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Commission Delegated Regulation (EU) 2018/1637 of 13 July 2018 supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the procedures and characteristics of the oversight function (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2018/1637

of 13 July 2018

supplementing Regulation (EU) 2016/1011 of the European Parliament and of the Council with regard to regulatory technical standards for the procedures and characteristics of the oversight function

(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 Article 5(5) thereof,

Whereas:

(1) Article 5 of Regulation (EU) 2016/1011 requires administrators of benchmarks to establish a permanent and effective oversight function which should be carried out by a separate committee or by means of another appropriate governance arrangement.

(2) Administrators have the discretion to design the most appropriate oversight function for the benchmarks they provide to fulfil the requirements of Article 5 of Regulation (EU) 2016/1011. This Regulation sets out a non-exhaustive list of appropriate governance arrangements.

(3) Entrusting external stakeholders with an oversight function can provide valuable expertise and their participation can increase the effectiveness of the oversight function. Conflicts of interest within that oversight function may arise due to the conflicting interests of those members or due to relationships between members of the oversight function and their clients or other stakeholders. To mitigate such conflicts, independent members that are free from conflicts of interest should, where possible, be included in those overseeing critical benchmarks due to their importance for market integrity, financial stability, consumers, the real economy and the financing of households and businesses in Member States. Where such independent members are not required in accordance with this Regulation, administrators should adopt other procedures to address potential conflicts of interest such as excluding members from certain discussions or removing voting rights of specific members.

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(4) Persons that are directly involved in the provision of the benchmark may sit on the oversight function in a non-voting capacity as they can provide useful insight into the work of the administrator. Their status as non-voting members is appropriate to ensure that the administrator does not hold undue influence over the decisions of the oversight function.

(5) The oversight function can include committees with specific, dedicated competencies, for different benchmarks or families of benchmarks or it can include multiple functions carrying out different tasks when persons with appropriate expertise cannot all sit on one committee, for example when they are based in different geographical regions. Those oversight functions need to have a single natural person or a committee in charge of the direction of the oversight function and responsible for interaction with the management body of the administrator and with the competent authority to facilitate the centralisation of oversight.

(6) For some lesser used and less vulnerable significant benchmarks, it may be possible for a single natural person to act as the oversight function, where the natural person can commit an appropriate amount of time to the oversight of the relevant benchmarks. Where the oversight function is a natural person, it is exempt from certain procedures which are only appropriate for a committee. Due to the high degree of use of critical benchmarks and the risks they might cause in certain instances, critical benchmarks should not be overseen by a natural person.

(7) To fulfil the responsibilities of the oversight function, members need to have expert knowledge of the benchmark provision process but also of the underlying market that the benchmark seeks to measure. Such expertise may be sourced from users and contributors active in the markets or from providers of regulated data. An oversight function may benefit from the expertise of contributors, as long as appropriate measures are taken to ensure the absence of conflicts of interest, and users have an interest in ensuring the benchmark is robust. It is therefore appropriate that contributors and users be considered as members for such benchmarks.

(8) The oversight function is an essential tool for managing conflicts of interest at the level of the administrator and in order to ensure the integrity of the function, persons that have been sanctioned for breaches of rules on financial services, in particular manipulation or attempted manipulation under Regulation (EU) No 596/2014 of the European Parliament and of the Council[(2)], should be prohibited from becoming members of an oversight function.

(9) External stakeholders can have an interest in the benchmark where it is widely used in their markets and they can provide additional expertise. Administrators may establish procedures that allow for them to participate as observers to the oversight function.

(10) Independent committees cannot be completely separated from the organisation of the administrator as the final decisions with regards to the business of the administrator lie with the management body, and a separate committee could take decisions without fully appreciating the potentially detrimental impact of such decisions on the business of the administrator. An oversight function embedded within the organisation of the

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administrator, or of the parent company of the group to which it belongs to, is therefore best placed to challenge the decisions of the administrator with respect to the benchmarks it provides.

(11) In order for the oversight body to perform its function assigned to it by Regulation (EU) 2016/1011, it is important that it has the ability to fully assess and to challenge the decisions of the management body of the administrator and that, in case of a disagreement, the deliberations of the oversight function in this regard are recorded.

(12) Procedures on the criteria for selection of members and observers, on conflicts of interest management and, in case the oversight function is a committee, procedures covering dispute resolution are necessary to ensure that the oversight function can operate without impediment. There may be other procedures appropriate to the oversight function for certain types of benchmarks or administrators which are not set out in this Regulation but are necessary and appropriate for the correct governance of their benchmarks. Administrators may therefore introduce alternative procedures provided that those procedures achieve the appropriate level of oversight.

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

(14) 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 in accordance with Article 37 of Regulation (EU) No 1095/2010[(3)].

(15) 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,

HAS ADOPTED THIS REGULATION:

Article 1

Composition of the oversight function

1 The structure and composition of the oversight function shall be proportionate to the ownership and control structure of the administrator and shall, as a general rule, be determined in accordance with one or more appropriate governance arrangements listed in the Annex to this Regulation. Administrators shall provide competent authorities with a justification for any deviation from such arrangements.

2 Where the benchmark is a critical benchmark, the oversight function shall be carried out by a committee with at least two independent members. Independent members shall be natural persons sitting on the oversight function who are not directly affiliated with the administrator other than through their involvement in the oversight function, and shall have no conflicts of interest, particularly at the level of the relevant benchmark.

3 The oversight function shall be composed of members who together have the skills and expertise appropriate to the oversight of the provision of a particular benchmark and to the responsibilities that the oversight function is required to fulfil. Members of the oversight

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function shall have appropriate knowledge of the underlying market or economic reality that the benchmark seeks to measure.

4 Administrators of regulated-data benchmarks shall include, as members of the oversight function, representatives from the entities listed in the definition of a regulated-data benchmark at point (a) of Article 3(1)(24) of Regulation (EU) 2016/1011 and, where applicable, from entities contributing net asset values of investment funds to regulated-data benchmarks. Administrators shall provide competent authorities with a justification for any exclusion of representatives from these entities.

5 Where a benchmark is based on contributions and representatives of its contributors or of supervised entities that use the benchmark are members of the oversight function, the administrator shall ensure that the number of members with conflicts of interest does not amount to or exceed a simple majority. Before the appointment of members, administrators shall also identify and take into account the conflicts arising from relationships between potential members and other external stakeholders, in particular resulting from a potential interest at the level of the relevant benchmarks.

6 Persons directly involved in the provision of the benchmark that may be members of the oversight function, shall have no voting rights. Representatives of the management body shall not be members or observers but may be invited to attend meetings by the oversight function in a non-voting capacity.

7 Members of the oversight function shall not include persons who have been subject to sanctions of administrative or criminal nature relating to financial services, in particular manipulation or attempted manipulation under Regulation (EU) No 596/2014.

Article 2

Characteristics and positioning of the oversight function

1 The oversight function shall constitute a part of the organisational structure of the administrator, or of the parent company of the group to which it belongs, but be separate from the management body and other governance functions of the benchmark administrator.

2 The oversight function shall assess, and where appropriate challenge, the decisions of the management body of the administrator with regards to benchmarks provision to ensure the fulfilment of the requirements of Regulation (EU) 2016/1011. Without prejudice to point (i) of Article 5(3) of Regulation (EU) 2016/1011, the oversight function shall address all recommendations on benchmark oversight to the management body.

3 Where the oversight function becomes aware that the management body has acted or intends to act contrary to any recommendations or decisions of the oversight function, it shall record that fact clearly in the minutes of its next meeting, or in its record of decisions where an oversight function has been established in accordance with the third governance arrangement set out in the Annex to this Regulation.

Article 3

Procedures governing the oversight function

1 An oversight function shall have procedures at least relating to the following areas: