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Commission Delegated Regulation (EU) 2018/1640 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the governance and control requirements for supervised contributors (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2018/1640

of 13 July 2018

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards specifying further the governance and control requirements for supervised contributors

(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 596/2014[(1)], and in particular the fourth subparagraph of Article 16(5) thereof,

Whereas:

(1) Article 16 of Regulation (EU) 2016/1011 imposes certain governance and control requirements on supervised contributors, including a requirement to have in place a control framework to ensure the integrity, accuracy and reliability of input data and a requirement to have in place effective systems and controls to ensure the integrity and reliability of all contributions of input data. Some of these requirements are already addressed in Articles 11 and 15 of Regulation (EU) 2016/1011 and the corresponding delegated regulations. However, in certain respects the provision of this Commission Delegated Regulation go beyond those in Articles 11 and 15 of Regulation (EU) 2016/1011 and certain supervised contributors might not be subject to the provisions of Articles 11 and 15 because they are contributing data to benchmarks provided by administrators who are exempted from the scope of Regulation (EU) 2016/1011. In order to avoid legal uncertainty, the requirements set forth by this Commission Delegated Regulation are without prejudice to Articles 11 and 15 of Regulation (EU) 2016/1011 and the corresponding delegated regulations and are therefore applicable only to the extent they complement the aforementioned provisions.

(2) The control framework established by a supervised contributor should include a procedure for detecting and managing breaches of Regulation (EU) 2016/1011 and breaches of the applicable code of conduct, and policies on whistle-blowing, oversight and periodic review of the process for contributing input data. This is so that supervised

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contributors can ensure that they are acting lawfully and submitting input data that is accurate and reliable.

(3) The training that submitters employed by a supervised contributor are required to have pursuant to Article 16(2)(b) of Regulation (EU) 2016/1011 should also include training in how the benchmark is intended to measure the underlying market or economic reality and training in all the elements of the code of conduct applicable to the contribution of input data. This is an essential tool in ensuring that submitters act appropriately and in line with the methodology of the benchmark.

(4) The measures for the management of conflicts of interest that a supervised contributor is required to have in place pursuant to Article 16(2)(c) of Regulation (EU) 2016/1011 should include measures for the separation of submitters from other employees of the contributor and measures on the contributor's remuneration policy for submitters in order to minimise the incentives on submitters to manipulate the contribution of input data.

(5) The record-keeping systems that a supervised contributor is required to have in place pursuant to Article 16(2)(d) of Regulation (EU) 2016/1011 should include the requirement to keep records of communications in relation to the provision of input data, including the names of the submitters. This is in order to provide an adequate level of transparency.

(6) Allowing contributors to use discretion creates a risk that different experts use it differently or that even the same expert uses it differently over time. Discretion also increases the vulnerability of the relevant benchmark to manipulation. It is therefore necessary that the policies established pursuant to Article 16(3) of Regulation (EU) 2016/1011 include a framework to ensure consistency in the use of judgement or the exercise of discretion and to reduce the risk of manipulation. Such a framework should impose an obligation to conduct regular internal reviews of the application of expert judgement. It should also identify types of information to be considered or not to be considered in order to frame the margin for discretion appropriately.

(7) Administrators should be given sufficient time to ensure compliance with the requirements of this Regulation. This Regulation should therefore start to apply two months after it enters into force.

(8) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(9) 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 opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(2)],

HAS ADOPTED THIS REGULATION:

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Article 1

Scope

This Regulation does not cover or apply to supervised contributors which contribute data only for non-significant benchmarks.

The requirements imposed under this Regulation are without prejudice to those imposed under Articles 11 and 15 of the Regulation (EU) 2016/1011 and the regulatory technical standards adopted under Article 11(5) and Article 15(6) of Regulation (EU) 2016/1011[(3)].

Article 2

Control framework

The control framework that a supervised contributor is required to have in place pursuant to Article 16(1) of Regulation (EU) 2016/1011 shall include the establishment and maintenance of at least the following controls:

(a) an effective oversight mechanism for overseeing the process for contributing input data that includes a risk management system, the identification of senior personnel who are responsible for the data contribution process and the involvement of any compliance and internal audit functions within the contributor's organisation;

(b) a policy on whistle-blowing, including appropriate safeguards for whistle-blowers;

(c) a procedure for detecting and managing breaches of Regulation (EU) 2016/1011 and breaches of the applicable code of conduct developed under Article 15 of that Regulation, including a procedure for investigating any detected breach and recording the actions taken as a consequence;

(d) periodic reviews of the process for contributing data, to be conducted at least annually and whenever there is a change in the applicable code of conduct.

Article 3

Controls on submitters

1 The systems and controls that a supervised contributor is required to have in place pursuant to Article 16(2)(a) of Regulation (EU) 2016/1011 shall include a documented and effective process for contributing data, and shall include at least the following:

a a process for the designation of submitters and procedures for making contributions when a submitter is unexpectedly unavailable, including the designation of alternates;

b procedures and systems for monitoring the data used for the contributions, and the contributions themselves, that are capable of producing alerts in line with parameters predefined by the contributor.

2 Without prejudice to any requirement imposed under Article 15 of Regulation (EU) 2016/1011, the contributor shall have regard to the following criteria in determining for the purposes of Article 16(2)(a) of that Regulation whether it is proportionate to have in place a process for sign-off by a natural person holding a position senior to that of the submitter:

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a the level of discretion involved in the process of contribution;

b the nature, scale and complexity of the supervised contributor's activities;

c whether conflicts of interest may rise between the contribution of input data to the benchmark and any trading or other activities performed by the contributor.

3 Where the controls put in place by a supervised contributor include a process for sign-off by a natural person holding a position senior to that of the submitter, those controls shall include clear rules about the timing of the sign-off and, if they include the possibility of sign-off after submission of the input data, they shall specify the circumstances in which sign-off after submission is permitted and the maximum time-period within which such sign-off is to occur.

Article 4

Training for submitters

1 The systems and controls that a supervised contributor is required to have in place pursuant to Article 16(2)(b) of Regulation (EU) 2016/1011 shall include training programmes to ensure that each submitter has:

a adequate knowledge and experience of how the benchmark is intended to measure the underlying market or economic reality;

b adequate knowledge of all the elements of the applicable code of conduct developed under Article 15(1) of that Regulation, if any.

2 The knowledge of submitters referred to in points (a) and (b) of paragraph 1 and of the requirements of Regulation (EU) 2016/1011 as well as Regulation (EU) No 596/2014 of the European Parliament and of the Council[(4)], to the extent applicable to the tasks of the submitters, shall be re-assessed periodically, and in any event at least annually, to verify that it is still appropriate for each of them to act as submitters.

3 Paragraph 2 shall not apply in the case of supervised contributors of significant benchmarks.

Article 5

Conflicts of interest

1 The measures for the management of conflicts of interest that a supervised contributor is required to have in place pursuant to Article 16(2)(c) of Regulation (EU) 2016/1011 shall include at least the following measures:

a a register of conflicts of interest, that shall be kept up to date and used to record any conflicts of interest identified and any measures taken to manage them. The register shall be accessible to internal or external auditors;

b physical separation of submitters from other employees of the contributor, where such separation is appropriate taking into account the level of discretion involved in the process of contribution, the nature, scale and complexity of the contributor's activities and whether conflicts of interest may arise between the contribution of input data to the benchmark and any trading or other activities performed by the contributor;

c appropriate internal oversight procedures including, in a case where there is no organisational or physical separation of employees, rules governing the interaction of submitters with front office employees.