

**ARRC SUPPLEMENTAL RECOMMENDATIONS OF HARDWIRED FALLBACK LANGUAGE  
FOR LIBOR SYNDICATED AND BILATERAL BUSINESS LOANS**

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## **Part I: Background about the ARRC and LIBOR Fallback Language**

In 2014, the Federal Reserve Board convened the Alternative Reference Rates Committee (“**ARRC**”) and tasked the group with identifying an alternative to U.S. dollar LIBOR (“**LIBOR**”) that was a robust, IOSCO compliant rate derived from a deep and liquid market. In 2017, the ARRC fulfilled this mandate by selecting the Secured Overnight Financing Rate, or SOFR. SOFR is based on overnight transactions in the U.S. dollar Treasury repo market, the largest rates market at a given maturity in the world. National working groups in other jurisdictions have similarly identified overnight nearly risk-free rates like SOFR as their preferred alternatives.

In 2018, the ARRC was reconstituted by the Federal Reserve Board and the New York Fed to represent derivatives and cash market participants and was tasked with an expanded mandate - to help ensure a successful transition from LIBOR to SOFR, its recommended replacement rate. The ARRC, assisted by its many working groups, has spearheaded numerous workstreams to enable an orderly, successful transition. Further information on these workstreams is available in the ARRC’s [Paced Transition Plan, Progress Report: The Transition from U.S. Dollar LIBOR](#) and [recommended best practices](#). One of these ARRC recommended best practices is the incorporation of hardwired fallback language into new contracts – a best practice which was further supported by the [banking regulators in their joint supervisory guidance](#) clearly stating that “[n]ew contracts entered into before December 31, 2021 should either utilize a reference rate other than LIBOR or have robust fallback language that includes a clearly defined alternative reference rate after LIBOR’s discontinuation.”

Recently, the USD LIBOR and non-USD LIBOR endgame was fully laid out. [ICE Benchmark Administration \(“IBA”\) stated](#) that as a result of its not having access to input data necessary to calculate LIBOR settings on a representative basis beyond the intended cessation dates as set forth below, it would have to cease publication of all 35 LIBOR settings immediately after such dates:

- 12/31/2021 - All GBP, EUR, CHF and JPY LIBOR settings; 1-week and 2-mo LIBOR settings
- 6/30/2023 - Overnight and 1-, 3-, 6- and 12-mo USD LIBOR settings

The IBA did not identify any successor administrator in its announcement. The [UK Financial Conduct Authority \(“FCA”\) also issued a separate announcement](#) confirming that the IBA had notified the FCA of its intent to cease providing all LIBOR settings. The FCA stated that all 35 LIBOR settings will either cease to be provided by any administrator or will no longer be representative as of the dates set out above. That FCA announcement served as an “Index Cessation Event” under ISDA’s IBOR Fallbacks Supplement (Supplement Number 70 to the 2006 ISDA Definitions) and the ISDA 2020 IBOR Fallbacks Protocol, which in turn triggered a “Spread Adjustment Fixing Date” under the Bloomberg IBOR Fallback Rate Adjustments Rule Book. When the panels for all USD LIBOR tenors cease after the end of June 2023 and the fallback rates apply, fallbacks for derivatives under ISDA’s documentation would shift to compounded averages of the Secured Overnight Financing Rate (SOFR) plus the spread adjustment that has now been fixed. Moreover, because the ARRC has stated its recommended spread adjustments for fallback language in non-consumer cash products will be the same values as the spread adjustments

applicable to fallbacks in ISDA’s documentation for USD LIBOR,<sup>1</sup> the ARRC recommended spread adjustments are likewise now set.<sup>2</sup>

In support of the ARRC’s best practice recommendation to use hardwired fallback language in business loans, and utilizing the economic and timing certainty afforded by the IBA and FCA announcements described above, the ARRC is now publishing supplemental recommendations of abridged fallback language for syndicated business loans and bilateral business loans. The supplemental recommendations contained herein do not supersede the [June 2020 recommendation for syndicated business loans](#) or the [August 2020 recommendation for bilateral business loans](#) but rather use the information provided in the recent IBA and FCA announcements to simplify the fallback language and to offer additional transparency into the spread adjustments that will be applied to fallback rates upon transition.

It is important to note that regardless of these recommendations, the extent to which any market participant decides to implement or adopt any suggested contract language is completely voluntary. Therefore, each market participant should make its own independent evaluation and decision about whether or to what extent any suggested contract language is adopted.

### **Part II: Supplemental Fallback Language for LIBOR Syndicated Business Loans**

The ARRC is offering a supplemental recommendation of hardwired fallback language for LIBOR-referenced U.S. dollar-denominated syndicated business loans<sup>3</sup> (“syndicated loans”). That language is set out in this **Part II**. The fallback language, as well as certain drafting alternatives and related guidance, is discussed in further detail in **Part IV: User’s Guide to Supplemental Fallback Language for Business Loans**.

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<sup>1</sup> See ISDA’s Benchmark Reform and Transition from IBOR webpage at <https://www.isda.org/2020/05/11/benchmark-reform-and-transition-from-libor> and the Bloomberg technical notice at <https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation-Announcement-20210305.pdf>.

<sup>2</sup> See ARRC’s Statement of Further Details Regarding its Recommendation for Cash Products at <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC-Recommendation-Spread-Adjustments-Cash-Products-Press-Release.pdf>.

<sup>3</sup> This language assumes a U.S. dollar-denominated only facility. Adjustments to these provisions will need to be made for multicurrency facilities.

## **Benchmark Replacement Setting**

Notwithstanding anything to the contrary herein or in any other Loan Document<sup>4</sup> [(and any Swap Agreement shall be deemed not to be a “Loan Document” for purposes of this Section]<sup>5</sup>:

- (a) Replacing USD LIBOR. On March 5, 2021 the Financial Conduct Authority (“FCA”), the regulatory supervisor of USD LIBOR’s administrator (“IBA”), announced in a public statement the future cessation or loss of representativeness of overnight/Spot Next, 1-month, 3-month, 6-month and 12-month USD LIBOR tenor settings.<sup>6</sup> On the earlier of (i) the date that all Available Tenors of USD LIBOR have either permanently or indefinitely ceased to be provided by IBA or have been announced by the FCA pursuant to public statement or publication of information to be no longer representative and (ii) the Early Opt-in Effective Date, if the then-current Benchmark is USD LIBOR, the Benchmark Replacement will replace such Benchmark for all purposes hereunder and under any Loan Document in respect of any setting of such Benchmark on such day and all subsequent settings without any amendment to, or further action or consent of any other party to this Agreement or any other Loan Document. If the Benchmark Replacement is Daily Simple SOFR, all interest payments will be payable on a [monthly][quarterly] basis.
- (b) Replacing Future Benchmarks. Upon the occurrence of a Benchmark Transition Event, the Benchmark Replacement will replace the then-current Benchmark for all purposes hereunder and under any Loan Document in respect of any Benchmark setting at or after 5:00 p.m. on the fifth (5<sup>th</sup>) Business Day after the date notice of such Benchmark Replacement is provided to the Lenders without any amendment to, or further action or consent of any other party to, this Agreement or any other Loan Document so long as the Administrative Agent has not received, by such time, written notice of objection to such Benchmark Replacement from Lenders comprising the Required Lenders [of each Class]<sup>7</sup>. At any time that the administrator of the then-current Benchmark has permanently or indefinitely ceased to provide such Benchmark or such Benchmark has been announced by the regulatory supervisor for the administrator of such Benchmark pursuant to public statement or publication of information to be no longer representative of the underlying market and economic reality that such Benchmark is intended to measure and that representativeness will not be restored, the Borrower may revoke any request for a borrowing of, conversion to or continuation of Loans to be made, converted or continued that would bear interest by reference to such Benchmark until the Borrower’s receipt of notice from the Administrative Agent that a Benchmark Replacement has replaced such Benchmark, and, failing that, the Borrower will be deemed to have converted any such request into a request for a borrowing of or conversion to ABR Loans. During the period referenced in the foregoing sentence, the component of ABR based upon the Benchmark will not be used in any

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<sup>4</sup> The following capitalized terms not defined herein will have the meanings ascribed in the relevant credit agreement: “Loan Document,” “Swap Agreement,” “Agreement,” “Business Day,” “Lender,” “Lenders,” “Administrative Agent,” “Class,” “Required Lenders,” “Borrower,” “Interest Period,” “Loans,” “ABR Loans,” and “ABR”. Such terms are included herein for illustrative purposes only and should be coordinated with definitions in the relevant credit agreement.

<sup>5</sup> If “Swap Agreements” (or similar documents) are included in the definition of “Loan Documents” in the relevant credit agreement, parties should consider whether “Swap Agreements” should be removed from the operative provisions of this Section. Excluding “Swap Agreements” may result in differing fallback rates applicable to any loan covered by the credit agreement and the swap documented in such Swap Agreement.

<sup>6</sup> This language assumes that 1-week and 2-month LIBOR settings are not contemplated by the relevant credit agreement.

<sup>7</sup> Include if applicable and agreed by the parties.

determination of ABR.

- (c) Benchmark Replacement Conforming Changes. In connection with the implementation and administration of a Benchmark Replacement, the Administrative Agent will have the right to make Benchmark Replacement Conforming Changes from time to time and, notwithstanding anything to the contrary herein or in any other Loan Document, any amendments implementing such Benchmark Replacement Conforming Changes will become effective without any further action or consent of any other party to this Agreement.
- (d) Notices; Standards for Decisions and Determinations. The Administrative Agent will promptly notify the Borrower and the Lenders of (i) the implementation of any Benchmark Replacement and (ii) the effectiveness of any Benchmark Replacement Conforming Changes. Any determination, decision or election that may be made by the Administrative Agent or, if applicable, any Lender (or group of Lenders) pursuant to this Section, including any determination with respect to a tenor, rate or adjustment or of the occurrence or non-occurrence of an event, circumstance or date and any decision to take or refrain from taking any action, will be conclusive and binding absent manifest error and may be made in its or their sole discretion and without consent from any other party hereto, except, in each case, as expressly required pursuant to this Section.
- (e) Unavailability of Tenor of Benchmark. At any time (including in connection with the implementation of a Benchmark Replacement), (i) if the then-current Benchmark is a term rate (including Term SOFR or USD LIBOR), then the Administrative Agent may remove any tenor of such Benchmark that is unavailable or non-representative for Benchmark (including Benchmark Replacement) settings and (ii) the Administrative Agent may reinstate any such previously removed tenor for Benchmark (including Benchmark Replacement) settings.
- (f) Definitions.

“**Available Tenor**” means, as of any date of determination and with respect to the then-current Benchmark, as applicable, (x) if the then-current Benchmark is a term rate, any tenor for such Benchmark that is or may be used for determining the length of an Interest Period or (y) otherwise, any payment period for interest calculated with reference to such Benchmark, as applicable, pursuant to this Agreement as of such date.

“**Benchmark**” means, initially, USD LIBOR; provided that if a replacement of the Benchmark has occurred pursuant to this Section titled “Benchmark Replacement Setting”, then “Benchmark” means the applicable Benchmark Replacement to the extent that such Benchmark Replacement has replaced such prior benchmark rate. Any reference to “Benchmark” shall include, as applicable, the published component used in the calculation thereof.

“**Benchmark Replacement**” means, for any Available Tenor:

- (1) For purposes of clause (a) of this Section, the first alternative set forth below that can be determined by the Administrative Agent:

- (a) the sum of: (i) Term SOFR and (ii) 0.11448% (11.448 basis points) for an Available Tenor of one-month’s duration, 0.26161% (26.161 basis points) for an Available

Tenor of three-months' duration, and 0.42826% (42.826 basis points) for an Available Tenor of six-months' duration<sup>8</sup>, or

- (b) the sum of: (i) Daily Simple SOFR and (ii) the spread adjustment selected or recommended by the Relevant Governmental Body for the replacement of the tenor of USD LIBOR with a SOFR-based rate having approximately the same length as the interest payment period specified in clause (a) of this Section; and
- (2) For purposes of clause (b) of this Section, the sum of (a) the alternate benchmark rate and (b) an adjustment (which may be a positive or negative value or zero), in each case, that has been selected by the Administrative Agent and the Borrower as the replacement for such Available Tenor of such Benchmark giving due consideration to any evolving or then-prevailing market convention, including any applicable recommendations made by the Relevant Governmental Body, for U.S. dollar-denominated syndicated credit facilities at such time;

provided that, if the Benchmark Replacement as determined pursuant to clause (1) or (2) above would be less than the Floor, the Benchmark Replacement will be deemed to be the Floor for the purposes of this Agreement and the other Loan Documents.

**“Benchmark Replacement Conforming Changes”** means, with respect to any Benchmark Replacement, any technical, administrative or operational changes (including changes to the definition of “ABR,” the definition of “Business Day,” the definition of “Interest Period,” timing and frequency of determining rates and making payments of interest, timing of borrowing requests or prepayment, conversion or continuation notices, the applicability and length of lookback periods, the applicability of breakage provisions, and other technical, administrative or operational matters) that the Administrative Agent decides may be appropriate to reflect the adoption and implementation of such Benchmark Replacement and to permit the administration thereof by the Administrative Agent in a manner substantially consistent with market practice (or, if the Administrative Agent decides that adoption of any portion of such market practice is not administratively feasible or if the Administrative Agent determines that no market practice for the administration of such Benchmark Replacement exists, in such other manner of administration as the Administrative Agent decides is reasonably necessary in connection with the administration of this Agreement and the other Loan Documents).

**“Benchmark Transition Event”** means, with respect to any then-current Benchmark other than USD LIBOR, the occurrence of a public statement or publication of information by or on behalf of the administrator of the then-current Benchmark, the regulatory supervisor for the administrator of such Benchmark, the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, an insolvency official with jurisdiction over the administrator for such Benchmark, a resolution authority with jurisdiction over the administrator for such Benchmark or a court or an entity with similar insolvency or resolution authority over the administrator for such Benchmark, announcing or stating that (a) such administrator has ceased or will cease on a specified date to provide all Available Tenors of such Benchmark, permanently or indefinitely, provided that, at the time of such statement or publication, there is no successor administrator that will continue to provide any Available Tenor of such Benchmark or (b) all Available Tenors of such Benchmark are or will no longer be representative of the underlying market and economic reality that such Benchmark is intended to measure and that representativeness will not be restored.

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<sup>8</sup> These values represent the ARRC/ISDA recommended spread adjustment values available here: [https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation\\_Announcement\\_20210305.pdf](https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation_Announcement_20210305.pdf).

**“Daily Simple SOFR”** means, for any day, SOFR, with the conventions for this rate (which will include a lookback) being established by the Administrative Agent in accordance with the conventions for this rate recommended by the Relevant Governmental Body for determining “Daily Simple SOFR” for syndicated business loans; provided, that if the Administrative Agent decides that any such convention is not administratively feasible for the Administrative Agent, then the Administrative Agent may establish another convention in its reasonable discretion.

**“Early Opt-in Effective Date”** means, with respect to any Early Opt-in Election, the sixth (6<sup>th</sup>) Business Day after the date notice of such Early Opt-in Election is provided to the Lenders, so long as the Administrative Agent has not received, by 5:00 p.m. (New York City time) on the fifth (5<sup>th</sup>) Business Day after the date notice of such Early Opt-in Election is provided to the Lenders, written notice of objection to such Early Opt-in Election from Lenders comprising the Required Lenders.

**“Early Opt-in Election”** means the occurrence of:

- (1) a notification by the Administrative Agent to (or the request by the Borrower to the Administrative Agent to notify) each of the other parties hereto that at least [five]<sup>9</sup> currently outstanding U.S. dollar-denominated syndicated credit facilities at such time contain (as a result of amendment or as originally executed) a SOFR-based rate (including SOFR, a term SOFR or any other rate based upon SOFR) as a benchmark rate (and such syndicated credit facilities are identified in such notice and are publicly available for review), and
- (2) the joint election by the Administrative Agent and the Borrower to trigger a fallback from USD LIBOR and the provision by the Administrative Agent of written notice of such election to the Lenders.

**“Floor”** means the benchmark rate floor, if any, provided in this Agreement initially (as of the execution of this Agreement, the modification, amendment or renewal of this Agreement or otherwise) with respect to USD LIBOR.

**“Relevant Governmental Body”** means the Board of Governors of the Federal Reserve System or the Federal Reserve Bank of New York, or a committee officially endorsed or convened by the Board of Governors of the Federal Reserve System or the Federal Reserve Bank of New York, or any successor thereto.

**“SOFR”** means a rate per annum equal to the secured overnight financing rate for such Business Day published by the Federal Reserve Bank of New York (or a successor administrator of the secured overnight financing rate) on the website of the Federal Reserve Bank of New York, currently at <http://www.newyorkfed.org> (or any successor source for the secured overnight financing rate identified as such by the administrator of the secured overnight financing rate from time to time).

**“Term SOFR”** means, for the applicable corresponding tenor, the forward-looking term rate based on SOFR that has been selected or recommended by the Relevant Governmental Body.

**“USD LIBOR”** means the London interbank offered rate for U.S. dollars.

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<sup>9</sup> Parties may choose to set a different threshold.

### **Part III: Supplemental Fallback Language for LIBOR Bilateral Business Loans**

The ARRC is offering a supplemental recommendation of hardwired fallback language for LIBOR-referenced U.S. dollar-denominated bilateral business loans<sup>10</sup> (“bilateral loans”). That language is set out in this **Part III**. The fallback language, as well as certain drafting alternatives and related guidance, is discussed in further detail in **Part IV: User’s Guide to Supplemental Fallback Language for Business Loans**.

#### **Benchmark Replacement Setting.**

Notwithstanding anything to the contrary herein or in any other Loan Document<sup>11</sup> [(and any Swap Agreement shall be deemed not to be a “Loan Document” for purposes of this Section]<sup>12</sup>:

- (a) **Replacing USD LIBOR.** On March 5, 2021 the Financial Conduct Authority (“FCA”), the regulatory supervisor of USD LIBOR’s administrator (“IBA”), announced in a public statement the future cessation or loss of representativeness of overnight/Spot Next, 1-month, 3-month, 6-month and 12-month USD LIBOR tenor settings.<sup>13</sup> On the earlier of (i) the date that all Available Tenors of USD LIBOR have either permanently or indefinitely ceased to be provided by IBA or have been announced by the FCA pursuant to public statement or publication of information to be no longer representative and (ii) the Early Opt-in Effective Date, if the then-current Benchmark is USD LIBOR, the Benchmark Replacement will replace such Benchmark for all purposes hereunder and under any Loan Document in respect of any setting of such Benchmark on such day and all subsequent settings without any amendment to, or further action or consent of any other party to this Agreement or any other Loan Document. If the Benchmark Replacement is Daily Simple SOFR, all interest payments will be payable on a [monthly][quarterly] basis.
- (b) **Replacing Future Benchmarks.** Upon the occurrence of a Benchmark Transition Event, the Benchmark Replacement will replace the then-current Benchmark for all purposes hereunder and under any Loan Document in respect of any Benchmark setting at or after 5:00 p.m. on the [fifth (5<sup>th</sup>)] [tenth (10<sup>th</sup>)] Business Day after the date notice of such Benchmark Replacement is provided to the Borrower without any amendment to this Agreement or any other Loan Document, or further

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<sup>10</sup> This language assumes a U.S. dollar-denominated only facility. Adjustments to these provisions will need to be made for multicurrency facilities.

<sup>11</sup> The following capitalized terms not defined herein will have the meanings ascribed in the relevant credit agreement: “Loan Document,” “Swap Agreement,” “Agreement,” “Business Day,” “Lender,” “Borrower,” “Interest Period,” “Loans,” “ABR Loans,” and “ABR”. Such terms are included herein for illustrative purposes only and should be coordinated with definitions in the relevant credit agreement.

<sup>12</sup> If “Swap Agreements” (or similar documents) are included in the definition of “Loan Documents” in the relevant credit agreement, parties should consider whether “Swap Agreements” should be removed from the operative provisions of this Section. Excluding “Swap Agreements” may result in differing fallback rates applicable to any loan covered by the credit agreement and the swap documented in such Swap Agreement. If parties wish to have the fallback rates applicable to any loan covered by the credit agreement be aligned with the fallback rates applicable to the swap documented by a “Swap Agreement,” the parties may consult the “Hedged Loan Approach” Fallback Language for bilateral hedged business loans set forth in the ARRC’s [2020 Recommended Fallback Language for Bilateral Business Loans](#).

<sup>13</sup> This language assumes that 1-week and 2-month LIBOR settings are not contemplated by the relevant credit agreement.



action or consent of the Borrower[, so long as the Lender has not received, by such time, written notice of objection to such Benchmark Replacement from the Borrower]. At any time that the administrator of the then-current Benchmark has permanently or indefinitely ceased to provide such Benchmark or such Benchmark has been announced by the regulatory supervisor for the administrator of such Benchmark pursuant to public statement or publication of information to be no longer representative of the underlying market and economic reality that such Benchmark is intended to measure and that representativeness will not be restored, the Borrower may revoke any request for a borrowing of, conversion to or continuation of Loans to be made, converted or continued that would bear interest by reference to such Benchmark until the Borrower's receipt of notice from the Lender that a Benchmark Replacement has replaced such Benchmark, and, failing that, the Borrower will be deemed to have converted any such request into a request for a borrowing of or conversion to ABR Loans. During the period referenced in the foregoing sentence, the component of ABR based upon the Benchmark will not be used in any determination of ABR.

- (c) Benchmark Replacement Conforming Changes. In connection with the implementation and administration of a Benchmark Replacement, the Lender will have the right to make Benchmark Replacement Conforming Changes from time to time and, notwithstanding anything to the contrary herein or in any other Loan Document, any amendments implementing such Benchmark Replacement Conforming Changes will become effective without any further action or consent of any other party to this Agreement.
- (d) Notices; Standards for Decisions and Determinations. The Lender will promptly notify the Borrower of (i) the implementation of any Benchmark Replacement and (ii) the effectiveness of any Benchmark Replacement Conforming Changes. Any determination, decision or election that may be made by the Lender pursuant to this Section, including any determination with respect to a tenor, rate or adjustment or of the occurrence or non-occurrence of an event, circumstance or date and any decision to take or refrain from taking any action, will be conclusive and binding absent manifest error and may be made in its sole discretion and without consent from any other party hereto, except, in each case, as expressly required pursuant to this Section.
- (e) Unavailability of Tenor of Benchmark. At any time (including in connection with the implementation of a Benchmark Replacement), (i) if the then-current Benchmark is a term rate (including Term SOFR or USD LIBOR), then the Lender may remove any tenor of such Benchmark that is unavailable or non-representative for Benchmark (including Benchmark Replacement) settings and (ii) the Lender may reinstate any such previously removed tenor for Benchmark (including Benchmark Replacement) settings.
- (f) Definitions.

“**Available Tenor**” means, as of any date of determination and with respect to the then-current Benchmark, as applicable, (x) if the then-current Benchmark is a term rate, any tenor for such Benchmark that is or may be used for determining the length of an Interest Period or (y) otherwise, any payment period for interest calculated with reference to such Benchmark, as applicable, pursuant to this Agreement as of such date.

“**Benchmark**” means, initially, USD LIBOR; provided that if a replacement of the Benchmark has occurred pursuant to this Section titled “Benchmark Replacement Setting”, then “Benchmark” means the applicable Benchmark Replacement to the extent that such Benchmark Replacement has replaced

such prior benchmark rate. Any reference to “Benchmark” shall include, as applicable, the published component used in the calculation thereof.

“**Benchmark Replacement**” means, for any Available Tenor:

- (1) For purposes of clause (a) of this Section, the first alternative set forth below that can be determined by the Lender:
  - (a) the sum of: (i) Term SOFR and (ii) 0.11448% (11.448 basis points) for an Available Tenor of one-month’s duration, 0.26161% (26.161 basis points) for an Available Tenor of three-months’ duration, and 0.42826% (42.826 basis points) for an Available Tenor of six-months’ duration<sup>14</sup>, or
  - (b) the sum of: (i) Daily Simple SOFR and (ii) the spread adjustment selected or recommended by the Relevant Governmental Body for the replacement of the tenor of USD LIBOR with a SOFR-based rate having approximately the same length as the interest payment period specified in clause (a) of this Section; and
- (2) For purposes of clause (b) of this Section, the sum of (a) the alternate benchmark rate and (b) an adjustment (which may be a positive or negative value or zero), in each case, that has been selected by the Lender as the replacement for such Available Tenor of such Benchmark giving due consideration to any evolving or then-prevailing market convention, including any applicable recommendations made by the Relevant Governmental Body, for U.S. dollar-denominated syndicated or bilateral credit facilities at such time;

provided that, if the Benchmark Replacement as determined pursuant to clause (1) or (2) above would be less than the Floor, the Benchmark Replacement will be deemed to be the Floor for the purposes of this Agreement and the other Loan Documents.

“**Benchmark Replacement Conforming Changes**” means, with respect to any Benchmark Replacement, any technical, administrative or operational changes (including changes to the definition of “ABR,” the definition of “Business Day,” the definition of “Interest Period,” timing and frequency of determining rates and making payments of interest, timing of borrowing requests or prepayment, conversion or continuation notices, the applicability and length of lookback periods, the applicability of breakage provisions, and other technical, administrative or operational matters) that the Lender decides may be appropriate to reflect the adoption and implementation of such Benchmark Replacement and to permit the administration thereof by the Lender in a manner substantially consistent with market practice (or, if the Lender decides that adoption of any portion of such market practice is not administratively feasible or if the Lender determines that no market practice for the administration of such Benchmark Replacement exists, in such other manner of administration as the Lender decides is reasonably necessary in connection with the administration of this Agreement and the other Loan Documents).

“**Benchmark Transition Event**” means, with respect to any then-current Benchmark other than USD LIBOR, the occurrence of a public statement or publication of information by or on behalf of the administrator of the then-current Benchmark, the regulatory supervisor for the administrator of such Benchmark, the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, an insolvency official with jurisdiction over the administrator for such Benchmark, a resolution authority with jurisdiction over the administrator for such Benchmark or a court or an entity with similar

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<sup>14</sup> These values represent the ARRC/ISDA recommended spread adjustment values available here: [https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation\\_Announcement\\_20210305.pdf](https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation_Announcement_20210305.pdf).

insolvency or resolution authority over the administrator for such Benchmark, announcing or stating that (a) such administrator has ceased or will cease on a specified date to provide all Available Tenors of such Benchmark, permanently or indefinitely, provided that, at the time of such statement or publication, there is no successor administrator that will continue to provide any Available Tenor of such Benchmark or (b) all Available Tenors of such Benchmark are or will no longer be representative of the underlying market and economic reality that such Benchmark is intended to measure and that representativeness will not be restored.

**“Daily Simple SOFR”** means, for any day, SOFR, with the conventions for this rate (which will include a lookback) being established by the Lender in accordance with the conventions for this rate recommended by the Relevant Governmental Body for determining “Daily Simple SOFR” for bilateral business loans; provided, that if the Lender decides that any such convention is not administratively feasible for the Lender, then the Lender may establish another convention in its reasonable discretion.

**“Early Opt-in Effective Date”** means, with respect to any Early Opt-in Election, the [first (1st)][sixth (6th)][eleventh (11th)] Business Day after the date notice of such Early Opt-in Election is provided to the Borrower[, so long as the Lender has not received, by 5:00 p.m. ([New York City][\_\_\_\_] time) on the [fifth (5th)][tenth (10<sup>th</sup>)] Business Day after the date notice of such Early Opt-in Election is provided to the Borrower, written notice of objection to such Early Opt-in Election from the Borrower].

**“Early Opt-in Election”** means the occurrence of:

- (1) a determination by the Lender that at least [five]<sup>15</sup> currently outstanding U.S. dollar-denominated syndicated or bilateral credit facilities at such time contain (as a result of amendment or as originally executed) a SOFR-based rate (including SOFR, a term SOFR or any other rate based upon SOFR) as a benchmark rate[ (and such credit facilities are identified in the notice to the Borrower described in clause (2) below and are publicly available for review)], and
- (2) the election by the Lender to trigger a fallback from USD LIBOR and the provision by the Lender of written notice of such election to the Borrower.

**“Floor”** means the benchmark rate floor, if any, provided in this Agreement initially (as of the execution of this Agreement, the modification, amendment or renewal of this Agreement or otherwise) with respect to USD LIBOR.

**“Relevant Governmental Body”** means the Board of Governors of the Federal Reserve System or the Federal Reserve Bank of New York, or a committee officially endorsed or convened by the Board of Governors of the Federal Reserve System or the Federal Reserve Bank of New York, or any successor thereto.

**“SOFR”** means a rate per annum equal to the secured overnight financing rate for such Business Day published by the Federal Reserve Bank of New York (or a successor administrator of the secured overnight financing rate) on the website of the Federal Reserve Bank of New York, currently at <http://www.newyorkfed.org> (or any successor source for the secured overnight financing rate identified as such by the administrator of the secured overnight financing rate from time to time).

**“Term SOFR”** means, for the applicable corresponding tenor, the forward-looking term rate based on SOFR that has been selected or recommended by the Relevant Governmental Body.

**“USD LIBOR”** means the London interbank offered rate for U.S. dollars.

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<sup>15</sup> Parties may choose to set a different threshold.

## **Part IV: User's Guide to Fallback Language for Business Loans**

While **Part II** sets forth the ARRC's supplemental recommendation for fallback provisions for LIBOR in syndicated loans and **Part III** sets forth the ARRC's supplemental recommendation for fallback provisions for LIBOR in bilateral loans, this **Part IV** contains a detailed description of the fallback provisions in these supplemental recommendations and guidance for market participants to consider in the adoption of these fallback provisions.

The paragraphs below describe in detail the operative provisions of this supplemental fallback language as well as important considerations market participants should bear in mind when reviewing and implementing the supplemental recommendations of fallback language for business loans. The discussion is written to cover both syndicated loans and bilateral loans and endeavors to distinguish differences, e.g. between the parties responsible for certain determinations and decisions referring to the "administrative agent or lender, as applicable." However, this **Part IV** does not include illustrative extracts from both recommendations in every instance or may include combined extracts for discussion purposes. Users are reminded to directly review the recommended language for syndicated loans in **Part II** and for bilateral loans in **Part III**.

### **A. Introduction to the Fallback Language**

#### Interpretative Provisions

The goal of the ARRC's recommended fallback language is to effectively and efficiently replace the Benchmark. The recommended fallback provisions set forth separate operative provisions specifying what is to happen in the replacement of USD LIBOR (clause (a) of the Section titled "Benchmark Replacement Setting") and what is to happen in potential future transitions with respect to the Benchmark (clause (b) of the Section titled "Benchmark Replacement Setting"):

- (1) **Benchmark Replacement:** The replacement to the then-current Benchmark is determined by the administrative agent or lender, as applicable, in accordance with the definition of "Benchmark Replacement". The definition of "Benchmark Replacement" includes any spread adjustment necessary to make the Benchmark and Benchmark Replacement more comparable.
- (2) **Benchmark Replacement Conforming Changes:** At the time of the Benchmark transition, and from time to time thereafter, certain conforming changes may be needed to account for the move to the Benchmark Replacement.
- (3) **Notices; Decisions and Determinations:** In addition, standards are set forth for the various decisions that must be made in connection with a Benchmark transition. The fallback language also specifies when the administrative agent or lender, as applicable, is required to send notices to the borrower and, if applicable, the lenders.

In reviewing the recommended fallback language, it is helpful to be mindful that at different times the language alternately refers to the "determination" of the Benchmark Replacement and the "setting" of the Benchmark Replacement. As used in the language, the "determination" of a Benchmark Replacement refers to the one-time process that occurs at the transition of a benchmark in connection

with ascertaining that such replacement rate (e.g., Term SOFR or Daily Simple SOFR) is available and should be the Benchmark Replacement. The “setting” of a Benchmark or a Benchmark Replacement refers to the ongoing process of setting the interest rate for the applicable Interest Period (e.g., the “setting” of Term SOFR for an Interest Period beginning on April 1).

Note that the recommended fallback language assumes that 1-week and 2-month USD LIBOR tenors will not be included in the relevant credit agreement.

### Concepts of “Interest Period” and “Available Tenor”

The supplemental fallback language for business loans contains two related concepts of “Interest Period” and “Available Tenor”. These terms (and concepts) are utilized throughout the operative provisions, including in the unavailability of tenor provisions and the definitions of “Benchmark Transition Event” and “Benchmark Replacement”.

**Interest Period:** For a USD LIBOR loan facility, the interest rate on LIBOR loans is fixed for discrete periods, referred to as “Interest Periods,” and these “Interest Periods” correspond to the tenors of USD LIBOR that are most commonly used. For many LIBOR loans, the borrower selects the length of its desired Interest Period for a loan at its option. “Interest Period” would refer to any concrete period pursuant to which a benchmark is calculated for a loan (or portion thereof) (e.g., an Interest Period from April 1 – April 30).

**Available Tenor:** “Available Tenor” refers to all of the tenors, or payment periods if the successor rate is a daily rate, available under the credit agreement with respect to the Benchmark. For example, a USD LIBOR facility may have Available Tenors of 1 month, 3 months and 6 months. The Available Tenor for a daily rate would be determined based upon the period during which interest is required to be paid (e.g., a Daily Simple SOFR loan may be payable monthly or quarterly, which would result in Available Tenors for such facility of 1 month or 3 months). Available Tenor is distinguishable from Interest Period because Available Tenor refers to the available tenors and Interest Period refers to the actual period applicable to such loan.

## B. Replacing LIBOR

As noted in *Part I*, the IBA announcement and FCA announcement made on March 5, 2021 offered clarity into the LIBOR endgame. Given that clarity, the replacement of USD LIBOR is addressed separately from any potential replacement of future Benchmarks. Instead of “Benchmark Transition Event” and “Benchmark Replacement Date” setting out the trigger event and effective date of the transition, respectively, as is the case in the 2020 recommendations of syndicated loans and bilateral loans, clause (a) of the Section titled “Benchmark Replacement Setting” summarizes the facts of the IBA and FCA announcements and provides for the effectiveness of the transition away from LIBOR to be the earlier of (i) the date that all “Available Tenors” of LIBOR have either permanently or indefinitely ceased to be provided by the IBA or have been announced by the FCA pursuant to public statement or publication of information to be no longer representative and (ii) the “Early Opt-in Effective Date.”

## Cessation or Loss of Representativeness of LIBOR

Based on the IBA and FCA announcements described in **Part I**, LIBOR will cease to be provided by the IBA permanently or indefinitely after the publication of the LIBOR settings on June 30, 2023. However, those announcements also stated that the FCA may, once granted the powers to do so, compel the IBA to continue to publish LIBOR based on a revised methodology for a period of time on a non-representative, synthetic basis. Whether the FCA will decide to compel the IBA to publish synthetic USD LIBOR for a period of time is still under consideration, and would be subject to further market consultation by the FCA if pursued. However, if the FCA pursues that course of action after June 30, 2023, LIBOR would no longer be representative. For purposes of the supplemental recommendations, without further action by the parties to the loan, the effective date of the transition would be:

*“...the date that all Available Tenors of USD LIBOR have either permanently or indefinitely ceased to be provided by IBA or have been announced by the FCA pursuant to public statement or publication of information to be no longer representative...”*

Therefore, June 30, 2023 seems to be the effective date of the transition away from LIBOR in the fallback language under either a future cessation or an announced loss of representativeness. It is not anticipated that there could be any change to the June 30, 2023 date set out in the IBA and FCA statements, however, clause (a) of the Section titled “Benchmark Replacement Setting” is drafted to provide for a transition on whatever date meets the terms set out in that clause (a) – whether such date fell before or after June 30, 2023. This treatment of the effectiveness of the transition is aligned with the terms provided in the 2020 recommendations of syndicated loans and bilateral loans.

### “Early Opt-in”

The supplemental recommendations continue to provide an “early opt in” mechanism. For syndicated loans, the borrower and administrative agent can begin the process once the specified criteria are met. For bilateral loans, the sole lender may begin the process once the specified criteria are met. The definition of “Early Opt-in Election” provides that this mechanism becomes available once:

*... “at least [five] currently outstanding U.S. dollar-denominated syndicated credit facilities [or bilateral loan facilities] at such time contain (as a result of amendment or as originally executed) a SOFR-based rate (including SOFR, a term SOFR or any other rate based upon SOFR) as a benchmark rate[ (and such syndicated credit facilities are identified in such notice and are publicly available for review)]”<sup>16</sup>*

This feature remains a key tool to enable the early – and therefore orderly – transition to SOFR despite the LIBOR endgame now being known. Parties are encouraged to consider whether “five” is the appropriate threshold number when drafting their own agreements and may choose a higher or lower number depending on their tolerance levels. Market participants should carefully consider the choice of threshold number to ensure that it is high enough to allow for objective, clear direction, but low enough to not force parties to wait before being able to transition to a successor rate if so desired. In the

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<sup>16</sup> For purposes of this **Part IV**, the discussion focuses on business loans generally. Attention should be paid to the exact drafting for syndicated loans (**Part II**) and bilateral loans (**Part III**).

supplemental recommendations, the effective date of an early opt-in transition is the “Early Opt-in Effective Date” as set forth in the respective recommendations for syndicated loans and bilateral loans.

Once initiated, there remains an additional step before an “early opt-in” is successful. Once notice is provided to the lenders or borrower, as applicable, the lenders or the borrower (in some cases), as applicable, are granted a period of time to object to the “early opt-in election”. This process is set out in the definition of “Early Opt-in Effective Date”.

*“Early Opt-in Effective Date” means, with respect to any Early Opt-in Election, the [first (1st)][sixth (6th)][eleventh (11th) Business Day after the date notice of such Early Opt-in Election is provided to the Borrower], so long as the Lender has not received, by 5:00 p.m. ([New York City][\_\_\_\_] time) on the [fifth (5th)][tenth (10<sup>th</sup>)] Business Day after the date notice of such Early Opt-in Election is provided to the Borrower, written notice of objection to such Early Opt-in Election from the Borrower].<sup>17</sup>*

For bilateral loans, if the borrower<sup>18</sup> has not objected to the election by the deadline, then the “early opt-in” will take effect on the next business day.<sup>19</sup> If the Required Lenders or borrower, as applicable, object to the Early Opt-in Election by the deadline, then there is no early transition. For syndicated loans, so long as lenders comprising Required Lenders do not object within the five-business day window, the “Early Opt-in Effective Date” is the sixth (6th) Business Day after the date notice of the Early Opt-in Election was provided to the lenders. For illustrative purposes, if notice of an Early Opt-in Election is provided on Monday to the Lenders in a syndicated loan, the following Monday by 5:00 p.m. is the deadline for objecting to the Early Opt-in Election. To the extent the Required Lenders have not objected in writing by such time, the Benchmark Replacement will go into effect Tuesday, the next business day. For purposes of determining interest, Tuesday would be used for settings of interest starting on the Thursday thereafter (which would be the next day that looked to Tuesday for setting of LIBOR given a standard two business day lookback) and any settings of interest made prior to Thursday would continue to use LIBOR.

### **C. Benchmark Replacement for LIBOR**

In the ARRC-recommended fallback language for both syndicated loans and bilateral loans, all references to the Benchmark will be replaced throughout the documentation with the “Benchmark Replacement” once the relevant date in clause (a) of the Section titled “Benchmark Replacement Setting” passes. It is particularly important to note that the defined term “Benchmark Replacement” in the fallback language continues to encompass the successor rate and any spread adjustment. However, unlike the 2020 fallback recommendations for business loans, the separate defined term “Benchmark Replacement Adjustment” is not needed.

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<sup>17</sup> See corresponding definition in **Part II** for syndicated loans.

<sup>18</sup> “Required Lenders” is most commonly defined as a majority of the lenders.

<sup>19</sup> The supplemental recommendation for bilateral loans offers different time periods. Please refer to **Part III** for more information.

## Waterfall

The defined term “Benchmark Replacement” sets forth a two-step waterfall to determine the successor rate to be used. It is important to note that for administrative ease and hedging purposes, each step in the waterfall must be assessed as of the first time a trigger event with respect to the Benchmark becomes effective. The availability of each step in the waterfall is not re-evaluated at a later point in time. The table below displays the waterfall:

<b>Benchmark Replacement Waterfall</b>
<b>Step 1:</b> Term SOFR + Adjustment
<b>Step 2:</b> Daily Simple SOFR + Adjustment

As is discussed in further detail below, counterparties may reasonably choose to eliminate the first step of this waterfall if they deem it appropriate at the time that they enter into the credit agreement or may reasonably replace the second step with Daily Compounded SOFR (i.e., Compounded in Arrears) + Adjustment or SOFR Average (i.e., Compounded in Advance) + Adjustment.

### Step 1: Term SOFR + Adjustment

The first step in the “Benchmark Replacement” waterfall is specified in the fallback language as follows:

*the sum of: (a) Term SOFR and (b) 0.11448% (11.448 basis points) for an Available Tenor of one-month’s duration, 0.26161% (26.161 basis points) for an Available Tenor of three-months’ duration, and 0.42826% (42.826 basis points) for an Available Tenor of six-months’ duration<sup>20</sup>*

“Term SOFR” is defined as the forward-looking term rate based on SOFR that is selected or recommended by the Relevant Governmental Body. The “Relevant Governmental Body” means the Board of Governors of the Federal Reserve System or the Federal Reserve Bank of New York, or a committee officially endorsed or convened by the Board of Governors of the Federal Reserve System or the Federal Reserve Bank of New York (e.g., the ARRC), or any successor thereto. The definition further provides that “Term SOFR” relates to the applicable corresponding tenor (meaning a period equivalent to the LIBOR tenor, e.g., 1-month SOFR, 3-month SOFR).

While the ARRC intends to recommend a forward-looking term SOFR for use as a fallback rate in cash product that originally referenced LIBOR, this is only possible if the ARRC determines that an IOSCO-compliant benchmark rate<sup>21</sup> exists and meets appropriate criteria set by the ARRC. Therefore, it is not certain that such a benchmark will be produced prior to June 30, 2023.<sup>22</sup> In addition, because standard

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<sup>20</sup> These values represent the ARRC/ISDA recommended spread adjustment values available here: [https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation\\_Announcement\\_20210305.pdf](https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation_Announcement_20210305.pdf).

<sup>21</sup> See the *Principles for Financial Benchmarks*, final report of the Board of the International Organization of Securities Commissions dated July 2013 at: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf>

<sup>22</sup> See ARRC Provides Update on Forward-Looking SOFR Term Rate: Market Participants Encouraged to Transition without Reliance on SOFR Term Rate available here: <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/arrc-press-release-term-rate-for-publication>.



derivatives will not reference a forward-looking term rate as a fallback to LIBOR or may not reference such a rate in new SOFR-based derivatives, borrowers in the loan market who execute swaps may prefer to remove Term SOFR (and adjust all of the corresponding cross references within the fallback language) in order to fall back to Daily Simple SOFR or Daily Compounded SOFR, to better align with ISDA's selected fallback rate and the floating rate option for "SOFR" in ISDA's standard documentation. Note that other conforming changes, e.g. the applicable conventions, may also be needed at the time a fallback is activated in order to maintain perfect alignment with hedges.<sup>23</sup>

The ARRC's 2020 recommendations for business loans includes a defined term "Benchmark Replacement Adjustment" which provides the spread adjustment that would be applicable to the relevant step of the "Benchmark Replacement" waterfall. Given the clarity given by the IBA and FCA's announcements, and ISDA's resultant "Index Cessation Event" which fixes the spread adjustments for ISDA fallback language (and ARRC fallback language described in **Part I** above), the exact spread adjustment values are set forth in these 2021 recommendations.

Parties incorporating 2021 recommended fallback language into transactions will have full transparency into the adjustments that would apply to the various "Available Tenors" of Term SOFR if Term SOFR is determined to be the "Benchmark Replacement."

## Step 2: Daily Simple SOFR + Adjustment

If the ARRC has concluded that a robust, IOSCO-compliant forward-looking SOFR term rate is not available and has therefore not selected or recommended such a rate when the Benchmark Replacement is determined<sup>24</sup>, then the second step specified in the "Benchmark Replacement" waterfall of the supplemental fallback language continues to be:

*the sum of: (a) Daily Simple SOFR and (b) the spread adjustment selected or recommended by the Relevant Governmental Body for the replacement of the tenor of USD LIBOR with a SOFR-based rate having approximately the same length as the interest payment period specified in clause (a) of this Section*

As discussed above, it is important to note that LIBOR is produced in various tenors (e.g. one-month, three-month, six-month). At each tenor LIBOR acts as a forward-looking rate whereby the interest due

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<sup>23</sup> The 2020 recommendation for bilateral business loans sets forth a "Hedged Loan" approach which may be more fit for purpose if full alignment with ISDA standard documentation is desired.

<sup>24</sup> The successor rate, i.e. the Benchmark Replacement, is determined in accordance with the "Benchmark Replacement" waterfall once at the time of transition. The fallback language for business loans does not provide for subsequent retesting of the "Benchmark Replacement" waterfall once a transition from LIBOR has occurred. It is not certain that Term SOFR will have developed before the transition away from LIBOR occurs, so it is possible that the business loan falls back to the second step of the waterfall. Retesting of the "Benchmark Replacement" waterfall has been rejected by the ARRC's Business Loans Working Group, but, given the operational ease and familiarity of a term rate, some market participants may still prefer to outline a means of transitioning a business loan to Term SOFR should such rate become available post-transition. Interested parties may consider adding a feature to the fallback language that provides for a later transition to Term SOFR. In all cases, parties should carefully consider their preference for Term SOFR against the potential operational challenges of a second transition and, importantly, implications for existing hedging arrangements.

at the end of the period is known at the beginning of that interest period. SOFR, however, is an overnight rate, with SOFR for a given day being published the following day. The Federal Reserve Bank of New York also publishes SOFR Averages.<sup>25</sup> SOFR Averages are compounded averages of SOFR over rolling 30-, 90-, and 180-calendar day periods. While SOFR Averages can generally be used for “in advance” or “in arrears” interest rate settings, as discussed fully below, business loans will only be able to reference SOFR Averages if the loan facility has compounded SOFR in advance as the “Benchmark Replacement.”

After robust discussion with market participants as well as loan systems providers, it is clear that loan facilities will need to be able to accrue interest on a daily basis. For this reason, use of an average rate that is not known until toward the end of the interest period is not operationally feasible because of, among other things, the intra-period principal fluctuations customary in business loans. While aspects of this challenge can be addressed by having accrued interest paid together with prepayments, the preference of market participants is to instead apply SOFR on a daily basis throughout the interest period.

The definition of “Daily Simple SOFR” is set forth below:

*“Daily Simple SOFR” means, for any day, SOFR, with the conventions for this rate (which will include a lookback) being established by the Administrative Agent in accordance with the conventions for this rate selected or recommended by the Relevant Governmental Body for determining “Daily Simple SOFR” for syndicated business loans; provided, that if the Administrative Agent decides that any such convention is not administratively feasible for the Administrative Agent, then the Administrative Agent may establish another convention in its reasonable discretion.<sup>26</sup>*

If the Benchmark Replacement is “Daily Simple SOFR” then, in its basic form, the loan would accrue interest based on SOFR for each day of the interest period. Because it is a daily rate that period represents the payment period for interest, e.g. monthly or quarterly, rather than the tenor of the loan as it does for LIBOR loans, e.g. one-month or three-month. While that is a simple description of how the rate functions, an important component of the definition are the conventions it specifies. As a daily rate loan, interest accrues on a real-time basis (also known as “in arrears”) so the amount of interest owed by the borrower would not be known until the end of the period without use of a convention to achieve certainty regarding cash flows before an interest payment is due. While there are different approaches that can be taken, such as a “lockout” (where a SOFR rate is repeated for the final few days in each observation period) or a “payment delay” (where the payment of the interest period is made after the last day of the interest period), for business loans the ARRC recommends the use of a lookback which is expressly included in the definition of “Daily Simple SOFR”. A lookback shifts backwards the period of time that the rates are observed. The exact length of the lookback will be established through the administrative agent’s or lender’s, as applicable, use of “Benchmark Replacement Conforming Changes.” As an example, assume a 30-day Daily Simple SOFR loan with a five-business day lookback starts on

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<sup>25</sup> SOFR Averages are published shortly after SOFR is published at approximately 8:00 a.m. ET. The published rates are available on the Federal Reserve Bank of New York’s website at:

<https://apps.newyorkfed.org/markets/autorates/sofr-avg-ind>.

<sup>26</sup> See corresponding definition in the supplemental recommendation for bilateral business loans set forth in **Part III**.

Wednesday, April 1<sup>st</sup>. The first SOFR rate applicable to the loan was SOFR for Wednesday, March 25<sup>th</sup> (five business days before the start of the interest period). This process of taking the daily rates would continue for the next twenty-nine days with the last day looking to the SOFR rate for Thursday, April 23<sup>rd</sup> (five business days before the end of the interest period on April 30<sup>th</sup>). The definition further provides that, in addition to the lookback, additional conventions shall be established by the administrative agent or lender, as applicable, in accordance with the conventions selected or recommended by the Relevant Governmental Body (e.g. the ARRC). The ARRC has published [recommended “in arrears” conventions](#) for use in syndicated loans and use in bilateral loans. While the recommended conventions are the primary source for establishing conventions when determining “Daily Simple SOFR,” administrative agents or lenders, as applicable, are able to select alternative conventions, in their reasonable discretion, should one or more of the recommended conventions be found not administratively feasible.

While LIBOR is a term rate, “Daily Simple SOFR” is not. In the event that the applicable Benchmark Replacement is “Daily Simple SOFR” it is anticipated that a set interest payment frequency, i.e. monthly or quarterly, would be established. In this case, the 2021 recommended fallback language would apply the relevant ISDA/ARRC spread adjustment for the tenor of USD LIBOR that has approximately the same length as the interest payment frequency.

*the sum of: (a) Daily Simple SOFR and (b) the spread adjustment selected or recommended by the Relevant Governmental Body for the replacement of the tenor of USD LIBOR with a SOFR-based rate having approximately the same length as the interest payment period specified in clause (a) of this Section;*

The end of clause (a) of the Section titled “Benchmark Replacement Setting” provides that, “If the Benchmark Replacement is Daily Simple SOFR, all interest payments will be payable on a [monthly][quarterly] basis” as agreed by the parties when incorporating the fallback language in the syndicated loan or business loan.

## Modifications to the Waterfall

For a transition away from LIBOR, the ARRC recognizes that certain modifications to the “Benchmark Replacement” waterfall may be aligned with the ARRC’s principles. Alternative steps of the waterfall, “Daily Compounded SOFR” and “SOFR Average,” are discussed below. A modification to the waterfall as discussed in detail below would be fully aligned with the ARRC’s principles.

### Daily Compounded SOFR

Market participants may prefer to reference daily SOFR compounded over the interest period in the second step of the successor rate waterfall.<sup>27</sup> “A User’s Guide to SOFR”<sup>28</sup> demonstrated that there is little basis between Daily Simple SOFR and compounded SOFR in arrears, thus indicating the rate is still hedgeable with compounded SOFR in arrears hedges. Due to the requirements for an instrument with fluctuating principal intra-period like business loans, compounded SOFR in arrears as used in loan

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<sup>27</sup> For the avoidance of doubt, compounding does not apply to the Benchmark Replacement Adjustment or any margin specified in the underlying terms.

<sup>28</sup> See Figure 3 on page 9 of *A User’s Guide to SOFR*, published by the ARRC in February 2021 at: <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/users-guide-to-sofr2021-update.pdf>

products would likely have different conventions than those used by ISDA, thereby generating differences between the two products even if both used compounded SOFR in arrears. In addition, Daily Simple SOFR is already operationalized, reduces operational risk relative to compounded SOFR in arrears, and poses fewer challenges for a heavily traded asset, like syndicated loans, where intra-period payments are routine.

To reference “Daily Compounded SOFR” the definition set forth below can be substituted for the (first or) second step of the waterfall and changing all the corresponding references within the fallback language from “Daily Simple SOFR” to “Daily Compounded SOFR.”

*“Daily Compounded SOFR” means, for any day, SOFR, with interest accruing on a compounded daily basis, with the methodology and conventions for this rate (which will include compounding in arrears with a lookback) being established by the [Administrative Agent][Lender] in accordance with a methodology and the conventions for this rate selected or recommended by the Relevant Governmental Body for determining “Daily Compounded SOFR” for [syndicated][bilateral] business loans; provided, that if the [Administrative Agent][Lender] decides that any such convention is not administratively feasible for the [Administrative Agent][Lender], then the [Administrative Agent][Lender] may establish another convention in its reasonable discretion.*

Market participants may want to consider their operational capabilities when adopting fallback language that includes a “Daily Compounded SOFR” option.

#### Compounded SOFR in Advance

Similarly, market participants that wish to use “in advance” rates, which are the most like how LIBOR functions today and thus easiest to operationalize, may wish to use compounded SOFR in advance as the first or second step in the successor rate waterfall. Indeed, given that Term SOFR does not yet exist, market participants may prefer to include compounded SOFR in advance as the first step of the waterfall in lieu of Term SOFR. If parties wish to include a compounded SOFR in advance rate, this can be accomplished by using the SOFR Averages. Parties can replace the definition of “Daily Simple SOFR” (or “Term SOFR”) with the definition of “SOFR Average” set forth below:

*“SOFR Average” means, for the applicable corresponding tenor, the compounded average of SOFR published by the Federal Reserve Bank of New York (or a successor administrator of the SOFR Average).*

Parties who choose to include “SOFR Average” should note that the Federal Reserve Bank of New York currently publishes 30-, 90-, and 180-Day Averages and any additional tenors that were available for LIBOR loans may need to be removed by the administrative agent or lender, as applicable, pursuant to clause (e) of the Section titled “Benchmark Replacement Setting.”

#### Rate Floors

Many credit agreements have floors applicable to LIBOR (zero or nonzero floors). It is assumed that parties would expect a negotiated rate floor to apply after a benchmark transition. Because the successor rate plus the spread adjustment together represent LIBOR’s successor it is appropriate for,

and the ARRC Guiding Principles<sup>29</sup> should be interpreted to mean that, the floor applicable to LIBOR would be applicable to the Benchmark Replacement (which includes both components). The rate floor appears at the end of the definition of “Benchmark Replacement” and the corresponding definition of “Floor”:

*... provided that, if the Benchmark Replacement as determined pursuant to clause (1) or (2) above would be less than the Floor, the Benchmark Replacement will be deemed to be the Floor for the purposes of this Agreement and the other Loan Documents.*

*“Floor” means the benchmark rate floor, if any, provided in this Agreement initially (as of the execution of this Agreement, the modification, amendment or renewal of this Agreement or otherwise) with respect to USD LIBOR.*

As discussed above, the “Floor” is applied to the entire “Benchmark Replacement”. For “Daily Simple SOFR” (or “Daily Compounded SOFR”) this means the applicable floor is applied on a daily basis.

#### **D. Replacing Future Benchmarks**

Clause (b) of the Section titled “Benchmark Replacement Setting” set forth in these supplemental recommendations addresses a fallback in the highly unlikely event that during the term of the agreement, the successor for LIBOR (previously adopted pursuant to clause (a) of that Section) later ceases or becomes non-representative. If that were to occur, the successor rate would be chosen through the streamlined amendment process described below.

#### Triggers

The triggers specified in the supplemental recommendations of business loans fallback language that precipitate the transition away from the then current-Benchmark (not LIBOR) are set forth in the defined term “Benchmark Transition Event.”

*“**Benchmark Transition Event**” means, with respect to any then-current Benchmark other than USD LIBOR, the occurrence of a public statement or publication of information by or on behalf of the administrator of the then-current Benchmark, the regulatory supervisor for the administrator of such Benchmark, the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York, an insolvency official with jurisdiction over the administrator for such Benchmark, a resolution authority with jurisdiction over the administrator for such Benchmark or a court or an entity with similar insolvency or resolution authority over the administrator for such Benchmark, announcing or stating that (a) such administrator has ceased or will cease on a specified date to provide all Available Tenors of such Benchmark, permanently or indefinitely, provided that, at the time of such statement or publication, there is no successor administrator that will continue to provide any Available Tenor of such Benchmark or (b) all Available Tenors of such Benchmark are or will no longer be representative of the underlying market and economic*

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<sup>29</sup> ARRC Guiding Principles for More Robust LIBOR Fallback Contract Language in Cash Products published on July 9, 2018 at: <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-principles-July2018>.

*reality that such Benchmark is intended to measure and that representativeness will not be restored.*

In the definition, a trigger event occurs when a public statement or publication of information is made by the administrator of the then-current Benchmark, the regulatory supervisor for that administrator, the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York or another entity specified in the definition of “Benchmark Transition Event”, announcing or stating that (a) such administrator has ceased or will cease on a specified date to provide all Available Tenors of such Benchmark, permanently or indefinitely, provided that, at the time of such statement or publication, there is no successor administrator that will continue to provide any Available Tenor of such Benchmark. These triggers (the cessation triggers and pre-cessation trigger) are intended to align with the triggers included in ISDA’s standard documentation. However, it must be noted that the “Benchmark Replacement” is determined through a streamlined amendment process – the effective date of which is not tied to the future transition dates contained in ISDA’s standard documentation.

#### Benchmark Replacement: Borrower and Administrative Agent Selected Rate + Adjustment

In this supplemental recommendations for business loans, if a “Benchmark Transition Event” occurs, all references to the Benchmark will be replaced throughout the documentation with the “Benchmark Replacement” as of the date set forth in the recommendations for syndicated loans or bilateral loans, as applicable. Note that the defined term “Benchmark Replacement” continues to encompass the successor rate and any spread adjustment.

In a future transition away from the then-current Benchmark (i.e., not a transition away from LIBOR), the “Benchmark Replacement” is selected by the borrower and administrative agent or the lender, as applicable. The relevant party(ies) select an alternate rate of interest and spread adjustment giving due consideration to any evolving or then-prevailing market convention for determining interest rates in U.S. dollar syndicated loans, including any selection or recommendation that has been made by the Relevant Governmental Body (e.g. the Fed or the ARRC). Clause (2) of “Benchmark Replacement” sets forth the applicable (or rather process for determining the) Benchmark Replacement:

- (2) *For purposes of clause (b) of this Section, the sum of (a) the alternate benchmark rate and (b) an adjustment (which may be a positive or negative value or zero), in each case, that has been selected by the Administrative Agent and the Borrower as the replacement for such Available Tenor of such Benchmark giving due consideration to any evolving or then-prevailing market convention, including any applicable recommendations made by the Relevant Governmental Body, for U.S. dollar-denominated syndicated credit facilities at such time;*<sup>30</sup>

Once selected, in the case of a syndicated loan, the administrative agent will give notice of the proposed Benchmark Replacement to the lender group. The lenders then have five days in which they can object to the proposed Benchmark Replacement and if lenders constituting Required Lenders do object, then

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<sup>30</sup> See corresponding definition in the supplemental recommendation for bilateral business loans set forth in **Part III**.



the amendment fails. The process would then begin again and continue until a Benchmark Replacement is successfully selected. The recommendation for bilateral loans provides that the lender will select an alternative benchmark rate adjustment (if the parties agree, giving due consideration to any evolving or then-prevailing market convention for determining interest rates in U.S. dollar syndicated or bilateral credit facilities, including any selection or recommendation that has been made by a Relevant Governmental Body (e.g., the Fed or the ARRC)). Once selected, the lender will give notice of the proposed Benchmark Replacement to the borrower. Depending upon the optional variants selected by the parties, the borrower may have no consent rights over such replacement rate or may have a negative consent right over any selection of a benchmark replacement pursuant to the streamlined amendment process.

In the meantime, before a “Benchmark Replacement” has replaced “Benchmark” for purposes of the credit agreement, outstanding loans (and new loans) will accrue interest at ABR (see the end of clause (b) of the Section titled “Replacement Benchmark Setting” in the supplemental recommendations and the discussion below).

### Benchmark Unavailability Period

The benchmark unavailability period set forth in clause (b) of the Section titled “Replacement Benchmark Setting” is designed to address timing or acceptance issues surrounding a Benchmark Replacement. During the period in which the Benchmark is no longer available for use (whether through cessation or loss of representativeness), all relevant loans that are set during such period would accrue interest at ABR instead of such Benchmark. Of course, that will end when a Benchmark Replacement is made effective.

The supplemental recommendations provide that, at any time that the administrator of the then-current Benchmark has permanently or indefinitely ceased to provide such Benchmark or such Benchmark has been announced by the regulatory supervisor for the administrator of such Benchmark pursuant to public statement or publication of information to be no longer representative of the underlying market and economic reality that such Benchmark is intended to measure and that representativeness will not be restored, the Borrower may revoke any request for a borrowing of, conversion to or continuation of Loans to be made, converted or continued that would bear interest by reference to such Benchmark until the Borrower’s receipt of notice from the Administrative Agent that a Benchmark Replacement has replaced such Benchmark, and, failing that, the Borrower will be deemed to have converted any such request into a request for a borrowing of or conversion to ABR Loans. Furthermore, any ABR prong based upon any unavailable Benchmark or an unavailable tenor thereof would be disregarded.

### **E. Conforming Changes**

Even though the fallback language is “hardwired,” there will certainly be conforming changes needed upon the transition to a successor rate that have not been specifically addressed in the fallback language. For this reason, the fallback language provides the administrative agent or lender, as applicable, the ability to execute certain conforming changes to the business loan in order to appropriately implement and administer the successor rate. Several non-exhaustive examples of such

changes include moving from months to day count (1 month vs. 30 days), the setting of the length of the lookback period or the reference time for the Benchmark Replacement.

Because conventions may evolve over time, the administrative agent's or lender's, as applicable, ability to implement conforming changes is not only available at the time of transition, but also from time to time thereafter. The administrative agent or lender may consider using its ability to make conforming changes to address the timing of borrowing requests or prepayment, conversion or continuation notices during the interim period around a benchmark transition, as such notice periods may not align for the current benchmark and the benchmark replacement.

#### **F. Notices and Standards for Decisions and Determinations**

Because it is important that the borrower or borrower and lenders, as applicable, are properly notified of changes resulting from the occurrence of events described in the Section "Benchmark Replacement Setting," the requirement that the administrative agent or lender, as applicable, is required to send notices in certain circumstances. This requirement is narrower in scope than in the 2020 recommendations, but still includes (i) the implementation of any Benchmark Replacement and (ii) the effectiveness of any Benchmark Replacement Conforming Changes. Separately, the definition of "Early Opt-in Election" includes a notice requirement be met for an "Early Opt-in" to duly occur.

For a syndicated loan facility, the fallback provisions specify that the administrative agent must make certain decisions and determinations, for example, the determination of the applicable successor rate and spread adjustment. In certain cases, such as in the case of an "early opt-in" or in the determination of the successor rate described in clause (b) of the Section titled "Benchmark Replacement Setting," the lenders in a syndicated facility also must make certain decisions. The fallback language specifies in the operative provisions that any determination, decision, including decisions regarding whether to take action or refrain from taking action, or election may be made "in the sole discretion" of the administrative agent, or lender (or group of lenders). The standard set forth for any such decision, determination or election is "conclusive and binding absent manifest error."

For a bilateral loan facility, the fallback provisions specify that the lender must make certain decisions and determinations, for example, the determination of the applicable successor rate and spread adjustment. The fallback language specifies in the operative provisions that any determination, decision, including decisions regarding whether to take action or refrain from taking action, or election may be made "in the sole discretion" of the lender. The standard set forth for any such decision, determination or election is "conclusive and binding absent manifest error."



## G. Unavailability of Tenor of Benchmark

Because loan facilities often permit borrowings under the credit agreement or note in different interest rate tenors, the administrative agent or lender, as applicable, has the ability to remove (and later reinstate) any tenor of a benchmark that is unavailable or is no longer representative. This ability is set forth in clause (e) of the Section titled “Benchmark Replacement Setting”:

*At any time (including in connection with the implementation of a Benchmark Replacement), (i) if the then-current Benchmark is a term rate (including Term SOFR or USD LIBOR), then the [Administrative Agent][Lender] may remove any tenor of such Benchmark that is unavailable or non-representative for Benchmark (including Benchmark Replacement) settings and (ii) the [Administrative Agent][Lender] may reinstate any such previously removed tenor for Benchmark (including Benchmark Replacement) settings.*

## H. General Considerations

### Scope of Recommendation

This ARRC recommendation offers a complete fallback solution, but it is not possible to address every aspect of a credit agreement that would be impacted when LIBOR is replaced and such other changes to operative provisions fall outside the scope of this project. There are a number of customary credit agreement provisions that have developed around the historical construct of LIBOR and such provisions, e.g. breakage, increased costs, and illegality, may need to be reconsidered if LIBOR is not the reference rate.

Finally, there are certain decisions and determinations that must be made by administrative agents or lenders, as applicable, in connection with a transition to a Benchmark Replacement. Administrative agents or lenders, as applicable, may deem it prudent to include general disclaimer language with respect to LIBOR or any successor rate. While such provisions are individual to each administrative agent or lender, the ARRC understands the needs of administrative agents and lenders, as applicable, and the ARRC does not consider the inclusion of such language to be at odds with its principles.

### Comparison: 2020 Hardwired Fallbacks vs. 2021 Hardwired Fallbacks

The supplemental recommendations set forth in **Part II** and **Part III** are not meant to substantively deviate from the hardwired fallback language set out in the 2020 recommendations. The supplemental recommendations do, however, simplify and eliminate aspects of the 2020 fallback language recommendations based on the IBA and FCA statements made on March 5, 2021. First, the March 5<sup>th</sup> statements confirmed that one-month, three-month, six-month and twelve-month LIBOR will all continue as representative panel bank rates through June 30, 2023 so there is no longer a need to have the triggers for the transition away from LIBOR to refer to all “Available Tenors.” Abridging the 2020 recommendations also allowed for further simplification, most notably, the supplemental recommendations do not include certain defined terms, such as “Benchmark Replacement Adjustment,”

“Benchmark Replacement Date,” “Corresponding Tenor” or “Reference Time, and have consolidated other defined terms, such as “SOFR Administrator” and “SOFR Administrator’s Website” into the definition of “SOFR”. The supplemental recommendations also provide certainty, based upon the selection in clause (a) of the Section titled “Benchmark Replacement Setting,” as to what payment period will be utilized for business loans that have transitioned from USD LIBOR to a Daily Simple SOFR, which in turn provides clarity for the relevant spread adjustment that will be utilized. Finally, now that the applicable spread adjustments are set, the set spread adjustment values are set forth in the definition of “Benchmark Replacement” (therefore a definition of “Benchmark Replacement Adjustment” is no longer needed). Finally, the pre-cessation event described in the definition of “Benchmark Transition Event,” namely that “...all Available Tenors of such Benchmark are or will no longer be representative of the underlying market and economic reality that such Benchmark is intended to measure and that representativeness will not be restored” more closely aligns with the drafting of “Index Cessation Event” in ISDA’s standard documentation.