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WHITE PAPER

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ISDA's IBOR Supplement and Protocol: Background, Operation, Prognosis

The International Swaps and Derivatives Association, Inc. ("ISDA") has finally published its long-awaited "Amendments to the 2006 ISDA Definitions to include new IBOR fallbacks" ("IBOR Supplement") and accompanying "protocol" ("Protocol"). The Protocol will be open for adherence on October 23, 2020, and the IBOR Supplement will be "effective" January 25, 2021.

Briefly stated, the IBOR Supplement introduces a set of "hard-wired" fallbacks that would become operational upon the demise of an IBOR such as, most pertinently, the London Interbank Offered Rate ("LIBOR"). These fallbacks consist, first, of linear interpolation between surviving IBOR tenors (if any) and, second, of the currency-specific "risk-free" rate, compounded in arrears during a given interest period with a two-day "look-back" plus a fixed tenor-specific "credit spread adjustment."

Protocol adherence permits a party to amend all (but not less than all) of its "legacy" IBOR-denominated contracts (which include, uniquely, transactions such as security finance transactions that do not typically use ISDA documentation) simultaneously with all other adherents. ISDA has also published a series of "bilateral" templates that cater to market participants who wish to conform the Protocol amendments with only one or a limited set of counterparties, who wish to narrow or expand the universe of covered documents, or who wish to tailor the Protocol amendments in various other ways.

Publication of the Protocol represents an immediate "go/no-go" decision point for the over-the-counter derivatives market, and the IBOR Supplement promises to alter the landscape for that market profoundly going forward.

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The International Swaps and Derivatives Association, Inc. ("ISDA") has finally published its long-awaited "Amendments to the 2006 ISDA Definitions to include new IBOR fallbacks" under the unassuming name "Supplement number 70 to the 2006 ISDA Definitions" ("IBOR Supplement"),[1] accompanying "protocol" ("Protocol"),[2] and a series of accompanying bilateral template agreements and language ("Bilateral Templates").[3] The Protocol will be open for adherence on October 23, 2020, and the IBOR Supplement is "effective" January 25, 2021, which means that all derivatives transacted on or after that date incorporating the 2006 ISDA Definitions will automatically incorporate the IBOR Supplement.

Briefly stated, the IBOR Supplement updates the 2006 ISDA Definitions to amend existing "Floating Rate Option" definitions that reference certain "inter-bank offered rates" ("IBORs") to include workable "fallback" provisions to facilitate a transition to "(nearly) risk-free rates" ("RFRs")[4] in the event one or more IBORs, as a result of regulatory pressure or otherwise, cease to exist. Most pertinently, the London Interbank Offered Rate(s) ("LIBOR") is widely expected to cease to exist in whole or in part in early 2022.[5] The 2006 ISDA Definitions in their current form are ill-equipped to handle such a cessation.

Publication of the Protocol represents an immediate "go/no-go" decision point for the over-the-counter derivatives market. The Protocol provides market participants a "one-stop" opportunity to amend all (but not less than all, absent bilaterally agreed exclusions) of their existing derivatives with other "Adhering Parties" in accordance with the "IBOR fallbacks" as described in the IBOR Supplement.

The IBOR Supplement and Protocol accordingly provide critically important tools in the transition from IBORs to RFRs for interest rate and other over-the-counter derivatives across a range of major currencies. Over-the-counter derivatives, by some estimates, represent approximately 75% of IBOR exposure globally.[6] Jones Day has been monitoring, advising clients, and writing about the IBOR transition in the derivatives and other markets since the outset.[7]

RFR TRANSITION—GENERAL BACKGROUND

IBORs, in very broad strokes, represent (or are meant to represent) the cost of funding in the inter-bank market over a variety of currencies and tenors. LIBOR is perhaps the most prominent IBOR and is actually a series of rates that encompasses five currencies (the United States dollar ("USD"), British pound sterling ("GBP"), euro ("EUR"), Japanese yen ("JPY"), and Swiss franc ("CHF")) and seven maturities ranging from overnight to 12 months.[8] IBORs are compiled from individual bank submissions that, because of a decline in actual reportable inter-bank deposit activity, are increasingly based on "expert judgment."[9] IBORs accordingly: (i) have a term structure; (ii) implicitly embed bank credit risk; and (iii) are not necessarily based on "actual transactions."

RFRs, on the other hand, exhibit the polar opposite features. Although the details for specific RFRs differ, they universally reflect actual market activity and are calculated and reported on a next-day basis. They are also strictly overnight transactions that have no term structure and, because they are overnight (and because some of them, like the Secured Financing Overnight Rate ("SOFR")[10] for USD, are collateralized), they are "(nearly) risk-free."

These fundamental differences make IBOR cessation and the transition to RFRs extremely challenging (economically, legally, and operationally) for both future transactions and "legacy" transactions. "Synthetic term" structures must be developed to replicate the term structures in IBORs,[11] and the bank credit risk inherent in IBORs must be calculated and added to RFRs to minimize the "value transfer" that would otherwise occur if even "synthetic term" RFRs were simply "substituted" for IBORs on a one-to-one basis. This is, of course, because "(nearly) risk-free" rates would be expected, in any given market environment, to be lower than their IBOR counterparts. On a more technical level, the operational challenges are still emerging.

The IBOR Supplement and Protocol mirror and address the IBOR transition challenges for future and "legacy" transactions. The IBOR Supplement introduces "hard-wired" fallbacks to RFRs in the event various "Relevant IBORs" permanently cease to exist[12] (or, in the case of LIBOR, are declared by the FCA no longer to be "representative of the underlying market and economic reality that [LIBOR] is intended to represent"). The Relevant IBORs include LIBOR for all five currencies; the Euro Interbank Offered Rate ("Euribor");[13] the Tokyo Interbank Offered Rate ("TIBOR," which comes in on-shore (Japanese yen) and off-shore (euroyen) varieties); the Australian Dollar Bank Bill Swap Rate ("BBSW"); the Canadian Dollar Offered

Rate ("CDOR"); the Hong Kong Interbank Offered Rate ("HIBOR"), the Singapore Dollar Swap Offer Rate ("SOR"), and the Thai Baht Interest Rate Fixing ("THB-SOR"). Meanwhile, the Protocol offers a means for willing market participants to amend their "legacy" derivatives transactions and governing agreements with all other Adhering Parties simultaneously so as to align them with the IBOR fallbacks in the IBOR Supplement.

THE IBOR SUPPLEMENT

The IBOR Supplement operates formally as a "supplement" to the 2006 ISDA Definitions, which means that all transactions that incorporate the 2006 ISDA Definitions and have a "Trade Date" on or after January 25, 2021, will incorporate the fallbacks specified in the IBOR Supplement.

The fallbacks for all Relevant IBORs (other than SOR and THB-SOR, which utilize USD LIBOR as an input in their calculation) follow the same generic pattern and are the product of numerous market consultations by ISDA.[14] This *White Paper* concentrates on the specific fallbacks for USD, GBP, and EUR LIBOR and Euribor, although Euribor and most other Relevant IBORs have been or are being "reformed" and are expected to survive, at least in the near- to medium-term future. The IBOR Supplement recognizes this in New Section 7.8 of the 2006 ISDA Definitions,[15] which acknowledges that contractual references to specific IBORs shall remain intact, notwithstanding that the "definition, methodology, formula or other means of calculating [such IBORs] . . . is modified." This acknowledgement, however, is subject to the fallbacks otherwise specifically provided in the IBOR Supplement so as to avoid, for example, any potential ambiguity arising from the UK Parliament's proposed legislation[16] to enable the FCA to direct IBA to create and publish an as-yet indeterminate form of "synthetic LIBOR."

First Fallback: Interpolation for Discontinued Rate Maturities

It is entirely possible for certain LIBOR tenors, rather than LIBOR for specific currencies altogether, to be discontinued before others. Indeed, the FCA has increasingly suggested, in its July 2020 press release and FAQs relative to the above-mentioned proposed legislation in the United Kingdom and otherwise, that it may declare certain LIBOR currency-tenor pairs "non-representative" (*see* "The IBOR Supplement: Pre-Cessation Trigger" below) before others.

The possibly counterintuitive result under the IBOR Supplement would be to interpolate between "surviving" tenors,[17] rather than transition immediately to an RFR for that tenor. The IBOR Supplement does this by incorporating the substance of the ISDA 2013 Discontinued Rates Maturities Protocol ("DRM Protocol"),[18] which was published following a "purge" of IBOR tenors in the wake of the LIBOR-fixing scandal. New Sections 8.5 and 8.6 create a set of "interpolation" rules for "Discontinued Maturity Rates," which are defined in New Section 8.6(i) to mean rate maturities that have been *permanently discontinued* (or in the case of LIBOR, have become "Non-Representative")[19] and that are "sandwiched" by a ("not Non-Representative") "Nearest Long Rate" and "Nearest Short Rate." The "Interpolation Method" under New Section 8.6(n) is to be "linear" unless the parties have otherwise agreed to a different methodology. An Index Cessation Event is deemed to have occurred when there is no longer a Nearest Long Rate or Nearest Short Rate. New Section 8.5(b).

New Section 8.5 will prevail over any inconsistent fallback provisions otherwise set out in the 2006 ISDA Definitions (including pursuant to the IBOR Supplement itself) or under the DRM Protocol. New Section 8.5(a) provides a limited "opt-out" ability, but these "Overriding Fallback Provisions" (as defined in New Section 8.6(s)) must be either "expressly set out in the Confirmation" or in a post-trade date protocol (other than the DRM Protocol) or stand-alone amendment. Moreover, in no event shall a "Reference Bank Fallback Provision" (i.e., a rate to be determined by polling Reference Banks as often appears in the 2006 ISDA Definitions) constitute an Overriding Fallback Provision for purposes of Section 8.5, which means that the interpolation provisions will prevail over a Reference Bank Fallback Provision.

Index Cessation Event

New Section 7.3(i) under the IBOR Supplement articulates the critically important concept of "permanent cessation" of a Relevant IBOR in its entirety.[20]

ISDA had recognized early in the process the necessity for Index Cessation Events (or "triggers") to be as clear, simple, and unambiguous as possible and, with the exception of the recently added "non-representativeness" or "pre-cessation" trigger discussed below, the definition has been relatively stable since the middle of 2018 and is common to all Relevant IBORs.[21] A corollary of the foregoing is that any non-availability of a Relevant IBOR on a given day in the *absence of the occurrence of an Index Cessation Event* will result in the use of a temporary cessation fallback.

The original Index Cessation Events are a function of an identifiable *announcement*, either: (i) by the administrator of the Relevant IBOR (IBA, in the case of LIBOR); (ii) by the regulatory supervisor (the FCA, in the case of LIBOR) or an insolvency official, resolution authority, or insolvency court for the administrator of the Relevant IBOR; or (iii) by the central bank for the currency of the Relevant IBOR that the administrator will cease (or has ceased) to "provide" the Relevant IBOR *permanently or indefinitely* (if there is no successor administrator, as of the time of the announcement, that will continue to provide the Relevant IBOR). New Section 7.3(i)(i) and (ii).

Pre-Cessation Trigger

ISDA somewhat belatedly determined to include a "non-representativeness" or "pre-cessation" trigger, which will apply solely to LIBOR. [22] This Index Cessation Event consists of an announcement by the FCA that LIBOR for one or more currencies has become or will become, as of a specified date in the future, "Non-Representative." New Section 7.3(i)(iii) and (q).[23] The requirement for regulators to assess the "representativeness" of benchmarks periodically has been law in the European Union since 2016,[24] and "non-representativeness" triggers had featured prominently in the work of the ARRC and other "cash" product working groups since at least 2018.[25] Nevertheless, the adoption of a "non-representativeness" trigger proved sufficiently controversial that ISDA had to "consult" the market on two occasions in order to achieve a fragile consensus on inclusion of the trigger.[26] Some of the reasons for this controversy and its lingering impacts are explored in slightly greater detail in the "spread adjustment" discussion below in "The IBOR Supplement: Permanent Cessation Fallbacks: Spread Adjustment."

Permanent Cessation Fallbacks

The "Index Cessation Effective Date" is the date when the IBOR fallback comes into force and is the date, whether announced in advance or not, on which the Relevant IBOR is no longer provided or as of when the applicable LIBOR rates become Non-Representative. New Section 7.3(j).

The results of the Benchmark Fallbacks Consultations were highly uniform across all Relevant IBORs[27] and may be summarized briefly (and opaquely, for the moment) as: the RFR for each Relevant IBOR currency (i) compounded in arrears, (ii) with a two-business-day "backward shift," and (iii) a five-year median "spread adjustment" (collectively, "Adjusted RFRs").[28]

Before explaining these components of Adjusted RFRs, a few prefatory comments are in order. First, because different Relevant IBORs have different administrators, regulators, and central banks, there can be no certainty that Index Cessation Events across Relevant IBORs, or even across currency-tenor pairs within Relevant IBORs, will occur simultaneously. On the other hand, most Relevant IBORs other than LIBOR are expected to survive in the near- to medium-term, and LIBOR (for all currencies) is presently anticipated to cease to exist at year-end 2021. Second, ISDA has engaged Bloomberg Index Services Limited ("BISL"), which commenced calculation and publication of definitive Adjusted RFRs on July 21, 2020.[29]

Compounding in Arrears

An Adjusted RFR predictably begins with an RFR. An RFR is an overnight repo or lending rate and is reported, typically by the relevant central bank, on the next business day to reflect the prior day's activity. A "synthetic term" structure is created by taking the average of the RFR compounded daily *in arrears*[30] throughout the applicable calculation period such that, absent some form of adjustment or other "mitigation," the result will not be known until the commencement of the next calculation period and payment is due.[31] The Federal Reserve Bank of New York is also publishing compounded SOFR figures, which are usable both in arrears and in advance, for 30-, 90-, and 180-day tenors and an "index" reflecting daily compounding, starting at "1.00000000," since SOFR's initiation on April 2, 2018.[32] These tenors differ from the Adjusted RFRs published by BISL in that the BISL tenors replicate the Relevant IBOR tenors (and so, instead of 30-, 90-, and 180-day tenors, BISL publishes one-month, three-month, and six-month tenors).

Two-Day "Backward-Shift"

The Adjusted RFRs utilize a two-business-day "backward-shift"[33] to alleviate the operational issues that arise from a given calculation period's interest payment not being determinable until the related payment date. It operates by shifting the observation period "backward" two business days (defined as "Reference Rate Business Days" in the Rule Book) such that each calculation period commences on the second business day preceding the relevant calculation period and terminates on the second business day prior to the date payments are due. The two-day backward-shift methodology benefits from the fact that it has long been the norm in the "overnight index swap" ("OIS") market, but some market participants have expressed concern that the methodology, particularly of a two-day duration, is singularly unsuited for the cash markets.[34]

Spread Adjustment

The final component of an Adjusted RFR is the "spread adjustment," which is necessary to "equalize" RFRs with "credit sensitive" IBORs and to minimize "value transfer" upon transition to Adjusted RFRs. The Adjusted RFRs will all utilize the five-year historical median IBOR/compounded RFR spread for each tenor,[35] measured backwards from the date of the relevant Index Cessation Event announcement.[36] The spread adjustment for each RFR tenor would be set "permanently" in connection with an Index Cessation Event for the related IBOR and would cease to exhibit the IBOR's characteristic "credit dynamism."[37]

Notably, the IBOR Supplement provides that the spread adjustments calculated specifically for Adjusted RFR tenors will be used for their respective fallbacks as well in the event of one or more Fallback Index Cessation Events.

Fallback Index Cessation Events

The financial markets do not need another index cessation for which they are unprepared, and although Adjusted RFRs are founded upon RFRs ("Underlying Rates") administered by reputable central banks, ISDA, the ARRC, and other working groups have given considerable thought to the "what if" scenario in which an Adjusted RFR or any other prescribed subsequent fallback (in each case, "Applicable Fallback Rate") ceases to exist ("Fallback Index Cessation Event").

For all Relevant IBORs under the IBOR Supplement, a Fallback Index Cessation Event consists of an *announcement* by: (i) the administrator or provider of the Applicable Fallback Rate (in the first instance, BISL) that it has ceased or will cease to publish an Applicable Fallback Rate with no successor provider having been appointed; or (ii) the central bank or other applicable regulator, or insolvency official or court, for the administrator of the Underlying Rate (in the case of an Adjusted RFR[38]) or the prevailing other Applicable Fallback Rate that publication of the Underlying Rate or Applicable Fallback Rate has ceased or will cease *permanently or indefinitely*.[39] New Section 7.3(l). The "Fallback Index Cessation Effective Date" is the date publication actually ceases. New Section 7.3(m).

Specific IBOR Fallbacks

USD LIBOR to Fallback Rate (SOFR) and Beyond

Current Definitions and Fallbacks. The 2006 ISDA Definitions presently provide contracting parties a choice of four "USD LIBOR" rates from which to choose: USD-LIBOR-BBA (which references Reuters Screen LIBOR01 Page), USD-LIBOR-Bloomberg (which references Bloomberg Screen BTMM Page under the heading "LIBOR FIX BBAM<GO>"), USD-LIBOR-LIBO,[40] and USD-LIBOR-Reference Banks. Current Sections 7.1(ab)(xxii) to (xxv).[41]

"USD-LIBOR-Reference Banks" is rarely if ever designated as the original floating rate option for USD LIBOR but serves as the first and only "fallback" in the event LIBOR "does not appear" on the applicable Reuters or Bloomberg screen (or any Successor Source). Current Sections 7.1(ab)(xii) and (xiii). It calls for the Calculation Agent to conduct a "private poll" for the "rates at which deposits in USD are offered by the Reference Banks[42] at approximately 11:00 a.m., London time . . . to prime banks in the London interbank market" for the applicable tenor and in a "Representative Amount." Current Section 7.1(a)(xv).[43] LIBOR for the applicable calculation period will be the arithmetic mean if two or more of the four Reference Banks provide such quotations. The definition of "Calculation Agent" sets out certain parameters for the conduct of the "private poll" and, importantly, requires consultation with the counterparty in the selection of Reference Banks:

> Whenever the Calculation Agent is required to select banks or dealers for purposes of making any calculation or determination . . . the Calculation Agent will make the selection in good faith after consultation with the other party (or the parties, if the Calculation Agent is a third party), if practicable, for purposes of obtaining a representative rate that will reasonably reflect conditions prevailing at the time in the relevant market. . . . Whenever the Calculation Agent is required to act, make a determination or to exercise judgment in any other way, it will do so in good faith and in a commercially reasonable manner.

Current Section 4.14.

If fewer than two quotations are received, the Calculation Agent is to conduct a "private poll" for the "rates quoted by major banks in New York City, selected by the Calculation Agent . . . for loans in U.S. Dollars to leading European banks" for the applicable tenor and in a Representative Amount. The Definitions do not specify the number of banks in New York City from which the Calculation Agent must request quotations and, more importantly, the *consequences if the Calculation Agent can obtain no quotations* (or even any given number of quotations). An aggrieved counterparty could potentially challenge any result on the basis that the Calculation Agent requested quotations from too many or too few "major banks." Moreover, the question arises whether the insertion of the words "selected by the Calculation Agent" overrides the consultation requirements in Section 4.14.

Expectations are fairly universal that these "private polls" will fail miserably upon USD LIBOR cessation. If banks in London are no longer providing quotations for "official" LIBOR fixings, they can hardly be expected to do so even for a favored few Calculation Agents, let alone for a significant portion of the market, all at the same moment. To proceed from the impossible to the absurd, the question to be asked in London differs more than a little from the question LIBOR panel banks had been answering from 1998 until recently,[44] which was "At what rate could *you* borrow funds, were you to do so by asking for and then accepting interbank offers in a reasonable market size just prior to 11:00 a.m.?" (emphasis not in original).[45]

Finally, these "private polls" are the sole "fallback" in the event LIBOR "does not appear" on Reuters or Bloomberg. The 2006 ISDA Definitions simply "run out" in the event private polls fail to yield a timely result. Indeed, observers have questioned even whether the polling mechanism was intended for permanent cessation—such as that in prospect—as opposed to a temporary operational disruption. The IBOR Supplement addresses many of these questions beginning with the last by establishing, as discussed above, separate fallback "paths" for "temporary" and "permanent" cessations.

Temporary Cessation Fallbacks Under the IBOR Supplement. If no Index Cessation Effective Date has occurred and USD LIBOR fails to be reported on Reuters or Bloomberg by 11:55 a.m. in London, then USD LIBOR will be as determined by IBA and published by an alternative authorized distributor or by IBA itself.[46] If USD LIBOR is not so published by 4:00 p.m. in London, then USD LIBOR will be (until publication re-commences or an Index Cessation Effective Date occurs), in the following order: (i) the rate, if any, formally recommended by IBA; (ii) the rate, if any, formally recommended by the Federal Reserve Board or the Federal Reserve Bank of New York (collectively, the "Fed") or the FCA as supervisor of IBA; or (iii) the rate determined by the Calculation Agent as a "commercially reasonable alternative . . . taking into account any rate implemented by central counterparties and/or futures exchanges . . . with trading volumes . . . the Calculation Agent considers sufficient for that rate to be a representative alternate rate." New Section 7.1(ab)(xxii) and (xxiii).

Permanent Cessation Fallbacks Under the Fallback Supplement. Upon the occurrence of an Index Cessation Effective Date, USD LIBOR will automatically be deemed to refer to the "Fallback Rate (SOFR)" as determined and published by BISL for the "Original USD Fixing Date" (i.e., two London Banking Days before the Reset Date) and for the applicable tenor at or prior to 10:30 a.m. in New York two Business Days preceding the applicable Payment Date.

The question then arises as to what happens if BISL fails to publish a Fallback Rate (SOFR) on a relevant Business Day. The answer replicates the temporary/permanent cessation fallback dichotomy. If no Fallback Index Cessation Effective Date has occurred, the rate will remain Fallback Rate (SOFR) as provided for the most recent "Original IBOR Rate Record Day"[47] (notwithstanding that such Original IBOR Record Date does not correspond to the Original USD Fixing Date).

Upon the occurrence of a Fallback Index Cessation Event for Fallback Rate (SOFR), the Applicable Fallback Rate will be SOFR, and the Calculation Agent is directed to adjust SOFR "as [is] necessary to account for any difference in term structure or tenor … by comparison to Fallback Rate (SOFR) and "by reference to" the Rule Book and to add the spread adjustment applicable to the relevant tenor. If a Fallback Index Cessation Event occurs with respect to SOFR, the next step is the "Fed Recommended Rate," which is defined to mean the rate recommended by the Fed or by a "committee officially endorsed or convened" by the Fed (i.e., the ARRC or successor committee), suitably adjusted to account for any difference in term structure or tenor to Fallback Rate (SOFR) plus the applicable spread adjustment.

Although it is difficult to envision the Fed ceasing to publish SOFR without ensuring the existence of a Fed Recommended Rate, if there is no Fed Recommended Rate or a Fallback Index Cessation Effective Date occurs in respect of the Fed Recommended Rate, the next Applicable Fallback Rate is the Overnight Bank Funding Rate ("OBFR") and, upon the occurrence of a Fallback Index Cessation Effective Date in respect of OBFR, the short-term interest target (or mid-point of the target range) ("FOMC Target Rate") set by the Federal Open Market Committee, each as suitably adjusted to account for any difference in term structure or tenor to Fallback Rate (SOFR) plus the applicable spread adjustment.

Non-publication of SOFR, the Fed Recommended Rate, OBFR, or FOMC Target Rate unaccompanied by a Fallback Index Cessation Effective Date results in use of the last-published SOFR, Fed Recommended Rate, OBFR, or FOMC Target Rate, as the case may be, until publication recommences or the occurrence of a Fallback Index Cessation Event.

GBP LIBOR to SONIA

Current Definitions and Fallbacks. In a similar way to USD LIBOR, the 2006 ISDA Definitions provide for a choice of three "GBP LIBOR" rates: GBP-LIBOR-BBA (as shown on Reuters Screen LIBOR01), GBP-LIBOR-BBA-Bloomberg (as shown on Bloomberg Screen BTMM UK Page), and GBP-LIBOR-Reference Banks. In a similar way to USD LIBOR, the GBP-LIBOR-Reference Banks rate is primarily used as a fallback to the other two rates (see Current Section 7.1(w)(i) and (ii)) with an equivalent "private poll" mechanism for the Calculation Agent to request a quotation of the rate at which deposits in British sterling are offered to prime banks in the London interbank market at approximately 11:00 a.m. on the relevant date, and using the same calculation methodology as seen for USD LIBOR.

In the event that fewer than two quotations are supplied as requested, the basis of the "private poll" changes to the arithmetic mean of the rates quoted by major banks in London, selected by the Calculation Agent, at approximately 11:00 a.m., London time, for loans in sterling to leading European banks for the applicable tenor and Representative Amount.

There is no further "fallback" in the event that no or only one quotation is provided to this second poll, and all the issues regarding potential weaknesses of challenges to the process, discussed above in the context of USD LIBOR, are relevant here also.

Fallbacks Under the IBOR Supplement. Under the IBOR Supplement, updated rate selection wording is provided for both GBP-LIBOR-BBA and GBP-LIBOR-BBA-Bloomberg, and in respect of both temporary unavailability of LIBOR prior to its discontinuation, as well as following an Index Cessation Event.

In the event of a temporary unavailability of either GBP LIBOR rate (i.e., a failure to publish on the relevant screen by 11:55 a.m., London time, or any specified amended publication time), then the initial fallback is to any sterling LIBOR rate published by the IBA as administrator (or any approved distributor) for that day by 4:00 p.m., London time (or such adjusted time as is appropriate given any amended publication time). Otherwise, the IBOR Supplement provides for a rate determined by the Calculation Agent to be a commercially reasonable alternative for sterling LIBOR by applying a waterfall of possible other recommended rates and ultimately its own judgment about what a representative alternative rate would be, during the period of non-publication of sterling LIBOR and for as long as no Index Cessation Event has occurred.

On the occurrence of the Index Cessation Event, the rate for any Reset Date occurring on or after that date will be determined as a reference to Fallback Rate SONIA for the "Original IBOR Rate Record Day"—i.e., as most recently published by BISL for the "Original GBP Fixing Date" (i.e., two London Banking Days before the Reset Date) and for the applicable

tenor at or prior to 11:30 a.m. in London two Business Days preceding the applicable Payment Date.

The IBOR Supplement then goes on to provide fallbacks for SONIA itself, again on a temporary or permanent basis, by reference to the "GBP Recommended Rate," which is defined as the rate (inclusive of any spreads or adjustments) recommended as the replacement for SONIA by its administrator or any authorized distributor. In summary, this further fallback wording provides that, on any occurrence of a Fallback Index Cessation Event in respect of Fallback Rate (SONIA), the Applicable Fallback Rate will be SONIA (or if SONIA is unavailable, the GBP Recommended Rate) and the Calculation Agent is directed to adjust SONIA or the GBP Recommended Rate as necessary to account for any difference in term structure or tenor of SONIA or the GBP Recommended Rate, as applicable, by comparison to the Fallback Rate (SONIA). A substantially similar fallback mechanism is then provided in respect of the GBP Recommended Rate, both in respect of temporary unavailability as well as following a Fallback Index Cessation Date with the ultimate fallback being to the official bank rate as determined by the Monetary Policy Committee of the Bank of England ("UK Bank Rate") as adjusted to take account of structure or tenor on any particular transaction.

The UK Bank Rate is commonly referred to as the "Bank of England Base Rate" and is published by the Bank of England ("BoE") to reflect the interest rate paid by the BoE to commercial banks that deposit funds with it. The Supplement provides that any relevant reference to the UK Bank Rate will be to the last provided or published UK Bank Rate as at close of business in London on the relevant day.

EUR LIBOR/Euribor to €STR

Current Definitions and Fallbacks—EUR LIBOR. In a similar way to GBP LIBOR, the 2006 ISDA Definitions provide for a choice of three "EUR LIBOR" rates: EUR-LIBOR-BBA (as shown on Reuters Screen LIBOR01), EUR-LIBOR-BBA-Bloomberg (as shown on Bloomberg Screen BTMM EU Page), and EUR-LIBOR-Reference Banks. In a similar way to GBP LIBOR, the EUR-LIBOR-Reference Banks rate is primarily used as a fallback to the other two rates (see Current Section 7.1(f)(v) and (vi)) with a similar "private poll" mechanism for the Calculation Agent to request a quotation of the rate at which deposits in euros are offered to prime banks in the London interbank market at approximately 11:00 a.m., London time, on the relevant date, and using the same calculation methodology as seen for GBP LIBOR.

In the event that fewer than two quotations are supplied as requested, the basis of the "private poll" changes to the arithmetic mean of the rates quoted by major banks in London, selected by the Calculation Agent, at approximately 11:00 a.m., London time, for loans in euros to leading European banks for the applicable tenor and Representative Amount.

There is no further "fallback" in the event that no or only one quotation is provided to this second poll, and all the issues regarding potential weaknesses of challenges to the process, discussed above in the context of USD and GBP LIBORs, are relevant here also.

Current Definitions and Fallbacks—Euribor. The 2006 ISDA Definitions provide for a choice of four "EUR EURIBOR" rates: EUR-EURIBOR-Reuters (as shown on Reuters Screen EURIBOR01), EUR-EURIBOR-Act/365 (as shown on Reuters Screen EURIBOR365), EUR-EURIBOR-Act/365-Bloomberg (as shown on Bloomberg Screen BTMM EU Page), and EUR-EURIBOR-Reference Banks. In a similar way to EUR LIBOR, the EUR-EURIBOR-Reference Banks rate is primarily used as a fallback to the other three rates (see Current Section 7.1(f)(i), (ii), and (iii)) with a similar "private poll" mechanism for the Calculation Agent to request a quotation of the rate at which deposits in euros are offered to prime banks in the eurozone interbank market at approximately 11:00 a.m., Brussels time, on the relevant date, and using the same calculation methodology as seen for GBP LIBOR.

In the event that fewer than two quotations are supplied as requested, the basis of the "private poll" changes to the arithmetic mean of the rates quoted by major banks in the eurozone, selected by the Calculation Agent, at approximately 11:00 a.m., Brussels time, for loans in euros to leading European banks for the applicable tenor and Representative Amount.

There is no further "fallback" in the event that no or only one quotation is provided to this second poll, and all the issues regarding potential weaknesses of challenges to the process, discussed above in the context of USD and GBP LIBORs, are relevant here also.

Fallbacks Under the IBOR Supplement

EUR LIBOR. In the event of a temporary unavailability of the EUR LIBOR (i.e., a failure to publish on the relevant screen by 11:55 a.m., London time, or any specified amended publication time), the initial fallback is the EUR LIBOR as published by the administrator (or any approved distributor) for that day by 4:00 p.m., London time (or such adjusted time as is appropriate given any amended publication time). Otherwise, the IBOR Supplement provides for the rate formally recommended for use by the administrator of EUR LIBOR or, if no such rate is available, the rate formally recommended for use by the supervisor of EUR LIBOR or the administrator of EUR LIBOR. In the absence of such rates, the fallback will be the rate determined by the Calculation Agent to be a commercially reasonable alternative for EUR LIBOR, during the period of non-publication of sterling LIBOR and for as long as no Index Cessation Event has occurred.

On the occurrence of the Index Cessation Event, the rate for any Reset Date occurring two or more TARGET Settlement Days after that date will be determined as a reference to Fallback Rate €STR for the "Original IBOR Rate Record Day"—i.e., as most recently published by BISL for the "Original EUR Fixing Date" (i.e., two TARGET Settlement Days before the Reset Date) and for the applicable tenor at or prior to 11:30 a.m. in Frankfurt two Business Days preceding the applicable Payment Date.

Euribor. Euribor's methodology was revised in 2019 and is now compliant with the EU Benchmarks Regulation. Most market players do not expect the publication of Euribor to cease in the near future.

Temporary Cessation Fallbacks under the IBOR Supplement. If no Index Cessation Effective Date has occurred and Euribor fails to be reported on Reuters or Bloomberg, as the case may be, by 11:00 a.m. in Brussels (or any specified amended publication time), then Euribor will be as determined by the European Money Markets Institute ("EMMI") and published by an alternative authorized distributor or by EMMI itself. If Euribor is not so published by 3:00 p.m. in Brussels (or such adjusted time as is appropriate given any amended publication time), then Euribor will be, until publication recommences or an Index Cessation Effective Date occurs (sequentially): (i) the rate, if any, formally recommended by EMMI; (ii) the rate, if any, formally recommended by the FSMA as supervisor of EMMI; or, in the absence of any such rates (iii) the rate determined by the Calculation Agent as a commercially reasonable alternative for Euribor.

Permanent Cessation Fallbacks Under the IBOR Supplement. Upon the occurrence of an Index Cessation Effective Date, Euribor will automatically be deemed to refer to the "Fallback Rate (€STR)" as determined and published by BISL for the "Original EUR Fixing Date" (i.e., two TARGET Settlement Days before the Reset Date) and for the applicable tenor at or prior to 11:30 a.m. in Frankfurt two Business Days preceding the applicable Payment Date.

Subsequent Fallbacks Under the IBOR Supplement. For both EUR LIBOR and Euribor, the IBOR Supplement then goes on to provide fallbacks for €STR itself, again on a temporary or permanent basis, by reference to the "ECB Recommended Rate," which is defined as the rate (inclusive of any spreads or adjustments) recommended as the replacement for €STR by the European Central Bank (or any successor) or by a "committee officially endorsed or convened" by the European Central Bank (or any successor). In summary, this further fallback wording provides that, on any occurrence of a Fallback Index Cessation Event in respect of Fallback Rate (€STR), the Applicable Fallback Rate will be €STR (or if €STR is unavailable, the ECB Recommended Rate). The Calculation Agent is directed to adjust €STR or the ECB Recommended Rate as necessary to account for any difference in term structure or tenor of €STR or the EUR Recommended Rate, as applicable, by comparison to the Fallback Rate (€STR). A substantially similar fallback mechanism is then provided in respect of the EUR Recommended Rate, both in respect of temporary unavailability as well as following a Fallback Index Cessation Date, with the ultimate fallback being "Modified EDFR," i.e., the rate on the overnight deposit facility of the euro system published on the ECB's website, as adjusted with a spread equal to the arithmetic mean of the daily difference between such rate and the ECB Recommended Rate over a 30 TARGET Settlement Days observation period.

If Modified EDFR is not published, the Supplement provides for Modified EDFR to fall back to its last provided or published date in the event of non-publication. This assumes that a Fallback Index Cessation Effective Date has not occurred in respect of this rate.

Linear Interpolation in the Context of an Adjusted RFR. Section 8.3 of the 2006 ISDA Definitions has always catered to the ability of parties to specify that linear interpolation will apply to "stub" periods. The "Discontinued Rate Maturities" provisions in new Sections 8.5 and 8.6 require parties to use the specified "Nearest Long Rate" and/or "Nearest Short Rate" for "Affected Interpolated Rates," which would otherwise have been calculated using Discontinued Maturity Rates.

However, Sections 8.3, 8.5, and 8.6 are inoperable when any or all of the potential Nearest Long Rates and/or Nearest Short Rates have ceased to be published or, in the case of LIBOR, have suffered a non-representativeness declaration. In these circumstances, new Section 7.9[48] provides for usage of a compounded average RFR to be measured during the "stub" period and for the "Interpolated Spread" to be added. The Interpolated Spread is the linear interpolation of the "spread adjustments" most recently published by BISL for the tenors next shorter and next longer than the "stub" period.[49]

THE PROTOCOL

The Protocol provides counterparties to "legacy" derivatives transactions (i.e., those transacted before the later of: (i) January 25, 2021 ("Protocol Effective Date," which postdates by 10 days the effective date for the IBOR Supplement), and (ii) the date on which ISDA accepts an Adherence Letter from the second Adhering Party to one or more "Protocol Covered Documents" ("Implementation Date")[50] with a "one-stop" opportunity to "adhere" to the Protocol and thereby retroactively and instantaneously amend all (but not less than all, absent bilaterally agreed exclusions) legacy derivatives with other "Adhering Parties." The Protocol operates similarly to other ISDA protocols in this respect. However, the Protocol is unique in that it goes beyond ISDA documentation to reach references to Relevant IBORs in other industry standard master agreements ("Additional Master Agreements") and credit support documents ("Additional Credit Support Documents") covering derivatives, securities forward purchases and options, repurchase agreements, securities lending, physical commodities trading, and similar other products. The Additional Master Agreements and Additional Credit Support Documents are set out in the "Additional Documents Annex" to the Protocol.

The Protocol, stated in its most succinct terms, operates to amend, as of the Protocol Amendment Effective Date, all "Protocol Covered Documents," which include "Protocol Covered Master Agreements"[51] and "Protocol Covered Credit Support Documents"[52] in addition to "Protocol Covered Confirmations"[53] in which a Relevant IBOR is an economic term, between any two[54] Adhering Parties.

There are a number of other prerequisites to status as a Protocol Covered Document. First, Protocol Covered Documents relate solely to uncleared derivatives transactions, in that the definition of "Protocol Covered Documents" specifically excludes documentation of cleared transactions under a "2016 ISDA/FIA Client Cleared OTC Derivatives Addendum or any equivalent agreement."[55] Second, Protocol Covered Documents must be dated, have an "as of" date or a Trade Date prior to the Protocol Amendment Effective Date. Finally, Protocol Covered Documents must: (i) incorporate the 2006 ISDA Definitions or certain previous ISDA definitions booklets (collectively, "Covered ISDA Definitions Booklets");[56] (ii) reference a Relevant IBOR "as defined in" a Covered ISDA Definitions Booklet; and/or (iii) reference a Relevant IBOR, "howsoever defined."[57]

Adhering Parties agree to amend, as of the Protocol Amendment Effective Date, all Protocol Covered Documents between them in accordance with the "Attachment" to the Protocol. The Attachment, in turn, operates to incorporate the IBOR Supplement by reference into Protocol Covered Documents that either incorporate a Covered ISDA Definitions Booklet or reference a Relevant IBOR "as defined" in a Covered ISDA Definitions Booklet. This incorporation by reference is relatively straightforward. For example, the Attachment's text relative to Protocol Covered Confirmations that incorporate the 2006 ISDA Definitions reads in relevant part as follows: "If a Protocol Covered Document incorporates the 2006 ISDA Definitions, the version of the 2006 ISDA Definitions so incorporated shall be amended in accordance with the terms of [the IBOR Supplement]." Protocol Attachment Section 1.

The situation is more complex when it comes to Relevant IBORs that are untethered to Covered ISDA Definitions Booklets, as would often be expected to be the case with Additional Master Agreement and Additional Credit Support Documents.

However, it also occurs from time to time in, for example, the "Interest Rate" provisions in ISDA Credit Support Documents. The fallback provisions for these Relevant IBORs are specified in the Attachment and track the IBOR Supplement, with certain adjustments, for example, to account for the possibility that Additional Master Agreements and Additional Credit Support Documents may not provide for certain IBORs to be observed in accordance with the 2006 ISDA Definitions and to account for discrepant interpolation methodologies.

Adherence Process and Consequences

The Protocol will be open for adherence on October 23, 2020, and, following past ISDA protocol practice, involves the submission of an executed "Adherence Letter" (a form of which appears as an exhibit to the Protocol) to ISDA and the payment of a fee.[58] Amendments between any two Adhering Parties are to be effective on the Protocol Amendment Effective Date. Adherence is irrevocable in the sense that adherence will irreversibly amend Protocol Covered Documents. However, Adhering Parties may, after the Protocol Effective Date, deliver to ISDA a "Revocation Notice" such that the Protocol will not amend any Protocol Covered Document between that Adhering Party and another Adhering Party for which the Implementation Date would occur after the month in which the Revocation Notice is delivered. ISDA has also retained the ability, as in prior protocols, to designate a "Cut-off Date" for adherence.

The Protocol is "intended for use without negotiation," and Adherence Letters may not specify additional provisions, conditions, or limitations. Protocol Section 1(d). However, Adhering Parties may, under Protocol Section 3(b) and (c), bilaterally agree to amendments to matters covered by the Protocol and exclude specific Protocol Covered Documents. The Bilateral Templates, as described in "Bilateral Templates" below, supply non-exclusive means of doing so.

The Protocol also contains a series of representations in Protocol Section 2(a), most of which are unexceptionable "good housekeeping" representations. These representations are deemed to have been made as of the later of: (i) the date ISDA accepts an Adherence Letter from the Adhering Party ("Adherence Date"); and (ii) the date of each relevant Protocol Covered Document Date[59] and deemed repeated as of the Protocol Effective Date and/or the Implementation Date, if later than the Adherence Date or the applicable Protocol Covered Document Date. Protocol Section 2(b).

Two representations, however, warrant special attention. They concern "Credit Support Documents," which are defined as guaranties, security agreements, or other credit support agreements that support an Adhering Party's obligations under a Protocol Covered Document, and "Third Party Credit Support Documents," which have been entered into or issued by a party ("Third Party") other than the two Adhering Parties to a Protocol Covered Document. The first appears in Protocol Section 2(a)(F) and is to the effect that Protocol adherence and consequent amendments to Protocol Covered Documents will not adversely impair the validity or enforceability of any Credit Support Document or Third Party Credit Support Document.[60] Although making this representation may require careful consideration, other Adhering Parties have a not unreasonable expectation that Protocol adherence will not impair the credit support for which they have negotiated.

The second representation, which appears in Protocol Section 2(c), is somewhat more problematic and is to the effect that the Adhering Party *has obtained* the "consent, approval, agreement, authorization or other action" of Third Parties under Third Party Credit Support Documents. Although the vast majority of Third Party Credit Support Documents are probably affiliate guaranties and should not pose insurmountable difficulties, the need to identify and secure consents from "true" Third Parties such as financial guaranty insurers *prior to adherence* will potentially cause a number of market participants to delay or refrain from adherence.[61]

Agent Adherence

Protocol Section 3(g) to (l) presents a somewhat bewildering range of options for adherence by "Agents" on behalf of "Clients." First, Agents may adhere on behalf of all Clients (Protocol Section 3(g)(i)(A)), on behalf of only certain specified Clients (Protocol Section 3(g)(i)(B)), or on behalf of all Clients other than certain specified Clients (Protocol Section 3(g)(i)(C)). Any Client specifications or exclusions under the latter two options must be by legal entity identifier "through an online platform available generally to the industry, including, for example, the ISDA Amend platform provided by IHS Markit" ("Platform"). Protocol Section 3(g)(v).

Under Protocol Section 3(g)(ii), Agents also have the option to adhere to the Protocol with respect to either: (i) the Protocol Covered Documents into which the Agent has entered on behalf of the relevant Clients ("Option 1"); or (ii) the foregoing documents plus each Protocol Covered Document "into which the Agent did not enter on behalf of those Clients but which the Agent has the authority from the relevant Client to amend" (exclusive of Protocol Covered Documents entered into by other Agents on behalf of the same Client) ("Option 2" and, such additional documents, "Non-Agent Executed Protocol Covered Documents"). The identities of Clients for whom the Agent is adhering in respect of Non-Agent Executed Protocol Covered Documents must be communicated to other Adhering Parties via a Platform.

Agents must upon request provide "reasonable evidence satisfactory to the other Adhering Party in its sole discretion supporting the Agent's authority to amend such [Non-Agent Executed Protocol Covered Documents]." Protocol Section 3(g)(iv).[62] The Implementation Date for Non-Agent Executed Protocol Covered Agreements will be the date of delivery (or deemed delivery) of such evidence of authority to amend. Protocol Section 3(l).

Finally, an Agent's adherence will apply automatically to Clients added to an Agent's portfolio subsequent to the Implementation Date ("New Clients") unless otherwise agreed between the Agent and any given Adhering Party.[63] In the case of an Agent's Client-specific adherence pursuant to Protocol Section 3(g)(i)(B), the Agent is required to identify New Clients for whom adherence is to be applicable through a Platform. Protocol Section 3(h)(ii) and 3(i).

BILATERAL TEMPLATES

The Protocol is a blunt instrument that, by virtue of adherence, imposes a uniform set of amendments for *all* Relevant IBORs on *all* legacy Protocol Covered Documents (including non-ISDA Additional Master Agreements and Additional Credit Support Documents, together with Protocol Covered Confirmations thereunder) with *all* other Adherents. ISDA has developed and published a series of stand-alone amendment agreements and "template language" that cater to market participants who wish to agree the Protocol amendments with only one or a limited set of counterparties, who wish to narrow or expand the universe of Protocol Covered Documents or who wish to tailor the Protocol amendments in various other ways.

First, and consistently with other protocols, ISDA has developed a series of stand-alone amendment agreements under which market participants may adopt the Protocol amendments with specific counterparties on a bilateral basis: a "short-form bilateral adoption of the terms of the ISDA 2020 IBOR Fallbacks Protocol" (which simply incorporates the Attachment by reference[64]) and a "long-form bilateral adoption of the terms of the ISDA 2020 IBOR Fallbacks Protocol" (which repeats the entirety of the Attachment in an annex). Both bilateral agreements permit counterparty pairs to include all would-be "Protocol Covered Documents" or to list specific documents on an annex, as well as to incorporate various permutations of the "template language" described below and to make other appropriate amendments as may be agreed. Both the short-form and long-form versions come in "principal-to-principal" and "principal-to-agent" formats.

ISDA has also published a stand-alone amendment agreement, which also comes in "principal-to-principal" and "principal-to-agent" formats, for Adhering Parties to customize the Protocol to incorporate various permutations of the "template language" described below and to make other amendments as may be agreed.

The "template language" is designed for incorporation in various permutations into the foregoing stand-alone amendments and comes in a somewhat bewildering multitude of flavors. Only one of these, simply to add existing documents to the universe of "Protocol Covered Documents," is relatively straightforward.

A second form of template language ("Exclusion Template") in general facilitates the *exclusion* of Protocol Covered Documents from operation of the Protocol. It is organized around three principal "Options" and two combinations of these Options. Under the first "Option," the parties list specific Protocol Covered Documents to be excluded from the Protocol and agree upon alternative triggers and fallbacks. The second "Option" allows parties to exclude specific Protocol Covered Documents that are "linked" to specified "Reference Contracts" and defer to the triggers and fallbacks in those Reference Contracts. The prototypical case in which this Option would be used is in the case of loan agreements that have fallbacks that

do not match those in the IBOR Supplement. The final "Option" allows parties to exclude certain Protocol Covered Documents from the Protocol's operation in favor of the triggers and fallbacks already contained in those documents. The Exclusion Template also contains language allowing parties to "mix and match" the approaches in the first and third Options and the approaches in the first, second, and third Options.

As noted above in "The IBOR Supplement: Pre-Cessation Trigger" and "The Protocol," inclusion of the pre-cessation trigger in the IBOR Supplement proved somewhat controversial, not least because a significant portion of the market believed that such a trigger should be optional. Because the pre-cessation trigger has been hard-wired into the IBOR Supplement, ISDA has prepared template language ("Pre-Cessation Trigger Opt-Out") for parties who wish to dis-apply the pre-cessation trigger on a bilateral basis. The Pre-Cessation Trigger Opt-Outs come in two variants, one that applies to existing Protocol Covered Documents and one that applies to post-effective date Protocol Covered Confirmations that would otherwise incorporate the entirety of the IBOR Supplement. Both variants also contain an ability by Pre-Cessation Trigger Opt-Out parties nevertheless to utilize the spread adjustments calculated by BISL upon the occurrence of a pre-cessation trigger ("Pre-Cessation Spread Opt-In"), if BISL indeed elects to calculate two sets of spread adjustments (as discussed in "The IBOR Supplement: Pre-Cessation Trigger" above). The Pre-Cessation Spread Opt-In permits Pre-Cessation Trigger Opt-Out Parties to utilize the same spread adjustments irrespective of whether or when BISL calculates separate sets of spread adjustments.

A final variant of template language is designed for inclusion in new agreements that contain references to a Relevant IBOR that are "untethered" to the 2006 ISDA Definitions and incorporates the Protocol amendments to such Relevant IBORs. The template language also makes Pre-Cessation Trigger Opt-Outs (and Pre-Cessation Spread Opt-Ins) available.

PROGNOSIS AND CONCLUSION

The IBOR Supplement and Protocol obviously represent an enormous opportunity for the derivatives industry to transition from Relevant IBORs to Adjusted RFRs, and there is little doubt that a very significant portion of the industry will do so. On the other hand, some major doubts and ambiguities remain.

First, going forward, the IBOR Supplement's fallbacks will automatically apply to all transactions that incorporate the 2006 ISDA Definitions that are transacted on or following the IBOR Supplement's effective date, but ISDA has already also published other supplements to the 2006 ISDA Definitions that contain "competing" compounded RFR definitions that do not include spread adjustments ("Unadjusted RFRs").[65] These Unadjusted RFRs are expressed in terms of "manual" formulae[66] (as opposed to the BISL screens referenced in the IBOR Supplement) and leave it to the parties to add on an undifferentiated spread to include both what would have been the traditional spread to IBOR and the spread adjustment. It would be perverse, to say the least, for parties to transact IBOR derivatives post-IBOR cessation for the sole purpose of obtaining the "hard-wired" IBOR Supplement fallbacks. The Adjusted RFRs accordingly have a natural "shelf life" after which Unadjusted RFRs would be expected to become dominant (even if, for a time, transactions may continue to be quoted in terms of a bifurcated spread until the market weans itself from an "IBOR mentality").

It also seems quite feasible for bilateral negotiations, rather than widespread Protocol adherence, to play a larger role in Adjusted RFR adoption than might have been hoped, even looking at the derivatives market in isolation. First, of course, is the sheer breadth of "Protocol Covered Documents." In principle, market participants will need to assess every single potential Protocol Covered Document (including Additional Master Agreements, Additional Credit Support Documents, and Confirmations thereunder) and the impact of Protocol adherence thereon. The parties must utilize the Bilateral Templates (or bespoke equivalent bilateral documentation) to effectuate Protocol Covered Document exclusions, additions, and other alterations.

Principal among the instruments that market participants might wish to exclude from the Protocol (or simply to terminate prior to IBOR cessation) are swaptions[67] and other "volatility" products. This is because, while LIBOR and Adjusted RFRs arguably substitute for one another tolerably well on a linear, one-to-one basis,[68] the differences between IBOR and Adjusted RFR volatilities are both pronounced and not well-understood.[69]

Issues multiply when hedging considerations are included in the analysis. First, many obligors under hedged instruments

such as bonds or loans have an aspiration for true "term" RFRs that operate much like IBORs. These, as detailed above, are not even within ISDA's contemplation. But that is merely a special case of a larger problem, which is that obligors may be reluctant to lock themselves into Adjusted RFRs until they are confident that their bonds and especially loans (even the most forward-looking of which have to date almost entirely adopted a "wait-and-see" approach to IBOR transition) will utilize the same or even similar Adjusted RFRs. Finally, the two-business-day "backward-shift" methodology and, indeed, even the compounded in arrears approach under the Adjusted RFRs are viewed with trepidation and even deep skepticism in significant parts of the cash markets.

Overarching all of the foregoing concerns, in the U.S. market in any event, is a sense of discomfort with SOFR itself. Daily SOFR settings have at times proven to be highly volatile and have been "managed" by the Federal Reserve from its bout of extreme volatility in September 2019 through the year-end and into the COVID-19 crisis.[70] SOFR, as a secured "repo" rate, is subject to forces of supply and demand in the market for U.S. Treasuries seemingly far removed from the needs of "Main Street" borrowers and lenders. Moreover, SOFR, as revealed during the period of financial stress relating to COVID-19, has a tendency to move downward when LIBOR—in principle—acts as a natural "buffer" against higher financing costs brought about by that same financial stress. One of the consequences of the use of a fixed spread adjustment in Adjusted RFRs will be to eliminate that buffer.[71] A "Credit Sensitivity Group" has been formed under the auspices of the Federal Reserve Bank of New York[72] to advocate a greater diversity in overnight rates to include "credit sensitive" spread adjustments or rates such as the "Ameribor" rate.[73]

An enormous amount of uncertainty, not least of which is the foundational question of whether it is to be applauded or feared, exists in the IBOR transition effort. The only certainties are that it will eventually happen and that it includes a mind-boggling array of moving parts. ISDA and its membership are to be commended for the level of leadership, thought, and effort brought to bear in producing the IBOR Supplement and Protocol. The vast majority of major players in the derivatives markets are expected to deploy these materials for a smooth transition to Adjusted RFRs. While some segments of the derivatives and especially other financial markets may, for sound reasons, go in different directions, the IBOR Supplement and Protocol provide an anchor of stability in a stormy sea.

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ENDNOTES

1 ISDA, *Amendments to the 2006 ISDA Definitions to include new IBOR fallbacks* (2020).

2 ISDA, *ISDA 2020 IBOR Fallbacks Protocol* (2020).

3 Bilateral Forms for IBOR Fallbacks.

4 The transition from IBORs to RFRs for the derivatives market can ultimately be traced to a 2014 report and recommendation from the Financial Stability Board ("FSB"), an international group of regulatory authorities, in which the FSB recommended the development of "at least two rates" for each currency: an RFR for derivatives and one that includes bank credit risk for "cash" products such as loans and corporate bonds. Fin. Stability Bd., *Reforming Major Interest Rate Benchmarks* at 10, 58-59 (July 22, 2014) ("2014 FSB Report").

5 The United Kingdom's Financial Conduct Authority ("FCA") jolted the markets in July 2017 when it announced without warning that market participants (including "cash" market participants) would be unable to rely upon LIBOR's continued existence beyond year-end 2021. Andrew Bailey, *The Future of LIBOR* (July 27, 2017). Mr. Bailey was at the time the chief executive of the FCA, which had gained regulatory authority over LIBOR in the wake of the "LIBOR rigging" scandals that began to emerge during the 2008 financial crisis. Mr. Bailey was careful to acknowledge that the FCA did "not suspect further wrongdoing." However, the pervasive and continuing absence of actual transactions in the unsecured wholesale term loan market for banks had rendered LIBOR, in the view of the FCA, incapable of ever being "genuinely representative of market conditions." Id.

6 See, e.g., Alternative Reference Rates Committee ("ARRC"), *Second Report* at 2 (March 2018) (reporting estimated volumes for United States dollar LIBOR as of year-end 2016). The ARRC is the USD rate reform private sector "working group" that was established under the auspices of the Board of Governors of the Federal Reserve and the Federal Reserve Bank of New York pursuant to the 2014 FSB Report to determine an RFR for the USD and was reconvened in early 2018 in response to Mr. Bailey's 2017 announcement.

7 Articles and biographies for Jones Day's IBOR Initiative Working Group can be accessed on Jones Day's dedicated "LIBOR Insights" webpage.

8 See ICE Benchmark Administration ("IBA"), *LIBOR*.

9 LIBOR's "administrator" is IBA, which replaced the British Bankers Association ("BBA") as part of the same reforms that resulted in the regulation of LIBOR by the FCA. IBA's description of the role of "expert judgment" in LIBOR's current compilation methodology may be found at IBA, *ICE LIBOR Methodology*.

10 SOFR is the USD RFR selected by the ARRC.

11 Although true "term RFRs" that would operate similarly to IBORs remain an aspiration for cash market products like bonds and loans, there is little or no immediate prospect for such rates to be adopted in the wholesale derivatives markets. This is a direct consequence of the 2014 FSB Report's "at least two rates" recommendation.

12 As detailed below in "The IBOR Supplement," the IBOR Supplement also specifically addresses "temporary" IBOR nonavailability.

13 Notably, the Euro Overnight Index Average ("EONIA") is an IBOR that is not included within the Relevant IBORs. This is because EONIA has already been "re-defined" by its own administrator (the European Money Markets Institute ("EMMI")) for a transitional period through the end of 2021 (at which point EONIA will cease to exist) as the euro short-term rate ("€STR" or "EuroSTR") plus a fixed spread equal to 8.5 basis points. See EMMI, *About EONIA*. ISDA has to date issued two publications to address EONIA cessation. The "Collateral Agreement Interest Rate Definitions" addresses the frequent use in Credit Support Documents of EONIA (and potentially other overnight rates and currencies to be added in the future) as the "Interest Rate" for credit support in the form of euros. ISDA, *ISDA Collateral Interest Rate Definitions*. The "Template Form of Bilateral Agreement for amending references to EONIA in Existing Agreements and Credit Support Documents" addresses master agreements and transaction confirmations in addition to Credit Support Documents. ISDA, *Template Form of Bilateral Agreement*.

14 See ISDA, *Consultation on Certain Aspects of Fallbacks for Derivatives Referencing GBP LIBOR, CHF LIBOR, JPY LIBOR, TIBOR, Euroyen TIBOR and BBSW* (Dec. 20, 2018) ("2018 Benchmark Fallbacks Consultation"); ISDA, *Supplemental Consultation on Spread and Term Adjustments for Fallbacks in Derivatives Referencing USD LIBOR, CDOR and HIBOR and Certain Aspects of Fallbacks for Derivatives Referencing SOR* (May 16, 2019) ("2019 Benchmark Fallbacks Consultation"); "Consultation on Pre-Cessation Issues for LIBOR and Certain Other Interbank Offered Rates (IBORs)," which was also issued on May 16, 2019 ("2019 Pre-Cessation Trigger Consultation"); ISDA, *Consultation on Final Parameters for the Spread and Term Adjustments in Derivatives Fallbacks for Key IBORs* (September 18, 2019) ("Final Parameters Consultation"); ISDA, Supplemental Consultation on Spread and Term Adjustments, including Final Parameters thereof, for Fallbacks in Derivatives Referencing EUR LIBOR and EURIBOR, as well as other less widely used IBORs (December 18, 2019) ("EUR Supplemental Consultation" and, together with the 2018 Benchmark Fallbacks Consultation, the 2019 Benchmark Fallbacks Consultation and the Final Parameters Consultation, "Benchmark Fallbacks Consultations"); ISDA, 2020 Consultation on How to Implement Pre-Cessation Fallbacks in Derivatives (February 24, 2020) ("2020 Pre-Cessation Trigger Consultation" and, together with the 2019 Pre-Cessation Consultation, "Pre-Cessation Trigger Consultations").

Jones Day has written extensively about many of these consultations. See, e.g., Jones Day Commentary, *ISDA Publishes Results of Benchmark Fallbacks Consultation as Sunset Looms for LIBOR* (December 2018); Jones Day Alert, *ISDA Forges Ahead With Market Consultations on Critical IBOR Transition Issues* (May 2019); Jones Day Commentary, *ISDA Pre-Cessation Trigger Consultation on LIBOR Renders Inconclusive Verdict* (August 2019); Jones Day Alert, *ISDA Announces Results of "Final Parameters" Consultation for LIBOR Transition* (Nov. 2019).

15 We utilize "Section" numbers to reference the 2006 ISDA Definitions and will characterize them by means of "Current" when they appear in the existing 2006 ISDA Definitions or "New" when they are being added by the IBOR Supplement. References to the Protocol sections appear as "Protocol Section" (and to sections in the "Attachment" to the Protocol as "Protocol Attachment Section").

16 See sections 8 to 14 of the Financial Sevices Bill 2020, which was introduced to the UK Parliament on October 21, 2020, as well as the *Financial Services Regulation: Written statement by Rishi Sunak – HCWS307* (June 23, 2020). The FCA published a nearly simultaneous press release and FAQs related to the Benchmarks Regulations. See FCA, *FCA statement on planned amendments to the Benchmarks Regulation* (June 23, 2020); FCA, *FAQs, Benchmarks Regulation – proposed new powers* (June 23, 2020). ISDA has also published a brief commentary on the proposed legislation in which, among other things, ISDA stated that the proposed legislation in the United Kingdom would have no impact on ISDA's ongoing work on the IBOR Supplement and Protocol. See Scott O'Malia, ISDA, *Tackling Tough Legacy* (June 26, 2020).

The European Commission has announced a similar initiative. See European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1011 as regards the exemption of certain third country foreign exchange benchmarks and the designation of replacement benchmarks for certain benchmarks in cessation* (July 24, 2020).

17 The relevant regulators have indicated that they intend to calculate their own interpolations if a USD LIBOR input to SGD-SOR-VWAP or THB-THBFIX-Reuters is discontinued. These Relevant IBORs have accordingly been excluded from the scope of Sections 8.5.

18 ISDA, *ISDA 2013 Discontinued Rates Maturities Protocol* (Oct. 11, 2013). The DRM Protocol appears not to have been widely adopted: ISDA lists only 116 unique legal entity adherents, many of which form part of the same corporate or banking groups.

19 These concepts are designed to mirror, on a tenor-specific basis, the Index Cessation Events that apply to Relevant IBORs in their entirety as discussed below in "The IBOR Supplement: Index Cessation Event" and "The IBOR Supplement: Pre-Cessation Trigger."

20 As already discussed, permanent cessation of specific currency-tenor pairs are addressed as "Discontinued Rate Maturities as set forth above, and "temporary" non-availability of Relevant IBORs or specific tenors receive distinct treatment under the IBOR Supplement.

21 "Applicable Rate" is the expression used in the Index Cessation Event definition and throughout the IBOR Supplement, and "Relevant IBOR" is the expression adopted in Protocol Section 4. The content of these definitions, in terms of the rates included, is identical.

22 See ISDA, *ISDA Publishes Report Summarizing Final Results of Consultation on Precessation Fallbacks for LIBOR* (May 14, 2020); Brattle Group, *Summary of Responses to the ISDA 2020 Consultation on How to Implement Pre-Cessation Fallbacks in Derivatives* (May 14, 2020).

23 New Section 7.3(q) defines "Non-Representative" in relation to a LIBOR rate as one that has been announced by the FCA to have (or will have) "cease[d] to be representative of the underlying market and economic reality that such [rate] is intended to measure and that representativeness will not be restored." The announcement by the FCA as to non-representativeness must specifically state that it "is being made in the awareness that the statement or publication will engage certain contractual triggers for fallbacks."

24 *Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds*.

25 See, e.g., ARRC, *Consultation Regarding More Robust LIBOR Fallback Contract Language for New Issuances of LIBOR Floating Rate Notes* (Sept. 24, 2018); Jones Day Commentary, *ARRC Publishes Final LIBOR Transition Recommendations for Floating Rate Notes and Syndicated Business Loans* (May 2019).

26 See Jones Day Commentary, *ISDA Pre-Cessation Trigger Consultation on LIBOR Renders Inconclusive Verdict* (August 2019). See also the Pre-Cessation Trigger Consultations, supra; Brattle Group, *Anonymized Narrative Summary of Responses to the ISDA Pre-Cessation Consultation* (Oct. 21, 2019); Brattle Group, *Summary of Responses to the ISDA 2020 Consultation on How to Implement Pre-Cessation Fallbacks in Derivatives* (May 14, 2020).

27 See Jones Day Commentary, *ISDA Publishes Results of Benchmark Fallbacks Consultation as Sunset Looms for LIBOR* (December 2018); Jones Day Alert, *ISDA Forges Ahead With Market Consultations on Critical IBOR Transition Issues* (May 2019); Jones Day Alert, *ISDA Announces Results of "Final Parameters" Consultation for LIBOR Transition* (Nov. 2019); Brattle Group, *Anonymized Narrative Summary of Responses to the ISDA Consultation on Term Fixings and Spread Adjustment Methodologies* (Dec. 20, 2018) (relating to the 2018 Benchmark fallbacks Consultation); Brattle Group, *Summary of Responses to the ISDA Supplemental Consultation on Spread and Term Adjustments* (Sept. 18, 2019) (relating to the 2019 Benchmark Fallbacks Consultation); Brattle Group, *Summary of Responses to the ISDA Consultation on Final Parameters for the Spread and Term Adjustments* (Nov. 15, 2019) (relating to the Final Parameters Consultation); Brattle Group, *Anonymized Summary of Responses to the ISDA Supplemental Consultation on Fallbacks in Derivatives Referencing EUR LIBOR and EURIBOR and Other Less Widely Used IBORs* (March 5, 2020) (relating to the EUR Supplemental Consultation).

28 New Section 7.3(n) defines these as "Applicable Fallback Rates."

29 These are available on a delayed basis for each Relevant IBOR (other than SGD-SOR-VWAP or THB-THBFIX-Reuters). BISL has produced copious materials on Adjusted RFRs that are available from a number of sources, among which the most readily available to derivatives legal practitioners is likely the ISDA web site. These materials ("BISL Materials") include: ISDA, *IBOR Fallback Rate Adjustments Rule Book* ("Rule Book"); ISDA, *IBOR Fallback Fact Sheet*; and ISDA, *IBOR Fallback Rate Adjustments FAQs*. The Rule Book, in particular, sets out the details of the mathematical operations that underlie BISL's "screen rates." It should be noted that the Adjusted RFRs as articulated in the Supplement, which incorporates the Rule Book by reference, reflect only the conventions for "IBOR fallbacks" and will not necessarily be applicable to transactions originally denominated in Adjusted RFRs. For example, the Supplement and Rule Book apply the current convention for most LIBOR settings other than GBP LIBOR to take place two London Banking Days prior to the Reset Date. This need not necessarily be the case for transactions originally denominated in Adjusted RFRs.

30 The "compounding in arrears" methodology was one of four suggested in the 2018 Benchmark Fallbacks Consultation. Each calendar day within a given observation period is given equal weight, with weekends and holidays reflecting the next preceding business day's figure. The specifics of this calculation are contained in the Rule Book rather than the IBOR Supplement.

31 By contrast, market participants utilizing Relevant IBORs know the exact amount of the relevant payment at the outset of each calculation period.

32 Federal Reserve Bank of New York, *SOFR Averages and Index Data*.

33 This "two business day backward shift" was determined under the Final Parameters Consultation. However, like many other Adjusted RFR features its details appear only in the complex mathematics of the Rule Book.

34 Somewhat ironically on the other hand, the OIS markets (in tandem with futures markets) in Adjusted RFRs would form part of the basis of a true forward-looking "term" RFR rate, which is probably the most deeply held aspiration for the cash markets.

35 Certain RFRs, such as the RFR for GBP, the Sterling overnight index average ("SONIA"), have been in existence for well over the five-year period. The spread adjustment for other, more recently created, RFRs such as SOFR (which commenced publication in April 2018) will need to utilize "proxy" data. See Final Parameters Consultation, supra, at 9-10.

36 The IBOR Supplement, again, simply incorporates the Rule Book by reference and does not specify the date as of when the spread adjustment is to be calculated.

37 Much of the controversy over adoption of a pre-cessation trigger concerned the desire on the part of a sizeable portion of respondents to make the trigger optional and the consequent basis risk potential. This problem was only exacerbated by the fact that LIBOR would likely be declared Non-Representative at a time prior, and potentially at a time well prior, to actual cessation and respondents questioned whether that would lead to the calculation of two spread adjustments for each tenor. ISDA ultimately elected to have a single Index Cessation Date to occur upon the earlier of an actual cessation announcement or, for LIBOR, the date upon which the FCA declares LIBOR to be Non-Representative.

However, the controversy persists in that among the options contained in the Bilateral Templates (as set out in Part IV below) is to disapply the pre-cessation trigger. Moreover, BISL is reportedly considering the calculation of two series of spread adjustments, one that would be calculated upon the occurrence of a pre-cessation trigger, and another that would be calculated upon the occurrence of an actual cessation trigger. The Bilateral Templates permit parties who have disapplied the pre-cessation trigger nevertheless to opt in to the spread adjustments calculated upon the occurrence of a pre-cessation Index Cessation Event.

38 Other than the Adjusted RFRs for SOR and THB-SOR, for which SOFR is an input.

39 A Fallback Index Cessation Event contains no analogue to the announcement that LIBOR has or will become Non-Representative under an Index Cessation Event.

40 ISDA noted in the 2019 Benchmark Fallbacks Consultation that the LIBO "floating rate option" has been discontinued and accordingly that ISDA does not propose to amend the definition to include fallbacks. 2019 Benchmarks Fallback Consultation, supra, at 7, n.6.

41 Current Section 7.2(a)(iii) and (xii), respectively, make clear that references to "Bloomberg Screen" and "Reuters Screen" (Supplement 52 to the 2006 ISDA Definitions (published on April 6, 2017, and available here) amended references to "Reuters" to be references to "Thomson Reuters" and include "any Successor Source." Successor Source" is in turn defined to mean:

(i) the successor display page, other published source, information vendor or provider that has been officially designated by the sponsor of the original page or source; or

(ii) if the sponsor has not officially designated a successor display page, other published source, service or provider (as the case may

be), the successor display page, other published source, service or provider, if any, designated by the relevant information vendor or provider (if different from the sponsor).

Current Section 7.2(b).

42 Current Section 7.3(c) defines Reference Banks for LIBOR purposes as "four major banks in the London interbank market."

43 "Representative Amount" is defined to mean "an amount that is representative for a single transaction in the relevant market at the relevant time." Current Section 7.3(a).

44 IBA introduced and implemented a new "waterfall" approach for calculating LIBOR in a thus-far unsuccessful effort to stave off its demise between 2017 and 2019. See IBA, *LIBOR*.

45 See BBA, *Welcome to bbalibor: Historical Perspective*.

46 The temporary and permanent fallbacks for USD LIBOR are identical as between USD-LIBOR-BBA and USD-LIBOR-Bloomberg but appear in New Sections 7.1(ab)(xxii) and 7.1(ab)(xxiii), respectively.

47 The "Original IBOR Record Day" corresponds to the day on which the relevant LIBOR tenor would have been observed (i.e., for USD, two business days prior to the Reset Date). However, it is defined for all Adjusted RFRs solely by reference to the applicable BISL screen.

48 New Section 7.10 provides special interpolation rules for Adjusted RFRs for SOR and THBFIX.

49 BISL is calculating and publishing indicative spread adjustments "on the run" for all Adjusted RFR tenors prior to the occurrence of an Index Cessation Event, at which point the spread adjustments will become fixed, and clause (b) of the definition of Interpolated Spread directs the use of a next longer or next shorter tenor spread adjustment even if an Index Cessation Event has not occurred with respect to the applicable Relevant IBOR. Sections 7.9 and 7.10 are the sole instances in the IBOR Supplement when these pre-Index Cessation Event spread adjustments will have contractual meaning.

50 Although the definition does not appear in the Protocol itself, this "later of" date will be hereinafter referred to as the "Protocol Amendment Effective Date." Additionally, the definition of "Implementation Date" for Adherence Letters submitted by an agent on behalf of one or more principals is subject to additional refinements as further set out below.

51 "Protocol Covered Master Agreements" include any of the 2002, 1992 and 1987 ISDA Master Agreements as well as Additional Master Agreements. "Long-form" confirmations pursuant to which parties are deemed to have entered into an ISDA Master Agreement or an Additional Master Agreement are also eligible for treatment as Protocol Covered Master Agreements. See Protocol Section 4 (definition of "Master Agreement").

52 "Protocol Covered Credit Support Documents" include seventeen enumerated ISDA Credit Support Documents as well as Additional Credit Support Documents.

53 Curiously, "Protocol Covered Confirmations" must be subject to or otherwise governed by an ISDA Master Agreement or an Additional Master Agreement.

54 The impact of the Protocol on Protocol Covered Documents with more than two parties (e.g., mono-line Credit Support Providers are sometimes named "parties" to ISDA Master Agreements in structured credit transactions and parties sometimes utilize "joint and several" structures for corporate groups) is uncertain and may require special amendment processes.

55 Cleared derivatives are expected to be amended to conform to the IBOR Supplement pursuant to rulebook changes by the relevant clearinghouses. The timing is expected to be simultaneous with the IBOR Supplement's Index Cessation Effective Date(s).

56 The Attachment defines "Covered ISDA Definitions Booklets" to include "the 2006 ISDA Definitions, the 2000 ISDA Definitions, the 1998 ISDA Euro Definitions, the 1998 Supplement to the 1991 ISDA Definitions and the 1991 ISDA Definitions, each as published by ISDA." Protocol Section 4. The Protocol conforms the IBOR Supplement to pre-2006 Covered IBOR Definitions Booklets by excluding floating rate options that did not exist under older iterations (e.g., the definition of "USD-LIBOR-BBA-Bloomberg," which was introduced for the first time in the 2006 ISDA Definitions, is deemed to be deleted from the IBOR Supplement for all Covered ISDA Definitions Booklets other than the 2006 ISDA Definitions). See Protocol Attachment Sections 2 (Protocol Covered Documents incorporating the 2000 ISDA Definitions), 3 (Protocol Covered Documents incorporating the 1991 ISDA Definitions and/or the 1998 Supplement to the 1991 ISDA Definitions); 4 (Protocol Covered Documents incorporating the 1998 ISDA Euro Definitions; and 5 (Protocol Covered Documents that specify Relevant IBORs "as defined in" a Covered ISDA Definitions Booklet).

57 Protocol Section 4, Definition: Protocol Covered Confirmation.

58 The fee is $500 (per legal entity) for "ISDA Primary Members" (described on ISDA's website as "over 200 large global institutions that deal in derivatives"). ISDA, *Membership*. Adherence is free for all others if they adhere prior to the Protocol Effective Date, but $500 if they adhere after the Protocol Effective Date.

59 "Protocol Covered Document Date means, in respect of any document, the date of such document, howsoever described therein, provided that (i) if such document has different dates specified therein, one of which includes a date specified as an "as of" date, such date shall be the Protocol Covered Document Date, and (ii) if such document is a Confirmation (other than a master confirmation agreement, including any related general terms confirmation), the Protocol Covered Document Date shall be the Trade Date." Protocol Section 4.

60 One obvious example of such an adverse impairment would be that amendments to a Protocol Covered Document would give rise to a suretyship defense on the part of a guarantor.

61 The Protocol does provide a "safe harbor" for Third Parties who are themselves Adhering Parties, in which case they are deemed to have consented to the amendments of all Protocol Covered Documents for which they have provided Third Party Credit Support Documents. Protocol Section 2(d). This presents something of a diligence challenge for Third Parties.

62 Protocol Section 3(g)(iv) provides a number of mechanisms for "deemed" delivery of reasonable evidence if the other Adhering Party (i) does not request such evidence within fifteen calendar days following the Implementation Date (Protocol Section 3(g)(iv)(B)); (ii) has been provided a copy of the applicable investment management agreement or similar instrument at any time and fails to request further evidence within fifteen calendar days following the Implementation Date (Protocol Section 3(g)(iv)(A)); or (iii) fails to request further information within fifteen calendar days of delivery by the Agent of evidence in response to a timely request therefor (Protocol Section 3(g)(iv)(C)).

63 Protocol Section 3(h)(i). Agents who have adhered to the Protocol on behalf of all but excluded Clients under Protocol Section 3(g)(i)(C) may identify the applicable New Clients through a Platform. Id.

64 The IBOR Supplement fallbacks themselves, of course, are implemented by the Attachment and are not repeated in either bilateral agreement.

65 See, e.g., *Supplement 51 to the 2006 ISDA Definitions* (hereinafter, "Supplement") (Apr. 3, 2017) (adding the compounded RFR for Swiss francs, the Swiss Average Rate for Overnight or "SARON"); *Supplement 55* (Apr. 23, 2018) (amending the pre-existing definition for compounded SONIA); *Supplement 57* (May 16, 2018) (adding compounded SOFR); *Supplement 59* (Oct. 1, 2019) (adding compounded EuroSTR).

66 For example, the compounded SOFR formula (which is consistent with the other Unadjusted RFRs) is expressed as follows and represents the average of SOFR compounded daily over a calculation period of "d" calendar days and "d0" business days, with non-business day SOFR taking on the value of the next preceding business day:

$$\left[\prod_{i=1}^{do}\left(1+\frac{SOFRi\ x\ ni}{360}\right)-1\right]x\frac{360}{d}$$

Note that the formula is agnostic as to whether the calculation is to be performed during the applicable calculation period ("compounded in arrears") or for an equivalent period measured prior to the commencement of the applicable calculation period ("compounded in advance").

67 Somewhat anomalously, it is the ARRC rather than ISDA which has taken the lead on market consultations on swaptions. See ARRC, Recommendations for Swaptions Impacted by the CCP Discounting Transition to SOFR (May 14, 2020), https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC-swaptions-recommendations.pdf. This is probably because the impact of LIBOR transition on swaptions straddles the cleared and uncleared swaps markets, in that over-the-counter swaptions are physically settled into cleared swaps or are cash-settled on the basis of a deemed cleared swap.

68 See, e.g., FSB, *Overnight Risk-Free Rates: A User's Guide* (June 4, 2019); ARRC, *A User's Guide to SOFR* (April 2019).

69 This is an issue that is somewhat but not entirely distinct from the (overnight) SOFR "spike" observed in September 2019. See Daniel Kluger and Vipal Monga, *Repo-Market Tumult Raises Concerns About New Benchmark Rate*, The Wall Street Journal (Sept. 23, 2019).

70 The Fed drastically curtailed its repo operations over the summer months, and Reuters reported on July 9, 2020 that the Fed's balance of open repurchase operations had dropped to "zero:" Dan Burns, *Fed balance sheet below $7 trillion, repo drops to zero for first time since September*, Reuters (July 9, 2020).

71 See, e.g., Jeffrey Armstrong, *COVID-19 Crisis Exposes Libor Replacement's Weaknesses*, Politico (Mar. 27, 2020).

72 See Federal Reserve Bank of New York, *Transition from LIBOR: Credit Sensitivity Group Workshops* (June 4, 2020).

73 The Credit Sensitivity Group has its roots in a pair of letters sent to the Federal Reserve and other regulators in October 2019 and February 2020. Letter from R. Christopher Marshall, Executive Vice President and Treasurer, BBVA USA Bancshares, Inc., et al. to Honorable Randal K. Quarles, Vice Chairman of Supervision, Board of Governors of the Federal Reserve System, et al. (Sept. 23, 2019); Letter from Kevin Sabin, President and Chief Executive Officer, Arvest Bank., et al. to Honorable Randal K. Quarles, Vice Chairman of Supervision, Board of Governors of the Federal Reserve System, et al. (Feb. 26, 2020).

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