

24 July 2017

Manager
Banking, Insurance and Capital Markets Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: benchmarkreform@treasury.gov.au

Dear Manager

Reform of the Regulation of Financial Benchmarks

The International Swaps and Derivatives Association, Inc. (**ISDA**)¹ is grateful for the opportunity to comment on the Exposure Draft of the *Corporations Amendment (Financial Benchmarks) Bill 2017* (Cth) (**Exposure Draft**), which forms part of the Australian government's legislative package in relation to the reform of the regulation of financial benchmarks (**Reforms**). Our submission is limited to the specific issues raised below and we do not comment on the industry funding aspects of the Reforms in this submission.² Our members may choose to make their own individual submissions on the Reforms, including in relation to the industry funding aspects of it.

Since its inception, ISDA has pioneered efforts to identify and reduce the sources of risk in the derivatives and risk management business through documentation that is the recognized standard

¹ **About ISDA:** Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 68 countries. These members comprise 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. Information about ISDA and its activities is available on the Association's website: www.isda.org.

² As set out in the Exposure Draft of the *ASIC Supervisory Cost Recovery Levy Amendment Bill 2017* (Cth) and related materials.

throughout the global market, legal opinions that facilitate enforceability of agreements and collateral arrangements, the development of sound risk management practices, and advancing the understanding and treatment of derivatives and risk management from public policy and regulatory capital perspectives.

Given the policy decision to legislate for the Reforms, ISDA acknowledges and supports the general legislative framework proposed for the Reforms in the Exposure Draft, which provides for an adaptive and flexible structure under which the Australian Securities and Investments Commission (ASIC) is to promulgate specific rules and administer the regime. Whilst this approach is acknowledged and supported, we note that, by providing this flexibility, the regime affords ASIC wide discretions and substantive rule making power. Accordingly, the scope and substance of ASIC's rules, and the guidance provided in respect of the rules will be critically important. In this regard, we note the parallel consultation process currently being undertaken by ASIC with respect to their proposed rules. We will, and are grateful for the opportunity to, participate in ASIC's consultation. We will provide any submissions we may have in respect of the scope and content of ASIC's rules through that consultation and accordingly do not comment further in this submission on those rules. We would welcome further formal and informal consultation with Treasury and ASIC in relation to any further changes to the proposed legislation, regulations, rules and guidance, including in advance of the publication of any particular proposed changes, to the extent appropriate. We set out below our submissions in relation to the Reforms.

Submissions

For the reasons set out below, ISDA makes the following observations and submissions:

(a) Support for financial benchmarks not being prescribed by legislation

We acknowledge and support the Exposure Draft setting out a principles-based approach to determining whether a benchmark constitutes a “financial benchmark” or “significant financial benchmark”, rather than listing the benchmarks themselves in the legislation. We consider that this will enable the framework to be both flexible and adaptable to the needs of the regime and circumstances over time. We also support that the approach taken in the Exposure Draft whereby administrators of significant financial benchmarks are required to be licensed while other administrators can also opt in to the licensing regime.³ Due to the significance of declaring a financial benchmark to be a significant financial benchmark, we would welcome further consideration being given to whether public consultation should be required for a declaration (at least outside of the circumstances described in section 908AC(5)). We would also welcome, to the extent possible, publication of the evidence which underpins the decision to make a declaration.

(b) Breadth of Reforms

³ See, in this regard, section 908BC(1) (Note 2) and associated comments in the draft Explanatory Memorandum to the Exposure Draft (eg in paragraph 2.6).

We note that ASIC’s compulsion power is broader than that which was proposed as part of the Council of Financial Regulators’ (CFR) consultation paper⁴ and recommendation to Treasurer.⁵ In particular, we note that the CFR’s consultation paper and recommendation were limited to ASIC being given the power to write rules to compel submission to a significant benchmark. The CFR consultation paper and recommendation did not extend to the powers set out in the Exposure Draft. The Exposure Draft gives ASIC powers to compel an administrator to continue to generate or administer the significant financial benchmark, to generate or administer the significant financial benchmark “in a particular way” and powers incidental or related to these powers or the compulsory generation or administration of a significant financial benchmark specified in a benchmark administrator licence (including a power or matter prescribed by the relevant regulations).⁶

We note that regulations may expand the powers and matters that may be dealt with in ASIC’s rules. We would welcome the opportunity to consult with Treasury and ASIC in relation to any regulations before they are registered.

(c) ASIC rules and industry consultation

Whilst the Reforms provide a legislative framework, the detail and content of the Reforms will be substantiated through the broad rule making powers, and discretions, provided to ASIC. In particular, ASIC has the power to make financial benchmark rules, which detail the responsibilities of benchmark administrator licensees and the generation and administration of financial benchmarks specified in benchmark administrator licences (among other things), and compelled financial benchmark rules, which can compel both licensees and information providers to take action.⁷ As acknowledged in the Explanatory

⁴ Council of Financial Regulators, *Financial Benchmarks Regulatory Reform, A Consultation Paper by the Council of Financial Regulators*, March 2016.

⁵ Glenn Stevens AC, Governor of the Reserve Bank of Australia, on behalf of the CFR, letter titled “Council of Financial Regulators: Regulation of Financial Benchmarks” addressed to The Hon Scott Morrison MP, Treasurer, and dated 23 August 2016 (**CFR Letter**).

⁶ Exposure Draft, Schedule 1, Item 1, proposed sections 908CD and 908CE(1). In this regard and by way of contrast, we note that the **European Benchmarks Regulation** (being, 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) provides competent authorities, after a period of consultation with the administrator, with the power to compel the administrator to continue to publish the benchmark until it has been transitioned, can ceased to be provided in an orderly fashion, or the benchmark is no longer critical.

⁷ Exposure Draft, Schedule 1, Item 1, Division 3. Under section 908CA of the proposed Reforms, ASIC has the power to make financial benchmark rules which deal with any one or more of the matters permitted by Subdivision A, including responsibilities of the licensees, generation and administration of financial benchmarks, the manner in which services are provided, business continuity planning, and governance, management and resources. In addition, under section 908CD, ASIC has the power to make compelled financial benchmark rules which confer or deal with one or more of the matters permitted by Subdivision B. Relevantly, these powers and matters include the power for ASIC to require an entity to continue to provide data or information to a licensee and the power for ASIC to require the holder of a license to continue to generate or administer the significant financial benchmark.

Memorandum, ASIC's compulsion power would need to be implemented quickly in rare and exceptional circumstances to prevent disruption due to a benchmark failing to be published daily.⁸ In this regard, we note that whilst ASIC's power to make rules is subject to controls through consultation,⁹ the exercise by ASIC of those powers is not.¹⁰ Whilst we acknowledge the justification for this approach, we submit that this strengthens the need for the exercise of these powers to be subject to a well-defined, transparent, fair, objective criteria which outline the circumstances, manner, and time periods and limits in which the power will be exercised. We also note that a compulsion to compel an entity to continue to provide data or information to a licensed benchmark administrator or to provide ASIC with some or all of that data or information may impose quite a significant regulatory, compliance and, importantly, operational burden on the entity and accordingly we suggest that it will be important for any compulsion to provide a reasonable timeframe for entities to implement the necessary controls, particularly if the entity is not already a contributor.

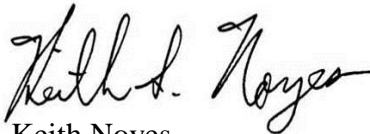
As noted earlier, we consider that it is important for ASIC to engage with industry on these matters, and we welcome the opportunity to provide our comments to ASIC in respect of the separate consultation process regarding the draft rules and regulatory guide.

Conclusion

We thank you for the opportunity to respond to the consultation on the Reforms. We would be very happy to discuss this matter further at your convenience. Please do not hesitate to contact Keith Noyes, Regional Director, Asia Pacific (knoyes@isda.org, +852 2200 5900), Erryan Abdul Samad, Assistant General Counsel (eabdulsamad@isda.org, +65 6653 4170), Jing Gu, Senior Counsel (jgu@isda.org, +65 6653 4170) or Rishi Kapoor, Director, Public Policy, Asia-Pacific (rkapoor@isda.org, +852 2200 5900) if we may be of further assistance.

Yours sincerely,

For the **International Swaps and Derivatives Association, Inc.**



Keith Noyes

Regional Director, Asia-Pacific

⁸ Explanatory Memorandum, paragraph [3.8].

⁹ Exposure Draft, Schedule 1, Item 1, proposed section 908CL.

¹⁰ We note in this regard that ASIC's exercise its compulsion power, to require something by giving notice under the compelled financial benchmark rules, is exempt from review by the Administrative Appeals Tribunal: see the amendments proposed to section 1317C(gdl) as set out in the Exposure Draft, Schedule 1, Item 22.