

REGULATION TO AMEND REGULATION 25-102 RESPECTING DESIGNATED BENCHMARKS AND BENCHMARK ADMINISTRATORS¹

Securities Act

(chapter V-1.1, s. 331.1, par. (9.2.1), (9.3), (9.5) and (9.6), and s. 331.2)

1. Section 1 of Regulation 25-102 respecting Designated Benchmarks and Benchmark Administrators (*insert reference*) is amended, in paragraph (1):

(1) by inserting, after the definition of the expression “designated benchmark administrator”, the following:

““designated commodity benchmark” means a benchmark that is designated for the purposes of this Regulation as a “commodity benchmark” by a decision of the securities regulatory authority;”;

(2) by adding, in the definition of the expression “subject requirements” and after paragraph (e), the following:

“(f) paragraphs 40.14(1)(a) and (b);”.

2. Section 6 of the Regulation is amended, in paragraph (3),

(1) by replacing, in subparagraph (a), the word “monitor” with the words “in the case of a benchmark that is not a designated commodity benchmark, monitor”;

(2) by inserting, after subparagraph (a), the following:

“(a.1) in the case of a designated commodity benchmark, monitor and assess compliance by the designated benchmark administrator and its DBA individuals with subsection 5(1), section 40.4 and securities legislation relating to benchmarks;”;

(3) in subparagraph (b):

(a) by inserting, in subparagraph (i) and after “paragraph (a)” “or (a.1), as applicable”;

(b) by replacing, in subparagraph (ii), the word “compliance” with the words “in the case of a benchmark that is not a designated commodity benchmark, compliance”;

(c) by inserting, after subparagraph (ii), the following:

“(ii.1) in the case of a designated commodity benchmark, compliance by the designated benchmark administrator and its DBA individuals with subsection 5(1), section 40.4 and securities legislation relating to benchmarks, and”.

3. The Regulation is amended by inserting, after section 40, the following part:

“PART 8.1 DESIGNATED COMMODITY BENCHMARKS

Interpretation

40.1. In this Part, “commodity benchmark” means a benchmark that is determined by reference to or an assessment of an underlying interest that is a commodity, but does not include a benchmark that has, as an underlying interest, a currency or a commodity that is intangible.

¹ The draft amendments are with respect to the final version of the Regulation published by the Authorities today, on April 29, 2021. For further details, see the CSA Notice of Publication, *Regulation 25-102 respecting Designated Benchmarks and Benchmark Administrators, Policy Statement to Regulation 25-102 respecting Designated Benchmarks and Benchmark Administrators*, dated April 29, 2021.

Application – dual-designated benchmarks

40.2. (1) Sections 30 to 33 do not apply to a designated benchmark administrator or to a benchmark contributor in relation to a designated commodity benchmark that is also a designated critical benchmark.

(2) This Part does not apply to a designated benchmark administrator in relation to a designated commodity benchmark if

- (a) the benchmark is also a designated critical benchmark, and
- (b) the underlying interest of the benchmark is gold, silver, platinum or palladium.

(3) The provisions set out in subsection (4) do not apply to a designated benchmark administrator in relation to a designated commodity benchmark if all of the following apply:

- (a) the benchmark is determined from input data arising from transactions of the commodity that is the underlying interest of the benchmark;
- (b) the commodity is of a type in respect of which parties to the transactions referred to in paragraph (a), in the ordinary course of business, make or take physical delivery of the commodity;
- (c) the benchmark is also a designated regulated-data benchmark.

(4) For the purposes of subsection (3), the following provisions do not apply:

- (a) subsections 11(1) and (2);
- (b) section 40.9;
- (c) section 40.10, other than subparagraph (1)(f)(ii);
- (d) paragraph 40.12(2)(a);
- (e) section 40.14.

Provisions of this Regulation not applicable to designated commodity benchmarks

40.3. The following provisions do not apply to a designated benchmark administrator, a benchmark contributor or a specified person in relation to a designated commodity benchmark:

- (a) Part 3, other than subsection 5(1) and sections 6, 11, 12 and 13;
- (b) Part 4, other than section 17;
- (c) sections 18 and 21;
- (d) Part 6;
- (e) Part 7.

Control framework

40.4. (1) A designated benchmark administrator must establish, document, maintain and apply policies, procedures and controls that are reasonably designed to ensure that a designated commodity benchmark is provided in accordance with this Regulation.

(2) Without limiting the generality of subsection (1), a designated benchmark administrator must ensure that its policies, procedures and controls address all of the following:

(a) management of operational risk, including any risk of financial loss, disruption or damage to the reputation of the designated benchmark administrator from any failure of its information technology systems;

(b) business continuity and disaster recovery plans;

(c) contingencies in the event of a disruption to the provision of the designated commodity benchmark or the process applied to provide the designated commodity benchmark.

Methodology

40.5. (1) A designated benchmark administrator must not follow a methodology for determining a designated commodity benchmark unless

(a) the methodology is sufficient to provide a designated commodity benchmark that accurately and reliably represents the value of the underlying interest of the designated commodity benchmark for that part of the market that the benchmark is intended to represent, and

(b) the accuracy and reliability of the designated commodity benchmark determined using the methodology is verifiable.

(2) A designated benchmark administrator must establish, document and publish the elements of the methodology of a designated commodity benchmark, including, for greater certainty, the following:

(a) all criteria and procedures used to determine a designated commodity benchmark, including, but not limited to the following:

(i) how the designated benchmark administrator will use input data, including, for greater certainty, how it will use the volume of transactions, concluded and reported transactions, bids, offers and any other market information used to determine the designated commodity benchmark;

(ii) the reason that a specific reference unit will be used;

(iii) how input data will be obtained;

(iv) identification of how and when expert judgment may be exercised in the determination of the designated commodity benchmark;

(v) the assumptions and the model or method that will be used for the extrapolation and interpolation of input data;

(b) procedures reasonably designed to ensure that benchmark individuals exercise expert judgment in a consistent manner;

(c) the relative importance assigned to the criteria used to determine the designated commodity benchmark, including, for greater certainty, the type of input data used and how and when expert judgment may be exercised;

(d) any minimum quantity of transaction data to be used to determine the designated commodity benchmark;

(e) if minimum quantity thresholds referred to in paragraph (d) are not provided, the rationale as to why minimum requirements are not provided;

(f) procedures for the determination of a designated commodity benchmark in circumstances in which the input data does not meet the minimum threshold for either the quantity of the transaction data or the quality of the input data, including, for greater certainty,

- (i) any alternative methods to determine the designated commodity benchmark, including any theoretical estimation models, and
- (ii) procedures to be used in circumstances if no transaction data exists;
- (g) the time period when input data must be provided;
- (h) the means of contribution of input data, whether electronically, by telephone or by other means;
- (i) procedures for how a designated commodity benchmark is determined if one or more benchmark contributors contribute input data that constitutes a significant proportion of the total input data for the determination of the designated commodity benchmark, including specifying what constitutes a significant proportion for the determination of the benchmark;
- (j) the circumstances in which transaction data may be excluded in the determination of the designated commodity benchmark.

Additional information about the methodology

40.6. A designated benchmark administrator must, with respect to the methodology used for a designated commodity benchmark, publish the following:

- (a) the rationale for adopting the methodology, including
 - (i) the rationale for any price adjustment techniques, and
 - (ii) a description of why the time period for the acceptance of input data is adequate for the input data to accurately and reliably represent the value of the underlying interest of the designated commodity benchmark;
- (b) the process for the internal review and the approval of the methodology and the frequency of such reviews;
- (c) the process referred to in section 17 for making significant changes to the methodology.

Review of methodology

40.7. A designated benchmark administrator must, at least once in every 12-month period, carry out an internal review of the methodology for each designated commodity benchmark that it administers to ensure that the designated commodity benchmark determined under the methodology accurately and reliably represents the value of the underlying interest of the designated commodity benchmark for that part of the market the benchmark is intended to represent.

Quality and integrity of the determination of a designated commodity benchmark

40.8. (1) A designated benchmark administrator must specify and document a description of the commodity that is the underlying interest of a designated commodity benchmark.

(2) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to ensure the quality and integrity of each determination of a designated commodity benchmark, including for greater certainty, policies and procedures that

- (a) ensure that input data is used in accordance with the order of priority specified in the methodology of the designated commodity benchmark;
- (b) identify transaction data that a reasonable person would conclude is anomalous or suspicious;

(c) ensure that the designated benchmark administrator maintains records of each decision, including the reasons for the decision, to exclude transaction data from the determination of the designated commodity benchmark;

(d) do not discourage benchmark contributors from contributing all of their input data that meets the designated benchmark administrator's criteria for the determination of the designated commodity benchmark;

(e) to the extent that is reasonable, ensure that

(i) input data contributed is representative of the benchmark contributors' concluded transactions relating to the underlying interest of the designated commodity benchmark, and

(ii) benchmark contributors comply with the designated benchmark administrator's quality and integrity standards for input data.

Transparency of determination of a designated commodity benchmark

40.9. A designated benchmark administrator must publish for each determination of a designated commodity benchmark, as soon as reasonably practicable, the following:

(a) a plain language explanation of how the designated commodity benchmark was determined, which explanation includes, for greater certainty, all of the following:

(i) the number and the volume of the transactions submitted;

(ii) with respect to each type of input data, the range of volumes and the average volume, the range of prices and the average price and the indicative percentage;

(b) a plain language explanation of the extent to which, and the basis upon which, expert judgment was used in the determination of the designated commodity benchmark, including, if applicable, the reasons for not giving priority to concluded and reported transactions.

Integrity of the process for contributing input data

40.10. (1) A designated benchmark administrator must establish, document, maintain and apply policies, procedures, controls and criteria reasonably designed to ensure the integrity of the process for contributing input data for a designated commodity benchmark including, for greater certainty, the following:

(a) criteria that determine who may contribute input data;

(b) procedures to verify the identity of a benchmark contributor and a contributing individual and the authorization of such contributing individuals to contribute input data on behalf of the benchmark contributor;

(c) criteria that determine which contributing individuals are permitted to contribute input data on behalf of a benchmark contributor;

(d) criteria that determine the appropriate contribution of transaction data by the benchmark contributor;

(e) if transaction data is contributed from any front office of a benchmark contributor, procedures to confirm the reliability of the input data, and the criteria upon which the reliability is measured, in accordance with its policies;

(f) procedures that

(i) identify any communications between contributing individuals and benchmark individuals that might involve manipulation or attempted manipulation of the

determination of the designated commodity benchmark for the benefit of any trading position of the benchmark contributor, any contributing individual or third party,

(ii) identify any attempts to cause a benchmark individual to not apply or follow the designated benchmark administrator's policies, procedures and controls,

(iii) identify benchmark contributors or contributing individuals that engage in a pattern of contributing transaction data that a reasonable person would consider is anomalous or suspicious, and

(iv) ensure that the appropriate supervisors within the benchmark contributor are notified, to the extent possible, of questions or concerns by the designated benchmark administrator.

(2) In this section, “front office” means any department, division or other internal grouping of a benchmark contributor, or any employee or agent of a benchmark contributor, that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring or brokerage activities on behalf of the benchmark contributor.

Governance and control requirements

40.11. (1) A designated benchmark administrator must establish and document an organizational structure.

(2) The organizational structure referred to in subsection (1) must establish well-defined roles and responsibilities for each person involved in the provision of a designated commodity benchmark administered by the administrator, and include, as necessary, segregated reporting lines, to ensure that the administrator complies with the provisions of this Regulation.

(3) A designated benchmark administrator must establish, document, maintain and apply policies and procedures reasonably designed to ensure the integrity and reliability of the determination of a designated commodity benchmark including, for greater certainty, policies and procedures to ensure

(a) that each of its benchmark individuals has the necessary skills, knowledge, experience, reliability and integrity for the duties assigned to the individual,

(b) that the provision of the designated commodity benchmark can be made on a consistent and regular basis,

(c) that succession plans exist to ensure

(i) that each of its benchmark individuals continues to have the necessary skills, knowledge, experience, reliability and integrity for the duties assigned to the individual, and

(ii) the provision of the designated commodity benchmark on a consistent and regular basis,

(d) that each of its benchmark individuals is subject to adequate management and supervision to ensure that the methodology of the designated commodity benchmark is properly applied, and

(e) a procedure for obtaining the approval of an individual holding a position senior to that of a benchmark individual prior to each publication of the designated commodity benchmark.

Books, records and other documents

40.12. (1) A designated benchmark administrator must keep such books, records and other documents that are necessary to account for its activities as a designated benchmark

administrator, its business transactions and its financial affairs relating to its designated commodity benchmarks.

(2) A designated benchmark administrator must keep books, records and other documents of the following:

- (a) all input data, including how the data was used;
- (b) each decision to exclude a particular transaction from input data that otherwise met the requirements of the methodology applicable to the determination of a designated commodity benchmark, and the rationale for doing so;
- (c) the methodology applicable to the determination of each designated commodity benchmark administered by the designated benchmark administrator;
- (d) any exercise of expert judgment by the designated benchmark administrator in the determination of the designated commodity benchmark, including the basis for the exercise of expert judgment;
- (e) changes in or deviations from policies, procedures, controls or methodologies;
- (f) the identities of contributing individuals and of benchmark individuals;
- (g) all documents relating to a complaint.

(3) A designated benchmark administrator must keep the records referred to in subsection (2) in a form that

- (a) identifies the manner in which the determination of a designated commodity benchmark was made, and
- (b) enables an audit, review or evaluation of any input data, calculation, or exercise of expert judgment, including in connection with any limited assurance report on compliance or reasonable assurance report on compliance.

(4) A designated benchmark administrator must retain the books, records and other documents required to be maintained under this section

- (a) for a period of 7 years from the date the record was made or received by the designated benchmark administrator, whichever is later,
- (b) in a safe location and a durable form, and
- (c) in a manner that permits those books, records and other documents to be provided promptly on request to the regulator, except in Québec, or securities regulatory authority.

Conflicts of interest

40.13. (1) A designated benchmark administrator must establish, document, maintain and apply policies and procedures that are reasonably designed to

- (a) identify and eliminate or manage conflicts of interest involving the designated benchmark administrator and its managers, benchmark contributors, benchmark users, DBA individuals and any affiliated entity of the designated benchmark administrator,
- (b) ensure that any expert judgment exercised by the benchmark administrator or DBA individuals is independently and honestly exercised,
- (c) protect the integrity and independence of the provision of a designated commodity benchmark, including, for greater certainty, by

(i) ensuring that the provision of a designated commodity benchmark is not influenced by the existence of, or potential for, financial interests, relationships or business connections between the designated benchmark administrator or its affiliates, its personnel, clients, any market participant or persons connected with them,

(ii) ensuring that each benchmark individual does not have any financial interests, relationships or business connections that adversely affect the integrity of the designated benchmark administrator, including outside employment, travel, and acceptance of entertainment, gifts and hospitality provided by the designated benchmark administrator's clients or other commodity market participants,

(iii) keeping separate, operationally, the business of the designated benchmark administrator relating to the designated commodity benchmark it administers, and its benchmark individuals, from any other business activity of the designated benchmark administrator if the designated benchmark administrator becomes aware of a conflict of interest or a potential conflict of interest involving the business of the designated benchmark administrator relating to any designated commodity benchmark, and

(iv) ensuring that each of its benchmark individuals does not contribute to a determination of a designated commodity benchmark by way of engaging in bids, offers or trades on a personal basis or on behalf of market participants, except as permitted under the policies and procedures of the designated benchmark administrator,

(d) ensure that an officer referred to in section 6, or any DBA individual that reports directly to the officer, does not receive compensation or other financial incentive from which conflicts of interest arise or that otherwise adversely affect the integrity of the benchmark determination,

(e) protect the confidentiality of information provided to or produced by the designated benchmark administrator, subject to the disclosure requirements under sections 19, 20, 40.5, 40.6 and 40.9, and

(f) identify and eliminate or manage conflicts of interest that exist between the provision of a designated commodity benchmark by the designated benchmark administrator, including all benchmark individuals who participate in the determination of the designated commodity benchmark, and any other business of the designated benchmark administrator.

(2) A designated benchmark administrator must ensure that its other businesses have appropriate policies, procedures and controls designed to minimize the likelihood that a conflict of interest will adversely affect the integrity of the provision of a designated commodity benchmark.

(3) In establishing an organizational structure, as required under subsections 40.11(1) and (2), a designated benchmark administrator must ensure that the responsibilities for each person involved in the provision of a designated commodity benchmark administered by the designated benchmark administrator do not cause a conflict of interest or a perception of conflict of interest.

(4) A designated benchmark administrator must promptly publish a description of a conflict of interest, or a potential conflict of interest, in respect of a designated commodity benchmark

(a) if a reasonable person would consider the risk of harm to any person arising from the conflict of interest, or the potential conflict of interest, is significant, and

(b) on becoming aware of the conflict of interest, or the potential conflict of interest, including, for greater certainty, a conflict or potential conflict arising from the ownership or control of the designated benchmark administrator.

(5) If a designated benchmark administrator fails to apply or follow a policy or procedure referred to in paragraph (1)(e), and a reasonable person would consider the failure to be significant, the designated benchmark administrator must promptly provide written notice of the significant failure to the regulator, except in Québec, or securities regulatory authority.

Assurance report on designated benchmark administrator

40.14. (1) A designated benchmark administrator must engage a public accountant to provide a limited assurance report on compliance or a reasonable assurance report on compliance, in respect of each designated commodity benchmark it administers, regarding the designated benchmark administrator's

(a) compliance with subsection 5(1) and sections 11 to 13, 40.4, 40.5, 40.7, 40.8, and 40.10 to 40.13, and

(b) following of the methodology applicable to the designated commodity benchmark.

(2) A designated benchmark administrator must ensure an engagement referred to in subsection (1) occurs once in every 12-month period.

(3) A designated benchmark administrator must, within 10 days of the receipt of a report provided for in subsection (1), publish the report and deliver a copy of the report to the regulator, except in Québec, or securities regulatory authority.”.

4. This Regulation comes into force on (*indicate here the date of coming into force of this Regulation*).