29 April 2016

Financial Market Infrastructure
Australian Securities and Investments Commission
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Sydney NSW 2001

Email: financial.benchmarks@asic.gov.au

Dear Sirs and Madams

Financial Benchmarks Regulatory Reform: A Consultation Paper by the Council of Financial Regulators

The Futures Industry Association ("**FIA**"), the Asia Securities Industry & Financial Markets Association ("**ASIFMA**") and the International Swaps and Derivatives Association, Inc ("**ISDA**") (collectively, the "**Associations**") welcome the opportunity to respond to the Consultation Paper on Financial Benchmarks Regulatory Reform ("**Consultation Paper**") issued by the Council of Financial Regulators ("**CFR**") in March 2016.

FIA is the leading global trade organisation for the futures, options and centrally cleared derivatives markets with offices in London, Singapore and Washington. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodity specialists from more than 48 countries as well as technology vendors, lawyers and other professionals serving the industry. FIA's mission is to support open, transparent and competitive markets, protect and enhance the integrity of the financial system and promote high standards of professional conduct. As the principal members of derivatives clearinghouses worldwide, FIA's member firms play a critical role in the reduction of systemic risk in global financial markets. Further information is available at www.fia.org.

ASIFMA is an independent, regional trade association with over 80 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, law firms and market infrastructure service providers. Through the GFMA alliance with SIFMA in the United States and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region. Further information is available at www.asifma.org.

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 countries. These members comprise of a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Further information is available at www.isda.org.

FIA, AISFMA and ISDA response

We set out our detailed responses to the Consultation Paper below.

Question 1: Do you have any comment on the proposed definition and scope of significant financial benchmarks?

We strongly agree with the proposed approach that only significant benchmarks will be subject to regulation in relation to proposed benchmark administration and benchmark submission reforms. We also agree that any new offences for benchmark manipulation and misconduct should extend to all financial benchmarks to promote market integrity across all benchmarks.

We agree with the proposed definition of significant benchmarks as those that are systemically important and where there is a material risk of financial contagion or systemic instability if the availability or integrity of the benchmark is disrupted.

We agree that the Bank Bill Swap Rate (BBSW) administered by the Australian Financial Markets Association and the Commonwealth Government Securities (CGS) yields survey for settling bond futures administered by ASX Clear (Futures) Pty Ltd are significant benchmarks.

Question 2: Do you have a view on whether major equity indices such as the ASX200 should be subject to regulation as significant benchmarks?

We note the comments made in the Consultation Paper that the S&P/ASX 200 equity index may not currently need to be brought within the scope of administration and submission regulation because it is an equity benchmark calculated from regulated data. Regulating such an index may go beyond the scope of comparable regulation internationally.

We note that significant equity indexes are in scope of comparable regulation, albeit controls are applied proportionally if the input data is based on transactions. We are concerned that the continued use of the S&P/ASX 200 equity index will be threatened if the index is not subject to regulation and therefore not deemed equivalent under the extraterritorial rules of third country regulatory regimes (e.g. EU Benchmarks Regulation). Therefore we would encourage the CFR to discuss with regulatory peers in overseas jurisdictions to ensure that the regulatory approaches to significant equity indexes are harmonised and aligned as much as possible.

Question 3: Are there any financial benchmarks that you consider should be subject to regulation as significant benchmarks?

No comments.

Question 4: Do you have any comment on the proposed mechanism for designating the scope of regulation?

We agree with the proposed hybrid option for designating the scope of regulation so that significant benchmarks would be listed in a Regulation and ASIC (in consultation with other CFR agencies) would have

the ability to add further benchmarks by determination based on criteria set out in the Regulation. We support this approach and agree that the hybrid option provides a balance between regulatory certainty and flexibility to adapt to changing circumstances.

We encourage the CFR to ensure that any criteria adopted should be clear and that the principle of proportionality be adopted when prescribing further significant benchmarks. If the criteria involves the use and frequency of use of the benchmark by end users we note that this should be considered carefully. For example, if determination of whether a benchmark is significant is dependent on the frequency of use of benchmarks by issuers of financial instruments, issuers of financial contracts (such as loans) or investment fund managers for the valuation or the performance of contracts or financial instruments, it is important to note that benchmark administrators are not necessarily in a position to make such an assessment on a continuous basis. This is because these administrators do not necessarily know at any moment in time how many funds or issuers are using their benchmarks and they do not have access on a continuous basis to the valuation of such contracts or financial instruments.

We also seek clarity on whether significant benchmarks will be reviewed on a regular basis to assess and evaluate whether they are still significant.

We also ask the CFR to consider any extra-territorial impacts of benchmark regulation and how overseas significant benchmarks will be treated under any proposed Australian reforms. For overseas significant benchmarks, we also seek clarity on how the necessary connection and nexus to Australia will be established and how duplicative or conflicting regulation of such benchmarks would be avoided.

Question 5: Which means of imposing the IOSCO Principles as a requirement of benchmark administration would you favour among the options identified and why?

Of the two options presented, we prefer the licensing option especially as it aligns with proposed international reforms in this area.

We note that as part of the proposed regime, the benchmark administrator could be required to: (a) comply with the IOSCO Principles; (b) conduct a regular self-assessment (for example, annually) against the IOSCO Principles and publish it, in line with the existing recommendation in Report 440; and (c) commission a regular (for example, two-yearly) independent audit review of IOSCO compliance, provide it to ASIC, and publish it (or at least make available to users on request). At a high level, we are supportive of this approach and believe any assessment of compliance should be based on a principles-based self-assessment or external assessment rather than a line-by-line analysis. This would provide a flexible approach and minimise disruption to markets and the use of existing benchmarks.

We agree that there should not be any dual or duplicative regulation for financial market licence holders or clearing and settlement facilities where benchmark activity is incidental to the operation of the clearing and settlement facility or the financial market.

We note that if additional oversight/supervision/registration is needed for entities already licensed by ASIC, then a streamlined licensing process should be adopted for those benchmark administrators. For

administrators who are not already under the supervision of ASIC, we understand the need for a comprehensive licensing process.

We also encourage the CFR to consider any extra-territorial impacts of licensing for overseas benchmark administrators and, to the extent necessary, establish a principles-based exemptions/equivalence process that avoids duplicative or conflicting requirements.

Question 6: Is there another option you prefer?

No comments.

Question 7: Among the options presented, which option do you prefer for regulating benchmark submission and why?

Of the four options presented, we prefer the first option where submitters would be indirectly regulated via requirements imposed on the benchmark administrator as part of their compliance with the IOSCO principles. This option is consistent with reforms in overseas jurisdictions such as reforms proposed by the European Commission and in Japan.

ASIC would still have powers to take action and enforce if the conduct of a submitter fell within the scope of new offences proposed for benchmark manipulation or misconduct or if it was also a breach of obligations under the Corporations Act or other applicable legislation.

Question 8: Do you consider that benchmark administrators would be able to effectively regulate submitters via a Submitter Code of Conduct?

IOSCO Principle 14 established that an administrator (with benchmarks based on submission) is expected to maintain a code which is to be confirmed annually for adherence. The code is therefore a powerful mechanism to confirm compliance with an administrator's standards.

We support an approach that gives discretion to the benchmark administrator to determine what is needed considering the significance of the benchmark. This will be particularly relevant for administrators who may administer more than one benchmark. An administrator could have one standard code for multiple types of benchmark. Or, in some cases, it may be simpler for an administrator to have multiple codes of conduct for several different benchmarks. Therefore our view is that any rules prescribed on benchmark administrators relating to codes of conduct should account for proportionality and differences in purpose, scope and complexity among benchmarks.

We also note that submission data can be commercially sensitive e.g. trading desk exposures and relevant communications. Therefore this approach would give the flexibility to consider issues related to confidentiality and to ensure that requirements imposed for submission would not be so onerous to discourage contributors/submitters from participating in the process.

Question 9: Do you agree that it is appropriate to develop a reserve power to compel benchmarks submission for significant benchmarks, including to official sector significant benchmarks?

We can understand why it would be a regulatory objective and policy goal to compel benchmark submission to ensure continuity and reliability of a particular benchmark.

However, if a reserve power to compel benchmark submission is developed, we believe it is appropriate to:

1. apply and limit the power to only critical benchmarks and not significant benchmarks;

2. based on an objective assessment of who the major participants are in the applicable underlying market and not limiting this to only banks (as they may not be the largest market players) and;

3. provide market participants who are identified as major participants with:

    a. an opportunity to respond to ASIC's assessment and if necessary, provide supporting evidence substantiating that they are not a major participant; and

    b. sufficient transitional time to implement the necessary controls to comply with any relevant requirements or to withdraw from the underlying applicable market.

Question 10: If so, who should be able to exercise such a power?

If a reserve power is developed, we believe that ASIC should be able to exercise such a power.

Question 11: Which option do you prefer for compelling submission, and why?

Of the four options presented for compelling submission, we would prefer to give ASIC a rulemaking power to impose an obligation on specified entities (the scope of which would need to be set out in relevant legislation) to make submissions to specified benchmarks.

However, as mentioned in response to question 9, we believe it is appropriate to limit this to critical benchmarks only and not significant benchmarks (similar to reforms proposed in Europe). Therefore clear criteria will need to be set out in legislation to determine the circumstances for when this power can be exercised.

Question 12: Do you have any comments on the suggested cohort of entities that could be made subject to such a power?

No comments.

Question 13: Do you have any other suggestions for how to compel submissions?

No comments.

Question 14: Do you have any comment on the proposal to introduce a specific offence of benchmark manipulation?

We agree with the approach to introduce additional offences with specific application to benchmark misconduct and manipulation.

Question 15: Do you agree that the proposed offence should cover all financial benchmarks rather than just significant benchmarks?

We agree that the proposed additional offences should cover all financial benchmarks rather than just significant benchmarks to assist in promoting market integrity across all benchmarks. We also support regulatory approaches that are consistent with approaches taken in other jurisdictions which will likely help with any applicable third country equivalence/recognition decisions.

Question 16: Do you have any comment on:

- ***(a) The physical elements of the proposed offence;***
- ***(b) The fault elements of the proposed offence;***
- ***(c) The proposed civil liability provision; or***
- ***(d) The proposed jurisdictional reach of the proposed offence? Are there other factors that should be considered in defining the jurisdictional reach of the proposed offence?***

No comments.

Question 17: Do you have any comment on the separate proposal to expressly provide that Bank Accepted Bills (BABs) and Negotiable Certificates of Deposit (NCDs) are financial products for the purposes of Part 7.10 of the Corporations Act?

We support the proposal that BABs and NCDs be classified as financial products for the limited purpose of Part 7.10 of the Corporations Act (provisions dealing with market misconduct and other prohibited conduct relating to financial products and financial services).

Question 18: Do you have any other comments?

No comments.

Question 19: Do you have any comments on the benefits and costs of reform?

No comments.

Conclusion

We thank you for this opportunity to respond to the Consultation Paper and we are, of course, very happy to discuss with you in greater detail any of our comments.

Please do not hesitate to contact Phuong Trinh of FIA (Email: ptrinh@fia.org), Mark Austen of ASIFMA (Email: mausten@asifma.org) or Keith Noyes of ISDA (Email: knoyes@isda.org).

Yours faithfully,

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