

AMENDMENTS TO *POLICY STATEMENT TO REGULATION 25-102 RESPECTING DESIGNATED BENCHMARKS AND BENCHMARK ADMINISTRATORS*

1. Part 1 of *Policy Statement to Regulation 25-102 respecting Designated Benchmarks and Benchmark Administrators* is amended:

(1) under the title “***Designation of Benchmarks and Benchmark Administrators***”:

(a) by inserting, in the first bullet point of the second paragraph and after “financial”, “or commodity”;

(b) by inserting, in the second paragraph and after “Furthermore,”, “regardless of who applies for the designation,”;

(2) under the title “***Categories of Designation***”:

(a) by inserting, after the second paragraph, the following:

“Designated commodity benchmarks, benchmarks dually designated as commodity and regulated-data benchmarks or dually designated as commodity and critical benchmarks are subject to the requirements as specified under Part 8.1 of the Regulation.”;

(b) in the third paragraph:

(i) in the second sentence:

(A) by replacing “or”, after “a designated interest rate benchmark”, by “,”;

(B) by adding, after “a designated regulated-data benchmark”, “or a designated commodity benchmark”;

(ii) in the bullet points:

(A) by striking out, in the first bullet point, “and”;

(B) by replacing “.”, in the second bullet point, by “, but not if it is a commodity benchmark,”;

(C) by adding, after the second bullet point, the following:

“● a designated commodity benchmark may also be designated as a designated regulated-data benchmark, and

“● a designated commodity benchmark may also be designated as a designated critical benchmark.”;

(c) in the fourth paragraph:

(i) by replacing “or”, after “an interest rate benchmark”, by “,”;

(ii) by adding, after “a regulated-data benchmark”, “or a commodity benchmark”;

(3) under the title “***Definitions and Interpretation***”:

(a) by inserting the following items:

“Subsection 1(1) – Definition of designated commodity benchmark

The Regulation defines a “designated commodity benchmark” to ensure, to the extent possible, a consistent interpretation of this term across the various CSA jurisdictions, despite possible differences in statutory definitions of “commodity”. The definition specifically excludes a benchmark that has, as an underlying interest, a currency.

By “commodity benchmark”, we generally mean a benchmark based on a commodity with a finite supply that can be delivered either in physical form or by delivery of the instrument evidencing ownership of the commodity. We consider certain intangible commodities, such as carbon credits and emissions allowances, to be commodities for purposes of securities legislation, and may include other intangible products that develop as international markets evolve. Certain crypto assets also may be characterized as intangible commodities. Staff of a securities regulatory authority may recommend that the securities regulatory authority designate a benchmark based on these intangible commodities as a “commodity benchmark” for the purposes of the Regulation.

“Subsection 1(1) – Definitions of front office and front office employee in relation to a benchmark contributor

“Front office” is used in the context of a benchmark contributor, or of an affiliated entity of a benchmark contributor, and means any department, division or other internal grouping of a benchmark contributor, or of an affiliated entity of a benchmark contributor, that performs any pricing, trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of the benchmark contributor or the affiliated entity of the benchmark contributor. “Front office employee” is used in the same context and means any employee or agent of a benchmark contributor, or of an affiliated entity of a benchmark contributor, who performs any of those functions. In general, we consider front office employees to be the individuals who generate revenue for the benchmark contributor or the affiliated entity.”;

(b) under the item ***“Subsection 1(1) – Definition of designated critical benchmark”***:

(i) by adding, at the end of the first paragraph, the following sentence:

“However, if a designated commodity benchmark is also designated as a critical benchmark, then subsections 40.1(1) and (2) of the Regulation will specify the requirements applicable to such a benchmark.”;

(ii) by inserting, in the first sentence of the second paragraph and after “to financial”, “or commodity”;

(c) by adding, under the item ***“Subsection 1(1) – Definition of designated regulated-data benchmark”*** and at the end of the first paragraph, the following sentence:

“However, if a commodity benchmark is dually designated as a commodity benchmark and a regulated-data benchmark, then subsections 40.1(3) and (4) of the Regulation will specify the requirements applicable to such a benchmark.”.

2. Part 4 of the Policy Statement is amended:

(1) in the item ***“Subsection 15(4) – Verification of input data from front office of a benchmark contributor”***:

(a) by inserting, in the title of the item and after ***“from front office”***, ***“or front office employee”***;

(b) by inserting, in the first paragraph and after ***“from any front office”***, ***“or front office employee”***;

(2) by striking out the item titled “**Subsection 15(5) – Front office of a benchmark contributor**”.

3. The Policy Statement is amended by adding, after part 8, the following:

**“PART 8.1
DESIGNATED COMMODITY BENCHMARKS**

Publication of information

Under Part 8.1, there are several provisions that require a designated benchmark administrator to publish information relating to a designated commodity benchmark, including:

- subsection 40.4(2) - the elements of the methodology of the designated commodity benchmark;
- section 40.5 - the rationale for adopting the methodology, the process for internal review and approval of the methodology, and the process for making significant changes to the methodology;
- subsection 40.7(1) - a description of the commodity that is the underlying interest of the designated commodity benchmark;
- section 40.8 - an explanation of each determination of the designated commodity benchmark;
- subsection 40.12(4) - a description of a conflict of interest, or a potential conflict of interest, in respect of the designated commodity benchmark; and
- section 40.13 - the publication of a limited assurance report or a reasonable assurance report.

For the purposes of Part 8.1, we generally consider publication of the applicable information on the designated benchmark administrator’s website, accompanied by a news release advising of the publication of the information, as sufficient notification in these contexts. However, we recognize that a news release generally will not be necessary for the explanation of each determination of a designated commodity benchmark required under section 40.8. We consider it good practice for a designated benchmark administrator to establish a voluntary subscription-based email distribution list for those parties who wish to receive notice of publication by email.

In addition to, or as an alternative to, a news release, a designated benchmark administrator may want to consider other ways of helping to ensure that stakeholders and members of the public are aware of the publication of the applicable information on the designated benchmark administrator’s website, such as postings on social media or internet platforms, media advisories, newsletters, or other forms of communication.

Subsections 40.1(1) and (2) – Dual designation as a commodity benchmark and a critical benchmark

A designated commodity benchmark may also be designated as a critical benchmark and, in such case, would still be subject to the requirements under Part 8.1. As there are no specific requirements under Part 8.1 for benchmark contributors, such dually-designated benchmarks would not be subject to the requirements under sections 30 to 33 of the Regulation.

If the underlying commodity is gold, silver, platinum or palladium, then rather than being subject to the requirements under Part 8.1, the requirements under Parts 1 to 8 would apply.

Subsections 40.1(3) and (4) – Dual designation as a commodity benchmark and a regulated-data benchmark

If a commodity benchmark is designated as a regulated-data benchmark, then it is not subject to Part 8.1, rather the requirements under Parts 1 to 8 would apply. However, some commodity benchmarks may be determined from transactions where the parties, in the ordinary course of business, make or take physical delivery of the commodity, and those same commodity benchmarks may also meet the requirements for regulated-data benchmarks. Generally, these transactions would also be arm's length transactions. Regulated-data benchmarks determined from such transactions would more closely resemble commodity benchmarks, rather than financial benchmarks, and they would be dually designated as commodity and regulated-data benchmarks. Benchmark administrators of such dually-designated benchmarks would be subject to the requirements under Part 8.1.

However, as provided by subsection 40.1(4), such benchmark administrators would be exempted from certain policy and control requirements relating to the process of contributing input data, from the requirement to publish certain explanations for each determination of the benchmark, and from the requirement for an assurance report. The exemptions under subsection 40.1(4) are meant to ensure that administrators of benchmarks dually designated as commodity and regulated-data benchmarks receive comparable treatment under Part 8.1 as administrators of designated regulated-data benchmarks under Parts 1 to 8.

Given the interpretation provided by paragraph 1(3)(a) of the Regulation as to when input data is considered to have been “contributed”, as described earlier in this Policy Statement, input data for regulated-data benchmarks would not generally be considered to be contributed. Therefore, certain requirements that are only applicable if there is a contributor or if input data is contributed, would not apply to a benchmark that is dually designated as a commodity benchmark and a regulated-data benchmark. Examples include the requirements in paragraphs 40.4(2)(g), (h) and (i), paragraphs 40.7(2)(d) and (e) and section 40.9.

For clarity, we would not designate a regulated-data benchmark that is also a commodity benchmark, whether dually designated as such or only as a regulated-data benchmark, as a critical benchmark.

Section 40.2 – Non-application to designated commodity benchmarks

Physical commodity markets have unique characteristics which have been taken into account in determining which requirements should be imposed on designated benchmark administrators in respect of designated commodity benchmarks. Consequently, section 40.2 includes a number of exemptions from certain requirements for such benchmark administrators, either because some are not suitable or because more appropriate substituted requirements are provided under Part 8.1 of the Regulation. Requirements that are relevant to designated benchmark administrators of designated commodity benchmarks have been excepted from the exemptions in section 40.2, and include, among others, the requirements for:

- policies and procedures as set out in subsection 5(1),
- a compliance officer as set out in section 6,
- reporting on contraventions in section 11,
- policies and procedures regarding complaints, as set out in section 12,
- outsourcing under section 13,
- the publishing of a benchmark statement under section 19, and

- providing notice of changes to and cessation of a benchmark, as provided under section 20.

In addition to the guidance provided in this Policy Statement with respect to paragraph 12(2)(c), we expect disputes as to pricing determinations that are not formal complaints to be resolved by the designated benchmark administrator of a commodity benchmark with reference to its appropriate standard procedures. In general, we would expect that if a complaint results in a change in price, whether the complaint is formal or informal, then the details of that change in price will be communicated to stakeholders as soon as possible.

With respect to section 13, for the purposes of securities legislation, a designated benchmark administrator remains responsible for compliance with the Regulation despite any outsourcing arrangement.

Paragraph 19(1)(a) of the Regulation provides that a required element of the benchmark statement for a designated benchmark is a description of the part of the market the designated benchmark is intended to represent. This relates to the benchmark's purpose. A commodity benchmark may be intended to reflect the characteristics and operations of the referenced underlying physical commodity market and may be used as a reference price for a commodity and for commodity derivative contracts.

Section 40.4 – Methodology to ensure the accuracy and reliability of a designated commodity benchmark

We expect that the methodology established and used by a designated benchmark administrator will be based on the applicable characteristics of the relevant underlying interest of the designated commodity benchmark for that part of the market that the designated commodity benchmark is intended to represent, such as the grade and quality of the commodity, its geographical location, seasonality, etc., and will be sufficient to provide an accurate and reliable benchmark. For example, the methodology for a crude oil benchmark should reflect the following, but not be limited to, the specific crude grade (e.g., sweet or heavy), the location (e.g., Edmonton or Hardisty), the time period within which transactions are concluded during the trading day, and the month of delivery.

We further expect that, where consistent with the methodology of the designated commodity benchmark, priority will be given to input data in the order of priority set out below:

- (a) concluded transactions in the underlying market that the designated commodity benchmark is intended to represent;
- (b) if the input data referred to in paragraph (a) is not available or is insufficient in quantity to determine the designated commodity benchmark in accordance with its methodology, bids and offers in the market described in paragraph (a);
- (c) if the input data referred to in paragraphs (a) and (b) is not available or is insufficient in quantity to determine the designated commodity benchmark in accordance with its methodology, any other information relating to the market described in paragraph (a) that is used to determine the designated commodity benchmark; and
- (d) in any other case, expert judgments.

Subparagraph 40.4(2)(a)(ii) – Specific reference unit used in the methodology

The specific reference unit used in the methodology will vary depending on the underlying commodity. Examples of possible reference units include barrels of oil or cubic meters (m³) in respect of crude oil, and gigajoules (GJ) or one million British Thermal Units (MMBTU) in respect of natural gas.

Paragraph 40.4(2)(c) – Relative importance assigned to each criterion used in the determination of a designated commodity benchmark

The requirement in paragraph 40.4(2)(c) regarding the relative importance assigned to each criterion, including the type of input data used and how and when expert judgment may be exercised, is not intended to restrict the specific application of the relevant methodology, but to ensure the quality and integrity of the determination of the designated commodity benchmark.

Paragraph 40.4(2)(j) – Circumstances in which transaction data may be excluded in the determination of a designated commodity benchmark

Where and to the extent that concluded transactions are consistent with the methodology of a designated commodity benchmark, we expect that a benchmark administrator will include all such concluded transactions in the determination of the designated commodity benchmark. This is not intended to reduce or restrict a benchmark administrator’s flexibility to determine the methodology or to determine whether certain input data is consistent with that methodology. Rather, it is intended to clarify that where data is determined by the benchmark administrator to be consistent with the methodology of the designated commodity benchmark, we expect all such data to be included in the calculation of the benchmark.

We consider “concluded transactions” to mean transactions that are executed but not necessarily settled.

Section 40.6 – Review of methodology

We expect that a designated benchmark administrator will determine the appropriate frequency for carrying out an internal review of a designated commodity benchmark’s methodology based on the specific nature of the benchmark (such as the complexity, use and vulnerability of the benchmark to manipulation) and the applicable characteristics of the part of the market (or changes thereto) that the benchmark is intended to represent. In any event, the administrator must review the methodology at least once every 12 months.

Paragraph 40.7(2)(a) – Quality and integrity of the determination of a designated commodity benchmark

While we recognize a benchmark administrator’s flexibility to determine its own methodology and use of market data, we expect an administrator to use input data in accordance with the order of priority specified in its methodology.

Furthermore, we expect that the designated benchmark administrator will employ measures reasonably designed to ensure that input data contributed and considered in the determination of a designated commodity benchmark is *bona fide*. By *bona fide* we mean that parties contributing the input data have executed or are prepared to execute transactions generating such input data and that executed transactions were concluded between parties at arm’s length. If the latter is not the case, then particular attention should be paid to transactions between affiliated entities and consideration given as to whether this affects the quality of the input data to any extent.

Section 40.8 – Transparency of determination of a designated commodity benchmark

We expect that, in providing an explanation of the extent to which, and the basis upon which, expert judgment was used in the determination of a designated commodity benchmark, a designated benchmark administrator will address the following:

- (a) the extent to which a determination is based on transactions or spreads, and interpolation or extrapolation of input data;

(b) whether greater priority was given to bids and offers or other market data than to concluded transactions, and, if so, the reason why;

(c) whether transaction data was excluded, and, if so, the reason why.

Section 40.8 requires a designated benchmark administrator to publish the specified explanations for each determination of a designated commodity benchmark. However, we recognize that, to the extent that there have been no significant changes, a standard explanation may be acceptable, and any exceptions in the explanation must then be noted for each determination. We generally expect that the specified explanations will be provided contemporaneously with the determination of a benchmark, but recognize that unforeseen circumstances may cause delays, in which case, we still expect that explanation to be published as soon as reasonably practicable.

Section 40.9 – Policies, procedures, controls and criteria of the designated benchmark administrator to ensure the integrity of the process of contributing input data

There are no specific requirements under Part 8.1 for benchmark contributors with respect to commodity benchmarks, as under Part 6 for financial benchmarks, nor, consequently, obligations on designated benchmark administrators to ensure that the benchmark contributors adhere to such requirements. However, section 40.9 does require an administrator to ensure the integrity of the process for contributing input data. We are of the view that such policies, procedures, controls and criteria will promote the accuracy and integrity of the determination of the commodity benchmark.

Paragraph 40.9(d) – Criteria relating to the contribution of transaction data

In establishing criteria that determine the appropriate contribution of transaction data by benchmark contributors, we would expect that the criteria would include encouraging benchmark contributors to contribute transaction data from the back office of the benchmark contributor. We consider the back office of a benchmark contributor to be any department, division or other internal grouping of a benchmark contributor, or of an affiliated entity of a benchmark contributor, that performs any administrative and support functions, including, as applicable, settlements, clearances, regulatory compliance, maintaining of records, accounting and information technology services on behalf of the benchmark contributor or of the affiliated entity of the benchmark contributor. In general, we consider the back office of a benchmark contributor, or of an affiliated entity of a benchmark contributor, to be comprised of employees or agents who support the generation of revenue for the benchmark contributor or the affiliated entity.

Subsection 40.10(3) – Governance and control requirements

To foster confidence in the integrity of a designated commodity benchmark, we are of the view that benchmark individuals involved in the determination of a commodity benchmark should be subject to the minimum controls set out in subsection 40.10(3). A designated benchmark administrator must decide how to implement its own specific measures to achieve the objectives set out in paragraphs (a) to (e).

Section 40.11 – Books, records and other documents

Subsection 40.11(2) sets out the minimum records that must be kept by a designated benchmark administrator. We expect an administrator to consider the nature of its benchmarks-related activity when determining the records that it must keep.

In addition to the record keeping requirements in the Regulation, securities legislation generally requires market participants to keep such books, records and other documents as may reasonably be required to demonstrate compliance with securities law of the jurisdiction.

Section 40.12 – Conflicts of interest

We expect the policies and procedures required under subsection 40.12(1) for identifying and eliminating or managing conflicts of interest to provide the parameters for a designated benchmark administrator to

- identify conflicts of interest,
- determine the level of risk, to both the benchmark administrator and users of its designated commodity benchmarks, that a conflict of interest raises, and
- respond to a conflict of interest by eliminating or managing the conflict of interest, as appropriate, given the level of risk that it raises.

In establishing an organizational structure, as required under subsections 40.10(1) and (2), that addresses the conflict of interest requirements under subsection 40.12(3), the designated benchmark administrator should ensure that persons responsible for the determination of the designated commodity benchmark:

- are located in a secure area apart from persons that carry out other business activity, and
- report to a person that reports to an executive officer that does not have responsibility relating to other business activities of the administrator.

Section 40.13 – Assurance report on designated benchmark administrator

Under Part 8.1, there is no requirement for an oversight committee, as provided by section 7. Therefore, for purposes of section 40.13, there is no oversight committee to specify whether a limited assurance report on compliance or a reasonable assurance report on compliance needs to be provided by a public accountant. We would expect the designated benchmark administrator to determine which report is appropriate, based on the specific nature of the designated commodity benchmark, including the complexity, use and vulnerability of the benchmark to manipulation, and the applicable characteristics of the market that the benchmark is intended to represent, or other relevant factors regarding the administration of the benchmark.”.