

MEMO# 34269

August 24, 2022

CFTC Adopts Final Rule on Clearing Requirement for Post-LIBOR Swaps

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TO: ICI Members

Derivatives Markets Advisory Committee

LIBOR Transition Working Group SUBJECTS: Derivatives

International/Global

Investment Advisers

Trading and Markets RE: CFTC Adopts Final Rule on Clearing Requirement for Post-LIBOR Swaps

On August 12, the Commodity Futures Trading Commission (CFTC) adopted a final rule modifying the swap clearing requirements to reflect the market shift away from the London Interbank Offered Rate (LIBOR) and other Interbank Offered Rates (IBORs) in favor of alternative benchmark interest rates, or risk-free rates (RFRs).^[1] We summarize below the final rule, which was adopted substantially as proposed.^[2]

The Transition Away from LIBOR

Over the last two years, regulators have actively encouraged the market to transition from using LIBOR as a reference rate for swaps and other financial products. For example, the United Kingdom Financial Conduct Authority (FCA) announced that publication of LIBOR would cease on December 31, 2021 for USD, EUR, CHF, JPY, and GBP LIBOR in some or all tenors.^[3] Currently, EUR, CHF, JPY, and GBP LIBOR in all tenors, as well as USD LIBOR in the one-week and two-month tenors, have either ceased publication or are unrepresentative of the underlying lending market they are intended to measure. Regulators and market participants have prepared for the transition away from LIBOR, and have transitioned to alternative reference rates, such as SOFR for USD LIBOR.

Background on Swap Clearing Requirements

Under the Commodity Exchange Act (CEA), a swap must be cleared through a derivatives clearing organization (DCO) if the CFTC determines that the swap is required to be cleared, unless an exception applies.^[4] The CFTC may issue a clearing requirement determination by initiating a review itself, or by reviewing a submission from a DCO.^[5] There are several factors that the CFTC must consider when making a clearing requirement determination:

- The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data;
- The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is traded;
- The effect on the mitigation of systemic risk, taking into account the size of the market of such contract and the resources of the DCOs available to clear the contract;
- The effect on competition, including appropriate fees and charges applied to clearing; and
- The existence of reasonable legal certainty in the event of the insolvency of the relevant DCO or one or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property.[\[6\]](#)

CFTC's Final Rule on the Clearing Requirement

The final rule amends Regulation 50.4(a) to remove certain IBORs and EUR EONIA interest rate swap clearing requirements and add clearing requirements for the corresponding RFR overnight index swaps (OIS). The following swaps will no longer be subject to the clearing requirement:

- USD, GBP, JPY, and CHF-denominated swaps referencing LIBOR as a floating rate index in the fixed-to-floating swap, basis swap, and forward rate agreement (FRA) classes;
- EUR-denominated swaps that reference EONIA as a floating rate index in the OIS class; and
- SGD-denominated swaps that reference SOR-VWAP as a floating rate index in the fixed-to-floating swap class.

The OIS class of interest rate swaps that will now be subject to the clearing requirement include:

- Swaps denominated in USD that reference SOFR as a floating rate index with a stated termination date range of seven days to 50 years;
- Swaps denominated in EUR that reference €STR as a floating rate index with a stated termination date range of seven days to three years;
- Swaps denominated in CHF that reference SARON as a floating rate index with a stated termination date range of seven days to 30 years;
- Swaps denominated in JPY that reference TONA as a floating rate index with a stated termination date range of seven days to 30 years;
- Swaps denominated in SGD that reference SORA as a floating rate index with a stated termination date range of seven days to 10 years; and
- Swaps denominated in GBP that reference SONIA as a floating rate index with a stated termination date range of seven days to 50 years.

The amendments are effective 30 days after publication in the Federal Register but will have a phased implementation schedule, discussed below.

MAT Determination

ICI's comment letter on the proposed rule[\[7\]](#) urged the Commission to not approve or allow certification of a "made available to trade" (MAT) determination pursuant to CEA Section 2(h)(8) for a new swap referencing an RFR solely on the basis of the swap being subject to the clearing requirement under CEA Section 2(h)(1)(A). We explained that it is critically important that the Commission make an independent assessment of whether it is appropriate for a cleared swap to be subject to the trade execution requirement. Ensuring a

separate and independent MAT process is especially important with respect to the longer-dated swaps proposed to be cleared under the Proposal (i.e., those with tenors up to 30-50 years), which are characterized by lower levels of liquidity. Although the CFTC stated that this issue was beyond the scope of the rulemaking, it noted that the trade execution requirement, in the future, could apply to some or all of the interest rate swaps covered by the rule. The Commission acknowledged, however, that the MAT process is separate from the clearing requirement determination process.^[8]

Implementation Schedule

The implementation date for the requirement to clear the covered RFR OIS will be 30 days after publication in the Federal Register. The implementation date for the requirement to clear OIS referencing USD SOFR and SGD SORA will be October 31, 2022. Removal of the clearing requirement for IBOR swaps will proceed in two phases. The requirement to clear interest rate swaps for which the IBOR rate has ceased publication or become non-representative will take effect at the same time as the rulemaking: 30 days after publication in the Federal Register. The removal of the clearing requirement for USD LIBOR and SGD SOR-VWAP will take place on July 1, 2023. If the 30th day following publication in the Federal Register falls on a weekend or US federal holiday, implementation will take place the next business day when US markets are open.

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endnotes

[1] See Clearing Requirement Determination Under Section 2(h) of the Commodity Exchange Act for Interest Rate Swaps to Account for the Transition from LIBOR and Other IBORs to Alternative Reference Rates, available at <https://www.cftc.gov/media/7546/votingdraft081222Part50/download> ("Adopting Release"). Commissioners Johnson, Romero, and Pham each issued statements supporting the final rule. See <https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement081222b>; <https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement081222>; <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement081222>.

[2] For a summary of the proposed rule, please see ICI Memorandum No. 34145 (May 16, 2022), available at <https://www.ici.org/memo34145>. ICI's June comment letter on the proposed rule is available at <https://comments.cftc.gov/Handlers/PdfHandler.ashx?id=33629> ("ICI June Letter").

[3] Financial Conduct Authority, FCA Announcement on Future Cessation and Loss of

Representativeness of the LIBOR Benchmarks, Mar. 5, 2021 (FCA Announcement on LIBOR Cessation), available at <https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf>.

[4] CEA Section (h)(1)(A).

[5] CEA Section (h)(2)(A)-(B).

[6] CEA Section (h)(2)(D)(ii).

[7] See ICI June Letter, *supra* note 2.

[8] See Adopting Release at 35-36.

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