April 29, 2016

Financial Markets Infrastructure
Australian Securities and Investments Commission
GPO Box 9827
Sydney NSW 2001

On behalf of the Index Industry Association ("IIA"), we appreciate the opportunity to provide comments to the CFR Consultation Paper on Financial Benchmarks.

The IIA is a not-for-profit organization representing the global index industry. The purpose of the IIA is to represent the industry by working with market participants, regulators, and other representative bodies to promote sound practices in the industry that strengthen markets and serve the needs of investors. Several of the leading, global, independent index administrators are members of IIA, including Barclays, the Center for Research in Security Prices, FTSE/Russell Group, Markit, MSCI Inc., Morningstar, NASDAQ OMX, S&P/Dow Jones Indices, STOXX, and the Singapore Exchange. IIA's members are independent, meaning they neither provide prices for their indices, nor do they provide investors products based on their indices. IIA members calculate, maintain and/or administer approximately 2 million indices across all asset classes. IIA members are aligned with *IIA's Best Practices,* (which can be found at www.indexindustry.org) as well as the *IOSCO Principles for Benchmarks*.

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

IIA agrees with the scope discussed in Section 3 of the CFR Consultation Paper and the reasoning set forth (a), and (b). It is difficult to use a single factor to determine if a benchmark is significant. IIA does agree that one factor in determining whether a benchmark is significant should be, as the CFR notes in Paragraph 3.1 of the CP, whether the benchmark is systemically important or presents *"….a material risk of financial contagion or systemic instability if the availability or integrity of the benchmark is disrupted."* Other factors may be important to making that determination as well. Other jurisdictions believe

substitutability is another appropriate criterion for deeming a benchmark significant because a market participant's ability to change benchmarks mitigates many of the concerns which arose in connection with the IBORs. In Australia, as in many other equity markets, market participants have benchmarks offered by a variety of competitors who have access to the necessary data and for many years have been producing benchmarks that may be used as a substitute. If a benchmark administrator, does not produce and publish a robust and reliable benchmark, market participants have options to use a substitute benchmark currently in the market or others will develop new ones.

In addition, IIA believes an important aspect in determining whether to treat a benchmark as significant is whether there are conflicts of interest in the benchmark administration process, including, for example, the independence of the benchmark provider, needs to be included in any assessment to meet the regulatory objective of ensuring that benchmarks are sound and robust. For example, equity index benchmarks using regulated data such as the S&P/ASX 200, produced by an independent benchmark provider, do not suffer from the same types of conflicts of interest as other types of benchmarks and should not be deemed a significant benchmark.

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

IIA agrees with the comments noted in the CFR Consultation Paper in Section 3, the last paragraph, "*However, the CFR considers that the S&P/ASX200 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.*" In fact, none of the foreign jurisdictions CFR lists in Section 1, the last paragraph (the UK, EU, Japan, Singapore, Hong Kong, and Canada) and no jurisdiction in the world, that IIA is aware of, plan to include regulated data benchmarks specifically equity indices. Equity index benchmarks using regulated data produced by an independent benchmark provider, do not suffer from the same types of conflicts of interest as other types of benchmarks (such as the IBORs) and should not be deemed a significant benchmark and subject to regulation as significant benchmarks.

There are substantive differences regarding benchmarks which rely on submissions in relatively opaque, sometimes illiquid markets where the submitters may have a financial interest in the outcome of the benchmark (e.g. LIBOR, FX, and BBSW). Submissions to such benchmarks are more prone to manipulation than those using data from regulated exchanges, which are transparent and already regulated by the exchange and ultimately the national regulator. Benchmarks that utilize data sourced from regulated markets or exchanges with mandatory post-trade transparency requirements (including clearing houses) are amongst the most heavily regulated markets in the world. Proportionality would dictate that these markets should not be subject to extra scrutiny due to the nature of checks and monitoring of such data in place at the regulated markets or exchanges and clearing houses, as well as a regulator's authority over rules governing the listing and trading of financial instruments referencing these benchmarks. In addition, market participants who continually monitor the S&P/ASX 200, and other equity index benchmarks for their own trading and/or investment purposes, sometimes in real

time, are able to detect any manipulation of the data. The proportional implementation of the IOSCO Principles allows for consideration of such important differences.

The IOSCO Principles focus on benchmarks based on submissions and/or those developed by benchmark providers with ownership structures or governance regimes that could lead to increased conflicts of interest. Independent benchmark administrators maintain robust governance regimes that separate commercial aspects of their business from analytical governance of their benchmarks, mitigating potential or actual conflicts of interests.

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

IIA does not have any information that would suggest any other financial benchmarks should be considered to be regulated as a significant benchmark in Australia.

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

The marketplace will operate best when there is clarity and transparency about which benchmarks are included in scope. This will allow benchmark administrators and providers to continue to innovate and provide assurance to market users. Each of the three options include an ability for the Government or ASIC to designate significant benchmark, whether it is the Government's ability to amend the list under option (a) or ASIC's ability to apply the criteria under option (b). In reviewing other jurisdiction's regulations, IIA believes the option that provides the most clarity at this time is (a) as the U.K. has implemented. The proposed EU regulation has had a very difficult time clearly defining the details of the criteria and still is being intensely discussed. Using notional values, as in the case of the proposed EU regulation, creates a situation where the data are difficult to determine and define based on the differing product structures, use of leverage, funded amounts, timing issues, etc. The biggest difficulty is the administrators do not have these data because the current licensing arrangements can not compel disclosure in all cases nor does the administrator have the legal authority to require it. No matter what option is chosen, the data must be transparent to both the administrator and the regulator. If either (b) or (c) are chosen the criteria must be proportionate to the risk of the benchmark and clarity of the criteria is of utmost importance.

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 offered, the second one makes more sense where there is competition and substitutability of benchmarks. In benchmarks based on regulated data, there is competition from global benchmark administrators. Independent benchmark administrators have been the administrators who are adhering to the IOSCO Principles and many have outside audits performed to demonstrate their compliance. History has demonstrated the marketplace for benchmarks works best where competition exists and substitutability of benchmarks is an option for investors. We are concerned a licensing regime could restrict the number of administrators willing to offer benchmarks in Australia lessening competition and choice for Australian investors. A more pragmatic approach by some global regulators has been to regulate the product providers, and in Australia's case, ASIC already

has jurisdiction. A system where the products and providers are directly regulated by ASIC and the administrators demonstrate they adhere to the IOSCO Principles would provide for investor protection.

6. Is there another option you prefer?

Please refer to the response to Question 5.

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

This is a significant burden for benchmark administrators and one that the benchmark administrator may not have the legal or commercial leverage to enforce. Benchmarks based on transaction data such as regulated data benchmarks do not have "submitters" so IIA feels they should not be included in any rule that may be adopted. The prices used for calculating equity index benchmarks are already regulated by the ASX, and ultimately by ASIC, who currently have the legal authority to enforce regulation.

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

For regulated data benchmarks, it is difficult to have a legally-binding Submitter Code of Conduct since independently administered ones do not know who are creating the prices for the component securities for the calculation of the benchmark. ASIC regulates the exchanges, trading venues and clearing houses and is in a better position to regulate the submitters than an independent administrator. Benchmark administrators have the ability to monitor and assess the quality of data they use in their benchmark determination processes and to implement a non-binding Submitter Code of Conduct with appropriate checks and balances to protect benchmark integrity. An issue arises when the implementation of a Submitter Code of Conduct becomes prescribed through regulatory requirements as this could have an adverse effect on a benchmark administrator's access to submissions necessary to produce the indices. It is important to ensure that any Submitter Code of Conduct, whether non-binding or binding, applies only to data that are not sourced from a regulated exchange or data from data vendor that created such data for the purposes other than calculating or determining a benchmark.

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

Compelling submission for regulated benchmarks does not make sense and is reason for Australia not to include regulated benchmarks in the significant category. Benchmarks based on regulated data are not based on submissions with the underlying securities traded via regulated exchanges or trading venues and are centrally cleared. ASIC and other Australian regulators already have regulatory authority over the traders and brokers of the products, not to mention, the trading venues, and clearing houses themselves. Independent benchmark administrators do not create the products that are being traded nor do they know who are trading the products and do not have any legal authority to compel submission.

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

Please refer to the response to Question 9.

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

Please refer to the response to Question 9.

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

Please refer to the response to Question 9.

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

Please refer to the response to Question 9.

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

Benchmark manipulation is a serious offense. The market needs to know with clarity what constitutes a violation and the sanctions must be proportionate to the offense and the damages incurred. The sanctions should be flexible enough to treat intentional conduct and unintentional conduct differently. Good faith efforts to comply or adhere to a benchmark regulation should be considered when determining if sanctions are appropriate and the magnitude.

It is important to recognise that many benchmark administrators operate globally with diverse benchmark offerings amongst various asset classes. A myriad of extra-territoriality issues have arisen during the EU regulatory process which could lead to an overly complex and/or unworkable regulatory regime. Also, having common definitions and similar regulations across the jurisdictions would make compliance more successful.

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

Yes, benchmark regulation should apply to all benchmarks; however, not all benchmarks pose the same risk. Those benchmarks based on data from regulated exchanges and trading venues with independent administration are far less likely to pose risk and the Australian regulators should focus on those markets with the limited resources they may have. This approach is consistent with the IOSCO Principles.

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?

Please refer to the response to Questions 14.

17. Do you have any comment on the separate proposal to expressly provide that BABs and NCDs are financial products for the purposes of Part 7.10 of the Corporations Act?

No.

18. Do you have any other comments?

IIA would like to reiterate Australia would be the only country declaring an equity index benchmark to be a systemically important if it includes the S&P/ASX 200 in the regulation. ASIC already regulates the entities that create the prices for Australia's equity index benchmarks including the exchanges, clearing house, and firms that broker transactions. Benchmarks based on regulated data are fundamentally different than benchmarks which derive prices from submitters. Australia's desire to adopt and implement policies and procedures that align with the IOSCO Principles is appropriate provided proportionality is applied when assessing such alignment. However, it is important to note that the IOSCO Principles are principles which work because they include a proportionality standard and comply or explain approach.

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

Well-crafted regulation is both transparent and proportional, and the benefits should outweigh the costs. If the regulation increases costs so much as to reduce competition amongst the administrators and/or deprive Australian investors of investment options based on benchmarks and would be detrimental to Australian capital formation and markets. Many benchmark providers are global in nature and are incurring considerable audit and regulatory related costs complying with regulation in other jurisdictions. A pragmatic approach would be for Australia to recognize and accept an audit for IOSCO compliance to be acceptable to demonstrate compliance for Australian regulatory purposes. This would mitigate the costs being incurred while providing assurance of compliance. A unique audit in every jurisdiction in the world would become superfluous and would likely reduce competition without necessary benefit for investors.

If I can be of any assistance or clarify any of IIA's positions, please feel free to contact me.

Sincerely,

Richard Redding, CEO
Index Industry Association