CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice and Request for Comment
Proposed Amendments to Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Changes to Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators*

April 29, 2021

Introduction

Today, the securities regulatory authorities (each an **Authority** and collectively the **Authorities** or **we**) of the Canadian Securities Administrators (the **CSA**) in British Columbia, Alberta, Saskatchewan, Ontario, Québec, New Brunswick and Nova Scotia (the **Participating Jurisdictions**) published Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* (**MI 25-102** or the **Instrument**) and Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators* (the **CP**). Subject to obtaining all necessary Ministerial approvals, the Instrument will come into force and the CP will come into effect in each of the Participating Jurisdictions on July 13, 2021.[1]

At the same time, as detailed in this Notice, the Participating Jurisdictions are also publishing for a 90-day comment period:

- proposed amendments to MI 25-102, and
- proposed changes to the CP.

Together, the proposed amendments to the Instrument and the proposed changes to the CP are referred to as the **Proposed Amendments**. The Proposed Amendments incorporate provisions for a securities regulatory regime for commodity benchmarks and their administrators.

The text of the Proposed Amendments is contained in Annex A and Annex C of this Notice and will also be available on websites of the Participating Jurisdictions, including:

www.lautorite.qc.ca
www.albertasecurities.com
www.bcsc.bc.ca
nssc.novascotia.ca
www.fcnb.ca
www.osc.ca
www.fcaa.gov.sk.ca

[1] For further details, see the CSA Notice of Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy, dated April 29, 2021.

We are issuing this Notice to solicit comments on the Proposed Amendments. We welcome all comments on this publication and have also included specific questions in the "Request for Comments" section below.

Currently, MI 25-102 provides a comprehensive regime for the designation and regulation of specific benchmarks and their administrators, and the regulation of contributors and of certain users.[2] An overview of this regime was provided in the March 14, 2019 CSA Notice and Request for Comment on Proposed National Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy (the **March 14, 2019 CSA Notice**), and today, in the April 29, 2021 CSA Multilateral Notice accompanying the final published version of MI 25-102. The Proposed Amendments in this Notice are the amendments that were contemplated in the March 14, 2019 CSA Notice, under the heading "Expected Future Amendments for Commodity Benchmarks".

The Proposed Amendments intend to implement a comprehensive regime for:

- the designation and regulation of commodity benchmarks (**designated commodity benchmarks**), including specific requirements (or exemptions from requirements) for benchmarks dually designated as designated critical benchmarks and designated commodity benchmarks (**designated critical** and **designated commodity benchmarks** or **critical commodity benchmarks**), and for benchmarks dually designated as designated regulated-data benchmarks and designated commodity benchmarks (**designated regulated-data** and **designated commodity benchmarks** or **regulated-data commodity benchmarks**), and
- the designation and regulation of persons or companies that administer such benchmarks (**designated benchmark administrators** or **administrators**).

Currently, the Authorities do not intend to designate any administrators of commodity benchmarks. However, the Authorities may designate administrators and their associated commodity benchmarks in the future on public interest grounds, including where:

- a commodity benchmark is sufficiently important to commodity markets in Canada,
- a benchmark administrator applies for designation to allow its commodity benchmark to be referenced in financial instruments that are invested in by, or where a counterparty is, one or more European institutional investors pursuant to the EU BMR (defined below), and
- the Authorities become aware of activities of a benchmark administrator that raise concerns that align with the regulatory risks identified below in respect of such parties and conclude that the administrator and commodity benchmark in question should be designated.

[2] As explained in this "Introduction", the coming into force of MI 25-102 is still subject to Ministerial approvals in the Participating Jurisdictions.

Background

In 2011, the G20 Leaders requested the International Organization of Securities Commissions (**IOSCO**), in collaboration with other organizations, to prepare recommendations to improve the functioning and oversight of oil price reporting agencies (**PRAs**).[3] This request followed an earlier request by the G8 Finance Ministers in 2008, arising from concerns about oil price volatility, for IOSCO to produce recommendations intended to improve the efficiency and functioning of commodities markets.[4]

As outlined in the March 14, 2019 CSA Notice, in 2012, allegations of manipulation of the London inter-bank offered rate (**LIBOR**) led to the loss of market confidence in the credibility and integrity of not only LIBOR, but also in financial benchmarks in general. Although not on the scale of the LIBOR scandal, there have also been examples of manipulation or attempted manipulation of energy price indexes to benefit positions on futures exchanges.[5]

IOSCO PRA Principles

In October 2012, IOSCO published the *Principles for Oil Price Reporting Agencies* (the **IOSCO PRA Principles**),[6] setting out principles intended to enhance the reliability of oil price assessments that are referenced in derivative contracts subject to regulation by IOSCO members. This was followed by the publication in July 2013 of the *Principles for Financial Benchmarks* (together with the IOSCO PRA Principles, the **IOSCO Principles**). Although both sets of IOSCO Principles reflect similar concerns regarding the need for safeguards to ensure the integrity of benchmarks, the IOSCO PRA Principles were developed to focus on the specifics of the underlying physical oil markets.[7] Even though the IOSCO PRA Principles were developed in the context of PRAs in oil derivatives markets, IOSCO has encouraged the adoption of these principles more generally to any commodity derivatives contract that references a PRA-assessed price without regard to the nature of the underlying commodity.[8]

EU Benchmarks Regulation

Regulation in the European Union (**EU**) of commodity benchmarks is embedded within the EU's *Regulation on indices used as benchmarks in financial instruments and financial contracts or to*

---

[3] PRAs are publishers and information providers who report prices transacted in physical and some derivatives markets and provide informed assessments of price levels at distinct points in time. See the IEA, IEF, OPEC and IOSCO October 2011 Report on *Oil Price Reporting Agencies*, specifically paragraph 1, available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD364.pdf.

[4] See the IOSCO March 2012 Consultation Report on the *Functioning and Oversight of Oil Price Reporting Agencies*, specifically Chapter 2, page 10, available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD375.pdf.

[5] For specific examples, see footnote 87 within IOSCO's September 2011 Final Report on the *Principles for the Regulation and Supervision of Commodity Derivatives Markets*, available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf.

[6] Available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD391.pdf.

[7] See the IOSCO September 2014 Report on the *Implementation of the Principles for Oil Price Reporting Agencies*, specifically Chapter 1, pages 1 and 2, available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD448.pdf.

[8] See page 7, *supra* note 6.

measure the performance of investment funds (**EU BMR**).[9] A detailed overview of the EU BMR, including the regime applicable to third country administrators and specifics on the process of obtaining an EU equivalency decision, was provided in the March 14, 2019 CSA Notice.

The preamble of the EU BMR generally acknowledges that "[p]hysical commodity markets have unique characteristics which should be taken into account. Commodity benchmarks are widely used and can have sector-specific characteristics, so it [was] necessary to introduce specific provisions in [the EU BMR] for such benchmarks."[10] Annex II of the EU BMR sets out the provisions that are applicable to commodity benchmarks, and these provisions closely track the IOSCO PRA Principles.

Substance and Purpose

The Proposed Amendments were developed to establish an EU BMR-equivalent commodity benchmarks regulatory regime and to ensure the integrity of Canada's commodity and capital markets, thereby protecting Canadian investors and other Canadian market participants.

Although currently the Authorities have no intention of designating any commodity benchmarks or administrators of commodity benchmarks, as outlined earlier in this Notice, the Authorities may designate administrators and their associated commodity benchmarks in the future on public interest grounds, including in the case where an administrator applies for designation.

The proposed changes to the CP are meant to assist in the interpretation and application of the proposed amendments to MI 25-102.

EU Equivalency

It is desirable and important to have the EU recognize the proposed Canadian commodity benchmarks regime as equivalent since it would allow EU institutional market participants to continue to use any Canadian commodity benchmark designated under MI 25-102.

Although Canada-based administrators are able to directly apply for registration under the EU BMR, the Authorities are of the view that:

- Canadian securities regulators have a sovereign responsibility and are best positioned to directly regulate commodity benchmarks with a significant connection to Canada, including such commodity benchmarks' administrators, and

- it would be prudent to implement a Canadian regime by, or soon after, the EU equivalency deadline (i.e., January 1, 2024) in the event that, for example, a non-EU registered benchmark administrator of a Canadian commodity benchmark would like the benefit of a Canadian domestic regime that has been recognized as equivalent by the EU.

---

[9] The EU BMR that came into force on June 30, 2016 is available online at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1011&from=EN; the consolidated version of the EU BMR, as of 10/12/2019, is available online at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R1011-20191210&from=EN.

[10] See P(34) of the EU BMR that came into force on June 30, 2016, *supra* note 9.

Risk Reduction and Investor Protection

We believe that we should now amend MI 25-102 to establish and implement a regulatory regime for commodity benchmarks for the following reasons:

- commodity benchmarks may be subject to vulnerabilities arising from voluntary reporting of input data, relatively low liquidity in physically-settled contracts, and variation in methodologies both across benchmark administrators and within a single administrator (largely due to the complexities of the physical commodity markets),

- these vulnerabilities could create opportunities for manipulation of the input data (i.e., data on physically-settled trades) and for deliberate manipulation or attempted manipulation of a benchmark for the benefit of the contributor,

- methodologies generally use expert judgment, and without appropriate policies, procedures and controls in place, the price determination could be an unreliable indicator of the physical commodity market it is attempting to measure, and in turn make commodity derivatives contracts more susceptible to manipulation,

- many factors that have resulted in benchmark-related misconduct in other jurisdictions are also present in Canada,[11]

- a commodity benchmark that does not accurately and reliably represent the value of the underlying interest of the commodity benchmark for that part of the market the benchmark is intended to represent, either because of deliberate misconduct or because of inadequate controls to ensure the integrity of that benchmark, could adversely impact investors, market participants, and the reputation and confidence in, Canada's commodity and capital markets, and

- a commodity benchmark regime would clarify, strengthen and specify the legal basis upon which Canadian securities regulators may take enforcement and other regulatory action against benchmark administrators in the event of misconduct involving a commodity benchmark that harms (or threatens to harm) investors, market participants, and commodity and capital markets in general.

We are of the view that amending MI 25-102 to incorporate the commodity benchmark provisions would codify international best practices, as articulated under the IOSCO PRA Principles.

Summary of the Proposed Amendments to the Instrument

Designated Commodity Benchmarks and Benchmark Administrators

Under the securities legislation of each of the Participating Jurisdictions, a benchmark administrator can apply for designation as a designated benchmark administrator and request the

---

[11] For example, in 2008, the Commodity Futures Trading Commission obtained a $10 million civil monetary penalty in a consent order settling charges against Energy Transfer Partners, L.P., of Dallas, Texas and three subsidiaries. They were charged with attempting to manipulate natural gas prices at the Houston Ship Channel delivery hub. For further details, see footnote 46 in the IOSCO Final Report on PRAs, *supra* footnote 6.

designation of a commodity benchmark. Alternatively, the regulator can also apply for a benchmark administrator or commodity benchmark to be designated under securities legislation, or in Québec or Alberta the securities regulatory authority may designate a benchmark administrator or commodity benchmark on its own initiative. The proposed definition of a commodity benchmark is found in section 40.1 of the proposed amendments to the Instrument.

The CP explains that when applying for designation, a benchmark administrator should provide the same information as is set out in Form 25-102F1 and Form 25-102F2, with respect to the administrator and the benchmark, respectively. The CP also provides guidance on what factors a regulator or securities regulatory authority would consider in determining if a benchmark, including a commodity benchmark, should also be designated as a critical benchmark or a regulated-data benchmark.

When designating a commodity benchmark, a securities regulatory authority will issue a decision document designating the commodity benchmark as a designated commodity benchmark. If applicable, the decision document will also indicate if the designated commodity benchmark is dually designated as a designated critical benchmark or a designated regulated-data benchmark.

As explained below, a regulated-data benchmark that is also a commodity benchmark may be designated only as a regulated-data benchmark, or dually designated as a regulated-data commodity benchmark. Such benchmarks, whether they receive a single or dual designation, would not also be designated as critical benchmarks. This is in contrast to the possible dual designation of a financial benchmark as a designated regulated-data and designated critical benchmark.

In summary, the possible designations for a commodity benchmark are as follows:

	Designation			
Type of benchmark	**Designated commodity benchmark**	**Designated commodity and designated critical benchmark**	**Designated regulated-data benchmark**	**Designated regulated-data and designated commodity benchmark**
Commodity benchmark	X	X		X
Critical benchmark		X		
Regulated-data benchmark (type 1)[12]			X	

[12] Regulated-data benchmark that meets the definition of a commodity benchmark under section 40.1, but not the criteria under subsection 40.2(3).

Regulated-data benchmark (type 2)[13]				X

General Requirements for Administrators of Commodity Benchmarks

Both the IOSCO PRA Principles and the regulations under Annex II of the EU BMR were developed by considering the characteristics of physical commodity markets without focusing on the regulation of contributors of input data, largely because of the voluntary nature of market participants' contributions of input data and the concern that overregulation of potential contributors could discourage such participants from providing their data. The approach has been to create incentives for PRAs or benchmark administrators to institute processes designed to enhance the reliability of assessments that are indicators of the price or value of the physical commodity that underlies a derivatives contract.[14]

Designated benchmark administrators of commodity benchmarks have to comply with some requirements that are applicable to all administrators, and some, as provided under proposed Part 8.1 of MI 25-102, that are specific to administrators of commodity benchmarks. These requirements include:

- delivering audited annual financial statements and certain forms (e.g., Form 25-102F1 *Designated Benchmark Administrator Annual Form* and Form 25-102F2 *Designated Benchmark Annual Form*) to Canadian securities regulators (Part 2);

- maintaining a control framework to manage operational risk and to ensure that there are controls in place with respect to business continuity and disaster recovery plans, and contingency procedures in the event of a disruption to the provision of the designated commodity benchmark (section 40.4);

- maintaining appropriate controls and oversight over the process of the provision of a commodity benchmark (subsection 5(1)), including specifying the responsibilities of a compliance officer (section 6) and the requirements and responsibilities of benchmark individuals (section 40.11);

- maintaining an appropriate accountability and control framework to address conflicts of interest (section 40.13), complaints (section 12), reporting of contraventions (section 11) and outsourcing (section 13);

- applying policies, procedures and controls relating to input data (section 40.10), as well as complying with obligations relating to the benchmark methodology used by the administrator (sections 40.5, 40.7 and 40.8) and any changes to such methodology (section 17);

---

[13] Regulated-data benchmark that meets the definition of a commodity benchmark under section 40.1 and the criteria under subsection 40.2(3).

[14] See specifically page 8 of the October 2012 IOSCO paper, *supra* note 6.

- publishing information about the administration of its designated commodity benchmarks, including publishing:

  - key elements of the methodology and other required information about the methodology or the determination of a designated commodity benchmark (sections 40.5, 40.6 and 40.9),

  - the procedures relating to a significant change or cessation of a benchmark (sections 17, 20 and 22), and

  - a specified benchmark statement (section 19);

- keeping specified books, records and other documents for a period of 7 years (section 40.12); and

- engaging a public accountant to provide an assurance report on the administrator's compliance with certain key sections, including proposed sections of MI 25-102 and the methodology for the commodity benchmark and publishing a copy of the assurance report (section 40.14).

Additional Administrator Requirements for Critical Commodity Benchmarks

Where a commodity benchmark is also designated as a critical benchmark and the underlying commodity is gold, silver, platinum or palladium, then it is proposed that Part 8.1 not apply. Typically, such commodities function as stores of value, and their benchmarks, if critical, closely resemble financial, rather than commodity benchmarks. Thus, the requirements under Parts 1 through 8 would apply to such benchmarks, including the additional requirements under Part 8, Division 1, specifically sections 27 to 33 of MI 25-102.

If the underlying commodity is not gold, silver, platinum or palladium, then a dually-designated critical commodity benchmark would be subject to proposed Part 8.1, which provides for some exemptions from Part 8, Division 1 requirements. The additional requirements that would apply include:

- that the administrator provide specific notice to securities regulators and comply with other requirements if it intends to cease administering the critical commodity benchmark,

- that the administrator take reasonable steps to ensure that users have direct access to the critical commodity benchmark on a fair, reasonable, transparent and non-discriminatory basis, and

- that the administrator provide securities regulators with an assessment at least once in each 24-month period of the capability of the critical commodity benchmark to accurately and reliably represent that part of the market the critical commodity benchmark is intended to represent.

Exemptions for Regulated-Data Commodity Benchmarks

Under the Proposed Amendments, a commodity benchmark designated as a regulated-data benchmark is subject to the requirements under Parts 1 to 8, including the exemptions under section 40.

However, if a commodity benchmark is determined from input data arising from transactions of the commodity that is the underlying interest of the benchmark and the parties to those transactions, in the ordinary course of business, make or take physical delivery of the commodity, and that benchmark also meets the requirements of a regulated-data benchmark, then it is proposed that such a benchmark be dually designated as a designated commodity and a designated regulated-data benchmark. Such dually-designated benchmarks would be subject to Part 8.1 requirements, but exempted from certain requirements as provided by subsection 40.2(4). Fundamentally, this subset of regulated-data benchmarks, determined from transactions where, in the ordinary course of business, parties make or take physical delivery of the commodity, would maintain a closer link to the commodity markets, rather than the financial markets, and should be treated as commodity benchmarks. In contrast, regulated-data benchmarks based on financial transactions where counterparties hedge their exposure in underlying physical contracts or speculate on the movement of the price of a commodity, would more closely resemble financial benchmarks, and should be subject to the requirements under Parts 1 to 8.

To the extent possible, the proposed exemptions under subsection 40.2(4) would ensure that administrators of benchmarks dually designated as commodity and regulated-data benchmarks would receive comparable treatment under Part 8.1 as administrators of designated regulated-data benchmarks receive under Parts 1 to 8. Administrators of such dually designated benchmarks would be exempted from certain requirements, including requirements for:

- systems and controls for detecting manipulation or attempted manipulation,
- policies, procedures and controls relating to the contribution of input data and the accuracy, reliability and completeness of such data, and the publication of certain explanations for each determination of a benchmark, and
- the engagement of a public accountant to provide an assurance report on the administrator's compliance with certain key sections of MI 25-102, and the methodology for the commodity benchmark.

Summary of the Proposed Changes to the CP

The proposed changes to the CP, found under Annex C, provide interpretational guidance on elements of the proposed amendments to MI 25-102.

Anticipated Costs and Benefits of the Proposed Amendments to MI 25-102

The integrity and reliability of commodity benchmarks is important to the functioning of commodity derivatives markets. Currently, the Authorities do not intend to designate any administrators of commodity benchmarks, but as outlined earlier in this Notice, we may do so in the future based on public interest grounds, including in the case where an administrator applies

for designation or if we become aware of activities that raise risk or investor protection concerns. The proposed requirements under Part 8.1 of MI 25-102 are substantially similar to the requirements under Annex II of the EU BMR, which generally codify international best practices, as articulated under the IOSCO PRA Principles. Such regulation is meant to ensure that commodity benchmarks have adequate protections against potential manipulation and that the provision of these benchmarks is subject to appropriate systems and controls, with administrators having in place appropriate standards of corporate governance. Where appropriate, such as in the case of certain regulated-data benchmarks, we have tailored the requirements to the Canadian commodity markets.

The proposed regulation of commodity benchmarks should enhance the confidence of stakeholders in the Canadian commodity markets and minimize the potential costs that may be borne by the Canadian commodity and financial markets, including investors, in the event of the unreliability or manipulation of designated commodity benchmarks.

Overall, the Authorities are of the view that the regulatory costs of the Proposed Amendments are proportionate to the benefits that would be realized by impacted market participants and the broader Canadian commodity market.

Unpublished Materials

In developing the Proposed Amendments, we have not relied on any significant unpublished study, report or other written materials.

Local Matters

Where applicable, Annex D provides additional information required by the local securities legislation.

Request for Comments

We welcome your comments on the Proposed Amendments and also invite comments on the specific questions set out in Annex A of this Notice. Please submit your comments in writing on or before July 28, 2021. If you are not sending your comments by email, an electronic file containing the submissions should also be provided in Microsoft Word format.

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of the written comments received during the comment period. All comments received will be posted on the websites of each of the Alberta Securities Commission at www.albertasecurities.com, the Autorité des marchés financiers at www.lautorite.qc.ca and the Ontario Securities Commission at www.osc.ca. Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Address your submission to the following CSA jurisdictions:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan

Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission

Deliver your comments **only** to the addresses below. Your comments will be distributed to the other participating CSA jurisdictions.

Navdeep Gill
Manager, Legal, Market Regulation
Alberta Securities Commission
Suite 600, 250 – 5th Street SW
Calgary, Alberta T2P 0R4
Fax: 403-297-4113
navdeep.gill@asc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8
Fax: 416-593-2318
comment@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: 514-864-6381
consultation-en-cours@lautorite.qc.ca

Contents of Annexes:

This Notice includes the following Annexes:

Annex A: Specific Questions of the Authorities Relating to the Proposed Amendments

Annex B: Proposed amendments to Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators*[15]

[15] The proposed amendments and the proposed changes, are with respect to the final versions of the Instrument and CP published by the Authorities today, on April 29, 2021. For further details, see the CSA Notice of Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy, dated April 29, 2021.

Annex C: Proposed changes to Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators*

Questions

Please refer your questions to any of the following:

Eniko Molnar
Senior Legal Counsel, Market Regulation
Alberta Securities Commission
403-297-4890
eniko.molnar@asc.ca

Janice Cherniak
Senior Legal Counsel, Market Regulation
Alberta Securities Commission
403-585-6271
janice.cherniak@asc.ca

Michael Bennett
Senior Legal Counsel, Corporate Finance
Ontario Securities Commission
416-593-8079
mbennett@osc.gov.on.ca

Melissa Taylor
Legal Counsel, Corporate Finance
Ontario Securities Commission
416-596-4295
mtaylor@osc.gov.on.ca

Serge Boisvert
Senior Policy Advisor
Autorité des marchés financiers
514-395-0337 poste 4358
serge.boisvert@lautorite.qc.ca

Roland Geiling
Derivatives Product Analyst
Autorité des marchés financiers
514-395-0337 poste 4323
roland.geiling@lautorite.qc.ca

Michael Brady
Manager, Derivatives
British Columbia Securities Commission
604-899-6561
mbrady@bcsc.bc.ca

Faisel Kirmani
Senior Analyst, Derivatives
British Columbia Securities Commission
604-899-6844
fkirmani@bcsc.bc.ca

ANNEX A

SPECIFIC QUESTIONS OF THE AUTHORITIES RELATING TO THE PROPOSED AMENDMENTS[16]

Interpretation

1. The definition for "commodity benchmark" excludes a benchmark that has, as an underlying interest, a currency or a commodity that is intangible. Is the scope of the proposed definition, and the guidance in the CP, appropriate to cover the commodity benchmark industry in Canada? Please explain with concrete examples.

Applicable Requirements from the Financial Benchmarks Regime

2. Despite a different proposed regime for commodity benchmarks, the Authorities expect that certain requirements, applicable to financial benchmarks, would also be applicable, sometimes with minor modifications, to commodity benchmarks. These include, for example, the requirements to report contraventions (section 11), the requirement for a control framework (section 40.4), and governance and control requirements (section 40.11). Are these requirements appropriate in the context of commodity benchmarks? Please explain with concrete examples.

Dual Designation as a Commodity Benchmark and a Critical Benchmark

3. Where the underlying commodity is gold, silver, platinum or palladium, a benchmark dually designated as a commodity benchmark and a critical benchmark would be subject to the requirements applicable to critical financial benchmarks, rather than critical commodity benchmarks. Do you think that there are benchmarks in Canada that could be dually designated as critical commodity benchmarks where the underlying is gold, silver, platinum or palladium, and is there a need to provide for the specific regulation of such benchmarks?

Dual Designation as a Commodity Benchmark and a Regulated-Data Benchmark

4. Subsection 40.2(4) provides for certain exemptions for benchmarks dually designated as commodity and regulated-data benchmarks, where such benchmarks are determined from transactions in which the transacting parties, in the ordinary course of business, make or take physical delivery of the commodity. Is carving out such a subset of dually-designated benchmarks necessary for appropriate regulation of commodity benchmarks in Canada? If so, are the exemptions provided for, which generally mirror exemptions for regulated-data

[16] The specific questions are with respect to the Proposed Amendments published by the Authorities today, on April 29, 2021. For further details, see the CSA Notice of Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy, dated April 29, 2021.

benchmarks from Parts 1 to 8 requirements, appropriate? Please explain with concrete examples.

Input Data

5. We have distinguished between input data that is "contributed" for the purposes of the Instrument (see subsection 1(3)), and data that is otherwise obtained by the administrator. Certain provisions in Part 8.1 impose requirements on a designated benchmark administrator if input data is "contributed", whereas other obligations are imposed irrespective of how input data is obtained. Where the word "contributed" is not specifically used or implied,[17] we mean all the input data, not only "contributed" data. Taking into consideration the obligations imposed on designated benchmark administrators of commodity benchmarks, through the use or lack of use of "contributed", are the obligations imposed under the provisions of Part 8.1 appropriate?[18] Please explain with concrete examples.

6. The guidance on paragraph 40.8(2)(a) of the CP states that, where consistent with the methodology, we expect the administrator to give priority to input data in a certain order. Does the order of priority of use of input data for purposes of determination of a commodity benchmark, as stated in the CP, reflect the methodology used for your commodity benchmarks? Are there any other types of input data that should be specified in the order of priority?

Methodology

7. Under the Proposed Amendments, designated administrators are expected to ensure that particular requirements are met whenever their methodology is implemented and a designated benchmark is determined. Are the elements of the methodology that we propose to regulate, specifically within section 40.5, sufficiently clear such that an administrator would be able to comply with the requirements?

Conflicts of Interest

8. Paragraphs 40.13(1)(a), (b) and (d) mirror the conflict of interest requirements under paragraphs 10(1)(a), (b) and (d) of the Instrument, to ensure that certain overarching requirements apply to all designated benchmark administrators. Is this approach appropriate? Do commodity benchmark administrators face potential conflicts of interest that are not addressed by these or the other conflict of interest provisions?

Assurance Report on Designated Benchmark Administrator

---

[17] For example, in paragraph 40.5(2)(g), it is implied that input data is "contributed", within the meaning of subsection 1(3) of the Instrument.

[18] See for example subparagraphs 40.5(2)(a)(i) and (iii), which apply in respect of all input data, while paragraphs 40.5(2)(g), (h) and (i) apply in respect of contributed data.

9. Subsection 40.14(2) requires a designated benchmark administrator of a designated commodity benchmark, whether or not the benchmark is also designated as a critical benchmark, to engage a public accountant to provide a limited or reasonable assurance report on compliance once in every 12-month period. In contrast, pursuant to subsection 36(2), an administrator of a designated interest rate benchmark is required to engage a public accountant to provide such a report, once in every 24-month period, albeit a report is required 6 months after the introduction of a code of conduct for benchmark contributors. Given the general risks raised by the activities of administrators of commodity benchmarks versus of interest rate benchmarks, are the proposed requirements appropriate? Please explain your response.

Concentration Risk

10. Pursuant to subsection 20(1), designated benchmark administrators of designated commodity benchmarks would be subject to certain obligations when they cease to provide a designated commodity benchmark. However, market users may potentially have more limited benchmarks to utilize for purposes of their transactions (concentration risk) where a designated benchmark administrator that administers a number of designated commodity benchmarks unexpectedly delays in providing or ceases to provide those benchmarks. Do you think that additional requirements should be added under Part 8.1 to address this concentration risk? If yes, what requirements should be added?

Designated Benchmarks

11. If your organization is a benchmark administrator of commodity benchmarks, please:

    a) advise if you intend to apply for designation under MI 25-102,
    b) advise of any benchmark you intend to also apply for designation under MI 25-102, and
    c) indicate the rationale for your intention.

Anticipated Costs and Benefits

12. The Notice sets out the anticipated costs and benefits of the Proposed Amendments (in Ontario, additional detail is provided in Annex F). Do you believe the costs and benefits of the Proposed Amendments have been accurately identified and are there any other significant costs or benefits that have not been identified in this analysis? Please explain and/or identify furthers costs or benefits.

ANNEX B

PROPOSED AMENDMENTS TO MULTILATERAL INSTRUMENT 25-102 *DESIGNATED BENCHMARKS AND BENCHMARK ADMINISTRATORS*

1. Multilateral Instrument 25-102 Designated Benchmarks and Benchmark Administrators is amended by this Instrument.[19]

2. Subsection 1(1) is amended

(a) by adding the following definition:

"designated commodity benchmark" means a benchmark that is designated for the purposes of this Instrument as a "commodity benchmark" by a decision of the securities regulatory authority;***, and***

(b) in the definition of "subject requirements" by

(i) deleting "and***" at the end of paragraph (d),***

(ii) adding "and***" at the end of paragraph (e), and***

(iii) adding the following paragraph:

(f) paragraphs 40.14(1)(a) and (b);***.***

3. Paragraph 6(3)(a) is amended by adding "in the case of a benchmark that is not a designated commodity benchmark,***" before "***monitor***".***

4. Subsection 6(3) is amended by adding the following paragraph:

(a.1) in the case of a designated commodity benchmark, monitor and assess compliance by the designated benchmark administrator and its DBA individuals with subsection 5(1), section 40.4 and securities legislation relating to benchmarks;***.***

5. Subparagraph 6(3)(b)(i) is amended by adding "or (a.1), as applicable***" before "***,***".***

6. Subparagraph 6(3)(b)(ii) is amended

[19] The proposed amendments are with respect to the final version of the Instrument published by the Authorities today, on April 29, 2021. For further details, see the CSA Notice of Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy, dated April 29, 2021.

(a) ***by adding*** "in the case of a benchmark that is not a designated commodity benchmark,***" before "***compliance***", and***

(b) ***by deleting*** "and***" at the end of the subparagraph.***

7. ***Paragraph 6(3)(b) is amended by adding the following subparagraph:***

(ii.1) in the case of a designated commodity benchmark, compliance by the designated benchmark administrator and its DBA individuals with subsection 5(1), section 40.4 and securities legislation relating to benchmarks, and.

8. ***The Instrument is amended by adding the following part:***

PART 8.1
DESIGNATED COMMODITY BENCHMARKS

Interpretation

40.1. In this Part, "commodity benchmark" means a benchmark that is determined by reference to or an assessment of an underlying interest that is a commodity, but does not include a benchmark that has, as an underlying interest, a currency or a commodity that is intangible.

Application – dual-designated benchmarks

40.2.(1) Sections 30 to 33 do not apply to a designated benchmark administrator or to a benchmark contributor in relation to a designated commodity benchmark that is also a designated critical benchmark.

(2) This Part does not apply to a designated benchmark administrator in relation to a designated commodity benchmark if

(a) the benchmark is also a designated critical benchmark, and

(b) the underlying interest of the benchmark is gold, silver, platinum or palladium.

(3) The provisions set out in subsection (4) do not apply to a designated benchmark administrator in relation to a designated commodity benchmark if all of the following apply:

(a) the benchmark is determined from input data arising from transactions of the commodity that is the underlying interest of the benchmark;

(b) the commodity is of a type in respect of which parties to the transactions

referred to in paragraph (a), in the ordinary course of business, make or take physical delivery of the commodity;

(c) the benchmark is also a designated regulated-data benchmark.

(4) For the purposes of subsection (3), the following provisions do not apply:

(a) subsections 11(1) and (2);

(b) section 40.9;

(c) section 40.10, other than subparagraph (1)(f)(ii);

(d) paragraph 40.12(2)(a);

(e) section 40.14.

Provisions of this Instrument not applicable to designated commodity benchmarks

40.3. The following provisions do not apply to a designated benchmark administrator, a benchmark contributor or a specified person or company in relation to a designated commodity benchmark:

(a) Part 3, other than subsection 5(1) and sections 6, 11, 12 and 13;

(b) Part 4, other than section 17;

(c) sections 18 and 21;

(d) Part 6;

(e) Part 7.

Control framework

40.4.(1) A designated benchmark administrator must establish, document, maintain and apply policies, procedures and controls that are reasonably designed to ensure that a designated commodity benchmark is provided in accordance with this Instrument.

(2) Without limiting the generality of subsection (1), a designated benchmark administrator must ensure that its policies, procedures and controls address all of the following:

(a) management of operational risk, including any risk of financial loss, disruption or damage to the reputation of the designated benchmark administrator from any failure of its information technology systems;

(b) business continuity and disaster recovery plans;

(c) contingencies in the event of a disruption to the provision of the designated commodity benchmark or the process applied to provide the designated commodity benchmark.

Methodology

40.5.(1) A designated benchmark administrator must not follow a methodology for determining a designated commodity benchmark unless

(a) the methodology is sufficient to provide a designated commodity benchmark that accurately and reliably represents the value of the underlying interest of the designated commodity benchmark for that part of the market that the benchmark is intended to represent, and

(b) the accuracy and reliability of the designated commodity benchmark determined using the methodology is verifiable.

(2) A designated benchmark administrator must establish, document and publish the elements of the methodology of a designated commodity benchmark, including, for greater certainty, the following:

(a) all criteria and procedures used to determine a designated commodity benchmark, including, but not limited to the following:

(i) how the designated benchmark administrator will use input data, including, for greater certainty, how it will use the volume of transactions, concluded and reported transactions, bids, offers and any other market information used to determine the designated commodity benchmark;

(ii) the reason that a specific reference unit will be used;

(iii) how input data will be obtained;

(iv) identification of how and when expert judgment may be exercised in the determination of the designated commodity benchmark;

(v) the assumptions and the model or method that will be used for the extrapolation and interpolation of input data;

(b) procedures reasonably designed to ensure that benchmark individuals exercise expert judgment in a consistent manner;

(c) the relative importance assigned to the criteria used to determine the designated commodity benchmark, including, for greater certainty, the type

of input data used and how and when expert judgment may be exercised;

(d) any minimum quantity of transaction data to be used to determine the designated commodity benchmark;

(e) if minimum quantity thresholds referred to in paragraph (d) are not provided, the rationale as to why minimum requirements are not provided;

(f) procedures for the determination of a designated commodity benchmark in circumstances in which the input data does not meet the minimum threshold for either the quantity of the transaction data or the quality of the input data, including, for greater certainty,

(i) any alternative methods to determine the designated commodity benchmark, including any theoretical estimation models, and

(ii) procedures to be used in circumstances if no transaction data exists;

(g) the time period when input data must be provided;

(h) the means of contribution of input data, whether electronically, by telephone or by other means;

(i) procedures for how a designated commodity benchmark is determined if one or more benchmark contributors contribute input data that constitutes a significant proportion of the total input data for the determination of the designated commodity benchmark, including specifying what constitutes a significant proportion for the determination of the benchmark;

(j) the circumstances in which transaction data may be excluded in the determination of the designated commodity benchmark.

Additional information about the methodology

40.6. A designated benchmark administrator must, with respect to the methodology used for a designated commodity benchmark, publish the following:

(a) the rationale for adopting the methodology, including

(i) the rationale for any price adjustment techniques, and

(ii) a description of why the time period for the acceptance of input data is adequate for the input data to accurately and reliably represent the value of the underlying interest of the designated commodity benchmark;

(b) the process for the internal review and the approval of the methodology and the frequency of such reviews;

(c) the process referred to in section 17 for making significant changes to the methodology.

Review of methodology

40.7. A designated benchmark administrator must, at least once in every 12-month period, carry out an internal review of the methodology for each designated commodity benchmark that it administers to ensure that the designated commodity benchmark determined under the methodology accurately and reliably represents the value of the underlying interest of the designated commodity benchmark for that part of the market the benchmark is intended to represent.

Quality and integrity of the determination of a designated commodity benchmark

40.8.(1) A designated benchmark administrator must specify and document a description of the commodity that is the underlying interest of a designated commodity benchmark.

(2) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to ensure the quality and integrity of each determination of a designated commodity benchmark, including for greater certainty, policies and procedures that

(a) ensure that input data is used in accordance with the order of priority specified in the methodology of the designated commodity benchmark;

(b) identify transaction data that a reasonable person would conclude is anomalous or suspicious;

(c) ensure that the designated benchmark administrator maintains records of each decision, including the reasons for the decision, to exclude transaction data from the determination of the designated commodity benchmark;

(d) do not discourage benchmark contributors from contributing all of their input data that meets the designated benchmark administrator's criteria for the determination of the designated commodity benchmark;

(e) to the extent that is reasonable, ensure that

(i) input data contributed is representative of the benchmark contributors' concluded transactions relating to the underlying interest of the designated commodity benchmark, and

(ii) benchmark contributors comply with the designated benchmark administrator's quality and integrity standards for input data.

Transparency of determination of a designated commodity benchmark

40.9. A designated benchmark administrator must publish for each determination of a designated commodity benchmark, as soon as reasonably practicable, the following:

(a) a plain language explanation of how the designated commodity benchmark was determined, which explanation includes, for greater certainty, all of the following:

(i) the number and the volume of the transactions submitted;

(ii) with respect to each type of input data, the range of volumes and the average volume, the range of prices and the average price and the indicative percentage;

(b) a plain language explanation of the extent to which, and the basis upon which, expert judgment was used in the determination of the designated commodity benchmark, including, if applicable, the reasons for not giving priority to concluded and reported transactions.

Integrity of the process for contributing input data

40.10.(1) A designated benchmark administrator must establish, document, maintain and apply policies, procedures, controls and criteria reasonably designed to ensure the integrity of the process for contributing input data for a designated commodity benchmark including, for greater certainty, the following:

(a) criteria that determine who may contribute input data;

(b) procedures to verify the identity of a benchmark contributor and a contributing individual and the authorization of such contributing individuals to contribute input data on behalf of the benchmark contributor;

(c) criteria that determine which contributing individuals are permitted to contribute input data on behalf of a benchmark contributor;

(d) criteria that determine the appropriate contribution of transaction data by the benchmark contributor;

(e) if transaction data is contributed from any front office of a benchmark contributor, procedures to confirm the reliability of the input data, and the criteria upon which the reliability is measured, in accordance with its

policies;

(f) procedures that

(i) identify any communications between contributing individuals and benchmark individuals that might involve manipulation or attempted manipulation of the determination of the designated commodity benchmark for the benefit of any trading position of the benchmark contributor, any contributing individual or third party,

(ii) identify any attempts to cause a benchmark individual to not apply or follow the designated benchmark administrator's policies, procedures and controls,

(iii) identify benchmark contributors or contributing individuals that engage in a pattern of contributing transaction data that a reasonable person would consider is anomalous or suspicious, and

(iv) ensure that the appropriate supervisors within the benchmark contributor are notified, to the extent possible, of questions or concerns by the designated benchmark administrator.

(2) In this section, "front office" means any department, division or other internal grouping of a benchmark contributor, or any employee or agent of a benchmark contributor, that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring or brokerage activities on behalf of the benchmark contributor.

Governance and control requirements

40.11.(1) A designated benchmark administrator must establish and document an organizational structure.

(2) The organizational structure referred to in subsection (1) must establish well-defined roles and responsibilities for each person or company involved in the provision of a designated commodity benchmark administered by the administrator, and include, as necessary, segregated reporting lines, to ensure that the administrator complies with the provisions of this Instrument.

(3) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to ensure the integrity and reliability of the determination of a designated commodity benchmark including, for greater certainty, policies and procedures to ensure

(a) that each of its benchmark individuals has the necessary skills, knowledge, experience, reliability and integrity for the duties assigned to the individual,

(b) that the provision of the designated commodity benchmark can be made on a consistent and regular basis,

(c) that succession plans exist to ensure

(i) that each of its benchmark individuals continues to have the necessary skills, knowledge, experience, reliability and integrity for the duties assigned to the individual, and

(ii) the provision of the designated commodity benchmark on a consistent and regular basis,

(d) that each of its benchmark individuals is subject to adequate management and supervision to ensure that the methodology of the designated commodity benchmark is properly applied, and

(e) a procedure for obtaining the approval of an individual holding a position senior to that of a benchmark individual prior to each publication of the designated commodity benchmark.

Books, records and other documents

40.12.(1) A designated benchmark administrator must keep such books, records and other documents that are necessary to account for its activities as a designated benchmark administrator, its business transactions and its financial affairs relating to its designated commodity benchmarks.

(2) A designated benchmark administrator must keep books, records and other documents of the following:

(a) all input data, including how the data was used;

(b) each decision to exclude a particular transaction from input data that otherwise met the requirements of the methodology applicable to the determination of a designated commodity benchmark, and the rationale for doing so;

(c) the methodology applicable to the determination of each designated commodity benchmark administered by the designated benchmark administrator;

(d) any exercise of expert judgment by the designated benchmark administrator in the determination of the designated commodity benchmark, including the basis for the exercise of expert judgment;

(e) changes in or deviations from policies, procedures, controls or

methodologies;

(f) the identities of contributing individuals and of benchmark individuals;

(g) all documents relating to a complaint.

(3) A designated benchmark administrator must keep the records referred to in subsection (2) in a form that

(a) identifies the manner in which the determination of a designated commodity benchmark was made, and

(b) enables an audit, review or evaluation of any input data, calculation, or exercise of expert judgment, including in connection with any limited assurance report on compliance or reasonable assurance report on compliance.

(4) A designated benchmark administrator must retain the books, records and other documents required to be maintained under this section

(a) for a period of 7 years from the date the record was made or received by the designated benchmark administrator, whichever is later,

(b) in a safe location and a durable form, and

(c) in a manner that permits those books, records and other documents to be provided promptly on request to the regulator or securities regulatory authority.

Conflicts of interest

40.13.(1) A designated benchmark administrator must establish, document, maintain and apply policies and procedures that are reasonably designed to

(a) identify and eliminate or manage conflicts of interest involving the designated benchmark administrator and its managers, benchmark contributors, benchmark users, DBA individuals and any affiliated entity of the designated benchmark administrator,

(b) ensure that any expert judgment exercised by the benchmark administrator or DBA individuals is independently and honestly exercised,

(c) protect the integrity and independence of the provision of a designated commodity benchmark, including, for greater certainty, by

(i) ensuring that the provision of a designated commodity benchmark

is not influenced by the existence of, or potential for, financial interests, relationships or business connections between the designated benchmark administrator or its affiliates, its personnel, clients, any market participant or persons connected with them,

(ii) ensuring that each benchmark individual does not have any financial interests, relationships or business connections that adversely affect the integrity of the designated benchmark administrator, including outside employment, travel, and acceptance of entertainment, gifts and hospitality provided by the designated benchmark administrator's clients or other commodity market participants,

(iii) keeping separate, operationally, the business of the designated benchmark administrator relating to the designated commodity benchmark it administers, and its benchmark individuals, from any other business activity of the designated benchmark administrator if the designated benchmark administrator becomes aware of a conflict of interest or a potential conflict of interest involving the business of the designated benchmark administrator relating to any designated commodity benchmark, and

(iv) ensuring that each of its benchmark individuals does not contribute to a determination of a designated commodity benchmark by way of engaging in bids, offers or trades on a personal basis or on behalf of market participants, except as permitted under the policies and procedures of the designated benchmark administrator,

(d) ensure that an officer referred to in section 6, or any DBA individual that reports directly to the officer, does not receive compensation or other financial incentive from which conflicts of interest arise or that otherwise adversely affect the integrity of the benchmark determination,

(e) protect the confidentiality of information provided to or produced by the designated benchmark administrator, subject to the disclosure requirements under sections 19, 20, 40.5, 40.6 and 40.9, and

(f) identify and eliminate or manage conflicts of interest that exist between the provision of a designated commodity benchmark by the designated benchmark administrator, including all benchmark individuals who participate in the determination of the designated commodity benchmark, and any other business of the designated benchmark administrator.

(2) A designated benchmark administrator must ensure that its other businesses have appropriate policies, procedures and controls designed to minimize the likelihood that a conflict of interest will adversely affect the integrity of the provision of a designated commodity benchmark.

(3) In establishing an organizational structure, as required under subsections 40.11(1) and (2), a designated benchmark administrator must ensure that the responsibilities for each person or company involved in the provision of a designated commodity benchmark administered by the designated benchmark administrator do not cause a conflict of interest or a perception of conflict of interest.

(4) A designated benchmark administrator must promptly publish a description of a conflict of interest, or a potential conflict of interest, in respect of a designated commodity benchmark

(a) if a reasonable person would consider the risk of harm to any person or company arising from the conflict of interest, or the potential conflict of interest, is significant, and

(b) on becoming aware of the conflict of interest, or the potential conflict of interest, including, for greater certainty, a conflict or potential conflict arising from the ownership or control of the designated benchmark administrator.

(5) If a designated benchmark administrator fails to apply or follow a policy or procedure referred to in paragraph (1)(e), and a reasonable person would consider the failure to be significant, the designated benchmark administrator must promptly provide written notice of the significant failure to the regulator or securities regulatory authority.

Assurance report on designated benchmark administrator

40.14.(1) A designated benchmark administrator must engage a public accountant to provide a limited assurance report on compliance or a reasonable assurance report on compliance, in respect of each designated commodity benchmark it administers, regarding the designated benchmark administrator's

(a) compliance with subsection 5(1) and sections 11 to 13, 40.4, 40.5, 40.7, 40.8, and 40.10 to 40.13, and

(b) following of the methodology applicable to the designated commodity benchmark.

(2) A designated benchmark administrator must ensure an engagement referred to in subsection (1) occurs once in every 12-month period.

(3) A designated benchmark administrator must, within 10 days of the receipt of a report provided for in subsection (1), publish the report and deliver a copy of the report to the regulator or securities regulatory authority..

9. This Instrument comes into force on ●.

ANNEX C

PROPOSED CHANGES TO COMPANION POLICY 25-102 *DESIGNATED BENCHMARKS AND BENCHMARK ADMINISTRATORS*

1. ***Companion Policy 25-102 Designated Benchmarks and Benchmark Administrators is changed by this Document.***[20]

2. ***Part 1 is changed***

   (a) ***in the first bullet of the second paragraph under the subheading of "Designation of Benchmarks and Benchmark Administrators" by adding "***or commodity***" after "***financial***",***

   (b) ***by adding after the second paragraph under the subheading of "Categories of Designation" the following paragraph:***

   Designated commodity benchmarks, benchmarks dually designated as commodity and regulated-data benchmarks or dually designated as commodity and critical benchmarks are subject to the requirements as specified under Part 8.1 of the Instrument.***,***

   (c) ***in the second sentence of the third paragraph under the subheading of "Categories of Designation" by***

      (i) ***replacing "***or***" with "***,***" before "***a designated regulated-data benchmark***", and***

      (ii) ***adding "***or a designated commodity benchmark***" before the period,***

   (d) ***in the bullets of the third paragraph under the subheading of "Categories of Designation"***

      (i) ***by deleting "***and***" in the first bullet,***

      (ii) ***by replacing "." with "***, but not if it is a commodity benchmark,***" in the second bullet, and***

      (iii) ***by adding after the second bullet the following two bullets:***

      - a designated commodity benchmark may also be designated as a

[20] The proposed changes are with respect to the final version of CP published by the Authorities today, on April 29, 2021. For further details, see the CSA Notice of Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy, dated April 29, 2021.

designated regulated-data benchmark, and

- a designated commodity benchmark may also be designated as a designated critical benchmark.*, and*

(e) in the fourth paragraph under the subheading of "Categories of Designation" by

(i) replacing "or" *with* "," *before* "a regulated-data benchmark*", and*

(ii) adding "or a commodity benchmark" *before the period.*

3. Subsection 1(1) with the heading of "Definition of designated critical benchmark" is changed

(a) in the first paragraph by adding at the end of that first paragraph the following sentence:

However, if a designated commodity benchmark is also designated as a critical benchmark, then subsections 40.2(1) and (2) of the Instrument will specify the requirements applicable to such a benchmark.***, and***

(b) in first sentence of the second paragraph by adding "or commodity" ***before*** "markets"***.***

4. Subsection 1(1) with the heading of "Definition of designated regulated-data benchmark" is changed by adding at the end of the first paragraph the following sentence:

However, if a commodity benchmark is dually designated as a commodity benchmark and a regulated-data benchmark, then subsections 40.2(3) and (4) of the Instrument will specify the requirements applicable to such a benchmark.**.**

5. The Companion Policy is changed by adding the following part:

PART 8.1
DESIGNATED COMMODITY BENCHMARKS

Section 40.1 – Definition of commodity benchmark

The Instrument defines a "commodity benchmark" to ensure, to the extent possible, a consistent interpretation of this term across the various CSA jurisdictions, despite possible differences in statutory definitions of "commodity". The definition specifically excludes a benchmark that has, as an underlying interest, a currency, or an intangible commodity that can only be delivered in digital format, including crypto and digital assets.

Subsections 40.2(1) and (2) – Dual designation as a commodity benchmark and a critical benchmark

A designated commodity benchmark may also be designated as a critical benchmark and, in such case, would still be subject to the requirements under Part 8.1. As there are no specific requirements under Part 8.1 for benchmark contributors, such dually-designated benchmarks would not be subject to the requirements under sections 30 to 33 of the Instrument.

If the underlying commodity is gold, silver, platinum or palladium, then rather than being subject to the requirements under Part 8.1, the requirements under Parts 1 to 8 would apply.

Subsections 40.2(3) and (4) – Dual designation as a commodity benchmark and a regulated-data benchmark

If a commodity benchmark is designated as a regulated-data benchmark, then it is not subject to Part 8.1, rather the requirements under Parts 1 to 8 would apply. However, some commodity benchmarks may be determined from transactions where the parties, in the ordinary course of business, make or take physical delivery of the commodity, and those same commodity benchmarks may also meet the requirements for regulated-data benchmarks. Generally, these transactions would also be arm's length transactions. Regulated-data benchmarks determined from such transactions would more closely resemble commodity benchmarks, rather than financial benchmarks, and they would be dually designated as commodity and regulated-data benchmarks. Benchmark administrators of such dually-designated benchmarks would be subject to the requirements under Part 8.1.

However, as provided by subsection 40.2(4), such benchmark administrators would be exempted from certain policy and control requirements relating to the process of contributing input data, from the requirement to publish certain explanations for each determination of the benchmark, and from the requirement for an assurance report. The exemptions under subsection 40.2(4) are meant to ensure that administrators of benchmarks dually designated as commodity and regulated-data benchmarks receive comparable treatment under Part 8.1 as administrators of designated regulated-data benchmarks under Parts 1 to 8.

Given the interpretation provided by paragraph 1(3)(a) of the Instrument as to when input data is considered to have been "contributed", as described earlier in this Policy, input data for regulated-data benchmarks would not generally be considered to be contributed. Therefore, certain requirements that are only applicable if there is a contributor or if input data is contributed, would not apply to a benchmark that is dually designated as a commodity benchmark and a regulated-data benchmark. Examples include the requirements in paragraphs 40.5(2)(g), (h) and (i), and paragraphs 40.8(2)(d) and (e).

For clarity, we would not designate a regulated-data benchmark that is also a commodity benchmark, whether dually designated as such or only as a regulated-data benchmark, as a critical benchmark.

Section 40.3 – Non-application to designated commodity benchmarks

Physical commodity markets have unique characteristics which have been taken into account in determining which requirements should be imposed on designated benchmark administrators in respect of designated commodity benchmarks. Consequently, section 40.3 includes a number of exemptions from certain requirements for such benchmark administrators, either because some are not suitable or because more appropriate substituted requirements are provided under Part 8.1 of the Instrument. Requirements that are relevant to designated benchmark administrators of designated commodity benchmarks have been excepted from the exemptions in section 40.3, and include, among others, the requirements for:

- policies and procedures as set out in subsection 5(1),
- a compliance officer as set out in section 6,
- reporting on contraventions in section 11,
- policies and procedures regarding complaints, as set out in section 12,
- outsourcing under section 13,
- the publishing of a benchmark statement under section 19, and
- providing notice of changes to and cessation of a benchmark, as provided under section 20.

In addition to the guidance provided in this Policy with respect to paragraph 12(2)(c), we expect disputes as to pricing determinations that are not formal complaints to be resolved by the designated benchmark administrator of a commodity benchmark with reference to its appropriate standard procedures. In general, we would expect that if a complaint results in a change in price, whether the complaint is formal or informal, then the details of that change in price will be communicated to stakeholders as soon as possible.

With respect to section 13, for the purposes of securities legislation, a designated benchmark administrator remains responsible for compliance with the Instrument despite any outsourcing arrangement.

Paragraph 19(2)(a) of the Instrument provides that a required element of the benchmark statement for a designated benchmark is a description of the part of the market the designated benchmark is intended to represent. This relates to the benchmark's purpose. A commodity benchmark may be intended to reflect the characteristics and operations of the referenced underlying physical commodity market and may be used as a reference price for a commodity and for commodity derivative contracts.

Section 40.5 – Methodology to ensure the accuracy and reliability of a designated commodity benchmark

We expect that the methodology established and used by a designated benchmark administrator will be based on the applicable characteristics of the relevant underlying interest of the designated commodity benchmark for that part of the market that the designated commodity benchmark is intended to represent, such as the grade and quality of the commodity, its geographical location, seasonality, etc., and will be sufficient to provide an accurate and reliable benchmark. For example, the methodology for a crude oil benchmark should reflect the following, but not be limited to, the specific crude grade (e.g., sweet or heavy), the location (e.g., Edmonton or Hardisty), the time period within which transactions are completed during the trading day, the month of delivery, and the assessment method used such as a volume-weighted average.

Subparagraph 40.5(2)(a)(i) – Reference to concluded transactions

In a number of instances, under Part 8.1, we refer to concluded transactions. For clarity, by concluded transactions, we mean transactions that are executed but not necessarily settled.

Subparagraph 40.5(2)(a)(ii) – Specific reference unit used in the methodology

The specific reference unit used in the methodology will vary depending on the underlying commodity. Examples of possible reference units include barrels of oil or cubic meters (m^3) in respect of crude oil, and gigajoules (GJ) or one million British Thermal Units (MMBTU) in respect of natural gas.

Paragraph 40.5(2)(c) – Relative importance assigned to each criterion used in the determination of a designated commodity benchmark

The requirement in paragraph 40.5(2)(c) regarding the relative importance assigned to each criterion, including the type of input data used and how and when expert judgment may be exercised, is not intended to restrict the specific application of the relevant methodology, but to ensure the quality and integrity of the determination of the designated commodity benchmark.

Section 40.7 – Review of methodology

We expect that a designated benchmark administrator will determine the appropriate frequency for carrying out an internal review of a designated commodity benchmark's methodology based on the specific nature of the benchmark (such as the complexity, use and vulnerability of the benchmark to manipulation) and the applicable characteristics of the part of the market (or changes thereto) that the benchmark is intended to represent. In any event, the administrator must review the methodology at least once in every 12-month period.

Paragraph 40.8(2)(a) – Order of priority of input data specified in the methodology

While we recognize a benchmark administrator's flexibility to determine its own methodology and use of market data, we expect an administrator to use input data in accordance with the order of priority specified in its methodology. We further expect that, where consistent with such methodology, priority will be given to input data in the following order: (1) concluded and reported transactions, (2) bids and offers, and (3) other information.

Furthermore, we expect that the designated benchmark administrator will employ measures reasonably designed to ensure that input data contributed and considered in the determination of a designated commodity benchmark is *bona fide*. By *bona fide* we mean that parties contributing the input data have executed or are prepared to execute transactions generating such input data and that concluded transactions were executed between parties at arm's length. If the latter is not the case, then particular attention should be paid to transactions between affiliated entities and consideration given as to whether this affects the quality of the input data to any extent.

Section 40.9 – Transparency of determination of a designated commodity benchmark

We expect that, in providing a plain language explanation of the extent to which, and the basis upon which, expert judgment was used in the determination of a designated commodity benchmark, a designated benchmark administrator will address the following:

(a) the extent to which a determination is based on transactions or spreads, and interpolation or extrapolation of input data;

(b) whether greater priority was given to bids and offers or other market data than to concluded and reported transactions, and, if so, the reason why.

Section 40.9 requires a designated benchmark administrator to publish the specified explanations for <u>each</u> determination of a designated commodity benchmark. However, we recognize that, to the extent that there have been no significant changes, a standard explanation may be acceptable, and any exceptions in the explanation must then be noted for each determination. We generally expect that the required explanations will be provided contemporaneously with the determination of a benchmark, but recognize that unforeseen circumstances may cause delays, in which case, we still expect that explanation to be published as soon as reasonably practicable.

Section 40.10 – Policies, procedures, controls and criteria of the designated benchmark administrator to ensure the integrity of the process of contributing input data

There are no specific requirements under Part 8.1 for benchmark contributors with respect to commodity benchmarks, as under Part 6 for financial benchmarks, nor, consequently, obligations on designated benchmark administrators to ensure that the benchmark

contributors adhere to such requirements. However, section 40.10 does require an administrator to ensure the integrity of the process for contributing input data. We are of the view that such policies, procedures, controls and criteria will promote the accuracy and integrity of the determination of the commodity benchmark.

Paragraph 40.10(1)(d) – Criteria relating to the contribution of transaction data

In establishing criteria that determine the appropriate contribution of transaction data by benchmark contributors, we would expect that the criteria would include encouraging benchmark contributors to contribute transaction data from the back office of the benchmark contributor. We would consider the back office of a benchmark contributor to be any department, division, group or personnel that performs any administrative and support functions, including, as applicable, settlements, clearances, regulatory compliance, maintaining of records, accounting and information technology services. In general, we consider back office staff to be the individuals who support the generation of revenue for the benchmark contributor.

Subsection 40.11(3) – Governance and control requirements

To foster confidence in the integrity of a designated commodity benchmark, we are of the view that benchmark individuals involved in the determination of a commodity benchmark should be subject to the minimum controls set out in subsection 40.11(3). A designated benchmark administrator must decide how to implement its own specific measures to achieve the objectives set out in paragraphs (a) to (e).

Section 40.12 – Books, records and other documents

Subsection 40.12(2) sets out the minimum records that must be kept by a designated benchmark administrator. We expect an administrator to consider the nature of its benchmarks-related activity when determining the records that it must keep.

In addition to the record keeping requirements in the Instrument, securities legislation generally requires market participants to keep such books, records and other documents as may reasonably be required to demonstrate compliance with securities law of the jurisdiction.

Section 40.13 – Conflicts of interest

We expect the policies and procedures required under subsection 40.13(1) for managing conflicts of interest to provide the parameters for a designated benchmark administrator to

- identify conflicts of interest,
- determine the level of risk, to both the benchmark administrator and users of its commodity benchmarks, that a conflict of interest raises, and
- respond appropriately to conflicts of interest.

In establishing an organizational structure, as required under subsections 40.11(1) and (2),

that addresses the conflict of interest requirements under subsection 40.13(3), the designated benchmark administrator should ensure that persons responsible for the determination of the designated commodity benchmark:

- are located in a secure area apart from persons that carry out other business activity, and
- report to a person that reports to an executive officer that does not have responsibility relating to other business activities of the administrator.

Section 40.14 - Assurance report on designated benchmark administrator

Under Part 8.1, there is no requirement for an oversight committee, as provided by section 7. Therefore, for purposes of section 40.14, there is no oversight committee to specify whether a limited assurance report on compliance or a reasonable assurance report on compliance needs to be provided by a public accountant. We would expect the designated benchmark administrator to determine which report is appropriate, based on the specific nature of the designated commodity benchmark, including the complexity, use and vulnerability of the benchmark to manipulation, and the applicable characteristics of the market that the benchmark is intended to represent, or other relevant factors regarding the administration of the benchmark.

6. These changes become effective on ●.