

Derivatives Alert

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CFTC Updates LIBOR Transition Relief

On August 31, 2020, the Commodity Futures Trading Commission (CFTC or Commission) announced relief for swap dealers (SD) and other market participants related to the industry-wide transition from swaps that reference the London Interbank Offered Rate (LIBOR) and other interbank offered rates (IBOR) to swaps that reference alternative benchmarks, such as the Secured Overnight Financing Rate.¹

Chairman Heath P. Tarbert stated that the relief will “help smooth the transition away from interbank offered rates” by “remov[ing] regulatory obstacles to the adoption of potential protocols updating robust fallback procedures” if an interbank offered rate “ceases or becomes non-representative,” and by “help[ing] market participants continue managing their swap portfolios.”²

The relief comes in the form of three staff letters issued by the Division of Swap Dealer and Intermediary Oversight (DSIO), Division of Market Oversight (DMO), and Division of Clearing and Risk (DCR), which update relief the CFTC provided in December 2019.³ The CFTC issued both the original relief and the updated relief in response to requests from the Alternative Reference Rates Committee, a private-public working group convened in 2014 by the Federal Reserve Board and the Federal Reserve Bank of New York to lead the effort to transition from IBORs to alternative benchmarks in the United States.⁴ The relief, which is subject to various terms and conditions set forth in the staff letters, highlights steps the CFTC is taking to ease that transition — a process that might otherwise trigger numerous CFTC requirements that were not intended to apply in such a situation.

CFTC Staff Letter No. 20-23: DSIO stated that, if a person amends a swap that uses LIBOR or other IBORs solely to replace that rate with an alternative benchmark, that change will not count as a new swap for purposes of the threshold at which the person

¹ See Press Release, “CFTC Provides Additional Relief to Market Participants Transitioning from LIBOR,” CFTC (Aug. 31, 2020) (Press Release). For more information on the transition from LIBOR to alternative benchmarks, see Skadden’s [August 15, 2017](#), and [March 28, 2018](#), client alerts.

² Press Release

³ See CFTC Letter Nos. [19-26](#), [19-27](#) & [19-28](#) (Dec. 17, 2019).

⁴ See the Alternative Reference Rates Committee’s letters dated [November 5, 2019](#), [June 16, 2020](#), and [July 20, 2020](#).

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would be required to register as a SD.⁵ In addition, DSIO will not recommend enforcement action against any SD for failing to comply with certain other eligibility requirements, uncleared swap margin rules, business conduct requirements, and confirmation, documentation and reconciliation requirements, to the extent that compliance would be required solely as a result of amending certain types of swaps to reference an alternative benchmark instead of an IBOR.⁶

CFTC Staff Letter No. 20-24: Until December 31, 2021, DMO will exempt from the CFTC's trade execution requirement swaps that are amended or created by an "IBOR Transition Mechanism" for the sole purpose of replacing an IBOR with an alternative benchmark.⁷ IBOR Transition Mechanisms include "fallback" amendments to swap terms, which are triggered when the IBOR the swap references becomes unavailable, is permanently discontinued, or is determined to be nonrepresentative by the

⁵ A person may be required to register as a SD based on the aggregate gross notional amount of swaps that it enters into over the prior 12 months in connection with its swap dealing activities. The current *de minimis* threshold for SD registration is \$8 billion. See 17 C.F.R. § 1.3 (definition of "swap dealer").

⁶ For example, DSIO will not recommend enforcement action against a person who fails to comply with Section 2(e) of the Commodity Exchange Act (CEA) or to qualify as an eligible contract participant (ECP), solely to the extent that status is relevant as a result of amending an uncleared swap to reference an alternative benchmark rather than an IBOR. ECPs are certain entities, such as financial institutions, insurance companies or commodity pools, that meet prescribed status and asset thresholds, and are permitted to engage in certain transactions that are not generally available to retail customers. See 7 U.S.C. § 1a(18). CEA Section 2(e) makes it unlawful for any person other than an ECP to enter into a swap, unless the swap is entered into on, or subject to the requirements of, a board of trade designated as a contract market under 7 U.S.C. § 7. See 7 U.S.C. § 2(e).

⁷ The CEA and CFTC regulations require that certain types of swaps be submitted for clearing. See 7 U.S.C. § 2(h)(1) (clearing requirement); 7 U.S.C. § 2(h)(7) (clearing exceptions); 17 C.F.R. § 50.4 (classes of swaps required to be cleared). These swaps must also be executed on a board of trade designated as a contract market, a registered swap execution facility (SEF) or a SEF that is exempt from registration, unless no board of trade or SEF makes the swap available to trade, or the swap is exempted from clearing requirements. See 7 U.S.C. § 2(h)(8).

benchmark administrator or the authority in the relevant jurisdiction. They also include amendments to benchmark rates in swaps made bilaterally by counterparties, and new swap transactions that reference alternative benchmarks instead of IBORs.⁸

CFTC Staff Letter No. 20-25: DCR stated that, until December 31, 2021, it will not pursue enforcement action against market participants for failing to comply with the CFTC's interest rate swap clearing requirement when they amend swaps or swaptions, executed prior to the date on which the swap counterparties would have been required to comply with the clearing requirement, solely to replace an IBOR with an alternative benchmark. DCR also provided no-action relief for failure to comply with the clearing requirement, and the requirements of certain exceptions to and exemptions from the clearing requirement, for Eligible End-Users.⁹ For example, DCR will not recommend the Commission take an enforcement action against an Eligible End-User in certain instances for failure to remain in compliance with the hedging or risk-mitigation requirements of CFTC Regulations 50.50(c) or 50.51(b)(2), or applicable conditions in a prior DCR staff letter, as long as the amendments are made for the sole purpose of transitioning an IBOR to an alternative benchmark.¹⁰

⁸ See CFTC Letter No. 20-24 at 5-6 (Aug. 31, 2020)

⁹ The CFTC defines "Eligible End-User" as "(1) a non-financial entity electing an exception under Commission regulations 50.50(a)-(c); (2) a financial entity electing an exception under Commission regulation 50.50(a)-(d); (3) an exempt cooperative electing an exemption under Commission regulation 50.51; and (4) an entity identified by the Commission in its recent notice of proposed rulemaking under proposed regulations 50.77 (community development financial institutions), 50.78 (bank holding companies), and 50.79 (savings and loan holding companies)." See CFTC Letter No. 20-25 at 18-19 (Aug. 31, 2020).

¹⁰ CEA Section 2(h)(7) provides that a swap need not be cleared if it is used to hedge or mitigate commercial risk. See 7 U.S.C. § 2(h)(7). CFTC Regulation 50.50(c) sets forth the conditions when a swap will be viewed as hedging or mitigating a commercial risk, and CFTC Regulation 50.51(b)(2) exempts certain cooperatives from the clearing requirement for swaps hedging or mitigating a commercial risk. See 17 C.F.R. §§ 50.50(c), 50.51(b)(2).