Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) 2016/2021. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details)EUR 2016 No. 2021 may be subject to amendment by EU Exit Instruments made by the Financial Conduct Authority under powers set out in The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115), regs. 2, 3, Sch. Pt. 5. These amendments are not currently available on legislation.gov.uk. Details of relevant amending instruments can be found on their website/s. (See end of Document for details) View outstanding changes*

Commission Delegated Regulation (EU) 2016/2021 of 2 June 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on access in respect of benchmarks (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2016/2021

of 2 June 2016

supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on access in respect of benchmarks

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012[(1)], and in particular the third subparagraph of Article 37(4) thereof,

Whereas:

(1) Regulation (EU) No 600/2014 provides for the non-discriminatory access for clearing and trading between central counterparties (CCPs) and trading venues, including access to licences of and information relating to benchmarks which are used to determine the value of some financial instruments for trading and clearing purposes. Given the variety of benchmarks, the information CCPs and trading venues need for clearing or trading purposes may vary depending on a number of factors, including the relevant financial instrument being traded or cleared and the type of benchmark that the financial instrument references. Therefore, CCPs and trading venues should be allowed to request access to any information, provided it is required for clearing or trading purposes.

(2) The diversity of benchmarks and the different uses identified render a one size fits all approach inappropriate and a high degree of harmonisation on the content of licence agreements unsuitable. Limiting the conditions under which access is granted on predetermined and exhaustive terms might therefore be detrimental to all parties.

(3) A person with proprietary rights to a benchmark should be able to set different conditions for different categories of CCPs and trading venues to access its benchmark only where objectively justified, such as in terms of the quantity, scope or field of use demanded and applied in a proportionate manner. The different categories and the criteria defining the various categories of CCPs and trading venues should be made publicly available.

(4) The way a benchmark is assessed as new or not will vary on a case by case basis. The person with proprietary rights to a benchmark should therefore demonstrate in what

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way that benchmark is new, if that is invoked as the reason for denying immediate access. Each assessment of a declared new benchmark should consider a combination of various factors and their appropriate weightings and not rely on a single factor to assess whether or not the benchmark meets the criteria specified in Regulation (EU) No 600/2014.

(5) Although the values of two benchmarks could be highly correlated, particularly in the short run, their compositions or methodology could be fundamentally different. The long run correlation and similarities in the composition and the methodology of each of the benchmarks should therefore be taken into account for assessing whether a benchmark is new. Considering the heterogeneity of benchmarks, in addition to the factors laid down in this Regulation, a person with proprietary rights to a benchmark should also take into account additional factors, considering standards in use, that are specific to the type of benchmark concerned. For commodity benchmarks other factors should be assessed, including whether the relevant benchmarks are based on different underlying commodities and different delivery locations.

(6) New series of benchmarks are released on a periodic basis, such as credit default swaps benchmarks. In those cases, the newly released benchmark is a continuation of the previous series and should therefore not be considered a new benchmark.

(7) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that the provisions laid down in this Regulation and the provisions laid down in Regulation (EU) No 600/2014 apply from the same date.

(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:

Article 1

Information to be made available to CCPs and trading venues

1 A person with proprietary rights to a benchmark shall, upon request, make available to central counterparties (CCPs) and trading venues the information necessary for performing their clearing or trading functions, as appropriate to the specific type of benchmark to which access is sought and to the relevant financial instrument to be traded or cleared.

2 A CCP or trading venue shall in its request explain why such information is required for clearing or trading purposes.

3 For the purposes of paragraph 1, relevant trading and clearing functions shall at least include the following:

a for a trading venue:

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(i) the initial assessment of the characteristics of the benchmark;

(ii) the marketing of the relevant product;

(iii) the support of the price formation process for the contracts admitted or being admitted to trading;

(iv) the on-going market surveillance activities;

b for a CCP:

(i) appropriate risk management of relevant open positions in exchange-traded derivatives, including netting;

(ii) compliance with relevant obligations set out in Regulation (EU) No 648/2012 of the European Parliament and of the Council[(3)].

4 Relevant information in respect of price and data feeds referred to in Article 37(1)(a) of Regulation (EU) No 600/2014 shall at least include:

a a feed of the benchmark's values;

b prompt notification of any inaccuracy in the calculation of the benchmark values and of the updated or corrected benchmark values;

c historical benchmark values where the person with proprietary rights to the benchmark maintains such information.

5 In respect of composition, methodology and pricing, the information provided shall allow CCPs and trading venues to understand how each benchmark value is created, and the actual methodology used to make the benchmark values. Relevant information in respect of composition, methodology and pricing shall at least include:

a the definitions for all key terms used in relation to the benchmark;

b the rationale for adopting a methodology and procedures for the review and approval of the methodology;

c the criteria and procedures used to determine the benchmark, including a description of the input data, the priority given to different types of input data, the use of any models or methods of extrapolation and any procedure for rebalancing the constituents of a benchmark;

d the controls and rules that govern any exercise of discretion or judgement, to ensure consistency in the use of such discretion or judgment;

e the procedures which govern benchmark determination in periods of stress, or periods where transaction data sources may be insufficient, inaccurate or unreliable and the potential limitations of the benchmark in such periods;

f the hours during which the benchmark is calculated;

g the procedures which govern the benchmark's rebalancing methodology and the resulting weightings of the constituents of the benchmark;

h the procedures for dealing with errors in input data, or the benchmark determination, including when a re-determination of the benchmark may be required;

i information regarding the frequency for any internal reviews and approvals of the composition and methodology and, where applicable, information regarding the procedures and frequency for external review of the composition and methodology.

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Article 2

General conditions for the information through licensing to be provided to CCPs and trading venues

1 A person with proprietary rights to a benchmark shall make available all relevant information referred to in Article 1 requested by CCPs and trading venues through licensing without undue delay, either on a one-off basis, including amendments to previously provided information, or on a continuous or periodic basis, depending on the type of information concerned.

2 A person with proprietary rights to a benchmark shall provide all relevant information referred to in Article 1 to all CCPs and trading venues through licensing on the same timescales and under the same conditions, unless different conditions can be objectively justified.

3 The requirements in paragraphs 1 and 2 do not apply if, and for as long as, a person with proprietary rights to a benchmark can demonstrate that certain information is available publicly or through other commercial means to CCPs and trading venues, if such information is reliable and timely.

Article 3

Differentiation and non-discrimination

1 Where a person with proprietary rights to a benchmark sets, in accordance with Article 37(1) of Regulation (EU) No 600/2014, different conditions, including fees and their payment conditions, those conditions shall apply in a manner specific to each category of licensees.

2 A person with proprietary rights to a benchmark shall set the same rights and obligations for the licensees within the same category.

3 A person with proprietary rights to a benchmark shall make the criteria defining the different categories of licensees publicly available.

4 A person with proprietary rights to a benchmark shall, on request, provide to any CCP or trading venue for free the conditions applying to the category to which that CCP or trading venue belongs.

5 A person with proprietary rights to a benchmark shall make available to all licensees within the same category any additions to or modifications of the conditions for licensing agreements agreed with a licensee within that category under the same conditions.

Article 4

Other conditions under which access is granted

1 A person with proprietary rights to a benchmark shall set the conditions for licensing agreements and make them available to CCPs and trading venues upon request free of charge. The conditions shall include the following:

a the scope of use and content of information for each use under the licensing agreements, clearly identifying in each case confidential information;

b the conditions for redistribution, if allowed, of information by CCPs and trading venues;