of a subsequent applicant for a period of five years from the date of entry into force of this Regulation without the agreement of Biova, LLC.

Article 3

The Annex to Implementing Regulation (EU) 2017/2470 is amended in accordance with the Annex to this Regulation.

Article 4

This Regulation shall enter into force on the twentieth day following that of its publication in *the Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 31 October 2018.

For the Commission
The President
Jean-Claude JUNCKER

⁽¹⁾ Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (OJ L 183, 12.7.2002, p. 51).

The Annex to Implementing Regulation (EU) 2017/2470 is amended as follows:

(1) the following last column is added in Table 1 (Authorised novel foods):

‘Data Protection’

(2) the following entry is inserted in Table 1 (Authorised novel foods) in alphabetical order:

Authorised novel food	Conditions under which the novel food may be used		Additional specific labelling requirements	Other requirements	Data Protection
‘Egg membrane hydrolysate	<i>Specified food category</i>	<i>Maximum levels</i>	The designation of the novel food on the labelling of the foodstuffs containing it shall be “egg membrane hydrolysate”.		Authorised on 25 November 2018. This inclusion is based on proprietary scientific evidence and scientific data protected in accordance with Article 26 of Regulation (EU) 2015/2283. Applicant: Biova, LLC., 5800 Merle Hay Rd, Suite 14 PO Box 394 Johnston 50131, Iowa USA. During the period of data protection the novel food egg membrane hydrolysate is authorised for placing on the market within the Union only by Biova, LLC. unless a subsequent applicant obtains authorisation for the novel food without reference to the proprietary scientific evidence or scientific data protected in accordance with Article 26 of Regulation (EU) 2015/2283 or with the agreement of Biova, LLC. End date of the data protection: 25 November 2023’.
	Food Supplements as defined in Directive 2002/46/EC intended for the general adult population	450 mg/day			

(3) the following entry is inserted in Table 2 (Specifications) in alphabetical order:

Authorised Novel Food	Specification
‘Egg membrane hydrolysate	Description The egg membrane hydrolysate is derived from the eggshell membranes of chicken eggs. The eggshells undergo hydro-mechanical separation in order to obtain the egg membranes, which are then further processed using a patented solubilisation method. Following the solubilisation process, the solution is filtered, concentrated, spray-dried and packaged.

Authorised Novel Food	Specification
	Characteristics/Composition Chemical parameters Total nitrogen-containing compounds (% w/w): ≥ 88 Collagen (% w/w): ≥ 15 Elastin (% w/w): ≥ 20 Total glycosaminoglycans (% w/w): ≥ 5 Calcium: $\leq 1\%$ Physical parameters pH: 6,5 – 7,6 Ash (% w/w): ≤ 8 Moisture (% w/w): ≤ 9 Water activity: $\leq 0,3$ Solubility (in water): soluble Bulk density: $\geq 0,6$ g/cc Heavy metals Arsenic $\leq 0,5$ mg/kg Microbiological criteria Aerobic plate count: $\leq 2\,500$ CFU/g <i>Escherichia coli</i>: ≤ 5 MPN/g <i>Salmonella</i>: Negative (in 25 g) Coliforms: ≤ 10 MPN/g <i>Staphylococcus aureus</i>: ≤ 10 CFU/g Mesophilic spore count: ≤ 25 CFU/g Thermophilic spore count: ≤ 10 CFU/10 g Yeast: ≤ 10 CFU/g Mould: ≤ 200 CFU/g CFU: Colony Forming Units; MPN = Most Probable Number; USP: United States Pharmacopeia.' Methods Combustion according to AOAC 990.03 and AOAC 992.15 Sircol™ Soluble Collagen Assay Fastin™ Elastin Assay USP26 (chondroitin sulphate K0032 method)

