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October 26, 2022

Charles P. Rettig
Commissioner
Internal Revenue Service (IRS)
1111 Constitution Avenue, NW
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Commissioner Rettig,

The National Association of Bond Lawyers ("NABL") appreciates the swift promulgation of Final Treasury Regulations §1.1001-6 and Final Amendments to §1.1275-2 (the "Final Regulations") relating to the transition from interbank offered rates (IBORs) to replacement benchmark rates. We now wish to provide the attached comments and recommendations to clarify how the Final Regulations are intended to operate in the context of tax-advantaged bonds.

NABL is a nonprofit organization and specialty bar association of approximately 2,500 lawyers whose purposes include, among other things, providing advice and comment at the federal, state, and local levels with respect to legislation affecting state and municipal obligations.

Thank you in advance for your time and attention here. I have asked our Director of Governmental Affairs, Brian Egan, to answer any questions you may have. You can reach Brian via email at began@nabl.org or via phone at (202) 503-3290. We look forward to hearing from you.

Best,

Joseph (Jodie) E. Smith
President
National Association of Bond Lawyers (NABL)

CC:
- Lily Batchelder, Assistant Secretary for Tax Policy, U.S. Department of Treasury
- Brett York, Deputy Tax Legislative Counsel, U.S. Department of Treasury
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COMMENTS ON
FINAL TREASURY REGULATIONS § 1.1001-6 AND
FINAL AMENDMENTS TO § 1.1275-2
(PUBLISHED JANUARY 4, 2022)

The National Association of Bond Lawyers (NABL) greatly appreciates the efforts of the Treasury Department and the Internal Revenue Service in addressing reissuance concerns arising from the modification of debt instruments and non-debt contracts to help facilitate an orderly transition from interbank offered rates (IBORs), including the London Interbank Offered Rate (LIBOR), to alternative benchmark rates. The enclosed comments were prepared by an ad hoc task force (whose members are listed in Appendix D) and were approved by the NABL Board of Directors.

NABL appreciates the swift promulgation of Final Treasury Regulations §1.1001-6 and Final Amendments to §1.1275-2[1] (the "Final Regulations") relating to the transition from IBORs to replacement benchmark rates, helping to avoid market disruptions that could otherwise accompany such transitions. NABL is pleased to offer the enclosed comments and recommendations to clarify how the Final Regulations are intended to operate in the context of tax-advantaged bonds. Specifically, these comments request the following, as described in more detail below:

1. The IRS should issue guidance to explicitly provide that changes made pursuant to or consistent with the Adjustable Interest Rate (LIBOR) Act (the "LIBOR Act")[2] included as part of the Consolidated Appropriations Act of 2022 (the "Appropriations Act"))[3] will not be treated as a sale or exchange for purposes of Section 1001 of the Internal Revenue Code of 1986 (the "Code"), as suggested in the legislative history to the LIBOR Act.

2. The IRS should clarify Section 1.1001-6(j) of the Final Regulations by providing examples of what constitutes a change intended to "induce" consent to a modification. Further, we suggest that, unless facts and circumstances indicate otherwise, substitutions of an IBOR by unrelated parties should be presumed not to be an inducement.

3. The IRS should issue guidance to explicitly provide that, as suggested by the removal of the fair market value requirement imposed by the Proposed Regulations, a fallback interest rate need not be tested under Section 1001 when it is activated. Instead, the activation should be governed similarly to the general reissuance rules of Section 1.1001-3 of the Treasury Regulations.

4. The IRS should clarify that the Final Regulations can apply to provide reissuance relief to "super-integrated" hedges and bonds by explaining that the statement that Section 1.1001-6(c)(1)(iv) of the Final Regulations does not apply to "super-integrated" hedges and bonds means only that the 90-day grace period and one-time payment provisions in that section do not apply to bonds and superintegrated hedges.

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1 87 F.R. 166-01, TD 9961 (Jan. 4, 2022).
2 12 U.S.C. §§5801-5807.
3 P.L. 117-103, 136 Stat 49.

5. The IRS should provide guidance on the appropriate treatment of qualified one-time payments for tax-advantaged bond purposes, including with respect to the arbitrage investment restrictions and private business use restrictions applicable to such bonds. A chart with our suggested treatment based on payor and payee and purpose of payment has been included.

6. The IRS should eliminate the one-year time limit under the definition of a "discontinued IBOR." to allow parties to make changes that are otherwise in compliance with the Final Regulations in order to avoid potential market disruptions that could occur after the cessation of an IBOR.

7. The IRS should expand the fallback approaches described in Rev. Proc. 2020-44, which are covered modifications *per se*, to include later ARRC simplifications and permit additional approved fallback language promulgated by entities other than ISDA or the ARRC, such as industry organizations or the IRS, if certain conditions are met.

1. Changes Pursuant to or Consistent with LIBOR Act

The LIBOR Act does not expressly state that changes pursuant to the LIBOR Act will not be treated as a taxable sale, exchange, or other disposition of property for purposes of Section 1001 of the Code. In contrast, earlier legislative proposals similar to the LIBOR Act[4] included specific express language regarding the tax treatment under Section 1001 of the Code. The legislative history to the LIBOR Act addresses the decision to omit this express language:

> There was an earlier draft of this bill that set forth the obvious, and that is the substitution of SOFR for the LIBOR index does not constitute a sale or exchange for tax purposes. We took that out because we wanted to move the bill quickly and not cause a referral to the Ways and Means Committee. Mostly we took it out because it was absolutely unnecessary.
>
> It is very clear under existing tax law, the change of one index to another index that is incredibly similar, in this case, designed to be as close as humanly possible does not constitute a sale or exchange, but especially where that change is through the operation of law and where the change is necessitated because the original index is no longer published. The tax outcome is obvious and does not need to be part of the statute.[5]

Given the clear intent of Congress to exempt changes pursuant to the LIBOR Act from reissuance testing under Section 1001, the IRS should issue guidance making this point explicit to eliminate confusion.

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[4] For example, section 6 of S. 3844, the "Economic Continuity and Stability Act" introduced in the U.S. Senate on March 15, 2022 and section 6 of the original version of H.R. 4616, introduced in the U.S. House of Representatives on July 22, 2021 (precursor to the LIBOR Act),

[5] 167 Cong. Rec. H7479 (statement of Rep. Sherman, Chairman of the House Financial Services Subcommittee on Capital Markets and Investor Protection).

2. Clarification of What Constitutes an "Inducement" for Purposes of Section 1.1001-6(j) of the Final Regulations

Prop. Treas. Reg. §1.1001-6 required the parties to demonstrate that the fair market value of an instrument was the same before and after an IBOR replacement for the replacement to qualify for reissuance relief. The preamble to Treasury Regulations §1.1001-6 (the "Preamble") states that the Final Regulations abandoned this fair market value test because of "practical problems and technical issues" and "replaced" it with specific rules under Treas. Reg. §1.1001-6(j). However, the rules in Treas. Reg. §1.1001-6(j) could be read to have retained a fair market value requirement, as described below.

Under the Final Regulations, a "covered modification" (which qualifies for reissuance relief) excludes a modification described in Treas. Reg. §1.1001-6(j). This exclusion applies, among other instances, where "[t]he terms of the contract are modified to change the amount or timing of contractual cash flows and that change is intended to *induce* one or more parties to perform any act necessary to consent to a modification. . . ." (*emphasis added*).

But the meaning of the word "induce" in Treas. Reg. §1.1001-6(j)(1) is ambiguous. In most business transactions, each party agrees upon terms that are intended to "induce" the other party to consent. In simplest terms, the selection of mutually agreeable terms causes parties to consent to an agreement. Because of the ambiguity of the term "induce," one might not be certain that a contractual term involved with the substitution of an IBOR was not included to induce another party to consent unless one has evidence of equivalent fair market value of the replacement rate. This issue is particularly problematic with respect to tax-exempt bond transactions, which require bond counsel to render an unqualified opinion that the bonds retain their tax-exempt status in spite of a modification.

A fair market value approach arguably appears to be used in Treas. Reg. §1.1001-6(j)(6)(i) (Example 1) to justify the conclusion that the substitution was a "covered modification." To do so, the example referred to the use of a third-party benchmark to determine rates did not involve an "inducement" for consent.

To promote clarity and consistency with the Preamble, the IRS should clarify that some additional change, above and beyond the mere substitution of an IBOR with a rate formula acceptable to another party, is necessary to constitute an "inducement" under Treas. Reg. §1.1001-6(j). Further, the IRS should state this principle as a presumption that IBOR substitutions among unrelated parties do not involve an inducement unless the facts and circumstances clearly indicate changes beyond an IBOR replacement, such as in Example 3 of Treas. Reg. §1.1001-6(j)(6)(iii). In that example, to entice the holders to consent to the IBOR replacement, the issuer increased the spread above what was needed to accomplish the IBOR replacement.

3. Retesting of Fallback Rate Upon Activation

The stated policy objective of the Final Regulations is to minimize potential market disruption and to facilitate an orderly transition in connection with the discontinuation of IBORs. The Final Regulations provide reissuance relief for modifications that replace an IBOR with a qualified rate, including by adding the qualified rate as a fallback rate to the IBOR. In those cases, the fallback rate may not be triggered until a later date, when either the applicable IBOR is officially discontinued or the parties take other steps outlined in the bond documents to activate the fallback rate.

Two commenters on the Proposed Regulations asked "whether, following a covered modification by which the parties add or amend fallback provisions, the change to the terms of the contract that results from the activation of the new fallback provisions must be tested separately at the time of activation to

determine whether that change is an exchange of property . . . for purposes of §1.1001-1(a). . . .” The Preamble responds: “As is ordinarily the case, a change to the terms of the contract that results from the activation of a fallback provision must be tested at the time of activation to determine whether that change results in such an exchange under §1.1001-1(a).”

The premise of this conclusion is that once the covered modification is made (i.e., the parties add the qualified rate as a fallback rate, even if they do not activate it immediately), the policy objectives of the Final Regulations – an orderly transition away from IBORs – are satisfied. Any subsequent activation of a fallback provision falls outside the scope of the Final Regulations. The Final Regulations fall short in this regard of providing sufficient reissuance relief. Moreover, the activation of a qualified fallback rate that does not otherwise involve the modification of an instrument would not ordinarily be required to be tested under the provisions of Treas. Reg. §1.1001-1(a) at the time the fallback rate goes into effect.

Recent experience with IBOR transitions indicates that lenders and borrowers will often make covered modifications of debt instruments to implement provisions for a qualified rate as a fallback rate but wait to activate it. The activation of fallback provisions are often planned to occur upon a later bilateral agreement once the parties are ready for a switch from the IBOR to the qualified rate. The bilateral nature of the agreement may contemplate, for example, the option of the lender to decide when to activate the rate and the pre-existing option of the borrower to then redeem the debt instrument. Immediate activation of the qualified rate may not occur for various other reasons as well, including operational considerations, such as allowing lenders and borrowers the time necessary to adjust accounting systems. Because of the imminent discontinuation of an IBOR, the lender and the borrower will be aware that activation must occur eventually.

Example 1 in Treas. Reg. §1.1001-6(j)(6)(i) illustrates the practical difficulty when activation does not occur immediately. The Example describes a covered modification in which the qualified rate activates immediately, as part of a bilateral agreement to implement fallback language. But, the Example is silent on the point made in the Preamble that “activation of a fallback provision must be tested at the time of activation” to determine its reissuance impact. In practice, we have regularly experienced situations where parties may have agreements that follow the facts of the example, but qualified rate activation (the forward-looking SOFR rate in the example) does not occur until the lender is ready to make the change.

If activation of a replacement rate does not require testing at that time under the existing reissuance regulations under Treas. Reg. §1.1001-3 (and the Final Regulations, in particular Treas. Reg. §1.1001-6(j)(6)(i), Example 1, indicate no testing is required in this situation), then activation later, under otherwise the same facts as the Example, should also be protected from retesting under the existing reissuance regulations. We respectfully request guidance on this point.

4. Super-Integrated Hedges and Bonds

Treas. Reg. §1.148-4(h)(1) generally provides that payments made and received by an issuer under a qualified hedge (as defined) are taken into account to determine the yield on the hedged bonds if the bonds and the hedge meet certain requirements. In general, a hedged bond is treated as a variable yield bond. However, Treas. Reg. §1.148-4(h)(4) generally provides that variable yield bonds are treated as fixed yield bonds if the bonds and the qualified hedge meet certain enhanced requirements (so-called “super-integrated” hedges). These enhanced requirements are designed to ensure, among other things, that the issuer’s aggregate payments on the hedged bonds and the qualified hedge are fixed and determinable as of a date no later than 15 days after the issue date of the bonds.

Treas. Reg. §1.1001-6(b)(1) provides that a covered modification of a contract is not treated as an exchange. A covered modification could include modifying a bond or an interest rate swap from a LIBOR-

based index to a new qualified rate, such as SOFR. If the Final Regulations said nothing more, we would conclude that the modification of a LIBOR-based hedged bond to a SOFR-based hedged bond and the contemporaneous modification of its associated LIBOR-based qualified hedge to a SOFR-based qualified hedge would not affect the status of the hedge as qualified under Treas. Reg. §1.148-4(h), including its qualification as a super-integrated hedge under Treas. Reg. §1.148-4(h)(4).

However, this is not the approach that the Final Regulations appear to take. Treas. Reg. §1.1001-6(c)(1)(iv) goes on to provide:

> A covered modification of a qualified hedge or of the tax-advantaged bonds with which the qualified hedge is integrated under §1.148-4(h)(1) is treated as not terminating the qualified hedge under §1.148-4(h)(3)(iv)(B), provided that, no later than the end of the 90-day period beginning on the date of the first covered modification of either the qualified hedge or the hedged bonds, the qualified hedge that results from any such covered modification satisfies the requirements to be a qualified hedge (determined by applying the special rules for certain modifications of qualified hedges under §1.148-4(h)(3)(iv)(C)) with respect to the hedged bonds that result from any such covered modification. Solely for purposes of determining whether the qualified hedge that results from a covered modification satisfies the requirements to be a qualified hedge with respect to the hedged bonds that result from any such covered modification in the preceding sentence, a qualified one-time payment with respect to the hedge or the hedged bonds (or both) is allocated in a manner consistent with the allocation of a termination payment for a variable yield issue under §1.148-4(h)(3)(iv)(H) and treated as a series of periodic payments. <u>This paragraph (c)(1)(iv) does not apply if, prior to any covered modifications, the qualified hedge and the tax-advantaged bond are integrated under §1.148-4(h)(4)</u>. (Emphasis added.)

The Preamble explains that "[s]ection 1.148-4(h)(4) generally permits only negligible mismatches in timing and amount of payments on super-integrated hedges and bonds, and super-integration of taxable-index hedges, such as hedges based on IBORs, is even more strictly limited. Accordingly, . . . the Final Regulations clarify that §1.1001-6(c)(1)(iv) does not apply to hedges and bonds integrated under §1.148-4(h)(4)."

The last sentence of §1.1001-6(c)(1)(iv) and the explanation in the Preamble could give rise to the conclusion that covered modifications of a super-integrated hedge and the hedged bonds, even if accomplished simultaneously, not only are no longer treated as super-integrated, but perhaps even must be treated as terminated under the qualified hedge termination rules in 1.148-4(h). These provisions could be interpreted to make it impossible to transition a bond bearing interest at an IBOR rate that is superintegrated with an IBOR-based hedge away from IBORs without having to test for a reissuance under the general rules under Treas. Reg. §1.1001-3.

The IRS should clarify that the only parts of Treas. Reg. §1.1001-6(c)(1)(iv) that do not apply to super-integrated hedges are the 90-day grace period and the qualified one-time payment rule. Further, we recommend that the 90-day grace period be identified as a safe harbor and not a bright-line limitation that does not take into account facts and circumstances of a modification.

5. <u>Character of Qualified One-Time Payments</u>

Qualified one-time payments may constitute part of a covered modification under the Final Regulations. Treas. Reg. §1.1001-6(h)(6) defines a qualified one-time payment as a cash payment intended to compensate parties to the transaction for all or a part of the basis difference between the discontinued IBOR and the replacement rate. The Final Regulations do not provide explicit guidance on how a one-time

payment should be characterized for various tax purposes. The Preamble acknowledges this gap and invites comments on this topic. The Preamble provides that until further guidance is promulgated, taxpayers may rely on Prop. Treas. Reg. §1.1001-6(d) (2019). Unfortunately, Prop. Treas. Reg. §1.1001-6(d) (2019) also lacks significant guidance regarding the many characterizations required for tax-advantaged bond purposes.

Section G.5 of the Preamble notes that one commenter requested guidance on how a one-time payment is treated for purposes of the arbitrage investment restrictions and private use restrictions that apply to tax-advantaged bonds and that the Treasury Department and the IRS continue to consider how best to address these issues. Section E of the Preamble also notes that "the Final Regulations generally limit a qualified one-time payment to the amount intended to compensate for the basis difference between the discontinued IBOR and the interest rate benchmark to which the qualified rate refers." This limitation was intended to avoid abuses based on large one-time payments.

NABL believes that limiting such payments to an amount that is small enough not to give rise to significant abuses should also permit the IRS to simplify the accounting and tax-advantaged bond analysis by selecting the simplest treatment for the parties to the transaction. NABL believes that simplicity and ease of application should be the most important criteria when selecting the characterization for tax-advantaged bond purposes. The natural reading of Section E of the Preamble is that any qualified one-time payment is, in effect, an adjustment of the cost of borrowing represented by the instrument. While the one-time payment may, in effect, represent a change in the borrowing rate over the remaining term of the instrument (or of that mode of the instrument) and relate not to a current interest payment, NABL believes that for the sake of simplicity and ease of application, this relatively small one-time payment should be treated as follows:

Payments from Issuers to Holders. For a bond holder receiving a one-time payment in connection with an IBOR replacement, the simplest characterization would be treating it as a payment of interest in the tax year paid rather than amortizing such treatment over a longer period. For a bond issuer making the payment, the simplest characterization would be treating the payment as interest because the arbitrage regulations provide clarity about when bond proceeds may be used for that purpose.

Payments from Holders to Issuers. For a bond holder making a one-time payment, the simplest characterization would be adding the payment to the holder's basis in the bond. For a bond issuer receiving that payment, the simplest characterization would be to treat the payments as not being gross proceeds of the bonds. The payment could in a more complex manner be treated as additional proceeds subject to the various tax-advantaged bond rules restricting the use of bond proceeds. However, we think it would create unnecessary complexity if the payment were subject to additional volume cap or other restrictions that impose size limitations on the bonds because these additional proceeds were not expected at the time the instrument was issued.

Accordingly, the receipt of a qualified one-time payment should not affect whether the amount of the original sale proceeds qualified, for example, for a spending exception from the arbitrage rebate requirements. A table included at Appendix C summarizes all the NABL recommendations for treatment of a qualified one-time payment for various tax-advantaged bond purposes.

6. Time Limit for Discontinued IBORs

Treas. Reg. §1.1001-6(h)(4) defines a "discontinued IBOR" as an interbank offered rate that has ceased or will cease pursuant to an announcement by an authority identified in Treas. Reg. §1.1001-6(h)(4)(i) or (ii) "during the period beginning on the date of the announcement described in paragraph (h)(4)(i) or (ii) of this section and ending on the date that is one year after the date on which the administrator of the interbank offered rate ceases to provide the interbank offered rate." The Preamble indicates that this one-year cutoff date for discontinued IBORs was included "to tailor the relief provided in the Final Regulations to better match the problem that the Final Regulations are intended to address."

NABL appreciates the policy goals for limiting the use of Treas. Reg. §1.1001-6 to one year after an IBOR ceases to be provided. However, the policy goals of the Final Regulations should not be limited to facilitating the transition away from discontinued IBORs to avoid the market disruption *before* the IBOR is discontinued. The policy goal of facilitating an orderly transition away from IBORs could just as easily apply to actions taken more than one year after an IBOR is discontinued.

At least some instruments in the marketplace, for various reasons, may include references to an IBOR (such as a fallback rate based on an IBOR) that will not be implicated until more than one year after such IBOR has been discontinued. In such situations, changes to these instruments that in all other respects would qualify as a covered modification would not be able to rely on the safe harbor provided by the Final Regulations. For these instruments, any changes would need to be tested under the general rules in Treas. Reg. §1.1001-3. Such a result does not appear to provide significant policy benefits. As such, the IRS should remove the one-year limit from the definition of a "discontinued IBOR."

7. Revenue Procedure 2020-44

a. ISDA and ARRC Fallback Approaches

Treas. Reg. §1.1001-6(h)(1) provides that any modification described in section 4.02 of Rev. Proc. 2020-44, 2020-45 I.R.B. 991, or described in other guidance published in the Internal Revenue Bulletin that supplements the list of modifications described in section 4.02 of Rev. Proc. 2020-44 or the definitions on which that section relies, will be a covered modification and hence will not result in a reissuance of the modified instrument. Under Treas. Reg. §1.1001-6(h)(1), there is no need to comply with the remaining provisions of the Final Regulations. For example, the parties need not check such a modification against the prohibitions of Treas. Reg. §1.1001-6(j).

Section 4.02 of Rev. Proc. 2020-44 in turn describes three situations in which a modification incorporates certain language recommended by the ARRC or by ISDA and Section 5.01 of the Rev. Proc. states that these modifications do not, *per se*, result in a reissuance of the modified instrument. Section 4.02 of Rev. Proc. 2020-44 relies on the defined terms *"ARRC Fallback"* and *"ISDA Fallback."* These terms are defined in Section 3.01 of Rev. Proc. 2020-44. It should be noted that not all ARRC- and ISDA-recommended fallback approaches are included in the definitions of ARRC Fallback and ISDA Fallback in Rev. Proc. 2020-44. There are ARRC-recommended approaches that were recommended prior to the publication of the Rev. Proc. that were left out of the definition in the Rev. Proc. of ARRC Fallback. We believe that this was intentional because the omitted ARRC approaches generally provided for significant discretion of the parties to choose the rate applicable at the time the transition from an IBOR occurs. By contrast, the ARRC-recommended approaches listed in Section 3.01 of the Rev. Proc. generally provide for transition to specific rates based on SOFR with much less discretion of the parties to make choices. They are often described as "hard-wired."

There were also some "hard-wired" ARRC-recommended fallback approaches that were released on March 25, 2021,[6] which was after the publication date of the Rev. Proc. We believe that these approaches would have been included in Section 3.01 of the Rev. Proc. if they had been published before the Rev. Proc., and we request that the IRS do so now by adding the March 25, 2021 approaches to the definition of ARRC Fallback in the Rev. Proc. The March 25, 2021 ARRC hard-wired approaches merely simplify and clarify certain of the ARRC Fallbacks identified in the Rev. Proc. to take into account the dates on which various tenors of LIBOR have and will be discontinued and the known spreads that the ARRC recommends as compensation to the parties for the switch from LIBOR to SOFR.

As a practical matter, use of the March 25, 2021 versions of the ARRC recommended fallback provisions is simpler for the parties, results in clearer language, but does not substantively differ in result from the earlier ARRC Fallbacks released in 2019 or 2020. Treas. Reg. §1.1001-6(h)(1) clearly allows for a later publication to change the definition of ARRC Fallback, and NABL strongly recommends that the IRS publish guidance that adds the March 25, 2021 ARRC approaches to the definition of ARRC Fallback. These two approaches are those that are identified in the Table of Contents of the March 25, 2021 release as follows:

- ***Part II: Supplemental Fallback Language for LIBOR Syndicated Business Loans*** of the document entitled ***ARRC SUPPLEMENTAL RECOMMENDATIONS OF HARDWIRED FALLBACK LANGUAGE FOR LIBOR SYNDICATED AND BILATERAL BUSINESS LOANS (March 25, 2021);*** *and,*

- ***Part III: Supplemental Fallback Language for LIBOR Bilateral Business Loans*** of the document entitled ***ARRC SUPPLEMENTAL RECOMMENDATIONS OF HARDWIRED FALLBACK LANGUAGE FOR LIBOR SYNDICATED AND BILATERAL BUSINESS LOANS (March 25, 2021)***

A draft Revenue Procedure adding these approaches to the definition of an ARRC Fallback can be found at Appendix A of these comments.

NABL also believes that additional model transition language should be added to the list either at the present time or as new situations develop. We think it is very useful for the IRS to provide that the use of approved language clearly meets the requirements of Treas. Reg. §1.1001-6 because that simplifies the required analysis when applied to actual debt and non-debt instruments. NABL believes that in each case, the ARRC Fallbacks and the ISDA Fallbacks are approaches that would in any case satisfy the substantive requirements of Treas. Reg. §1.1001-6 without regard to the provision referencing Rev. Proc. 2020-44, although the analysis is more difficult without the reference to approved language. We believe that compliance with the requirements of Treas. Reg. §1.1001-6(j) should remain an objective of adding any additional ARRC Fallback or ISDA Fallback to the list or to adding any other type of approved fallback language.

b. IRS and Industry Organization Fallback Approaches

Further, the ARRC and ISDA are not the only appropriate sources for additional approved fallback language. For example, the IRS itself could provide such language in a future revenue procedure or other pronouncement. We also believe that industry organizations, including NABL, the Securities Industry and Financial Markets Association (SIFMA), and the Government Finance Officers Association (GFOA), are

[6] Available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/arrc-supplemental-hardwired-recommendation.

well suited to provide such language. This is particularly true for tax-exempt bonds, which have their own peculiarities and have not been a major emphasis of the ARRC or ISDA. We note that SIFMA, GFOA and NABL, have in the past provided recommended language for tax-exempt bond documents dealing with tax law provisions.[7] We understand the reluctance to grant approval to language recommended by a non-governmental entity. However, the IRS would have ample time to review any such proposed language before including it in a revised definition of a qualified rate and could insist that the proposers provide a memorandum explaining whether or not the drafters intended it to meet the other substantive rules of Treas. Reg. §1.1001-6.

In general, the most difficult part of establishing that a modification to replace an IBOR is a covered modification is establishing that the modification is not described in Treas. Reg. §1.1001-6(j). This is not required, however, for modifications described in section 4.02 of Rev. Proc. 2020-44 (or an authorized expansion thereof).

The IRS should use expansions of Rev. Proc. 2020-44 to introduce additional fallback language that expands on the current provisions of Treas. Reg. §1.1001-6 and similarly allows the parties to avoid applying the detailed rules in Treas. Reg. §1.1001-6(j) to the modification. It would be appropriate for the Rev. Proc. to be expanded by adding a defined term "Approved Fallback" that would be treated exactly the same as an ARRC Fallback or an ISDA Fallback. An Approved Fallback would then be defined to include listed fallback language as added from time to time, whether by ARRC, ISDA, or the IRS (of its own accord or after a request from an industry group), including the following.

An Approved Fallback should include language that would match an ARRC Fallback if it referred to LIBOR. The transition from an existing rate to this new Approved Fallback would be to the same waterfall of possible replacement rates, with the same events triggering the replacement (including an early opt in). While modifications incorporating these changes would not otherwise meet the requirements of Treas. Reg. §1.1001-6 (because the discontinued rate might not be a "discontinued IBOR") such modification would in all non-remote circumstances be to SOFR plus a spread. Because this change is included in as an Approved Fallback under Rev. Proc. 2020-44, the restrictions of Treas. Reg. §1.1001-6(j) would not apply. We have included a draft of this proposed "Approved Fallback" as Appendix B. Note that the language we have provided is taken from the March 25, 2021 ARRC supplemental recommended fallback language because that language is simpler and easier to follow than the versions from 2020 or 2019. We are using this as our base, on the assumption that the IRS will add such 2021 versions of the ARRC language to the list of approved ARRC Fallbacks. If the IRS decides not to use the 2021 version of the ARRC recommended language, the 2020 version could be similarly modified to remove all LIBOR references.

* * *

[7] For example, SIFMA and NABL each prepared model provisions relating to the revisions to the definition of "issue price" made in 2016 (Treas. Reg. §1.148-1(f)).

APPENDIX A

Rev. Proc. 2022-__, 2022-__ IRB ____, __/__/2022, IRC Sec(s). 1001

1. Purpose

The purpose of this revenue procedure is to augment the list of published provisions that are designated as "ARRC Fallbacks" currently listed in section 3.01(2) of Revenue Procedure 2020-44, 2020-45 IRB 991, 10/12/2020. Regulation section 1.1001-6(h)(1) provides in part that any modification of the terms of a contract described in section 4.02 of Rev. Proc. 2020-44, or described in other guidance published in the Internal Revenue Bulletin that supplements the list of modifications described in section 4.02 of Rev. Proc. 2020-44 or the definitions on which that section relies (see §601.601(d)(2)(ii)(a) of the Treasury Regulations) is treated as a covered modification. One of the definitions on which section 4.02 of Rev. Proc. 2020-44 relies is the definition of an "ARRC Fallback." This revenue procedure modifies that definition to include the additional ARRC Fallbacks itemized in section _ of this revenue procedure.

2. Background

.01. LIBOR and other IBORs. On July 27, 2017, the Financial Conduct Authority, the United Kingdom regulator tasked with overseeing LIBOR, announced that all currency and term variants of LIBOR, including U.S.-dollar LIBOR (USD LIBOR), may be phased out after the end of 2021. The Financial Stability Board and the Financial Stability Oversight Council have publicly acknowledged that, in light of the prevalence of USD LIBOR as the reference rate in a broad range of financial instruments, the probable elimination of USD LIBOR has created risks that pose a potential threat not only to the safety and soundness of individual financial institutions but also to financial stability generally.

.02. The ARRC and SOFR. The Alternative Reference Rates Committee ("ARRC"), whose ex officio members include the Board of Governors of the Federal Reserve System, the Department of the Treasury (Treasury Department), the Commodity Futures Trading Commission, and the Office of Financial Research, was convened by the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York to identify an alternative reference rate that would be more robust than USD LIBOR and that would comply with standards such as the International Organization of Securities Commissions' "Principles for Financial Benchmarks." After considering a comprehensive list of alternatives, the ARRC recommended the Secured Overnight Financing Rate (SOFR) as the replacement for USD LIBOR. Since April 3, 2018, the Federal Reserve Bank of New York has published SOFR daily.

.03. ARRC contract fallback language. The ARRC was also tasked with facilitating the voluntary acceptance of SOFR as the replacement for USD LIBOR. Many cash products, including newly issued cash products, refer to USD LIBOR and contain fallback provisions that do not adequately protect against the cessation of that benchmark. To support the transition from USD LIBOR, the ARRC has published recommended fallback language for inclusion in the terms of certain newly issued cash products, including floating rate notes, bilateral business loans, syndicated loans, securitizations, adjustable rate mortgages, and variable-rate private student loans. In each case, the fallback language describes the circumstances under which references to the current benchmark rate are replaced. When such a circumstance arises, the fallback language generally provides a mechanism for determining the replacement benchmark rate that supplants the current benchmark rate. The fallback language generally also provides a mechanism for determining a spread adjustment that is added to the replacement

benchmark rate to account for any difference between the replacement benchmark rate and the current benchmark rate. Although the ARRC has recommended this fallback language for use in newly issued cash products, the ARRC believes that parties to outstanding cash products that refer to USD LIBOR will also modify the contracts relating to those cash products to incorporate the appropriate fallback language.

.04. ISDA and derivative contracts. The ARRC has also been actively engaged in work led by ISDA to ensure that the contractual fallback provisions in derivative contracts are sufficiently robust to prevent serious market disruptions if LIBOR is permanently discontinued. Documents published by ISDA, such as the 2002 ISDA Master Agreement and the 2006 ISDA Definitions, form the basic framework of many derivative contracts. Section 7.1 of the 2006 ISDA Definitions lists and defines the various standard floating rates from which the parties may choose in creating a derivative contract (rate options). These rate options may be combined with other elements, such as the addition of a fixed spread, to determine the overall floating rate under the derivative contract. Generally, the 2006 ISDA Definitions define each rate option by describing the methodology for determining the value of the rate option at each reset date. In the case of rate options that refer to IBORs, the 2006 ISDA Definitions also provide fallback provisions that generally designate another rate to stand in for the relevant IBOR if the IBOR is unavailable.

.05. Final Regulations. Treasury Regulations section §1.1001-6 was published in the Federal Register on January 4, 2022. Section 1.1001-6(h)(1) provides in part that modifications described in section 4.02 of Rev. Proc. 2020-44 are covered modifications. Section 1.1001-6(h)(1) further provides that the defined terms used in section 4.02 of Rev. Proc. 2020-44 may be modified by guidance published in the Internal Revenue Bulletin. This Revenue Procedure is such guidance.

3. Definitions

This section 3 defines certain terms for the purpose of this revenue procedure and Rev. Proc. 2020-44.

.01. ARRC Fallback.

(1) In general. An "ARRC Fallback" is contract language that is recommended by the ARRC and identified in any one of sections 3.01(2)(i) through (ix) of Rev. Proc.2020-44 or sections 3.01(2)(i) through (ii) of this revenue procedure.[2] An ARRC Fallback includes any option or variant provided in the contract language identified in sections 3.01(2)(i) through (ix) of Rev. Proc. 2020-44 or sections 3.01(2)(i) through (ii) of this revenue procedure and excludes any option or variant not provided in the contract language identified in sections 3.01(2)(i) through (ix) of Rev. Proc. 2020-44 or sections 3.01(2)(i) through (ii) of this revenue procedure, even if that option or variant is recommended elsewhere by the ARRC.

(2) Identification of contract language. The contract language contained in each of the following materials is identified in this section 3.01(2):

(i) Part II: Supplemental Fallback Language for LIBOR Syndicated Business Loans of the document entitled *ARRC SUPPLEMENTAL RECOMMENDATIONS OF HARDWIRED FALLBACK LANGUAGE FOR LIBOR SYNDICATED AND BILATERAL BUSINESS LOANS* March 25, 2021; and,
(ii) Part III: Supplemental Fallback Language for LIBOR Bilateral Business Loans of the document entitled *ARRC SUPPLEMENTAL RECOMMENDATIONS OF HARDWIRED FALLBACK LANGUAGE FOR LIBOR SYNDICATED AND BILATERAL BUSINESS LOANS* March 25, 2021

4. Effective Date

This revenue procedure is effective for modifications to contracts occurring on or after March 7, 2022.

5. Additional Guidance

In future guidance published in the Internal Revenue Bulletin, the Treasury Department and the IRS may provide additional relief as necessary to address developments in the transition away from IBORs. For example, if the ARRC modifies the contract language identified in section 3.01(2) of this revenue procedure or recommends similar contract language for inclusion in other cash products after October 9, 2020, the Treasury Department and the IRS will evaluate the ARRC's new or revised contract language and may supplement the definition of an ARRC Fallback accordingly. The Treasury Department and the IRS request comments on the list of deviations in section 4.02(3) of this revenue procedure, including the need for additional categories of deviation in that list. Comments should be submitted in writing on or before _____ , and should contain a reference to this revenue procedure.
All comments will be available for public inspection and copying. Commenters are strongly suggested to submit comments electronically, as access to mail may be limited. Comments may be submitted in one of two ways:

(1) Electronically via the Federal eRulemaking Portal at *https://www.regulations.gov* (type "IRS-2020-0029" in the search field on the homepage to find this revenue procedure and submit comments); or

(2) Alternatively, by mail to Internal Revenue Service, CC:PA:LPD:PR (Rev. Proc. _____), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

6. Drafting Information

The principal author of this revenue procedure is _____ of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure contact _____ (not a toll-free call).

* * * *

APPENDIX B

Based upon
ARRC SUPPLEMENTAL RECOMMENDATIONS OF HARDWIRED FALLBACK LANGUAGE FOR LIBOR SYNDICATED AND BILATERAL BUSINESS LOANS
March 25, 2021;
Revised to eliminate all references to LIBOR and make more generic

Part II: Supplemental Fallback Language for Syndicated Business Loans

BENCHMARK REPLACEMENT SETTING

Notwithstanding anything to the contrary herein or in any other Loan Document[8] [(and any Swap Agreement shall be deemed not to be a "Loan Document" for purposes of this Section][9]:

(a) *Replacing Original Benchmark*. The interest rate on the Loan is currently expressed in terms of the benchmark index _____ (the *"Original Benchmark"*). The regulatory supervisor of the administrator of the Original Benchmark (*"OBA"*), announced or might in the future announce in a public statement the future cessation or loss of representativeness of [list of tenors used in Loan Documents] [overnight/Spot Next, 1-month, 3-month, 6-month and 12-month Original Benchmark tenor settings]. On the earlier of (i) the date that all Available Tenors of the Original Benchmark have either permanently or indefinitely ceased to be provided by OBA or have been announced by the OBA 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 the Original Benchmark, 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 (5th) 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

[8] The following capitalized terms not defined herein will have the meanings as described 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.

[9] 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.

the Required Lenders [of each Class].[10] 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 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), 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.

[10] Include if applicable and agreed by the parties.

"Benchmark" means, initially, the Original Benchmark; *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) the spread adjustment selected or recommended by the Relevant Governmental Body for the replacement of the tenor of the then current Benchmark with a SOFR-based rate having approximately the same length as the interest payment period specified in clause (a) of this Section;[11] 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 the then current Benchmark 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,

[11] The ARRC/ISDA recommended spread adjustment values for transition from an unsecured to a secured rate are available here: https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation_Announcement_20210305.pdf.

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, 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.

"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 (6th) 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 (5th) 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][12] 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 the then current Benchmark 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 the Original Benchmark.

"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.

PART III: SUPPLEMENTAL FALLBACK LANGUAGE FOR BILATERAL BUSINESS LOANS

BENCHMARK REPLACEMENT SETTING.

Notwithstanding anything to the contrary herein or in any other Loan Document[13] [(and any Swap Agreement shall be deemed not to be a "Loan Document" for purposes of this Section][14]:

(a) *Replacing Original Benchmark*. The interest rate on the Loan is currently expressed in terms of the benchmark index _____ (the *"Original Benchmark"*). The

[12] Parties may choose to set a different threshold.

[13] The following capitalized terms not defined herein will have the meanings as described 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.

[14] If "Swap Agreements" (or similar documents) are included in the definition of "Loan Documents" in the relevant credit

regulatory supervisor of the administrator of the Original Benchmark (*"OBA"*), announced or might in the future announce in a public statement the future cessation or loss of representativeness of [list of tenors used in the Loan Documents] [overnight/Spot Next, 1-month, 3-month, 6-month and 12-month tenor settings]. On the earlier of (i) the date that all Available Tenors of Original Benchmark have either permanently or indefinitely ceased to be provided by OBA or have been announced by the OBA 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 the Original Benchmark, 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 (5th)][tenth (10th)] 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 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.

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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.

(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), 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, the Original Benchmark; *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) the spread adjustment selected or recommended by the Relevant Governmental Body for the replacement of the tenor the Original Benchmark with a SOFR-based rate having approximately the same length as the interest payment period specified in clause (a) of this Section,[15]
or

[15] The ARRC/ISDA recommended spread adjustment values for transition from an unsecured to a secured rate are available here: https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation_Announcement_20210305.pdf.

(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 the Original Benchmark 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, 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.

"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 (10th)] 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][16] 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 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 the Original Benchmark.

"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

[16] Parties may choose to set a different threshold.

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.

APPENDIX C

Party Receiving Payment:	Treatment by:	Tax-advantaged Bond Purpose:	Recommended Treatment:
Bond Owner	Bond Owner Recipient	Exemption of interest (for tax-exempt bonds)	As tax-exempt interest on a tax-exempt bond.
		Tax Credit (for tax credit bonds)	As interest eligible for a tax credit.
	Bond Issuer Payor	Direct Pay Refundable Credit	As interest eligible for a direct pay credit.
		Arbitrage Yield	Included in the yield computation.
		Determining permitted sources for payment	Treated as interest on the bond.
Bond Issuer	Bond Owner Payor	Determining basis and interest received	Added to basis.
	Bond Issuer Recipient	Permitted use of funds received	Additional proceeds for purposes of Code section 148.
		Volume Cap	No additional volume cap required
		Bank Qualification under Section 265(b)	Does not affect Bank Qualified status.
		Arbitrage Yield	Included in the yield computation as the equivalent of an interest payment.
		Effect on qualified hedges	No effect on an integrated or super-integrated hedge.

APPENDIX D

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