

## **The Benchmark Regulation: Impact on Investment Funds**

The European Union (“**EU**”) regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds (the “**Benchmark Regulation**”) applies from 1 January 2018, subject to transitional provisions, and introduces a new EU regime governing the provision of, contribution to and use of benchmarks.

While the Benchmark Regulation primarily impacts entities that provide or have control over the provision of benchmarks, referred to as benchmark administrators, and entities that contribute data to a benchmark, the regulation also impacts “supervised entities” (including UCITS, UCITS management companies and AIFMs) that “*use*” benchmarks. The “*use*” of a benchmark is defined as:

- tracking one or more benchmark(s);
- using one or more benchmarks as the basis for calculating a performance fee; or
- the entry into certain exchange traded derivatives which give exposure to the performance of benchmarks (where the terms of the derivative are not set by the relevant exchange).

The Benchmark Regulation introduces a new authorisation and supervision regime for benchmark administrators. The consequence of the introduction of this regime for an investment fund that uses a benchmark is that the fund will need to ensure that the benchmark is provided by an index provider which is authorised and registered within the EU by the European Securities and Markets Authority (“**ESMA**”) as a benchmark administrator. Where the benchmark is provided by a third country provider, such benchmark must be registered for use in the EU. Under the transitional provisions in the Benchmark Regulation, an index provider providing a benchmark on 30 June 2016 must apply for authorisation or registration by **1 January 2020**.

The Benchmark Regulation also imposes further obligations on investment funds, including:

- the need to prepare contingency plans around the use of benchmarks and to reflect this in the contractual relationship with clients; and
- the requirement that UCITS include certain disclosures in their prospectuses about the status of the administrators of the benchmarks used by the fund.

### ***Written Contingency Plan***

The Benchmark Regulation provides that a supervised entity which uses a benchmark is required to have in place a “*robust written*” contingency plan to cover the eventuality of the benchmark no longer being available or being subject to material change. This plan may (but does not have to) specify

alternative benchmarks which the fund might choose to use in place of the affected benchmark. The contingency plan should be made available to the relevant competent authority on request and should be reflected in the supervised entity’s contractual arrangements with its clients. There is no transitional period for this requirement and so it applies from 1 January 2018. Impacted funds should adopt a written contingency plan and include a relevant term in their subscription form to reflect this.














**Prospectus Update**

UCITS are also required to update their prospectuses to include a statement in respect of the status of the administrators of the benchmarks that they are using. The Benchmark Regulation provides that such amendments shall be made to prospectuses approved prior to the coming into effect of the Benchmark Regulations “at the first occasion or at the latest within 12 months” of 1 January 2018. Although the wording of the Benchmark Regulation is not entirely clear, we consider that an investment fund should make these amendments the next time that it is updating the prospectus after 1 January 2018. The Central Bank of Ireland (the “Central Bank”) has recently confirmed that the UCITS prospectus does not need to include the name of the benchmark administrator. The Central Bank has also confirmed its understanding that there is no obligation for an alternative investment fund (“AIF”) to comply with this disclosure requirement unless the AIF is subject to the Prospectus Directive.

Please get in touch with your usual Asset Management and Investment Funds Department contact or any of the contacts listed in this publication should you require further information in relation to the material referred to in this update.

Full details of the Asset Management and Investment Funds Department, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team, can be accessed at [www.matheson.com](http://www.matheson.com).

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