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Industry Information

New Regulation Governing Benchmarks And Their Use By Investment Funds

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Regulation (EU) 2016/1011 (the “**Benchmark Regulation**”) will apply from 1 January 2018 introducing a new regime governing the use of certain indices considered to be benchmarks. The aim of the Benchmark Regulation is to put in place a common EU framework under which benchmarks are produced and used by financial institutions. It applies to all published indices that are used to reference the price of financial instruments or contracts, or to measure the performance of an investment fund.

While the Benchmark Regulation primarily impacts entities that have control over the provision of benchmarks (“**Benchmark Administrators**”) and entities that contribute or input data to benchmarks, it also regulates certain entities that use benchmarks (“**Supervised Entities**”), which include UCITS and alternative investment fund managers (“**AIFMs**”).

The Benchmark Regulation introduces a new authorisation and supervision framework for Benchmark Administrators which will require all EU Benchmark Administrators to be authorised and registered on a public register maintained by the European Securities and Markets Authority (“**ESMA**”). The Benchmark Regulation also permits non-EU Benchmark Administrators to use their benchmarks in the EU where they can satisfy the equivalence requirements set out in the Benchmark Regulation, which include registration and the establishment of cooperation arrangements with ESMA, or alternatively, where the particular benchmark has been endorsed for use in accordance with the Benchmark Regulation.

Supervised Entities can only use benchmarks that are provided by an authorised Benchmark Administrator or that appear on the ESMA register. Consequently UCITS and AIFMs will need to review their use of benchmarks. UCITS will also need to ensure that any prospectus which references a benchmark includes prominent information stating whether the benchmark is provided by a Benchmark Administrator included on the ESMA register. Furthermore, Supervised Entities, such as UCITS and AIFMs, must have “robust written plans” setting out the steps to be followed should a benchmark materially change or cease to be produced.

National competent authorities will have the power to impose a range of penalties, including fines and non-financial penalties (such as cease and desist orders), for infringement of the Benchmark Regulation or failure to cooperate with an investigation.

Benchmark Administrators which were already providing a benchmark on 30 June 2016 have until 1 January 2020 to apply for authorisation or registration. Accordingly, under the transitional provisions, these Benchmark Administrators can continue to provide an existing benchmark until 1 January 2020. Consequently, UCITS and AIFMs may continue to use the existing benchmark during that period unless the Benchmark Administrator has applied to its regulator to become authorised or registered and that application has been refused. UCITS approved prior to 1 January 2018 must update the prospectus to include the necessary disclosures on the first occasion or at the latest within 12 months after that date.



Key Contacts

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