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June 4, 2019

Re: *International Swaps & Derivatives Association, Inc.'s Request for Business Review Letter, File No. 60-523999-0010*

Makan Delrahim
Assistant Attorney General
U.S. Department of Justice
Antitrust Division
Main Justice Building
Room 3109
950 Pennsylvania Avenue NW
Washington, DC 20001

Dear Mr. Delrahim:

The International Swaps and Derivatives Association, Inc. ("ISDA") requests a business review letter pursuant to C.F.R. § 50.6 concerning ISDA's plan to amend its standardized documentation to account for the potential discontinuation of LIBOR and other interbank offered rates (collectively referred to as "IBORs").

Executive Summary

ISDA is a trade association whose members include a broad range of derivatives market participants, such as international, regional and specialized banks, corporations, investment managers, government and supranational entities, insurance companies, and other firms. ISDA's work focuses on reducing counterparty credit risk, increasing transparency, and improving the industry's operational infrastructure. One significant component of ISDA's work has been to develop standard contractual documentation that may be voluntarily used by market participants. ISDA's standard documentation provides the standard contractual terms in the global market for interest rate and other derivatives. A significant portion of those interest rate and other derivatives incorporate IBORs into their standard terms and conditions.

In the wake of allegations of potentially fraudulent or improper behavior with respect to the LIBOR-submission process, regulators in and outside of the U.S. urged the market to identify and adopt risk-free or nearly risk-free interest rate benchmarks ("RFRs") as alternatives to LIBOR and other key IBORs to account for the possibility that IBORs may be discontinued. A failure to account for the potential discontinuation of IBORs poses a serious risk of frustrating existing contracts that reference IBORs, and could have rippling, negative effects on the U.S. and global economies. In order to mitigate these risks, and at the request of regulators, ISDA has worked closely with a broad range of industry participants to develop a fallback methodology (i.e., a methodology that prepares for the discontinuation of IBORs) that will cause the least amount of disruption, is the least susceptible to manipulation, and ensures the most commercially reasonable outcome. ISDA's proposed fallback methodology has, to date, garnered incredible consensus among industry participants, reflecting that the proposed fallback methodology will be well and timely received by industry participants.

Because ISDA's members are competitors in certain markets, the Association's work to develop a proposed fallback methodology could be viewed as coordination among competitors. In particular, ISDA has worked with industry participants to develop a methodology that attempts to account for the inherent differences between the IBORs and the relevant RFRs. In short, that methodology attempts to approximate the differences between the IBORs and the relevant RFRs. As described more fully below, the methodology applies a "term adjustment" and "spread adjustment" (representing the "risk premium" in the IBORs) to the relevant RFRs, and ISDA has worked with industry participants to develop the preferred term adjustment and spread adjustment calculations.

For the reasons outlined in this letter, ISDA respectfully submits that this coordination by ISDA and market participants should not be subject to enforcement by the Antitrust Division. ISDA has taken substantial efforts, described in detail below, to ensure that its process was fair, transparent, and objective, and that neither the process nor its resulting methodology was the product of anticompetitive conduct. ISDA believes that its process represents procompetitive efforts to ensure a safer and more efficient marketplace, and therefore believes that no violation of the antitrust laws has occurred by or through ISDA's processes.

Introduction

ISDA respectfully requests that the Antitrust Division issue a statement indicating that it is not presently inclined to bring an enforcement action against ISDA's adoption of certain methodologies to account for differences between the IBORs and the relevant RFR that would apply if an IBOR is permanently discontinued and the impact that these differences would have on contracts referencing that IBOR.[1] In support of this request, this letter provides background on IBORs, the role they play in the derivatives markets, the way IBORs are incorporated into ISDA's standard documentation, and how ISDA's proposed

[1] For purposes of this letter, ISDA is defined to include the Association, its Board, any Board committee, and any Board or Board committee member acting in that capacity.

fallback methodology will center around proposed changes to ISDA's standard documentation. Part I starts by describing the role ISDA plays in the industry, the history and role of IBORs in derivatives, and the nature and use of ISDA's standard documentation in derivatives transactions. Part II then outlines the risks presented by the potential discontinuation of IBORs and the significant negative consequences that the discontinuation of IBORs could have on derivatives transactions. Part III describes the steps ISDA took to evaluate and analyze the possible methods for addressing the discontinuation of IBORs, and the general consensus around how to address that problem. Finally, Part IV outlines the proposed fallback methodology, with a focus on the changes to ISDA's standard documentation and the steps that ISDA will take to effectuate those changes. Because this letter contains commercially sensitive operational details and strategy, the disclosure of which would have a detrimental effect on ISDA and its members, ISDA requests confidential treatment to the fullest extent provided for by 28 C.F.R. § 50.6(10)(c).

I. Factual Background

a. ISDA

ISDA is a trade association that was created in 1985 to make global derivatives markets safer and more efficient. ISDA has over 900 member institutions from 71 countries. Membership is comprised of a broad range of derivatives market participants: international, regional and specialized banks, corporations, investment managers, government and supranational entities, insurance companies, and other firms. Members also include key components of the derivatives market infrastructure, including financial technology firms, trading platforms, exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. ISDA's work focuses on reducing counterparty credit risk, increasing transparency, and improving the industry's operational infrastructure for all market participants.

ISDA has pioneered industry-standardized documentation for derivatives transactions, promoted sound risk management practices and processes, and engaged with policymakers and industry participants to assess and implement regulatory reform. ISDA's first major standardization work was the ISDA Master Agreement, which remains a standard document for derivatives transactions today. Utilization of ISDA's standardized documentation by market participants is entirely voluntary, but ISDA's documentation is widely used as a starting point for bilateral negotiations because it increases efficiency and reduces costs. As a practical matter, even though ISDA's documents remain voluntary, ISDA has typically seen wide-spread adoption of most of ISDA's standardized terms and conditions and, in some cases, these terms and conditions are hardwired in derivatives market infrastructure.

b. Interbank Offered Rates ("IBORs")

Although the IBORs are not all defined the same, they are generally intended to represent the average rate at which certain identified banks (called "panel banks") could borrow money in various currencies in the interbank market on an unsecured basis for a given period of time, known as a "tenor." Tenors can vary from overnight to months. Different administrators produce and publish the different IBORs. For example, LIBOR, also known today as ICE LIBOR, is the most widely used reference rate, and is intended to reflect London interbank lending rates for Eurodollars. Today, LIBOR is administrated by the ICE Benchmark Administration, a subsidiary of the Intercontinental Exchange. LIBOR is currently produced across five currencies and numerous tenors spanning from overnight to twelve months. IBORs are used for many purposes in the global financial system, including as reference rates in financial transactions. In these cases, the IBORs are used to determine the amounts owed to or by the parties to those financial transactions.

The process by which each IBOR is set differs by currency, but generally speaking, each panel bank submits, for each tenor on each day, the rate at which it could expect to borrow funds in that currency in the interbank market. An administrator collects all of the rates submitted by the panel banks, and (after making certain adjustments to cull down the set of submissions) averages all of the rates submitted to produce a single rate for each tenor. Because banks typically fund themselves differently today than they did 30+ years ago, there are far fewer transactions in the interbank markets that LIBOR and other IBORs are intended to represent. Therefore, LIBOR and other IBORs are produced largely based on the rates at which panel banks believe they could borrow in these markets, which in turn is based on a variety of data points and their judgment.

II. ISDA's Standard Documentation and References to IBORs

ISDA's documentation includes several forms of a Master Agreement and various definitional booklets.

- The Master Agreement is a standard contract that can be used to govern over-the-counter ("OTC") derivatives transactions entered into between parties. ISDA publishes the template, which is made available to parties who can choose to bilaterally enter into the Master Agreement to govern their transactions and set out provisions governing their relationship. Transactions across different asset classes and products are often documented using the same Master Agreement.

- The Definitions provide the basic framework for the documentation of the privately-negotiated derivatives transactions. They are intended for use in confirmations of individual transactions governed by ISDA Master Agreements. The 2006 ISDA Definitions specifically address interest rate and currency derivative transactions. The 2006 ISDA Definitions have a mechanism whereby ISDA can publish supplements to update, add or adjust provisions as markets develop.

The 2006 ISDA Definitions contain the "rate options" for the IBORs that serve as the legal definitions of these reference rates in most interest rate derivatives. If LIBOR or another IBOR were to be permanently discontinued, and thus no longer available, then all transactions using the terms in the 2006 ISDA Definitions (and earlier versions of the ISDA Definitions for interest rate and currency derivative transactions) would transition to a fallback mechanism for the calculation of the relevant rate. The current fallback mechanism in ISDA's Definitions is not practical and could lead to widespread market disruption. Specifically, the relevant rate options in ISDA's Definitions currently establish that in the event an IBOR is discontinued, the counterparty that is the "calculation agent" for the transaction must obtain price quotes from major dealers in the relevant market. However, it is unlikely that dealers would be willing and/or able to give such quotes, particularly if the relevant IBOR has been permanently discontinued. Even if quotes were available in the near-term after the discontinuation of the IBOR, it is unlikely that quotes would be available for each future reset date over the remaining tenors of long-dated contracts. (Some derivatives transactions have multi-year terms, and interest rate swaps can last 5, 10, 30 or even more years). And even if dealers provided such quotes, the quotes likely would vary materially across the market and it would be difficult, if not impossible, to obtain such quotes for all of the hundreds of millions notional of derivatives that currently reference IBORs.

If the benchmark rates that are incorporated into these derivatives transactions are unavailable, then potentially catastrophic consequences could ensue. Indeed, these derivatives transactions are often used for hedging purposes, allowing purchasers of interest rate swaps to mitigate against extreme fluctuations in interest rates. If those derivatives transactions become frustrated, then large portions of the economy would be more exposed to market volatility. In all events, the frustration of those contracts could lead to extreme and unintended value transfers between the parties and/or require the bilateral renegotiations of hundreds of trillions of dollars in notional transactions.

In order to mitigate these potentially catastrophic consequences, ISDA has undertaken efforts to make the markets safer and more efficient by seeking a general consensus on how the definitions for various key IBORs should be revised to include specific fallback rates.

III. Uncertain Future for LIBOR

The long history of LIBOR and its reform illustrate that ISDA's work is essential to protecting efficient financial markets. In 2009, the G20 formed the Financial Stability Board ("FSB"), an international body that monitors and makes recommendations about the global financial system. Around that time, allegations emerged that certain panel banks may have engaged in fraudulent or improper behavior with respect to the process of making submissions to the LIBOR administrator, which prompted the FSB and regulators across the globe to investigate the durability and robustness of LIBOR.

In light of this review and given the importance of LIBOR in the global economy,[2] regulators urged the market to identify and adopt risk-free or nearly risk-free interest rate

2 Jerome H. Powell, Federal Reserve Board of Governors, *Reforming U.S. Dollar LIBOR: The Path Forward*, Speech at the Money Marketeers of New York University (Sept. 4, 2014); https://www.federalreserve.gov/newsevents/speech/powell20140904a.htm ("This problem is not just Wall Street's concern; every household with a LIBOR-linked mortgage and every corporation with a LIBOR-linked loan has an interest in more robust U.S. dollar reference rates.").

benchmarks ("RFRs") as alternatives to LIBOR and other key IBORs.[3] In 2013, the FSB established the Official Sector Steering Group ("OSSG"), comprised of senior officials from central banks and regulatory bodies, to focus specifically on interest rate benchmarks and possible alternative rates. In July 2014, the FSB and OSSG recommended that the alternative rates, to the maximum extent possible, be anchored in actual transactions to avoid the need for submissions from market participants based on judgment and to protect against the potential for manipulation.[4] Public-private sector working groups were established in relevant jurisdictions (e.g., the Alternative Reference Rates Committee, or the "ARRC" in the United States) to carry out this work.

Alongside this work, UK's Financial Conduct Authority ("FCA") and other members of the FSB OSSG, including the US Federal Reserve, have been encouraging market participants to transition away from LIBOR.[5] In July 2017, Andrew Bailey (Chief Executive of the FCA) explained that "it is not only potentially unsustainable, but also undesirable, for market participants to rely indefinitely on reference rates [e.g., LIBOR] that do not have active underlying markets to support them."[6] Mr. Bailey announced that panel banks have agreed to sustain LIBOR until the end of 2021 to enable a transition away from the rates that can be planned and executed smoothly.[7]

There are hundreds of trillions of dollars notional in derivatives and other financial products tied to LIBOR through the use of ISDA's Definitions. Therefore, it was logical that the OSSG asked ISDA on July 6, 2016 to lead an initiative to increase derivative contract robustness by developing fallbacks in its Definitions for key IBORs.[8] ISDA understood its implicit assignment: to (1) establish and implement fallback procedures that are sufficiently robust to prevent serious market disruption in the event that an IBOR is permanently discontinued, and (2) ensure that market participants understand these fallback arrangements. On September 7, 2016, ISDA agreed to take on this work, and as illustrated below, ISDA has carried out a process that satisfied the OSSG's objectives.

IV. ISDA's IBOR Reform

a. Risk Free Rates Require Adjustments to Replace IBORs

A threshold matter for ISDA's work was identifying the relevant fallback rates. After discussions with a broad range of industry participants, regulators, and the OSSG,

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3 *Id.* ("[R]egulators need to work with market participants to encourage them to develop and adopt alternative reference rates that better reflect the current structure of U.S. financial markets. . . . Going forward, these alternative rates could replace LIBOR as the reference rate for new interest rate derivatives and some other contracts denominated in U.S. dollars.).

4 Financial Stability Board, Reforming Major Interest Rate Benchmarks (July 22, 2014) http://www.fsb.org/wp-content/uploads/r_140722.pdf.

5 Andrew Bailey, Chief Executive of the FCA, *The Future of LIBOR*, Speech at Bloomberg London, UK (July 27, 2017) https://www.fca.org.uk/news/speeches/the-future-of-libor

6 *Id.*

7 *Id. See also* Andrew Bailey, Chief Executive of the FCA, *FCA statement on LIBOR panels*, Speech (Nov. 24, 2017) https://www.fca.org.uk/news/statements/fca-statement-libor-panels

8 The FSB OSSG also sent letters to ISDA regarding this work on April 18, 2018 and March 12, 2019.

ISDA determined that the RFRs that were identified by relevant public-private sector working groups would be the fallback rates incorporated into ISDA's Definitions for the relevant IBORs. Those RFRs have been selected for most major jurisdictions, and at present include:

Table 1: Public-Private Sector RFR Selections

Jurisdiction	IBOR(s)	Public-Private Sector Working Group	Selected RFR
USA	USD LIBOR	Alternative Reference Rate Committee	SOFR (broad treasuries repo financing rate to be published by NY Fed)
UK	GBP LIBOR	Bank of England Working Group on Sterling Risk-Free Reference Rates	SONIA
Japan	JPY LIBOR TIBOR Euroyen TIBOR	Cross-Industry Committee on Japanese Yen Interest Rate Benchmarks	TONA
Switzerland	CHF LIBOR	National Working Group on Swiss Franc Reference Rates	SARON
Eurozone	EUR LIBOR EURIBOR	Working Group on Euro Risk-Free Rates	€STR
Australia	BBSW	N/A	RBA Cash Rate (AONIA)
Canada	CDOR	Canadian Alternative Reference Rate Working Group	CORRA
Hong Kong	HIBOR	TMA Working Group on Alternative Reference Rates	HONIA

Multiple market participants pointed out, and others agreed, that RFRs technically cannot be substituted directly for IBORs without adjustments. First, IBORs are currently available in multiple tenors, such as one, three, six and twelve months. By contrast, the RFRs are overnight rates. Second, IBORs incorporate a bank credit risk premium and a variety of other factors that RFRs do not capture. Because direct substitution is not possible, ISDA sought to determine how to adjust the RFRs to make them suitable IBOR replacements. To ensure that ISDA understood the potential risks and industry participants' views on how best to account for these two issues—for the differences in "terms" between IBORs and RFRs and the existence of a "risk premium" in IBORs but not in RFRs—ISDA conducted a multi-step, public consultation during the second half of 2018. The results of that consultation form the basis for ISDA's proposed fallback procedures.

b. ISDA's Consultation Generated Market Consensus

To prepare for the consultation, ISDA took steps to ensure that the market survey would be informative and would elicit meaningful feedback from the respondents. When it first undertook the work requested by the FSB OSSG described above, ISDA established four open-membership working groups, organized by currency, to address risks associated with an IBOR discontinuation and draft fallback arrangements. The working groups reported to the ISDA Board Benchmark Committee formed by the ISDA Board of Directors, and included representatives of interest rate swap dealers, interest rate swap end-users, central counterparties, and IBOR benchmark administrators. ISDA also established a separate working group to analyze technical issues that may be necessary when transitioning from an IBOR to an RFR fallback rate. This group included technical experts from the working groups, and was primarily tasked with identifying a range of potential term adjustments and spread adjustment methodologies. The technical group shared their recommendations with the working groups for further consideration, and these recommendations informed the questions and options presented in the consultation. ISDA also engaged and consulted with The Brattle Group on analysis of the implementation items, and tasked The Brattle Group with conducting an independent overview, summary, and analysis of the market responses to the Consultation.

On July 12, 2018, ISDA launched the consultation as a public survey designed to educate the public about the proposed amendments to ISDA's standard documentation and solicit informed recommendations on the term structure and RFR adjustment methodologies. The consultation provided information on alternative options for calculating the term adjusted RFRs (i.e., the RFRs with adjustments for the tenor of the relevant IBOR) and spread adjustments, and asked market participants to rank nine combinations of these options in order of preference and to specify whether their preferences applied universally across the covered IBORs. The consultation also asked market participants about the potential impact of any of the possible combinations on their ability to complete transactions, and prompted them to disclose any concerns if fallbacks were based on different calculations across the covered IBORs. Market participants were asked to comment on the general appropriateness and effectiveness, and potential operational challenges or other barriers to implementation, of the options in the consultation.

ISDA received responses to the consultation from a diverse range of market participants from five continents and 19 countries, reflecting the preferences of 164 entities or respondents.[9] The respondents represent a variety of industry sectors, including banks, asset managers, pension funds, corporate entities, exchanges and clearinghouses, global financial services firms, industry and trade associations and government entities, and thus reflect several different perspectives and businesses.

The results of the consultation confirmed a general market consensus. In almost 90 percent of respondent rankings, the "compounded setting in arrears rate" was selected as the

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9 ISDA received 151 responses from market participants. However, two of these responses consisted of separate sets of answers for different related entities or on behalf of different clienteles, and two responses were exact duplicates of each other, resulting in 152 actual responses by market participants. In addition, two of these responses were from trade associations that explicitly listed the member entities that contributed to the responses. One of these trade associations represented ten member entities and the other represented four member entities. Therefore, collectively, the 152 actual responses came from 164 entities. Of these 164 entities, only responses from 147 were considered when determining fallback option preferences because the other responses were not from named market participants, were incomplete or did not address the IBORs covered by the consultation.

top preference for the term adjusted RFR. The compounded setting in arrears rate consists of the relevant RFR observed over the relevant IBOR tenor and compounded daily during that period. Proponents of this approach highlighted as advantages its compatibility with the overnight index swap ("OIS") market and its ability to reflect the daily interest rate movements during the relevant period. The remaining respondents (but for one) that did not select the compounded setting in arrears rate were not opposed to this approach.

The "historical mean/median approach" to the spread adjustment was selected as the top preference in almost 70 percent of the respondent rankings. The historical mean/median approach is based on the mean or median spread between the relevant IBOR and RFR calculated over a significant, static lookback period (e.g., 5 or 10 years). Proponents of this approach highlighted several advantages, including that: (i) it is robust and simple; (ii) it would reduce the potential for manipulation; and (iii) it is resistant to market distortions. Some respondents expressed concerns with the historical mean/median approach to the spread adjustment, including the potential for a value transfer if the fallbacks are triggered. The concern over value transfer appeared to be the key reason persuading the remaining respondents to select the forward approach to the spread adjustment as their first preference. However, even among the proponents of the forward approach to the spread adjustment, several acknowledged that, relative to the historical mean/median approach to the spread adjustment, there is: (i) more manipulation risk associated with the forward approach; and (ii) concern over uncertainty as to whether there will be sufficient market liquidity in relevant transactions to support the forward approach. In more than half of the respondent rankings in which the forward approach was ranked first, the historical mean/median approach was the next preferred option. As a result, more than 80 percent of respondent rankings included the historical mean/median approach in their top two preferred options.

The consultation that ISDA conducted in 2018 specifically covered GBP LIBOR, CHF LIBOR, JPY LIBOR, TIBOR, Euroyen TIBOR and BBSW. It also asked for preliminary feedback regarding USD LIBOR, EUR LIBOR and EURIBOR and asked respondents to indicate whether their preferences applied to the covered IBORs specifically or to IBORs generally. Approximately 78 percent of respondents found it appropriate to apply the same adjustments to all IBORs.

In order to confirm these results for USD LIBOR, CDOR and HIBOR specifically, ISDA is conducting a supplemental consultation that will close on July 12, 2019.[10] ISDA waited to consult on these IBORs so that market participants would have more information about the RFRs when responding. In the case of USD LIBOR, the fallback RFR, SOFR, was not produced until April 2018, only three months before the 2018 consultation. In the case of CDOR and HIBOR, the relevant public-private sector working groups were still consulting on reforms to the fallback RFRs, CDOR and HIBOR, respectively, in 2018.

[10] At the urging of certain regulators, ISDA also recently launched a consultation seeking input on whether market participants would also like to incorporate a fallback mechanism for the IBORs in the event that the IBORs have been deemed unrepresentative of the market, even though the IBORs continue to be published (i.e., even though the IBORs have not been permanently discontinued). That consultation is also expected to close in July 2019.

ISDA will update the Antitrust Division if the results of the current consultation differ from the results of the 2018 consultation.

The fallback RFR for EUR LIBOR and EURIBOR, which is €STR, will not be produced until October 2019. ISDA expects to confirm the results of the 2018 consultation for EUR LIBOR and EURIBOR sometime at the end of 2019 or in early 2020, after €STR begins trading. As a result, ISDA will implement fallbacks for EUR LIBOR and EURIBOR on a delayed timetable.

c. ISDA's Implementation Plan

As it has done for prior amendments, ISDA intends to publish a "Supplement" in order to amend and restate the relevant rate options in the 2006 ISDA Definitions to include the new fallback rates and adjustment methodology. Specifically, the Amendments will apply to the rate options in Section 7.1 of the Definitions. Upon the effective date of the Supplement, all transactions moving forward that reference the relevant IBORs and incorporate the 2006 ISDA Definitions will include the amended rate option (i.e., the rate option with the fallback). Transactions entered into prior to the effective date of the Supplement (so called "legacy derivatives contracts") will not be covered by the Supplement and will therefore not contain the fallbacks.

ISDA also intends to publish a protocol to assist parties who voluntarily adhere to the amended and restated rate options (i.e., the rate options with the fallbacks) in legacy contracts referencing the relevant IBORs. If market participants choose to adhere to the protocol, then they would agree that their legacy derivatives contracts referencing the relevant IBORs with other adherents will include the amended and restated rate option even though they were entered into prior to the effective date of the Supplement. Such legacy derivatives contracts will therefore include the fallback provisions. Adherence to the protocol will be completely voluntary and will only amend contracts between two adhering parties (i.e., it will not amend contracts between an adhering party and a non-adhering party or between two non-adhering parties). The fallbacks included in legacy derivatives contracts by adherence to the protocol will be exactly the same as the fallbacks included in new transactions that incorporate the 2006 ISDA Definitions after the effective date of the Supplement. ISDA expects that the protocol will open for adherence when the Supplement is finalized, but about three months before the Supplement takes effect. At the end of the three-month period, the amendments made by the protocol will take effect as of the same date that the Supplement takes effect for contracts between two parties that have adhered to the protocol as of that date. If one or more counterparties to a contracts adheres to the protocol after that date, the amendments will take effect as of the date that the last counterparty adheres.

V. ISDA's Proposed Fallback Methodology Will Improve Market Stability and Efficiency

ISDA fallback rates and adjustment methodology are the result of an open, robust, and transparent consultation of market participants undertaken at the behest of international regulators in a process akin to the activities of standard setting organizations. ISDA undertook the effort to publish fallback rates at the express request of regulatory bodies and international government organizations. To develop the consultation, ISDA then utilized open-member working groups to consider the merits and drawbacks of various approaches to the fallback rates in order to ensure that all perspectives were represented. ISDA did not steer the iterative process, but instead helped working groups to collect independent comments from industry members. Through the consultation process, ISDA maintained a list of FAQs, hosted educational webinars to facilitate a transparent process and ultimately shared the detailed results of the consultation publicly on its website. As detailed further below, the proposed methodology is the product of a years-long, diligent process.

a. The Proposed Fallback Methodology Was Developed at the Behest of International Regulators

As an initial matter, ISDA engaged in work to implement more robust fallbacks for key IBORs at the behest of international regulatory bodies in order to have a procompetitive impact on derivative markets. Regulatory bodies and international governmental organizations explicitly requested that ISDA undertake this work in an attempt to stabilize the swaps and derivatives markets.[11] These regulatory bodies and international governmental organizations uniformly recognize the important competitive benefits of ISDA's reform efforts.[12]

b. The Proposed Fallback Methodology Was Developed Through a Robust, Objective, and Transparent Process

First, ISDA's Consultation process was robust. ISDA's proposed term and spread adjustments represent an approach cultivated by the diligent deliberations of market participants, regulators, and other advisors. Under ISDA's leadership, these diverse entities engaged in an open dialogue, weighing the merits of different approaches over several years.

As previously described, ISDA formed four open-membership working groups to consider fallback rates, draft amendments to the ISDA definitions, and devise a plan to amend legacy contracts that reference applicable IBORs. The working groups consisted of dealers, end users, central counterparties, and IBOR benchmark administrators. Each of the four groups focused on separate IBOR rates, although the working groups routinely conducted joint calls with each other. ISDA also created a technical group to address adoption of fallback rates by analyzing different adjustment methodologies. The working groups engaged in a comprehensive process in which participant ideas and concerns were broadly discussed and commonly agreed-upon goals were integrated into the evaluation of a

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[11] Andrew Bailey, Chief Executive of the FCA, *The Future of LIBOR*, Speech at Bloomberg London, UK (July 27, 2017) https://www.fca.org.uk/news/speeches/the-future-of-libor ("Fall back language to support contract continuity or enable conversion of contracts if LIBOR ceases is an essential safety net – a 'seat belt' in case of a crash when LIBOR reaches the end of the road.")

[12] *See Id.* ("For the reasons set out in the FSB's statement, [ISDA's] consultation rightly points to the overnight RFRs identified by the various Working Groups as the foundation for a fall back rate in these contracts. . . . The FSB statement reflects the collective determination of authorities across the globe.").

variety of potential approaches. In total, there were roughly 80 working group meetings attended by 93 unique participants from a broad range of institutions stretching over a ~15 month period. In the process of engaging with the FSB OSSG, ISDA circulated several "draft notes" to the various Working Groups containing the items under consideration for each meeting. These draft notes were made available to all market participants who were ISDA members, including end-users, before they were submitted to the FSB OSSG.

ISDA also engaged directly with various trade associations, including the Loan Market Association, the Association for Financial Markets in Europe, the International Capital Market Association, and the Loan Syndications and Trading Association, to obtain their perspectives as to the items under consideration. This ensured that the process included and addressed the perspectives of additional market participants. ISDA also routinely consulted with outside, independent advisors about its process, including legal counsel, The Brattle Group (economic consults), and Martin Baxter, an expert in algorithms, models and data.

Second, ISDA's process was objective. ISDA broadly engaged market participants in an extensive, iterative process to evaluate the hierarchy of fallback options. The iterative process made progressive use of inputs and comments from the meeting participants, the FSB OSSG, various regulators, trade associations, and end users, with ISDA representatives serving as a conduit amongst the Working Groups and facilitating information flows and information collection between group/subgroup meetings. ISDA did not drive the results in any particular direction, nor did it appear to ISDA that any members were trying to steer the process in any one direction. Rather, ISDA and the working groups suggested criteria to assist individual market participants in responding to the consultation based on their own independent judgment. ISDA's independent advisors have consistently reviewed, validated and tested ISDA's process through regular updates, frequent review of materials, and occasional participation in working group meetings.

Third, ISDA's process was transparent. After launching the consultation, ISDA published a consultation overview, maintained a list of FAQs on its website, and hosted two educational webinars. After publishing preliminary results on November 27, 2018,[13] ISDA shared the detailed results of the consultation publicly on December 20, 2018,[14] and plans to publish the developed approach for review and comment prior to implementation. ISDA is undertaking the same steps with respect to the current supplemental consultation for USD LIBOR, CDOR and HIBOR (and certain aspects of fallbacks for derivatives referencing SOR). ISDA has also been transparent with key regulators and government agencies. ISDA has discussed the fallbacks it will implement with numerous regulatory agencies since 2016 and has consistently provided substantive updates and materials to the FSB OSSG. During this process, ISDA has consistently updated government agencies (including the DOJ and

[13] *ISDA Publishes Preliminary Results of Benchmark Consultation*, (Nov. 27, 2018), https://www.isda.org/2018/11/27/isda-publishes-preliminary-results-of-benchmark-consultation/

[14] *Anonymized Narrative Summary of Responses to the ISDA Consultation on Term Fixings and Spread Adjustment Methodologies*, (Dec. 20, 2018), https://www.isda.org/2018/12/20/isda-publishes-final-results-of-benchmark-fallback-consultation/

European Commission) of key milestones, and has attempted to preempt any potential concerns.

c. The Proposed Fallback Methodology is Implemented Contractually

ISDA's methodology will not be binding on market participants with legacy derivatives contracts referencing the relevant IBORs. There will always remain optionality with respect to how individual counter-parties choose to amend their contracts, and ISDA cannot and will not be in a position to ensure that all market participants use the fallbacks in the ISDA Definitions as a starting point for those discussions. ISDA is merely offering a fallback methodology – not a fixed price. Nevertheless, ISDA's expectation is that there will be significant adoption of the fallback methodology.

VI. Conclusion

For the foregoing reasons, ISDA respectfully requests that the Antitrust Division issue a statement that it does not presently intend to bring any enforcement action against ISDA's proposed business activities with respect to implementation of fallbacks for IBORs. We would be pleased to answer any questions or provide any additional information that may assist in your assessment of this request. Given the uncertainty regarding the timing of when IBORs may be permanently discontinued, ISDA respectfully requests that the Division provide as expeditious a response to this request for a business review letter as possible. ISDA and the FSB OSSG have discussed a strong desire to finalize the fallbacks by the end of 2019.

We also attach for your review and consideration the *Anonymized Narrative Summary of Responses to the ISDA Consultation on Term Fixings and Spread Adjustment Methodologies* report by The Brattle Group, dated December 20, 2018.

Thank you for your consideration.

Respectfully submitted,

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