June 12, 2019

BY EMAIL ONLY

The Secretary
Ontario Securities Commission
20 Queen Street West, 22nd Floor
Toronto, Ontario M5H 3S8
comment@osc.gov.on.ca

AND TO

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, rue du Square Victoria, 4e étage
C.P. 246, Place Victoria
Montréal, Québec H4Z 1G3
consultation-en-cours@lautorite.qc.ca

Dear Sirs/Madams,

Re: Proposed National Instrument 25-102 Designated Benchmarks and Benchmark Administrators and Companion Policy

TMX Group Limited ("**TMX**" or "**we**") welcomes the opportunity to comment on the proposed National Instrument 25-102 Designated Benchmarks and Benchmark Administrators and its Companion Policy, as published by the Canadian Securities Administrators ("**CSA**") in a Notice and Request for Comment dated March 14, 2019 (the "**Notice**"). Capitalized terms used in this letter and not otherwise defined have the meaning given to them in the Notice.

TMX is an integrated, multi-asset class exchange group. TMX's key subsidiaries operate cash and derivatives markets for multiple asset classes, including equities and fixed income, and provide clearing facilities, data driven solutions and other services to domestic and global financial and energy markets. Toronto Stock Exchange, TSX Venture Exchange, TSX Alpha Exchange, The Canadian Depository for Securities Limited, Montreal Exchange, Canadian Derivatives Clearing Corporation, Shorcan Brokers Limited and other TMX companies provide listing markets, trading markets, clearing facilities, data products and other services to the global financial community and play a central role in Canadian capital and financial markets.

TMX welcomes and supports the CSA's efforts to develop a regulatory regime for benchmarks aiming to establish an EU BMR-equivalent benchmark regulatory regime and to reduce risk in Canada's capital markets, thereby protecting Canadian investors and other Canadian market participants. These objectives are sound, and in line with other efforts globally to implement the IOSCO Financial Benchmark Principles.

As drafted, Proposed NI 25-102 goes beyond the IOSCO Financial Benchmark Principles, and even beyond the EU BMR in some respects, and adopts a very prescriptive approach to implementing these principles. We are also concerned that the Proposed NI 25-102 does not sufficiently address the significant differences between submission-based benchmarks and public data-based benchmarks, as acknowledged in the IOSCO Financial Benchmark Principles. TMX is of the view that the Canadian regime should seek to ensure compliance with the IOSCO Financial Benchmark Principles, which have proven to be a workable framework over the last few years for major global benchmark providers. The need to regulate beyond these principles is unclear, and in our view would have unintended negative consequences for Canadian market participants. Proportional implementation being at the core of the IOSCO Financial Benchmark Principles, we suggest that a principles-based regime in line with the IOSCO Financial Benchmark Principles would be a more appropriate first step, followed by future assessment, which could lead to more prescriptive regulation if warranted based on experience.

A. Alignment with Overarching Objectives

a) Objective of the IOSCO Financial Benchmark Principles

It is useful to recall the main objective of the IOSCO Financial Benchmark Principles, which was to create an overarching framework of principles for benchmarks used in financial markets, particularly to address conflicts of interest in the benchmark setting process, as well as transparency and openness when considering issues relating to transition. IOSCO's Task Force has identified factors to be taken into account when assessing the risks of a benchmark: submissions to benchmarks, content and transparency of methodologies, and governance process. The IOSCO Financial Benchmark Principles were developed to address these vulnerabilities.

It is also important to recall the scope of the IOSCO Financial Benchmark Principles:

> *"Benchmark Administration by a National Authority used for public policy purposes (e.g., labour, economic activity, inflation or consumer price indices) is not within the scope of the Principles. However, Benchmarks where a National Authority acts as a mechanical Calculation Agent are within the scope of the Principles. The Principles also exclude reference prices or settlement prices produced by Central Counterparties (CCPs), provided that they are produced solely for the purposes of risk management and settlement. The prices of single financial securities (e.g., equity securities underlying stock options or futures) are not considered Benchmarks for the purposes of these Principles."*

As a general comment, we note that Proposed NI 25-102 seems to go beyond the stated objective and scope of the IOSCO Financial Benchmark Principles. We also note that the EU BMR provides that in establishing equivalency, the European Commission will in particular take into account whether the legal framework and supervisory practice of a third country ensures compliance with the IOSCO principles.[1] The Notice does not discuss why it would be necessary or beneficial in Canada to establish legislation that extends beyond the objective or the scope of the IOSCO Financial Benchmark Principles.

Finally, it is also important to note that the IOSCO Financial Benchmark Principles recognize that the expectation is not to find a one-size-fits-all method of implementation and that their application and implementation should be proportional to the size and risks posed by each benchmark or administrator. Given the broad definition of "benchmark" in Proposed NI 25-102, we believe the Canadian market would be better served by a regulation that is more principles-based, rather than very prescriptive and detailed. This would provide the CSA with the tools to properly regulate and oversee benchmarks and their administrators in Canada, with the flexibility to impose more detailed requirements in recognition documents, if and as appropriate, while avoiding a regulatory framework that has the effect of driving benchmarks and their administrators into a specific model. While a broad range of benchmarks should appropriately be in scope, not all of them require the same scrutiny and not all administrators have, or need to have, the same practices and structures.

We acknowledge and support the discretionary ability of the regulators to grant exemptions under Proposed NI 25-102. We believe this power, as well as legal certainty and clarity, would be better served if the regulation provided for a framework of guiding principles that would inform the exercise of that discretion.

b) Equivalency

Similarly, TMX does not believe that Proposed NI 25-102 should go beyond the EU BMR regime. As mentioned above, the EU BMR equivalence assessment seems to be grounded in assessing if the third-country regime ensures compliance with the IOSCO Financial Benchmark Principles. The draft Implementing Decisions with respect to Singapore and Australia, the first jurisdictions to have gone through the equivalency assessment under the EU BMR, are informative as to what the European Commission will be looking at.[2] We do not believe that the EU BMR's objective is to impose regulation in third-country regimes that goes beyond the IOSCO Financial Benchmark Principles, and it is not reasonable to assume that equivalency will require that the third-country regime goes beyond the EU BMR itself. We are concerned that the Proposed NI 25-102 goes beyond the EU BMR in certain significant aspects. For example, Proposed NI 25-102 imposes significant formal obligations on benchmark users that are not contemplated in as much detail by

[1] See article 30 of the EU BMR.

[2] See European Commission (2019), 'Recognition of financial benchmarks in Australia', Implementing decision. Available at: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-1806384_en and European Commission (2019), 'Recognition of financial benchmarks in Singapore', Implementing decision. Available at: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-1806355_en

the EU BMR (nor at all by the IOSCO Financial Benchmark Principles, Australia's regime or Singapore's regime to our knowledge).

Separately, we note that while RBSL administers two important Canadian benchmarks, it is a UK-based company regulated by the FCA and is currently already approved in the EU by ESMA as it pertains to CDOR and CORRA. We also note that S&P Dow Jones Indices LLC has been endorsed in the EU under article 33 of the EU BMR and that the S&P/TSX indices are already recognized by ESMA.[3] Under the EU BMR, it is important to note that equivalence under article 30 is one of three options for non-EU benchmarks to obtain recognition in the EU, in addition to recognition of the administrator directly under article 32 and endorsement under article 33.

We understand that Canadian regulators may want to have direct oversight of benchmark administrators administering Canadian benchmarks and that ensuring Canada may be deemed equivalent, despite other recognition options, may be desirable. However, we encourage the CSA to consider already existing obligations and regimes applicable to foreign global benchmark providers and to ensure harmonization on a global level as much as possible.

c) Reducing Risk in Canada's Capital Markets

i. Striking the Right Balance Between Benchmark Strengthening and Regulatory Burden Is Important

We acknowledge regulating benchmarks is not an easy task. While stakeholders would agree that market participants need to be able to have confidence in a benchmark's integrity and reliability, the risks that excessive requirements or regulation could have unintended negative impacts, like reduced participation in the submission process and therefore reduced representativeness of a benchmark, should not be overlooked. Similarly, the risk of increasing the burden on benchmark administrators so much that this activity is deemed too risky or that the increased compliance costs get passed to end-users, especially in the context of a multitude of regulations in different jurisdictions, must be analyzed and addressed.

We believe the most crucial aspects to be addressed are appropriate transparency around the methodology and sound benchmark-setting governance process, particularly with respect to submission-based benchmarks. If regulation can ensure the strength of these aspects, it should then be left to users to assess whether the benchmark should be used and for which purpose.

As stated above, over the years, the IOSCO Financial Benchmark Principles have been mostly adopted as the international best practices. These principles focus on imposing obligations on administrators, who generally receive a benefit for their administration, as opposed to contributors (who are targeted through obligations on the administrators) or users. Moreover, while the administrator often receives compensation for its activities, it is important not to create an environment within which the regulatory risks of administering a benchmark disproportionately

[3] See the Third Country Benchmarks Register available at https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_bench_benchmarks

harm the commercial viability of the undertaking. What would be even worse than not regulating financial benchmarks in Canada would be to over-regulate them, to the point that the regulation itself would contribute to exacerbating the potential harms that the regulation is attempting to attenuate. We encourage the CSA to review its proposed obligations to be imposed on administrators, contributors and users to align them with the IOSCO Financial Benchmark Principles.

In particular, with respect to users targeted under section 22, we do not believe introducing obligations on these users in a benchmark regulation is appropriate. We believe that the regulatory framework already applicable to these entities covers the objective of this section, namely to mitigate the risks posed to these entities with respect to their use of benchmarks. The publication of best practices (either by the CSA or the administrators) would be a more proportional avenue, or at the very least, these obligations should be incorporated in the regulations governing these entities rather than in Proposed NI 25-102. Finally, if the CSA deems it necessary to regulate users in such a specific manner with respect to benchmarks, the language used should be aligned to the EU BMR article 28, paragraph 2.

B. TMX and Stakeholder Impacts

As currently drafted, several TMX entities could potentially be designated as administrators or targeted as contributors and users of benchmarks. In addition to the broader regulatory policy considerations above, we have analyzed the Proposed NI 25-102 from a compliance perspective. We have the following concerns.

a) Clarity and legal certainty

i. Harmonization of definitions

Unless justified by a Canada-specific consideration, we believe the definitions of the main concepts should be aligned with the IOSCO Financial Benchmark Principles definitions. For example, it is unclear to us:

- why the definition of benchmark differs slightly between Proposed NI 25-102 and the IOSCO Financial Benchmark Principles;
- why different terms were chosen under Proposed NI 25-102 to refer to the same concepts as the terms used under the IOSCO Financial Benchmark Principles; or
- why some foundational definitions are not incorporated into Proposed NI 25-102 (administration, for example).[4]

[4] In some cases, the term is defined in Proposed NI 25-102, but in a circular way. For example, Proposed NI 25-102 defines “benchmark administrator” as a person or company that administers a benchmark.

This creates interpretation challenges as we try to assess all of the impacts of this proposed regulation. All relevant terms should be clearly defined, in a manner consistent with the IOSCO Financial Benchmark Principles, unless a different definition is warranted in the Canadian context.

ii. Lack of legal certainty around conditions for designation, obligations, etc.

Proposed NI 25-102 does not establish the requirements for designation or the circumstances in which a benchmark or an administrator will be designated. While we acknowledge the Proposed Companion Policy provides some more detailed guidance, companion policies are not enforceable regulation. The regulation itself should provide for clear obligations as to which benchmarks and administrators may be required to obtain designation in Canada and under which conditions. The same comment is valid for the categories of benchmark created. This will allow legal certainty not only for the administrator, but also for the contributors to those benchmarks on which the regulation imposes obligations (as well as users, although we reiterate our comment that users shouldn't be directly regulated under Proposed NI 25-102).

We also note standards for some obligations that are unusual for securities regulations. For example, the standard of a reasonable person appears in various places to set obligation standards. Typically, regulations should create either clear obligations or establish principles within which the relevant regulatory authority may exercise some discretion. We are aware of the use of the reasonable standard in securities regulation with respect to public companies' disclosures. In this context, while the interpretation of a reasonable person's expectation may still lead to interpretation challenges, the standard is not surprising given that the disclosures are intended specifically for use by the public. By contrast, the introduction of a reasonable person standard in the manner in which it is used in Proposed NI 25-102 will create interpretation, compliance and enforcement challenges.

iii. Harmonization with other securities laws and regulations

Where concepts or principles referred to in Proposed NI 25-102 already exist in other securities laws or regulations, these concepts or principles should be referred to or imported into Proposed NI 25-102. Similarly, we would caution against creating new concepts in Proposed NI 25-102 that are not found elsewhere in securities laws generally.

For example, Section 5(4) defines independence for board members of an administrator with a unique set of criteria that are not aligned with the already existing principles of independence in National Instrument 52-110 Audit Committees ("**NI 52-110**"). Creating unique independence criteria is in contrast to many other securities law instruments and rules, including TMX entities' recognition orders and recognition decisions, which refer to NI 52-110, even when the content is not directly related to audit committees per se. We highlight, among others, sub-paragraph (c) that would make an independent director non-independent after five (5) years on the board. Specifically with respect to the CSA's question number 4 in the Notice, we recommend relying on NI 52-110 and we do not support adopting a reasonable person standard.

As well, we do not think it is appropriate to prevent the Chief Compliance Officer of an administrator to be compensated based on the financial performance of the administrator as contemplated under section 7(6). We agree that it is extremely important to not link the compensation solely to the performance of the benchmark itself, as contemplated under subparagraph (b), and we support this proposed prohibition. But subparagraph (a) is not the approach adopted in other securities legislation that mandates a Chief Compliance Officer role.[5] There is not a *de facto* conflict in linking the compensation of the Chief Compliance Officer with the overall financial performance of the administrator, which may have many other parts to its business that contribute to financial performance. In fact, overall financial performance should also reflect sound and efficient compliance. Preventing the Chief Compliance Officer to be compensated based on the financial performance of the administrator is not reasonable and may hinder benchmark administrators in recruiting qualified individuals to fill this important role in an environment where competition for talented compliance officers is becoming increasingly competitive.

We also invite the CSA to review the level of obligations imposed on the Chief Compliance Officer. It seems that certain provisions create standards or thresholds that are unusual. We note for example Section 7(3)(c) which requires the Chief Compliance Officer to advise the board of suspected non-compliance reasonably expected to create risks or that is part of a pattern of non-compliance. A duty to investigate and report instances of actual non-compliance would be more typical and appropriate. We also make the same comment with respect to section 11(3) that requires disclosure of a risk of a significant conflict of interest, section 12 in terms of reporting conduct that might involve manipulation or attempted manipulation and with respect to section 16(2) that requires the administrator to not use input data if it has any indication that the benchmark contributor doesn't comply with the code of conduct. Such vague standards create the potential for increased risks as opposed to reducing them. With respect to question number 5 in the Notice, we do not believe it is the role of a Chief Compliance Officer to assess compliance of the benchmark with the methodology. The role is to ensure the appropriate governance and internal control framework for compliance is in place.

Finally, as currently contemplated, we do not believe that the oversight committee provided for under section 8 and the powers entrusted to them are consistent with corporate law principles that, in most jurisdictions, put ultimate corporate oversight powers into the hands of the board of directors. We would expect that the day-to-day responsibilities for administration of benchmarks in most cases would be fulfilled by management rather than a board of directors, with the board or a committee of the board fulfilling an oversight role. Proposed NI 25-102 seems to contemplate almost the opposite scenario. We do not think the proposal is workable in practice.

This section also seems to go beyond what is contemplated under IOSCO Financial Benchmark Principle 5 - Internal Oversight. There could be overlap between the responsibilities of the management team, including the Chief Compliance Officer, and the Oversight Committee. We

[5] See for example National Instrument 24-102 Clearing Agency Requirements.

also question whether the Oversight Committee, which is an external committee, would be able to fulfill all of the obligations to the extent contemplated and what type of liability these obligations will create for Oversight Committee members. It also seems unusual to us to impose on such a committee obligations to report to securities regulators.

iv. Models for Designation and Ongoing Regulatory Oversight

The Notice refers to four options being considered for processing the designation and regulation of benchmarks and benchmark administrators by the CSA. TMX believes a non-coordinated review model would not be in the interest of any stakeholder. It is important that the CSA members coordinate among themselves the designation and oversight of benchmarks for the sake of efficient use of resources as well as consistency and clarity. The risk that two different regulatory authorities in Canada would take a different approach to the same benchmark is not desirable for any Canadian market participant.

Although TMX does not have a view in terms of which of the coordinated approaches among the three other options would be the best, we strongly suggest modifying Proposed NI 25-102 to ensure that the CSA will request public comments before issuing a designation order or decision on a specific benchmark. The Proposed NI 25-102 is so broad in scope that it is difficult at this point to contemplate and comment generally on the realm of impacts this proposed regulation could have, given that many of these impacts would be benchmark-specific. For example, real-estate market benchmarks which currently could be caught under the broad definition of "Benchmark", would not raise the same concerns, challenges and opportunities as CDOR and CORRA, the benchmarks we understand the CSA is immediately concerned with. It will be important to give the public an opportunity to comment on specific benchmark designations contemplated.

b) Contributor obligations

Generally, the IOSCO Financial Benchmark Principles do not impose obligations directly on contributors, but rather on administrators to impose a code of conduct and other obligations to the contributors. This approach recognizes that contributions are provided voluntarily by market participants who are not always regulated and not compensated for their contribution. Imposing a regulatory burden on contributors risks to disincentivize contributors, which in turn creates the risk of diluting the quality of the benchmark. We support regulation on contributors that makes it an offense to try to manipulate a benchmark or to provide data that the contributor knows is false, and we support regulation that imposes certain governance requirements on contributors. However, we believe that as currently drafted, Proposed NI 25-102 goes too far in imposing a set of detailed obligations directly on contributors, which could discourage contributors to contribute. If the cost of compliance is too high and outweighs the benefit of contributing, then contributors will cease to contribute, and benchmarks will be at risk of losing valuable input content. If the CSA feels strongly that imposing requirements on contributors directly is necessary, a principles-based approach rather than prescriptive obligations, may be a good alternative.

c) Exclusion of exchanges, clearing houses and transaction data as input data

As contemplated by the IOSCO Financial Benchmark Principles and the EU BMR, we submit that prices of single financial securities or instruments established by regulated exchanges, and prices produced exclusively for the purpose of risk management and settlement by regulated CCPs should not be considered benchmarks for purposes of the Proposed NI 25-102 and should explicitly be excluded, given notably the regulatory regime and oversight to which those entities are already subject. In the same vein, we also believe that exchanges and clearing houses should be specifically excluded from the definition of benchmark contributors as contemplated under the IOSCO Financial Benchmark Principles, to the extent that the data contributed are considered regulated-data.

Finally, as expressed under note 19 in the Notice, it is important that the Proposed NI 25-102 clearly reflects the concept that the providers of input data that is otherwise publicly available are not considered contributors under the Proposed NI 25-102. This may be done in a number of different ways, either by adapting relevant definitions or creating a specific exception.

d) Public data-based benchmarks

While the Notice gives some indication as to what a designated regulated-data benchmark is, we note that the regulation itself does not define what a designated regulated-data benchmark is. We believe complete definitions of designated regulated-data benchmark should be incorporated, as well as designated critical benchmark and designated interest rate benchmark.

Assuming the definition in the request for comments materials is incorporated in the regulation, we are of the view that limiting the input data to transaction data exclusively may be too limiting as currently defined. We point to IOSCO Principle 7 which provides:

> *"The data used to construct a Benchmark should be based on prices, rates, indices or values that have been formed by the competitive forces of supply and demand (i.e., in an active market) and be anchored by observable transactions entered into at arm's length between buyers and sellers in the market for the Interest the Benchmark measures. This Principle recognizes that Bona Fide observable transactions in active markets provide a level of confidence that the prices or values used as the basis of the Benchmark are credible. Principle 7 does not mean that every individual Benchmark determination must be constructed solely from transaction data. Provided that an active market exists, conditions in the market on any given day might require the Administrator to rely on different forms of data tied to observable market data as an adjunct or supplement to transactions. Depending upon the Administrator's Methodology, this could result in an individual Benchmark determination based predominantly, or exclusively, on bids and offers or extrapolations from prior transactions." [our emphasis]*

Based on the above, our view is that designated regulated-data benchmarks should rely not on transaction data as currently construed in the Proposed NI 25-102 but rather on data that is made available to the public, either free of charge or on payment.

Also, we agree that interest rates benchmarks typically do not pose the same challenges as the regulated-data benchmark. The creation and distribution of regulated-data benchmarks is also a highly competitive market. Undue pressures or limitations on global competition is therefore a further potential unintended consequence of benchmark regulation. It is therefore paramount that the Proposed NI 25-102 be in line with global standards in this space. We believe that exemptions from some of the requirements are completely appropriate and support this approach. We believe that designated regulated-data benchmarks should be subject to transparency of the methodology obligations, as well as internal controls obligations. Given that the benchmarks can be replicated and verified by third parties, we believe these obligations are the only ones necessary to ensure the appropriate checks and balances are in place. The exemption provided for under section 41 should therefore be broadened accordingly.

C. Conclusion

TMX believes that Proposed NI 25-102 should align as much as possible with the IOSCO Financial Benchmark Principles which have been adopted as global standards. Definitions and terms used should be harmonized as much as possible. Substance covered, in terms of scope and obligations, should be consistent. As indicated throughout this letter, to ensure consistency with global standards, the CSA should revisit in particular the following areas of Proposed NI 25-102:

- Obligations imposed on contributors should not be so significant that entities decide not to contribute to benchmarks: this would have a negative impact on the quality of benchmarks;

- Financial market infrastructures that are highly regulated should be clearly excluded from the definition of Benchmark Administrators: lack of certainty in this area will create unnecessary confusion;

- Providers of input data that is otherwise publicly available should be clearly excluded as contributors;

- The requirements for designation or the circumstances in which a benchmark or a benchmark administrator will be designated should be clearly set forth in the regulation, as well as conditions for the designation as a specific category of benchmark;

- Concepts should not depart from established securities and corporate law practices, namely:

- an external committee like the proposed Oversight Committee should not have powers over a company's board of directors,
- independence criteria for board members should not be expanded beyond accepted practices, as per NI 52-110,
- Chief Compliance Officers should not have their compensation circumscribed by legislation, and their obligations should not include mandatory reporting to the board based on suspicions alone, and
- Benchmark Administrators should not be held to a "reasonable person" standard for obligations that are highly technical in nature;

- Differences between submission-based benchmarks and public data-based benchmarks must be clearly acknowledged so as to not create an unnecessary regulatory burden on public data-based benchmarks; and
- Contemplated benchmark designation decisions or orders should be subject to a public comment process.

A principles-based approach that leaves flexibility to Canadian regulators to adopt a proportional application of the regulation, in light of the size and risks posed by each benchmark and/or administrator and the benchmark-setting process would be more desirable and effective. This is important not only for reducing unforeseen, unintended impacts of the Proposed NI 25-102 on Canadian markets, but also to ensure consistency of the Canadian regime with foreign frameworks. As many regulators develop and adopt their oversight regimes for benchmarks, it is important to minimize the potential for conflicts of laws and regulatory arbitrage. Canadian regulation that is as consistent as possible with the IOSCO Financial Benchmark Principles will ensure that Canada remains on the same level playing field as other jurisdictions and will lead to appropriate protections and likely greater compliance within the regime.

Sincerely,

Deanna Dobrowsky
Vice President, Regulatory
T: +1 (416) 365-8130
E: deanna.dobrowsky@tmx.com