CSA/ACVM Canadian Securities Administrators Autorités canadiennes en valeurs mobilières

CSA Notice of Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* and Companion Policy

April 29, 2021

Introduction

The following members of the Canadian Securities Administrators (the **CSA** or **we**) are adopting Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators* (**MI 25-102**) and Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators* (the **CP**):

- 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

We expect that as the other CSA members introduce and enact the required amendments to their securities legislation that give them the authority to regulate benchmarks and benchmark administrators, benchmark contributors and benchmark users (including authority to designate benchmarks and benchmark administrators), they will adopt MI 25-102.

The text of MI 25-102 and the CP is contained in Annex C and Annex D, respectively, of this Notice and will also be available on websites of applicable CSA members, 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

In some jurisdictions, Ministerial approvals are required for the implementation of MI 25-102 and the CP. Subject to obtaining all necessary approvals, MI 25-102 will come into force and the CP will come into effect on July 13, 2021.

Commodity Benchmarks

Today, we are also publishing a separate notice of proposed amendments to MI 25-102 and the CP regarding commodity benchmarks. The notice of proposed amendments will also be available on the websites of the CSA members listed above and the comment period will end on July 28, 2021.

Substance and Purpose

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 adopt a securities regulatory regime for benchmarks and their administrators, contributors and certain of their users.

MI 25-102 will 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,

- 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 who are already regulated in some capacity under Canadian securities legislation (**benchmark users** or **users**).

Background

On March 14, 2019, the CSA published a Notice and Request for Comment (the **March 2019 Notice**) proposing MI 25-102 and the CP.[1] As detailed in the March 2019 Notice, 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. Following the LIBOR controversies:

- the International Organization of Securities Commissions (**IOSCO**) published the *Principles for Oil Price Reporting Agencies*[2] and the *Principles for Financial Benchmarks*[3] (together, the **IOSCO Principles**);

- Canadian financial sector regulators pursued certain measures to reduce risk, such as:

[1] Available online at https://www.osc.ca/sites/default/files/pdfs/irps/ni_20190314_25-102_designated-benchmarks.pdf.
[2] Available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD391.pdf.
[3] Available online at https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf.

    - encouraging contributors to the Canadian Dollar Offered Rate (**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

    - arranging for Refinitiv Benchmark Services (UK) Limited (**RBSL**) to agree to follow certain procedures to strengthen the integrity of CDOR and the Canadian Overnight Repo Rate Average (**CORRA**); and

- the European Union (**EU**) adopted *Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds* (**EU BMR**).[4]

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

- there is a need to regulate CDOR and its administrator (i.e., RBSL) in light of the significant reliance placed by users and other market participants on CDOR;

- there is a need for the ability to regulate benchmark administrators and benchmark contributors due to the risk of benchmark-related misconduct that could adversely impact:[5]

    - 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;

- such a regime would ensure the continuity of a viable designated critical benchmark by requiring certain benchmark contributors to provide information in relation to the designated critical benchmark for use by the designated benchmark administrator; and

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[4] Available online at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1011&from=EN.
[5] See, for example, the enforcement actions taken in the UK alone: https://www.fca.org.uk/markets/benchmarks/enforcement.

- such a regime is necessary to reflect international developments in the regulation of benchmarks, including the IOSCO Principles and the fact that certain other major jurisdictions have either introduced benchmark regulations or taken measures to regulate key benchmarks or their methodologies.[6]

As discussed in more detail below:

- In Canada, RBSL is currently the administrator of a key domestically important benchmark, CDOR. Currently, the intention of the CSA is to designate only RBSL as a benchmark administrator, and only CDOR as a designated critical benchmark and a designated interest rate benchmark, under MI 25-102.[7]

- CSA staff no longer intend to recommend that CORRA be designated as a critical benchmark and an interest rate benchmark at this time as the Bank of Canada is its current benchmark administrator.

- The CSA may designate other administrators and their associated benchmarks in the future on public interest grounds.

- The CSA is seeking to have the EU recognize MI 25-102 as "equivalent" under the EU BMR in the event that other Canadian benchmarks would like the benefit of a Canadian domestic regime that has been recognized as equivalent by the EU.

CDOR

Currently, the intention of the CSA is to designate only RBSL as an administrator, and only CDOR as a designated critical benchmark and a designated interest rate benchmark, under MI 25-102. This intention is based on the significant reliance placed by users and other market participants on CDOR, which is used in various financial instruments with a notional value of at least $10.9 trillion dollars.[8] This figure is approximately five times larger than the gross domestic product for Canada in 2019.[9]

For CDOR, we believe that the following risks should be minimized:

- interruption or uncertainty (if, for example, the administrator resigns or is unsuitable), and

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[6] 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* (December 18, 2019), online: https://www.fsb.org/wp-content/uploads/P181219.pdf.

[7] 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. Additional information on CDOR can be found at: https://www.refinitiv.com/en/financial-data/financial-benchmarks/interest-rate-benchmarks/canadian-interest-rates.

[8] 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-financial-markets-size-scope-september-17-2018.pdf.

[9] See, for example: https://www.international.gc.ca/economist-economiste/statistics-statistiques/annual_ec_indicators.aspx?lang=eng.

- abusive activity relating to the benchmark, including manipulation of the benchmark.

If one of these events were to occur, the loss of confidence that Canadian capital markets would suffer and the costs that would be borne by Canadian financial markets (including investors) could be significant.

CORRA

In the March 2019 Notice, we indicated that the CSA also intended to designate CORRA as a critical benchmark and an interest rate benchmark. At the time of the March 2019 Notice, RBSL was the administrator of CORRA. Subsequently, on July 16, 2019, the Bank of Canada announced that it intended to become the administrator of CORRA when enhancements to CORRA were implemented in 2020. Those enhancements to CORRA have since taken effect and the Bank of Canada is now the administrator of CORRA.

Since central banks are exempted from the EU BMR and assuming that the Bank of Canada will continue to comply with the IOSCO Principles for Financial Benchmarks in respect of CORRA, at this time CSA staff do not expect to recommend that the Bank of Canada be designated as a benchmark administrator or that CORRA be designated as a designated benchmark.

However, given the expected importance of CORRA to capital markets in Canada, there may be possible situations in the future where CSA staff may recommend that CORRA be designated as a designated benchmark (and if relevant, that the Bank of Canada be designated as a benchmark administrator) for specific purposes. For example, if in the future CSA staff had concerns that a firm was directly or indirectly providing incomplete or inaccurate transaction data for purposes of CORRA and the firm was not otherwise subject to appropriate CSA regulation, staff of a securities regulatory authority may want to conduct a compliance review of the firm. Under applicable securities legislation in certain CSA jurisdictions, the securities regulatory authority in a jurisdiction may decide to designate CORRA as a designated benchmark (and the Bank of Canada as its designated benchmark administrator) for the purpose of allowing staff of the securities regulatory authority to rely on the provisions in its securities legislation for conducting compliance reviews of a "market participant" (which includes, in certain jurisdictions, a person or company that engages or participates in the provision of information for use by a benchmark administrator for the purpose of determining a designated benchmark).

As a second example, securities legislation in applicable jurisdictions provides that the securities regulatory authority may, in response to an application by the regulator, or, in Alberta and Québec, on its own initiative, require a person or company to provide information to a designated benchmark administrator in relation to a designated benchmark if it is in the public interest to do so. If in the future the Bank of Canada encountered problems in obtaining transaction data from firms for purposes of determining CORRA on a daily basis, the securities regulatory authority in a jurisdiction may decide to designate CORRA as a designated benchmark (and the Bank of Canada as its designated benchmark administrator) for the purpose of allowing the securities regulatory authority in the jurisdiction to make an order requiring certain market participants to provide transaction data to the Bank of Canada for the purpose of determining CORRA.

There may be other situations or specific purposes in the future where CSA staff may recommend that CORRA be designated as a designated benchmark and that the Bank of Canada be designated as a benchmark administrator.

If CORRA were designated as a designated benchmark for a purpose, the Bank of Canada could, if necessary, be granted exemptive relief from having to comply with certain or all requirements in MI 25-102 applicable to a designated benchmark administrator. In the latter case, only the requirements in MI 25-102 applicable to certain benchmark contributors to CORRA and benchmark users of CORRA might apply (unless additional exemptive relief was granted).

Despite the current intention to no longer designate CORRA, the policy rationale for MI 25-102 continue. In particular,

- In the wake of the LIBOR scandal, there is still a need to:
    - regulate RBSL and CDOR, and
    - have the ability to regulate other benchmarks or categories of benchmarks in the future on public interest grounds, as discussed in more detail below.

- Given the EU equivalence deadline of January 1, 2024, there is a need to have MI 25-102 recognized as "equivalent" by the EU under the EU BMR in the event that other Canadian benchmarks would like the benefit of a Canadian domestic regime that has been recognized as equivalent by the EU.

Benchmarks other than CDOR and CORRA

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 a 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, 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 also refer to the separate notice of proposed amendments to MI 25-102 and the CP regarding commodity benchmarks for circumstances in which a CSA jurisdiction may designate commodity benchmarks in the future.

EU Equivalence

Most of the provisions of the EU BMR came into effect on January 1, 2018. The EU BMR 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, 2024. In other words, a benchmark produced outside of the EU cannot be used by EU supervised entities after December 31, 2023, 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.[10]

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 an EU member state in accordance with the requirements set out in the EU BMR. This process is not relevant for purposes of MI 25-102.

[10] ESMA's Benchmarks Register can be found online at https://www.esma.europa.eu/databases-library/registers-and-data.

- *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 MI 25-102.

- *Equivalence* – where an equivalence 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 equivalence 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 equivalence 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 equivalence 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 equivalence 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.

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 MI 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, prior to Brexit, RBSL secured such authorization from the United Kingdom's (**UK**) Financial Conduct Authority), 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 the EU equivalence deadline (i.e., January 1, 2024) 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) 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.

Therefore, the CSA is seeking a decision that would recognize MI 25-102 as equivalent for the purposes of EU BMR.

UK Equivalence

In addition, in connection with Brexit, the UK has adopted a UK version of the EU BMR (the **UK BMR**). Consequently, the CSA is also seeking a UK equivalence decision under the UK BMR. 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 MI 25-102 after a UK equivalence deadline of January 1, 2026 (which is later than the EU equivalence deadline). We expect that a positive EU equivalence decision would lead to a positive UK equivalence decision.

Summary of Changes

Annex A includes a summary of notable changes made to the version of MI 25-102 published for comment in the March 2019 Notice (**Proposed NI 25-102**). For details of all the changes made, Annex E includes a blackline of MI 25-102 to Proposed NI 25-102. As these changes are not material, we are not publishing the changes for a further comment period.

In response to comments, we also made various changes to the version of the CP published for comment in the March 2019 Notice (the **Proposed CP**) in order to provide additional guidance. For details of all the changes made, Annex F includes a blackline of the CP to the Proposed CP.

Summary of Written Comments Received by the CSA

The comment period for the March 2019 Notice ended on June 12, 2019. We received 13 comment letters. We have considered the comments received and thank all of the commenters for their input. The names of the commenters and a summary of their comments, together with our responses, are contained in Annex B. The comment letters can be viewed on the websites of each of the:

- Alberta Securities Commission at www.albertasecurities.com,
- Autorité des marchés financiers at www.lautorite.qc.ca, and
- Ontario Securities Commission at www.osc.gov.on.ca.

Regulatory Model for Designation and Ongoing Regulatory Oversight of Benchmarks and Benchmark Administrators

In the March 2019 Notice, we noted that we were considering four options for processing the designation and regulation of benchmarks and benchmark administrators and for ongoing regulatory oversight. We have decided to use a regulatory model similar to that used for exchanges, self-regulatory organizations, clearing houses, trade repositories and matching services utilities.

To establish this regulatory model, we intend to enter into a memorandum of understanding (**MoU**) that sets out a lead/co-lead authority model. Under this model, each designated benchmark and benchmark administrator will have one or more CSA members that function as its lead authority or co-lead authorities and are primarily responsible for its oversight. Each designated benchmark and benchmark administrator will also have one or more "reliant authorities", which are CSA members that are also engaged in its oversight but rely on the lead authority or co-lead authorities for primary oversight. The MoU will provide that where there are co-lead authorities, the number of co-lead authorities should be limited to two or three in order to ensure the efficiency and effectiveness of oversight.

This regulatory model will allow for the effective oversight of designated benchmarks and benchmark administrators while limiting the number of CSA members by which they are designated and with which they will interact.

Subject to required approvals, the MoU is expected to be published on May 6, 2021 and come into effect on July 5, 2021.

For CDOR and RBSL, the Ontario Securities Commission and Autorité des marchés financiers will be co-lead authorities.

Local Matters

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

Contents of Annexes

This Notice includes the following annexes:

Annex A	Summary of Notable Changes to Proposed NI 25-102
Annex B	Summary of Comments and CSA Responses

Annex C Multilateral Instrument 25-102 *Designated Benchmarks and Benchmark Administrators*

Annex D Companion Policy 25-102 *Designated Benchmarks and Benchmark Administrators*

In certain jurisdictions, this Notice also includes:

Annex E MI 25-102, blacklined to show changes from Proposed NI 25-102

Annex F CP, blacklined to show changes from Proposed CP

Annex G Local Matters

Questions

Please refer your questions to any of the following:

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