



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5000

Division of Clearing and Risk

M. Clark Hutchison III
Director

Re: Staff No-Action Relief from the Swap Clearing Requirement for Amendments to Legacy Uncleared Swaps to Facilitate Orderly Transition from Inter-Bank Offered Rates to Alternative Risk-Free Rates

Ladies and Gentlemen:

This letter from the Division of Clearing and Risk (**DCR**) responds to a November 5, 2019 letter from the Alternative Reference Rates Committee (**ARRC**)¹ on behalf of its members that are subject to certain Commodity Futures Trading Commission (**CFTC** or **Commission**) regulations.² Among other things, ARRC requested no-action relief for failure to comply with certain provisions of the swap clearing requirement promulgated pursuant to section 2(h)(1)(A) of the Commodity Exchange Act (**CEA**) and codified in part 50 of Commission regulations when swap counterparties amend certain uncleared swaps as part of an industry-wide initiative to amend swaps that reference certain London Interbank Offered Rate (**LIBOR**) rates and other interbank offered rates (collectively with LIBOR, the **IBORs**)³ to reference specified risk-free rates (**RFRs**).

ARRC's request to DCR focuses on swaps that were executed prior to the compliance date on which swap counterparties were required to begin centrally clearing interest rate swaps (IRS) pursuant to the CFTC's swap clearing requirement and thus were not required to be

¹ Authorities representing U.S. banking regulators and other financial sector members, including the Commission, serve as non-voting *ex officio* members of the ARRC.

² The ARRC letter also requested relief from the Division of Market Oversight (**DMO**) and the Division of Swap Dealer and Intermediary Oversight (**DSIO**). Relief requested from DMO and DSIO will be addressed separately. In formulating this letter, DCR considered the November 5, 2019 letter, along with prior letters submitted by ARRC, as well as in-person discussions related to ARRC's requested relief.

³ IBORs include, but are not limited to, U.S. dollar (**USD**) LIBOR, British pound (**GBP**) LIBOR, Japanese yen (**JYP**) LIBOR, the Tokyo Interbank Offered Rate (**TIBOR**), the Australian Bank Bill Swap Rate (**BBSW**), the Singapore Interbank Offered Rate (**SIBOR**), the Canadian Dollar Offered Rate (**CDOR**), Euro Interbank Offered Rate (**EURIBOR**), and the Hong Kong Interbank Offered Rate (**HIBOR**). As discussed below, the Singapore dollar rate overnight rate, the SOR-VWAP, also would be considered to be an IBOR in the context of this letter. Please note that the relief provided in this letter applies only to certain rates as relevant to the swap clearing requirement and as specified below.

cleared and have not been cleared (**Uncleared Legacy IRS**). ARRC members seek to amend their portfolios of Uncleared Legacy IRS without such swaps being considered to be new swaps subject to the swap clearing requirement under section 2(h)(1)(A) of the CEA and CFTC regulation 50.4(a) (**IRS clearing requirement**).

In recognition of the public policy importance of amending Uncleared Legacy IRS that reference certain IBORs, DCR will not recommend enforcement action for failure to comply with the CFTC's IRS clearing requirement when counterparties amend Uncleared Legacy IRS under specific conditions, as set forth below.

ARRC's request also seeks clarification with respect to two other Part 50 regulations related to certain end-users currently exempted from the swap clearing requirement under subpart C of Part 50. This letter also provides no-action relief related to those requests.⁴

I. Factual Background

In response to significant concerns regarding the reliability and robustness of the IBORs, the Financial Stability Board (**FSB**) called for the identification of alternative benchmarks to the IBORs and transition plans to support implementation.⁵ The U.S. Financial Stability Oversight Council (**FSOC**) has made repeated calls for member agencies to work closely with market participants to identify and mitigate risks that may arise during an IBOR transition process.⁶ In response to ongoing efforts such as these, central banks in various jurisdictions, including the United States, United Kingdom, Japan, Switzerland, and European Union, have convened working groups of official sector representatives and market participants.

In 2014, the Federal Reserve Bank of New York convened the ARRC in order to identify best practices for U.S. alternative reference rates, identify best practices for contract robustness,

⁴ This letter addresses only those ARRC requests that relate to Part 50 of the Commission's regulations. Other parts of the ARRC request letter will be addressed separately by other divisions of the CFTC.

⁵ See FSB statement, "Interest rate benchmark reform – overnight risk-free rates and term rates" (July 12, 2018), available at <https://www.fsb.org/2018/07/interest-rate-benchmark-reform-overnight-risk-free-rates-and-term-rates/> ("Because derivatives represent a particularly large exposure to certain IBORs, and because these prospective [risk-free rate] RFR-derived term rates can only be robustly created if derivatives markets on the overnight RFRs are actively and predominantly used, the FSB believes that transition of most derivatives to the more robust overnight RFRs is important to ensuring financial stability."). In addition, the FSB's July 2014 recommendation to move to RFRs is available at https://www.fsb.org/wp-content/uploads/r_140722.pdf. See also Statement on Communication and Outreach to Inform Relevant Stakeholders Regarding Benchmarks Transition by the Board of the International Organization of Securities Commissions (**IOSCO**), July 31, 2019, available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD636.pdf>.

⁶ See, e.g., FSOC 2018 Annual Report, pages 4-5, 8-9, 108-109 (Dec. 19, 2018), available at <https://home.treasury.gov/system/files/261/FSOC2018AnnualReport.pdf> ("The uncertainty surrounding LIBOR's sustainability may threaten individual financial institutions and the U.S. financial system more broadly. Specifically, without advance preparation, a sudden cessation of such a heavily used reference rate could cause considerable disruptions to, and uncertainties around, the large flows of LIBOR-related payments. It could also impair the functioning of a variety of markets, including business and consumer lending The Council recommends that member agencies work closely with market participants to identify and mitigate risks from potential dislocations during the transition process."); see also FSOC 2013 Annual Report, pages 6, 14-15, 137, 140-142 (June 2013) available at <https://www.treasury.gov/initiatives/fsoc/Documents/FSOC%202013%20Annual%20Report.pdf>.

develop an adoption plan, and create an implementation plan with metrics of success and a timeline.⁷ Similar committees have been established in other jurisdictions, including the European Union, Japan, Switzerland, and United Kingdom.

In June 2017, the ARRC identified a broad Treasuries repo financing rate, the secured overnight financing rate (**SOFR**), as the preferred alternative benchmark to U.S. dollar (**USD**) LIBOR (**USD LIBOR**) for certain new U.S. dollar derivatives and other financial contracts. It also published an updated paced transition plan outlining the steps that the ARRC, derivatives clearing organizations, and other market participants intend to take in order to progressively build the liquidity required to support the issuance of, and transition to, contracts referencing SOFR.⁸ In accordance with the ARRC's plan and similar plans in other jurisdictions, trading of SOFR-based derivatives and other financial contracts linked to alternative benchmarks commenced in 2018 and has continued to expand in scope in 2019.⁹

In July 2017, the U.K. Financial Conduct Authority (**FCA**), which regulates ICE Benchmark Administration Limited, the administrator of LIBOR,¹⁰ announced that it has sought commitments from LIBOR panel banks to continue to contribute to LIBOR through the end of 2021, but that the FCA will not use its powers to compel or persuade contributions beyond such date.¹¹ The submissions by panel banks serve as inputs to formulate LIBOR rates in five currencies, namely, USD LIBOR, EUR LIBOR, GBP LIBOR, CHF LIBOR, and JPY LIBOR. In addition, the Singapore dollar (SGD) Swap Offer Rate (SOR) is computed based on transactions that reference USD LIBOR.

Non-U.S. jurisdictions also have determined that applicable reference rates are no longer representative benchmarks due to a significant impairment as determined by authorized benchmark administrators or the relevant authority in a particular jurisdiction.¹² For example, in the United Kingdom, the Working Group on Risk-Free Reference Rates recommended the Sterling Overnight Index Average (**SONIA**) as the recommended replacement rate for GBP

⁷ In March 2018, the ARRC was reconstituted with expanded participation by additional financial institutions and trade organizations, and with additional government agencies added as *ex officio* members. See Alternative Reference Rates Committee, Press Release, March 7, 2018, available at <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-March-7-2018-press-release.pdf>.

⁸ In 2019, ARRC released an incremental objectives document that compliments the paced transition plan, available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARRC_2019_Incremental_Objectives.pdf.

⁹ Information regarding the progress of trading SOFR derivatives to date can be found at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/SOFR_Anniversary.pdf and <https://www.isda.org/a/xogME/Benchmarks-Full-Year-2018.pdf>.

¹⁰ ICE Benchmark Administration Limited is the administrator for LIBOR rates in five currencies, four of which are subject to the IRS clearing requirement: USD, British pound (GBP), Swiss franc (CHF), and Japanese yen (JPY).

¹¹ See Speech by Andrew Bailey, Chief Executive of the FCA, at Bloomberg London, UK, July 27, 2017, available at <https://www.fca.org.uk/news/speeches/the-future-of-libor>.

¹² When making such a determination, benchmark administrators and authorities supervising benchmark administrators have considered whether the benchmark (and, by extension, its administrator) satisfies the Principles for Financial Benchmarks published by the Board of IOSCO, July 2013, available at <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf>.

LIBOR.¹³ Similarly, in Japan, the Cross-Industry Committee on Japanese Yen Interest Rate benchmarks has identified the Tokyo Overnight Average Rate (**TONA**) as the preferred replacement rate for JPY TIBOR, where appropriate.¹⁴ In Switzerland, the National Working Group on Swiss Franc Reference Rates has recommended the CHF Swiss Average Rate Overnight (**SARON**) as the alternative rate to replace CHF LIBOR. In Singapore, the Monetary Authority of Singapore (**MAS**) recently announced that SOR will transition to the Singapore Overnight Rate Average (**SORA**), a SGD risk-free rate benchmark.¹⁵

II. ARRC's Request for Relief and Related Industry Protocols

In order to facilitate the transition from IBORs to RFRs and protect against any permanent cessation of IBOR publication, ARRC requested that DCR provide relief such that swap counterparties may amend their Uncleared Legacy IRS without those swaps being considered to be new swaps subject to the IRS clearing requirement. In existing master agreement documentation between swap counterparties, there are fallback provisions that become relevant only if the floating rate term in the IRS is not available (including because the rate is permanently discontinued or is determined to be non-representative by the benchmark administrator or the relevant authority in a particular jurisdiction).¹⁶ As part of the transition from IBORs to alternative RFRs, there are specified RFRs that will be included in fallback provisions to the underlying master agreement documentation.¹⁷ For purposes of this letter, the

¹³ The IRS clearing requirement applies to overnight index swaps with a SONIA floating rate and a term between 7 days and 3 years.

¹⁴ However, for JPY LIBOR swaps, the Japanese committee noted that either JPY TIBOR or JPY TONA may be an appropriate replacement rate so the committee is monitoring the progress of market-led initiatives and will continue to consult regarding the transition.

¹⁵ See MAS press release (Aug. 30, 2019), available at <https://www.mas.gov.sg/news/media-releases/2019/mas-sets-up-steering-committee-to-drive-the-interest-rate-benchmark-transition-from-sgd-sor-to-sora>. The industry working group in Singapore, led by the Association of Banks in Singapore and Singapore Foreign Exchange Market Committee, recommended that swaps referencing SGD SOR be transitioned to the Singapore Overnight Rate Average (SORA), a transaction-based overnight interest rate benchmark. The transition is envisaged to take place over the next few years ahead of end-2021. See Roadmap for Transition of Interest Rate Benchmarks: From SGD Swap Offer Rate (SOR) to Singapore Overnight Rate Average (SORA) (Aug. 30, 2019) available at <https://abs.org.sg/docs/library/consultation-report-on-roadmap-for-transition-of-interest-rate-benchmarks-from-sor-to-sora.pdf>.

¹⁶ Existing master agreement documentation between swap counterparties, such as the agreement published by the International Swaps and Derivatives Association, Inc. (ISDA) master agreement, generally contains fallback provisions to determine a floating rate term of an IRS if the rate becomes impaired or is unavailable. According to the 2006 ISDA Definitions, the current fallback provisions for LIBOR and other key IBORs require a poll of four major banks in a relevant interbank market to determine the rate. If fewer than two major banks in the interbank market respond the fallback provision may require the calculation agent to poll major banks in the relevant city. Finally, if rates are unavailable, the fallback provision may require the calculation agent to determine the rate. All of these fallback instructions may vary or may be difficult to implement in practice. See also Development of Fallbacks for LIBOR and Other Key IBORs – FAQs, available at <https://www.isda.org/2017/11/28/development-fallbacks-libor-key-ibors-faqs/>.

¹⁷ The provisions of this letter are based on the specified RFRs in the proposed ISDA protocol.

amendment of fallback provisions (or addition of contractual terms)¹⁸ to modify the process for selecting the new floating rate term of an IRS that is not available because the rate is unavailable, permanently discontinued, or determined to be non-representative by the benchmark administrator or the relevant authority in a particular jurisdiction, will be referred to as the **Fallback Amendment**.¹⁹

ARRC contends that certainty about the application of CFTC regulations to Uncleared Legacy Swaps will eliminate significant impediments to the efficient amending of large volumes of swaps and facilitate the orderly transition away from the use of IBORs, which is a goal supported by public sector authorities around the world.

An industry protocol is currently being developed by ISDA with respect to Fallback Amendments. The protocol is based on consultations and commentary from the industry. At the time of publication this letter, ISDA has not yet finalized its protocol and its associated templates. It expects to finalize such documentation by the end of 2019 with implementation in early 2020. It is expected that, by adhering to the ISDA protocol, the counterparties to an uncleared swap would be able to add a Fallback Amendment to an Uncleared Legacy IRS without extensive, bilateral negotiations.

Once the ISDA protocol is in place, counterparties relying on ISDA documentation with outstanding IRS will be able to adopt Fallback Amendments voluntarily. ARRC represents that most counterparties will adopt the ISDA benchmark rate fallback supplement because it reduces uncertainty by specifying which RFR will replace which IBOR, as well as how any new swap rate will be determined if such a rate becomes unavailable.

Swap counterparties also may elect to make voluntary, bilaterally negotiated Fallback Amendments to their Uncleared Legacy IRS. As discussed further below, either adherence to the ISDA protocol or bilateral negotiation to add a Fallback Amendment to Uncleared Legacy IRS prior to the permanent cessation of the applicable IBOR or determination that the IBOR is non-representative by the benchmark administrator or the relevant authority in a jurisdiction, would qualify for relief under this letter.

III. Applicable Regulatory Requirements and DCR Staff Analysis

A. Interest Rate Swap Clearing Requirements

The Commission adopted its initial IRS clearing requirement under Commission regulation 50.4(a) in 2012 and the regulations were phased in over the course of 2013.²⁰ The

¹⁸ The addition of new contract terms will be applicable only in situations where the underlying documentation is not based on the 2006 ISDA master agreement, which contains fallback provisions.

¹⁹ In swaps that have no reference rate fallback provision currently, a Fallback Amendment would consist of new provisions in the master agreement or other appropriate swap documentation. Whether adopting a new Fallback Amendment provision or updating a current fallback provision through a Fallback Amendment, this letter refers to that process as “adding a Fallback Amendment.”

²⁰ See Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (Dec. 13, 2012) (**2012 Clearing Requirement**). Phased implementation of the 2012 Clearing Requirement took place in three phases based on type of market participant. See subpart B of Part 50 of the Commission’s Regulations.

initial IRS clearing requirement included fixed-to-floating IRS denominated in four currencies, U.S. dollar (referencing USD LIBOR), Euro (referencing EURIBOR), British pound (referencing GBP LIBOR), and Japanese yen (referencing JPY LIBOR). The 2012 IRS clearing requirement also included basis swaps and forward rate agreements denominated in the same currencies and reference rates.²¹

In 2016, the Commission expanded the IRS clearing requirement to include fixed-to-floating IRS in nine additional major currencies (Australian dollars, Canadian dollars, Hong Kong dollars, Mexican pesos, Norwegian krone, Polish zloty, Singapore dollars, Swedish krone, and Swiss franc), as well as other modifications to the scope of the IRS clearing requirement.²²

In the 2012 clearing requirement adopting release, the Commission clarified that the clearing requirement applies to all new swaps, as well as changes in the ownership of a swap, including by assignment, novation, exchange, transfer, or conveyance.²³ Notably, the Commission did not address amendments, material or otherwise, to existing swaps.²⁴

B. Existing DCR No-Action Relief for Compression Exercises

In March 2013, during the implementation of the 2012 clearing requirement, DCR staff issued a no-action letter providing relief from Part 50 when counterparties amend and replace swaps resulting from multilateral compression exercises consisting only of swaps entered into prior to the compliance date for the Commission's clearing requirement, provided that certain conditions are met.²⁵ Under the terms of the letter, uncleared legacy swaps executed prior to any applicable compliance date would not become subject to Part 50 when included in a multilateral compression exercise. DCR staff took this no-action position in 2013 in order to "promote the benefits of compression for uncleared swaps." DCR recognized that amending swaps entered into prior to a relevant compliance date for the clearing requirement was warranted in light of the public policy objectives of reducing outstanding notional exposures and reducing operational and counterparty credit risk.

In staff letter 13-01, DCR set forth five conditions under which legacy swaps could be amended and a replacement swap generated. The portfolio compression exercise must: (1) meet the definition set forth in Commission regulation 23.500(h) and must involve more than two

²¹ The 2012 Clearing Requirement also included overnight index swaps denominated in U.S. dollars, euros, and British pounds, as well as two classes of credit default swaps.

²² See Clearing Requirement Determination Under Section 2(h) of the Commodity Exchange Act for Interest Rate Swaps, 81 FR 71202 (Oct. 14, 2016) (**2016 Clearing Requirement**) (amending all four classes of IRS under regulation 50.4(a)).

²³ See 2012 Clearing Requirement, 77 FR at 74316.

²⁴ In its 2012 adopting release, the Commission discussed certain negotiated swap provisions that counterparties can undertake based on the goal of reducing counterparty credit risk. The Commission stated that these changes to a swap would be viewed as "legitimate business considerations . . . on a case-by-case basis in conjunction with all other relevant facts and circumstances" and would be an affirmative defense to any charges of evasion of the clearing requirement. See *id.* at 74319. DCR believes that this preamble discussion of public policy considerations by the Commission offers additional support for the no-action position taken by staff in this letter.

²⁵ See DCR No-Action Relief from Required Clearing of Swaps Resulting from Multilateral Compression Exercises, CFTC Letter No. 13-01 (Mar. 18, 2013), available at <https://www.cftc.gov/csl/13-01/download>.

participants; (2) the exercise may not include cleared swaps; (3) the exercise may include only swaps executed prior to an applicable clearing requirement compliance date; (4) the compression exercise must have established rules, the original counterparties to the swaps cannot be altered, the material terms of the swap, including the maximum maturity of the swap and average weighted maturity of the swap cannot change, and the sole purpose of the exercise must be reducing operational or counterparty credit risk; and (5) the compression exercise methodology cannot allow participants to specify which swaps will be amended or replaced.

The no-action position taken by DCR in 2013 is consistent with Commission rules promoting the use of multilateral compression as a means of operational and risk management.²⁶ More recently, earlier this year, citing DCR's 2013 no-action letter, the Division of Swap Dealer and Intermediary Oversight (**DSIO**) issued a similar no-action letter related to uncleared margin requirements to allow compression exercises.²⁷ Finally, the conditions outlined below are generally consistent with relief provided by DSIO and the prudential regulators with regard to margin for uncleared swaps.

C. Size of Legacy Uncleared IRS Portfolios

DCR estimates that the size of the Uncleared Legacy IRS portfolios is relatively small given that a significant number of IRS referencing LIBOR rates were moved into clearing by the end of 2013 with respect to the 2012 Clearing Requirement and by the end of 2018 with respect to the 2016 Clearing Requirement. In addition, presumably some number of uncleared IRS referencing LIBOR rates have been terminated or expired given the passage of time.

In May 2019, the CFTC's Office of the Chief Economist (**OCE**) published an analysis estimating, among other things, the population of uncleared swap positions that constitute legacy swaps.²⁸ In this report, OCE noted that "legacy swaps with respect to the clearing requirement constitute a trivial portion of swaps markets."²⁹

DCR's analysis of Uncleared Legacy IRS portfolios supports OCE's conclusions. After reviewing swap transaction data reported to swap data repositories, DCR found that the number of swaps expected to be eligible for the relief under the terms of this letter is small. Most swap counterparties have a discrete and manageable portfolio of outstanding uncleared swaps that qualify as legacy swaps for the purposes of the 2012 IRS Clearing Requirement. DCR calculated the size of these legacy portfolios, and in an overwhelming majority of cases, an Uncleared Legacy IRS portfolio contains fewer than 1,000 swaps. Nonetheless, DCR understands the importance of providing legal and operational certainty in the context of global IBOR reform efforts.

²⁶ See, e.g., Commission regulations 23.503 and 39.13(h)(4).

²⁷ DSIO No-Action Letter No. 19-13 (June 6, 2019).

²⁸ See Legacy Swaps under the CFTC's Uncleared Margin and Clearing Rules (May 22, 2019), available at <https://www.cftc.gov/node/216426>.

²⁹ See *id.*

IV. DCR No-Action Position For Uncleared Legacy IRS

ARRC requested that DCR confirm that a Fallback Amendment would not cause a swap that is currently not required to be cleared pursuant to section 2(h)(1) of the CEA, as implemented in Part 50 of the Commission's regulations, to become subject to the Commission's IRS clearing requirement. DCR has concluded that adding a Fallback Amendment to an Uncleared Legacy IRS should not cause the loss of legacy status resulting in the swap becoming subject to the IRS clearing requirement. DCR is providing the relief set forth in this letter to help facilitate an orderly market-wide transition away from the use of IBOR floating rates to RFRs selected by ARRC and similar working groups convened in other jurisdictions.

The Fallback Amendment process for Uncleared Legacy Swaps is one piece of a global reform agenda and does not reflect market participants voluntarily assuming risk or exercising independent discretion.

A. Legacy Status

Uncleared Legacy Swaps refer to uncleared swaps that would have been subject to the IRS clearing requirement under CFTC regulation 50.4(a), but for the fact that such swaps were entered into before the application of the 2012 clearing requirement as set forth under CFTC regulation 50.5³⁰ and relevant implementation phasing dates.³¹ Specifically, this letter applies to swaps that were executed prior to the date on which the counterparties were required to begin complying with the relevant IRS clearing requirement,³² and are subsequently amended by adding a Fallback Amendment.

In issuing this letter, DCR notes that swap counterparties retain responsibility for determining which of their swaps qualify as Uncleared Legacy Swaps.

This letter does not apply to swaps that have been submitted to clearing voluntarily.

B. IBOR Rates and Permissible Fallback Amendments

Based on current ARRC transition plans, DCR has determined that Uncleared Legacy IRS in five currencies across three IRS classes referencing specific floating rates under

³⁰ For purposes of implementing the 2012 clearing requirement, the Commission promulgated regulation 50.5, which defines swaps that are exempt from the clearing requirement as (a) swaps entered into prior to July 21, 2010, and (b) swaps entered into before the application of the clearing requirement under regulations 50.2 and 50.4.

³¹ The 2012 clearing requirement was phased in by type of market participant, while the 2016 clearing requirement was phased in by when comparable clearing mandates took effect in non-U.S. jurisdictions.

³² The Commission set forth a specific compliance schedule for market participants to bring their swaps into compliance with the clearing requirement. *See* 2012 IRS Clearing Requirement, 77 FR 74284, 74319-20 (Dec. 13, 2012). Swap dealers, major swap participants, and private funds active in the swaps market (active funds) were required to comply beginning on March 11, 2013, for swaps they enter into on or after that date. All other financial entities were required to clear swaps beginning on June 10, 2013, for swaps entered into on or after that date, except for accounts managed by third-party investment managers, as well as ERISA pension plans, which had until September 9, 2013, to begin clearing swaps entered into on or after that date.

Commission regulation 50.4(a) require relief.³³ This letter applies only to Uncleared Legacy IRS referencing USD LIBOR, JPY LIBOR, GBP LIBOR, CHF LIBOR, and SGD SOR.³⁴

For ease of reference the tables below are excerpted from CFTC regulation 50.4(a) Table 1a and edited to reflect the affected classes of IRS:

Table 1

<u>Specification</u>	Fixed-to-Floating Swap Class				
1. Currency	Singapore Dollar (SGD)	Swiss Franc (CHF)	Sterling (GBP)	U.S. Dollar (USD)	Yen (JPY)
2. Floating Rate Indexes	SOR-VWAP	LIBOR	LIBOR	LIBOR	LIBOR
3. Stated Termination Date Range	28 days to 10 years	28 days to 30 years	28 days to 50 years	28 days to 50 years	28 days to 30 years
4. Optionality	No	No	No	No	No
5. Dual Currencies	No	No	No	No	No
6. Conditional Notional Amounts	No	No	No	No	No

Table 2

<u>Specification</u>	Basis Swap Class		
1. Currency	Sterling (GBP)	U.S. Dollar (USD)	Yen (JPY)
2. Floating Rate Indexes	LIBOR	LIBOR	LIBOR
3. Stated Termination Date Range	28 days to 50 years	28 days to 50 years	28 days to 30 years
4. Optionality	No	No	No
5. Dual Currencies	No	No	No
6. Conditional Notional Amounts	No	No	No

³³ Any OIS referencing GBP SONIA created as part of the IBOR transition process would be considered to be new swaps subject to Part 50. OIS referencing GBP SONIA are not covered by the fallback amendment process, and thus this class is not included under the provisions of this letter.

³⁴ Each of the rates identified as a RFR fallback rate in the chart below is one that swap counterparties would be permitted to select under the framework set forth in the ISDA protocol based on current expectations. See Consultation on Final Parameters for the Spread and Term Adjustments in Derivatives Fallbacks for Key IBORs (Sept. 18, 2019) available at <https://www.isda.org/2019/09/18/september-2019-consultation-on-final-parameters/>. See also Supplemental Consultation on Spread and Term Adjustments for Fallbacks in Derivatives Referencing USD LIBOR, CDOR, HIBOR and Certain Aspects of Fallbacks for Derivatives Referencing SOR (May 16, 2019) available at <https://www.isda.org/a/n6tME/Supplemental-Consultation-on-USD-LIBOR-CDOR-HIBOR-and-SOR.pdf>.

Table 3

<u>Specification</u>	<u>Forward Rate Agreement Class</u>		
1. Currency	Sterling (GBP)	U.S. Dollar (USD)	Yen (JPY)
2. Floating Rate Indexes	LIBOR	LIBOR	LIBOR
3. Stated Termination Date Range	3 days to 3 years	3 days to 3 years	3 days to 3 years
4. Optionality	No	No	No
5. Dual Currencies	No	No	No
6. Conditional Notional Amounts	No	No	No

When adding a Fallback Amendment to an Uncleared Legacy IRS, the following rates are the permissible RFR fallback rates that may serve as a replacement for the floating LIBOR rates or rates using LIBOR as an input:

Currency and IBOR Floating Rate	Permissible RFR Fallback Rate
GBP LIBOR	SONIA
CHF LIBOR	SARON
JPY LIBOR	TONA
USD LIBOR	SOFR
SGD SOR-VWAP	SORA ³⁵

Each of the permissible RFRs included in the table above has been identified by a national level committee or working group in response to the FSB's Official Sector Steering Group's report and recommendation that central banks and supervisory authorities should work together with market participants to identify and implement RFRs.

DCR believes that Fallback Amendments should be limited to provisions incorporating these RFRs because relevant working groups have vetted and selected these rates as the most appropriate rates to transition to from existing LIBOR-based floating rates.

Despite the specificity of the floating rates identified above, DCR stands ready to provide additional relief for amendments to Uncleared Legacy IRS to transition from other IBOR floating rates to identified RFRs at such time as relevant authorities in foreign jurisdictions announce plans for such transitions.

³⁵ The industry working group in Singapore, led by the Association of Banks in Singapore and Singapore Foreign Exchange Market Committee recommended the Singapore Overnight Rate Average (SORA) as the most suitable alternative reference rate to replace the Singapore dollar swap offer rate. *See* Roadmap for Transition of Interest Rate Benchmarks: From SGD Swap Offer Rate (SOR) to Singapore Overnight Rate Average (SORA) (Aug. 30, 2019) available at <https://abs.org.sg/docs/library/consultation-report-on-roadmap-for-transition-of-interest-rate-benchmarks-from-sor-to-sora.pdf>.

C. Amendment Process

DCR is providing this no-action relief based on representations from ARRC that “a significant portion of the Fallback Amendments will be effected by the multilateral ISDA protocol, although some counterparties may enter into Fallback Amendments bilaterally.” Given this representation, DCR is not specifying that swap counterparties must rely upon an industry protocol. Bilateral negotiation and addition of Fallback Amendments to Uncleared Legacy IRS would be permissible under the terms of this letter.

For the avoidance of doubt, DCR notes that swap counterparties are not required to add Fallback Amendments to Uncleared Legacy Swaps and could instead choose to: (1) clear the swap, or (2) terminate the swap.

D. Grant of No-Action Relief and Applicable Conditions

In providing the relief described in this letter, DCR has attempted to ensure that this letter is consistent with prior no-action letters related to the swap clearing requirement. DCR also believes that counterparties should not be using the relief provided in this letter as an opportunity to renegotiate economic terms or otherwise engage in price-forming activity. For these reasons, DCR takes the view that certain conditions are appropriate. The relief provided in this letter is not available if the Fallback Amendment (i) extends the maximum maturity of an Uncleared Legacy IRS, or (ii) increases the total effective notional amount of an Uncleared Legacy IRS. The relief also will not apply if the original counterparties to the Uncleared Legacy Swap change.

Accordingly, until December 31, 2021, DCR will not recommend that the Commission take an enforcement action against any person for a failure to comply with the swap clearing requirement under section 2(h)(1)(A) of the CEA and Commission regulation 50.2 with respect to an Uncleared Legacy IRS that references USD LIBOR, JPY LIBOR, GBP LIBOR, CHF LIBOR or SGD SOR and is amended by adding a Fallback Amendment for the sole purpose of changing the existing floating rate to an applicable RFR, as specified above, in the event the existing floating rate is unavailable, permanently discontinued, or has been determined to be non-representative by the benchmark administrator or the relevant authority in a jurisdiction, provided that the following conditions are met:

1. The swap meets the definition of the term “Uncleared Legacy Swap” as described in this letter and is not required to be cleared under 2(h)(1)(A) of the CEA and Part 50 of Commission regulations because it was entered into before an applicable compliance date and has not been voluntarily submitted for clearing to a derivatives clearing organization; and
2. Each amended Uncleared Legacy Swap must:
 - a. have the same counterparties as the original swap that is amended;
 - b. have the same maximum maturity, the same average weighted maturity, and the same total effective notional amount of the original swap; and
 - c. be amended for the sole purpose of changing the floating rate fallback provisions.

This relief does not apply to the Commission's trade execution requirement, implemented via the "made available to trade" determination process in 2013, which took effect in 2014 and currently applies to fixed-to-floating IRS contracts with benchmark tenors denominated in U.S. dollars, euros, and British pound sterling.³⁶

V. Relief Requested by Certain End-Users

Commission regulations 50.50(c) and 50.51(b)(2) provide the bases for an exception from the swap clearing requirement for non-financial entities (*i.e.*, end-users eligible to elect an exception under Commission regulation 50.50(c)) and an exemption for cooperatives from the Commission's clearing requirement,³⁷ provided that certain conditions are satisfied, including the requirement that the swap is used to "hedge or mitigate commercial risk."

ARRC states that, as the IRS market transitions to RFRs, there are likely to be situations where commercial end-users and cooperatives will have to amend their swaps that reference IBORs that are subject to the CFTC's IRS clearing requirement, but have not yet amended their IBOR-linked loan agreements, debt instruments, and other agreements or transactions to include new fallbacks or RFRs. The reverse may also be true (*i.e.*, amendments to financial agreements may be completed before the related swaps are amended).

Therefore, ARRC requests that DCR provide relief for a transitional period to allow commercial end-users and cooperatives to maintain the status of swaps that are "used to hedge or mitigate commercial risk" pursuant to Commission regulations 50.50(c) and 50.51(b)(2) respectively, even if the underlying swap documentation or commercial documentation is amended and the two sets of documentation no longer reference the same rate or have different rates for some period of time.³⁸

Commercial end-users and cooperatives note that they may not be able to amend both sets of documentation simultaneously due to the administrative constraints and timing difficulties. For this reason, an end-user or cooperative would have a reference rate mismatch between its swap documentation and commercial documentation if one set of documents is amended before the other.

In addition to requesting relief with regard to Part 50 exceptions and exemptions in the context of Fallback Amendments to swaps subject to the IRS clearing requirement, the

³⁶ See Commission regulation 37.10 and Commission regulation 38.12; *see also* CFTC, Industry Filings – Swaps Made Available to Trade, available at <https://www.cftc.gov/idc/groups/public/@otherif/documents/file/swapsmadeavailablechart.pdf>.

³⁷ These rules also apply to uncleared swap margin requirements pursuant to Commission regulation 23.150(b).

³⁸ In addition to the ARRC letter requesting the relief discussed in this letter, Commission staff also received a letter from the National Association of Corporate Treasurers (NACT), which set forth certain requests for staff action on behalf of the end-user community. NACT, in support of ARRC's request, stated that "[d]uring this transitional phase, such derivatives contracts should maintain their status as swaps that are 'used to hedge or mitigate commercial risk' as they will still 'remain economically appropriate to the reduction of risks' in connection with the management of a commercial enterprise." NACT letter to DMO and DCR, Summary of LIBOR-SOFR Transition Issues, page 4, dated June 5, 2019 (quoting Commission regulation 50.50(c)).

commercial end-users and cooperatives have asked staff to provide certainty regarding amendments for replacement rates because of implications with respect to the Part 23 margin rules for swap dealers.³⁹

A. DCR No-Action Relief Related to Subpart C of Part 50

With respect to any IRS that includes an IBOR that is used to hedge or mitigate commercial risk, DCR recognizes that a temporary mismatch between the floating rates referenced in commercial arrangements and the rates referenced in the swap documentation for swaps used to hedge the risk of such commercial arrangements may lead certain end-users and cooperatives to question whether one or more swaps still qualify as instruments used to hedge or mitigate commercial risk as prescribed by Commission regulations 50.50(c) and 50.51(b)(2).

To alleviate any question in this regard and given the public policy rationale discussed above, DCR believes that a no-action position is warranted. Accordingly, until December 31, 2021, DCR will not recommend the Commission commence an enforcement action against an eligible entity electing an exception or exemption under Commission regulations 50.50(c) or 50.51(b)(2) for failure to submit a swap that is required to be cleared to a derivatives clearing organization for clearing pursuant to Commission regulation 50.2, if:

1. Such swap is an uncleared swap referencing a floating rate that qualified as a swap used to hedge or mitigate commercial risk pursuant to Commission regulation 50.50(c) or 50.51(b)(2) at the time of execution;
2. One or more of the following amendments occurs: (a) such swap or relevant commercial agreement is amended by execution of a Fallback Amendment (or similar contractual provision in a commercial agreement); or (b) an existing fallback provision in a commercial agreement is activated because the floating rate is unavailable, permanently discontinued, or has been determined to be non-representative by the benchmark administrator or the relevant authority in a jurisdiction; or (c) a commercial agreement is amended for the sole purpose of changing the existing floating rate to an applicable RFR; and
3. Prior to December 31, 2021, the commercial arrangement documentation and/or the uncleared swap documentation is amended such that the uncleared swap again qualifies as a swap used to hedge or mitigate commercial risk of such an entity pursuant to Commission regulation 50.50(c) or 50.51(b)(2).

With regard to the last condition, DCR notes that because both commercial end-users and cooperatives are subject to an ongoing obligations under CFTC regulations to maintain eligibility to elect an exception or exemption from the clearing requirement, such entities should plan to amend the reference rate provisions in both swap documentation and commercial documentation so that the rates referenced are aligned again as soon as practical, but no later than December 31, 2021.

³⁹ This issue is addressed by relief provided in a staff letter issued by DSIO.

B. DCR No-Action Relief Related to End-User Documentation Requirements

Further, to the extent an end-user or cooperative that uses an uncleared swap to hedge or mitigate commercial risk files reports pursuant to Commission regulation 50.50(b) or 50.51(c), respectively, until December 31, 2021, DCR will not recommend that the Commission commence an enforcement action if such an entity relies on the most recently filed documents meeting the requirements of Commission regulation 50.50(b) or 50.51(c) when: (1) the swap or relevant commercial agreement is amended by execution of a Fallback Amendment (or similar contractual provision in a commercial agreement); or (2) an existing fallback provision in a commercial agreement is activated because the floating rate is unavailable, permanently discontinued, or has been determined to be non-representative by the benchmark administrator or the relevant authority in a jurisdiction; or (3) a commercial agreement is amended for the sole purpose of changing the existing floating rate to an applicable RFR.

VI. Conclusion

This letter, and the positions taken herein, represent the views of DCR only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse persons relying on it from compliance with any other applicable requirements contained in the CEA or in Commission regulations. It does not create or confer any rights for or obligations on any person or persons subject to compliance with the CEA that bind the Commission or any of its other offices or divisions. Further, this letter and the positions taken herein are based upon the facts and circumstances presented to DCR. Any different, changed, or omitted material facts or circumstances might render the relief provided by this letter void. Finally, as with all staff letters, DCR retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of relief provided herein, in their discretion.

If you have any questions concerning this correspondence, please contact, Melissa A. D'Arcy, Special Counsel, at (202) 418-5086 or mdarcy@cftc.gov, or Sarah E. Josephson, Deputy Director, at (202) 418-5684 or sjosephson@cftc.gov.

Sincerely,

M. Clark Hutchison III