



U.S. COMMODITY FUTURES TRADING COMMISSION

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Re: No-Action Position With Respect to Certain Requirements of Parts 43 and 45 for Registered Entities and Swap Counterparties Reporting Swap Data for USD LIBOR Swaps, Among Others, That Will Transition to Alternative Rates

Dear Mr. Wipf:

This letter responds to a request from the Alternative Reference Rate Committee (“ARRC”) and its member firms to the Commodity Futures Trading Commission’s (“CFTC” or “Commission”) Division of Market Oversight (“DMO”) and Division of Data (“DOD”) that DMO and DOD take a no-action position with respect to certain requirements of the swap data reporting rules set forth in Parts 43 and 45 of the Commission’s regulations.¹

As described in the Request Letter, the London Interbank Offered Rate (“LIBOR”) for the Swiss Franc, Euro, British Pound Sterling, Japanese Yen, and all related tenors—as well as 1-week and 2-month tenors of USD LIBOR—have not been available on a representative basis since December 31, 2021.² The remaining tenors of USD LIBOR—that is, the overnight and 1-, 3-, 6-, and 12-month tenors—as well as the USD LIBOR ICE Swap Rates, and Moscow Prime Offered Rate (“MosPrime”) (together, the “Impacted Rates”³), will cease to be published on a representative basis after June 30, 2023. To assist with the transition to alternative reference rates (“Fallback Rates”), the International Swaps and Derivatives Association, Inc. (“ISDA”) developed “fallback provisions” for transactions that incorporate ISDA definitions.⁴ These fallback provisions were designed to ensure that transactions that reference the Impacted Rates, including as a settlement rate or as an index rate, continue to function following the cessation or non-representativeness of the Impacted Rates, by providing that upon such event, the Impacted Rate

¹ 17 C.F.R. Part 43; 17 C.F.R. Part 45.

² ARRC, Letter Regarding the Reporting of USD LIBOR Swaps that will Transition to Alternative Rates in July 2023, dated June 14, 2023 (“Request Letter”), at 3.

³ As described in the Request Letter, the relevant USD LIBOR rates, USD LIBOR ICE Swap Rates, and MosPrime are listed in Appendix 1 of the Request Letter and referred to as the “Impacted Rates.”

⁴ See, e.g., 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/>.

will be replaced with the relevant Fallback Rate plus, or including, any applicable standard, fixed spread adjustment as published by a specified reference rate provider or otherwise determined through a published formula (together with any certain conforming changes to give effect to the calculation of the relevant Fallback Rate). Accordingly, following the non-representativeness of the Impacted Rates, these fallback provisions operate to modify the floating rate for certain transactions, an event for which regulation 45.4 requires the reporting party to report continuation data.⁵ Additionally, regulation 43.3 requires various entities to report publicly reportable swap transactions, as defined in regulation 43.2, to a registered swap data repository.⁶

At the ARRC's request,⁷ DOD previously took a no-action position with respect to delayed Part 45 reporting of the change in floating rate pursuant to the fallback provisions for uncleared swap transactions referencing the currencies and tenors for which LIBOR ceased to be published or became non-representative after December 31, 2021.⁸ In addition, DOD took a no-action position with respect to the requirement to report such transactions under Part 43 of the Commission's regulations. The ARRC now requests similar relief for transactions referencing an Impacted Rate following the non-representativeness of the Impacted Rates after June 30, 2023. The ARRC states that, among other reasons, due to the volume of swap transactions subject to the fallback provisions and the timing of non-representativeness of the Impacted Rates over a U.S. federal holiday weekend, it may be operationally difficult for some entities to report in the timeframe required by Part 45.

I. Background

In response to significant concerns regarding the reliability and robustness of the interbank offered rates ("IBORs"), the Financial Stability Board ("FSB") called for the identification of alternative benchmarks to the IBORs and transition plans to support implementation of these alternatives.⁹

In order to ensure that transactions that reference LIBOR continue to function following the cessation or non-representativeness of LIBOR, ISDA developed "fallback provisions"

⁵ See 17 C.F.R. § 45.4.

⁶ See 17 C.F.R. § 43.3.

⁷ ARRC, Letter Regarding the Reporting of LIBOR Swaps that will Transition to Risk-Free Rates, dated Dec. 15, 2021.

⁸ CFTC Letter No. 21-30, No-Action Position With Respect to Certain Requirements of Parts 43 and 45 for Registered Entities and Swap Counterparties Reporting Swap Data for LIBOR Swaps That Will Transition to Risk-Free Rates (Dec. 22, 2021), available at <https://www.cftc.gov/csl/21-30/download>.

⁹ See generally FSB statement, "Interest rate benchmark reform – overnight risk-free rates and term rates" at 1, (July 12, 2018), available at <https://www.fsb.org/wp-content/uploads/P120718.pdf> ("Because derivatives represent a particularly large exposure to certain IBORs, and because these prospective 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."); FSB Reforming Major Interest Rate Benchmarks (July 22, 2014), available at https://www.fsb.org/wp-content/uploads/r_140722.pdf; IOSCO Principles for Financial Bench-marks: Final Report (July 2013), available at <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf>; and 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>.

applicable to swap transactions that incorporate the 2006 ISDA Definitions or certain versions of the 2021 Definitions,¹⁰ which the ARRC represents are incorporated into the documentation used for a significant majority of swap transactions.¹¹ The fallbacks are designed to ensure that transactions that reference LIBOR or certain rates the determination of which is dependent on LIBOR (such as the USD LIBOR ICE Swap Rate), including as a settlement rate or as an index rate, will continue to function following the cessation or non-representativeness of the relevant rates by providing that upon such an event, the affected rates will be replaced with the relevant Fallback Rate plus, or including, any applicable standard spread adjustment as published by a specified reference rate provider or otherwise determined through a published formula (together with any certain conforming changes to give effect to the calculation of the relevant Fallback Rate).

These fallbacks are automatically incorporated into transactions that incorporate the 2006 ISDA Definitions or 2021 ISDA Definitions and are entered into after the date on which the relevant supplement to the 2006 ISDA Definitions or the relevant version of the 2021 ISDA Definitions is published, in each case, to address the Impacted Rate and provide for its transition to the relevant Fallback Rate (each, the “Relevant Date”). The Relevant Date with respect to USD LIBOR is January 25, 2021; the Relevant Date with respect to USD LIBOR ICE Swap Rate is November 10, 2021; and the Relevant Date with respect to MosPrime is November 18, 2022.

ISDA has also published the ISDA 2020 IBOR Fallbacks Protocol¹² and the ISDA 2021 IBOR Fallback Protocol,¹³ including the June 2022 Benchmark Module¹⁴ and the November 2022 Benchmark Module¹⁵ (the “ISDA Protocols”), each a multilateral protocol—and in the case of the ISDA 2021 IBOR Fallback Protocol, a modular protocol—to allow market participants to include the fallbacks referred to above in certain transactions that were entered into prior to the Relevant Date with respect to the applicable Impacted Rate(s). The ARRC represents that a significant number of market participants have adhered¹⁶ to the ISDA Protocols or have agreed bilaterally to incorporate substantively identical fallbacks to the ISDA Protocols in their existing transactions.¹⁷ The fallback provisions (including the spread adjustment and conforming changes described above) in the 2006 ISDA Definitions, the 2021 ISDA Definitions, the ISDA Protocols, or the bilaterally incorporated provisions equivalent to the ISDA Protocols are referred to herein as the “ISDA Fallbacks.”

Consistent with prior announcement by the UK Financial Conduct Authority (“FCA”), the regulatory supervisor for the administrator of LIBOR, all tenors of Swiss Franc, Euro, British

¹⁰ See ISDA, 2021 ISDA Interest Rate Derivatives Definitions, available at <https://www.isda.org/2021/10/04/2021-isda-interest-rate-derivatives-definitions/>.

¹¹ Request Letter at 2.

¹² ISDA, ISDA 2020 IBOR Fallbacks Protocol (Oct. 23, 2020), available at <http://assets.isda.org/media/3062e7b4/08268161-pdf/>.

¹³ ISDA, ISDA 2021 Fallbacks Protocol (Dec. 16, 2021), available at https://www.isda.org/a/nhtgE/ISDA-2021-Fallbacks-Protocol_Publication-Version.pdf.

¹⁴ ISDA, June 2022 Benchmark Module (June 15, 2022), available at https://www.isda.org/a/bbWgE/ISDA-2021-Fallbacks-Protocol_June-2022-Benchmark-Module.pdf.

¹⁵ ISDA, November 2022 Benchmark Module (Nov. 21, 2022), available at [ISDA-2021-Fallbacks-Protocol_November-2022-Benchmark-Module.pdf](https://www.isda.org/a/nhtgE/ISDA-2021-Fallbacks-Protocol_November-2022-Benchmark-Module.pdf).

¹⁶ As of May 23, 2023, ISDA records indicate that 15,887 parties have adhered to the ISDA Protocol, <https://www.isda.org/protocol/isda-2020-ibor-fallbacks-protocol/adhering-parties>.

¹⁷ Request Letter at 3.

Pound Sterling, and Japanese Yen LIBOR, as well as 1-week and 2-month tenors of USD LIBOR have not been available on a representative basis since December 31, 2021. Following a request from ARRC on December 15, 2021, DOD issued CFTC No-Action Letter 21-30¹⁸ taking a no-action position in connection with market participants' reporting obligations under Part 43 and Part 45 arising out of changes in the floating rates of uncleared swaps referencing any tenor of CHF, EUR, GBP, and JPY LIBOR pursuant to the ISDA Fallbacks.

The FCA has confirmed that the remaining tenors of USD LIBOR—that is, the overnight and 1-, 3-, 6-, and 12-month tenors—will cease to be published on a representative basis after June 30, 2023. While the FCA has proposed to require the 1-, 3- and 6-month USD LIBOR settings to be published on a synthetic basis until the end of September, 2024, such synthetic settings will be non-representative.¹⁹ On November 14, 2022, ICE Benchmark Administration (“IBA”) announced that calculation and publication of each tenor of the USD LIBOR ICE Swap Rate (which will be the USD LIBOR ICE Swap Rate with an underlying rate of 3-month USD LIBOR) will cease immediately after publication on June 30, 2023.²⁰ Russia’s National Finance Association announced on April 29, 2022 that MosPrime would cease to be published on January 1, 2023,²¹ and subsequently announced on August 3, 2022 that the publication of MosPrime would continue until June 30, 2023.²²

Under the terms of the ISDA Fallbacks, the Impacted Rates will be automatically replaced by the Fallback Rates as follows:

- **USD LIBOR:** Each transaction which references a relevant tenor of USD LIBOR and includes the ISDA Fallbacks will, from, and including, July 1, 2023, no longer use the LIBOR rate and will instead use the applicable Fallback Rate—that is, the term-adjusted Secured Overnight Financing Rate (“SOFR”) plus the spread adjustment fixed on March 5, 2021, as published by Bloomberg. The ISDA Fallbacks include other technical “conforming changes” to enable the Fallback Rate plus spread adjustment to be calculated and the resulting amounts paid.
- **USD LIBOR ICE Swap Rate:** Each transaction which references the USD LIBOR ICE Swap Rate and includes the ISDA Fallbacks will, from, and including, July 1, 2023, no longer use the USD LIBOR ICE Swap Rate and will instead use the applicable Fallback Rate—that is, a specific fallback rate published by IBA plus any applicable spread adjustment. IBA has been publishing such fallback rate—the “USD SOFR Spread-Adjusted ICE Swap Rate”—since October 1, 2021 on an indicative, ‘beta’ basis, and has announced its intention to launch this rate on July 3, 2023, so that it can be used as the

¹⁸ CFTC Letter No. 21-30 (Dec. 22, 2021), available at <https://www.cftc.gov/csl/21-30/download>.

¹⁹ FCA, CP22/21: Consultation on ‘synthetic’ US dollar LIBOR and feedback to CP22/11 (first published, Nov. 23, 2022), available at <https://www.fca.org.uk/publications/consultation-papers/cp22-21-synthetic-us-dollar-libor>.

²⁰ IBA, ICE SWAP Rate based on USD LIBOR – Feedback Statement on Consultation on Potential Cessation (Nov. 2022), available at https://www.ice.com/publicdocs/ISR_USD_LIBOR_cessation_feedback_statement.pdf.

²¹ SRO NFA, SRO NFA’s Expert Council on Benchmarks and Rates decided to accelerate the rejection of the MosPrime Rate benchmark, available at <http://mosprime.com/news/the-rejection-of-the-mosprime>.

²² SRO NFA, The termination date of the MosPrime Rate publication is rescheduled for 30th June 2023, available at <http://mosprime.com/news/mosprime-rate-300622>.

Fallback Rate for the USD LIBOR ICE Swap Rate.²³ If IBA does not publish such Fallback Rate, an alternative Fallback Rate determined through a published and fixed formula will be used to replace the USD LIBOR ICE Swap Rate.²⁴

- **MosPrime:** Each transaction which references a tenor of the MosPrime and includes the ISDA Fallbacks will, from and including, July 1, 2023, no longer use the MosPrime and will instead use the applicable Fallback Rate, i.e., the “Fallback Rate (RUONIA)” as defined in the ISDA definitions, which is compounded Russian Ruble Overnight Index Average rate plus the applicable adjustment spread. Such spread as of December 30, 2022, has been published on both the MosPrime website²⁵ with respect to certain tenors, and on the website of the Central Bank of the Russian Federation²⁶ with respect to all tenors.

The ARRC states that, given that a change in floating rate is a “life cycle event,” the ARRC and its member firms intend to report the change in the floating rate pursuant to the ISDA Fallbacks under Part 45 as continuation data. Therefore, the ARRC now requests a similar no-action position to that taken in CFTC Letter No. 21-30 for swaps referencing an Impacted Rate.

In addition, the ARRC has requested, to the extent applicable, a no-action position with respect to the requirement to report the change in the floating rate pursuant to the ISDA Fallbacks under Part 43 of the Commission’s regulations. Regulation 43.3 requires reporting of publicly reportable swap transactions, which include, “[a]ny executed swap that is an arm’s-length transaction between two parties that results in a corresponding change in the market risk position between the two parties,” and, “[a]ny . . . amendment . . . of a swap that changes the pricing of the swap.”²⁷ A modification to the floating rate and the addition of a spread may cause swap transactions modified after execution to incorporate the ISDA Fallbacks to be Part 43 reportable absent an exemption or relief.

II. The ARRC’s Request for a No-action Position With Respect to Part 45

The ARRC represents that “the timing under the P[art] 45 reporting requirements may present substantial operational challenges for market participants when transitioning from Impacted Rates to the relevant Fallback Rates under the ISDA Fallbacks.”²⁸ Accordingly, the ARRC is requesting a no-action position with respect to certain reporting requirements in Part 45 to permit delayed reporting of the change in the floating rate for swaps referencing the Impacted Rates.

²³ ICE, ICE Benchmark Administration Announces Intention to Launch SOFR Spread-Adjusted ICE Swap Rate as a Benchmark, available at <https://ir.theice.com/press/news-details/2023/ICE-Benchmark-Administration-Announces-Intention-to-Launch-SOFR-Spread-Adjusted-ICE-Swap-Rate-as-a-Benchmark/default.aspx>.

²⁴ See definition of “Calculated USD ISR Fallback Rate” in the 2021 Definitions.

²⁵ See <http://mosprime.com/>

²⁶ See http://www.cbr.ru/hd_base/mosprime-spread/.

²⁷ 17 C.F.R. § 43.2.

²⁸ See Request Letter at 4. Reporting counterparties must report “all data elements necessary to fully report any life cycle event,” defined as “an event that would result in a change to required swap creation data previously reported to a swap data repository in connection with a swap,” including “a change in . . . rates originally reported.” 17 C.F.R. § 45.1. Depending on the entity responsible for reporting, continuation data reporting is generally required within one or two business days following the reportable events. 17 C.F.R. § 45.4.

The ARRC identifies several such operational challenges. The ARRC states that it understands from its member firms that “the volume of swaps” covered by this request letter “is materially greater than the volume of swaps subject to reporting requirements in the prior transitions of other currencies.”²⁹ Additionally, the fact that the change “will occur over a U.S. federal holiday weekend . . . creates a materially greater burden from an operational and technological perspective.”³⁰ The ARRC also represents that its “member firms vary in size and operational and technological capacity” and that the requested no-action position is intended to account for that variation.³¹ The ARRC also represents that member firms are making significant efforts to “prepar[e] systems and operational processes in order to achieve compliance with the applicable P[art] 45 reporting deadline.”³² Despite these efforts, the ARRC and its member firms remain concerned that, given the operational challenges described above, not all market participants will be able to timely report the operation of the ISDA Fallbacks for all affected swap transactions.

Specifically, the ARRC requests a no-action position with respect to regulation 45 timelines for reporting the change in the floating rate pursuant to the ISDA Fallbacks in uncleared swaps referencing any Impacted Rate so long as entities make best efforts to report the change in the floating rate pursuant to the ISDA Fallbacks in accordance with the requirements of Part 45, provided that to the extent it is not possible to comply with such timing requirements the entities will report the required information under Part 45 not later than 5 business days³³ from, but excluding, June 30, 2023.

III. Manner of Reporting the Change to the Floating Rate Under Part 45

The Request Letter includes Appendix 1 that represents how the transition of swaps referencing an Impacted Rate pursuant to the ISDA Fallbacks will be reported.³⁴ For instance, Appendix 1 represents that reporting parties will specifically report the fallback rate and spread adjustment that applies to each swap covered in this letter.

IV. The ARRC’s Request for a No-Action Position With Respect to Part 43

The ARRC explained that the triggering of the ISDA Fallbacks is a publicly known and anticipated event. The ARRC represents that under the ISDA Fallbacks, transactions will automatically “fall back” to a pre-defined, corresponding Fallback Rate.³⁵ The ARRC advised that the ISDA Protocols, including the pre-defined corresponding Fallback Rates, as well as the

²⁹ Request Letter at 6.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³The ARRC acknowledges that certain foreign regulators require analogous regulatory reporting of the change in floating rate pursuant to the ISDA Fallbacks, and specifically, the FCA requires reporting by the next business day after the June 30, 2023 transition. *See* Request Letter at 6. The ARRC represents that the FCA “has indicated willingness to exercise a degree of tolerance for late reporting due to operational issues.” *Id.* at 6 n.29.

Accordingly, the ARRC believes a lengthier CFTC reporting timeline is appropriate.

³⁴ *See* Request Letter, App. 1.

³⁵ Request Letter at 7.

relevant spread adjustments or the formula of any applicable adjustment, and the conforming changes in each case, are public. Additionally, the ARRC stated that, although market participants voluntarily adhere to the ISDA Protocols, the new Fallback Rate and applicable spread adjustment are or will be predetermined, not negotiated, and apply automatically and uniformly to swaps that incorporate the terms of the ISDA Protocols.³⁶ Moreover, the ARRC understands from its member firms that Part 43 reporting of changes that occur pursuant to the ISDA Fallbacks could lead to a significant number of messages being published by swap data repositories that do not serve a price discovery function and that may harm market transparency and data integrity by suggesting more current price forming activity than is actually the case.³⁷

V. No-Action Position

Based on the representations in the Request Letter, Appendix 1 to the Request Letter, and related communications among staff, the ARRC, and the ARRC's counsel, DMO and DOD believe it is warranted to take a no-action position, and are taking such a position with respect to certain reporting obligations under regulation 45.4 and regulation 43.3 of the Commission's regulations. Specifically:

1. DMO and DOD will not recommend the Commission commence an enforcement action against an entity for failure to timely report under regulation 45.4 the change in the floating rate pursuant to the ISDA Fallbacks for an uncleared swap referencing any Impacted Rate, provided the entity uses its best efforts to report the change by the applicable deadline in Part 45 and in no case reports the required information under regulation 45.4 later than 5 business days from, but excluding, June 30, 2023.
2. DMO and DOD will not recommend the Commission commence an enforcement action against an entity for failure to report under regulation 43.3 the change in the floating rate pursuant to the ISDA Fallbacks for an uncleared swap referencing any Impacted Rate.

This letter, and the no-action position taken herein, represent the views of DMO and DOD only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The no-action position taken herein does not bind the Commission or Commission staff outside of DMO or DOD, nor does it excuse persons relying on it from compliance with any other applicable requirements contained in the Commodity Exchange Act or in Commission regulations. Further, this letter and the position taken herein are based upon the facts and circumstances presented to DMO and DOD. Any different, changed, or omitted material facts or circumstances might render the relief provided by this letter void. As with all staff letters, DMO and DOD retain the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of relief provided herein, in its discretion.

If you have any questions concerning this correspondence, please contact Paul Chaffin, Assistant Chief Counsel, Division of Market Oversight, at (202) 418-5185 or pchaffin@cftc.gov, Chase Lindsey, Assistant Chief Counsel, Division of Market Oversight, at (202) 740-4833 or

³⁶ *Id.*

³⁷ *Id.*

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Sincerely,

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