S&P Dow Jones Indices

An S&P Global Division

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The Secretary
Ontario Securities Commission
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Me Anne-Marie Beaudoin
Corporate Secretary
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RE: Feedback on proposed National Instrument 25-102 Designated Benchmarks and Benchmark Administrators and Companion Policy Instrument 25-102 (Proposed Instrument)

S&P Dow Jones Indices LLC (S&P DJI") is a leading provider of index-based innovation, data and research. We welcome the opportunity to provide comments to the Canadian Securities Administrators' (CSA) Notice and Request for Comment on the Proposed Instrument. We hope that our comments and suggestions on the Proposed Instrument are helpful.

In June 2012, S&P DJ was formed as a joint venture between S&P Global as the owner of S&P Indices and the Chicago Mercantile Exchange as the owner of Dow Jones Indexes. Combined, S&P Dow Jones Indices is the largest global resource for essential index-based solutions, data and research, and S&P DJI is home to iconic brands, such as the S&P 500® and the Dow Jones Industrial Average®. More assets are invested in products based on our indices than products based on indices from any other provider in the world. Since Charles Dow invented the first index in 1884,S&P DJI has been innovating and developing indices across the spectrum of asset classes helping to define the way investors measure and trade the markets. S&P DJI's mission is to bring independent, transparent and cost effective solutions to the global investment community. Headquartered in New York, S&P DJI employs over 500 professionals operating out of 25 offices worldwide. For more information, please visit www.spdji.com. We are an independent index provider. We do not issue financial instruments, do not participate in the markets which our benchmarks measure and have no vested interest in the value of any of our benchmarks.

As independent benchmark provider whose benchmarks are used as the basis for financial products, S&P DJI is fully supportive of the IOSCO Principles for Financial Benchmarks ("IOSCO Principles") and the objective of fostering integrity, transparency and efficiency of financial benchmarks. The IOSCO

Principles are very much in line with how S&P DJI transparently and independently govern its benchmarks. Indeed, S&P DJI had many of the practices, policies and procedures called for by the IOSCO Principles in place before they were published by IOSCO. On an annual basis, S&P DJI engages an internationally recognized audit firm to assess adherence to the IOSCO Principles and has received an unqualified reasonable assurance each year.

First and foremost, if the CSA believes it is necessary to pass benchmark regulation then S&P DJI believes the CSA should align its regulation with the concepts and requirements of the IOSCO Principles, as they are the global standard. A consistent approach will result in more choices for investors by encouraging broader participation in the Canadian market by qualified benchmark administrators.

In addition, the CSA's current approach to limit the Proposed Instrument to domestic, contribution-based benchmarks is appropriate and consistent with the response from most other regulators and policy-makers around the globe. The EU has taken a different approach by seeking to regulate a broader spectrum of benchmarks, which has led to some inconsistencies, confusion and delay with the implementation of their benchmark regulation.

Answer to Specific Questions in Annex C

Definition and Interpretation

1. *Does the proposed definition of "contributing individual" capture (or fail to capture) all of the arrangements between contributing individuals and administrators? If not, please explain with concrete examples.*

No response.

2. *Is the proposed interpretation of "control" appropriate? Please explain with concrete examples.*

No response.

Governance

3. *Is the requirement for the board of directors of an administrator to be comprised of a minimum of 3 directors, of which at least half must be independent, appropriate? If not, please explain with concrete examples.*

Any requirement pertaining to the composition of the board of directors (or any other governance or oversight function) should not be prescribed and needs to be flexible to allow benchmark administrators to select a structure most appropriate to their businesses.

This flexibility is recognized in both the EU Benchmark Regulation, the Australian Benchmark Regulation and the IOSCO Principles. The guiding principles that have been established in most legislative frameworks for benchmarks are proportionality and the avoidance of excessive administrative burden. None of the EU Benchmark Regulation, the Australian Benchmark Regulation or the IOSCO Principles specify the composition of the benchmark administrator's corporate board, the length of time that board directors may serve and the need for independent members. These requirements are disproportionate to the risks and overly burdensome for a benchmark administrator to manage.

The index industry is diverse and includes many global benchmark administrators. The proposed requirements are overly complex and unnecessary to protect the integrity of the benchmark determination process. Many benchmark administrators operate multiple index families globally. Effective compliance with this requirement would necessitate the establishment of separate benchmark administrators for specific designated benchmarks.

Finally, index governance is fairly specialized requiring candidates with sufficient expertise in the index industry who are typically employed elsewhere in the industry value-chain. Therefore, independent members may introduce conflicts of interest and S&P DJI believes outside members could adversely impact its status as an independent benchmark administrator and be challenging to manage.

4. *The determination of non-independence of members of the board of directors and the oversight committee by the board of directors of administrators as set out in paragraphs 5(4)(d), 32(2)(d) and 36(2)(d) of Proposed NI 25-102 includes a provision that if the director or oversight committee member has a relationship with the administrator that may, in the opinion of the board of directors, be reasonably expected to interfere with the exercise of the director's or oversight committee member's independent judgment, such director or oversight committee member would not be independent for purposes of Proposed NI 25-102. We are seeking comment on whether the CSA should replace the opinion of the board of directors with a "reasonable person" opinion in these paragraphs. Please explain with concrete examples.*

No response.

Administrator Compliance Officer

5. *Should the compliance officer of an administrator also monitor the administrator's compliance with its own benchmark methodology? Please explain with concrete examples.*

Expanding the duties of a compliance officer to undertake the monitoring of an administrator's compliance with its benchmark methodology is not workable.

Most benchmark administrators operate thousands of individual benchmarks and the responsibility for monitoring and overseeing of the calculation of those benchmarks and the maintenance of their methodologies has been delegated to specific committees staffed by experienced index and financial market professionals. Requiring a benchmark administrator to re-write its oversight framework for its benchmarks would be counter-productive and disproportionate to the associated risks and will likely lead to greater risk and uncertainty.

In line with our response to Question 3, any requirement pertaining to the composition of any governance or oversight function should not be prescribed and needs to be flexible to allow benchmark administrators to select a structure most appropriate to their businesses. S&P DJI, for example, employs an oversight function consisting of multiple committees and functions, each performing a subset of the oversight responsibilities and tasks. On the one hand, there are functions and committees responsible for governing the methodologies and rules of our indices. This group, referred to as Index Governance, has the skills and expertise to assess and challenge the analytical or editorial decisions made during the benchmark determination process. On the other hand, there are functions and committees responsible for ensuring those who govern our indices and corresponding methodologies comply with our policies, procedures and

best practices. The criteria to select members of the various components of the oversight function focuses on the expertise and skills required.

Greater flexibility for benchmark administrators to construct a governance and oversight function appropriate and proportionate to the benchmarks it administers is of utmost importance. The current regulatory regimes S&P DJI operates under as well as the IOSCO Principles acknowledge that there may be multiple committees that together fulfill the requirements to monitor, assess and oversee compliance by the benchmark administrator with its methodologies, policies, procedures, legal and regulatory requirements.

6. *Should the compliance officer of an administrator not be involved in the establishment of compensation levels for any DBA individual (as defined in Proposed NI 25-102), other than for a DBA individual that reports directly to the compliance officer? For example, are there cases where compliance officer involvement in the compensation setting process is appropriate or desirable to, for example, reduce conflicts of interest? Please explain with concrete examples.*

No, we do not believe it is appropriate or desirable for the compliance officer to be involved in the establishment of compensation levels for any DBA individual, other than for its direct reports. The compliance function should ensure compensation policies adhere to regulatory requirements but should not set compensation levels. Compensation should be the responsibility of human resources and the business as they are best suited to determine the appropriate compensation level to attract and retain the necessary talent to operate in the index industry. It is unlikely that a compliance officer will have sufficient expertise and industry knowledge to contribute to this process.

Critical Benchmarks

7. *Under Proposed NI 25-102, only an administrator of a designated critical benchmark must take reasonable steps to ensure that access rights to, and information relating to, the designed critical benchmark are provided to all benchmark users on a fair, reasonable, transparent and non-discriminatory basis. Should such access rights be afforded to all benchmark users for all designated benchmarks? Please explain with concrete examples.*

No. We do not believe there is any justification for the CSA to mandate how corporate entities transact for license rights and information related to benchmarks. Intellectual property owners have the right to determine the commercial terms on which they license such intellectual property. "Fair, reasonable, transparent and non-discriminatory" pricing rules or requirements have the potential to interfere materially with the rights of index providers to set the terms of their licensing agreements.

In the event the CSA has identified a market failure or anticompetitive behavior in the index industry, it has existing competition laws and tools to prevent and/or punish any index providers and/or any other market participants from exploiting their market power, if any, in a way that might hinder effective competition. In addition, absent any evidence of a history of market failure or anticompetitive behavior, the introduction of any form of mandatory licensing regime and/or price controls is not justified. The index industry is diverse with many alternative suppliers of financial market indices so that index providers are forced to compete. The fact that index providers seek to legitimately protect their intellectual property through appropriate licensing regimes does not enable those providers to prevent other providers from offering an alternative, functionally equivalent benchmark. Regulated price control is rarely an appropriate tool in open and free markets and, as such, is seldom used in conjunction with open access

regimes. Price control is particularly disproportionate in circumstances where there is no clear monopoly or dominant position and, furthermore, where there is no evidence of historic abusive practices. We are not aware of any obstacles that users face in Canada to access data and information in relation benchmarks.

Finally, one must not overlook the disclosure requirements of the Proposed Instrument, specifically in relation to the benchmark methodology and benchmark statement and any changes or cessations thereto (Part 5). These requirements provide a significant amount of information to users and such information must be published by benchmark administrators. This requirement needs to be balanced with the need for benchmark administrators to protect their intellectual property and the intellectual property of the underlying data providers.

8. *Section 31 requires a benchmark contributor to a designated critical benchmark to notify the designated benchmark administrator for that benchmark of the benchmark contributor's decision to cease contributing input data in relation to the designated critical benchmark. Should Proposed NI 25-102 include a requirement that the benchmark contributor continue to provide data for a period of time to allow the benchmark administrator and regulators to consider the impact of the benchmark contributor's decision?*

This question highlights one issue related to designated regulated data benchmarks and the ability for a CSA to designate a regulated data benchmark as critical. In the context of designated regulated data benchmarks there is no 'contributor', so in circumstances where a designated regulated benchmark is also designed critical, it is unclear how the concept of compelling a contributor to provide input data would be applied. Furthermore, it also raises the question why the CSA has deemed it appropriate to have the power to classify regulated data benchmarks as critical. This is a departure from other jurisdictions, such as the EU, who have acknowledged and understood the different risks between contributed benchmarks and those benchmarks based on data from transparent and regulated markets. The authority to designate regulated data benchmarks as critical should be removed.

Conflict of Interest

9. *Is the requirement in subsection 11(3) of Proposed NI 25-102 appropriate, particularly as it relates to a risk of a significant conflict of interest? Please explain with concrete examples.*

Yes, it is appropriate to limit publication to significant conflicts of interest as it would be more effective for its intended audience. Expanding the requirement to include all possible or potential conflicts of interest will make it more difficult for users to assess those conflicts of interest.

Designated Benchmarks

10. *The notice states that the current intention of the CSA is to designate only RBSL as an administrator and CDOR and CORRA as RBSL's designated benchmarks. Are there any other benchmark administrators that you believe should be designated under Proposed NI 25-102? If so, please:*

(a) Identify the benchmark administrator,
(b) Identify any benchmark that the benchmark administrator administers that should also be designated, and
(c) Provide your rationale for why such designations are appropriate.

We do not believe any other benchmark administrator or benchmarks should be included. However, the CSA should provide greater clarity and transparency in terms of the assessment and/or method it will adopt to designate benchmark administrators and/or benchmarks in the future in order to avoid market disruption and ensure continued innovation in Canada's index industry.

11. If your organization is a benchmark administrator, please:

(a) *Advise if you intend to apply for designation under Proposed NI 25-102;*
(b) *Advise of any benchmarks you intend to also apply for designation under Proposed NI 25-102; and*
(c) *The rationale for your intention.*

We do not intend to voluntarily apply for designation as a benchmark administrator under the Proposed Instrument.

Anticipated Costs and Benefits

12. The Notice sets out the anticipated costs and benefits of Proposed NI 25-102 (in Ontario, additional detail is provided in Annex D). Do you believe the costs and benefits of Proposed NI 25-102 have been accurately identified and are there any other significant costs or benefits that have not been identified in this analysis? Please explain with concrete examples.

The Proposed Instrument provides no acknowledgement or framework for those benchmark administrators based outside of Canada. Therefore, the example does not include one of the most significant costs which will be faced by those benchmark administrators subject to other benchmark regulations. Where the CSA designates benchmarks that are also regulated in the EU for example the benchmark administrator will be subject to dual supervision and have to comply with the regulation in both jurisdictions. Such costs can be reduced by reducing the scope of the Proposed Instrument so that it only captures critical, contribution-based benchmarks and/or replicating its requirements as close as possible to the IOSCO Principles or the requirements of other jurisdictions.

Other Issues Identified Not Specifically Asked in Annex C

Regulated Data

There are several issues involving designated regulated data benchmarks that are not identified in Annex C that should be addressed.

As mentioned above, it is inconsistent and disproportionate for the CSA to have the authority and power to designed regulated data benchmarks as critical. As acknowledged by most regulators/policy makers, regulated data benchmarks are less susceptible to manipulation since the underlying data is sourced from regulated exchanges, are more transparent through publicly available methodologies and have a far greater number of alternatives. Therefore, regulated data benchmarks have been specifically excluded from being deemed critical. Canadian regulators directly supervise exchanges and trading venues and/or have deemed foreign exchanges or trading venues as operating under similar regimes, so it is unclear why the CSA considers it necessary to allow regulated data benchmarks to be designated critical.

The CSA does not need to include them as critical to be deemed equivalent to the EU Benchmark Regulation, since the EU expressly excludes regulated data benchmarks from being designated as critical. In addition, permitting regulated data benchmarks to be designated critical is inconsistent with the proportionality principles in the IOSCO Principles.

Another issue relates to the requirement that regulated data benchmarks receive input data "entirely and directly" from trading venues and exchanges. This language seems to have been directly imported from the EU Benchmark Regulation. However, the EU recently amended the terminology in the EU Benchmark Regulation to remove the words "and directly" to ensure that the designation of regulated data benchmarks could be used as intended. Please refer to the recent EU ESA Review page 328. Benchmark administrators are global in nature and take prices from over 200 recognized stock exchanges and trading venues. The only way that it is possible to source data from such a large and diverse group is to acquire it from data aggregators, such as Thomson Reuters and Bloomberg. The data aggregators provide a technical means to receive the data in a common format so it may be used and calculated quickly and efficiently. The data aggregators do not change the underlying prices from the exchanges.

Where a data aggregator is used by a benchmark administrator to provide a technical means of receiving the input data from an exchange or trading venue, the practice should not be deemed an outsourcing to a service provider (and therefore within the auspices of Section 14) in the context of regulated data benchmarks. According to Section 14, outsourcing is where a benchmark administrator outsources to a service provider a function, service or activity in the provision of a designed benchmarks. By contrast, data aggregators act purely as a technical link to provide access to transaction data from exchanges and trading venues. The benchmark administrator then processes the input data according to its methodology to determine the benchmark.

Records Retention

There is some inconsistency between the records retention requirements included in the Proposed Instrument and those within regulations adopted in other jurisdictions. For example, the IOSCO Principles and the EU Benchmark Regulation require administrators to retain the information for 5 years and not the 7 years proposed by the CSA. As mentioned before, benchmark administrators operate global businesses and consistency is necessary across all jurisdictions. If different standards are implemented this will increase costs to investors with little or no benefit.

Designated Benchmark Administrator & Designated Benchmark Annual Form

A designated benchmark administrator is required to provide annual revenue received: (a) for determining a designated benchmark; (b) revenue from determining any other benchmarks administered by the designated benchmark administrator; (c) revenue for granting licenses or right to publish information about the designated benchmark; (d) revenue for granting licenses to any other benchmark administered by the designated benchmark administrator; and (e) fees it charges and a fee schedule describing the fees for the benchmark. The rationale for this requirement is unclear and in our view does not contribute toward protecting the integrity of any benchmark determination process.

Definitions

DBA Individual / benchmark individual – the additional definitions and requirements associated with the definition of DBA Individual and Benchmark Individual are cumbersome, disproportionate and

burdensome. It is unclear why the CSA has introduced these concepts. They do not reflect how most global benchmark administrators are organized.

Made available to the public (vis-à-vis definition of a benchmark) – what does it mean to be 'made available to the public? CSA to provide further guidance.

Benchmark Users – the definition is unclear and requires further detail to understand what users and products are in-scope of the Proposed Instrument.

If you have any questions on our response, or if you would like to discuss any points further please contact: Joe DePaolo, Chief Legal Officer, S&P DJI & Associate General Counsel, S&P Global, at joseph.depaolo@spglobal.com.