

Treasury and IRS colleagues,

As discussed, we are submitting a revised request for guidance concerning the ISDA Protocol and Amended Definitions relating to IBOR discontinuation. The ARRC requests that Treasury and the IRS issue standalone guidance stating that adherence to the Protocol, as well as bilateral modifications that implement substantially similar fallback provisions, will not give rise to a taxable event under Section 1001 of the Code. The changes to our request reflect the use of a “substantially similar” standard (in place of “comparable”) for bilateral amendments. We also propose that Treasury and the IRS provide explicit relief for “pre-cessation triggers” and “associated alterations.”

The ARRC believes that the use of a “substantially similar” standard provides the needed flexibility for bilateral amendments while still making clear that the primary features of the fallback methodologies included in the Amended Definitions are retained. For example, the ARRC believes that this “substantially similar” standard could allow for deviations (to the extent they do not qualify as “associated alterations,” as discussed below) such as (1) changes that make the amendments enforceable in a relevant jurisdiction or in order to satisfy legal requirements of that jurisdiction, (2) an amendment to incorporate the Amended Definitions into a non-ISDA based contract or one that does not already incorporate the current Definitions and (3) an amendment to a contract that incorporates only the provisions of the fallback methodologies in the Amended Definitions that are relevant to that contract (for example, only the fallback provisions related to USD LIBOR). The ARRC notes that, if the IRS wishes, it may clarify that the “substantially similar” standard would not cover modifications that seek to change the fallback reference rate or the spread adjustment methodology employed by the Amended Definitions.

The ARRC requests that the guidance permit the addition of pre-cessation triggers to the fallback methodologies included in the Amended Definitions. The addition of a pre-cessation trigger could result in the calculation of the fallback rate (including the spread adjustment that applies to the base rate) and transition of a contract’s reference rate to the fallback rate under the Amended Definitions at earlier dates than would otherwise occur under the Amended Definitions. Other than being applied on an earlier date, the method for determining the replacement rate, including the spread adjustment calculation, would generally be consistent with the method in the Amended Definitions. For further discussion of pre-cessation triggers, please see the ARRC’s December 9 submission, as well as the pre-cessation consultation and report released by ISDA (each available at the links provided below).

The ARRC also requests that the guidance permit any alterations associated with the incorporation of the fallback methodologies contained in the Amended Definitions (and a pre-cessation trigger, if any) that are reasonably necessary to adopt or to implement such changes (“associated alterations”). This term is modeled on Proposed Treasury Regulations Section 1.1001-6(a)(5) and could be similarly limited to technical, administrative or operational alterations.

We would be happy to discuss these issues further at your convenience.

Jared

ARRC December 9 Submission:

[https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARRC Tax Letter re ISDA Protocol.pdf](https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARRC_Tax_Letter_re_ISDA_Protocol.pdf)

ISDA Consultation on Pre-Cessation Triggers: <https://www.isda.org/a/md6ME/FINAL-Pre-cessation-issues-Consultation.pdf>

ISDA Report on Pre-Cessation Triggers: <http://assets.isda.org/media/e0b1bac2/04397355-pdf/>

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