SLAUGHTER AND MAY/

CLIENT BRIEFING

JANUARY 2021

ISDA 2020 IBOR FALLBACKS PROTOCOL:

CORPORATES MAY ADHERE WITHOUT FEE UP TO 24 JANUARY 2021

We highlight the upcoming deadline of 24 January 2021 for corporates to be able to sign up to the ISDA 2020 IBOR Fallbacks Protocol without paying a fee.

The Protocol provides a safety net to ensure that existing ISDA trades that reference LIBOR and certain other IBORs can continue once that IBOR ceases, by making reference to the relevant risk-free rate that replaces the relevant IBOR (such as SOFR for USD LIBOR). The Protocol also provides for a potential LIBOR 'pre-cessation' if (as expected) the UK Financial Conduct Authority makes an announcement before 31 December 2021 that LIBOR is no longer representative of the economic reality.

Where the Protocol is adhered to by the two ISDA parties before 24 January 2021, it will apply to the ISDA trades entered into on or before that date. If adherence takes place at a later date, the Protocol will apply to the ISDA trades entered into before the date on which the later of the two ISDA parties adheres to the Protocol.

Protocol and future ISDA trades: For future ISDA trades that refer to a relevant IBOR, the Supplement to the 2006 ISDA Definitions, which will become effective on 25 January 2021, will amend the 2006 ISDA Definitions to include cessation fallbacks.

Adherence to the Protocol means that the two ISDA parties agree that the 2006 ISDA Definitions are amended in accordance with the terms of the Supplement.

Where the Protocol is not adhered to by the two ISDA parties to an ISDA Master Agreement, then the specific terms of the ISDA Master Agreement - relating to whether or not the ISDA definitions are to be read and construed as amended by future ISDA supplements to those definitions - will determine whether the Supplement applies automatically to future ISDA trades or whether the ISDA parties should bilaterally amend the ISDA Master Agreement (or each relevant confirmation).

Active management of legacy LIBOR contracts: Although the best solution is for a corporate to actively manage all its existing LIBOR contracts and amend or replace as and when required, the Protocol is a helpful solution and provides a backstop even for those who are actively managing the transition of contracts away from LIBOR.

Details on the Protocol are available at: **https://www.isda.org/protocol/isda-2020-ibor-fallbacks-protocol/**.

Entities that are not 'ISDA Primary Members' (i.e. most corporates) may adhere to the Protocol for free up to 24 January 2021. After that date, a fee of USD500 is payable to adhere to the Protocol.

Details on how to adhere to the Protocol are available at: **http://assets.isda.org/media/3062e7b4/562d1a52-pdf/**.

In order to adhere to the Protocol, a corporate must first obtain a legal entity identifier (**LEI**). An LEI is a key to standardized information on the corporate which is publicly available. The LEI and associated LEI data pool is designed to ultimately answer three questions: Who is who? Who owns whom? And who owns what? More information about LEIs is available at **www.gleif.org/en/about-lei/introducing-the-legal-entity-identifier-lei**. Many corporates already have an LEI. The LEI initiative is supported by the Financial Stability Board and many regulators around the world, including the HKMA and the SFC.

There is no requirement to adhere to the Protocol. It is possible to enter into bilateral arrangements with each ISDA counterparty to amend each ISDA contract. Such bilateral arrangements may well be chosen for amending structured transactions where the dovetailing of ISDA terms with other documents is important (although a corporate may decide to adhere to the Protocol for its vanilla trades and also to enter into specific bilateral amendments for structured transactions). With this in mind, ISDA has published template forms of bilateral amendment agreements.

Existing trades that reference a discontinued IBOR and which are not amended will likely be valued by quotations received by dealers or by poll of major banks or by reference to comparable available indices, none of which is attractive as those valuation methods will likely lead to arbitarary results depending upon the relevant dealers, banks or indices used for each swap. Financial institution counterparties may well seek to terminate swaps rather than rely on quotations/polls/comparable available indices. It is expected that LIBOR will cease to be available by 31 December 2021 (and may well be non-representative before that date).

As mentioned above, the Protocol is a helpful safety net but best practice remains for the contracting parties to ISDAs to actively review their existing ISDAs which use LIBOR references and consider required changes and preferred timing for implementing those changes. The same best practice applies to all other products that use LIBOR.

CONTACT

PETER BRIEN
PARTNER
T: +852 2901 7206
E: peter.brien@slaughterandmay.com

PETER LAKE
PARTNER
T: +852 2901 7235
E: peter.lake@Slaughterandmay.com

LISA CHUNG
PARTNER
T: +852 2901 7268
E:lisa.chung@slaughterandmay.com