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November 5, 2019

Re: Treatment of Swaps Amended or Otherwise Transitioned from IBOR to Alternative Risk Free Rates under the Commodity Exchange Act

Dear Messrs. Hutchison, McGonagle, and Sterling,

The Alternative Reference Rates Committee (**ARRC**) and its member firms are writing to request interpretive guidance or no-action relief from the staff of the U.S. Commodity Futures Trading Commission (**Commission**) regarding the treatment under the Commodity Exchange Act (**CEA**) and the Commission's regulations of swaps that are amended or that are otherwise transitioned to reference risk free rates (**RFRs**) in connection with the upcoming discontinuation of the London Interbank Offered Rate (**LIBOR**).[1]

[1] This letter updates the ARRC's prior requests for interpretive guidance and relief. ARRC, Follow-up Letter to Chairman Giancarlo Regarding Treatment of Derivatives Contracts Referencing the Alterative Risk-Free Rates (May 13, 2019) (**ARRC May 2019 Letter**), *available at* https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARRC_Letter_CFTC_Regulatory_Derivatives_Treatment_05132019.pdf; ARRC, Letter to U.S. Regulators Regarding Treatment of Derivatives Contracts Referencing the Alternative Risk-Free Rates and Associated Transitions under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 12, 2018) (**ARRC July 2018 Letter**),

I. Introduction

In response to concerns regarding the reliability and robustness of the LIBOR and other interbank offered rates (**IBORs**), the Financial Stability Board and the U.S. Financial Stability Oversight Council called for the identification of risk free alternatives to LIBOR and transition plans to support the implementation of these alternatives. Recognizing that the "weaknesses of . . . [LIBOR] may undermine market integrity and the uncertainty surrounding its sustainability could threaten U.S. financial institutions and the U.S. financial system more broadly," the goal of these government-led efforts is "to achieve a smooth transition away from LIBOR."[2]

Central banks in various jurisdictions have convened working groups of market participants and official sector representatives in furtherance of this goal. In 2014, the Federal Reserve Bank of New York convened the ARRC to identify best practices for U.S. alternative reference rates and contract robustness, develop an adoption plan and create an implementation plan with metrics of success and a timeline. In July 2017, the U.K. Financial Conduct Authority (**FCA**), which regulates ICE Benchmark Administration, the administrator of ICE LIBOR, 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 compel or persuade contributions beyond that date. Therefore, market participants must plan to transition away from LIBOR to other RFRs by December 2021.

The ARRC has been working with regulators, other industry groups, and market participants to facilitate a coordinated, orderly and smooth transition of markets away from LIBOR well in advance of LIBOR being fully discontinued. In June 2017, the ARRC identified a broad Treasuries repo financing rate, the Secured Overnight Financing Rate (**SOFR**), as the preferred alternative to U.S. Dollar LIBOR for new U.S. Dollar derivatives and other financial contracts. It also published an updated "Paced Transition Plan" outlining the steps that the ARRC, central counterparties and other market participants intend to take to progressively build the liquidity required to support the issuance of, and transition to, contracts referencing SOFR.

As one way to effectuate this transition in the swaps markets, the International Swaps and Derivatives Association, Inc. (**ISDA**) has developed new fallback provisions, which will be included in the 2006 ISDA Definitions for interest rate swaps. These fallbacks are designed to ensure that contracts that reference LIBOR will continue to function following a LIBOR cessation by providing that upon a LIBOR cessation, LIBOR will be replaced with a new RFR. The fallbacks will automatically apply to new IBOR trades entered into after the effective date of the amended 2006 ISDA Definitions,

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available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-July-16-2018-titleviiletter.

[2] Financial Stability Oversight Council, 2018 Annual Report at 4 (revised June 20, 2019), *available at* https://home.treasury.gov/system/files/261/FSOC2018AnnualReport.pdf.

and ISDA will also publish a multilateral protocol that will allow market participants to include the fallbacks in IBOR contracts that were entered into prior to that date.

The ISDA effort represents a critical piece of the market's LIBOR transition efforts. However, the ARRC believes that an orderly transition cannot rely solely on the incorporation of fallbacks. Instead, a smooth and orderly transition will need to involve market participants voluntarily transitioning LIBOR reference rates in existing transactions to new RFRs well in advance of LIBOR cessation. An early, voluntary transition is necessary both to avoid potential operational and market disruptions and, as importantly, to begin to build liquidity and depth in the new RFR markets. This effort is particularly important in the new SOFR markets, which will need to fully develop over the course of the next few years.

Facilitating and encouraging a voluntary transition, particularly given the size of the market and diversity of market participants that currently have LIBOR-reference contracts, requires ensuring that existing IBOR transactions can continue under a voluntary transition to the new RFR as otherwise contemplated—without requiring a renegotiation of other, unrelated terms or newly triggering swap regulatory requirements under the CEA and Commission regulations. An absence of regulatory certainty in this regard would, the ARRC believes, materially hinder a smooth and orderly transition from LIBOR.

II. Flexibility for Different Transition Mechanisms and Models

Market participants expect that transitions from LIBOR and other IBORs will take different forms and may need to employ different mechanisms, depending on the needs of counterparties, the nature of the particular swap or swap portfolio being transitioned, and the liquidity and availability of products referencing new RFRs. The ARRC has identified three primary mechanisms, described below, through which IBOR transitions are expected to be effected.

- *RFR Conversion Mechanisms*. Some market participants may choose to voluntarily amend IBOR-linked swaps to reference an RFR (**Replacement Rate Amendment**). Replacement Rate Amendments will be effected bilaterally between the counterparties to the trades. Replacement Rate Amendments are expected to be accomplished in a myriad of ways to address differing interests of swap counterparties. In addition, these amendments may require amendments to swap terms other than the reference rate, for example to adjust for any economic impacts to counterparties of a change from the IBOR to new RFR. In some cases, it may be more efficient for counterparties to execute new swaps to transition a swap or swap portfolio from an IBOR to a new RFR (such new swaps, together with Replacement Rate Amendments, **RFR Conversion Mechanisms**). For example, some counterparties that have concerns about the tax or accounting implications of amending existing trades may need to convert their IBOR-linked trades by entering into a new swap, such as an IBOR-RFR basis swap that offsets the IBOR rate with the related RFR rate. Alternatively, some counterparties will need to convert their IBOR-linked trades by amending their entire portfolio of

IBOR-linked trades. Depending on the size of the portfolio, parties may need to undertake various bilateral or multilateral portfolio compression exercises to reduce the risk, cost and inefficiencies of maintaining unnecessary transactions on their books.

- *Amendment of Swaps to Include IBOR Fallback Provisions*. Some counterparties may choose not to voluntarily transition to a new RFR in advance of the cessation of any IBOR; instead these counterparties may use the ISDA-developed fallback amendments discussed above so that upon—and only upon—the cessation of the relevant IBOR, the swap is transitioned to the new RFR (**Fallback Amendments**). The ARRC anticipates that a significant portion of Fallback Amendments will be effected by the multilateral ISDA protocol, although some counterparties may enter into the Fallback Amendments bilaterally.

- *New Swaps Referencing SOFR*. In accordance with the ARRC's Paced Transition Plan and similar plans in other jurisdictions, market participants will trade new swaps referencing SOFR (**New SOFR Swaps**). A smooth and orderly transition from LIBOR will necessitate building liquidity in these SOFR swaps.

The ARRC's Market Structures Working Group has developed several example conversion models to identify different approaches that may be used to effect an IBOR transition, including via RFR Conversion Mechanisms (which could include New SOFR Swaps) as described above.[3] However, these conversion models are not exhaustive, and the ARRC expects that counterparties may effect the necessary amendments in ways not currently contemplated. For example, the conversion models are premised on plain vanilla USD IBOR swaps. Other swap products that may reference IBORs, such as cross-currency, credit, or commodity swaps, have not yet been analyzed.

This letter refers to the Fallback Amendments and various RFR Conversion Mechanisms that market participants may employ to transition swaps and swap portfolios from IBORs as **IBOR Transition Mechanisms**. The ARRC requests that, in providing interpretive guidance or no-action relief in connection with IBOR transition efforts, the Commission staff do so in a manner that allows for flexibility in IBOR Transition Mechanisms. This flexibility will be necessary to accommodate different conversion models that the ARRC expects will be developed as market participants assess their particular swap portfolios and the tax, accounting, and other consequences of an early transition from an IBOR.

III. Requests for Relief[4]

[3] The example conversion models conceptualized to date can be found in Annex 2 to the ARRC May 2019 Letter.

[4] In addition to the requests discussed in this Section III, the ARRC is also requesting relief from the Commission's reporting requirements, though that request will be submitted through a separate process.

On behalf of its member firms, the ARRC requests interpretive guidance or no-action relief from the CEA provisions and Commission regulations discussed below to ensure continuity of swaps through the transition from an IBOR to another RFR and to incentivize an early transition to the new RFRs. The requests for relief from the requirements described in this letter relate to those swaps modified or created by IBOR Transition Mechanisms or New SOFR Swaps, which are made for the purposes of effectuating the transition from LIBOR to the new RFRs. The relief requests are grouped into subsections based on whether the request is to the Commission's Division of Clearing and Risk (**DCR**), Division of Market Oversight (**DMO**) or Division of Swap Dealer and Intermediary Oversight (**DSIO**). Within each subset of requests, the relevant legal requirement is discussed along with the specific request for relief.

A. Division of Clearing and Risk

i. Mandatory Clearing Requirement

Section 2(h)(1)(A) of the CEA and Commission Regulation 50.2 require any swap that is subject to a mandatory clearing requirement to be cleared through an eligible derivatives clearing organization.[5]

a. Discussion

In the adopting release to the 2012 mandatory clearing requirement determination, the Commission stated that the mandatory clearing requirement will apply "only to new swap transactions" as well as to swaps subject to a change in ownership.[6]

Application of the mandatory clearing requirement to a swap modified or created by an IBOR Transition Mechanism would be disruptive to IBOR transition efforts, given that the costs and terms of clearing would not have been reflected in the price and other terms of the swap when originally negotiated between the two parties.[7] For example, certain overnight index swaps that reference the Sterling Overnight Index Average rate (**SONIA**) are currently subject to mandatory clearing, such that a material amendment to a swap to effect a transition from an IBOR to SONIA would cause the resulting swap to be subject to the mandatory clearing requirement, absent relief. Even where an IBOR Transition Mechanism would not clearly result in the application of the mandatory clearing requirement, the market would benefit from regulatory certainty that IBOR Transition Mechanisms designed to transition a swap or swap portfolio from an IBOR to a new RFR would not trigger a mandatory clearing requirement.

b. Request for Relief

[5] CEA § 2(h)(1)(A); 17 C.F.R. § 50.2.

[6] Clearing Requirement Determination Under Section 2(h) of the CEA, 77 Fed. Reg. 74,284, 74,316, 74,326 (Dec. 13, 2012).

[7] *See* 17 C.F.R. § 50.4(b).

The ARRC requests that DCR: (1) issue interpretative guidance or no-action relief confirming that swaps modified or created by IBOR Transition Mechanisms would not become subject to any new mandatory clearing requirements; and (2) grant specific no-action relief from the mandatory clearing requirement for any swaps amended or created by an IBOR Transition Mechanism, such as overnight index swaps that reference SONIA.

ii. End-User Exception

CEA Section 2(h)(7) and Commission Regulation 50.50 provide an exception from the mandatory clearing requirement for end users that enter into swaps to hedge or mitigate commercial risk.[8] A swap "is used to hedge or mitigate commercial risk" if it: (1) is economically appropriate to the reduction of risks in the conduct or management of a commercial enterprise; (2) qualifies for bona fide hedging for purposes of an exemption from the CEA's position limits; or (3) qualifies for hedging treatment under certain accounting standards.[9]

a. Discussion

As the market transitions to RFRs, there will likely be situations in which swaps end users either will have transitioned their swaps or swap portfolios to new RFRs without yet having transitioned related IBOR-linked loan agreements, debt instruments, and other agreements (**cash products**), or will have first transitioned the cash product agreements, with the related transition of swaps to follow. During this transitionary phase, therefore, there may be a mismatch between the reference rates of IBOR-linked cash products and the swaps meant to hedge them. The ARRC requests that the Commission staff provide clarity to end users that, despite a mismatch due to IBOR transition efforts, these hedging swaps should maintain their status for purposes of the end-user exception 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.[10]

In addition, swaps end users relying on an exception from the mandatory clearing requirement are required to maintain documents relating to their ability to elect an exception from the mandatory clearing requirement (e.g., a document affirming the approval of the board of directors of the end user to enter into swaps that are exempt from the mandatory clearing requirement) and file reports annually with a swap data repository stating that the end user meets the requirements of an exception to the mandatory clearing requirement. These end users would benefit from regulatory clarity regarding their ability to continue to rely on existing documentation prepared for these purposes before

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[8] CEA § 2(h)(7); 17 C.F.R. § 50.50(a), (c).

[9] 17 C.F.R. § 50.50(c).

[10] 17 C.F.R. § 50.50(c).

an IBOR transition, even if these documents do not explicitly provide for uncleared swaps with terms that would be effectuated by an IBOR Transition Mechanism.

b. Request for Relief

The ARRC requests that DCR issue interpretative guidance confirming that: (1) swaps referencing LIBOR or other IBORs that were entered into by an end user in reliance on the end-user exception will maintain their status as swaps that are "used to hedge or mitigate commercial risk," as defined in Commission Regulation 50.50(c), despite a mismatch between the swap and cash product reference rate; and (2) end users may rely on the most recently utilized and filed end-user exception documents, as required, and are not required to re-issue or re-file these documents under Commission Regulations 50.50(b)(2) and 50.51(c).

B. Division of Market Oversight

i. Trade Execution Requirement

Subject to exceptions, CEA Section 2(h)(8) requires that transactions involving a swap subject to the mandatory clearing requirement be executed on a board of trade designated as a contract market or on a swap execution facility.[11] This requirement does not apply if no board of trade or swap execution facility makes the swap available to trade.[12]

a. Discussion

The application of the mandatory trade execution requirement to a swap modified or created by an IBOR Transition Mechanism would raise impediments to a smooth and orderly IBOR transition similar to those discussed above in connection with the mandatory clearing requirement. The application of the mandatory trade execution requirement would impose costs and other considerations on swaps that would not have been reflected in the price and other terms of the swap when originally negotiated between the two parties.

The ARRC recognizes that where a swap is not subject to a mandatory clearing requirement, it will not—by operation of regulation—be subject to a mandatory trade execution requirement. However, the ARRC believes that interpretive guidance or no-action relief clarifying the disapplication of the trade execution requirement to swaps modified or created by IBOR Transition Mechanisms would provide certainty to swap markets participants.

b. Request for Relief

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[11] CEA § 2(h)(8); 17 C.F.R. §§ 37.9, 38.11.

[12] CEA § 2(h)(8)(B); *see also* 17 C.F.R. §§ 37.10, 38.12 (process for making a swap available to trade).

The ARRC requests that DMO issue interpretative guidance or no-action relief confirming that a swap modified or created by an IBOR Transition Mechanism will not be subject to the mandatory trade execution requirement.

C. Division of Swap Dealer and Intermediary Oversight

i. *De Minimis* Exception to the Swap Dealer Definition

The definition of "swap dealer" in Commission Regulation 1.3 excludes from the definition a person that is not currently registered as a swap dealer and whose swap dealing activity, together with the swap dealing activity of any other entity controlling, controlled by, or under common control with the person, does not exceed an aggregate gross notional amount threshold of $8 billion over the preceding 12-month period.[13] Once a person's swap dealing activity exceeds this $8 billion *de minimis* threshold, it must register with the Commission as a swap dealer within two months of the end of the month in which the threshold was breached.

Registering as a swap dealer subjects an entity to a comprehensive regulatory framework, including capital requirements, margin requirements for uncleared swaps, segregation of counterparty collateral, business conduct rules, and reporting and recordkeeping requirements, among others. Registration and compliance costs can be prohibitive for smaller firms for whom swap services are provided largely as an incidental service to commercial clients. These firms often actively monitor and manage their swap dealing activities to stay below the *de minimis* threshold.

a. Discussion

Swap dealers whose activities are currently below the *de minimis* threshold may be reluctant to transition from IBORs voluntarily and early if they must count swaps modified or created by IBOR Transition Mechanisms towards the threshold. Any such modifications are meant to be continuations of existing transactions—which would have been counted as required. Therefore, the ARRC believes that such swaps should not be counted towards a person's *de minimis* swap dealing threshold to avoid unnecessary delays in an IBOR transition for these swaps or swap portfolios.

b. Request for Relief

The ARRC requests that DSIO grant no-action relief providing that a person does not need to count towards its swap dealer *de minimis* threshold swaps modified or created by IBOR Transition Mechanisms.

ii. Margin Requirements for Uncleared Swaps

[13] 17 C.F.R. § 1.3, definition of swap dealer, paragraph (4).

The CEA Section 4s(e) and the Commission's regulations establish requirements for a swap dealer that is not prudentially regulated to collect and post initial and variation margin for uncleared swaps.[14]

a. Discussion

The ARRC believes relief is necessary to confirm that swaps modified or created by IBOR Transition Mechanisms are not newly subject to the Commission's uncleared swap margin requirements both to encourage—and not disincentivize—market participants to engage in early IBOR transitions and to ensure consistent regulatory treatment between jurisdictions.[15] The ARRC understands that the Commission has been working with the U.S. prudential regulators (the Office of the Comptroller of the Currency, and the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency and the Farm Credit Administration) in issuing the aforementioned interpretative guidance or no-action relief, as ARRC member firms may be subject to the uncleared swap and security-based swap margin requirements promulgated by the U.S. prudential regulators.

Additionally, as discussed above, building liquidity and depth in SOFR and other RFR markets is a necessary component of a smooth and orderly LIBOR transition. As a way to incentivize a market transition to New SOFR Swaps, the ARRC also requests that DSIO provide no-action relief from uncleared swap margin requirements for New SOFR Swaps that are not subject to mandatory clearing and that are executed prior to the date on which LIBOR will cease. Unlike the United Kingdom, which has elected an RFR that already exists, and the European Union, which elected to strengthen and preserve the EURIBOR, the preferred U.S. rate—SOFR—is new, so more time will be required to build a liquid market for it and to encourage early transitions for market participants who are otherwise unfamiliar with the new rate. This relief for New SOFR Swaps would be time-limited until the date of LIBOR cessation and would provide a much needed incentive for market participants to execute New SOFR Swaps, which would help promote early liquidity in RFR-linked products in order to facilitate a successful transition from the IBORs to the RFRs.

b. Request for Relief

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[14] CEA § 4s(e); 17 C.F.R. §§ 23.150–.161.

[15] *See* Minutes of Working Group on Sterling Risk-Free Rates (Feb. 19, 2018), *available at* https://www.bankofengland.co.uk/-/media/boe/files/minutes/2018/rfr-february-2018.pdf?la=en&hash=D8F2F5CEDFDAEE45FFF8FDD0E46B0E31E7D17D4C; *see also* Board of the International Organization of Securities Commissions: Margin Requirements for Non-Centrally Cleared Derivatives (Sep. 2013), *available at* https://www.iosco.org/library/pubdocs/pdf/IOSCOPD423.pdf (stating that "[g]enuine amendments to existing derivatives contracts do not qualify as a new derivatives contract. Any amendment that is intended to extend an existing derivatives contract for the purpose of avoiding margin requirements will be considered a new derivatives contract.").

The ARRC requests that DSIO: (1) grant no-action relief providing that swaps modified or created by IBOR Transition Mechanisms are not newly subject to the Commission's uncleared swap margin requirements; and (2) grant no-action relief from the uncleared swap margin requirements for New SOFR Swaps that are not subject to mandatory clearing and that are executed before the date on which LIBOR will cease.

iii. Business Conduct Requirements

Commission regulations require that a swap dealer verify various characteristics of a counterparty relating to its eligibility to enter into a swap and which regulatory requirements apply to the swap, such as mandatory clearing, trade execution, margin, collateral segregation, and suitability reviews (**Counterparty Characteristics**).[16] These Counterparty Characteristics include information about whether a counterparty is an "eligible contract participant" (**ECP**) as required under Section 2(e) of the CEA.[17] In addition, there are a number of external business conduct requirements that impose disclosure or information gathering obligations on counterparties, such as the requirement to engage in Know Your Counterparty procedures (i.e., obtaining a record of essential facts concerning each counterparty),[18] provide pre-trade disclosures (including mid-market mark and scenario analysis),[19] make determinations or obtain representations regarding suitability[20] or address a number of considerations when interacting with special entities.[21] For ease of reference, this letter refers to these requirements together—including the statutory requirement that off-exchange swaps be transacted only between ECPs—as **external business conduct requirements**.

a. Discussion

For swaps referencing IBORs that were entered into prior to the compliance date of the external business conduct requirements (**Legacy Swaps**), Counterparty Characteristics may not have been obtained and disclosures may not have been provided, given that the swaps were not subject to these requirements;[22] for swaps referencing IBORs that were executed prior to the cessation of LIBOR and are not Legacy Swaps

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[16] 17 C.F.R. § 23.430; *see also* 17 C.F.R. §§ 50.1–.5 (mandatory clearing); 17 C.F.R. §§ 37.9, 38.11 (trade execution), 17 C.F.R. §§ 23.150–.161 (margin); 17 C.F.R. §§ 23.700–.704 (collateral segregation); 17 C.F.R. § 23.434 (suitability reviews).

[17] *See* CEA § 1a(18) (defining "eligible contract participant").

[18] 17 C.F.R. § 23.402.

[19] 17 C.F.R. § 23.431.

[20] 17 C.F.R. § 23.434.

[21] 17 C.F.R. §§ 23.440, 23.450.

[22] Though a swap dealer would have assessed the ECP and special entity status of a counterparty to a Legacy Swap if that counterparty entered into a new trade after the compliance date of the external business conduct requirements.

(**Pre-Transition Swaps**), swap dealers would have obtained the Counterparty Characteristics and provided required disclosure prior to entering into those trades.

In some cases, a requirement for a swap dealer to assess, or verify, Counterparty Characteristics as a result of an IBOR Transition Mechanism would result in the necessary discontinuation of the swap. For example, a swap dealer may be unable to obtain or re-verify a counterparty's ECP status, including because the counterparty may no longer be an ECP.[23] Additionally, for the external business conduct requirements related to suitability[24] and notice of the right to segregation,[25] having to re-perform the relevant external business conduct obligations could result in the swap in some cases having to be terminated rather than continue. Finally, the performance (for Legacy Swaps) or re-performance (for Pre-Transition Swaps) of the business conduct requirements also would require significant time and cost on behalf of the swap dealers and would further slow an early and orderly LIBOR transition.

The imposition of these requirements, therefore, on swaps modified or created by IBOR Transition Mechanisms would, at a minimum, slow an early and orderly transition from LIBOR and, at worse, would result in the termination of swaps in a manner inconsistent with that goal.

b. Request for Relief

The ARRC requests that DSIO provide no-action relief from: (1) the requirement that a swap counterparty assess its status as an ECP for a swap modified or created by an IBOR Transition Mechanism for purposes of Section 2(e) of the CEA; and (2) for a swap dealer, the external business conduct requirements for a swap by virtue of its modification or creation by an IBOR Transition Mechanism for purposes of Commission Regulations 23.402, 23.430, 23.431, 23.434, 23.440, 23.450 and 23.701.

iv. Confirmation and Documentation Requirements

Commission Regulation 23.501(b) requires that each swap dealer make and retain a record of the date and time of transmission to, or receipt from, a counterparty of any confirmation.[26] Separately, Commission Regulation 23.504(b) provides that swap trading relationship documentation includes all confirmations of swap transactions under Commission Regulation 23.501.[27] In addition, Commission Regulation 23.505 requires

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[23] The requirement that swap counterparties be ECPs, and that a swap dealer verify ECP status, in Commission Regulation 23.430 applies prior to offering to enter into or entering into a swap with a counterparty. It is not a continuous obligation that applies throughout the duration of the swap.

[24] 17 C.F.R. § 23.434.

[25] 17 C.F.R. § 23.701.

[26] 17 C.F.R. § 23.501(b).

[27] 17 C.F.R. § 23.504(b).

that a swap dealer obtain and maintain documentation "sufficient to provide a reasonable basis on which to believe that its counterparty meets the statutory conditions required for an exception to from the mandatory clearing requirement," including the end-user exception discussed above.[28]

a. Discussion

Fallback Amendments effected through the multilateral ISDA protocol will amend counterparties' existing swap confirmations to memorialize the agreement of the counterparties to incorporate the updated fallbacks should the relevant IBOR be permanently discontinued.[29] Under Commission regulations, an amendment to a confirmation, including if done by adherence to the ISDA protocol, would trigger the recordkeeping requirements in the Commission's confirmation rule.

Market participants will adhere to the ISDA protocol at different times, and the Fallback Amendments will be incorporated into a confirmation once both counterparties have adhered to the protocol. Although swap dealers will be able to view the date their counterparties' adhered to the protocol, they will not have visibility into the precise time of a counterparty's adherence. As a result, swap dealers will not be able to record the precise time that the confirmation is transmitted to, or received from, its counterparty.

In addition, because a Fallback Amendment effected via a multilateral industry-wide ISDA protocol will constitute an amendment to a confirmation and thus will be included as part of the counterparties' swap trading relationship documentation, interpretive relief or no-action relief confirming that no additional changes are needed to the counterparties' swap trading relationship documentation is necessary to help avoid market confusion and disruption regarding whether the Fallback Amendment is sufficient documentation for swap dealers to document the fallback provisions with respect to Commission swap trading relationship documentation requirements.

Finally, for swaps modified or created due to IBOR Transition Mechanisms, requiring swap dealers to obtain new documentation demonstrating that the end-user counterparty meets the statutory conditions required to qualify for an exception from the mandatory clearing requirement would be burdensome and, in some cases, could result in the swap dealer being required to terminate the swap, absent relief. Therefore, the ARRC requests that swap dealers be permitted to rely on the current representations of their counterparties regarding their eligibility to elect the end-user exception.

b. Request for Relief

The ARRC requests that DSIO provide: (1) no-action relief from the requirements of Commission Regulation 23.501(b) for confirmations amended to

[28] 17 C.F.R. § 23.505.

[29] In addition to amending counterparties' existing swap confirmations, the ISDA protocol will also amend any references to IBORs in the counterparties' swap trading relationship documentation (such as an ISDA master agreement or credit support annex) to incorporate the updated fallbacks.

incorporate the Fallback Amendments effected through the ISDA protocol; (2) interpretive guidance or no-action relief confirming that a Fallback Amendment effected via a multilateral industry-wide ISDA protocol would not require any additional changes to counterparties' swap trading relationship documentation (such as an ISDA master agreement); and (3) no-action relief from the requirement under Commission Regulation 23.505 that swap dealers confirm or re-confirm the eligibility of their counterparties for swaps modified or created by IBOR Transition Mechanisms.

v. Portfolio Reconciliation Requirements

Commission Regulation 23.502(a)(4) requires that each swap dealer immediately resolve any discrepancy in a material term identified as a part of a portfolio reconciliation or otherwise.[30] For purposes of the portfolio reconciliation requirements, material terms include the minimum primary economic terms data included in Appendix 1 to Part 45 of the Commission's regulations, with some exclusions. The material terms of a swap would include the name of any floating rate index for an interest rate swap and any terms of the swap that are matched or affirmed by the counterparties in verifying the swap even if not expressly enumerated in Appendix 1 to Part 45.

a. Discussion

Market participants may effect IBOR Transition Mechanisms for their swaps and swap portfolios differently and at different times. Any potential discrepancies in these terms across counterparties' books as a result of this timing misalignment could be viewed as requiring "immediate" resolution under the portfolio reconciliation rules. The ARRC believes that such an application of the Commission's portfolio reconciliation requirements both would be unnecessary, given the purpose of the IBOR Transition Mechanisms, and could discourage or disrupt efforts by swap dealers and their counterparties to transition voluntarily and early from LIBOR.

b. Request for Relief

The ARRC requests that DSIO provide no-action relief from the requirement in Commission Regulation 23.502(a)(4) to immediately resolve discrepancies between trades for swaps modified or created by IBOR Transition Mechanisms.

IV. Conclusion

The ARRC is strongly committed to maintaining the safety and soundness of the global derivatives markets, and is therefore supportive of the global reform agenda to transition to alternative RFRs. The ARRC recognizes the importance of an inter-agency approach among the relevant U.S. financial regulators to the relief request and the contemporaneous coordination of this effort at the international level to provide a level playing field for all market participants. On behalf of its member firms, the ARRC looks

[30] 17 C.F.R. § 23.502(a)(4).

forward to a continued dialogue with regulatory authorities as additional regulatory clarity and guidance is needed to facilitate this transition.

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