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LIBOR: GOVERNANCE

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Introduction and Questions

We have been considering the interactions between regulation limited by reference to geography and financial activity which crosses geographic borders. This material is a case study which allows us to think about these issues in a new context.[2] Different domestic regulators have taken enforcement action with respect to banks' participation in the Libor-setting process. Do you think that the capacity of multiple national regulators to take enforcement action with respect to such activity risks excessive sanctions? What does the case study suggest with respect to co-operation between regulators? [3]

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[2] See generally Libor: The Spider Network at http://graphics.wsj.com/libor-network/ .

[3] Prosecutors in the US and the UK are interested in prosecuting people who are alleged to have violated the criminal law with respect to Libor. *See, e.g.*, Serious Fraud Office, LIBOR: Three former ICAP brokers to be charged (Mar. 28, 2014) (suggesting co-operation between the UK and US) and David Enrich, U.K. Charges Former ICAP Brokers Over Libor, Wall Street Journal (Mar. 28, 2014) (noting that "The three former ICAP brokers—Daniel Wilkinson, 47 years old, Darrell Read, 49, and Colin Goodman, 52—were charged with similar fraud-related crimes by the U.S. Justice Department last year....After the U.S. charges last year, lawyers for the three men, all of whom are British citizens, were in the unusual position of pushing British prosecutors to file charges

Libor became especially significant as a transnational benchmark because of standardization. Does this mean that standardization is a financial stability issue?

Does this case study change your views about the need for government regulation? About the possibility for self-regulation? About the need for particular types of regulation? For harmonization of regulation across geographic borders? For new methods of ensuring compliance with regulation?

The case study illustrates the intersections between private market activity and Government regulation. Why do you think the GFMA, a trade association, published principles relating to benchmarks?

Note how the EU Commission defined the subject of its study more broadly than the UK Government did. Why do you think this is? Is this a good idea?

Libor and the British Bankers' Association

Originally Libor was not a standard interest rate but was established for individual transactions under procedures specified by contract, and which identified particular banks as the banks which would quote rates to be used to establish Libor for those transactions. But Libor became a standardized rate, and the British Bankers' Association (BBA), a trade association for banks, developed standardized procedures for the fixing of Libor. As of the beginning of 2014 the BBA is no longer involved in the fixing of Libor. The UK Government established the Hogg Tendering Advisory Committee to invite tenders for the function of administering Libor. The successful tenderer was NYSE Euronext Rate Administration Limited, a subsidiary of NYSE Euronext.[4] In November 2013 Intercontinental Exchange announced it had completed its acquisition of NYSE Euronext.[5]

This is how BBA Libor described the Libor-setting process in outline:

bbalibor stands for 'London InterBank Offered Rate'. It is produced for ten currencies with 15 maturities quoted for each - ranging from overnight to 12 months - thus producing 150 rates each business day. bbalibor is a benchmark giving an indication of the average rate at which a LIBOR contributor bank can

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against their clients. The reason: If the men faced similar charges in the U.K., it would make it much harder to extradite them to the U.S., where they would face stiffer penalties if convicted on the Libor-related charges. As a result, the British charges threaten to reopen a sore spot between U.S. and U.K. fraud prosecutors, who have previously tussled over jurisdictional issues in the Libor case. ")

[4] The Hogg Tendering Committee for LIBOR, Appointment of New LIBOR Administrator (Jul. 2013) at https://www.gov.uk/government/policy-advisory-groups/hogg-tendering-committee-for-libor .

[5] IntercontinentalExchange Completes Acquisition of NYSE Euronext (Nov. 13, 2013) at http://ir.theice.com/investors-and-media/press/press-releases/press-release-details/2013/IntercontinentalExchange-Completes-Acquisition-of-NYSE-Euronext/default.aspx. For ICE LIBOR see https://www.theice.com/iba_libor.jhtml .

obtain unsecured funding in the London interbank market for a given period, in a given currency. Individual bbalibor rates are the end-product of a calculation based upon submissions from LIBOR contributor banks, which are then averaged under a "trimmed mean" methodology.

Definition

Every contributor bank is asked to base their bbalibor submissions on the following question:
"At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?"

Therefore, submissions are based upon the lowest perceived rate at which a bank could go into the London interbank money market and obtain funding in reasonable market size, for a given maturity and currency.

bbalibor is not necessarily based on actual transactions, as not all banks will require funds in marketable size each day in each of the currencies/ maturities they quote and so it would not be feasible to create a full suite of LIBOR rates if this was a requirement. However, a bank will know what its credit and liquidity risk profile is from rates at which it has dealt and can construct a curve to predict accurately the correct rate for currencies or maturities in which it has not been active.

"Reasonable market size" is intentionally left broadly defined: it would have to be constantly monitored and in the current conditions would have to be changed very frequently. It would also vary between currencies and maturities, leading to a considerable amount of confusion.

The current definition was adopted as the standard after a review in 1998. Up until this point, submissions from panel members were based upon the following: "At what rate do you think interbank term deposits will be offered by one prime bank to another prime bank for a reasonable market size today at 11am?" The new definition enables accountability for the rates.

All bbalibor rates are quoted as an annualised interest rate. This is a market convention. For example, if an overnight Sterling rate from a contributor bank is given as 2.00000%, this does not indicate that a contributing bank would expect to pay 2% interest on the value of an overnight loan. Instead, it means that it would expect to pay 2% divided by 365.

What is bbalibor used for?

bbalibor is the primary benchmark for short term interest rates globally. It is written into standard derivative and loan documentation such as the ISDA terms, and is used for an increasing range of retail products such as mortgages and college loans. It is used as a barometer to measure strain in money markets and as a gauge of market expectation for future central bank interest rates. It is also the basis for settlement of interest rate contracts on many of the world's major futures and options exchanges.

Selection of Contributors

Contributor banks have been selected for currency panels in line with three guiding principles:
Scale of market activity
Credit rating
Perceived expertise in the currency concerned

Calculation of bbalibor

Thomson Reuters is the designated calculation agent for BBA LIBOR. Data submitted by panel banks into the bbalibor process is received and processed by Thomson Reuters and the data is calculated using guidelines provided by the "LIBOR Panel Banks and Users Group" ("LPBAUG").

Each LIBOR contributor bank has an application installed allowing that institution to confidentially submit rates. Each morning between 1100 and 1110 each panel bank formulates their own rates for the day and inputs them into this application, which links directly to a rate setting team at Thomson Reuters. A bank cannot see other contributor rates during the submission window - this is only possible after final publication of the BBA LIBOR data. Thomson Reuters run a collection of automated and manual tests on the submitted rates before they are sent to the calculation engine, and after calculation the data is released to the market via Thomson Reuters and other licensed data vendors.

Libor Processes

Every bbalibor rate produced by Thomson Reuters is calculated using a trimmed arithmetic mean. Once Thomson Reuters receive each submission they rank them in descending order and then exclude the highest and lowest 25% of submissions - this is the trimming process. Details of this are shown in the table below. The remaining contributions are then arithmetically averaged to create a bbalibor quote. This is repeated for every currency and maturity, producing 150 rates every business day.

No. of Contributors	Methodology	No. of Contributor rates averaged
18 Contributors	top 4 highest rates, tail 4 lowest rates	10
17 Contributors	top 4 highest rates, tail 4 lowest rates	9
16 Contributors	top 4 highest rates, tail 4 lowest rates	8
15 Contributors	top 4 highest rates, tail 4 lowest rates	7
14 Contributors	top 3 highest rates, tail 3 lowest rates	8
13 Contributors	top 3 highest rates, tail 3 lowest rates	7
12 Contributors	top 3 highest rates, tail 3 lowest rates	6
11 Contributors	top 3 highest rates, tail 3 lowest rates	5
10 Contributors	top 2 highest rates, tail 2 lowest rates	6
9 Contributors	top 2 highest rates, tail 2 lowest rates	5
8 Contributors	top 2 highest rates, tail 2 lowest rates	4
7 Contributors	top highest rate, tail lowest rate	5
6 Contributors	top highest rate, tail lowest rate	4

The trimming of the top and bottom quartiles allows the exclusion of outliers from the final calculation.[6]

BBA LIBOR's definition of Libor was as follows:

LIBOR is defined as:

"The rate at which an individual contributor panel bank could borrow funds, were it to do so by asking for and then accepting interbank offers in reasonable market size, just prior to 11.00am London time."

This definition is amplified as follows:-

The rate at which each bank submits must be formed from that bank's perception of its cost of unsecured funds in the London interbank market. This will be based on the cost of funds not covered by any

[6] http://www.bbalibor.com. Note that bbalibor was clear that bbalibor was a benchmark rater than an interest rate: "LIBOR is not an interest rate; it is a benchmark used by banks, securities houses and investors to gauge the cost of unsecured borrowing in the London interbank market."

governmental guarantee scheme.
Contributions must represent rates at which a bank would be offered funds in the London interbank market.
Contributions must be for the specific currency concerned and not the cost of producing the currency by borrowing in a different currency and obtaining the required currency via the foreign exchange markets.
The rates must be submitted by members of staff at a bank with primary responsibility for management of a bank's cash, rather than a bank's derivative book.
The definition of "funds" is: unsecured interbank cash or cash raised through primary issuance of interbank Certificates of Deposit.

BBA LIBOR had a FAQ which contained the following question and answer:

Why is the bbalibor standard important?
bbalibor is important because:
it is long established
it reflects the largest range of international rates
it has a wide commercial use
it has a wide international dissemination
it has a transparent calculation mechanism.

In 2008 (during the global financial crisis) commentators began to criticize the arrangements for fixing BBA LIBOR, because, although it was clear that banks were reluctant to lend to each other, BBA LIBOR did not increase to reflect this fact. People speculated that banks quoting as part of the BBA's contributor panels were unwilling to reveal through the quotes they submitted to the Libor fixing process that other banks had lost confidence in them and were raising the rates they were demanding to lend money. If contributor banks were submitting inaccurate quotes then Libor quoted by the BBA would also be inaccurate as a reflection of actual rates of interest lenders might be expected to pay. The BBA responded to these concerns by reviewing its procedures and by strengthening the governance arrangements for the Libor fixing process. A consultative paper published in June of 2008[7] was followed by a paper describing the new arrangements in November 2008.[8] The Foreign Exchange and Money Markets Committee ("FX & MM Committee"), responsible for the operation and development of BBA LIBOR, would have two sub-committees: a Fixings Sub-committee to scrutinize the fixings process and an Oversight Sub-committee. Membership of the FX & MM Committee had not been disclosed and the members sat as individuals. The 2008 governance changes involved a move to Committee Members being individuals representing their firms, with a responsibility "to

[7] BBA, Understanding the Construction and Operation of BBA LIBOR - Strengthening for the Future (Jun. 10, 2008) available at http://www.aciforex.org/docs/markettopics/20080610_BBA_comments_on_Libor_fixing.pdf.

[8] See BBA, LIBOR Governance and Scrutiny - Proposals agreed by the FX & MM Committee (Nov. 17, 2008) at http://www.bbalibor.com/download/4025

act in the best interests of the LIBOR benchmark and the markets it serves."[9] Membership of the Committee would for the future include "[a] representative of a (currently) non-contributing US bank that is active in the money markets..[a] representative of a (currently) non-contributing European bank that is active in the money markets.. [a] representative from Liffe and one from the Chicago Mercantile Exchange (CME) [and t]wo "rate takers": one from the fund management industry and one from the Association of Corporate Treasurers."[10]

The Problem

This section of the materials illustrates problems relating to Libor and Euribor. Some of the problems involved actions taken before the onset of the financial crisis, and others involve actions taken during the financial crisis.

In June 2012 the US Department of Justice,[11] the CFTC,[12] and the UK's Financial Services Authority[13] announced settlements of enforcement actions against **Barclays Bank** with respect to manipulations of Libor and Euribor rates. Barclays submitted quotes to the US dollar Libor and Euribor setting processes based on requests of its interest rate derivatives dealers, tried to influence the submissions of other banks to the Euribor (and to some extent to the Libor) setting process, and made submissions to the Libor setting process which were designed to reduce negative media perception. The Financial Services Authority said that Barclays did not have any specific systems or controls relating to the Libor and Euribor setting processes until December 2009. Before these announcements with respect to enforcement much speculation in the press about abuses of the Libor setting process had focused on the financial crisis, and the

[9] *Id.* at 6.

[10] *Id.*

[11] Department of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay $160 Million Penalty (Jun. 27, 2012) at http://www.justice.gov/opa/pr/2012/June/12-crm-815.html .

[12] CFTC Orders Barclays to pay $200 Million Penalty for Attempted Manipulation of and False Reporting concerning LIBOR and Euribor Benchmark Interest Rates (Jun. 27, 2012) at http://www.cftc.gov/PressRoom/PressReleases/pr6289-12 ; Order at http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder062712.pdf ("Over a period of several years, commencing in at least 2005, Barclays PLC, Barclays Banle and Barclays Capital, by and through their agents, officers and employees located in at least New York, London and Tokyo, repeatedly attempted to manipulate and made false, misleading or knowingly inaccurate submissions concerning two global benchmark interest rates, the British Banleers' Association's ("BBA") London Interbanle Offered Rate ("LIBOR") and the European Banldng Federation's ("EBF") Euro Interbanle Offered Rate ("Euribor"). ")

[13] Barclays fined £59.5 million for significant failings in relation to LIBOR and EURIBOR (Jun. 27, 2012) at http://www.fsa.gov.uk/library/communication/pr/2012/070.shtml .

idea that during the crisis banks were reluctant to quote accurate rates for Libor because this would suggest that other market participants lacked confidence in their financial health. However, Barclays derivatives traders made requests to those responsible for making rate submissions going back as far as the beginning of 2005. The FSA's final notice cited emails and instant messages by the traders, and tracked the extent to which submissions seem to have followed the email requests.

Here is an excerpt from the FSA's Final Notice:

Liquidity issues were a particular focus for Barclays and other banks during the financial crisis and banks' LIBOR submissions were seen by some commentators as a measure of their ability to raise funds. Barclays was identified in the media as having higher LIBOR submissions than othe
r contributing banks at the outset of the financial crisis. Barclays believed that other banks were making LIBOR submissions that were too low and did not reflect market conditions. The media questioned whether Barclays' submissions indicated that it had a liquidity problem. Senior management at high levels within Barclays expressed concerns over this negative publicity.
Senior management's concerns in turn resulted in instructions being given by less senior managers at Barclays to reduce LIBOR submissions in order to avoid negative media comment. The origin of these instructions is unclear. Barclays' LIBOR submissions continued to be high relative to other contributing banks' submissions during the financial crisis....
On numerous occasions between January 2005 and June 2009, Barclays' Derivatives Traders made requests to its Submitters for submissions based on their trading positions. These included requests made on behalf of derivatives traders at other banks. The Derivatives Traders were motivated by profit and sought to benefit Barclays' trading positions. The aim of these requests was to influence the final benchmark LIBOR and EURIBOR rates published by the BBA and EBF.
The misconduct involving internal requests to the Submitters at Barclays was widespread, cutting across several currencies and occurring over a number of years. The Derivatives Traders discussed the request
s openly at their desks. At least one Derivatives Trader at Barclays would shout across the euro Swap
s Desk to confirm that other traders had no conflicting preference prior to making a request to the Submitters.
Requests to Barclays' Submitters were made verbally and a large amount of email and instant message evidence consisting of Derivatives Traders' requests also exists. At times, requests made by email alone were sent by the Derivatives Traders nearly every day. For example, requests were made by Barclays' US dollar Derivatives Traders on 16 out of the 20 days on which Barclays made US dollar LIBOR submissions in February 2006 and on 14 out of the 23 days on which it made US dollar LIBOR submissions in March 2006.
The FSA has identified that:
i. between January 2005 and May 2009, at least 173 requests for US dollar LIBOR submissions were made to Barclays' Submitters (including 11 requests based on communications from traders at other banks);
ii.between September 2005 and May 2009, at least 58 requests for EURIBOR submissions were made to Barclays' Submitters (including 20 requests based on communications from traders at other banks); and
iii. between August 2006 and June 2009, at least 26 requests for yen LIBOR submissions were made to Barclays' Submitters.
At least 14 Derivatives Traders at Barclays made these requests. This included senior Derivatives

Traders. In addition, trading desk managers received or participated in inappropriate communications on, at least, the following occasions:
i. on 22 March 2006, Trader A (a US dollar Derivatives Trader) stated in an email to Manager A that Barclays' Submitter " submits our settings each day, we influence our settings based on the fixings we all have". Manager A took no action as a result of this email;
ii. on 5 February 2008, Trader B (a US dollar Derivatives Trader) stated in a telephone conversation with Manager B that Barclays' Submitter was submitting "the highest LIBOR of anybody [...] He's like, I think this is where it should be. I'm like, dude, you're killing us ". Manager B instructed Trader B to: "just tell him to keep it, to put it low ". Trader B said that he had " begged " the Submitter to put in a low LIBOR submission and the Submitter had said he would " see what I can do "; and
iii. in July 2008, euro Derivatives Traders sent emails to Manager C indicating that they had spoken to Barclays' Submitter about the desk's reset positions and he had agreed to assist them. This followed instructions from Manager C for the traders to speak to the Submitter.
Barclays' Derivative Traders would request high or low submissions regularly in emails, for example on 7 February 2006, Trader C (a US dollar Derivatives Trader) requested a " High 1m and high 3m if poss please. Have v. large 3m coming up for the next 10 days or so". Trader C also expressed his preference that Barclays would be " kicked out " of the average calculation. Trader C's aim was therefore that Barclays' submissions would be high enough to be excluded from the final average calculation, which could have affected the final benchmark rate.
On Friday, 10 March 2006, two US dollar Derivatives Traders made email requests for a low three month US dollar LIBOR submission for the coming Monday:
i. Trader C stated " We have an unbelievably large set on Monday (the IMM). We need a really low 3m fix, it could potentially cost a fortune. Would really appreciate any help";
ii. Trader B explained "I really need a very very low 3m fixing on Monday –preferably we get kicked out. We have about 80 yards [billion] fixing for the desk and each 0.1 [one basis point] lower in the fix is a huge help for us. So 4.90 or lower would be fantastic ". Trader B also indicated his preference that Barclays would be kicked out of the average calculation; and
ii. On Monday, 13 March 2006, the following email exchange took place: Trader C: "The big day [has] arrived... My NYK are screaming at me about an unchanged 3m libor. As always, any help wd be greatly appreciated. What do you think you'll go for 3m?" Submitter: "I am going 90 altho 91 is what I should be posting".Trader C:"[...]when I retire and write a book about this business your name will be written in golden letters [...]".Submitter:"I would prefer this[to]not be in any book!"
The number of requests and the period of time over which they were made indicate that the Derivatives Traders made requests on a routine basis. Specific emails also indicate the requests were made regular ly. For example, the following email exchange took place on 27 May 2005: Submitter:"Hi All, Just as an FYI, I will be in noon'ish on Monday [...]".Trader B:"Noonish? Whos going to put my low fixings in? hehehe" Submitter:"[...] [X or Y] will be here if you have any requests for the fixings".
Trader D set calendar entries on at least 4 occasions in 2006 to remind him to make requests for EURIBOR submissions: "Ask for Low Reset Rate" and "Ask for High 6M Fix".
The routine nature of the requests demonstrates that the Derivatives Traders considered Barclays took their requests into account when determining its submissions.

Responses from Barclays' Submitters
Barclays' Submitters stated to the Derivatives Traders contemporaneously on numerous occasions that they would take their requests into account. Submitters sent positive responses to Barclays' Derivative

Traders on a regular basis. Examples are set out below. Certain examples record expressly that the Submitters' judgement in determining Barclays' submissions was influenced by the Derivatives Traders' requests.
In response to a request from Trader C for a high one month and low three month US dollar LIBOR submission on 16 March 2006, a Submitter responded: " For you...anything. I am going to go 78 and 92.5. It is difficult to go lower than that in threes, looking at where cash is trading. In fact, if you did not want a low one I would have gone 93 at least".
Trader C requested low one month and three month US dollar LIBOR submissions at 10:52 am on 7 April 2006 (shortly before the submissions were due to be made); " If it's not too late low 1m and 3m would be nice, but please feel free to say "no"... Coffees will be coming your way either way, just to say thank you for your help in the past few weeks ". A Submitter responded "Done...for you big boy ".
On 29 June 2006, a Submitter responded to Trader E's request for EURIBOR submissions "with the offer side at 2.90 and 3.05 I will input mine at 2.89 and 3.04 with you guys wanting lower fixings (normally I would be a tick above the offer side)".
On 6 August 2007, a Submitter even offered to submit a US dollar rate higher than that requested: Trader F: "Pls set 3m libor as high as possible today" Submitter:"Sure 5.37 okay?"Trader F: "5.36 is fine"
Evidence from certain Submitters confirms that Barclays took the Derivatives Traders' requests into account when determining its submissions. One of the Submitters adjusted Barclays' submissions one or two basis points up or down in order to comply with the requests. The numbers he submitted taking into account the Derivatives Traders' requests were different to the numbers he would have submitted absent the requests and were not consistent with the LIBOR definition. However, he thought Barclays could still have raised money at the rates submitted. Another Submitter considered it possible to justify Barclays' submissions by reference to market data even on occasions when he may have taken the Derivatives Traders' requests into account. Another Submitter denies taking the Derivatives Traders' requests into account.
The FSA considers that the routine nature of Barclays' Submitters' responses to the Derivatives Traders, the language used in the responses and the evidence obtained from the Submitters during the course of the investigation demonstrates that Barclays took the Derivatives Traders' requests for US dollar LIBOR and EURIBOR submissions into account on numerous occasions when determining its submissions....
On the majority of occasions where Barclays' Submitters were contacted by Barclays' Derivatives Traders with requests, Barclays' submissions (for US dollar LIBOR and EURIBOR) were consistent with those requests...
The examples given above relate to requests that were made by Barclays' Derivatives Traders to benefit their own trading positions. However Barclays' Derivatives Traders also made internal requests for EURIBOR and US Dollar LIBOR submissions based on the trading positions of traders at other banks who had asked them to pass requests on to Barclays' Submitters..
At least 12 of the US dollar LIBOR requests made to Barclays' Submitters were made on behalf of external traders that ha d previously worked at Barclays and were now working at other banks (although those banks did not contribute US dollar LIBOR submissions).
For example, on 26 October 2006, an external trader made a request for a lower three month US dollar LIBOR submission. The external trader stated in an email to Trader G at Barclays " If it comes in unchanged I'm a dead man ". Trader G responded that he would "have a chat ". Barclays' submission on that day for three month US dollar LIBOR was half a basis point lower than the day before, rather than being unchanged. The external trader thanked Trader G for Barclays' LIBOR submission later that day:" Dude. I owe you big time! Come over one day after work and I'm opening a bottle of Bollinger ".

At least 20 of the EURIBOR requests made by the Derivatives Traders were made on behalf of traders at other banks that contributed EURIBOR rates. Barclays' Derivatives Traders passed on the requests of these other traders to Barclays' Submitters, even blind copying in the external traders to their emails in order to demonstrate they had done so.
For example, on 6 September 2006, an external trader at another bank (Panel Bank 1) contributing EURIBOR submissions sent an instant message to Trader E at Barclays requesting a low one month submission: "I seriously need your help tomorrow on the 1mth fix" . The next day, Trader E passed on the request to Barclays' Submitters, blind copying in the external trader.
On 1 February 2007, the same external trader sent several messages to Trader E requesting a low one month EURIBOR submission. Trader E in turn made a request for a low one month submission to a Submitter, who sent a positive response.
Barclays' Submitters also received 11 requests for sterling LIBOR submissions from an external trader at another bank (who ha d previously worked at Barclays). These requests were not taken into account....
On 10 June 2008, the BBA published a consultation paper in response to concerns being raised about the accuracy of LIBOR rates at that time. The paper sought comments on certain proposals to modify LIBOR, including in response to concerns about negative media perception of high LIBOR submissions: “the BBA proposes to explore options for avoiding any stigma whilst maintaining transparency ”. The BBA’s paper stated that contributors were continuing to make submissions in accordance with the LIBOR definition “ at the rate their cash desks perceive they can raise cash in the specified currency”. Barclays was one of the institutions that provided comments to the BBA in response to this paper. Barclays’ response did not explain that Barclays had not been making submissions in accordance with the LIBOR definition. Liquidity conditions had eased during the consultation period. Barclays’ response to the BBA was made by Manager D, who had given instructions to Barclays’ Submitters to reduce Barclays’ LIBOR submissions from November 2007 onwards. Compliance was not involved in Barclays’ response.
The BBA published a ‘Feedback Statement’ on its consultation paper on 5 August 2008. The paper stated: “ In conclusion, all contributing banks are confident that their submissions reflect their perception of their true costs of borrowing at the time at which they submitted their rates. They are therefore prepared to continue with their individual quotes being published with the day’s LIBOR rates. As there was no real support for any of the proposals to limit stigmatisation, the FX & MM Committee has therefore decided to retain the existing process”.
At the same time as publishing this Feedback Statement, the BBA first published guidance which amplified the definition of LIBOR. This amplification stated “ the rate at which each bank submits must be formed from that bank’s perception of its cost of funds in the interbank market.
When liquidity conditions deteriorated in September 2008 (following Lehman Brothers’ insolvency filing) Barclays again factored senior management’s concerns about negative media attention into its LIBOR submissions process. Even after the BBA review, on which Barclays’ commented, Barclays’ Submitters continued to receive instructions to reduce their LIBOR submissions.
For example, on 18 September 2008, a Submitter stated in a telephone conversation with Manager D that he would put in a one month US dollar LIBOR submission of 4.75 because that was where he had obtained money in the market. Barclays’ two month and three month submissions were also discussed. The Submitter agreed to lower Barclays’ one month LIBOR submission to 4.50. The next highest submission was 50 basis points lower than Barclays’ submission on that day.
On 8 October 2008, a Submitter was asked about Barclays’ LIBOR submissions during a telephone conversation. He responded that “[Manager E] ’s asked me to put it lower than it was yesterday ... to send

the message that we're not in the shit". Barclays' submission the day before had been 5.05, which was 25 basis points higher than the next highest contributor. Barclays' submission on 8 October 2008 was still the highest submission, but equal with one other contributor.
During this period, Barclays continued to believe that other banks were making LIBOR submissions that were too low and did not reflect market conditions. Submitters continued to make comments indicating that Barclays' submissions were being made taking concerns about negative media comment into account until May 2009 (although relevant communications were more sporadic after October 2008).[14]

UBS

UBS settled enforcement proceedings with FINMA of Switzerland,[15] the CFTC[16] and FSA[17] in December 2012.[18] The FSA's Final Notice[19] stated:

UBS's Traders routinely made requests to the individuals at UBS responsible for determining its LIBOR and EURIBOR submissions to adjust their submissions to benefit their trading positions ("Internal Requests"). During the Relevant Period, more than 800 documented Internal Requests were made in respect of JPY LIBOR. During the same period more than 115 Internal Requests were also made in connection with UBS's GBP, CHF, EUR and USD LIBOR submissions and EURIBOR submissions. More than 40 individuals were directly involved in these Internal Requests.
8. At times, a single Internal Request was made that covered a sustained period of time. For example, on 24 January 2007 in response to a Trader's request about three month and six month JPY LIBOR submissions, Manager A, who was overseeing the Trader Submitter responsible for determining the submissions, replied: "standing order, sir."
9. Across the separate currencies for which UBS made LIBOR submissions, the practice of making Internal Requests is broken down as follows across the Relevant Period:
a. In relation to JPY LIBOR, at least 800 documented Internal Requests were made, directly involving at

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[14] FSA, Final Notice to Barclays Bank plc (Jun. 27, 2012) at http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf

[15] LIBOR: FINMA Concludes Proceedings Against UBS and Orders Disgorgement of Profits (Dec,. 19, 2012) at http://www.finma.ch/e/aktuell/Pages/mm-ubs-libor-20121219.aspx .

[16] CFTC Orders UBS to Pay $700 Million Penalty to Settle Charges of Manipulation, Attempted Manipulation and False Reporting of LIBOR and Other Benchmark Interest Rates (Dec. 19, 2012) at http://www.cftc.gov/PressRoom/PressReleases/pr6472-12. See also Order at http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfubsorder121912.pdf .

[17] FSA, UBS fined £160 million for significant failings in relation to LIBOR and EURIBOR (Dec. 19, 2012) at http://www.fsa.gov.uk/library/communication/pr/2012/116.shtml .

[18] Japan's Financial Services Agency took action against UBS in December 2011. FSA, Administrative Actions against UBS Securities Japan Ltd and UBS AG, Japan Branches (Dec. 16, 2011) at http://www.fsa.go.jp/en/news/2011/20111216-3.html

[19] FSA, Final Notice to UBS AG (Dec. 19, 2012) at http://www.fsa.gov.uk/static/pubs/final/ubs.pdf .

least 17 individuals, four of whom were Managers;
b. In relation to GBP LIBOR, at least 90 documented Internal Requests were made, directly involving at least nine individuals, three of whom were Managers;
c. In relation to CHF LIBOR, UBS routinely rounded all of its CHF LIBOR submissions by between 0.25 and 0.5 of a basis point to favour the bank's trading position (the "Rounding Adjustment"). Furthermore, at least six documented Internal Requests were made, directly involving at least three individuals, one of whom was a Manager;
d. In relation to EUR LIBOR, at least eight documented Internal Requests were made, directly involving at least six individuals, three of whom were Managers; and
e. In relation to USD LIBOR, at least two documented Internal Requests were made, directly involving at least four individuals, one of whom was a Manager1.
10. In relation to EURIBOR, at least 13 documented Internal Requests were made, directly involving at least eight individuals, five of whom were Managers.
11. In addition, Traders and Trader-Submitters routinely discussed their trading positions and made Internal Requests orally. Trader-Submitters also influenced the submissions they made to suit their own trading positions.
12. Given the widespread and routine nature of making Internal Requests and the nature of the control failures identified in this Notice, every LIBOR and EURIBOR submission in currencies and tenors in which UBS traded is at risk of having been improperly influenced...
13. UBS, through four of its Traders, colluded with interdealer brokers to attempt to influence the JPY LIBOR submissions of other banks ("Broker Requests"). The Brokers were in regular contact with various Panel Banks that contributed JPY LIBOR submissions. During the Relevant Period, the UBS Traders (one of whom was a Manager) were directly involved in making more than 1000 documented requests to 11 Brokers at six Broker Firms.
14. UBS, through one of its Traders, also colluded with individuals at Panel Banks to make submissions in relation to JPY LIBOR that benefited UBS's trading positions ("External Requests"). During the Relevant Period, UBS, through this Trader colluded with these individuals in his attempt to influence the JPY LIBOR submissions of four other banks by making more than 80 documented External Requests, as well as making such requests orally.
15. Broker Requests and External Requests were co-ordinated with Internal Requests. In the course of one campaign of manipulation, a UBS Trader agreed with his counterpart that he would attempt to manipulate UBS's submissions in "small drops" in order to avoid arousing suspicion. The Trader made it clear that he hoped to profit from the manipulation and referred explicitly to his UBS trading positions and the impact of the JPY LIBOR rate on those positions. He offered to "return the favour" and entered into facilitation trades and other illicit transactions in order to incentivise and reward his counterparts. UBS, through one of its Traders:
a. sought to secure the co-operation of traders at other Panel Banks by entering into facilitation trades that aligned their respective commercial interests so that both sides would benefit from the intended JPY LIBOR manipulation; and
b. together with another UBS Trader, entered into "wash trades" (i.e. risk free trades that cancelled each other out and which had no legitimate commercial rationale) through two Broker Firms in order to facilitate corrupt brokerage payments to brokers as reward for their efforts to manipulate the JPY LIBOR submissions of Panel Banks. For example, on 18 September 2008, a Trader explained to a Broker: "if you keep 6s [i.e. the six month JPY LIBOR rate] unchanged today ... I will fucking do one humongous deal with you ... Like a 50,000 buck deal, whatever ... I need you to keep it as low as possible ... if you do that

.... I'll pay you, you know, 50,000 dollars, 100,000 dollars... whatever you want ... I'm a man of my word". UBS entered into at least nine such wash trades using this Broker Firm, generating illicit fees of more than £170,000 for the Brokers.
16. In addition, UBS made corrupt payments of £15,000 per quarter to Brokers to reward them for their assistance for a period of at least 18 months.
17. The nature of the relationship and total disregard for proper standards by these Traders and Brokers is clear from the documented communications in which particular individuals referred to each other in congratulatory and exhortatory terms such as "the three muscateers [sic]", "SUPERMAN", "BE A HERO TODAY" and "captain caos [sic]"....
18. A number of UBS managers knew about and in some cases were actively involved in UBS's attempts to manipulate LIBOR and EURIBOR submissions. In total, improper requests directly involved approximately 40 individuals at UBS, 11 of whom were Managers. At least two further Managers and five Senior Managers were also aware of the practice of the manipulation of submissions to benefit trading positions.
19. Furthermore, the practice of attempts to manipulate LIBOR and EURIBOR submissions to benefit trading positions was often conducted between certain individuals in open chat forums and in group emails, which included at least a further 70 individuals at UBS.
20. UBS sought to manipulate LIBOR and EURIBOR in order to improve the profitability of trading positions....
133. As mentioned in paragraph 119 above, The Wall Street Journal published an article in April 2008 about differences between USD LIBOR submissions and other market measures of the borrowing costs of certain Panel Banks, including UBS. The article also referred to a report published by the Bank for International Settlements highlighting that "banks might have an incentive to provide false rates to profit from derivatives transactions". The Wall Street Journal followed up with an article in May 2008 commenting that: "... banks face a dilemma. If any bank submits a much higher rate than its peers, it risks looking like it's in financial trouble. So banks have an incentive to play it safe by reporting something similar - which could cause the reported rates to cluster."
134. On 10 June 2008, the BBA published a consultation paper about the future operation of the benchmark. At section 3.3 of the paper, the BBA explained how the LIBOR rate is calculated, explaining that: "The trimming process removes any outlying data as well as preventing any individual bank from attempting to influence the rates". The paper also amplified the LIBOR definition by prescribing that: "The rates must be submitted by members of staff at a bank with primary responsibility for management of a bank's cash, rather than a bank's derivative book".
135. Prompted by media attention (and potential regulatory proceedings) UBS's Legal and Compliance department commenced a limited review of its LIBOR processes and procedures (the "2008 Review"). The 2008 Review concluded on 7 August 2008 and included consideration of the management of potential conflicts of interest in UBS's LIBOR submission process, specifically, the risk of submissions being influenced to benefit trading positions. In the course of the 2008 Review, UBS became concerned about its submissions such that by 24 June 2008, it anticipated imminent regulatory action and/or civil litigation arising from the risks associated with its involvement in LIBOR submissions.
136. As part of the 2008 Review, a sample correlation analysis was performed by Trader-Submitter E, for the period 1 December 2007 up to and including March 2008 for three and six month USD LIBOR submissions and the published LIBOR rate against net open derivative positions. The purpose of the analysis was to demonstrate that there was no correlation between UBS's USD LIBOR submissions and trading positions.

137. However the 2008 Review was inadequate because:
a. Its scope was limited to USD LIBOR submissions, because that was the LIBOR currency that was the subject of media attention at the time. It did not consider whether there was any linkage between derivatives trading positions and the manipulation of submissions on other currencies;
b. Trader-Submitter E had been responsible for determining UBS's USD submissions in the four month period December 2007 to March 2008. UBS took no account of the risks inherent in asking an individual to investigate their own submissions;
c. When performing the analysis, Trader-Submitter E did not report that he had in fact received and rejected an Internal Request from Trader E in the review period that he was analysing;
d. At least two of the Managers and one Senior Manager who were involved in the 2008 Review were aware of the practice of manipulating LIBOR submissions to benefit trading positions; and
e. The 2008 Review did not take into account the fact that submissions may be being manipulated to benefit particular trading positions of particular Traders. Such misconduct would not necessarily be detected by merely looking at net open derivative positions, because Traders' positions could "offset" the positions of other Traders.
138. UBS concluded that Trader-Submitter E's analysis gave rise to no suspicion of any inappropriate manipulation of the USD LIBOR submissions. UBS did not consider making any enquiries into any other LIBOR currencies or benchmark rates, in particular EURIBOR.
139. The 2008 Review culminated in the preparation of formal procedures and guidelines on 7 August 2008 (the "2008 Procedures"). Amongst other matters, the 2008 Procedures:
a. Identified management who were responsible for the integrity and monitoring of the submission process, as well as senior management to whom unresolved issues and concerns should be escalated; and
b. Introduced a weekly exception reporting regime whereby a comparison was undertaken between UBS's LIBOR submissions and its weighted daily average cost of funds and/or the published rate for the relevant day, with explanations to be sought for deviations. The responsibility for conducting this analysis lay with those Managers who had oversight of the submission process and this information was to be submitted to the division's Compliance department in the form of a report (an "Exception Report" for their independent review).
140. The 2008 Procedures were inadequate in design because:
a. They were based on the 2008 Review, which was itself inadequate;
b. Despite anticipating imminent regulatory action and/or civil proceedings arising from its involvement in LIBOR submissions and having identified a conflict of interest in its LIBOR submission process, the 2008 Procedures did not address the cause of the conflict namely the combination of submission and trading responsibilities;
c. They did not provide any practical guidance to LIBOR submitters or compliance in determining rates;
d. No specific training was provided to those involved in the LIBOR submission process;
e. The tolerance level for exception reporting was set at ten basis points and no subsequent consideration was given as to whether this level was appropriate, or if it needed to be adjusted for each currency;
f. Of the four Managers given responsibility for the integrity and monitoring of the submissions process under the 2008 Procedures, all were aware of the ongoing manipulation namely, Senior Manager B, Senior Manager D, Manager C and Manager D; and
g. They did not direct Traders and Trader-Submitters that it was improper to attempt to manipulate LIBOR to benefit trading positions.
141. The 2008 Procedures were inadequate in operation because:
a. The primary tool available to senior management during the Relevant Period to monitor, identify and

resolve issues with the determination of LIBOR submissions was the exception reporting regime. Despite the widespread abuse, it failed to detect a single instance of submission manipulation.
b. Exception Reports were required to be submitted on a monthly rotational basis for JPY, CAD, AUD, SEK and DKK. However, save for a single report on AUD, no Exception Reports were actually prepared for those five currencies throughout the Relevant Period;
c. Contrary to what the procedures stipulated, Exception Reports for the USD overnight tenor submissions were not always prepared; and
d. The 2008 Procedures were premised on the business taking responsibility for the Exception Reports, with Compliance performing an independent secondary review. In practice, Compliance assumed the first line of defence role for the review of the Exception Reports, which was not what was intended and for which they were not appropriately skilled.
142. In any event, whilst Exception Reports were regularly produced, because of an oversight, UBS never actually circulated the 2008 Procedures beyond those involved in their preparation.
143. Even after the introduction of the 2008 Procedures, Traders remained able to make their Internal Requests to influence submissions and were not constrained from doing so by any of UBS's systems and controls...
144. On 2 July 2008 and 15 September 2008, the FX & MM Committee prepared draft Terms of Reference for LIBOR panel banks. The draft proposed that: "[the rate should not be] set in reference to information supplied by any individual or institution outside that area of the contributing bank that has the primary responsibility for managing that bank's cash".
145. UBS Legal and Compliance explained its concern to the Committee on 24 July 2008 and again on 28 October 2008, namely that its wording did not reflect the reality of the situation and that as a practical matter, it would be impossible for the cash desk to analyse the source of all the information on which its good faith perception of UBS's cost of borrowing was based. UBS Legal and Compliance suggested alternative wording (which the FX & MM Committee subsequently adopted) in order to deal with this concern, explaining that it understood what the BBA was seeking to achieve, namely "that the cash desk takes full responsibility for the submitted rate and that this should not be contributed or unduly influenced by other areas of the bank or outside institutions."
146. Therefore, when making its representations to the Committee, UBS was aware of the concerns of the BBA and the FX & MM Committee about inappropriate influences on LIBOR submissions and the inherent conflict of interest in its own LIBOR submission function.
147. Furthermore, when making its representations UBS (through a number of Senior Managers and Managers) was aware that it was manipulating submissions itself to benefit its trading positions....

RBS

In February 2013 the CFTC announced the settlement of enforcement proceedings against RBS.with respect to charges of manipulation, attempted manipulation and false reporting of yen and Swiss franc LIBOR.[20] The UK FSA announced it had fined RBS for misconduct relating to

[20] CFTC Orders The Royal Bank of Scotland plc and RBS Securities Japan Limited to Pay $325 Million Penalty to Settle Charges of Manipulation, Attempted Manipulation, and False Reporting of Yen and Swiss Franc LIBOR (Feb. 6, 2013) at http://www.cftc.gov/PressRoom/PressReleases/pr6510-13. See also Order at http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfrbsorder020613.pdf.

Libor.[21] The CFTC Order stated:

Commencing in at least mid-2006 and continuing through 2010, RBS made hundreds of attempts to manipulate Yen and Swiss Franc LIBOR and, on numerous occasions, made false LIBOR submissions to benefit its derivatives and money market trading positions. At times, RBS also aided and abetted other panel banks' attempts to manipulate those same rates. This misconduct involved more than a dozen RBS derivatives and money market traders, one manager, and multiple offices around the world, including London, Singapore and Tokyo. Sometimes, RBS was successful in manipulating Yen and Swiss Franc LIBOR.

The ways in which RBS conducted this scheme all followed a similar theme. The profitability of RBS' s Yen and Swiss Franc derivatives positions, such as interest rate swaps, depended on Yen and Swiss Franc LIBOR, as did certain of RBS's money market positions. RBS traders would ask their colleagues to make false submissions that were beneficial to RBS's trading positions. The traders' requests were either for falsely high submissions or falsely low ones, whatever was needed to turn a profit. The submitters often accommodated those requests by making false submissions. The statement of an RBS trader at the time makes their motivation clear: "[I]ts [sic] just amazing how libor fixing can make you that much money."

RBS created an environment for a number of years that eased the path to manipulation inasmuch as RBS sat derivatives traders and submitters together on the same desk, heightening the conflict of interest between the profit motives of the traders and the responsibility of submitters to make honest submissions. When derivatives traders and submitters eventually were separated (for business, not compliance reasons), the misconduct continued through Bloomberg chats and an internal instant messaging system ("instant messages") rather than by one trader merely turning in his chair to speak to his colleague on the desk Some of these submitters were even traders themselves, and skewed their LIBOR submissions to drive the profitability of their own money market and derivatives trading positions.

RBS derivatives traders also unlawfully worked in conce1i with a trader from a UBS AG subsidiary ("UBS"), also a LIBOR panel bank, in attempts to manipulate Yen LIBOR, and with a trader at another panel bank in attempts to manipulate Swiss Franc LIBOR. RBS also aided and abetted UBS's attempts to manipulate Yen LIBOR by executing wash trades (trades that result in financial nullities) in order to generate extra brokerage commissions to compensate two interdealer brokers for assisting UBS in its unlawful manipulative conduct. On at least one occasion, RBS also requested the assistance of an interdealer broker to influence the submissions of multiple panel banks in an attempt to manipulate Yen LIBOR. RBS engaged in its attempts to manipulate Yen and Swiss Franc LIBOR despite the questions that arose in the media in 2007 and 2008 about the integrity of banks' LIBOR submissions, LIBOR reviews and guidance by the British Bankers' Association in 2008 and 2009, and the Commission's request in April2010 that RBS conduct an internal investigation relating to its U.S. Dollar LIBOR practices. In fact, certain RBS employees involved in the misconduct were aware of the CFTC LIBOR investigation, and nonetheless continued their manipulative conduct while at the same time trying to conceal those efforts by not using Bloomberg chats or instant messages.

RBS's traders were able to carry out their many attempts to manipulate Yen and Swiss Franc LIBOR for years because RBS lacked internal controls, procedures and policies concerning its LIBOR submission processes, and failed to adequately supervise its trading desks and traders. RBS did not institute any

[21] FSA, RBS fined £87.5 million for significant failings in relation to LIBOR (Feb. 6, 2012) at http://www.fsa.gov.uk/library/communication/pr/2013/011.shtml.

meaningful controls, procedures or policies concerning LIBOR submissions until in or about June 2011. During this time, RBS was experiencing significant growth on its Yen and Swiss Franc trading desks, generating revenues for RBS that were multiplying over the years...

Responsibility for making RBS's LIBOR submissions was assigned to certain London based money market traders until March 2012. RBS money market traders were responsible for ensuring that the banlc met its funding needs each day in all currencies, including Yen and Swiss Franc. To do so, RBS money market traders engaged in both intra-bank and inter-bank borrowing and lending transactions. RBS money market traders also traded derivatives products that were indexed to, and therefore valued based on, LIB OR, including Yen and Swiss Franc LIBOR. One money market trader was primarily responsible for making both the Yen and Swiss Franc LIBOR submissions ("Primary Submitter").

The Primary Submitter considered certain market information in determining RBS' s Yen and Swiss Franc LIBOR submissions, such as RBS's funding needs, money market transactions, futures and other derivatives prices, "market color" communications with derivatives traders, information from interdealer brokers, arbitrage transactions, and synthetic cash deposits in various currencies. But the Primary Submitter also improperly considered requests to benefit derivative traders' positions or his own positions. At times, the Primary Submitter skewed the LIBOR submissions to benefit those positions. After considering these factors, the Primary Submitter or his backups determined a rate for each tenor and input the rates into a spreadsheet that was then submitted to Thomson Reuters shortly before 11:00 a.m. London time....

In October 2006, RBS senior management decided to facilitate more communication between derivatives traders and money market traders, some of whom were also LIBOR submitters, by locating them on the same RBS currency trading desks. This co-location plan was known as the Short-Term Markets Desk ("STM"). One of the express purposes of STM was to encourage derivatives and money market traders to communicate about the relevant market conditions that could impact trading and funding decisions. The seating arrangement, however, magnified the preexisting conflict of interest between the profit motive of traders and the responsibility of LIBOR submitters to assess honestly RBS's costs of borrowing unsecured funds in the London interbank market. RBS did not provide any guidance or controls over what constituted appropriate communications between the derivative traders and money market traders who were the LIBOR submitters. The result was an environment where the RBS Yen and Swiss Franc traders had increased opportunities to attempt to manipulate Yen and Swiss Franc LIBOR to RBS's benefit.

RBS's Yen and Swiss Franc derivatives traders quickly took advantage of this new arrangement. Sitting with the Primary Submitter, the traders not only shared their views of market conditions, or "market color," but they also told him what their trading positions were and encouraged him to make submissions that would make their positions more profitable. At times, if the Primary Submitter was not at the desk, the traders made written requests via Bloomberg chats or instant messages.

If the Primary Submitter was absent, junior derivatives and money market traders determined RBS's Swiss Franc LIBOR submissions, and a London-based derivatives trader ("Yen Trader 1 ") made the Yen LIBOR submissions. The substitute submitters took advantage of those opportunities to ensure that the Yen and Swiss Franc LIBOR submissions were beneficial either to those of other RBS traders, or at times positions held in RBS 's Yen or Swiss Franc money market trading book.

STM was in place formally until mid-2008 and continued informally for Yen and Swiss Franc traders into 2009. In the spring of2009, the trading floor was reorganized, and the derivatives traders and submitters were separated onto different desks. The seating change did nothing to slow the scheme. When they were no longer in close proximity to the submitters, the traders increased their use of

Bloomberg chats and instant messages to continue making requests for beneficial submissions, which were frequently accommodated...

RBS Yen traders knew that they were engaging in wrongful conduct and that Yen LIBOR was being manipulated to benefit trading positions throughout the market. As the Senior Yen Trader, Yen Manager, and other Yen traders coordinated their requests for beneficial LIBOR submissions with the Primary Submitter, they discussed at times how the Yen LIBOR panel was a "cartel" in which rates were being "manipulated." RBS traders, including the Senior Yen Trader, also discussed how the UBS Yen Trader was attempting to manipulate Yen LIBOR, including by coordinating with others. Despite the recognition that manipulation was occurring, at least one RBS trader welcomed having the UBS Yen Trader in the market because his aggressive trading brought increased liquidity, allowing traders, such as the RBS traders, to take on larger positions and potentially obtain greater trading profits...

On a number of occasions from at least early 2007 through at least mid-2009, RBS, through two traders, colluded with the UBS Yen Trader in coordinated attempts to manipulate Yen LIBOR. Another RBS derivatives trader engaged in wash trades with UBS to generate brokerage commissions to compensate interdealer brokers for assisting UBS's attempted manipulations. That same RBS derivatives trader also attempted to manipulate Yen LIBOR at least once by coordinating with an interdealer broker to influence the submissions of other panel banks.

Beginning in early 2007 through at least late 2008, the UBS Yen Trader, who was a former employee of RBS, exploited his friendship with an RBS derivatives trader, Yen Trader 2, in his many attempts to manipulate Yen LIBOR to his advantage. Frequently, the two traders discussed how changes in Yen LIBOR could benefit their respective trading positions. Through written communications, the UBS Yen Trader asked Yen Trader 2 to make requests of the RBS Primary Submitter for certain Yen LIBOR submissions that would benefit the UBS Yen Trader's positions. Yen Trader 2 often agreed to and did make the requests of the Primary Submitter. The Primary Submitter accommodated some of those requests....

RBS, through its derivatives traders and submitters, knew it was improper to consider derivatives trading positions in determining the bank's LIBOR submissions. A bank's financial derivatives trading positions are not legitimate or permissible factors on which to base a bank’s daily LIBOR submissions. By basing its Yen and Swiss Franc LIBOR submissions on rates that benefited RBS's or any other bank's derivatives positions, RBS's submissions were not made in accordance with the BBA definition and criteria for LIBOR submissions. Instead, RBS knowingly conveyed false, misleading or knowingly inaccurate reports that its submitted rates for Yen and Swiss Franc LIBOR were based on and solely reflected its assessment of the costs of borrowing unsecured funds in the relevant interbank money markets. Accordingly, RBS regularly attempted to manipulate, and at times succeeded in manipulating the official Yen and Swiss Franc LIBOR fixings in particular tenors, and knowingly delivered false, misleading or knowingly inaccurate reports concerning Yen LIBOR and Swiss Franc LIBOR, commodities in interstate commerce...

In 2008 and again in 2009, after the media questioned the integrity of LIBOR and the panel banks' submissions, the BBA reviewed its LIBOR submissions process and issued new guidance governing how banks should make LIBOR submissions. RBS participated in the reviews and sat on the FX & MM and Steering Committees for the BBA. In April 2010, RBS received the Commission's request that it conduct an internal investigation of its U.S. Dollar LIBOR practices. Yet RBS did not implement policies or internal controls until March 2011, and RBS's traders and submitters continued to attempt to manipulate LIBOR into late 2010 and other benchmark interest rates well into 2011. For example, throughout the relevant period, RBS failed to provide its benchmark interest rate submitters with any training or

supervision related to the setting of LIBOR, factors to be considered in the setting of LIBOR, or the LIBOR submission process in general. RBS also did not require documentation of its submitters' LIBOR determinations. Finally, RBS failed to provide its employees with any training regarding appropriate communications between derivatives traders and LIBOR submitters. This lack of supervision and training permitted RBS employees to knowingly make repeated false Yen and Swiss Franc LIBOR submissions for years....

Section 9(a)(2) of the Act[22] makes it unlawful for any person "knowingly to deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce .... " 7 U.S.C. § 13(a)(2) (2006); United States v. Brooks, 681 F.3d 678, 691 (5th Cir. 2012); United States v. Valencia, 394 F.3d 352, 354-355 (5th Cir. 2004); see also CFTC v. Johnson, 408 F. Supp. 2d 259, 267 (S.D. Tex. 2005) (same).

On a daily basis, RBS, through the transmission of an electronic spreadsheet to the service provider of the BBA, who calculates their official fixings (i.e., Thomson Reuters), knowingly delivered or caused to be delivered its Yen and Swiss Franc LIBOR submissions through the mails or interstate commerce. RBS's submissions were also caused to be delivered through the mails or interstate commerce through the daily dissemination and publication globally, including into the United States, of the panel banks' submissions as well as the daily official benchmark interest rates by at least Thomson Reuters on behalf of the BBA and other third party vendors. The panel banks' submissions are used to determine the official published rates for LIBOR which are calculated based on a trimmed average of the submissions. RBS's daily LIBOR submissions contained market information concerning the costs of borrowing unsecured funds in particular currencies and tenors, the liquidity conditions and stress in the money markets, and RBS's ability to borrow funds in the particular markets. Such market information affects or tends to affect the prices of commodities in interstate commerce, including the daily rates at which Yen LIBOR and Swiss Franc LIBOR are fixed. At times, during the periods relevant to the conduct described herein, RBS's submissions for certain tenors of Yen and Swiss Franc LIBOR were false, misleading or knowingly inaccurate because they were based in whole or in part on impermissible and illegitimate factors, specifically RBS's derivatives and money market trading positions. By using these impermissible and illegitimate factors in making its LIBOR submissions, RBS at times conveyed false, misleading or knowingly inaccurate information that the rates it submitted were based on and related solely to the costs of borrowing unsecured funds in the relevant markets and were truthful and reliable. Moreover, RBS traders, submitters and at least one manager knew that certain RBS LIBOR submissions contained false, misleading and knowingly inaccurate information concerning the submitted rates. By such conduct, Respondents violated Section 9(a)(2) of the Act, 7 U.S.C. § 13(a)(2) (2006)...

Together, Sections 6(c), 6(d), and 9(a)(2) of the Act prohibit acts of manipulation or attempted manipulation. Section 9(a)(2) of the Act makes it unlawful for "[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity .... " 7 U.S.C. § 13(a)(2) (2006). Section 6(c) of the Act authorizes the Commission to serve a complaint and provide for the imposition of, among other things, civil monetary penalties and cease and desist orders if the Commission "has reason to believe that any person ... is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any

[22] The Commodity Exchange Act codified at 7 USC Chapter 1.

registered entity, ... or otherwise is violating or has violated any of the provisions of [the] Act .... " 7 U.S.C. § 9 (2006). Section 6(d) of the Act is substantially identical to Section 6(c). See 7 U.S.C. § 13b (2006).
Manipulation under the Act is the "intentional exaction of a price determined by forces other than supply or demand." Frey v. CFTC, 931 F.2d 1171, 1175 (7th Cir. 1991). The following four elements must be met, by a preponderance of the evidence, to show a successful manipulation has occurred:
(1) the [respondent] had the ability to influence market prices;
(2) the [respondent] specifically intended to do so;
(3) artificial prices existed; and
(4) the [respondent] caused an artificial price.
In re Cox, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) 123,786, at 34,061
(CFTC July 15, 1987). The test for manipulation, however, is a practical one: We think the test of manipulation must largely be a practical one if the purposes of the Commodity Exchange Act are to be accomplished. The methods and techniques of manipulation are limited only the ingenuity of man. The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand. Cargill v. Hardin, 452 F.2d 1154, 1163 (8th Cir. 1971). "[I]ntent is the essence of manipulation." Indiana Farm Bureau Cooperative Ass 'n, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep (CCH) 121,796, at 27,282 (CFTC Dec. 17, 1982). The manipulator's intent separates "lawful business conduct from unlawful manipulative activity." !d. at 27,283. To prove the intent element of manipulation, it must be shown that RBS "acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand." !d.
The Commission has observed that "intent must of necessity be inferred from the objective facts and may, of course, be inferred by a person's actions and the totality of the circumstances." In re Hohenberg Bros., [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) 120,271, at 21,477 (CFTC Feb. 18, 1977). "[O]nce it is demonstrated that the alleged manipulator sought, by act or omission, to move the market away from the equilibrium or efficient price - the price which reflects market forces of supply and demand - the mental element of manipulation may be inferred." Indiana Farm Bureau Cooperative Ass 'n, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep (CCH) at 27,283. "It is enough to present evidence from which it may reasonably be inferred that the accused 'consciously desire[d) that result, whatever the likelihood of that result happening from his conduct.'" !d. (quoting United States v. United States Gypsum Co., 438 U.S. 442,445 (1978)). A profit motive may also be evidence of intent, although profit motive is not a necessary element of an attempted manipulation. See In re DiPlacido [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ~ 30,970, at 62,484 (CFTC Nov. 5, 2008) (citing In re Hohenberg Bros. Co., (CCH) ~ 20,271, at 21,478)), aff'd, 364 Fed. Appx. 657, No. 08-5559-ag, 2009 WL 3326624 (2d Cir. 2009).
An artificial price (also termed a "distorted" price) is one "that does not reflect market or economic forces of supply and demand." In re Cox, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 34,064; Indiana Farm Bureau Cooperative Ass 'n, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep (CCH) at 27,288 n. 2. As the Commission noted with approval in DiPlacido, ~ 30,970, at 62,484 (quoting Indiana Farm Bureau Cooperative Ass 'n, Inc., [1982- 1984 Transfer Binder] Comm. Fut. L. Rep (CCH) at 27,300 (Commissioner Stone concurring)), a Commissioner has commented: "[t]his is more an axiom than a test." In determining whether an artificial price has occurred: [O]ne must look at the aggregate forces of supply and demand and search for those factors which are extraneous to the pricing system, are not a legitimate part of the economic pricing of the commodity, or are extrinsic to that commodity

market. When the aggregate forces of supply and demand bearing down on a particular market are all legitimate, it follows that the price will not be miificial. On the other hand when a price is effected by a factor which is not legitimate, the resulting price is necessarily artificial. Thus, the focus should not be as much on the ultimate price as on the nature of the factors causing it. Indiana Farm Bureau Cooperative Ass'n, Inc., [1982-1984 Transfer Binder] Comm. Fut. L. Rep (CCH) at 27,288 n.2. See also In re DiPlacido [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 62,484 (finding that the placement of uneconomic bids or offers results in artificial prices because those prices are not determined by the free forces of supply and demand on the exchange).

Causation of artificial prices is established when it is demonstrated that artificial market prices resulted from the conduct of a trader, or group of traders acting in concert, rather than legitimate forces of supply and demand. See Cargill, Inc. v. Hardin, 452 F.2d 1154, 1171-72 (8th Cir. 1971) (price squeeze "intentionally brought about and exploited by Cargill"); In re Cox, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 34,067 (proof of causation requires the Division to show that "the respondents' conduct 'resulted in' artificial prices").

There can be multiple causes of an artificial price. In re DiPlacido [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 62,485. The manipulator's actions need not be the sole cause of the artificial price. "It is enough for purposes of a finding of manipulation in violation of Sections 6(b) and 9 of the Act that respondents' action contributed to the price [movement]." In re Kosuga, 19 A.D. 603, 624 (1960); see also In re Cox, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 34,066 (recognizing there can be multiple causes of an artificial price and holding that a charge of manipulation can be sustained where respondents' acts are a proximate cause of the artificial price).

Here, as a member of the BBA's Yen and Swiss Franc LIBOR panels, RBS made daily submissions that purported to reflect its assessments of the costs of borrowing unsecured funds in the London interbank market for Yen and Swiss Franc LIBOR across tenors. The official LIBOR fixings are calculated using a trimmed average methodology applied to the rates submitted by the panel banks. By virtue of this methodology, RBS had the ability to influence or affect the rate that would become the official Yen and Swiss Franc LIBOR for any tenor. As evidenced by the extensive communications and other facts set forth above, in making the false Yen and Swiss Franc LIBOR submissions, several RBS derivatives traders and submitters specifically intended to affect the daily Yen and Swiss Franc LIBOR for certain tenors, including one-month, three-month, and six-month. Their intent is also made clear by the evidence that the derivatives traders and submitters' motives were to benefit RBS's derivatives and at times money market trading positions, or, at times, the derivatives trading positions of other panel banks with whom certain RBS derivatives traders colluded.

On certain occasions, RBS's false, misleading or knowingly inaccurate Yen and Swiss Franc LIBOR submissions were illegitimate factors in the pricing of the daily Yen and Swiss Franc LIBOR fixings and affected the official Yen and Swiss Franc LIBOR for certain tenors, resulting in artificial Yen and Swiss Franc LIBOR fixings. Thus, RBS' s actions were a proximate cause ofthe artificial Yen and Swiss Franc LIBOR fixings. Accordingly, on certain occasions, RBS manipulated Yen and Swiss Franc LIBOR for certain tenors, commodities in interstate commerce, in violation of Sections 6(c), 6(d), and 9(a)(2) of the Act.

ICAP

In September 2013 the CFTC announced the settlement of charges of manipulation, attempted manipulation, false reporting, and aiding and abetting derivatives traders'

manipulation and attempted manipulation, relating to Yen LIBOR against ICAP.[23] At the same time the UK's Financial Conduct Authority (FCA) (a successor regulator to the Financial Services Authority with responsibility for conduct regulation) announced its own action against ICAP.[24] ICAP paid $65 million to the CFTC and £14 million to the FCA.

Here is an excerpt from the CFTC's Order:

The Yen London Interbank Offered Rate ("Yen LIBOR"), the benchmark rate at issue in this Order, is one of the most important financial benchmark interest rates used around the world. Yen LIBOR is established every day based on information submitted by banks who are members of the Yen LIBOR Panel. Three panel banks have been found to have undermined the integrity and reliability of LIBOR and other benchmark rates through the manipulative acts of their employees. As set forth below, money market and derivatives traders at the banks were not the only wrongdoers with respect to LIBOR. The Yen interdealer brokers of Respondent ICAP- purported honest middlemen between banks- participated as well.

For more than four years, from at least October 2006 through at least January 2011 ("relevant period"), ICAP brokers on the Yen derivatives and cash desks knowingly disseminated false and misleading information concerning Yen borrowing rates to market participants in attempts to manipulate, at times successfully, the official fixing of the daily Yen LIBOR. ICAP brokers, including one known as "Lord LIBOR," engaged in this misconduct primarily to aid and abet a highly valued client, who was a senior Yen derivatives trader ("Senior Yen Trader") employed at UBS Securities Japan Co., Ltd. ("UBS") and later at another bank, in his relentless attempts to manipulate Yen LIB OR to benefit his derivatives trading positions that were tied to this benchmark....

The Senior Yen Trader sought to capitalize on ICAP's extensive network of contacts at the Yen LIB OR panel banks to achieve his manipulative goals. Because the Senior Yen Trader was a significant client of the ICAP Yen derivatives desk, and to ensure that the desk kept and increased its share of his business, including the commissions and bonuses he generated for ICAP, the ICAP Yen brokers readily acquiesced to his repeated demands for assistance in manipulating Yen LIBOR.

Over the years the Senior Yen Trader made more than 400 manipulative requests of certain ICAP brokers, which they often accommodated. Those ICAP Yen brokers used two means to disseminate false Yen LIBOR information and influence Yen LIBOR submitters. First, one ICAP "cash" broker provided daily market information concerning Yen LIBOR borrowing rates via group emails and oral communications to market participants, including Yen LIBOR submitters. The group emails were called "Run Thrus" and included "Suggested LIBORs" for certain Yen LIBOR tenors. Market participants believed that the Suggested LIBORs reflected the cash broker's assessment ofhow Yen LIBOR would be fixed based on his unbiased evaluation of borrowing costs in the interbank market. Almost all of the panel banks' Yen LIBOR submitters received the cash broker's Run Thru emails, and several relied on them in making their own rate submissions. However, during the relevant period, ICAP's Yen cash broker

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[23] CFTC Charges ICAP Europe Limited, a Subsidiary of ICAP plc, with Manipulation and Attempted Manipulation of Yen Libor (Sep. 25, 2013) http://www.cftc.gov/PressRoom/PressReleases/pr6708-13 , Order : http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enficaporder092513.pdf.

[24] http://www.fca.org.uk/static/documents/final-notices/icap-europe-limited.pdf .

often skewed his Suggested LIBORs to benefit the Senior Yen Trader, rather than provide an objective, unbiased assessment of this benchmark interest rate. The brokers attempted to exploit the bank submitters' reliance, even sometimes referring to submitters as "sheep" blindly adopting the Suggested LIBORs as their own submissions. Second, at times, certain ICAP Yen brokers targeted particular submitters or traders at panel banks and provided them false LIBOR information individually under the guise of true market information.
ICAP's Yen derivatives desk maintained ICAP's direct relationship with the Senior Yen Trader. They and the Senior Yen Trader ensured the ICAP cash broker's unlawful assistance by providing various financial incentives, but the cash broker grew increasingly demanding. At one point, the ICAP Yen cash broker threatened the head of the Yen derivatives desk- "no more mr libor"- if he was not well-compensated for his services. As the cash broker's demands grew, the "kick backs" (as the head of the Yen derivatives desk called it) paid to the cash broker for "LIBOR services" quickly escalated from free meals and champagne, to commissions specially generated by the Senior Yen Trader, to a qumierly payment of $9,000 (ultimately totaling $72,000).
Separate from the unlawful activity to help the Senior Yen Trader, on a limited number of occasions, the ICAP Yen brokers aided and abetted other derivatives traders' attempts to manipulate Yen LIB OR, for the same reasons that motivated them to help the Senior Yen Trader.
ICAP's ineffectual supervision ofthe Yen derivatives and cash desks, its misplaced reliance on the expectation that Yen desk heads would enforce a compliance regime on their desk colleagues, and its failure to audit the Yen derivatives desk or adequately review the Yen brokers' communications with clients, among other internal controls and supervisory deficiencies, allowed this misconduct to continue for years.

Rabobank

In October 2013 regulators announced enforcement action against Rabobank whereby it would pay $475 million to the CFTC, and £105 million to the FCA.[25]

Gary Gensler, then Chairman of the CFTC, said:

With today's settlement, the CFTC has shown – now for the fifth time – how banks have pervasively rigged key interest rate benchmarks, such as LIBOR and Euribor.
Unfortunately, we once again see how the public trust can be violated through bad actors readily manipulating benchmark interest rates.
Through hundreds of manipulative acts spanning six years, in six offices, and on three continents, more than two dozen Rabobank employees, including a senior manager, manipulated, attempted to manipulate and falsely reported crucial reference rates in global financial markets. Rabobank employees also aided and abetted other banks to manipulate benchmark interest rates.
I wish I could say that this won't happen again, but I can't. LIBOR and Euribor are not sufficiently

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[25] *See* CFTC Order with respect to Rabobank (Oct. 29, 2013) at http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfrabobank102913.pdf ; FCA Final Notice with respect to Rabobank (Oct. 29, 2013) at http://fca.org.uk/static/documents/final-notices/rabobank.pdf .

anchored in observable transactions. Thus, they are basically more akin to fiction than fact. That's the fundamental challenge so sharply revealed by Rabobank and our prior cases.
This fifth instance of benchmark manipulative conduct highlights the critical need to find replacements for LIBOR and Euribor – replacements truly anchored in observable transactions.
Though addressing governance and conflicts of interest regarding benchmarks is critical, that will not solve the lack of transactions in the market underlying these benchmarks.
That is why the work of the Financial Stability Board to find alternatives and consider potential transitions to these alternatives is so important. The CFTC looks forward to continuing to work with the international community on much needed reforms.[26]

Here is an excerpt from the FCA's Final Notice:

Between May 2005 and January 2011, Rabobank acted improperly and breached Principle 5 by failing to observe proper standards of market conduct. Certain Rabobank LIBOR submitters (who were primarily money markets traders and located in the bank's London and Utrecht offices) ("Submitters") routinely took trading positions in interest rate derivatives into account when making JPY, and to a lesser extent, USD and GBP LIBOR submissions. Certain Rabobank employees also sought to influence the JPY and USD LIBOR submissions of other Panel Banks...
From May 2005 to November 2010, Rabobank Traders made at least 508 documented Internal Requests in relation to JPY, USD and GBP LIBOR. This included: .. At least 384 documented Internal Requests in relation to JPY LIBOR. (One JPY Trader described himself as "setting libors for rabo", and a JPY LIBOR Submitter assured that same Trader that "I would never change libors without consulting you" and " we are on the same team".).. At least 112 documented Internal Requests in relation to USD LIBOR. (A Manager noted in relation to another Trader who made Internal Requests of the USD LIBOR Submitters, that he was "fast turning into [that Trader's] bitch!!!!".)...
In addition, Traders frequently discussed their trading positions with Submitters and made Internal Requests orally. One USD Trader noted on 17 September 2008 that Traders were used to "help[ing] ourselves to the libors"...Certain Submitters also influenced the submissions they made to suit trading positions they took in their capacities as money markets traders...Given the widespread and routine nature of making JPY, and to a lesser extent, USD and GBP, Internal Requests and the nature of the control failures identified in this Notice, every other LIBOR submission in currencies and tenors in which Rabobank submitted were at risk of having been improperly influenced...
Rabobank colluded with individuals from other Panel Banks to make submissions in relation to JPY and USD LIBOR that benefited trading positions ("External Requests"). From June 2005 to October 2008, at least one Rabobank Trader and one Rabobank Submitter made at least 12 documented External Requests to at least two individuals from one other Panel Bank...Rabobank also took into account requests made by individuals from other Panel Banks to make submissions in relation to JPY LIBOR ostensibly for the benefit of the trading positions of those Panel Banks. From June 2006 to October 2008, at least one Rabobank Submitter took into account at least seven documented requests from at least two individuals at two other Panel Banks...In addition, Rabobank colluded with Brokers to attempt to influence the JPY LIBOR submissions of other Panel Banks ("Broker Requests"). The Brokers were in regular contact with

[26] Statement of Chairman Gary Gensler on Settlement Order against Rabobank (Oct. 29, 2013) at http://www.cftc.gov/PressRoom/SpeechesTestimony/genslerstatement102913 ;

the various Panel Banks that contributed JPY LIBOR submissions...
From May 2009 to January 2011, at least one Rabobank Trader made at least 12 JPY LIBOR Broker Requests to at least four Brokers at two broker firms ("Broker Firms")...
Rabobank also took into account requests from Brokers to make submissions in relation to JPY LIBOR to benefit the Brokers' clients at other Panel Banks. From July 2008 to September 2008, at least one Rabobank Submitter took into account at least 14 documented requests from one Broker at one Broker Firm....
From 2009 to November 2010, Rabobank specifically instructed its JPY LIBOR Submitters to seek market colour from certain JPY Traders to inform their LIBOR submissions. This created the risk that Traders who had significant derivatives trading positions would improperly seek to influence those JPY LIBOR Submitters. This risk was aggravated by the fact that certain JPY LIBOR Submitters took the instruction to seek market colour to be a direction to obtain and make LIBOR submissions at levels suggested by Traders, including Traders who, in practice, exploited their roles by making suggestions that directly benefitted trading positions... In total, 26 individuals, seven of whom were Managers, were directly involved in, or aware of, these improper requests. Two other Managers ought to have known of, and stopped, the Internal Requests made by individuals who reported to them.... Further, the practice of attempting to manipulate LIBOR submissions to benefit trading positions was also conducted between individuals in open conversations, chat forums and group emails...
Although between May 2005 and 30 March 2011 Rabobank had in place general policies and procedures concerning compliance standards and which required, amongst other things, staff to act with integrity, it did not have in place any specific systems, controls or policies governing the procedure for making LIBOR submissions despite: (I) commentary by the Wall Street Journal in 2008 noting the risk of derivatives traders' influence; (ii) the amended BBA Guidance in 2009 which specifically noted that derivatives traders should not be involved in the submission process; and (iii) concerns raised by a regulator in 2010 relating to USD LIBOR submissions...
Further, between May 2005 and August 2012, certain Submitters carried out trading in derivatives products referenced to LIBOR. Although there was an inherent conflict of interest in allowing Submitters to trade such products, Rabobank did not expressly prohibit its Submitters from trading derivatives products for purposes other than hedging cash positions until August 2012...
Rabobank also located Traders in close proximity with Submitters. This created an obvious risk that Traders would seek to influence Submitters to make submissions to benefit trading positions. Rabobank took no steps to mitigate this risk until July 2012...
Accordingly, throughout the Relevant Period, Rabobank management failed to manage the relevant business areas appropriately. In fact... a number of Rabobank Managers knew about (and in some cases were actively involved in) attempts to manipulate LIBOR submissions...
It was not until 30 March 2011 that Rabobank implemented systems and controls to explicitly govern its procedures for making LIBOR submissions. Even then, Rabobank failed to take steps sufficient to prevent Submitters from trading derivatives products linked to the very rates they submitted for the bank, other than for the purposes of hedging cash positions.

Department of Justice, EU Commission: Price-fixing and Cartels

In June 2013 RBS entered into a deferred prosecution agreement with the US Department of Justice with respect to charges of wire fraud and price fixing.[27] This was "the first time a financial services firm was ever held criminally liable under antitrust laws for a trader-based market manipulation scheme." [28]

In December 2013 the EU Commission announced that it had fined 8 international financial institutions (Barclays, Deutsche Bank, Société Générale, RBS, UBS, JP Morgan, Citigroup and RP Martin) a total of 1.71 billion euros for participating in illegal cartels in markets for financial derivatives in the EEA:[29] competitors should not collude with each other. The Commission said:

The Commission has the responsibility to enforce the EU antitrust rules, in particular Article 101 of the TFEU and Article 53 of the EEA Agreement which prohibit cartels, in all economic sectors, including the financial sector.
In contrast to the actions undertaken by regulatory agencies, the Commission focuses solely on breaches of competition rules – in this case collusion between competitors in derivatives markets.
This means that the Commission has looked at the conduct of the relevant bank in respect of financial benchmarks from a different angle. Financial regulatory agencies tackling the possible manipulation of benchmarks may for instance focus on the conduct of single banks rather than a number of banks. By contrast, the Commission has detected and sanctioned cartels.
Participation in a cartel is a very serious infringement of EU competition law for which the Commission, as the EU's antitrust authority, must impose a fine sufficiently deterrent to ensure that other undertakings refrain from engaging in such conduct.
The Commission understands that benchmark manipulation is also being investigated by other authorities or that such authorities may have already imposed fines on some of the undertakings involved in these cases, but none of these cases concerns the enforcement of competition rules in the European Economic Area (EEA). Investigations of other regulators do not relieve the Commission from its responsibility to also ensure that the rules of fair competition are respected in the banking sector. [30]

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[27] *See* US v RBS Deferred Prosecution Agreement at http://www.justice.gov/atr/cases/f292500/292555.pdf

[28] John Terzaken, A New Era of Antitrust Enforcement (Feb. 18, 2014) at http://dealbook.nytimes.com/2014/02/18/a-new-era-of-antitrust-enforcement/?_php=true&_type=blogs&_r=0.

[29] EU Commission, Press Release: Antitrust: Commission Fines Banks € 1.71 Billion for Participating in Cartels in the Interest Rate Derivatives Industry (Dec. 4, 2013). As of March 28, 2014 no public version of the decision is available: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39914/39914_4238_7.pdf .

[30] Antitrust: Commission Fines Banks € 1.71 Billion for Participating in Cartels in the Interest Rate Derivatives Industry - Frequently Asked Questions, MEMO/13/1090 (Dec. 4, 2013).

Fixing the Problem

After the Barclays announcements the UK Parliament engaged in a frenzy of fact finding. Executives at Barclays resigned, and UK MPs and regulators began to debate whether there were problems with the culture of banking. A Parliamentary Commission on Banking Standards was established in the UK.[31]

During this period the Bank of England published communications which took place between Tim Geithner, then President of the Federal Reserve Bank of New York and Mervyn King, then Governor of the Bank of England in May 2008 with respect to ideas for changes to the BBA governance arrangements.[32] We have seen that Libor and the euromarkets originated as an offshore phenomenon, so it is interesting that the then President of the Federal Reserve Bank of New York should be seeking to affect the way in which Libor is calculated. Of course, by 2008 Libor had become standardized and had moved back into the US as a rate of interest used in domestic US transactions. However, the idea of federal reserve/central bankers in the UK and US co-operating over the governance of Libor is interesting. Geithner proposed some sensible-seeming governance suggestions, for example that Bank auditors be expected to attest to the accuracy of banks' Libor rates, and an idea of establishing random sampling of rates submitted by an expanded set of contributor banks to minimize misreporting. But he also argued that more US banks should be involved in Libor fixing, and that there could be a second fixing after the US markets open because this would be more indicative of conditions while the US market was open. King replied that the Bank of England would ask the BBA to include Geithner's suggestions in its consultation document. Ben Bernanke gave evidence to the Senate Committee on Banking, Housing and Urban Affairs in which he commented unfavorably on the lack of responsiveness of Libor to the US suggestions for governance changes and suggested that transaction based measures of interest rates were preferable.[33] Others were arguing for transaction based systems for setting rates, such as the DTCC GCF Repo Index and AFMA's bank bill swap reference rate.

The Wheatley Review

In July 2012 the UK Treasury established the Wheatley Review of Libor. Martin Wheatley, charged with the review, was at the time the Managing Director of the FSA and Chief

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[31] *See* http://www.parliament.uk/business/committees/committees-a-z/joint-select/professional-standards-in-the-banking-industry/

[32] *See* http://www.bankofengland.co.uk/publications/Documents/news/2012/nr068.pdf

[33] Binyamin Appelbaum, Cautious on Growth, Bernanke Offers No Hint of New Action, NY Times (Jul. 17, 2012) at http://www.nytimes.com/2012/07/18/business/economy/bernanke-testifies-before-senate-panel.html?hp

Executive-designate of the UK's Financial Conduct Authority.[34] The Final Report was published in September 2012.[35]

Here are the Key Conclusions and Recommendations of the Report:

1.10 Through the process of analysis and consultation, the Wheatley Review has reached three fundamental conclusions that underpin its recommendations.
1.11 First, the Review has concluded that there is a clear case in favour of comprehensively reforming LIBOR, rather than replacing the benchmark . LIBOR is used in a vast number of financial transactions; it is estimated that contracts with an outstanding value of at least $300 trillion reference the benchmark. A move to replace LIBOR could only be justified by clear evidence that the benchmark is severely damaged, and that a transition to a new, suitable benchmark or benchmarks could be quickly managed to ensure limited disruption to financial markets.
1.12 The Wheatley Review has concluded that the issues identified with LIBOR, while serious, can be rectified through a comprehensive and far-reaching programme of reform; and that a transition to a new benchmark or benchmarks would pose an unacceptably high risk of significant financial instability, and risk large- scale litigation between parties holding contracts that reference LIBOR.
1.13 Furthermore, through the course of the consultation, it has become clear that, despite the loss of credibility that LIBOR has suffered recently, there has been no noticeable decline in the use of LIBOR by market participants. Indeed, a clear majority market participants responding to the Review's consultation argued for the continuation of a form of LIBOR, rather than its wholesale replacement. While there are other benchmarks that are used in some cases as substitutes for LIBOR, there is clearly a large role that LIBOR plays in financial markets for which there is no immediately obvious alternative.
1.14 It should however be noted that, given the immediate focus of the Review and the difficulties identified with attempting to replace LIBOR quickly, this Review has not attempted to conduct a detailed evaluation of alternatives that might, over time, come to be used by market participants. That work should proceed... through internationally coordinated action.
1.15 Second, the Review has concluded that transaction data should be explicitly used to support LIBOR submissions. A number of the Review's recommendations are intended to establish strict and detailed processes for verifying submissions against transaction data and limiting the publication of LIBOR to those currencies and tenors that are supported by sufficient transaction data.
1.16 Third, the Review has concluded that market participants should continue to play a significant role in the production and oversight of LIBOR. While LIBOR needs to be reformed to address the weaknesses that have been identified, it would not be appropriate for the authorities to completely take over the process of producing a benchmark which exists primarily for the benefit of

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[34] He is now the Chief Executive of the FCA: http://fca.org.uk/about/structure/board/martin-wheatley .

[35] The Wheatley Review of LIBOR: Final Report (Sep. 2012) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf . In December 2012 the FSA published a Consultation Document on the regulation of benchmarks. FSA, the Regulation and Supervision of Benchmarks (Dec. 2012) at http://www.fsa.gov.uk/static/pubs/cp/cp12-36.pdf ., CP12/36

market participants.
1.17 Many alternative benchmarks do already exist and are in use in a number of markets, although none with such widespread usage as LIBOR. Market participants can, and do, adopt the benchmark that is most appropriate for each type of contract. The role of the authorities is
primarily to ensure the integrity of the process by which benchmarks are determined rather than to direct users to adopt a particular benchmark This said, the market is likely to coalesce around the most reliable and verifiable benchmark for any given transaction; the reforms recommended by the Wheatley Review to strengthen LIBOR should inform the work being done by the IOSCO Board Level Task Force....
1.18 Drawing on these three fundamental conclusions, this report presents the Wheatley Review's ten-point plan for the comprehensive reform of LIBOR....

Regulation of LIBOR
1 The authorities should introduce statutory regulation of administration of, and submission to, LIBOR , including an Approved Persons regime, to provide the assurance of credible independent supervision, oversight and enforcement, both civil and criminal..
Institutional reform
2 The BBA should transfer responsibility for LIBOR to a new administrator , who will be responsible for compiling and distributing the rate, as well as providing credible internal governance and oversight. This should be achieved through a tender process to be run by an independent committee convened by the regulatory authorities...
3 The new administrator should fulfil specific obligations as part of its governance and oversight of the rate, having due regard to transparency and fair and non-discriminatory access to the benchmark. These obligations will include surveillance and scrutiny of submissions, publication of a statistical digest of rate submissions, and periodic reviews addressing the issue of whether LIBOR continues to meet market needs effectively and credibly ...
The rules governing LIBOR
4 Submitting banks should immediately look to comply with the submission guidelines presented in this report, making explicit and clear use of transaction data to corroborate their submissions...
5 The new administrator should, as a priority, introduce a code of conduct for submitters that should clearly define:
guidelines for the explicit use of transaction data to determine submissions;
systems and controls for submitting firms;
transaction record keeping responsibilities for submitting banks; and
a requirement for regular external audit of submitting firms....
Immediate improvements to LIBOR
6 The BBA and should cease the compilation and publication of LIBOR for those currencies and tenors for which there is insufficient trade data to corroborate submissions, immediately engaging in consultation with users and submitters to plan and implement a phased removal of these rates ....
7 The BBA should publish individual LIBOR submissions after 3 months to reduce the potential for submitters to attempt manipulation, and to reduce any potential interpretation of submissions as a signal of creditworthiness ...
8 Banks, including those not currently submitting to LIBOR, should be encouraged to participate as widely as possible in the LIBOR compilation process , including, if necessary, through new powers of regulatory compulsion...

9 Market participants using LIBOR should be encouraged to consider and evaluate their use of LIBOR, including the a consideration of whether LIBOR is the most appropriate benchmark for the transactions that they undertake, and whether standard contracts contain adequate contingency provisions covering the event of LIBOR not being produced..
International co-ordination
10 The UK authorities should work closely with the European and international community and contribute fully to the debate on the long-term future of LIBOR and other global benchmarks , establishing and promoting clear principles for effective global benchmarks

The BBA acknowledged that it would cease to act as Libor administrator,[36] and consulted about eliminating Libor quotes for currencies and tenors which were unsupported by transaction data.[37] Responses to the consultation commented that the proposed timescale for the changes was too fast and the BBA made some adjustments.[38] HM Treasury established the Hogg Tendering Advisory Committee for LIBOR and the Committee opened the tendering process for a new Libor administrator in February 2013. As noted above, as a result of the tendering process, the Intercontinental Exchange now manages ICE LIBOR.

The UK's Financial Services Act 2012[39] contains provisions relating to benchmarks. Activity relating to the setting of benchmarks is defined as a regulated activity under section 7 (amending 22 of FSMA 2000) and s. 91 specifically addresses manipulation of benchmarks:

91 Misleading statements etc in relation to benchmarks
(1)A person ("A") who makes to another person ("B") a false or misleading statement commits an offence if—
(a)A makes the statement in the course of arrangements for the setting of a relevant benchmark,
(b)A intends that the statement should be used by B for the purpose of the setting of a relevant benchmark, and
(c)A knows that the statement is false or misleading or is reckless as to whether it is.
(2)A person ("C") who does any act or engages in any course of conduct which creates a false or

[36] *See, e.g.*, BBA statement on conclusions of Wheatley Review into LIBOR (Sep. 28, 2012) at http://www.bbalibor.com/news-releases/bba-statement-on-conclusions-of-wheatley-review-into-libor; HM Treasury, The Hogg Tendering Committee for LIBOR (Feb. 26, 2013) ("The work of the Committee is able to progress following the passage of a Resolution by BBA members, voted upon at an Extraordinary General Meeting of the BBA held on 25 February. ")

[37] BBA, Strengthening LIBOR – proposal to implement recommendation number 6 of 'The Wheatley Review of LIBOR' (Nov. 2012).

[38] Strengthening LIBOR – proposal to implement recommendation number 6 of 'The Wheatley Review of LIBOR':Feedback Statement (Dec. 2012) .

[39] Financial Services Act 2012, 2012 C. 21 at http://www.legislation.gov.uk/ukpga/2012/21/contents/enacted .

misleading impression as to the price or value of any investment or as to the interest rate appropriate to any transaction commits an offence if—
(a)C intends to create the impression,
(b)the impression may affect the setting of a relevant benchmark,
(c)C knows that the impression is false or misleading or is reckless as to whether it is, and
(d)C knows that the impression may affect the setting of a relevant benchmark.
(3)In proceedings for an offence under subsection (1), it is a defence for the person charged ("D") to show that the statement was made in conformity with—
(a) price stabilising rules,
(b)control of information rules, or
(c)the relevant provisions of Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments.
(4)In proceedings brought against any person ("D") for an offence under subsection (2) it is a defence for D to show—
(a)that D acted or engaged in the conduct—
(i)for the purpose of stabilising the price of investments, and
(ii)in conformity with price stabilising rules,
(b)that D acted or engaged in the conduct in conformity with control of information rules, or
(c)that D acted or engaged in the conduct in conformity with the relevant provisions of Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments.
(5)Subsection (1) does not apply unless the statement is made in or from the United Kingdom or to a person in the United Kingdom.
(6)Subsection (2) does not apply unless—
(a)the act is done, or the course of conduct is engaged in, in the United Kingdom, or
(b)the false or misleading impression is created there.

EU Commission and EU Parliament Consultations- September 2012

In September 2012 the EU Commission published a consultation document on the regulation of "indices," which included Libor and Euribor.[40] Whereas the UK focused on fixing Libor, the EU Commission initiated a wider-ranging study. This idea of characterizing the problem as a generalized problem rather than a specific problem affecting particular mechanisms is also reflected in IOSCO's work (for which see later). As the Commission began to work on the problem of indices the EU Parliament also got involved, and the Economic and Monetary Affairs

[40] EU Commission, Consultation Document on the Regulation of Indices: A Possible Framework for the Regulation of the Production and Use of Indices serving as Benchmarks in Financial and other Contracts (Sep. 5, 2012) at http://ec.europa.eu/internal_market/consultations/docs/2012/benchmarks/consultation-document_en.pdf.

Committee began a consultation with the following questions:

TOPIC 1: TACKLING THE CULTURE OF MANIPULATION
Q1: How widespread is the problem? Are there other financial instruments, markets and/or benchmarks vulnerable to potential manipulation?
What action should be taken to ensure these forms of market abuse are tackled?
Q2: What action should be taken to ensure the integrity and quality of all benchmarks, financial instruments and markets?
a. Do both benchmarks and those entities that input into the setting of the benchmark need to be regulated?
b. Are traded rates as opposed to offered rates a better basis for input? Or should a 'hybrid' approach be adopted?
c. Should the posters of rates be granted anonymity? What would be the potential downside to such an approach? Would such a status add or diminish the integrity of prices?
d. What kind of powers should regulators of the financial sector be given to set and introduce criminal sanctions for attempted or actual manipulation of benchmarks?

TOPIC 2: ESTABLISHING INTEGRITY AND TRUST POST LIBOR/EURIBOR
Q3:What specific measures should be taken at European/Global level to improve investor confidence?
How can cooperation between global regulators be improved?
How can legislators ensure continuity between existing contracts which rely on Libor/Euribor (some $500 trillion of contracts) and future contracts?
Q4: What specific measures could be taken to enhance transparency and information quality in the financial sector?
Q5: What future action could be taken to achieve better governance in order to prevent future manipulation and establish integrity, trust and fairness in the financial services industry?[41]

GFMA Principles for Financial Benchmarks[42]

Two days after the Commission published its consultation document in September 2012 the Global Financial Markets Association (GFMA), a trade association, published a set of principles for financial market benchmarks:

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[41] *See* http://www.europarl.europa.eu/committees/en/econ/subject-files.html?id=20120820CDT49762

[42] GFMA Principles for Financial Benchmarks (Sep. 7, 2012) at http://www.gfma.org/Initiatives/Market-Practices/GFMA-Provides-its-Principles-for-Financial-Benchmarks-to-the-Global-Regulatory-Community/. For information about GFMA *see* http://gfma.org/about/ ("GFMA brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA.")

Financial benchmarks are widely used as references for determining payments under a variety of financial instruments and many have a significant impact on market activity globally. The integrity of these benchmarks is critical to the effective functioning of markets and investor confidence. Recent events have placed the integrity of some of the most significant benchmarks into question and have contributed to public distrust in the financial industry. These events have prompted policy-makers to study enhancements to the benchmark-setting process. For instance, the United Kingdom's Chancellor of the Exchequer commissioned The Wheatley Review to focus on the reforms to the framework for setting the London Interbank Offered Rate. The International Organization of Securities Commissions has been reviewing the need for such principles in the crude oil markets.

A broadly accepted set of best practice standards for conducting benchmark price assessment processes ("benchmark process") would serve to enhance confidence in such assessments and, more generally, promote both the integrity and efficiency of the global financial markets.

In this context, the Global Financial Markets Association2 ("GFMA") is issuing these Principles for Financial Benchmarks (the "Principles"). Our objectives in doing so are the following:

- To draw attention to the need for international standards that apply to the issuance of financial benchmarks;
- To offer the Principles as a basis for crafting such international standards; and
- To urge the adoption of the Principles by organizations responsible for developing and issuing benchmarks.

The Principles recognize that benchmarks and their data inputs necessarily vary by market and reference asset type, and that many benchmarks inevitably rely on voluntary contributors and their judgment. Nonetheless, sponsors and their agents are encouraged by the Principles to solicit sufficiently deep or broad-based reference data while maintaining the integrity of the submission process and resulting benchmark price assessment.

SCOPE AND DEFINITIONS

The types of financial benchmarks vary widely, both in terms of the participants involved in developing and issuing benchmarks and in the uses and significance of the benchmarks.

For the purposes of the Principles, a benchmark will be defined as a commercial or published price assessment, distributed regularly to third parties and primarily intended for use as a reference in determining the pricing of, or the amount payable pursuant to, a financial instrument or contract. Thus, benchmarks may be established from the market prices or rates for transactions in debt or equity securities, the foreign exchange, money and commodity markets, or derivatives of any of these.

For clarity, the Principles are not intended to apply to benchmarks meeting one or more of the following exclusion criteria:

1. Use

Indices that are primarily used for purposes other than pricing financial instruments or contracts are out of scope.

Examples include indices that are used primarily for the purpose of evaluating the returns or other performance characteristics of asset portfolios, and economic or market sentiment indices produced by private sector organizations.

2. Scale

Customized indices used for pricing bespoke bilateral or similar transactions among a limited number of counterparties are out of scope.

Examples include customized or privately-negotiated indices, reference portfolios or baskets, defined in connection with specific issuances of structured notes, with bespoke transactions to effect investment

strategies, or with similar bilateral or limited arrangements, for which no third parties contribute data directly and for whose use no license fee is charged.
3. Public Source
Indices issued by public sector entities are out of scope.
Examples include economic indicators or other statistics published by government entities, even if some, such as inflation indices or weather data, are widely used in the pricing of financial instruments. These examples would also be excluded under the use test.
Although operating models for designing, operating and publishing benchmarks vary considerably across markets, the Principles are intended to apply to as broad a variety of models as practicable over the range of benchmarks within scope. The common elements of operating models generally comprise:
• Sponsor - an entity or group that develops and issues a benchmark.
• Calculation Agent - an agent of the sponsor responsible for conducting a benchmark price assessment.
• Contributor - an entity that provides data to the sponsor or the calculation agent for the purpose of conducting a benchmark price assessment.
The calculation agent may be an internal division of the sponsor or a third party contracted by the sponsor. A division of the sponsor may also act as a contributor. The Principles recognize such variation in operating models by allowing for various governance, control and conflict management mechanisms to be implemented as appropriate to the particular process or operating model.

PRINCIPLES FRAMEWORK
The overall responsibility for the benchmark process lies with the sponsor. The Principles are grounded in three fundamental sponsor obligations, which should be applied in a manner commensurate with the significance of the benchmark:
• Governance: A sponsor should ensure that there is an appropriate governance structure for oversight of the benchmark;
• Benchmark Methodology and Quality: A sponsor should employ sound design standards in devising the benchmark and ongoing processes related to its operations; and
• Controls: A sponsor should ensure that there is an appropriate system of controls promoting the efficient and sound operation of the benchmark process and should implement such a system of controls.
The Principles are grouped into three sections under the above headings accordingly.

THE PRINCIPLES
1. GOVERNANCE
PRINCIPLE I: OVERALL RESPONSIBILITY
A sponsor is ultimately responsible for the quality and integrity of a benchmark.
A sponsor should appoint and appropriately empower a governance body accountable for the development, issuance and operation of the benchmark. The nature of the governance body may vary depending on the benchmark and may comprise a formal board, a dedicated committee or an individual manager. In all instances, however, it is essential that there be a single identifiable authority with specific accountability for the sound operation of the benchmark. The responsibilities of the governance body include overseeing the benchmark methodology, the control framework, and the relationships between the sponsor and any third parties. The governance body should oversee the management responsible for operation of the benchmark, take appropriate measures to remain informed about material issues and risks related to the benchmark, and commission periodic independent internal or external reviews to oversee that the benchmark continues to operate in accordance with the Principles.

PRINCIPLE II: CLEAR ROLES AND RESPONSIBILITIES

A sponsor should define clearly the roles and responsibilities of the participants in the benchmark process. A sponsor may enter into an agreement with a third party to act as its agent in calculating the price assessment, distributing the price assessment data, or licensing the benchmark. A sponsor should establish clear roles and responsibilities for any third party charged with acting on the sponsor's behalf. In addition, in the case where the process relies upon contributors to provide the sponsor or sponsor's agent with market data or estimates, the sponsor should ensure that there are clear standards for contribution of data or estimates and ensure transparency regarding the nature of such participation for the end users of the benchmark. Such standards for contributors should be specified by the sponsor in a documented Contributor Code of Conduct, as described in Principle IX.

Where one or more of the functions in the benchmark process are carried out within a broader organization, the sponsor should ensure that there are policies and procedures to identify and manage conflicts of interest arising either between the various benchmark functions or between the benchmark functions and the activities of the broader organization.

PRINCIPLE III: TRANSPARENCY

A sponsor should operate with transparency with respect to benchmark development and changes, taking due account of impacts on process participants and anticipated end users. Specifically, the sponsor should make the methodology for determining a benchmark available to those parties that the sponsor can identify as being affected by the benchmark, provide such parties with notice of any proposed amendments to the methodology for determining a benchmark price assessment and ensure that there is a process for receiving and responding to any comments on these proposed amendments.

The sponsor should also ensure that there are procedures for the communication, management and timely resolution of complaints related to the benchmark process. The sponsor should make available the complaint procedures to those parties that the sponsor can identify as being affected by the benchmark. In the case of benchmarks using contributor data, the sponsor should provide a contributor with appropriate notice if the sponsor determines that a contributor is violating the Contributor Code of Conduct. Any disputes should be handled in accordance with an appropriate dispute resolution process.

The sponsor should also make available the policies and procedures, required under Principle VI, for identifying and managing conflicts of interests to those parties that the sponsor can identify as being affected by the benchmark.

2. BENCHMARK METHODOLOGY AND QUALITY

PRINCIPLE IV:METHODOLOGY

A sponsor should ensure that there is a methodology for conducting the benchmark price assessment that relies on sound data and accurately reflects market conditions.

This methodology should:

• Define clearly the technical specifications for the benchmark;
• Be clearly documented;
• Describe the manner in which the sponsor determines the benchmark, including the responsibilities of any third parties, such as calculation agents and contributors, as well as the procedures and criteria for the application of judgment by sponsor personnel in determining the benchmark price assessment and for addressing periods where the quantity or quality of data falls below the standards set by the methodology;
• Use sound and transparent data. Where feasible, a sponsor's methodology for determining a benchmark price assessment should give significant weight to data reflecting either executed transactions into which

unrelated counterparties acting at arm's length have entered in such sizes and upon such other terms as the sponsor may define, or executable bids and offers to enter into such transactions.
Where such information is sparse or unavailable, a sponsor may rely on other methods for assessing prices, including dealer quotes, mathematical models that predict prices based on the observed prices of other products, good faith estimates, contributor surveys, or other methods. The sponsor's benchmark process should not be overly reliant on data from a narrow range of contributors, and should be sufficiently resilient to allow for a benchmark price assessment in the event of limited liquidity in the underlying market or market segment. Under such circumstances of limited liquidity, the sponsor should have particular regard to transparency obligations in identifying how the benchmark assessment is reached.

• Permit the sponsor or the calculation agent to exercise appropriate judgment in respect of data analysis, modeling and calculation methods to promote the integrity of the assessment.

PRINCIPLE V: BENCHMARK QUALITY

To promote the quality of a benchmark over time, a sponsor should follow best practice design elements. Those elements include the following:

• There should be sufficient trading activity in the underlying or closely-related markets on which the benchmark is based to allow a reasonable and regular price assessment to be made.
• The trading activity in the underlying market should be conducted in such a manner and among a sufficiently broad group of participants so as to allow for transparent price discovery.
• The terms of contracts and participants to the underlying transactions upon which the benchmark is based should share sufficiently similar characteristics to minimize idiosyncratic distortion to the benchmark over successive assessments.
• While the sponsor cannot control all of the uses for which a benchmark may be employed by third parties, the design of the benchmark should reflect the broad terms of financial instruments and contracts for which it is generally intended to be used as a reference rate.

The sponsor should periodically review the benchmark design and calculation methodology, as well as the nature of activities in the underlying market, to promote continued adherence to sound design elements and reflection of market conditions.

3. CONTROLS

PRINCIPLE VI: CONTROL FRAMEWORK

A sponsor should ensure that there is an appropriate control framework for conducting and maintaining the benchmark process and for distributing the benchmark price assessment.
At a minimum, this framework should cover:

• The engagement of suitably qualified and experienced personnel to carry out the sponsor's responsibilities;
• Appropriate periodic training, including technical and ethics training;
• Policies and procedures relating to the identification and management of conflicts of interest (including through disclosure). Such policies and procedures should take into account conflicts arising from the other activities of the sponsor, the calculation agent, or contributors;
• Policies and procedures for safeguarding confidential information, including confidential information received from contributors, and controls to prevent the premature, unauthorized or preferential disclosure of information concerning a benchmark price assessment;
• Policies and procedures for receiving, investigating, reporting, and documenting complaints or potential errors with the sponsor's benchmark price assessment, including a process for escalating complaints, as appropriate, to the sponsor's governance body;

• Policies and procedures to ensure that emerging issues that may affect market integrity are brought promptly to the attention of the appropriate regulators;
• Policies and procedures applicable to violations of the sponsor's procedures by the sponsor's personnel or agents, or of the Contributor Code of Conduct by contributors. Such procedures should include appropriate reporting mechanisms to the sponsor's governance body;
• Policies and procedures for identifying anomalous data received from contributors, excluding such data from the benchmark process, and taking appropriate remedial actions to minimize the possibility of recurrence;
• Procedures to notify end users promptly of errors and corrections in a benchmark price assessment;
• An infrastructure, with appropriate resiliency, reflecting the significance and criticality of the benchmark to the marketplace, and a process for the periodic testing of this infrastructure; and
• A contingency plan for conducting the benchmark price assessment due to the absence of data from contributors, market disruptions, failure of critical infrastructure, or other factors.

PRINCIPLE VII: RECORD-KEEPING AND INDEPENDENT REVIEW

A sponsor, or by delegation, the sponsor's calculation agent, should maintain documentation and keep records (for a period defined by the sponsor commensurate with the significance of the benchmark) showing all inputs to the benchmark price assessment, the application of these inputs to determine the final benchmark price assessment, and the methodology utilized, as appropriate.

Such documentation should include an explanation for the sponsor's or the calculation agent's exercise of judgment, the disregard, if any, of observed transaction or contributor data, and descriptions of any pricing models defined in the methodology.

The process and methodology documentation, and the regular operational records, should be subject to a periodic review by a party independent of the benchmark process. Such reviews, commissioned by the sponsor's governance body, may be conducted by a sponsor's independent internal control function, by the sponsor's external auditor or by an independent third party, as appropriate to the scope of the benchmark and organization structure of the sponsor.

The independent review should assess the sponsor's adherence to the established methodology for determining the benchmark and the control framework relating to the benchmark in light of the Principles. The sponsor should be able to confirm that periodic independent reviews have been conducted, that any necessary remedial measures have been taken and that appropriate parties have been advised as needed of matters arising from the review.

PRINCIPLE VIII: DATA COLLECTION

A sponsor should ensure that there are appropriate controls over the process for collecting data for use in a benchmark price assessment.

Where a sponsor uses data collected directly from a contributor, these controls should include a process for selecting the contributor, collecting data from the contributor, protecting the confidentiality of the contributor's data, evaluating the contributor's data submission process, and removing or applying other sanctions for non-compliance against the contributor, where appropriate.

PRINCIPLE IX: CONTRIBUTOR CODE OF CONDUCT

Where the benchmark price assessment requires the submission of data by a third party contributor, a sponsor should ensure that there are standards for contributions, specified in a Contributor Code of Conduct, and contributors should employ appropriate controls over data submissions.

The Contributor Code of Conduct should cover, at a minimum, the following:
• The existence of a governance structure that promotes integrity among the contributor and its personnel and associated policies and procedures governing the data submission process;

• Policies and procedures relating to the identification and management of conflicts of interest (including through disclosure), including protections against insider trading, segregation of responsibilities where practicable, and informational firewalls, as appropriate;
• Policies and procedures prohibiting the coordination of, or sharing of information regarding, contributor data submissions with other contributors;
• The engagement of suitably qualified and experienced personnel, including supervisors, to carry out the contributor's responsibilities;
• The clear definition of roles and responsibilities for contributor personnel associated with the data submission process;
• Appropriate periodic training, including technical and ethics training;
• An appropriate monitoring and testing process for reviewing that data communicated to a sponsor or a calculation agent are consistent with the sponsor's methodology and the contributor's policies and procedures;
• Policies and procedures for receiving, investigating, reporting, and documenting complaints relating to the contributor's data submissions;
• Policies and procedures applicable to violations of the contributor's policies and procedures relating to the contributor's role in the benchmark process. Such procedures should include appropriate reporting mechanisms to the contributor's governance body;
• Controls for the protection of confidential information;
• An infrastructure, with appropriate resiliency, to support the timeliness and accuracy of submissions, and periodic testing of this infrastructure;
• A contingency plan for submitting data due to a failure in the infrastructure or other factors, where practicable;
• A process for retaining records relating to data provided to a sponsor, including documentation deemed the most relevant by a contributor in its assessment, in a form which facilitates subsequent review; and
• A periodic independent internal or external review of the contributor's data submissions and control framework.

IOSCO Benchmarks Consultation

In September 2012 (as the EU Commission announced its consultation on the regulation of benchmarks) IOSCO announced the establishment of a "Board Level Task Force on Financial Market Benchmarks" to be co-chaired by Martin Wheatley of the FSA (responsible for the UK's Wheatley Review) and Gary Gensler of the CFTC. The press notice announcing the review stated that "Other international organizations and national regulators, such as the European Commission, UK Treasury, (Wheatley Review), Central Bank Governors of the Bank for International Settlement and the Global Financial Market Association, are also undertaking work on the benchmark issue."[43] IOSCO published a Consultation Report on Financial Benchmarks in

[43] IOSCO, IOSCO Creates Board Level Task Force on Financial Market Benchmarks (Sep. 14, 2012) at http://www.iosco.org/news/pdf/IOSCONEWS250.pdf .

January 2013:[44]

IOSCO has an important role in creating an overarching framework of principles for Benchmarks used extensively in financial markets, as recognized by the G-20 and the Financial Stability Board. Regular co-ordination and co-operation with other related regional and international initiatives on financial Benchmarks is vital to achieve a robust and effective framework. The Task Force, together with the Chairman of the Board, will represent IOSCO in other international work initiatives on Benchmarks. Key work streams include:
• Regulatory: the European Commission's Consultation on the regulation of indices, 5 the European Securities and Markets Authority's Consultation on principles for Benchmark-setting processes, and the BIS Board of Governors Economic Consultative Committee.6 The Task Force and IOSCO Chairman will engage with these work streams as appropriate to ensure coordination and consistency.
• Industry: a proposal by Argus Media, ICIS and Platts for a price reporting code for independent price reporting agencies (IPRO), and best practice standards for conducting Benchmark price assessments issued by the Global Financial Markets Association (GFMA)...
The Task Force notes that a significant proportion of global financial activity is linked to Benchmarks and the universe of Benchmarks is large and diverse. To inform its work, the Task Force has reviewed a selection of Benchmarks, representing a number of asset classes and jurisdictions....
The review focused on risks to the credibility of Benchmarks, or risks to users arising from the Benchmark's Methodology, transparency and governance arrangements. The issues identified in the Task Force's review and Consultation are likely to be relevant to most Benchmarks and across most asset classes. Whilst the forthcoming principles should be applicable to all Benchmarks and asset classes, we expect IOSCO members to assess the applicability, monitoring or oversight of such principles to Benchmarks determined or used in their domestic jurisdictions.
The Task Force did not consider Benchmark Administration by public bodies to be in scope. However, Benchmarks where a public body acts as mechanical Calculation Agent, as defined in Annex A, are within scope...
In line with IOSCO's objectives of ensuring that markets are fair, efficient and transparent, the Task Force considers Benchmarks should have the following characteristics in order to be credible:
• Representative: a Benchmark should clearly convey the economic realities of the underlying interest it seeks to measure to its users;
• Reliable: the data relied upon to construct the Benchmark should be sufficient to represent that interest and the data should be bona fide;
• Transparent: there should be sufficient transparency over the Methodology, calculation and inputs to allow users to understand how the Benchmark is derived and its potential limitations; and
• Subject to clear governance and accountability mechanisms...
The range of different Methodologies reflects the varied nature of the underlying interests represented by Benchmarks. Methodologies differ in their respective strengths and weaknesses. In particular, some Methodologies are less prone to conflicts of interest, some are more able to provide an accurate and stable representation of the market, and others provide more resilience to market stresses.
No Methodology is immune from attempts to manipulate the Benchmark - especially where the conflicts

[44] IOSCO, Financial Benchmarks: Consultation Report (Jan. 2013) at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD399.pdf .

of interests are not mitigated, and the Benchmark setting process lacks transparency. A key element of any Benchmark Methodology is the selection of inputs...
A.2 Vulnerability of Data inputs
For each input type, the following vulnerabilities should be considered and addressed:
Voluntary submission of inputs to an individual fixing or determination: Many Benchmarks rely on voluntary submissions by Market Participants. In some cases, submitting entities self-report to Administrators and can choose whether to participate in the submission process and to what extent. For example, hedge fund indices rely on voluntary reporting by fund managers on investment strategy and performance.
Partial or selective reporting of data or gaps in availability of submissions may undermine the credibility of the Benchmark as a representation of the underlying interest and the resilience of the Benchmark to market stress. For example, the selective reporting of data may also skew or bias the Benchmark. In the IOSCO Report on Principles of Oil Reporting Agencies, IOSCO strongly encouraged Submitters to submit all their market data so as to ensure the representativeness of the inputs.
To mitigate these concerns, Administrators should develop procedures and policies governing submission discipline and frequency for contributing entities.
Continuity of participation: Another significant risk posed by voluntary submission of inputs, is that Submitters may cease to participate in the Benchmark altogether. As identified in the Wheatley Review, the representativeness, and in extremis, the viability and continuity of the Benchmark itself could be threatened if a sufficient number of Submitters are no longer willing to contribute to the Benchmark setting process.
Encouraging or requiring submissions could be an option in certain cases...The UK FSA's Consultation Paper on the regulation and supervision of Benchmarks discusses requiring firms to participate in submission.
Administrator discretion: Administrators may also exercise discretion in the selection and composition of inputs and (where applicable) over when the composition of inputs is rebalanced. For example, Administrators may be able to alter the algorithms used to compile stock or other indices to rebalance the weighting or the composition of components or choose which inputs to use on the basis of other information or judgments.
Composition of Submitting Panels (where applicable): Traditionally, Panels are composed of active Market Participants or market makers; some Benchmarks produced by trade associations rely solely on the input from their member firms. Other Benchmark Panels have further eligibility criteria, which may involve some compliance with ethical standards, market size, geographic coverage, or rules on adequate market behavior.
Participation in Panels may also be selective. For example, some families of indices use inputs from a self-selected group of Market Participants. This may give rise to conflicts of interest e.g. where these participants have large positions in the instruments referenced by the Benchmark, an incentive to participate is created.
The size and composition of a Panel may undermine a Benchmark's integrity if it is not representative of the underlying market. For example, active participants may have a more informed view of the market and thus may be able to give better estimates of its level. However, these participants may also have greater incentive to adjust Benchmark levels in favorable directions. In cases where Submitters also own, control or are represented by the Benchmark Administrator, conflicts of interest may be particularly acute if robust governance safeguards are absent.
Administrators should consider how to balance measures to encourage regular participation whilst

ensuring that conflicts of interest arising from the composition of the Panel are identified and subject to controls (see sections C and E).

Panel inclusion criteria should consider at least the following factors:

• Whether Panel members follow requirements set out by the Administrator.

• Whether Panel members are subject to any regulatory provisions with respect to submitting inputs to the Benchmark.

• Any jurisdictional issues relating the location of the Submitters (if different from location of Administration).

• Provisions for changes in Panel composition (noting that this may alter the nature of the Benchmark).

A.3 Verification of submissions

Because inputs may be subject to error or deliberate manipulation, the Administrator should seek to verify the accuracy and plausibility of the inputs. This could take the form of identifying and, if appropriate, seeking clarification over outliers.

The effectiveness of controls and verification processes will depend on the existence and complexity of underlying data that can be used to corroborate inputs, the availability of supporting records and adequate Audit Trail, as defined in Annex A, and the ability of the Administrator to monitor irregularities. Where submission of inputs is selective, it is important to consider how the Administrator would be able to access non-submitted data and records, or compare inputs against each other or the final Benchmark figures.

Some Benchmarks reviewed by the Task Force monitored submissions for non-deliberate errors ('fat-finger errors') but did not indicate whether they checked submissions beyond this. This lack of review may leave Benchmarks vulnerable to potential manipulation. Some Administrator reserve the right to query submissions, but in order to be effective, Administrators need to implement clear and consistent policies to that effect.

It is important that both Administrators and Submitters find ways to ensure the quality of their submissions by using supporting data in underlying or related markets, and monitor submissions to detect for possible manipulation. The Task Force also believes that Administrators should communicate regularly with the relevant regulatory authorities to communicate any misgivings or suspicions regarding the submissions they monitor.

Bona Fide

The integrity of the Benchmark Methodology may suffer if the input data is not bona fide or binding. For example, for transaction or committed quote-based Benchmarks, Submitters should have executed or have been prepared to execute an arm's-length transaction. Greater scrutiny may be needed for inter-group/affiliate transactions to ensure their bona fide nature.

Sample size

Inputs may not effectively represent the underlying interest if the sample size is inadequate. Overall the size of the input sample should be sufficiently broad to be representative of the underlying interest being measured and to ensure that attempted manipulation of the Benchmark inputs is made much more difficult.

A.4 Calculation options

Benchmarks rely on various calculation and compilation methods, which aggregate the inputs to create a single Benchmark.

Some Benchmarks rely on averaging processes; however simple averages can be skewed by outlier submissions and so many Benchmarks mitigate this risk by using medians or trimmed averages whereby the top and bottom quartiles are eliminated before averaging.

To avoid giving undue influence to smaller trades, most transaction-based rates use some form of volume-weighted averages. Some other Benchmarks use randomly selected prices or inputs at the end of the trading day.

Trimmed averages have the advantage of being easily understood, transparent and easy to replicate. Another advantage is that averages smooth volatility compared to randomised approaches, and therefore may be more appropriate for certain markets.

The algorithms for averaging can be more complex, involving smoothing mechanisms and interpolations. CDS indices, for instance, use such a smoothing mechanism to interpolate prices for non-liquid individual components. The exact calculation Methodology might not always be transparent in these cases.

Some strategy indices use more sophisticated methodologies to calculate the input weights or input values for the Benchmark. Volatility indices, for example, use the variance calculation based on the price of a sample set of data. As above, the calculation Methodology might not always be transparent.

Some Benchmarks use estimated data and backfilling in their calculation. The exact degree of discretion in the calculation and the precise calculation Methodology itself might not always be transparent to users in these cases.

Administrators should consider the potential for different calculation methodologies to create incentives that enhance the integrity of the input data. Trimmed averages reduce the individual incentive to try to manipulate Benchmarks by large amounts, while the incorporation of a Methodology with an element of commitment by the Submitter (as described in A1) may increase the incentive to provide accurate inputs.

It is important to distinguish between Benchmarks that rely on averaging of inputs, and those that interpolate between inputs to provide a continuous Benchmark time series. The former is prevalent for interbank rates, and the latter for markets with lower liquidity such as Jet Fuel. In general, methods that rely on averages involve the exercise of less discretion by the Administrator than those that rely on interpolation. On the other hand, methods that incorporate interpolation may be more robust to illiquidity or the unavailability of input data than averages.

A.5 The use of third parties

Some Administrators rely on third parties for part or all of the compilation process. This can include calculation, data collection and/or dissemination of the Benchmark. In these cases, the roles and responsibilities of each party should be clear.

Even assuming the use of a third party, responsibilities and obligations cannot be outsourced and the Administrator should retain ultimate responsibility for the Benchmark setting process and should therefore verify that adequate systems and controls exist in relevant third parties involved in the Benchmark-setting activity.

Some Benchmarks may incorporate the output of another Benchmark or index as one of its constituent variables. Where the relevant component is calculated by another Administrator, the suitability and reliability of the 'component Benchmark' should be considered....

C. Governance

Credible Benchmarks should be supported by a governance framework that addresses conflicts of interest and incorporates an oversight committee or other independent body to oversee the production of the Benchmark and all other relevant activities.

C.1 Conflicts of interest

Conflicts of interest can arise at the level of the Submitter, between Submitters at different entities, and between Submitters, Administrators, Calculation Agents and other third parties due to economic incentives and the relationship between Market Participants.

Private economic incentives
The Wheatley Review notes that the need for judgement on the part of a Benchmark Submitter involves discretion, and that that discretion can be misused. In the case of LIBOR, some contributing banks sought to exploit the conflicts of interest that arose from their respective roles as Submitter to the Benchmark, user of the Benchmark, and wider participant in the market.
Submitters may be financial institutions that operate multiple business lines which include trading on their own behalf in addition to trading on behalf of their clients. In these circumstances, tackling the forms of alleged conflicts reported in the context of the interbank reference rate investigations requires addressing the existence of incentives that staff within such financial institutions may have to collude to favour a particular trading exposure.
An effective control framework should be able to identify and mitigate potential internal and external conflicts to the extent possible. For example, it may be appropriate to implement Chinese walls or physical separation between Submitters and traders within a submitting entity. Similarly, controls could exist to prevent improper communication between Submitters at different entities, and between Submitters, Administrators, Calculation Agents and other third parties. The control framework in place should be transparent and its effectiveness should be monitored (for example by an oversight committee, or audit or compliance functions).
The Task Force notes that for certain financial institutions, the broader framework of existing or planned national and regional bank structure reforms aims to minimise conflicts of interest between banks and their clients through separating, reducing and/or prohibiting certain types of business practices. Whilst not designed to target conflicts of interest with respect to participation in Benchmark setting, these structural reforms may address some of the conflicts outlined above.
Individuals may have a financial incentive to manipulate the level of the Benchmark where their remuneration reflects the performance of a Benchmark-linked asset or liability, or where they trade in instruments, the performance of which is affected by the level of the Benchmark, in a personal capacity. As an example, a trader seeking to manipulate a price might attempt to influence other staff within his or her organisation that are responsible for inputting submissions to the Administrator.
Individuals may be offered gifts, hospitality or other incentives by other Market Participants to influence the Benchmark. In formulating remuneration and ethics policies Administrators and Submitters should be mindful of incentives for Benchmark manipulation, and take steps to reduce them.
Ownership and control of Administrators
A number of different entities may perform the role of Administrator and/or Calculation Agent – some examples are set out below. Often, but not exclusively, this is determined by the market.
• Trade associations. Notable examples include the BBA (British Bankers' Association), EBF (the European banking Federation) and the Australian Financial Markets Association (AFMA).
• Public entities.
• Regulated exchanges or other trading platforms.
• Price reporting agencies, such as those responsible for calculating international commodity prices.
• Regulated firms such as banks or asset managers.
• Other commercial organisations such as data providers (e.g. Thomson Reuters, Markit) or news agencies.
The governance framework should identify and manage the inherent conflicts of interest posed by ownership structures where Administrators are wholly or partially owned, controlled or influenced by Market Participants who:
• subscribe or contribute to the Benchmark;

• structure financial contracts or instruments that reference the Benchmark;
• are active participants in the underlying market of the Benchmark; or
• carry large positions on products linked to the Benchmark.

For example, Administrators who are commercial entities may have an economic interest in maintaining the publication of the Benchmark even when the quality or representativeness of the Benchmark is in question. Trade bodies which act as Benchmark Administrators are also owned by, and represent the interests of, their members. Trade body members are typically the most active participants in the underlying markets and often carry large positions on products linked to the Benchmark, which may influence the way the trade body discharges its role as Administrator.

Conflicts of interest can also exist within a financial institution that is involved (on a stand-alone basis or through one or more affiliates) in administrating an index and simultaneously in structuring and marketing financial products that are linked to the performance of a proprietary Benchmark.

For example, the financial institution may engage in trading and market-making activities and may hold long or short positions in the index, its components and other instruments or derivative products based on or related to the index for its proprietary account or for other accounts under its management. It may also issue – directly or through an affiliate – other securities in respect of the index or its components, or issue derivative instruments in respect thereof.

To the extent that the financial institution, directly or through its affiliates, serves as issuer, agent, manager, sponsor or underwriter of such securities or other instruments, its interests with respect to such index may be adverse to those of the investors in, or users of, such index.

The financial institution may also undertake proprietary activities, including hedging transactions, which may affect the market price, rate, index or other market factors and, consequently, the index or its component.

Conflicts of interest may be present when there is direct involvement of public bodies in the administration process. There are only a few examples of a public body taking full ownership of the fixing process. However there are several examples of public bodies acting in some capacity, primarily that of compilation or Calculation Agent.

Where a public body takes responsibility for producing a Benchmark, a perception may be created that all risks (e.g., reputational, operational, litigation and conduct risk from the process and potential prudential risks from the resulting rate) are solely borne by the public body. This may undermine the rigour of efforts by the Submitter to ensure the quality of the Benchmark (e.g., by scrutiny of submissions), potentially undermining the quality and integrity of inputs.

Secondly, there may be conflicts of interest where a public body acts as Administrator and has other duties, e.g., supervision of firms involved in the Benchmark process or financial stability objective. In times of heightened stress, these obligations may conflict with its duties as an Administrator.

C.2 Oversight Committee

Whilst the Administrator is ultimately responsible for its governance framework, an external oversight committee (or other independent body) could play an important role in identifying, mitigating and managing the conflicts of interest.

Administrators could establish an oversight committee from a range of Market Participants and other stakeholders to scrutinise the production of the Benchmark, which could enhance the transparency and credibility of a Benchmark. The range of stakeholders on the oversight committee (or other independent body) should comprise a balance of Submitters, users as well as other key stakeholders (such as exchanges if relevant). The committee's composition and rules should ensure that it is independent, not subject to conflicts of interest and effective. The role of the oversight committee (or other independent

body) could be to contribute to the technical aspects of Benchmark scrutiny and governance arrangements (including scrutiny of submissions, consideration of changes to the Methodology, development and monitoring of the code of conduct for Submitters, scrutiny of the Administrators' internal procedures). Any such committee would benefit from regular meetings, and transparent procedures regarding its membership, processes and decisions.
The oversight committee (or other independent body) could review the appropriateness of the Benchmark definition and Methodology. In particular, as markets evolve, the committee could regularly re-assess if the definition of key terms and inputs is still representative of the underlying interest it seeks to measure. The review may also consider the validity of data used to corroborate inputs.[45]

In July 2013 IOSCO published a set of Principles for Financial Benchmarks.[46]

EU Commission Proposed Regulation on Indices used as Benchmarks

In September 2013, the EU Commission published a proposed regulation on indices used as benchmarks[47] Here is the Explanatory Memorandum the Commission published as part of the proposal:

EXPLANATORY MEMORANDUM
1. CONTEXT OF THE PROPOSAL
1.1. General context, grounds for and objectives of the proposal
An index is a measure, typically of a price or quantity, determined from time to time from a representative set of underlying data. When an index is used as a reference price for a financial instrument or contract it becomes a benchmark. A wide variety of benchmarks are currently produced using different methodologies by different providers, ranging from public entities to independent dedicated benchmark providers.
The settlements reached by several competent authorities with a number of banks concerning the manipulation of the LIBOR and EURIBOR interest rate benchmarks have highlighted the importance of benchmarks and their vulnerabilities. Allegations of attempted manipulation of commodity price assessments provided by commodity price reporting agencies (PRAs) are also under investigation by the competent authorities and IOSCO has carried out a review of oil price assessments by PRAs. The integrity of benchmarks is critical to the pricing of many financial instruments, such as interest rate swaps, and commercial and non-commercial contracts, such as mortgages. If a benchmark is manipulated this will cause significant losses to some of the investors that own financial instruments whose value is determined by reference to the benchmark. By sending out deceptive signals about the state of an

[45] The excerpt focuses only on part of the IOSCO document.

[46] IOSCO, Principles for Financial Benchmarks (Jul. 2013) at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf .

[47] Proposed Regulation on Indices Used as Benchmarks in Financial Instruments and Financial Contracts, COM/2013/0641 final (Sep. 18, 2013).

underlying market it may distort the real economy. More generally concerns about the risk of benchmark manipulation undermine market confidence. Benchmarks are susceptible to manipulation where conflicts of interest and discretion exists in the benchmark process and these are not subject to adequate governance and controls.
The first part of the Commission's response to the alleged manipulation of LIBOR and EURIBOR was to amend the existing proposals for a market abuse Regulation (MAR) and criminal sanctions for market abuse Directive (CSMAD) to clarify that any manipulation of benchmarks is clearly and unequivocally illegal and subject to administrative or criminal sanctions.
However, changing the sanctioning regime alone will not improve the way in which benchmarks are produced and used; sanctioning does not remove the risks of manipulation arising from the inadequate governance of the benchmark process where conflicts of interest and discretion exist. Secondly, in order to protect investors and consumers, it is necessary that benchmarks are robust, reliable and fit for purpose. In the light of these considerations, this proposal for a regulation has four main objectives that aim to improve the framework under which benchmarks are provided, contributed to and used:
– to improve the governance and controls over the benchmark process and in particular ensure that administrators avoid conflicts of interest, or at least manage them adequately;
– to improve the quality of the input data and methodologies used by benchmark administrators and in particular ensure that sufficient and accurate data is used in the determination of benchmarks;
– to ensure that contributors to benchmarks are subject to adequate controls, in particular to avoid conflicts of interest and that their contributions to benchmarks are subject to adequate controls. Where necessary the relevant competent authority should have the power to mandate contributors to continue to contribute to benchmarks; and
– to ensure adequate protection for consumers and investors using benchmarks by enhancing transparency, ensuring adequate rights of redress and ensuring suitability is assessed where necessary.

1.2. Existing provisions in the area of the proposal
Union law currently addresses certain aspects of the use of benchmarks:
– The proposals for a Market Abuse Regulation (MAR) in Articles 2(3)(d) and 8(1)(d) and for a Criminal Sanctions for Market Abuse Directive (CSMAD) (MAR has been the subject of a political agreement by the European Parliament and the Council in June 2013) clarify that any manipulation of benchmarks is clearly and unequivocally illegal and subject to administrative or criminal sanctions.
– The Regulation on Energy Market Integrity and Transparency (REMIT)provides that the manipulation of benchmarks that are used for wholesale energy products is illegal.

– The Markets in Financial Instruments Directive requires that any financial instruments admitted to trading in a regulated market are capable of being traded in a fair, orderly and efficient manner. The Implementing Regulation of that Directive further specifies that the price or other value measure of the underlying must be reliable and publicly available.
– Article 30 of the European Commission Proposal on the Markets in Financial Instruments Regulation (MiFIR) (which is currently being negotiated by the European Parliament and the Council) contains a provision requiring the non-exclusive licencing of benchmarks for clearing and trading purposes.
– The Prospectus Directive and Implementing Regulation provide that where a prospectus contains a reference to an index, the issuer should set out the type of the underlying and details of where information on the underlying can be obtained, an indication of where information about the past and the further performance of the underlying and its volatility can be obtained, and the name of the index. If the

index in question is composed by the issuer, the issuer also needs to include a description of the index. If the index is not composed by the issuer, the issuer needs to clarify where information about the index can be obtained, and where the underlying is an interest rate the issuer needs to provide a description of the interest rate.
– The Undertakings for Collective Investment in Transferable Securities Directive provides that UCITS funds may only hold a maximum share of instruments issued by the same body in their portfolio. Member States may raise the limits that apply to how much of its total portfolio a UCITS may hold to a maximum of 20% for investment in shares or debt securities issued by the same body when it concerns an index which the UCITS wants to replicate, provided the composition of the index is sufficiently diversified, the index represents an adequate benchmark for the market to which it refers and it is published in an appropriate manner.

2. RESULTS OF CONSULTATIONS WITH INTERESTED PARTIES AND IMPACT ASSESSMENTS
2.1. Consultations
A three month public consultation was launched on 3 September and closed on 29 November 2012. 84 contributions were received from contributors, benchmark providers and users including exchanges, banks, investors, consumer groups, trade bodies and public bodies. Stakeholders acknowledged the weaknesses in the production and use of benchmarks, and broadly supported action at EU level. Respondents also emphasised the need for international coordination, and careful calibration of the scope of any initiative.
ESMA and the EBA jointly investigated shortcomings in the provision of EURIBOR by the EBF-EURIBOR and on 11 January 2013 launched a consultation on the Principles for Benchmarks-Setting Processes in the EU. In a letter dated 7 March 2013 the EBA, ESMA and EIOPA provided advice on the content of this proposed legislation in light of this work. The Commission services participated in an ESMA-EBA open hearing on 13 February 2013 on these Principles for Benchmarks-Setting Processes. The Commission services also participated in the public hearing on tackling the culture of market manipulation - global action post LIBOR/EURIBOR held by the European Parliament on 29 September 2012.

2.2. Impact Assessment
In line with its "Better Regulation" policy, the Commission conducted an impact assessment of policy alternatives. The policy options encompassed options to limit incentives for manipulation, minimise discretion and ensure benchmarks are based on sufficient, reliable and representative data, ensure internal governance and controls address risks, ensure effective supervision of benchmarks and enhance transparency and investor protection. Each policy option was assessed against the following criteria: impact on stakeholders, effectiveness and efficiency.
The following fundamental rights of the Charter of Fundamental Rights are of particular relevance: respect for private and family life, protection of personal data, freedom of expression and information. Limitations on these rights and freedoms are allowed under Article 52 of the Charter. The objectives as defined above are consistent with the EU's obligations to respect fundamental rights. However, any limitation on the exercise of these rights and freedoms must be provided for by law and respect the essence of these rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. In the case of benchmarks, the general interest objective which justifies certain limitations of fundamental rights is the objective of ensuring market

integrity. The need to protect the right to property (Article 17 of the Charter) also justifies certain limitations of fundamental rights, as investors are entitled to see the value of their property (e.g. loans, derivatives) protected from losses caused by market distortions.
The right to freedom of expression and information requires that the freedom of the media shall be respected. This Regulation should be interpreted and applied in accordance with this fundamental right. Therefore where a person merely publishes or refers to a benchmark as part of his or her journalistic activities but does not have control over the provision of that benchmark, that person should not be subject to the requirements imposed on administrators by this Regulation. This therefore leaves journalists free when performing journalistic activities to report on financial and commodities markets. Accordingly the definition of the administrator of a benchmark has been tightly defined to ensure that it encompasses the provision of a benchmark but does not capture within its scope journalistic activities.

3. LEGAL ELEMENTS OF THE PROPOSAL
3.1. Legal basis
The proposal is based on Article 114 of the Treaty on the Functioning of the European Union ("TFEU").

3.2. Subsidiarity and proportionality
The Commission proposal to regulate benchmarks is in line with the principle of subsidiarity as laid down in Article 5(3) of the Treaty on European Union (TEU), which requires the Union to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Union.
While many benchmarks are national, the benchmark industry as a whole is international in both production and use. While action at national level in relation to national indices may help ensure that any intervention is appropriately tailored to the problems at a national level, this may lead to a patchwork of divergent rules, could create an un-level playing field within the single market and result in an inconsistent and un-coordinated approach. Benchmarks are used to price a wide variety of cross border transactions, in particular in the interbank funding market and derivatives. A patchwork of national rules would impede the opportunity to produce cross border benchmarks and therefore impede these cross border transactions. This problem has been recognised by the G20 and FSB which charged IOSCO with producing a global set of principles to apply to financial benchmarks. An EU initiative will help enhance the single market by creating a common framework for reliable and correctly used benchmarks across different Member States.
While in most Member States there is currently no regulation at national level on the production of benchmarks, two Member States have already adopted national legislation on interest rate benchmarks in their national currencies. Moreover, IOSCO has recently agreed principles on benchmarks which are to be implemented by its members. However these principles provide flexibility as to the scope and means of their implementation and in relation to certain terms. In the absence of a harmonised European framework for benchmarks, some Member States are likely to adopt legislation at national level which would be divergent. For example, at this point of time, the scope of the legislation of one Member State would appear as wide as IOSCO's while the legislation of the other Member State that has introduced rules regarding benchmarks only covers interest rate benchmarks. These divergent approaches would result in fragmentation of the internal market, since administrators and users of benchmarks would be subject to different rules in different Member States. In the absence of a Union legislative framework, the individual national actions would also be ineffective, as there is no obligation or incentive on Member

States to cooperate with each other and the absence of such cooperation leaves scope for regulatory arbitrage.
Certain aspects of investor protection in this field are generally covered by MiFID. In particular, there is the requirement under MiFID for firms to carry out an assessment of appropriateness. This test shall determine whether the client has the necessary experience and knowledge in order to understand the risks involved in relation to the product or investment service offered or demanded. Thus, it provides a sufficient level of investor protection.
Concerning consumer protection, the Consumer Credit Directive includes rules on the disclosure of adequate information, as well as the soon to be adopted Mortgage Credit Directive which also includes the requirement to recommend suitable credit agreements. However, those EU consumer protection rules do not address the particular issue of the suitability of benchmarks in financial contracts. Furthermore, unequal bargaining power and the use of standard terms means that consumers may have a limited choice about the benchmark used. Consumers lack the necessary knowledge or experience to appropriately assess benchmark suitability. Therefore this proposal should complement the existing EU legislation in this area by ensuring that the responsibility for assessing the suitability of benchmarks for retail contracts rests with the lenders or creditors. This will also ensure harmonised EU consumer protection rules on the use of benchmarks to reference financial contracts. A common regulatory framework for consumers and creditors in relation to financial contracts is also required to enable the use of cross border benchmarks rather than a fragmented national approach. As a result of consumer complaints and litigation relating to the use of unsuitable benchmarks in several Member States, it is likely that divergent measures on consumer protection would be adopted at national level. This could result in fragmentation of the internal market.
The proposed Regulation is also proportionate, as required by Article 5(4) of TEU. It targets only those indices that are used to reference financial instruments, or financial contracts such as mortgages, because these are the benchmark that may have a direct and certain economic impact if they are manipulated. In addition, the proposed Regulation contains provisions to tailor its requirements to different sectors and the different types of benchmark such as commodity, interbank interest rate and benchmarks that use exchange data. A proportionate approach is ensured since the vast majority of obligations are imposed on the administrator of the benchmark. Many administrators of benchmarks already comply with at least some of these requirements, implying that the administrative burden should not increase disporportionately. Moreover, processes for internal governance and control are only required from supervised contributors, meaning that the impact on non supervised contributors to a benchmark, for example a nonregistered trader, will not be substantial. Finally, in all important parts, this Regulation is aligned with the internationally agreed IOSCO Principles for financial benchmarks published on 17 July 2013, which has been extensively consulted with stakeholders. This will limit adaptation costs.
Against this background, EU action is appropriate in terms of the principles of subsidiarity and proportionality.

3.3. Choice of instrument
A Regulation is considered to be the most appropriate legal instrument to introduce uniform rules concerning the provision of benchmarks, the contribution of input data to those benchmarks, and the use of benchmarks in the Union. The provisions of this proposal are laying down certain requirements for administrators, contributors and users of benchmarks. The cross border nature of many benchmarks creates a need for maximum harmonisation of these requirements. Since the regulation of benchmarks involves measures specifying precise requirements that relate to data and methodologies, even small

divergences in the approach taken could lead to significant impediments in the cross border provision of benchmarks. The use of a Regulation, which is directly applicable without requiring national legislation, will restrict the possibility of divergent measures being taken by competent authorities at national level, and will ensure a consistent approach and greater legal certainty throughout the EU.

3.4. Detailed explanation of the proposal

3.4.1. Scope (Article 2)

The proposed Regulation applies to all published benchmarks that are used to reference a financial instrument traded or admitted to trading on a regulated venue, or a financial contract (such as mortgages) and benchmarks that measure the performance of an investment fund.

Where there is discretion in the benchmark process which is subject to a conflict of interest, there is a risk of manipulation in the absence of adequate governance and controls. Therefore indices which involve discretion should be subject to regulatory measures. While the degree of discretion varies, all indices involve some discretion. Therefore, the scope should include all benchmarks, regardless of the method of calculation or the nature of the contributions.

The scope should include all indices, including published indices, since any doubts about the accuracy and reliability of such indices are likely to inflict more damage on a wider population than indices which are not public.

Where benchmarks are used as a reference price for a financial instrument or contract, any manipulation causes economic loss. In the case where the contributor also uses the financial instrument that references it, an inherent conflict of interest exists and there is an incentive to manipulate. Furthermore, were benchmarks are used to measure the performance of financial instruments, they may be subject to conflicts of interests and their manipulation will lead to suboptimal investment choices by investors. Therefore, it is important to target all benchmarks that price a financial instrument or consumer contract or that measure the performance of investment funds.

For widely used benchmarks, even a minor manipulation may have a significant impact but the vulnerability and importance of a benchmark varies over time. Restricting the scope by reference to important or vulnerable indices would not address the risks that any benchmark may pose in the future. Given all these considerations and in order to ensure a clear and comprehensive application of the Regulation, the scope is also not dependent on the nature of the input data i.e. whether the input data is an economic (e.g. a share price) or non-economic (e.g. a weather parameter) number or value. This is because the critical element when determining the scope is how the output value determines the value of a financial instrument, financial contract or measures the performance of an investment fund. In this context, once a value is used to reference a financial contract or instrument, its previous non-economic nature becomes irrelevant.

As regards the administrators of benchmarks, all administrators are potentially subject to conflicts of interest, exercise discretion and may have inadequate governance and control systems in place. Thus, they need to be subject to appropriate regulation. Moreover, as they control the benchmark process, an authorisation requirement is imposed on all benchmark administrators as supervision is the most effective way to ensure the integrity of benchmarks.

Concerning contributors to benchmarks, these are also potentially subject to conflicts of interest, exercise discretion and so may be the source of manipulation. Contributing to a benchmark is a voluntary activity. If any initiative requires contributors to significantly change their business models, they may cease to contribute to the benchmark concerned. However, for entities already subject to regulation and supervision, (so-called supervised contributors), requiring good governance and control systems is not

expected to lead to substantial costs or disproportionate administrative burden. It is therefore appropriate to include all supervised contributors within the scope of this Regulation.
For contributors not subject to regulation and supervision (non-supervised contributors), authorisation or otherwise becoming subject to rules could impose significant costs and administrative burden. Regulators would also be ineffective supervising firms for which they have no expertise. Imposing supervision on currently non-supervised entities and persons would therefore impose significant costs and provide minimal benefits. Nonetheless, certain parts of this Regulation, as for example the need to provide accurate and reliable input data are indirectly relevant for all contributors since they remain subject to the Market Abuse Regulation and will be contractually bound to comply with the requirement of the administrator's code of conduct under this Regulation.
The proposal exempts from its scope central banks that are members of the European System of Central Banks.
Finally, in some cases a person may produce an index but not be aware that this index is a benchmark because, for example, it is used as a reference to a financial instrument without the knowledge of the producer. The regulation therefore provides a mechanism to notify the producers that their index has or may become a benchmark and give them the power to refuse that it be used as a benchmark. If the producer consents, he will become subject to the proposed Regulation in respect of that benchmark. If he refuses, the index may not be used as a benchmark and the administrator requirements in this Regulation will not apply.

3.4.2. Governance and Control of Administrators (Article 5-6)
The proposal ensures that conflicts of interest are avoided and ensures that governance and controls are effective. These are addressed by requirements on governance and controls, with more detailed requirements included in the annex.

3.4.3. Input Data and Methodology (Articles 7)
The proposal sets out three requirements, detailed in the annex, in respect of the input data and methodology used to produce a benchmark to reduce discretion and enhance integrity and reliability:
– the input data should be sufficient and accurate so that it represent the actual market or economic reality that the benchmark is intended to measure;
– the input data should be obtained from a reliable and representative panel or sample of contributors; and
– the administrator should use robust and reliable methodology for determining the benchmark.

3.4.4. Contributor Requirements (Articles 9 and 11)
The administrator is required to draw up a contributor code of conduct which clearly specifies the obligations and responsibilities of the contributors when they provide input data for the determination of the benchmark. Where the contributors are already regulated entities they are also required to avoid conflicts of interest and implement adequate controls.

3.4.5. Sectoral Requirements (Article 10 and 12-14)
In order to ensure proportionality and ensure that the proposal is adequately tailored to different benchmark types and sectors, annexes II and III contain more detailed provisions on commodity benchmarks and interest rate benchmarks. Additional requirements are imposed on critical benchmarks, including the power for the relevant competent authority to mandate contributions. Benchmarks whose

input data is provided by regulated venues are also released from certain obligations to avoid dual regulation.

3.4.6. Transparency and Consumer Protection (Articles 15-18)
Investor protection is enhanced through transparency provisions. Administrators are required to provide a statement setting out what the benchmark measures, its vulnerabilities, along with the publication of underlying data to allow users to choose the most appropriate and suitable benchmark. This statement also provides notice that the users should make adequate provision in the event that the administrator ceases to provide the benchmark. Finally a suitability assessment is imposed on banks in their dealings with consumers in financial contracts such as loans secured by mortgages.

3.4.7. Supervision and Authorisation Procedure for Administrators (Articles 22 -37)
The activity of the provision of benchmarks will be subject to prior authorisation and on-going supervision. The proposal lays down the conditions and the procedure for administrators of benchmarks located in the Union to obtain authorisation from the relevant competent authority. The proposal creates a mechanism to ensure effective enforcement of the Regulation. It gives competent authorities the necessary powers to ensure that administrators comply with the Regulation.
For critical benchmarks colleges of supervisors should be formed to enhance the exchange of information and ensure uniform authorisation and supervision.

4. BUDGETARY IMPLICATION
The proposal has implications for the Community budget.
The specific budget implications of the proposal relate to task allocated to ESMA, as specified in the legislative financial statements accompanying this proposal. The new tasks will be carried out with the human resources available within the annual budgetary allocation procedure, in the light of budgetary constraints which are applicable to all EU bodies and in line with the financial programming for agencies.
Notably, the resources needed by the agency for the new tasks will be consistent and compatible with the human and financing programming for ESMA set by the recent Communication to the European Parliament and the Council – Programming of human and financial resources for decentralised agencies 2014-2020' (COM(2013)519).
Specific budgetary implications for the Commission are also assessed in the financial statement accompanying this proposal.In summary, the main budgetary implications of the proposal are:
a) DG MARKT staff: 1 AD staff member (full-time) for drafting delegated acts, as well as for the evaluation, monitoring of the implementation and potential review of the initiative. The total estimated costs are € 0.141 M yearly.
b) ESMA:
(i) Staff costs: two temporary agents for participating and mediating in the colleges of supervisors for critical benchmarks, providing technical advice to the Commission on the implementation of this Regulation, coordinating the development of cooperation arrangements with third countries, drafting guidelines to promote convergence and cross-sector consistency of penalty regimes and maintaining registers of notifications on the use of benchmarks and a list of registered benchmark administrators.
The total yearly costs of these 2 temporary agents would be of €0.326 M, towards which the Commission would contribute 40% (€ 0.130 M) and Member States 60% (€ 0.196 M) yearly.
(ii) Operational and infrastructure costs: an initial expense of € 0.25 M is also estimated for ESMA,

towards which the Commission would contribute 40% (€ 0.1 M) and Member States 60% (€ 0.15 M) in 2015. This expense relates mainly to IT systems for ESMA to fulfil the requirements of:
- Maintaining a list of administrators registered in accordance with this Regulation and third country firms providing benchmarks in the Union.
- Receiving notifications of the use of a benchmark in a financial instrument or financial contract within the Union, and maintaining a register and ensuring that administrators are aware of this use.
ESMA will also need to produce a report on the application of this Regulation by 1 January 2018 with a total cost of € 0.3 M towards which the Commission would contribute 40% (€ 0.12 M) and Member States 60% (€ 0.18 M) in 2017.

The **European Central Bank** had some reservations about the Commission's proposal:

The ECB would also like to make a few forward looking remarks on the reform of critical interest rate benchmarks. While progress has been made in strengthening the governance process and restoring credibility, further steps need to be taken. The ECB strongly supports market initiatives that aim at identifying transaction-based reference rates that could constitute viable complements or substitutes to Euribor and support facilitating market choices in a changing financial system so that users can choose reference rates which better match their needs. Furthermore, the design of new reference rates needs to consider the sound principles for reference rates put forward by ESMA, the European Banking Authority (EBA), and IOSCO. Therefore, the ECB strongly encourages market participants to be actively involved in the rate design process, in order to ensure that the resulting rate meets the market's needs. It is also very important in this transitional phase to new reference rates that any Union framework is workable for market participants. This is particularly crucial as the proposed regulation is very broad in scope...
The ECB welcomes the fact that the input data to be submitted by contributors must be transaction data and that other data may only be used if the available transaction data are not sufficient to represent accurately and reliably the market or economic reality that the benchmark is intended to measure , provided they are verifiable...
However, the Union legislative bodies should take particular care to ensure that , in pursuing the justified goals of the proposal, the toughening of the regulatory requirements on administrators does not inadvertently dissuade new entrants to such a critical function nor discourage too strongly current administrators from resigning from this function, especially during the current period of transition to possible new reference rates.
Such barriers to entry could lead to a sub-optimal list of benchmarks which may not meet users' needs...
Furthermore, for the purpose of determining where the threshold of '50% of [the] value of transactions in the market' lies , which is required in Article 7(1)(c) of the proposed regulation for the administrator to determine whether for non -transaction -based benchmarks an underlying market exists , clarification is needed on how the administrator is to arrive at a robust and challenge - resistant assessment of what constitutes a market for the purposes of making this determination, given that 'market' is an economic notion derived from competition law and not further defined in the proposed regulation..
The ECB also notes that under the proposed regulation administrators and contributors to benchmarks in the Union will be supervised by competent authorities designated by the Member States, and that administrators of benchmarks will require authorisation by these authorities. The ECB has previously stated its view that, given the systemic importance of Euribor for the Union financial markets and its role in monetary policy transmission, the European Supervisory Authorities (ESAs) should be involved in the supervision of the Euribor rate-setting process. The ECB believes that authorities such as ESMA and the

EBA are well placed to assume such a role. The ECB welcomes, therefore, the proposal for the Commission to adopt delegated acts based on technical standards prepared by ESMA on specified matters in the benchmark-setting process and the proposed ESMA power to carry out 'binding mediation' in coordinating cooperation between competent authorities within the Union and its role in registering and withdrawing the registration of administrators located in third countries. Moreover, the terminology of location of legal or natural persons, as defined in the proposed regulation, should be used consistently throughout the text. The ECB also welcomes the fact that competent authorities may delegate some of their tasks under the proposed regulation to ESMA, subject to the latter's agreement....[48]

Some people have expressed concern that the proposed regulation would interfere with the work of financial journalists.[49] The European Publishers Council and the Professional Publishers Association sought a legal opinion from **Michael Beloff QC**, Brian Kennelly, James Segan, and Jason Pobjoy as to the legality of the proposed regulation. Here is a summary of their opinion:

If adopted in its current form, the Draft EU Regulation on Indices used as Benchmarks in Financial Instruments and Financial Contracts would be unlawful.

The objectives of the Draft Regulation are legitimate but its scope is so wide that it catches journalism. Journalistic material may become a "benchmark" within the meaning of the Draft Regulation depending on how it is used. How this material is used may be outside the control of the media organisations in question.

The Draft Regulation will severely restrict the ability of media organisations to continue this journalistic work. The obligation to publish sources will make it impossible to obtain useful information on a confidential basis. The publication of such confidential information also risks damaging the economic interests of the sources.

Media organisations will be subject to licensing requirements and oversight by the financial services regulators, armed with search and seizure powers. These regulators, which will not have media expertise, may impose severe financial penalties on media organisations and their parent companies. These restrictions will have a chilling effect on the exercise of free speech rights by media organisations which operate in this area.

For such onerous restrictions EU law requires particularly compelling justification. That is absent in the Draft Regulation. The restrictions imposed on media organisations engaged in journalistic activities are not appropriate or necessary in a measure designed to regulate benchmarks in financial instruments and financial contracts (e.g. LIBOR). In fact, by treating media organisations (which do not have an inherent conflict of interest) in the same way as traditional benchmarking bodies (which may have such a conflict), the Draft Regulation discriminates against those media organisations.

The European Commission's own (very brief) legal analysis, contained in an Annex to its Impact

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[48] Opinion of the European Central Bank on a Proposal for a Regulation on Indices Used as Benchmarks in Financial Instruments and Financial Contracts (Jan. 7, 2014) at https://www.ecb.europa.eu/ecb/legal/pdf/en_con_2014_02_f_sign.pdf.

[49] Current 'Libor' regulation is a threat to financial journalism (Feb. 13, 2014) at http://www.euractiv.com/infosociety/current-libor-regulation-brings-analysis-533509.

Assessment, demonstrates an incomplete understanding of European law safeguarding fundamental rights and freedoms including, most critically, freedom of expression.
The European Commission has failed to demonstrate that the proposed restrictions on fundamental rights and freedoms are objectively justifiable or proportionate. The harm that will be done to freedom of expression in the financial journalism sector will plainly outweigh whatever negligible benefits (if any) the restrictions may produce. On any view, they are not the least restrictive means to secure the objectives of the Draft Regulation.
The Commission has failed to consider whether the measures proposed will, in the context of media organisations, achieve the ends which the Commission seeks to achieve: namely, market integrity and a high level of consumer protection. If adopted in its present form, the measures proposed in the Draft Regulation may in fact have precisely the opposite result.
Most significantly, the EU legislature is required to demonstrate that it has undertaken a reasoning exercise that ensures a fair balance between the stated objectives and the interference with fundamental rights and freedoms. The absence of evidence that this exercise has been conducted is fatal on the issue of proportionality.
Amendments to the Draft Regulation that exempt the media have been proposed within the European Parliament. These would address the problems set out above. If these amendments are not adopted, and the Draft Regulation is adopted in its current form, it is vulnerable to annulment by the Court of Justice of the EU. [50]

McGraw Hill Financial commented on the proposed regulation:

It is clear that in the wake of the LIBOR scandal and concerns about other interest rate benchmarks, targeted reform of benchmarks that are prone to the same problems that LIBOR faced is appropriate. It is important to note, however, that not all benchmarks are equal, and therefore we do not favor a "one size fits all" approach to regulating benchmarks. Specifically, Platts and S&P Dow Jones Indices' benchmarks differ fundamentally from LIBOR and other similar benchmarks in the areas of independence, methodology and competition.
For example, at the time of the LIBOR scandal, LIBOR was overseen by the British Bankers Association's Foreign Exchange and Money Markets Committee, which principally consists of representatives of the banks that contribute to LIBOR. Those banks in turn often have positions in the financial products based on LIBOR. By contrast, Platts and S&P Dow Jones Indices are independent of and have no vested interest in the value of any of their price assessments or indices. Platts and S&P Dow Jones Indices are not market participants, nor providers of transaction execution, clearing or settlement services. In addition, the use of our indices and price assessments is voluntary and at the sole discretion of the user.
Platts and S&P Dow Jones also do not use the types of panel -based mechanisms like LIBOR, whereby a selection of market participants provide estimates of the price at which a hypothetical transaction might take place. Such mechanisms, not anchored in bona fide existing markets created by arm's -length market participants, by their nature are prone to risks and conflicts...

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[50] Leading Counsel's Opinion Advises the Media That Draft Eu"libor" Regulation Would Be Unlawful Without Clear Media Exemption at http://www.magazinemedia.eu/wp-content/uploads/20141004joint-Press-Release-on-Benchmarking.pdf .

Both Platts and S&P Dow Jones Indices would be benchmark administrators for purposes of the European Commission's proposal for the regulation of indices used as benchmarks in financial instruments and financial contracts, published on September 18, 2013 (the "EC Proposal"), and each has significant concerns about the EC Proposal and significant unintended consequences that could occur if the EC Proposal is enacted as currently drafted. Platts and S&P Dow Jones Indices are of the view that the EC Proposal could have a deleterious impact not only on the benchmark industry, and particularly the highly competitive independent benchmark industry of which each is a part, but also importantly a similarly deleterious impact on the diverse constituency of market participants and end investors whose activities benefit from such a competitive and high- quality independent benchmark industry. Both Platts and S&P Dow Jones Indices have robust self- governance and pride themselves on their longstanding reputations for independence. Accordingly, we hope to continue engaging in constructive dialogue to clarify the intended scope of the Commission's proposal and to discuss the specific concerns we have with the proposal, such as the requirements that:
- data contributors submit to binding codes of conduct;
- input data used to calculate indices must be made publicly available immediately following publication of the index;
- indices published by administrators in third countries may not be used by supervised entities in the European Union unless the Commission has recognized the third country's supervisory framework as equivalent to the Commission's own rules; and
- fines of up to 10 percent of total annual turnover, regardless of fault or negligence, be imposed in the event of any breach of the regulation.[51]

[51] McGraw Hill Financial's Response to the European Commission's Proposal for the Regulation on Indices Used as Benchmarks in Financial Instruments and Financial Contracts (Nov. 2013) at http://platts.com/IM.Platts.Content%5Caboutplatts%5Cmediacenter%5CPDF%5CEC_Benchmarks_WPaper_final.pdf.