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 CDOR Swaps That Will Transition to an Alternative Rate

To the Canadian Market Infrastructure Committee:

This letter responds to a request from the Canadian Market Infrastructure Committee ("CMIC") and its member firms ("Request Letter")[1] 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.[2]

As noted in the Request Letter, the Canadian Dollar Offered Rate ("CDOR") will cease to be published on a representative basis after June 28, 2024.[3] As described in the prior staff letters issued in connection with the cessation of other interbank offered rates ("IBORs"),[4] 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

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[1] CMIC, Letter Regarding the Reporting of CAD CDOR Swaps that will Transition to a Risk-Free Rate in July 2024 (June 12, 2024).

[2] 17 C.F.R. Part 43 and 17 C.F.R. Part 45, respectively.

[3] Request letter at 3 ("On May 16, 2022, Refinitiv announced that the calculation and publication of all tenors of CDOR will permanently cease immediately following a final publication on Friday, June 28, 2024.").

[4] 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, at 1 (Dec. 22, 2021), *available at* https://www.cftc.gov/csl/21-30/download; CFTC Letter No. 23-09, 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, at 1 (June 29, 2023), *available at* https://www.cftc.gov/csl/23-09/download.

incorporate ISDA definitions.[5] Like transactions that referenced other IBOR rates,[6] these fallback provisions were designed to ensure that transactions that reference CDOR will continue to function following the cessation of CDOR by providing that upon such event, CDOR 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 cessation of CDOR, 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.[7] 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.[8]

After similar requests from the Alternative Reference Rate Committee ("ARRC"),[9] Commission staff issued two no-action letters 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.[10] In addition, staff took no-action positions with respect to the requirement to report such transactions under Part 43 of the Commission's regulations. The CMIC now requests a similar no-action position for transactions referencing CDOR following the cessation of CDOR after June 28, 2024. The CMIC states that, among other reasons, due to the volume of swap transactions subject to the fallback provisions and the timing of the cessation of CDOR over a Canadian federal holiday weekend, it may be operationally difficult for some entities to report in the timeframe required by Part 45. Additionally, to relieve the burdens of potentially inconsistent reporting timeframes between Canadian and U.S. requirements, the CMIC seeks to align the timing requirements for swap reporting under Part 45 of the Commission's regulations with anticipated exemptive relief with respect to the Canadian reporting regulations.

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.[11]

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[5] *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/.
[6] *See* CFTC Letter No. 21-30, at 1-2 (covering transactions referencing Swiss, Franc, British Pound Sterling, and Japanese Yen LIBORs) ; CFTC Letter No. 23-09, at 1-2 (covering transactions referencing USD Libor, the USD LIBOR ICE Swap Rates, and Moscow Prime Offered Rate).
[7] 17 C.F.R. § 45.4.
[8] 17 C.F.R. § 43.3.
[9] ARRC, Letter Regarding the Reporting of LIBOR Swaps that will Transition to Risk-Free Rates (Dec. 15, 2021); ARRC, Letter Regarding the Reporting of USD LIBOR Swaps and Other Swaps that will Transition to Alternative Rates in July 2023 (June 14, 2023).
[10] CFTC Letter No. 21-30 (Dec. 22, 2021); CFTC Letter No. 23-09 (June 29, 2023).
[11] *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

In order to ensure that transactions that reference CDOR continue to function following the cessation of CDOR, ISDA developed "fallback provisions" applicable to swap transactions that incorporate the 2006 ISDA Definitions or certain versions of the 2021 Definitions,[12] which the CMIC represents are incorporated into the documentation used for a significant majority of interest rate and other derivative swap transactions.[13] As stated above, the fallbacks are designed to ensure that transactions that reference CDOR will continue to function following the cessation of CDOR by providing that upon such an event, CDOR 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).

As described in the prior staff letters issued in connection with the cessation of other IBORs,[14] these fallbacks are automatically incorporated into transactions that incorporate the 2006 ISDA Definitions or 2021 ISDA Definitions and are entered into after January 25, 2021 (the "Relevant Date"), in each case, to address CDOR and provide for its transition to the Fallback Rate. ISDA has also published the ISDA 2020 IBOR Fallbacks Protocol[15] and the ISDA 2021 IBOR Fallback Protocol,[16] including the June 2022 Benchmark Module[17] and the November 2022 Benchmark Module[18] (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. The CMIC represents that "[a] significant number of market participants have adhered to the ISDA Protocols or have agreed bilaterally to incorporate substantively identical fallbacks to the ISDA Protocols in their existing transactions."[19] The fallback provisions (including the spread adjustment and conforming changes described above) in the 2006 ISDA Definitions, the 2021

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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.

[12] *See generally* ISDA, 2006 ISDA Definition, *available at* https://www.rbccm.com/assets/rbccm/docs/legal/doddfrank/Documents/ISDALibrary/2006%20ISDA%20Definitions.pdf ; ISDA, 2021 ISDA Interest Rate Derivatives Definitions, *available at* https://www.isda.org/2021/10/04/2021-isda-interest-rate-derivatives-definitions/.

[13] Request Letter at 2.

[14] CFTC Letter No. 21-30 at 1; CFTC Letter No. 23-09 at 1.

[15] ISDA, ISDA 2020 IBOR Fallbacks Protocol (Oct. 23, 2020), *available at* http://assets.isda.org/media/3062e7b4/08268161-pdf/.

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

[17] 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.

[18] ISDA, November 2022 Benchmark Module (Nov. 21, 2022), *available at* ISDA-2021-Fallbacks-Protocol_November-2022-Benchmark-Module.pdf.

[19] Request Letter at 3 (citation omitted).

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 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; and the overnight and 1-, 3-, 6-, and 12-month tenors of U.S. Dollar LIBOR, the USD LIBOR ICE Swap Rates and the Moscow Prime Offered Rate have not been available on a representative basis since June 30, 2023. Following requests from the ARRC on December 15, 2021 and June 14, 2023, staff issued CFTC No-Action Letter 21-30[20] and CFTC No-Action Letter 23-09,[21] respectively, taking no-action positions 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 the rates indicated above pursuant to the ISDA Fallbacks.

On May 16, 2022, Refinitiv Benchmark Services (UK) Limited ("Refinitiv"), the administrator of CDOR, "announced that the calculation and publication of all tenors of CDOR will permanently cease immediately following a final publication on Friday, June 28, 2024"[22] ("Refinitiv Announcement"). Under the terms of the ISDA Fallbacks, CDOR will be automatically replaced by term adjusted CORRA plus the spread adjustment fixed on May 16, 2022, as published by Bloomberg Index Services Limited (or a successor provider). The ISDA Fallbacks include other technical "conforming changes" to enable the Fallback Rate plus spread adjustment to be calculated and the resulting amounts paid.

The CMIC states that, given that a change in floating rate is a "life cycle event," the member firms of CMIC that are reporting counterparties under Part 45 intend to report the change in the floating rate pursuant to the ISDA Fallbacks under Part 45 as continuation data. Therefore, the CMIC now requests a similar no-action position to that taken in CFTC Letter No. 21-30 for swaps referencing the overnight and 1-, 3-, 6-, and 12-month tenors of U.S. Dollar LIBOR, the USD LIBOR ICE Swap Rates and the Moscow Prime Offered Rate.

In addition, the CMIC 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."[23] 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.

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[20] CFTC Letter No. 21-30 (Dec. 22, 2021), *available at* https://www.cftc.gov/csl/21-30/download.

[21] CFTC Letter No. 23-09 (June 29, 2023), *available at* https://www.cftc.gov/csl/23-09/download.

[22] Request Letter at 3; *See* Refinitiv, Announcement of Cessation of CDOR in June 2024 (May 16, 2022), *available at* https://www.lseg.com/content/dam/ftse-russell/en_us/documents/announcement/cdor-cessation-notice.pdf.

[23] 17 C.F.R. § 43.2.

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

The CMIC represents that "the timing under the P[art] 45 reporting requirements may present substantial operational challenges for market participants when transitioning from CDOR to the relevant Fallback Rate under the ISDA Fallbacks."[24] Accordingly, the CMIC 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 CDOR.

The CMIC identifies several such operational challenges. The CMIC states that the Canadian Securities Administrators (CSA) have implemented trade reporting rules in Canada that are analogous to Part 45 reporting and that "[c]ertain member firms . . . have applied to the CSA for exemptive relief in all provinces and territories of Canada, except Alberta and Ontario, of up to five business days after July 2, 2024, due to the large volume of CDOR derivatives that are expected to transition to CORRA on the same day."[25] CMIC states that "it would create a significant burden if the timing of the reporting requirements under P[art] 45 were to differ from the relief that is being sought under the Canadian [Trade Reporting] Rules."[26] Additionally, CMIC states that the fact that the change "will occur over a Canadian federal holiday weekend" might exacerbate the reporting difficulties, such that "it would be prudent from an operational and technological perspective to align the timing of the reporting under P[art] 45 with anticipated exemptive relief with respect to the Canadian [Trade Reporting] Rules."[27]

Specifically, the CMIC 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 CDOR . . . so long as market participants make best efforts to report the change in the floating rate pursuant to the ISDA Fallbacks in accordance with the requirements of P[art] 45, provided that, to the extent it is not possible to comply with such timing requirements, affected market participants will report the required information under P[art] 45 not later than five business days from, but excluding, July 2, 2024."[28]

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

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[24] 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.

[25] Request Letter at 5. On March 7, 2024, staff of the Alberta Securities Commission and the Ontario Securities Commission issued Multilateral CSA Staff Notice 96-305 providing guidance that there is no public interest in recommending or pursuing an enforcement action against counterparties in respect of late reporting of life-cycle event data with respect to transition to the Fallback Rate provided that the report is made on or before the end of the fifth business day after the day on which the CDOR transition life-cycle event occurs. Multilateral CSA Staff Notice 96-305, Derivatives Data Reporting Guidance for CDOR Transition (Mar. 7, 2024), *available at https://www.osc.ca/sites/default/files/2024-03/sn_20240307_96-305_multilateral-staff-notice-derivatives-data-reporting-cdor.pdf.*

[26] Request Letter at 5.

[27] *Id.*

[28] Request Letter at 6.

The Request Letter includes Appendix 1 that represents how the transition of swaps referencing CDOR pursuant to the ISDA Fallbacks will be reported.[29] Accordingly, reporting parties should specifically report the applicable spread adjustment and the applicable UPI reflecting the new underlying reference rate that applies to each swap covered in this letter.

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

The CMIC explained that the triggering of the ISDA Fallbacks is a publicly known and anticipated event. The CMIC represents that under the ISDA Fallbacks, transactions will automatically "fallback to a pre-defined, corresponding Fallback Rate."[30] The CMIC represents that the ISDA Protocols, including the pre-defined corresponding Fallback Rates, as well as the relevant spread adjustments or the formula of any applicable adjustment, and the conforming changes in each case, are public. Additionally, the CMIC 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.[31] Moreover, the CMIC 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.[32]

V. No-Action Position

Based on the representations in the Request Letter, Appendix 1 to the Request Letter, and related communications among staff, the CMIC, and the CMIC'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 CDOR, 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, July 2, 2024.

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 CDOR.

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[29] Request Letter, App. 1.
[30] Request Letter at 5.
[31] *Id.*
[32] *Id.*

Division staff believes this no-action position would provide a reasonable period of time for entities to report under regulation 45.4 the change in the floating rate for uncleared swaps transitioning from CDOR to a risk-free reference rate pursuant to the ISDA Fallbacks. Division staff understands that the CDOR transition presents operational challenges that may make compliance with the Part 45 reporting timeline challenging for some reporting counterparties. Division staff have provided similar no-action positions in connection with the cessation of other IBORs[33] and see no reason to treat the CDOR transition differently.

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 no-action position 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 the no-action position 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 clindsey@cftc.gov, or Owen Kopon, Associate Chief Counsel, Division of Market Oversight, at (202) 418-5360 or okopon@cftc.gov.

Sincerely,

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[33] CFTC Letter No. 21-30 (Dec. 22, 2021); CFTC Letter No. 23-09 (June 29, 2023).