Mr. Christian Sabella
Acting Director
Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

April 30, 2021

Re: Treatment of Security-Based Swaps Amended or Otherwise Transitioned from IBORs to Alternative Risk Free Rates under the Exchange Act

Dear Mr. Sabella,

The Alternative Reference Rates Committee (**ARRC**) and its member firms are writing to request no-action relief, interpretive guidance or a rulemaking, as appropriate, regarding the treatment under the Securities Act of 1933 (**Securities Act**), the Securities Exchange Act of 1934 (**Exchange Act**) and the regulations of the U.S. Securities and Exchange Commission (**Commission**) of security-based swaps that are amended or that are otherwise transitioned to reference risk-free rates (**RFRs**) in connection with the upcoming discontinuation of the London Interbank Offered Rate (**LIBOR**) and other interbank offered rates (**IBORs**).

I. Introduction

In response to concerns regarding the reliability and robustness of LIBOR and other IBORs, the Financial Stability Board and the U.S. Financial Stability Oversight Council called for the identification of risk free alternatives to LIBOR and transition plans to support the implementation of these alternatives. Recognizing that the "weaknesses of . . . [LIBOR] may undermine market integrity and the uncertainty surrounding its sustainability could threaten U.S. financial institutions and the U.S. financial system more broadly," the goal of these government-led efforts is "to achieve a smooth transition away from LIBOR."[1]

Central banks in various jurisdictions have convened working groups of market participants and official sector representatives in furtherance of this goal. In 2014, the Federal Reserve Bank of New York convened the ARRC to identify best practices for U.S. alternative reference rates and contract robustness, develop an adoption plan and create an implementation plan with metrics of success and a timeline. In July 2017, the U.K. Financial Conduct Authority (**FCA**), which regulates ICE Benchmark Administration, the administrator of ICE LIBOR, announced that it has sought commitments from LIBOR panel banks to continue to contribute to LIBOR through the end of 2021, but that the FCA will not compel or persuade contributions beyond that date. However, in December 2020, the ICE Benchmark Administration published a consultation regarding its intention to cease publication of the major

[1] Financial Stability Oversight Council, 2018 Annual Report at 4 (revised June 20, 2019), *available at* https://home.treasury.gov/system/files/261/FSOC2018AnnualReport.pdf.

USD LIBOR tenors in mid-2023, rather than by the end of 2021.[2] In either case, market participants must plan to transition away from LIBOR and other IBORs in advance of their cessation to avoid any market disruptions.

The ARRC has been working with regulators, other industry groups, and market participants to facilitate a coordinated, orderly and smooth transition of markets away from LIBOR well in advance of LIBOR being fully discontinued. In June 2017, the ARRC identified a broad Treasuries repo financing rate, the Secured Overnight Financing Rate (**SOFR**), as the preferred alternative to U.S. Dollar LIBOR for new U.S. Dollar derivatives, including security-based swaps, and other financial contracts. It also published an updated "Paced Transition Plan" outlining target dates for achievement of certain milestones related to progressively building the liquidity required to support the issuance of, and transition to, contracts referencing SOFR.

As part of this transition, market participants will need to amend existing security-based swaps, which frequently reference IBORs. For example, credit default swaps and equity swaps typically have floating or funding legs that reference an IBOR. In addition, risk participation swaps incorporate other transactions, which may include interest rate swaps that reference an IBOR. Credit support annexes used in connection with collateralized security-based swaps may also reference rates, including non-IBOR rates, that will need to be replaced in connection with the IBOR transition.[3]

The Commission's security-based swap regime will generally come into effect at the same time that market participants transition their financial contracts away from IBORs. Specifically, the compliance date for many security-based swap requirements will occur on October 6, 2021 (the **Registration Compliance Date**), and the compliance date for certain requirements will occur earlier, as discussed further below. A security-based swap entered into before the compliance date of a particular requirement (a **Legacy SBS**) will generally not be subject to that requirement.[4] However, a Legacy SBS may become subject to such a requirement if it is amended after that date; the Commission has stated that "if the material terms of a security-based swap are amended or modified during its life based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula, the amended or modified security-based swap is viewed as a new security-based swap."[5] Given that

[2] ICE Benchmark Association, ICE LIBOR Consultation on Potential Cessation (Dec. 2020), *available at* https://www.theice.com/publicdocs/ICE_LIBOR_Consultation_on_Potential_Cessation.pdf.

[3] For example, to avoid basis risk, a market participant may choose to align the discount rate used in a CSA, such as daily effective federal funds rate, with the discount rate used by a clearing organization, such as SOFR.

[4] *See, e.g.*, 17 C.F.R. § 15Fi-5(a)(1)(i) (security-based swap trading relationship documentation); 17 C.F.R. § 240.18a-3(c)(1)(iii)(D), 17 C.F.R. § 240.18a-3(c)(2)(iii)(B) (non-cleared security-based swap margin requirements); Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 81 Fed. Reg. 29,959, 29,969 (May 13, 2016) ("To address concerns raised by commenters, the Commission is clarifying that the business conduct rules generally will not apply to any security-based swap entered into prior to the compliance date of the rules.").

[5] *See, e.g.*, Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,207, 48,286

the rate referenced in a security-based swap is likely a material term, a large number of Legacy SBS would unnecessarily become subject to security-based swap requirements once they are transitioned to alternative rates. In addition, in some cases, it may not be clear whether or not an amendment to a Legacy Swap in connection with the transition to alternative RFRs would trigger application of particular security-based swap requirements. For example, the ARRC believes that amendments replacing the interest rate referenced in a credit support annex generally would not result in application of security-based swap requirements, although there may be some uncertainty in this regard. The ARRC is therefore seeking relief from (or interpretive guidance or a rulemaking, as appropriate, with respect to) certain security-based swap requirements to provide regulatory certainty with respect to such amendments and to facilitate a smooth and orderly transition away from LIBOR and other IBORs, as further described below.[6]

Relief with respect to these requirements would also ensure consistent regulatory treatment. The Commodity Futures Trading Commission (**CFTC**) has issued no-action relief from a number of its swap regulatory requirements for swaps that are amended in connection with the IBOR transition.[7] Similarly, the U.S. banking regulators have adopted amendments to their uncleared swap and security-based swap margin rules providing that legacy transactions will retain their legacy status in the event that they are amended to replace an IBOR or other discontinued rate.[8]

The ARRC recognizes that the likely extension of certain LIBOR tenors to mid-2023 will provide additional time for legacy contracts referencing such rates to mature; however, the ARRC believes that relief is still necessary as it expects that many market participants will seek to transition their LIBOR contracts prior to cessation of the relevant rate and because the extension will likely not apply to all IBORs. In addition, the ARRC requests that Commission staff take into account the possibility of this extension in providing any relief, such as by not including any time limitation.

II. Flexibility for Different Transition Mechanisms and Models

(Aug. 13, 2012); Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 81 Fed. Reg. 29,959, 29,969-70 (May 13, 2016); Trade Acknowledgment and Verification of Security-Based Swap Transactions, 81 Fed. Reg. 39,807, 39,819 n.146 (June 17, 2016).

[6] Given the fluid nature of the transition process, the ARRC notes that it may request additional guidance or relief as new considerations or issues are identified. In addition, the ARRC respectfully requests that the Commission staff consider issues relating to the IBOR transition as it implements or amends security-based swap requirements.

[7] *See* CFTC Letter 20-23 (Aug. 31, 2020), available at https://www.cftc.gov/csl/20-23/download; CFTC Letter 20-24 (Aug. 31, 2020), available at https://www.cftc.gov/csl/20-24/download; CFTC Letter 20-25 (Aug. 31, 2020), available at https://www.cftc.gov/csl/20-25/download.

[8] *See* Margin and Capital Requirements for Covered Swap Entities, 85 Fed. Reg. 39,754 (July 1, 2020).

Market participants expect that transitions from LIBOR and other IBORs will take different forms and may need to employ different mechanisms, depending on the needs of counterparties, the nature of the particular security-based swap or security-based swap portfolio being transitioned, and the liquidity and availability of products referencing new RFRs.

As one way to effectuate this transition, the International Swaps and Derivatives Association, Inc. (**ISDA**) has developed new "fallback" provisions, which will be included in the 2006 ISDA Definitions.[9] These fallbacks provide that upon a cessation of an IBOR, the IBOR will be replaced with a new RFR, and are thus designed to ensure that contracts that reference an IBOR will continue to function following an IBOR cessation. The fallback provisions will automatically apply to new IBOR trades entered into after January 25, 2021, the effective date of the amended 2006 ISDA Definitions. ISDA has also published a multilateral protocol, the "ISDA 2020 IBOR Fallbacks Protocol" (the **ISDA Protocol**), which will allow market participants to include the fallbacks in IBOR-linked contracts that were entered into prior to the date on which both counterparties adhere.[10] The ARRC anticipates that while many market participants will adhere to the ISDA Protocol to amend existing contracts, some market participants may instead choose to incorporate fallback provisions into their existing contracts by entering into bilateral amendments. Amendments to a security-based swap to incorporate fallback provisions, whether made through the ISDA Protocol or bilaterally, are referred to herein as **Fallback Amendments**.

As an alternative to Fallback Amendments, market participants may also affirmatively replace IBORs referenced in their security-based swaps with alternative RFRs in advance of the cessation of LIBOR and other IBORs (**Replacement Rate Amendments**). Replacement Rate Amendments are expected to be accomplished in several different ways to address the needs of various security-based swap counterparties. For example, some counterparties that have concerns about the tax or accounting implications of amending existing trades may effect a Replacement Rate Amendment by execution of new contracts in replacement of and immediately upon termination of existing contracts (i.e., tear-ups). Alternatively, some counterparties will need to convert their entire portfolio of IBOR-linked trades. Depending on the size of the portfolio, parties may need to undertake various bilateral or multilateral portfolio compression exercises to reduce the risk, cost and inefficiencies of maintaining unnecessary transactions on their books.

Fallback Amendments and Replacement Rate Amendments may also require various follow-on amendments to maintain the economics of a security-based swap, such as spread adjustments resulting from the move from a term rate to an overnight rate, from unsecured to secured, or from a change in tenor, among other things. In addition, counterparties may need to make other ancillary changes to existing trade terms to account for different market conventions for the alternative rate as compared to the IBOR that is being replaced (e.g., different reset dates, fixed/floating leg payment dates, business day conventions and day count fractions). As a result, the ARRC requests that the relief requested below for Fallback

[9] *See* ISDA Launches IBOR Fallbacks Supplement and Protocol (Oct. 23, 2020), *available at* https://www.isda.org/2020/10/23/isda-launches-ibor-fallbacks-supplement-and-protocol/.

[10] *Id.*

Amendments and Replacement Rate Amendments also apply to any associated follow-on or ancillary amendments.

This letter refers to Fallback Amendments and Replacement Rate Amendments, together with any associated follow-on or ancillary amendments, that market participants may employ to transition security-based swaps and security-based swap portfolios from IBORs as **IBOR Transition Mechanisms**.[11] The ARRC requests that, in providing no-action or other relief in connection with IBOR transition efforts, the Commission staff do so in a manner that allows for flexibility in IBOR Transition Mechanisms. This flexibility will be necessary to accommodate different conversion models that the ARRC expects will be developed as market participants assess their particular security-based swap portfolios and the tax, accounting, and other consequences of an early transition from an IBOR.

For similar reasons, the ARRC also requests that any no-action or other relief provide flexibility in terms of the rates that may be replaced and the rates that may be incorporated pursuant to IBOR Transition Mechanisms. Given the various rates that may be referenced in existing security-based swaps and in security-based swaps created or amended by an IBOR Transition Mechanism, such flexibility would help to avoid gaps in any relief. For example, market participants may replace various IBORs, other rates that are expected to be discontinued or impaired, as well as rates that may not be discontinued or impaired but that may still be replaced in connection with the transition to RFRs.

III. Requests for Relief

On behalf of its member firms, the ARRC requests no-action relief from, and, in some cases, interpretive guidance or a rulemaking with respect to, the Securities Act and the Exchange Act provisions and Commission regulations discussed below to facilitate a smooth and orderly transition away from IBORs to RFRs. The requests relate to those security-based swaps modified or created by IBOR Transition Mechanisms, which are made for the purposes of effectuating the transition from an IBOR to the new RFRs.

A. Security-Based Swap Dealer Registration Counting

i. Discussion

Market participants are not required to register as security-based swap dealers (**SBSDs**) unless their security-based swap dealing activities exceed certain enumerated thresholds. Market participants must assess whether their security-based swap activities exceed these

[11] Although IBOR Transition Mechanisms would be effected for purposes of transitioning from IBORs to alternative RFRs, and not as a substitute for engaging in new transactions, there may be situations where an IBOR Transition Mechanism results in an increase in notional amount or extension of maturity for a security-based swap or a portfolio of security-based swaps. This could occur, for example, as a result of different market conventions for an IBOR and its replacement, such as the examples described above.

thresholds starting on August 6, 2021 (the **Counting Date**).[12] Security-based swap positions entered into before the Counting Date do not count toward the SBSD registration thresholds.[13]

Market participants whose security-based swap activities are currently below the SBSD registration thresholds may be reluctant to transition from IBORs if they must count security-based swaps modified or created by IBOR Transition Mechanisms towards the thresholds. Registering as an SBSD will subject an entity to a comprehensive regulatory framework, including capital requirements, margin requirements for uncleared security-based swaps, business conduct rules, and reporting and recordkeeping requirements, among others. These registration and compliance costs will likely be prohibitive for smaller firms for whom security-based swap services are provided largely as an incidental service to commercial clients. In addition, the use of IBOR Transition Mechanisms is meant to continue existing transactions, rather than engage in new economic activity or serve as a signal of future economic activity. Therefore, the ARRC believes that security-based swaps resulting from or amended by IBOR Transition Mechanisms should not be counted towards the SBSD registration thresholds.

ii. Request for Relief

The ARRC requests that Commission staff grant no-action relief providing that a person does not need to count a security-based swap towards its SBSD registration thresholds to the extent that such security-based swap would need to be counted solely as a result of an IBOR Transition Mechanism.

B. Eligible Contract Participant Status

i. Discussion

The Exchange Act makes it unlawful to effect a transaction in a security-based swap with a person that is not an eligible contract participant (**ECP**), unless such transaction is effected on a national securities exchange.[14] In addition, the Securities Act makes it unlawful for a person to buy, sell, or offer to buy or sell, a security-based swap to a person that is not an ECP unless a registration statement under the Securities Act is in effect with respect to that security-based swap.[15] The Exchange Act also carves out security-based swaps from the definition of "dealer," provided that the security-based swaps are with ECPs.[16]

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[12] *See* Key Dates for Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants (modified Feb. 13, 2020), available at https://www.sec.gov/page/key-dates-registration-security-based-swap-dealers-and-major-security-based-swap-participants.

[13] *See id* ("Only security-based swap positions connected with dealing activity engaged in on or after August 6, 2021, will count toward determining a person's status as a security-based swap dealer.").

[14] *See* 15 U.S.C. § 78f(l).

[15] *See* 15 U.S.C. § 77e(e).

[16] *See* 15 U.S.C. § 78c(a)(5).

If a market participant has a security-based swap with a counterparty that no longer qualifies as an ECP (either because the counterparty ceased being an ECP or the security-based swap was entered into before the ECP requirements in the Dodd-Frank Act), the market participant may not be lawfully able to transition the security-based swap if the transition is viewed to give rise to a new security-based swap, as we understand that there are no national securities exchanges that currently facilitate trading in security-based swaps. In addition, the market participant may not be able to lawfully terminate (or even offer to terminate) the security-based swap given that the termination may be viewed as a sale of the security-based swap. As a result, the counterparties may be stuck, unable to transition and unable to terminate, and thus may be required to continue to hold to maturity a security-based swap that references a rate that ceases to exist. The ARRC therefore believes that relief is warranted for the limited purpose of allowing market participants to transition their security-based swaps away from IBORs.

The ARRC understands that the ECP provisions in the federal securities laws provide important protections to market participants. In particular, these provisions help ensure that counterparties to security-based swaps are sufficiently sophisticated and have sufficient financial resources to assess and bear the risks associated with such instruments. However, the ARRC believes that the limited relief requested here would not be contrary to this policy goal, in that the relief is requested solely to ensure that pre-existing security-based swaps can continue to function, rather than to allow market participants to engage in new economic activity with non-ECPs.

ii. Request for Relief

The ARRC requests that the Commission adopt rules, or that Commission staff grant no-action relief, providing that a person would be permitted to modify or enter into a security-based swap pursuant to an IBOR Transition Mechanism, regardless of whether or not its counterparty is an ECP.

C. Margin Requirements for Uncleared Security-Based Swaps

i. Discussion

Exchange Act Rule 18a-3 generally requires SBS Entities for which there is no prudential regulator to exchange variation margin with and, in the case of SBSDs, collect initial margin from, counterparties to non-cleared security-based swaps, subject to limited exceptions.[17] There is an exception from these requirements for legacy accounts;[18] however, given that the Commission has taken the position that an amendment to a material term of a security-based swap based on the exercise of discretion would result in a new security-based swap, it is possible that a Fallback Amendment or a Replacement Rate Amendment would trigger application of Exchange Act Rule 18a-3 to such security-based swaps, which appears contrary to the intent to provide an exception for legacy accounts.

[17] 17 C.F.R. § 240.18a-3.

[18] 17 C.F.R. § 240.18a-3(c)(1)(iii)(D); 17 C.F.R. § 240.18a-3(c)(2)(iii)(B).

The ARRC believes relief from the SEC's margin requirements for Legacy SBS amended pursuant to a Fallback Amendment or Replacement Rate Amendment is necessary to avoid disincentivizing market participants from engaging in IBOR transitions.

ii. Request for Relief

The ARRC requests no-action relief from Exchange Act Rule 18a-3 for Legacy SBS to the extent compliance would be required as a result of an IBOR Transition Mechanism.

D. Trade Acknowledgment and Verification

i. Discussion

Exchange Act Rule 15Fi-2 generally requires SBSDs and major security-based swap participants (**MSBSPs** and, together with SBSDs, **SBS Entities**) to provide their counterparties with a trade acknowledgement following the purchase or sale of a security-based swap.[19] This acknowledgment must be provided promptly, but in any event by the end of the first business day following the day of execution.[20] In addition, SBS Entities must promptly verify any trade acknowledgments they receive and must establish, maintain, and enforce written policies and procedures that are reasonably designed to obtain prompt verification of the terms of a trade acknowledgment provided to a counterparty.[21]

In the adopting release for this rule, the Commission clarified that an amendment to the material terms of an security-based swap based on the exercise of discretion would result in the purchase and sale of a new security-based swap and trigger application of the trade acknowledgment and verification requirements.[22] It is unclear if an IBOR Transition Mechanism would necessarily constitute an amendment to a material term of a security-based swap for these purposes. However, in the event that these types of amendments would be considered material amendments, the ARRC believes that SBS Entities would face significant operational challenges in complying with the acknowledgment and verification requirements of Exchange Act Rule 15Fi-2.

As noted above, the ARRC expects that many Fallback Amendments will be effected through the ISDA Protocol. Under the terms of the ISDA Protocol, a Fallback Amendment will be effective once both counterparties to a security-based swap have adhered. A market participant that adheres to the ISDA Protocol may not necessarily know or be notified when its

[19] 17 C.F.R. § 240.15Fi-2.

[20] 17 C.F.R. § 240.15Fi-2(b).

[21] 17 C.F.R. § 240.15Fi-2(d).

[22] *See* Trade Acknowledgment and Verification of Security-Based Swap Transactions, 81 Fed. Reg. 39,807, 39,819 n.146 (June 17, 2016) ("The Commission has previously noted that if the material terms of an SBS are amended or modified during its life based on an exercise of discretion and not through predetermined criteria or a predetermined self-executing formula, the Commission views the amended or modified SBS as a new SBS…The Commission considers such amendments or modifications to an SBS based on the exercise of discretion to result in the purchase and sale of a new SBS.")

counterparties also adhere, and counterparties may adhere at different times. As a result, SBS Entities may not know when a Fallback Amendment technically occurs and therefore would be unable to provide an acknowledgment in accordance with the timing requirements of Exchange Act Rule 15Fi-2.

Compliance with this rule could also be challenging for bilateral IBOR Transition Mechanisms that amend multiple security-based swaps simultaneously. For example, market participants may enter into bilateral agreements that incorporate fallback provisions or replace reference rates with respect to all security-based swaps with a particular counterparty or with respect to particular portfolios of security-based swaps. In such cases, it may be burdensome for SBS Entities to provide acknowledgments for each security-based swap that is amended by the agreement.

ii. Request for Relief

The ARRC requests that Commission staff provide no-action relief providing that SBS Entities would not be required to comply with Exchange Act Rule 15Fi-2 to the extent that a security-based swap is amended pursuant to an IBOR Transition Mechanism that is effected through a multilateral protocol or a bilateral agreement that amends multiple security-based swaps.

E. Trading Relationship Documentation

i. Discussion

Exchange Act Rule 15Fi-5 requires SBS Entities to establish, maintain, and follow written policies and procedures reasonably designed to ensure that the SBS Entity executes written security-based swap trading relationship documentation with its counterparty that complies with the requirements of this rule.[23] Exchange Act Rule 15Fi-5(a)(1)(i) provides that this documentation requirement does not apply to security-based swaps executed prior to the date on which the SBS Entity must comply with this rule (i.e., before the SBS Entity becomes registered as such).[24] However, given that the Commission has taken the view that an amendment to a material term of a security-based swap based on the exercise of discretion would result in a new security-based swap, Legacy SBS that are amended pursuant to an IBOR Transition Mechanism could become subject to this requirement. As a result, market participants may be disincentivized to transition their Legacy SBS away from LIBOR and other IBORs.

In addition, this requirement would be operationally challenging, particularly with respect to Legacy SBS amended pursuant to the ISDA Protocol. As discussed above, under the terms of the ISDA Protocol, a Fallback Amendment is effective once both counterparties to a security-based swap have adhered to the ISDA Protocol. This amendment will therefore occur without extensive, bilateral negotiation that is expected with respect to security-based swaps generally. As a result, it may not be possible for SBS Entities to ensure that their counterparties

[23] 17 C.F.R. § 240.15Fi-5.

[24] 17 C.F.R. § 240.15Fi-5(a)(1)(i).

to Legacy SBS enter into the required security-based swap trading relationship documentation prior to their adherence to the ISDA Protocol.

ii. Request for Relief

The ARRC requests that Commission staff provide no-action relief providing that SBS Entities would not be required to comply with Exchange Act Rule 15Fi-5 to the extent that compliance with this rule would be required as a result of an IBOR Transition Mechanism.

F. Portfolio Reconciliation Requirements

i. Discussion

Exchange Act Rule 15Fi-3 requires SBS Entities to resolve discrepancies in material terms of their security-based swaps with other SBS Entities "immediately" and establish policies and procedures to resolve discrepancies with other counterparties in a timely fashion.[25]

Market participants may, in some cases, book Fallback Amendments or Replacement Rate Amendments for their security-based swaps or portfolios of security-based swaps differently and at different times, creating the potential for discrepancies across counterparties' books that will appear in the reconciliation processes. Given the potential volume of these discrepancies, the ARRC believes that SBS Entities may be unable to resolve the discrepancies in accordance with the timing requirements of Rule 15Fi-3. The ARRC believes that requiring SBS Entities to comply with the timing requirements of Rule 15Fi-3 could discourage or disrupt efforts by SBS Entities and their counterparties to transition voluntarily and early from LIBOR and other IBORs.

ii. Request for Relief

The ARRC requests that Commission staff provide no-action relief from the discrepancy resolution timing requirements of Exchange Act Rule 15Fi-3 to the extent such compliance would be required as a result of an IBOR Transition Mechanism.

G. Business Conduct Requirements

i. Discussion

Exchange Act Rules 15Fh-1 through 15Fh-6 (**Business Conduct Standards**) generally require SBS Entities to verify various characteristics of a counterparty relating to its eligibility to enter into a security-based swap (e.g., whether the counterparty is an ECP), collect "know your counterparty" information, provide certain pre-trade disclosures, make determinations or

[25] 17 C.F.R. § 240.15Fi-3(a)(4).

obtain representations regarding suitability and address a number of considerations when interacting with special entities,[26] among other things.

Although the Business Conduct Standards generally do not apply to Legacy SBS, the Commission clarified in the adopting release for the Business Conduct Standards that an amendment to a material term of a security-based swap based on the exercise of discretion would result in a new security-based swap for purposes of the Business Conduct Standards.[27] As a result, a Fallback Amendment or Replacement Rate Amendment could trigger application of the Business Conduct Standards for a Legacy SBS, as well as for a security-based swap entered into after the Business Conduct Standards compliance date but before the cessation of the applicable IBOR or other rate.

The ARRC believes that relief from the Business Conduct Standards is warranted to the extent that compliance with these requirements would be required as a result of an IBOR Transition Mechanism. In particular, the customer protection goals of the Business Conduct Standards are less relevant in this context, since IBOR Transition Mechanisms will not involve a new customer and are not intended as a substitute for entering into a new security-based swap.

In addition, the performance or re-performance, in the case of a security-based swap entered into after the Business Conduct Standards compliance date, of certain obligations under the Business Conduct Standards could result in terminations of security-based swaps with counterparties that cannot make the necessary representations due to a change in circumstances. For example, a counterparty may not be able to provide the representation an SBSD needs to rely on the safe harbor from the suitability requirement.

The performance or re-performance of the business conduct requirements also would require significant time and cost on behalf of SBS Entities and would further slow an early and orderly LIBOR transition.

ii. Request for Relief

The ARRC requests relief from the Business Conduct Standards to the extent compliance would be required as a result of an IBOR Transition Mechanism.

H. Security-Based Swap Reporting

i. Discussion

[26] Special entities generally include federal, state or municipal agencies, other instrumentalities or subdivisions of a state, certain employee benefit plans and governmental plans as defined in the Employee Retirement Income Security Act of 1974, and endowments. *See* 17 C.F.R. § 240.15Fh-2(d).

[27] Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 81 Fed. Reg. 29,959, 29,969 (May 13, 2016).

Regulation SBSR requires market participants to report security-based swaps to a registered security-based swap data repository.[28] However, given that market participants have invested in systems and developed policies and procedures to comply with the CFTC's swap reporting rules, the Commission has provided temporary no-action relief that generally aligns the Commission's security-based swap reporting requirements with the CFTC's swap reporting rules in force at the time of the transaction.[29] For example, this relief generally provides that a person with a duty to report a security-based swap would not need to do so if a different person (or no person) would have a duty to report a comparable swap, a person does not need to report certain specified data elements if the CFTC's reporting rules would not require such data elements to be provided, and a person does not need to report a life cycle event in a manner consistent with Regulation SBSR if such person acts in a manner consistent with the CFTC's reporting rules.[30]

The ARRC believes that market participants may face operational challenges in reporting swaps and security-based swaps in connection with the IBOR transition efforts. This is due in part because such transitions may be concentrated around particular times. For example, a significant portion of the market will transition simultaneously by means of effectuation of a trigger event under a Fallback Amendment (e.g., the discontinuation of LIBOR). Replacement Rate Amendments may also be concentrated when market conditions are considered most favorable. The ARRC understands that the reporting systems of some market participants may not have the capacity to handle such a large volume of reportable events, at least within the timeframes for reporting life cycle events under CFTC rules.[31]

The ARRC believes that reporting of Fallback Amendments and Replacement Rate Amendments would not only be operationally challenging, but could result in harm to market participants who seek an early and orderly transition from LIBOR and other IBORs. Specifically, public dissemination of transition-related data could create an artificial and inaccurate impression of market activity. For example, trigger events associated with Fallback Amendments do not provide new price discovery information, and if reported, would result in noisy data that could be misleading to the market. In addition, because market participants may convert large portfolios of derivatives contracts in a short time-frame, public dissemination of transactions associated with the transition presents a risk that transitioning parties, by virtue of the volume of transactions, could be identified or front-run.

The ARRC expects to request no-action relief from the CFTC to alleviate these concerns. It is not clear if the existing Commission no-action relief with respect to Regulation SBSR would

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[28] 17 C.F.R. §§ 242.900–242.909.

[29] Cross-Border Application of Certain Security-Based Swap Requirements, 85 Fed. Reg. 6,270 (Feb. 4, 2020). This relief will remain in effect until the earlier of: (i) four years following Regulation SBSR's "Compliance Date 1" in a particular security-based swap asset class, or (ii) 12 months after the Commission provides notice that the relief will expire. *Id.* at 6,349.

[30] *Id.* at 6,347.

[31] Depending on the size and technological capabilities of the institution, some firms may need to apply certain amendments manually while others may be technologically capable of applying a bulk overlay.

take into account any no-action relief or interpretive guidance provided by CFTC staff. However, the ARRC believes that regulatory certainty in this regard is required to ensure a smooth and orderly transition from LIBOR and other IBORs.

ii. Request for Relief

The ARRC requests that Commission staff provide interpretive guidance confirming that its existing no-action relief with respect to Regulation SBSR would take into account any no-action relief or interpretive guidance provided by CFTC staff with respect to the CFTC's swap reporting rules.

I. Beneficial Ownership Reporting

i. Discussion

Exchange Act Sections 13 and 16[32] and the Commission rules adopted thereunder generally require market participants to file certain information with the Commission when their beneficial ownership in the equity securities of public companies exceeds certain thresholds. This information must be filed on various Commission forms, such as Schedules 13D and 13G and Forms 3, 4 and 5 (collectively, "**Beneficial Ownership Forms**").

Beneficial ownership for purposes of Exchange Acts Sections 13 and 16 may arise not only as a result of purchases of the relevant equity securities, but also through entry into security-based swaps referencing such securities.[33] In particular this could occur where the security-based swap confers voting and/or investment power or where the security-based swap grants a right to acquire an equity security, among other situations.[34] In addition, even if a security-based swap does not constitute beneficial ownership for these purposes, it may need to be described in or filed with a Beneficial Ownership Form if it relates to the relevant securities.[35]

After a person exceeds the relevant beneficial ownership thresholds, such person also becomes subject to certain ongoing reporting requirements. For example, Exchange Act Rule 13d-2 generally requires market participants to promptly file an amendment to Schedule 13D whenever there is a material change in the facts set forth in that schedule.[36] In addition,

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[32] 15 U.S.C. § 78m; 15 U.S.C. § 78p.

[33] *See* 15 U.S.C. § 78m(d)(1) (providing that beneficial ownership reporting may be required by a person that "otherwise becomes or is deemed to become a beneficial owner of [certain equity securities] upon the purchase or sale of a security-based swap that the Commission may define by rule."); Beneficial Ownership Reporting Requirements and Security-Based Swaps, 76 Fed. Reg. 34,579 (June 14, 2011).

[34] *Id.* at 34,582.

[35] For example, Item 6 generally requires a description of any contracts with respect to any securities of the relevant issuer. Item 7 of Schedule 13D also requires certain written agreements to be filed as exhibits, including among other things, written agreements relating to the transfer or voting of the relevant securities.

[36] 15 U.S.C. § 78m(d)(2); 17 C.F.R. § 240.13d-2.

Exchange Act Rule 16a-3 generally requires more than ten percent beneficial owners of any class of equity security registered under Exchange Act Section 12 and each officer and director (collectively "insiders") of the issuer of such a security ("issuer") to file statements on Form 4 for transactions that result in a change in beneficial ownership for Section 16 purposes, including as a result of certain transactions in derivative securities, such as the exercise, conversion and settlement of derivative securities, before the end of the second business day following the day on which the subject transaction has occurred.[37]

Although a security-based swap may be described in Schedule 13D, the ARRC does not believe that amendments to a security-based swap pursuant to an IBOR Transition Mechanism would be considered a material change for purposes of Schedule 13D.[38] Exchange Act Rule 12b-2 provides that the term "material" "when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered."[39] We understand that SEC staff looks to this definition to inform the meaning of "material" used in Exchange Act Rule 13d-2.[40] In general, we do not believe that a reasonable investor would attach importance to an amendment being made to a security-based swap pursuant to an IBOR Transition Mechanism when determining whether to buy or sell the securities underlying the security-based swap.

With respect to Form 4, the ARRC believes that it is possible that a change in a reference rate pursuant to an IBOR Transition Mechanism could result in a value transfer between the counterparties, which could change a party's beneficial ownership in the relevant security. However, because the IBOR Transition Mechanism would be intended to maintain the economics of the security-based swap and would not reflect insiders' views of the performance or prospects of the issuer, the ARRC believes that such an amendment should not give rise to an obligation to file a Form 4.

The ARRC believes that requiring market participants to amend or file Beneficial Ownership Forms as a result of IBOR Transition Mechanisms would impose burdens on market participants and would provide little regulatory benefit. As discussed throughout this letter, IBOR Transition Mechanisms would be effected to transition out of IBORs or other impaired rates to RFRs as part of a global reform effort, and not to engage in new economic activity or as a substitute for new transactions. Thus, while the ARRC believes amendments to a security-based swap pursuant to an IBOR Transition Mechanism would not trigger any beneficial ownership reporting obligations, the ARRC believes that the market would benefit from regulatory certainty in this regard, as uncertainty may impede transition efforts.

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[37] 17 C.F.R. § 240.16a-3(g)(1).

[38] For example, we do not think that an IBOR Transition Mechanism would constitute a material change to the description of a security-based swap provided pursuant to Item 6 or a material change to any security-based swap documentation filed as an exhibit pursuant to Item 7.

[39] 17 C.F.R. § 240.12b-2.

[40] 17 C.F.R. § 240.12b-1.

ii. Request for Relief

The ARRC requests that Commission staff provide interpretive guidance confirming that a market participant would not be required to file an amendment to its Beneficial Ownership Forms as a result of an IBOR Transition Mechanism or, in the alternative, no-action relief from such requirement.

IV. Conclusion

The ARRC is strongly committed to maintaining the safety and soundness of the global derivatives markets, and is therefore supportive of the global reform agenda to transition to alternative RFRs. The ARRC recognizes the importance of an inter-agency approach among the relevant U.S. financial regulators to the relief request and the contemporaneous coordination of this effort at the international level to provide a level playing field for all market participants. On behalf of its member firms, the ARRC looks forward to a continued dialogue with the Commission and staff as additional regulatory clarity and guidance is needed to facilitate this transition.