



Brussels, 6.5.2021
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COMMISSION DELEGATED REGULATION (EU) .../...

of 6.5.2021

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria under which competent authorities may require changes to the compliance statement of non-significant benchmarks

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the Benchmark Regulation) introduces a common framework to ensure the accuracy and integrity of benchmarks referenced in financial instruments, financial contracts or investment funds in the European Union. In doing so it aims to contribute to the functioning of the internal market, while achieving a high level of consumer and investor protection.

This Delegated Regulation is based on a mandatory empowerment in Article 26 of Regulation (EU) 2016/1011 (BMR) as amended by Regulation (EU) 2019/2175. The issue of subsidiarity was covered in the impact assessment for the Benchmark Regulation.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with Article 10 of Regulation (EU) 1095/2010 ESMA has carried out a public consultation on the draft regulatory technical standards. A consultation paper was published on 9 March 2020 on the ESMA website and the consultation closed on 8 June 2020. An open hearing on the consultation paper was held on 29 May 2020 via conference call. On 29 September 2020, ESMA published a final report including the draft technical standards.

In addition, ESMA requested the opinion of the Securities and Markets Stakeholder Group (MSG) established in accordance with Article 37 of Regulation (EU) No 1095/2010.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA has submitted an analysis of costs and benefits related to the draft technical standards.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The right to adopt regulatory technical standards is provided for under Article 26(6) of Regulation (EU) No 2016/1011 (BMR) as amended by Regulation (EU) 2019/2175. Under this provision, the Commission is empowered to further specify the criteria on which competent authorities may require changes to the compliance statement published and maintained by an administrator of a non-significant benchmark.

Article 1 defines the criteria at the level of the administrator on which a competent authority may require changes to a non-significant benchmark compliance statement if it considers that the statement does not clearly state why it is appropriate for the relevant administrator not to comply with one or more of the requirements referred to in Article 26(1) of Regulation (EU) 2016/1011.

Article 2 defines the criteria at the level of the benchmark or family of benchmarks on which a competent authority may require changes to a non-significant benchmark compliance statement if it considers that the statement does not clearly state why it is appropriate for the relevant administrator not to comply with one or more of the requirements referred to in Article 26(1) of Regulation (EU) 2016/1011.

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014¹, and in particular Article 26(6) thereof,

Whereas:

- (1) The criteria under which competent authorities may require changes to the compliance statement referred to in Article 26(3) of that Regulation should take into account the nature of the provisions of Regulation (EU) 2016/1011 that administrators of non-significant benchmarks, in accordance with Article 26(1) of that Regulation, may choose not to apply. As some of the requirements set out in those provisions concern the organisational structure of the administrator, while others concern the benchmark or family of benchmarks concerned, the same distinction applies to the criteria under which competent authorities may require changes to the compliance statement.
- (2) In relation to requirements concerning the organisational structure of the administrator, competent authorities should be able to require changes to the compliance statement of a non-significant benchmark where they consider that the compliance statement is not clear about why the administrator concerned should be allowed not to comply with the requirements laid down in Articles 4, 5 and 6 of Regulation (EU) 2016/1011. That should in particular be the case where there is a lack of clarity about the organisational structure of the administrator concerned, about the identification of potential conflicts of interest that may arise between the persons involved in the provision of the benchmark and the other employees or parts of the administrator's organisation, the process of oversight of the provision of the non-significant benchmark, or the control framework for the provision or publication of the non-significant benchmark or for making it available.
- (3) In relation to requirements concerning the benchmark or family of benchmarks, competent authorities should be able to require changes to the compliance statement of a non-significant benchmark where they consider that the compliance statement is not clear about why the administrator concerned should be allowed not to comply with the requirements laid down in Article 11 and Articles 13 to 16 of Regulation (EU)

¹ OJ L 171, 29.6.2016, p. 1.

2016/1011. That should in particular be the case where there is a lack of clarity about the level of control over the provision of the input data, the transparency of the procedures for consulting on any material change to the non-significant benchmark's methodology, the process of reporting instances of manipulation or attempted manipulation of the non-significant benchmark, the code of conduct where the non-significant benchmark is based on input data from contributors, the capacity of the administrator to review and report on its compliance with the non-significant benchmark's methodology and with Regulation (EU) 2016/1011, and, where input data is contributed by a supervised contributor, whether that is done with appropriate controls to ensure the accuracy, integrity and reliability of the input data.

- (4) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA).
- (5) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council².
- (6) In order to ensure consistency with the date of application of Article 5 of Regulation (EU) 2019/2175 of the European Parliament and of the Council³, which introduced in Regulation (EU) 2016/1011 Article 26(6) of that Regulation, this Regulation should apply from 1 January 2022,

HAS ADOPTED THIS REGULATION:

Article 1

Criteria at the level of the administrator

Competent authorities may require changes to the compliance statement referred to in Article 26(3) of Regulation (EU) 2016/1011 where they consider that such statement is not clear about why the administrator concerned should be allowed not to comply with one or more of the requirements referred to in Article 26(1) of Regulation (EU) 2016/1011, and more particularly where there is a lack of clarity about:

- (a) the organisational structure of the administrator concerned and the conflicts of interest that may arise as a result of its structure;
- (b) the identification and management of conflicts of interest related to the employees of the administrator concerned, the persons whose services are placed at its disposal or

² Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

³ Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds (OJ L 334, 27.12.2019, p. 1).

under its control and the persons directly involved in the provision of the non-significant benchmark;

- (c) the process of oversight of the provision of the non-significant benchmark, taking into account the vulnerability of the benchmark concerned and the scale of the administrator's organisation;
- (d) the control framework for the provision or publication of the non-significant benchmark or for making it available, including the administrator's exposure to operational risk, business continuity risk or to the risk of disruption of the benchmark provision process.

Article 2

Criteria at the level of the benchmark or family of benchmarks

Competent authorities may require changes to the compliance statement referred to in Article 26(3) of Regulation (EU) 2016/1011 where they consider that such statement is not clear about why the concerned administrator should not to comply with one or more of the requirements referred to in Article 26(1) of Regulation (EU) 2016/1011, and more particularly where there is a lack of clarity about:

- (a) the level of control over the provision of the input data and whether, taking into account the nature of the input data, that level of control is sufficient to ensure the accuracy, integrity and reliability of the input data;
- (b) the transparency of the procedures for consulting on any material change to the non-significant benchmark's methodology, taking into account the complexity of that methodology and the nature of the input data used;
- (c) the process of reporting instances of manipulation or attempted manipulation of the non-significant benchmark, particularly in relation to the monitoring of input data and contributors;
- (d) where the non-significant benchmark is based on input data from contributors, the code of conduct and whether, taking into account the nature of the input data, it includes safeguards for the integrity of the input data used;
- (e) the capacity of the administrator to review and report on its compliance with the non-significant benchmark's methodology and with Regulation (EU) 2016/1011;
- (f) where input data is contributed by a supervised contributor, whether that is done with appropriate controls to ensure the accuracy, integrity and reliability of the input data.

Article 3

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 January 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 6.5.2021

For the Commission
The President
Ursula VON DER LEYEN