

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).