

## CSA Notice and Request for Comment

### Proposed National Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy

March 14, 2019

#### Introduction

The Canadian Securities Administrators (the **CSA** or **we**) are publishing the following for a 90-day comment period, expiring on June 12, 2019:

- proposed National Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* (**Proposed NI 25-102**), and
- proposed Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators* (the **Proposed CP**).

Collectively, Proposed NI 25-102 and the Proposed CP are referred to as the **Proposed Instrument** in this Notice.

The text of Proposed NI 25-102 and the Proposed CP is contained in Annex A and Annex B, respectively, of this Notice and will also be available on websites of CSA jurisdictions, including:

[www.lautorite.qc.ca](http://www.lautorite.qc.ca)  
[www.albertasecurities.com](http://www.albertasecurities.com)  
[www.bcsc.bc.ca](http://www.bcsc.bc.ca)  
[nssc.novascotia.ca](http://nssc.novascotia.ca)  
[www.fcnb.ca](http://www.fcnb.ca)  
[www.osc.gov.on.ca](http://www.osc.gov.on.ca)  
[www.fcaa.sk.ca](http://www.fcaa.sk.ca)  
[www.mbsecurities.ca](http://www.mbsecurities.ca)

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

Currently, benchmarks, and persons or companies that administer them, contribute data that is used to determine them, and use them, are not subject to formal securities regulatory requirements or oversight in Canada. However, as the importance of benchmarks continues to increase in Canadian capital markets, and because misconduct involving benchmarks has led to significant negative impacts on capital markets causing several international developments, we are of the view that it is appropriate to develop a securities regulatory regime for benchmarks and their administrators, contributors and certain of their users.

The Proposed Instrument is intended to implement a comprehensive regime for:

- the designation and regulation of benchmarks (**designated benchmarks**), including specific requirements (or exemptions from requirements) for designated critical benchmarks (**designated critical benchmarks** or **critical benchmarks**), designated interest rate benchmarks (**designated interest rate benchmarks** or **interest rate benchmarks**) and designated regulated-data benchmarks (**designated regulated-data benchmarks** or **regulated-data benchmarks**),
- the designation and regulation of persons or companies that administer such benchmarks (**designated benchmark administrators** or **administrators**),
- the regulation of persons or companies, if any, that contribute certain data that will be used to determine such designated benchmarks (**benchmark contributors** or **contributors**), and
- the regulation of certain users of designated benchmarks, particularly users who are already regulated in some capacity under Canadian securities legislation (**benchmark users** or **users**).

In Canada, Refinitiv Benchmark Services (UK) Limited (**RBSL**)<sup>1</sup> is currently the administrator of two domestically important benchmarks:

- the Canadian Dollar Offered Rate (**CDOR**), and
- the Canadian Overnight Repo Rate Average (**CORRA**).

Currently, the intention of the CSA is to designate only RBSL as an administrator, and only CDOR and CORRA as its designated benchmarks (which are each expected to be designated as a critical benchmark and an interest rate benchmark), under Proposed NI 25-102.<sup>2</sup> This intention is based on the significant reliance placed by users and other market participants on CDOR and CORRA, which are used in various financial instruments with a notional value of at least \$12.3 trillion

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<sup>1</sup> Prior to a name change on February 28, 2019, RBSL was known as Thomson Reuters Benchmark Services Limited.

<sup>2</sup> CDOR is the recognized financial benchmark in Canada for bankers' acceptances (BAs) with a term of maturity of one year or less; it is the rate at which banks are willing to lend to companies. CORRA is a measure of the average cost of overnight collateralized funding, and is widely used as the reference for overnight indexed swaps and related futures. Additional information on CDOR and CORRA can be found at: <https://financial.thomsonreuters.com/en/products/data-analytics/market-data/financial-benchmarks/benchmarks-in-canada.html>.

dollars.<sup>3</sup> This figure is approximately five times larger than the gross domestic product for Canada in 2017.<sup>4</sup> For CDOR and CORRA, we believe that the following risks should be minimized:

- interruption or uncertainty (if, for example, the administrator resigns or is unsuitable), and
- abusive activity relating to the benchmark, including manipulation of the benchmark.

If not, confidence in Canadian capital markets would suffer and participants in Canadian financial markets (including investors) would incur significant losses or costs.

It is possible that the CSA may designate other administrators and their associated benchmarks in the future on public interest grounds, including where:

- a benchmark is sufficiently important to financial markets in Canada,
- a benchmark administrator applies for designation to allow its 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 CSA becomes aware of activities of a benchmark administrator, contributor or user that raise concerns that align with the regulatory risks identified below in respect of such parties and conclude that the administrator and benchmark in question should be designated.

Please refer to the section of this Notice on “Expected Future Amendments on Commodity Benchmarks” for circumstances in which a CSA jurisdiction may designate commodity benchmarks in the future.

## Background

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 LIBOR and financial benchmarks in general. The manipulation of LIBOR led to individual and class-action lawsuits, criminal prosecutions, significant fines and settlements paid by banks that contributed data, an independent review (the **Wheatley Review**)<sup>5</sup> and, ultimately, the implementation of several recommendations from that review, including the replacement in February 2014 of the British Bankers’ Association as the administrator of LIBOR by ICE Benchmark Administration Limited. Although the change in administrator and the implementation of other changes recommended in the Wheatley Review

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<sup>3</sup> Bank of Canada, *CDOR & CORRA in Financial Markets –Size and Scope* (September 2018), online: <https://www.bankofcanada.ca/wp-content/uploads/2018/10/CDOR-CORRA-in-Financial-Markets-%E2%80%93Size-and-Scope.pdf>.

<sup>4</sup> See, for example: [http://www.international.gc.ca/economist-economiste/statistics-statistiques/data-indicators-indicateurs/Annual\\_Ec\\_Indicators.aspx?lang=eng](http://www.international.gc.ca/economist-economiste/statistics-statistiques/data-indicators-indicateurs/Annual_Ec_Indicators.aspx?lang=eng).

<sup>5</sup> Available online at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/191762/wheatley\\_review\\_libor\\_finalreport\\_280912.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf).

have increased market confidence in LIBOR, market concerns have persisted regarding the reliability of LIBOR due to the decline in interbank borrowing activity since the onset of the financial crisis. As a result, regulatory work has been ongoing to identify alternatives to LIBOR and other interbank offered rates.<sup>6</sup>

### ***IOSCO Principles***

In October 2012, after the LIBOR controversies, the International Organization of Securities Commissions (**IOSCO**) published the *Principles for Oil Price Reporting Agencies* (the **IOSCO PRA Principles**)<sup>7</sup> which are intended to enhance the reliability of oil price assessments that are referenced in derivatives contracts subject to regulation by IOSCO members.

In July 2013, IOSCO published the *Principles for Financial Benchmarks* (**IOSCO Financial Benchmark Principles**).<sup>8</sup> Together the IOSCO Financial Benchmark Principles and the IOSCO PRA Principles (the **IOSCO Principles**) provide an overarching framework of principles for the regulation of benchmarks used in financial markets, including principles to address conflicts of interest in processes for determining benchmarks, that are referenced in financial instruments subject to regulation by IOSCO members.

### ***Initial Canadian Regulatory Response***

Following the controversies in 2012 regarding alleged misconduct related to the determination of LIBOR and the introduction of the IOSCO Principles, we initially decided that we did not need to seek to immediately regulate benchmarks. Instead, Canadian financial sector regulators pursued other measures to reduce risk, such as:

- encouraging contributors to CDOR to develop a voluntary code of conduct that addresses some of the conflicts of interest issues that could lead to manipulation of submission-based benchmarks, and

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<sup>6</sup> See, for example, the following publications:

ISDA, *Interbank Offered Rate (IBOR) Fallbacks for 2006 ISDA Definitions - Consultation on Certain Aspects of Fallbacks for Derivatives Referencing GBP LIBOR, 1 CHF LIBOR, JPY LIBOR, TIBOR, Euroyen TIBOR and BBSW* (July 12, 2018), online: <http://assets.isda.org/media/f253b540-193/42c13663-pdf/>,

Deloitte, *The alphabet soup of alternative reference rates post-LIBOR - SOFR, SONIA, EONIA, SARON, and TONAR* (April 11, 2018), online: <https://www2.deloitte.com/us/en/pages/financial-services/articles/alternative-reference-rates-post-libor.html>,

PWC, *Farewell LIBOR - The transition to alternative reference rates for new and legacy contracts* (October 3, 2018), online: [https://www.pwc.ch/en/publications/2018/Farewell-LIBOR\\_EN\\_web2.pdf](https://www.pwc.ch/en/publications/2018/Farewell-LIBOR_EN_web2.pdf), and

Oliver Wyman, *Making the World's Most Important Number Less Important - Libor Transition* (July 2018), online: [https://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2018/july/Oliver-Wyman-Making-The-Worlds-Most-Important-Number-Less-Important\\_vFINAL.pdf](https://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2018/july/Oliver-Wyman-Making-The-Worlds-Most-Important-Number-Less-Important_vFINAL.pdf).

<sup>7</sup> Available online at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD391.pdf>.

<sup>8</sup> Available online at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf>.

- arranging for RBSL to agree to follow certain procedures to strengthen the integrity of CDOR and CORRA.

### ***EU Benchmarks Regulation***

On June 30, 2016, the European Union's (EU) *Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (EU BMR)*<sup>9</sup> came into force. Most of the provisions of the EU BMR came into effect on January 1, 2018. The regulation introduces a common framework and consistent approach to benchmark regulation across the EU. It aims to ensure benchmarks are robust and reliable, and to minimize conflicts of interest in benchmark-setting processes.

The EU BMR is part of the EU's response to the LIBOR scandal and, in particular:

- aims to reduce the risk of manipulation of benchmarks by addressing conflicts of interest, governance controls and the use of discretion in the benchmark-setting process, and
- requires administrators of a broad range of benchmarks used in the EU to be authorized or registered by a national regulator and to implement governance systems and other controls to ensure the integrity and reliability of the benchmarks they administer.

The EU BMR has provisions regulating benchmark administrators, benchmark contributors and benchmark users.

Supervised entities under EU legislation (e.g., banks, investment firms, insurance companies, mutual funds, pension funds, fund managers and consumer lenders) will be subject to restrictions on using benchmarks (including trading in financial contracts and instruments that reference a benchmark) unless:

- they are produced by an EU administrator authorized or registered under the EU BMR, or
- they are benchmarks of a benchmark administrator located outside the EU that have been qualified for use in the EU under the EU BMR's third country regime (three possible routes are described below).

The restriction applies to "third country regime" benchmarks from January 1, 2022.<sup>10</sup> In other words, a benchmark produced outside of the EU cannot be used by EU supervised entities after December 31, 2021, unless that benchmark meets the requirements in the EU BMR and, as a result, is listed on the European Securities and Markets Authority (ESMA) Benchmarks Register.<sup>11</sup>

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<sup>9</sup> Available online at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1011&from=EN>.

<sup>10</sup> Originally, this restriction was to apply from January 1, 2020. However, on February 25, 2019, EU authorities announced that the date would be extended to January 1, 2022.

<sup>11</sup> ESMA's Benchmarks Register can be found online at <https://www.esma.europa.eu/databases-library/registers-and-data>.

In order for supervised entities in the EU to be able to use benchmarks produced by third country administrators (e.g., administrators located in Canada), those administrators must apply to be added to the ESMA list of benchmarks in one of three ways:

- *Recognition* – where an administrator located in a third country has been recognised by a EU member state in accordance with the requirements set out in the EU BMR. This process is not relevant for purposes of Proposed NI 25-102.
- *Endorsement* – where an administrator or supervised entity located in the EU has a clear and well-defined role within the control or accountability framework of a third country administrator and is able to monitor effectively the provision of a benchmark. This process is relevant if the administrator or supervised entity applies for endorsement in accordance with the requirements set out in the EU BMR but is not relevant for purposes of Proposed NI 25-102.
- *Equivalence* – where an equivalency decision has been adopted by the European Commission (EC), as described further below.

Under the EU BMR, ESMA will be able to register a benchmark provided by a non-EU administrator in a non-EU state as qualified for use in the EU if:

- the EC has adopted an equivalency decision with respect to the non-EU state,
- the administrator is authorized or registered, and is supervised, in the non-EU state,
- the administrator has notified ESMA of its consent to the use of its benchmarks in the EU by supervised entities (the administrator must also provide ESMA with a list of the relevant benchmarks and advise ESMA of the relevant non-EU regulator in the non-EU state), and
- specific cooperation arrangements between ESMA and the non-EU regulator in the non-EU state are operational.

The EC will be able to adopt an equivalency decision with respect to the non-EU state if administrators authorized or registered in that state comply with binding requirements that are equivalent to the EU BMR. The determination of equivalence takes into account whether the legal framework and supervisory practice of a third country ensures compliance with the IOSCO Principles, as applicable.

Alternatively, the EC will be able to adopt an equivalency decision if there are binding requirements in the non-EU state equivalent to the EU BMR with respect to a specific non-EU administrator or benchmark or benchmark family. This provides some flexibility as it will allow the EC to make equivalency decisions for non-EU benchmarks in those cases where a non-EU state only regulates a limited category of critical benchmarks on an equivalent basis.

### ***RBSL Authorization***

On July 12, 2018, RBSL issued a press release announcing that it had been approved by the United Kingdom's (UK) Financial Conduct Authority (FCA) as an authorized "benchmark administrator" under the EU BMR. As an authorized administrator, RBSL is certified to continue to administer, calculate and publish benchmarks in line with the EU BMR, and users of these benchmarks can continue to use them in accordance with the EU BMR. For additional information regarding the impact of the UK leaving the EU on RBSL's authorization with the FCA, please see the discussion below under the heading "*EU Equivalency*".

### **Substance and Purpose**

We developed Proposed NI 25-102 to establish an EU BMR-equivalent benchmarks regulatory regime and to reduce risk in Canada's capital markets, thereby protecting Canadian investors and other Canadian market participants.

As previously indicated, the current intention of the CSA is to designate only:

- RBSL as an administrator, and
- CDOR and CORRA as RBSL's designated benchmarks under Proposed NI 25-102.

The Proposed CP is meant to assist in the interpretation and application of Proposed NI 25-102.

### ***EU Equivalency***

In light of the EU BMR, having the EU recognize the Canadian benchmarks regime as equivalent is desirable and important since it would allow EU institutional market participants to continue to use any Canadian benchmark designated under Proposed NI 25-102. For example, an EU institutional investor may hold securities that refer to a Canadian benchmark.

Although Canada-based administrators are able to directly apply for EU-based registration in the EU under the EU BMR (and, as noted above, RBSL has in fact secured such authorization from the FCA), the CSA is of the view that:

- Canadian securities regulators have a sovereign responsibility and are best positioned to directly regulate benchmarks with a significant connection to Canada, including such benchmarks' administrators, contributors and users, and
- it would be prudent to implement a Canadian regime by, or soon after, the EU equivalency deadline (i.e., January 1, 2022) in the event that, for example
  - another entity, including an entity resident in Canada, is later chosen to act as the administrator of benchmarks (e.g., CDOR and CORRA) administered by an EU-registered benchmark administrator (e.g., RBSL) and would like the benefit of a Canadian regime that has been recognized as equivalent by the EU, or

- a non-EU registered benchmark administrator of another Canadian benchmark would like the benefit of a Canadian domestic regime that has been recognized as equivalent by the EU.

In addition, we understand that, in the event that the UK leaves the EU, the UK will make amendments to retain EU law related to financial benchmarks (i.e., the EU BMR) to ensure that it continues to operate effectively in a UK context.<sup>12</sup> In such an event, we would also seek a UK equivalency decision. Having the UK recognize the Canadian regime as equivalent is desirable and important since it would, for example, allow UK institutional market participants to continue to use any Canadian benchmark designated under Proposed NI 25-102. We expect that a positive EU equivalency decision would lead to a positive UK equivalency decision.

### ***Risk Reduction and Investor Protection***

The CSA believes that Canadian securities regulators should now establish and implement a regulatory regime for benchmarks for the following reasons:

- there is a need to regulate CDOR and CORRA and their administrator (i.e., RBSL) in light of the significant reliance placed by users and other market participants on CDOR and CORRA. In particular, for CDOR and CORRA, we believe that the following risks should be minimized:
  - interruption or uncertainty (if, for example, the benchmark administrator resigns or is unsuitable), and
  - misconduct relating to benchmarks including manipulation of the benchmark.

If not and one of these events occurs, the loss of confidence that Canadian capital markets would suffer and the costs that would be borne by Canadian financial markets (including investors), would be significant,<sup>13</sup>

- there is a need for the ability to regulate benchmark administrators and benchmark contributors due to the risk of benchmark-related misconduct that would adversely impact:<sup>14</sup>

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<sup>12</sup> See, for example, HM Treasury, *Draft Benchmarks (Amendment and Transitional Provision) (EU Exit) Regulations 2019*, online: <https://www.gov.uk/government/publications/draft-benchmarks-amendment-and-transitional-provision-eu-exit-regulations-2019>.

<sup>13</sup> In January 2018, 9 large banks, including 6 from Canada, were accused by a plaintiff in a U.S. civil lawsuit of conspiring to rig CDOR to improve profits from derivatives trading. The complaint, filed by a Colorado pension fund in U.S. District Court in New York, accused the banks of suppressing CDOR from August 2007 to June 2014 by making artificially lower interest rate submissions to RBSL, CDOR's administrator. The lawsuit has not yet gone to trial and the plaintiff's allegations have not been proven in court.

<sup>14</sup> See, for example, the enforcement actions taken in the UK alone: <https://www.fca.org.uk/markets/benchmarks/enforcement>.



- investors,
  - market participants, and
  - the reputation of, and confidence in, Canada's capital markets,
- many factors that resulted in benchmark-related misconduct in other jurisdictions are also present in Canada (e.g., widespread usage of the benchmark to price unrelated securities that can be traded by contributors, rate fixing activities that rely on a combination of observable market inputs and expert judgment),
  - such a regime would clarify, strengthen and specify the legal basis on which Canadian securities regulators may take enforcement and other regulatory action against benchmark administrators, benchmark contributors and benchmark users in the event of misconduct involving a benchmark that harms (or threatens to harm) investors, market participants and capital markets generally, and
  - such a regime would ensure the continuity of a viable designated critical benchmark by requiring market participants to provide information in relation to the designated critical benchmark for use by the designated benchmark administrator.

In addition, the CSA believes it is necessary to reflect international developments in the regulation of benchmarks. IOSCO has released its IOSCO Principles and certain other major jurisdictions have either introduced benchmark regulations or taken measures to regulate key benchmarks or their methodologies.<sup>15</sup>

## **Summary of Proposed NI 25-102**

### ***Designated Benchmarks and Benchmark Administrators***

Under current or forthcoming securities legislation,<sup>16</sup> a benchmark administrator can apply for designation as a designated benchmark administrator and to request the designation of a benchmark. Alternatively, the regulator can also apply for a benchmark administrator or benchmark to be designated under securities legislation.<sup>17</sup>

The Proposed CP explains that if a benchmark administrator wants to apply to be designated as a designated benchmark administrator and to request the designation of a benchmark, the application

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<sup>15</sup> In addition to the EU, for example, Australia, Hong Kong, Singapore and South Africa. For additional detail, see Financial Stability Board, *Reforming major interest rate benchmarks - Progress report* (November 14, 2018), online: <http://www.fsb.org/wp-content/uploads/P141118-1.pdf>.

<sup>16</sup> For additional detail, see the section "Recent or Proposed Legislative Amendments" below.

<sup>17</sup> Except in Québec, where the securities regulatory authority has the authority to designate a benchmark administrator or benchmark on its own initiative.

should provide the same information as that set out in Form 25-102F1 and Form 25-102F2. A benchmark administrator may request, or the regulator or securities regulatory authority may decide, that a benchmark should receive, one or more of the following additional designations:<sup>18</sup>

- **Critical benchmark** – Staff of a regulator or securities regulatory authority may recommend that the regulator or the securities regulatory authority designate a benchmark as a “critical benchmark” if the benchmark is critical to financial markets in Canada or a region of Canada. The following two factors are among those that will be considered:
  - (a) the benchmark is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds, having a total value in Canada of at least \$400 billion on the basis of the range of maturities or tenors of the benchmark, where applicable, or
  - (b) the benchmark satisfies all of the following criteria:
    - (i) the benchmark is used directly or indirectly within a combination of benchmarks as a reference for financial instruments or financial contracts or for measuring the performance of investment funds having a total value in one or more jurisdictions of Canada that is significant, on the basis of all the range of maturities or tenors of the benchmark, where applicable,
    - (ii) the benchmark has no, or very few, appropriate market-led substitutes,
    - (iii) in the event that the benchmark is no longer provided, or is provided on the basis of input data that is no longer sufficient to provide a benchmark that accurately represents that part of the market or economy the designated benchmark is intended to record, or on the basis of unreliable input data, there would be significant and adverse impacts on:
      - (A) market integrity, financial stability, the real economy, or the financing of businesses in one or more jurisdictions of Canada, or
      - (B) a significant number of market participants in one or more jurisdictions of Canada.

For the purpose of paragraph (a) and subparagraph (b)(i), staff of a regulator or securities regulatory authority will consider, among other things, the outstanding principal amount of any debt securities that reference the benchmark, the outstanding notional amount of any derivatives that reference the benchmark, and the outstanding net asset value of any investment funds that use the benchmark to measure performance.

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<sup>18</sup> Note that the interpretations of what can constitute a critical benchmark, an interest rate benchmark and a regulated-data benchmark are located in the Proposed CP.

- **Interest rate benchmark** – Staff of a regulator or securities regulatory authority may recommend that the regulator or the securities regulatory authority designate a benchmark as an “interest rate benchmark” if the benchmark is used to set interest rates of debt securities or is otherwise used as a reference in derivatives or other instruments. Factors that will be considered include the following:
  - (a) the benchmark is determined on the basis of the rate at which financial institutions may lend to, or borrow from, other financial institutions, or market participants other than financial institutions, in the money market, or
  - (b) the benchmark is determined from a survey of bid-side rates provided by financial institutions that routinely accept bankers’ acceptances issued by borrowers and are market makers in bankers’ acceptances either directly or through an affiliate.
  
- **Regulated-data benchmark** – Staff of a regulator or securities regulatory authority may recommend that the regulator or the securities regulatory authority designate a benchmark as a “regulated-data benchmark” if the benchmark is determined by the application of a formula from any of the following:
  - (a) input data contributed entirely and directly from:
    - (i) any of the following, but only with reference to transaction data relating to securities or derivatives:
      - (A) a recognized exchange in a jurisdiction of Canada or an exchange that is subject to appropriate regulation in a foreign jurisdiction,
      - (B) a recognized quotation and trade reporting system in a jurisdiction of Canada or a quotation and trade reporting system that is subject to appropriate regulation in a foreign jurisdiction,
      - (C) an alternative trading system that is registered as a dealer in a jurisdiction in Canada and is a member of a self-regulatory entity or an alternative trading system that is subject to appropriate regulation in a foreign jurisdiction,
      - (D) an entity that is similar or analogous to the entities referred to in clause (A), (B) or (C) and that is subject to appropriate regulation in a jurisdiction of Canada or a foreign jurisdiction,

- (ii) a service provider to which the designated benchmark administrator of the designated benchmark has outsourced the data collection in accordance with section 14 of Proposed NI 25-102, if the service provider receives the data entirely and directly from an entity referred to in subparagraph (i);
- (b) net asset values of investment funds that are reporting issuers in a jurisdiction of Canada or subject to appropriate regulation in a foreign jurisdiction.

When designating a benchmark, a securities regulatory authority will issue a decision document designating the benchmark as a designated benchmark. If applicable, the decision document will indicate if the benchmark is also designated as a designated critical benchmark, a designated interest rate benchmark or a designated regulated-data benchmark. It is possible that a designated benchmark will receive two designations:

- a designated interest rate benchmark may also be designated as designated critical benchmark, and
- a designated regulated-data benchmark may also be designated as a designated critical benchmark.

### ***General Requirements for Administrators***

Once designated, an administrator must comply with various requirements, such as:

- 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 governance regime that includes a board of directors (of which at least half of the members must be independent), oversight committee and compliance officer with defined roles and responsibilities within an accountability and control framework that addresses conflicts of interest, complaints, reporting of infringements, and outsourcing (Part 3),
- applying policies, procedures and controls relating to input data and the contribution of input data, as well as complying with obligations relating to the benchmark methodology used by the administrator and any changes to such methodology (Part 4),
- publishing information about the administration of its designated benchmarks, including publishing:
  - important information about the methodology,

- the procedures relating to a significant change or cessation of a designated benchmark, and
- a specified benchmark statement (Part 5),
- if the designated benchmark is determined using input data from contributors that is not reasonably available to the administrator,<sup>19</sup> applying a code of conduct to the contributors of such input data that:
  - specifies the responsibilities of those contributors with respect to the contribution of input data for the designated benchmark, and
  - includes policies and procedures designed to ensure the contributors are adhering to the code of conduct (Part 6), and
- keeping specified books, records and documents for a period of 7 years (Part 7).

#### ***Additional Administrator Requirements for Critical Benchmarks***

Proposed NI 25-102 has additional requirements relating to an administrator of a critical benchmark (Part 8), including:

- that the administrator provides specific notice to securities regulators and complies with other requirements if it intends to cease administering the critical benchmark,
- that the administrator provides specific notice to securities regulators if a contributor decides to cease contributing input data with respect to the critical benchmark and an assessment of the impact of such development on the critical benchmark,
- that the administrator provides user access to the critical benchmark on a fair, reasonable, transparent and non-discriminatory basis,
- that the administrator provides securities regulators with an assessment at least once every 24 months of the capability of the critical benchmark to accurately represent that part of the market or economy the critical benchmark is intended to record,
- that at least half of the administrator's oversight committee be comprised of independent members, and
- that, at least once every 12 months, the administrator must engage a public accountant to provide an assurance report on the administrator's compliance with certain key sections of

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<sup>19</sup>Note that since the input data for CORRA is reasonably available to RBSL as the CORRA administrator (e.g., it is available via subscription or is a public source) and such data is not created for the specific purpose of determining CORRA, the providers of such data sources are not considered "contributors" for purposes of certain provisions relating to input data in the EU BMR and Proposed NI 25-102.

Proposed NI 25-102 and the methodology for the critical benchmark and publish a copy of the assurance report.

***Additional Administrator Requirements for Interest Rate Benchmarks***

Similarly, Proposed NI 25-102 has additional requirements relating to the administrator of an interest rate benchmark (Part 8), including:

- that the administrator follows a specified order of priority for the use of input data and adjusts the data in specified circumstances,
- that at least half of the administrator's oversight committee be comprised of independent members, and
- that, at least once every 2 years, the administrator must engage a public accountant to provide an assurance report on the administrator's compliance with certain key requirements under Proposed NI 25-102 and the methodology for the interest rate benchmark and publish a copy of the assurance report.

***General Requirements for Contributors***

Proposed NI 25-102 also imposes requirements on contributors to a designated benchmark, including governance and control requirements, such as appointing a compliance officer and applying policies and procedures relating to accurate and complete contributions of input data, conflicts of interest involving contributions of input data, and the use (and records evidencing the rationale of such use) of expert judgment (Part 6).

***Additional Contributor Requirements for Critical Benchmarks***

Proposed NI 25-102 has additional requirements relating to a contributor of a critical benchmark (Part 8), including that:

- a contributor provides specific notice to the administrator if it decides to cease contributing to the critical benchmark, and
- if required by the administrator's oversight committee, the contributor engages a public accountant to provide an assurance report on the contributor's compliance with certain key requirements under Proposed NI 25-102 and the methodology for the critical benchmark and deliver a copy of the assurance report to the oversight committee, the board of the administrator, and the regulator or securities regulatory authority.

***Additional Contributor Requirements for Interest Rate Benchmarks***

Similarly, Proposed NI 25-102 has additional requirements relating to a contributor of an interest rate benchmark (Part 8), including that the contributor must:

- engage a public accountant to provide an assurance report on the contributor's compliance with certain key requirements under Proposed NI 25-102 and the administrator's code of conduct, at least once every 2 years or when required by the administrator's oversight committee, and deliver a copy of the assurance report to the oversight committee, the board of the administrator, and the regulator or securities regulatory authority,
- ensure that each contributing individual (and their direct managers) provide a written statement that they will comply with the code of conduct established by the applicable administrator, and
- have additional policies, procedures and controls relating to various matters, including:
  - an outline of responsibilities within the benchmark contributor's organization, including a list of contributing individuals and their managers and alternates,
  - sign-off of contributions of input data,
  - disciplinary procedures relating to actual or attempted manipulation of the interest rate benchmark,
  - the management of conflicts of interest and controls to avoid any inappropriate external influence over those responsible for contributing rates,
  - requirements that contributing individuals work in locations physically separated from interest rate derivatives traders,
  - requirements to avoid collusion, and
  - requirements to keep detailed records on specified matters, such as all relevant aspects of contributions of input data and any communications between contributing individuals and other persons, including internal and external traders and brokers.

### ***Exemptions for Regulated-data Benchmarks***

Proposed NI 25-102 (section 41) includes several exemptions from certain requirements in Proposed NI 25-102 for administrators and contributors of regulated-data benchmarks, including exemptions from:

- administrator requirements relating to systems and controls for detecting manipulation or attempted manipulation,
- administrator requirements involving policies, procedures and controls relating to contribution of input data and the accuracy and completeness of such data,
- the administrator requirement for a code of conduct for contributors, and

- contributor requirements relating to appointing a compliance officer and maintaining a specified governance and control framework.

### ***Requirements for Registrants, Reporting Issuers and Recognized Entities***

Proposed NI 25-102 (section 22) also imposes certain requirements on registrants, reporting issuers and specified recognized entities that use a designated benchmark if the cessation of the designated benchmark could have a significant impact on such person or company, a security issued by the person or company, or any derivative to which the person or company is a party. In this case, registrants, reporting issuers and specified recognized entities must:<sup>20</sup>

- establish and maintain written plans setting out the actions the entity would take in the event of a significant change or cessation of the designated benchmark, including the identification of a suitable alternative, and
- if appropriate, reflect the written plans in any security issued by the person or company, or any derivative to which the person or company is a party, that references the designated benchmark.

Proposed NI 25-102 is in Annex A.

### **Summary of the Proposed CP**

The Proposed CP provides interpretational guidance on elements of Proposed NI 25-102, including the criteria the regulators may consider when determining whether to designate a benchmark as a critical benchmark, interest rate benchmark and/or regulated-data benchmark.

Proposed CP is in Annex B.

### **Recent or Proposed Legislative Amendments**

In order to implement Proposed NI 25-102 and have the Canadian benchmarks regulatory regime recognized as equivalent in the EU (and potentially the UK), staff in each CSA jurisdiction recommended changes to their local securities legislation, including:

- additional authority to regulate benchmarks and benchmark administrators, benchmark contributors and benchmark users (including authority to designate benchmarks and benchmark administrators), and

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<sup>20</sup> We note that these obligations are not exhaustive and should be considered as supplementary to obligations that may otherwise exist in respect of the use of benchmarks (whether or not the benchmark is a “designated benchmark” for the purposes of Proposed NI 25-102) under other requirements pursuant to securities and derivatives legislation, such as the requirement for a registered firm to “establish, maintain and apply policies and procedures that establish a system of controls and supervision sufficient to ... manage the risks associated with its business in accordance with prudent business practices” under paragraph 11.1(b) of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*.



- prohibitions on market misconduct in relation to benchmarks, specifically a prohibition on providing false or misleading information for a benchmark determination and a prohibition on benchmark manipulation.

To date, benchmark-related amendments to securities legislation are in force or have received royal assent in Alberta, Ontario, Québec and Nova Scotia. Other CSA jurisdictions are recommending these amendments to their government.

### **Anticipated Costs and Benefits of Proposed NI 25-102**

Currently, the intention of the CSA is to designate only RBSL as an administrator, and only CDOR and CORRA as its designated benchmarks, under Proposed NI 25-102. Since the obligations under Proposed NI 25-102 are substantially similar to the EU BMR requirements already applicable to RBSL and the current contributors for CDOR, we anticipate that Proposed NI 25-102 would not impose a significant incremental regulatory burden to RBSL, the current contributors to CDOR, and certain users of CDOR and CORRA that are already regulated under Canadian securities legislation.

However, there are many expected benefits from Proposed NI 25-102 to benchmark administrators, contributors, users, investors, market participants and Canada's capital markets. Proposed NI 25-102 significantly mitigates the risks of manipulation, interruption and uncertainty<sup>21</sup> in the use of CDOR and CORRA, which are Canada's most important interest rate benchmarks. The proposed regulatory requirements should further enhance confidence in Canadian capital markets and minimize the higher costs that may be borne by Canadian financial markets, including investors, in the event of interruption, uncertainty or manipulation of designated benchmarks. For example, even if Proposed NI 25-102 only results in the avoidance of a small error, distortion or manipulation of CDOR and CORRA, this would mean the direct avoidance of an error, distortion, or manipulation on financial instruments with a value of at least \$12.3 trillion.

As a result, the CSA is of the view that the regulatory costs of Proposed NI 25-102 are proportionate to the benefits that would be realized by impacted market participants and the broader Canadian financial market.

In Ontario, Annex D sets out the OSC's more detailed description of the anticipated costs and benefits of Proposed NI 25-102.

### **Potential Models for Designation and Ongoing Regulatory Oversight of Benchmarks and Benchmark Administrators**

We are considering the following four options for processing the designation and regulation of benchmarks and benchmark administrators and for ongoing regulatory oversight:

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<sup>21</sup> As examples of uncertainty, the benchmark administrator resigns or is no longer suitable in carrying out its role as a benchmark administrator, or contributors cease to contribute to a benchmark.

- Non-coordinated review model: Each CSA jurisdiction would separately process designation applications in its jurisdiction without coordinating with other CSA jurisdictions.
- Coordinated review model: The CSA would manage designation applications in accordance with a process that mirrors the “coordinated review” process set out in National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions*.
- Passport model: The CSA would add designations of benchmarks and benchmark administrators to the Passport system with a process that mirrors:
  - Part 4B (Application to become a designated rating organization) in Multilateral Instrument 11-102 *Passport System*.
  - National Policy 11-205 *Process for Designation of Credit Rating Organizations in Multiple Jurisdictions*.
- Regulatory model similar to that used for exchanges, self-regulatory organizations, clearing houses, trade repositories and matching services utilities: The CSA would develop an approach to regulation similar to the CSA’s approach to regulating exchanges, self-regulatory organizations, clearing houses, trade repositories and matching services utilities. Different approaches (e.g., principal, lead, co-leads) could be used based on a memorandum of understanding established by CSA jurisdictions.

The CSA is also considering a two-phased approach to implementation where we could begin using a non-coordinated review model on a trial basis. Based on the CSA’s experience processing the designations and the frequency of such designations, the CSA would consider the model which is most appropriate as the permanent CSA model.

### **Local Matters**

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

### **Unpublished Materials**

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

### **Expected Future Amendments for Commodity Benchmarks**

We expect to propose revisions to Proposed NI 25-102 to incorporate requirements relating to commodity benchmarks later in 2019. We expect these changes to include a definition of “designated commodity benchmark” and to specify whether the existing requirements in Proposed NI 25-102 apply to “designated commodity benchmarks” (or their administrators, contributors and certain users) and whether any additional or different requirements are appropriate.

These proposed amendments would be subject to a separate publication and comment process.

## Request for Comments

We welcome your comments on the Proposed Instrument and also invite comments on the specific questions set out in Annex C of this Notice.

Please submit your comments in writing on or before June 12, 2019. 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](http://www.albertasecurities.com), the Autorité des marchés financiers at [www.lautorite.qc.ca](http://www.lautorite.qc.ca) and the Ontario Securities Commission at [www.osc.gov.on.ca](http://www.osc.gov.on.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 all of the CSA as follows:

British Columbia Securities Commission  
Alberta Securities Commission  
Financial and Consumer Affairs Authority of Saskatchewan  
Manitoba Securities Commission  
Ontario Securities Commission  
Autorité des marchés financiers  
Financial and Consumer Services Commission (New Brunswick)  
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island  
Nova Scotia Securities Commission  
Superintendent of Securities, Newfoundland and Labrador  
Superintendent of Securities, Northwest Territories  
Superintendent of Securities, Yukon Territory  
Superintendent of Securities, Nunavut

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

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20 Queen Street West, 22<sup>nd</sup> Floor  
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Fax: 416-593-2318  
[comment@osc.gov.on.ca](mailto:comment@osc.gov.on.ca)

Me Anne-Marie Beaudoin  
Corporate Secretary  
Autorité des marchés financiers  
800, rue du Square Victoria, 4e étage  
C.P. 246, Place Victoria

Montréal (Québec) H4Z 1G3  
Fax : 514-864-6381  
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### **Contents of Annexes**

This Notice includes the following annexes:

- Annex A Proposed National Instrument 25-102 *Designated Benchmarks and Benchmark Administrators*
- Annex B Proposed Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators*
- Annex C Specific Questions of the CSA Relating to the Proposed Instrument
- Annex D Local Matters (where applicable)

### **Questions**

Please refer your questions to any of the following:

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