U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Data

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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 LIBOR Swaps That Will Transition to Risk-Free 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 Data ("DOD") that 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, 2]

As described in the Request Letter, after December 31, 2021, the London Interbank Offered Rate ("LIBOR") for certain currencies and tenors will cease to be published or become non-representative.[3] To assist with the transition to alternative reference rates, the International Swaps and Derivatives Association, Inc. ("ISDA") developed "fallback provisions" for transactions that incorporate ISDA definitions.[4] These fallback provisions are designed to ensure that transactions that reference LIBOR will continue to function following the cessation or non-representativeness of LIBOR by providing that, upon such event, LIBOR will be replaced by the relevant risk-free reference rate ("RFR") plus a relevant spread adjustment. Accordingly, following the cessation or non-representativeness of LIBOR for certain currencies and tenors after December 31, 2021, these fallback provisions will 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]

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[1] 17 C.F.R. Part 43; 17 C.F.R. Part 45.
[2] ARRC, Letter Regarding the Reporting of LIBOR Swaps that will Transition to Risk-Free Rates, dated Dec. 15, 2021 ("Request Letter"), at 1.
[3] *See id*.
[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/.
[5] *See* 17 C.F.R. § 45.4.
[6] *See* 17 C.F.R. § 43.3.

The ARRC states that, among other reasons, due to the unique nature of these fallback provisions, the volume of swap transactions subject to the fallback provisions, and the end-of-year timing of the cessation and non-representativeness of certain LIBORs, it may be operationally difficult for some entities to report in the timeframe required by Part 45. Therefore, the ARRC is requesting 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 Swiss Franc, Euro, British Pound Sterling, and Japanese Yen LIBORs in the event, and to the extent, that timely reporting thereof is not operationally feasible. In addition, the ARRC is requesting a no-action position with respect to the requirement to report such transactions under Part 43 of the Commission's 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.[7]

In order to ensure that transactions that reference LIBOR will continue to function following the cessation or non-representativeness of LIBOR, ISDA has developed "fallback provisions" applicable to swap transactions that incorporate the 2006 ISDA Definitions, which the ARRC represents are incorporated into the documentation used for a significant majority of swap transactions.[8] Similar provisions exist in the 2021 ISDA Definitions published in June 2021, which went live on October 4, 2021.[9] These fallback provisions provide that upon the cessation or non-representativeness of LIBOR, LIBOR will be replaced with the relevant RFR plus the relevant spread adjustment published by Bloomberg (together with any certain conforming changes to give effect to the calculation of the relevant RFR).

These fallback provisions are automatically incorporated into transactions that incorporate the 2006 ISDA Definitions or 2021 ISDA Definitions and are entered into after January 25, 2021. ISDA has also published the ISDA 2020 IBOR Fallbacks Protocol (the "ISDA Protocol"[10]), a multilateral protocol to allow market participants to include the fallback

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[7] *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.

[8] Request Letter, at 2.

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

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

provisions referred to above in certain transactions that were entered into prior to January 25, 2021. The ARRC represents that a significant number of market participants have adhered[11] to the ISDA Protocol or have agreed bilaterally to incorporate substantively identical fallbacks to the ISDA Protocol in their existing transactions.[12] The fallback provisions (including the spread adjustment and conforming changes described above) in the 2006 ISDA Definitions, the 2021 ISDA Definitions, the ISDA Protocol, or the bilaterally incorporated provisions equivalent to the ISDA Protocol are referred to herein as the "LIBOR Fallbacks."

On March 5, 2021, the UK Financial Conduct Authority ("FCA"), the regulatory supervisor for the administrator of LIBOR, announced (the "FCA Announcement"[13]) that publication of the LIBOR settings below will cease following the final publication date, as follows:

Currency	**Tenors**	**Final Publication Date**
EUR, CHF	All tenors	December 31, 2021
GBP	Overnight, 1 week, 2 month and 12 month	December 31, 2021
JPY	Spot Next, 1 week, 2 month and 12 month	December 31, 2021
USD	1 week, 2 month	December 31, 2021
USD	Overnight and 12 month	June 30, 2023

The FCA Announcement also stated that the following LIBOR settings will become non-representative immediately following the "Final Date of Representativeness" as follows:

Currency	**Tenors**	**Final Date of Representativeness**
GBP	1 month, 3 month and 6 month	December 31, 2021
JPY	1 month, 3 month and 6 month	December 31, 2021
USD	1 month, 3 month and 6 month	June 30, 2023

The ARRC has requested a no-action position in relation to all the above tenors of Swiss Franc, Euro, British Pound Sterling, and Japanese Yen LIBORs (each a "Relevant LIBOR").[14] When each of the Relevant LIBORs ceases to be published or becomes non-representative beginning on January 1, 2022, under the terms of the LIBOR Fallbacks, each transaction subject to the LIBOR Fallbacks will, from, and including, January 1, 2022, "fallback" from a LIBOR to

[11] As of October 8, 2021, ISDA records indicate 14,632 parties have adhered to the ISDA Protocol, https://www.isda.org/protocol/isda-2020-ibor-fallbacks-protocol/adhering-parties.
[12] Request Letter, at 2.
[13] FCA, FCA Announcement on Future Cessation and Loss of Representativeness of the LIBOR Benchmarks (Mar. 5, 2021), *available at* https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf.
[14] Request Letter, at 3.

the relevant RFR plus the spread adjustment fixed on March 5, 2021, as published by Bloomberg.[15]

The ARRC states that, given that a change in floating rate is a change in the primary economic terms of a swap occurring during the existence of the swap, the ARRC and its member firms intend to report the change in the floating rate pursuant to the LIBOR Fallbacks under Part 45 as continuation data.

In addition, the ARRC has requested, to the extent applicable, a no-action position the requirement to report the change in the floating rate pursuant to the LIBOR 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."[16] A modification to the floating rate and the addition of a spread may cause swap transactions modified after execution to incorporate the LIBOR 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 "understands from its member firms that reporting the change to the floating rate from LIBOR to the relevant RFR plus spread within the timeframe required under P[art] 45 will pose significant operational challenges for its members."[17] 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 Relevant LIBORs pursuant to the LIBOR Fallbacks.[18]

The ARRC identifies several such operational challenges. The ARRC states that it understands from its member firms that "volume of the contracts impacted" by the change in floating rate under the LIBOR Fallbacks will pose significant operational challenges.[19]

[15] *See, e.g.*, ISDA, ISDA 2020 IBOR Fallbacks Protocol, at 38 (October 23, 2020), *available at* http://assets.isda.org/media/3062e7b4/08268161-pdf/ (addressing determination of the "Applicable Fallback Rate" by reference to the Bloomberg IBOR Fallback Rate Adjustments Rulebook); *see also* Bloomberg, IBOR Fallbacks Technical Notice – Spread Fixing Event for LIBOR (Mar. 5, 2021), *available at* https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation_Announcement_20210305.pdf (setting out the relevant spread adjustments).

[16] 17 C.F.R. § 43.2.

[17] *See* Request Letter, at 6. Reporting counterparties must report swap continuation data "in a manner sufficient to ensure that all data in the swap data repository concerning the swap remains current and accurate, and includes all changes to the primary economic terms of the swap occurring during the existence of the swap." *See* 17 C.F.R § 45.4(a). The primary economic terms of a swap include, among other terms, the "Floating rate index name/rate period," "*E.g.*, USD-LIBOR-BBA." *See* 17 C.F.R. Part 45, App'x 1.

[18] Request Letter, at 6. The ARRC is not requesting relief in relation to Overnight, 1 month, 3 month, 6 month, or 12 month U.S. Dollar LIBOR, on the basis that it expects those tenors of U.S. Dollar LIBOR to continue to be published and representative up to, and including, June 30, 2023. *Id.* at 3. The ARRC is also not requesting relief in respect to 1 week or 2 month U.S. Dollar LIBOR on the basis that the cessation of these tenors of U.S. Dollar LIBOR at the end of 2021 does not result in a transition to an RFR or change in the floating rate under the LIBOR Fallbacks and instead is generally addressed by interpolating between remaining tenors of U.S. Dollar LIBOR. *Id.*

[19] *Id.* at 6.

Additionally, the fact that the change "will occur simultaneously across all impacted contracts on a single date" and will occur "during calendar year-end code freezes" may present operational challenges.[20] 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.[21] 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."[22] 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 LIBOR Fallbacks for all affected swap transactions.

The ARRC states that a time-limited delay of Part 45 reporting requirements would assist in managing the reporting alongside [those] constraints.[23] Specifically, the ARRC requests a no-action position with respect to regulation 45.4 timelines for reporting the change in the floating rate pursuant to the LIBOR Fallbacks in uncleared swaps referencing non-USD LIBOR so long as entities make best efforts to report the change in the floating rate pursuant to the LIBOR Fallbacks in accordance with the timing 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 days,[24] as defined in regulation 43.2(a), from, but excluding, December 31, 2021.[25]

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

The Request Letter states that "industry participants intend to report the change to the floating rate for fallback amendments when triggered and applied by adding a suffix of 'fallback' to the four-letter [ISO] code[26] that described the floating rate prior to the application of the fallback.[27] The ARRC states that member firms intend to take this approach because it will "clearly identify" swaps that have transitioned to new RFRs under the Fallbacks Protocol, because: it is "technologically feasible," it aligns with FCA requirements,[28] and SDRs "have the

[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] The ARRC acknowledges that certain foreign regulators require analogous regulatory reporting of the change in floating rate pursuant to the LIBOR Fallbacks within a shorter time span—for example, the FCA requires reporting by the next business day after the LIBOR Fallbacks. The ARRC represents that, based on input from its members, it anticipates that the volume of CFTC-reportable transactions subject to the LIBOR Fallbacks will be materially greater than the volume of swap transactions reportable to foreign regulators, which will impose a materially greater burden on reporting parties from an operational and technological perspective. Accordingly, the ARRC believes a lengthier CFTC reporting timeline is appropriate. *See* Request Letter, at 5-6.
[25] The ARRC does not request relief in connection with the swap data reporting rule amendments for which the compliance date is May 25, 2022, *see* CFTC, Final Rule, Swap Data Recordkeeping and Reporting Requirements, 85 Fed. Reg. 75503 (Nov. 25, 2020), as the ARRC understands that its member firms will continue to comply with the Part 45 reporting requirements that are currently in effect on January 1, 2022, the date on which the Relevant LIBORs will cease to be published or become non-representative. *See* Request Letter, at 4.
[26] "BenchmarkCurveName2Code," ISO 20022 Universal Industry Message Scheme, https://www.iso20022.org/standardsrepository/type/BenchmarkCurveName2Code.
[27] Request Letter, at 7.
[28] *See* FCA, UK Emir News (July 2021), https://www.fca.org.uk/firms/uk-emir/news.

capability to support this solution."[29] The ARRC has represented to DOD staff that, to facilitate Commission interpretation of data reported in this manner, it will provide DOD with a document mapping the values reported in the relevant fields to the corresponding new RFRs to which swaps will transition.

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

The ARRC explained that the triggering of the LIBOR Fallbacks is a publicly known and anticipated event. The ARRC represents that under the LIBOR Fallbacks, transactions will automatically "fall back" to a pre-defined corresponding RFR in relation to the relevant currency, plus a fixed spread adjustment published by Bloomberg.[30] The ARRC advised that the ISDA Protocol, including the pre-defined corresponding RFRs for the Relevant LIBORs, as well as the relevant spread adjustments published by Bloomberg, are public.[31] Additionally, the ARCC stated that, although market participants voluntarily adhere to the ISDA Protocol, the new RFR and spread adjustment are predetermined, not negotiated, and apply automatically and uniformly to swaps that incorporate the terms of the ISDA Protocol.[32] Moreover, the ARRC understands from its member firms that Part 43 reporting of changes that occur pursuant to the LIBOR 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.[33]

V. No-Action Position

Based on the representations in the Request Letter and related communications among staff, the ARRC, and the ARCC's counsel, DOD believes it is warranted to take a no-action position, and is 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. 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 LIBOR Fallbacks for an uncleared swap referencing any tenor of Swiss Franc, Euro, British Pound Sterling, and Japanese Yen LIBOR, 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 December 31, 2021.

2. 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 for a swap modified after execution to incorporate the LIBOR Fallbacks to transition from

[29] Request Letter, at 7.
[30] *Id.* at 6.
[31] *See* ISDA 2020 IBOR Fallbacks Protocol (Oct. 23, 2020), *available at* http://assets.isda.org/media/3062e7b4/08268161-pdf/; Bloomberg, IBOR Fallbacks Technical Notice – Spread Fixing Event for LIBOR (Mar. 5, 2021), *available at* https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation_Announcement_20210305.pdf.
[32] Request Letter, at 6.
[33] *See id.*

referencing any tenor of Swiss Franc, Euro, British Pound Sterling, and Japanese Yen LIBOR to referencing a pre-defined corresponding RFR plus the relevant spread adjustment as published by Bloomberg.

This letter, and the no-action position taken herein, represent the views of 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 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 positions taken herein are based upon the facts and circumstances presented to DOD. Any different, changed, or omitted material facts or circumstances might render the relief provided by this letter void. As with all staff letters, DOD retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of relief provided herein, in its discretion.

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Sincerely,

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