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PER MAIL

Public Comment on Financial Benchmarks

Dear Sir,

The attached paper constitutes the response of EUSIPA to the IOSCO Consultation on Financial Benchmarks dated January 2013.

EUSIPA stands for European Structured Investment Products Association and represents the issuers of note-based and listed Structured Investment Products to retail customers. Our members are national industry associations from Austria, France, Germany, Italy, Sweden and Switzerland. Members of these national associations are major banking institutions such as, for example, BNP Paribas, Citi, Commerzbank, Deutsche Bank, Royal Bank of Scotland, Société Générale and HVB Unicredit.

Structured Investment Products, also called certificates in some markets, are securitised debt papers for which the issuer, usually a bank, takes the debtor position. The products are called structured because the pay-out to the investor depends on several clearly defined, or "constructed", conditions. These conditions mainly relate to the performance of an underlying asset (e.g. a share, a bond, a currency, a commodity or an index), over a certain time span. The product landscape in the EU's main markets provided for a volume (called open interest) of around 240b Euro (including Switzerland of around 430b Euro) in Q2 2012.

Members of EUSIPA have a close interest in the proper functioning of indices because products whose pay-off algorithm is based on an index (index-linked products) constitute a considerable part of the structured products universe.

However, members of EUSIPA also attach high importance to stressing that any future regulation of indices must not disregard that the notion of "index" is not exclusively used to designate market indices such as, e.g., the LIBOR; EURIBOR, FTSE 100, or DAX®. It rather also designates **customized proprietary indices** that reflect

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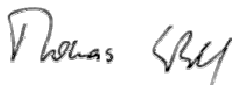
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rules-based investment strategies hypothetically (i.e., with not necessarily any actual trading or investment activities) conducted by the index sponsor ("**Strategy Indices**"). Unfortunately, the definition of "Benchmark" used in the consultation is so broad that it does not only cover market indices, but also encompasses Strategy Indices. This is somewhat of a concern because the questions asked in the consultation seem in most cases to be specifically aimed at market indices insofar as they disregard the peculiarities of Strategy Indices. Therefore, we expect that many answers will also not reflect the difference between market indices and Strategy Indices. This has the potential to create a massively wrong perception, as (also desirable) rules on the creation, calculation, publication, transparency and governance of market indices do not at all fit to Strategy Indices.

Further, we are of the opinion that any new regulation should encompass proper grandfathering rules with respect to existing Benchmarks, i.e. those existing Benchmarks should not be subject to any new regulation or only in a limited way as otherwise the restructuring of existing transactions could be highly costly with only limited additional benefits for the investors.

We hope you find the thoughts summarized in attached paper useful and encourage you to contact us should further background be needed.

Yours sincerely,



Thomas Wulf
Secretary General, EUSIPA



Dr. Nikolaus Dominik Neundörfer
Head of Legal Committee, EUSIPA

ANSWERS TO SPECIFIC CONSULTATION QUESTIONS

of the

European Structured Investment Products Association (EUSIPA)

on the

IOSCO Consultation on Financial Benchmarks

EUSIPA chooses to provide specific answers to the following Consultation questions.

- 1. Do you agree with the scope of the report and intended audience? Are there other Benchmarks or stakeholders that have idiosyncrasies that should place them outside of the scope of the report? Please describe each Benchmark or stakeholder and the idiosyncrasies that you identify and the reasons why in your view the Benchmark or stakeholder should be placed outside of the scope of the report.*

It is our understanding that the regulatory initiatives which this Consultation is part of can only be seen from a political perspective. Recent events gave rise to concerns with respect to the integrity of certain indices.

Indices used as a "Benchmark" are instrumental to a very large part of the structured investment products universe issued by our members. Consequently, our members have a close interest in ensuring the integrity of any such indices. Therefore, we welcome a sound regulatory environment for Benchmarks to be in place. However, any regulatory changes of the *status quo* should be tailored to only address areas where such enforced regulation is really required.

First of all, we note that it is necessary to make a difference between indices that are objective reference data (as, e.g., the LIBOR; EURIBOR, FTSE 100, or DAX[®]), and "**Strategy Indices**", i.e., customized proprietary indices that reflect rules-based investment strategies hypothetically (i.e., with no actual trading or investment activities) conducted by the index sponsor, who basically allocates a hypothetical amount of money as provided for by the index description.

Such indices represent customized investment strategies and are therefore actually extended parts of the pay-off mechanism of any financial product, which either are incorporated in the relevant product terms & conditions (if the product is a structured security) or the agreement (if the product is traded OTC). As a consequence, any investor in a product linked to a Strategy Index has a contractual right versus his counterparty on that the index methodology is being strictly followed, which is protected by the national laws on unfair contract terms.

This fundamental difference between indices that are based on objective data, and Strategy Indices is also recognised by the EU Prospectus Regulation (i.e. Annex XII No. 4.2.2. (ii) of Regulation (EU) No 486/2012 amending the Prospectus Regulation (EC) No 809/2004) that basically treats indices composed by the issuer of a security as part of the pay-off formula. Anyway, it cannot really make a difference whether the index description of a Proprietary Index is set out in a separate document (to which reference is made in the terms & conditions of the financial product) or is directly inserted in the terms & conditions.

Secondly, from a structured products perspective, appropriate control to ensure that both market indices and Strategy Indices fit for the purpose of relevant investors, can already be achieved by applying the relevant product regulatory framework (e.g., in the EU/EEA, the MiFID). As investors cannot directly invest into an index, an exposure is only possible by way of investing in a financial product with a pay-off structure linked to the index. As such financial products necessarily fall within the scope of the relevant product regulatory framework (e.g., in the EU/EEA, the MiFID) the responsibility to assess the suitability of the index (and of the financial product) lies basically with the distributor, and, alternatively, with the manufacturer of the index-linked products who might determine on a generic basis for what category of investors a financial product linked to a specific index might be suitable.

Therefore, where an index, e.g. a Strategy Index is 'wrapped' in another product and sold under applicable protective laws (such as the MiFID-regime), we do not see a need for regulatory reform.

We underline again that Strategy Indices are a mere tool to provide the investor in the referencing product with an exposure to a specific investment strategy. Strategy Indices should therefore not be confused / regulated together with market indices.

2. Do you agree that the design of a Benchmark should clearly reflect the key characteristics of the underlying interest it seeks to measure?

The characteristics of underlying interests described in this section of the Consultation Document refer to an existing market which is not appropriate in the case of Strategy Indices, as Strategy Indices are predominantly a means to provide the investors with exposure to a specific investment strategy and not an existing market.

3. What measures should Administrators take to ensure the integrity of information used in Benchmark-setting and that the data is bona fide? Please highlight any additional measures required where Benchmarks are survey based. Please also comment on each of the factors identified in the discussion on the vulnerability of data inputs such as voluntary submission, and discretion exercised by Administrators. Are these measures

adequately reflected in the discussion of roles and responsibilities of the Administrator discussed in section E?

4. *What measures should Submitters implement to ensure the integrity of information provided to Administrators? Are these measures adequately reflected in the discussion of a code of conduct for Submitters discussed in section E? In particular, should Submitters submit all input data, and not a selection of such data so as to maximise the representation of the underlying market? Please comment on any practical issues that compliance with such an approach may give rise to.*

Regarding the role of the Administrator we would like to make the following general remark: Potentially desirable rules on the creation, calculation, publication, transparency and governance of market indices cannot reasonably be equally applied to Strategy Indices. Any regulation of requirements in respect of the calculation of indices that would equally apply to Strategy Indices would be confusing to the market participants and – without any need, as the law on unfair contract terms provides sufficient protection to investors in products linked to a Strategy Index – intrude in the contractual relationship between the parties to financial products linked to proprietary indices.

Under the respective contractual relationships, the Administrator is bound to calculate the Strategy Index as agreed and therefore has an interest that information received via Submitters (if any) is of an integer nature.

5. *What level of granularity with regard to the transparency of Methodologies would enable users to assess the credibility, representativeness, relevance and suitability of a Benchmark on an on-going basis and its limitations with respect to their intended use? Relevant factors could include; criteria and procedures used to develop the Methodology, type of data used, how data is collected, relative weighting of data used, how and when judgement is used, contingency measures (e.g., methods when transaction data is unavailable, etc.), publication of information supporting each Benchmark determination, etc. Please provide examples where you consider there are currently significant gaps in the provision of this information.*

Having existing regulation regarding transparency and rules for distribution in mind, we do not see a need for regulatory action in this field.

7. *What steps should an Administrator take to notify Market Participants of material changes to a Benchmark Methodology (including to Benchmark components) and to take their feedback into account?*

In the case of Strategy Indices, any changes are already governed by the existing rules for each 'wrapper', meaning the legal format of a product, and thus basically an issue of contractual law. We do not see a need for regulatory action in this field.

9. *The Consultation Report discusses a number of potential conflicts of interest that may arise at the level of the Submitters, between Submitters at different entities, and between Submitters, Administrators and other third parties. Are there other types of conflicts of interest that have not been mentioned that you consider may arise? If so, how best should these conflicts of interest be addressed? Are the measures discussed in the Consultation Report sufficient to address potential conflicts of interests at the level of the Submitters, between Submitters at different entities, and between Submitters, Administrators and other third parties?*
10. *Do you agree that the Administrator's oversight committee or other body could provide independent scrutiny of all relevant activities and management of conflicts of interest? Please comment if and why any different approaches might be appropriate for different kinds of Benchmarks. For example, where Administrators simultaneously act as the trade body for Submitters to the Benchmark. What is the minimum level of independent representation this committee or body should include?*

Additional regulation such as, for instance, Chinese walls between distribution and trading departments would not give investors in products linked to Strategy Indices any additional benefit, as such investors have, as mentioned before, a contractual claim to the proper execution of the index description.

Questions 19. to 29. regarding Regulatory Distinctions

We welcome the distinctions as set out in B.3. We are convinced that existing regulation addresses the reliability and governance concerns raised in the Consultation. As Strategy Indices are a structural component of the exchange traded derivatives and securities in question, we are of the opinion that there is already a sufficient level of indirect regulation via the regulation of the 'wrapper'.

31. *Are there specific Benchmarks for which you consider that observable transactional data is not an appropriate criterion or the sole criterion? If so, please provide a description of such Benchmarks and what value you think such Benchmarks provide?*

In the case of Strategy Indices, the focus is on providing the investor in the 'wrapper' with exposure to a specific proprietary trading style. This does not exclude transactional data as an input in order to calculate the current yield of such trading style. However, the focus in the case of Strategy Indices is clearly on the trading style as such. The contractual obligations under the specific 'wrapper' make necessary an adequate calculation of such current yield of the particular trading style. Assuming anything to the contrary would put a whole asset class under the suspicion of fraudulent behaviour.

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