

T-H ALERT

13 DECEMBER 2018

ISDA's Benchmarks Supplement Protocol

On Monday, ISDA launched the ISDA Benchmarks Supplement Protocol. Clients should expect outreach from regulated counterparties in the near future concerning adherence to this protocol. We encourage our clients to review the protocol and to consider their preferred approach to addressing its subject matter.

In September 2018, ISDA published the ISDA Benchmarks Supplement (the "Benchmarks Supplement") primarily in response to the EU's Benchmarks Regulation (the "BMR"), which regulates the provision of, contribution to and use of a wide set of benchmarks. Of particular relevance, Article 28(2) of the BMR requires EU supervised entities to produce and maintain robust written plans setting out the actions that they would take should a benchmark cease to exist and to reflect those plans in their trading documentation. Also, Article 29(1) of the BMR prohibits supervised entities from using a benchmark unless it is provided by an administrator included in the register of administrators and benchmarks maintained by the European Securities and Markets Authority.

The Benchmarks Supplement amends transactions that reference certain ISDA interest rates, equity, FX and commodities definitions to add fallbacks that apply if certain triggering events occur. The approach taken in relation to each asset class varies because, for example, certain ISDA definitions booklets already contain workable fallbacks that address index disruptions. The Benchmarks Supplement does not apply automatically to any transaction; it will apply only if parties expressly incorporate it into their transactions. ISDA has published the ISDA Benchmarks Supplement Protocol (the "Protocol") as one means by which parties can incorporate the Benchmarks Supplement into their transactions.

The Protocol permits counterparty-by-counterparty matching through an exchange of questionnaires. This approach allows a party to incorporate the Benchmarks Supplement into transactions with some, but not all, of its counterparties if it chooses to do so. While the Benchmarks Supplement is driven primarily by EU regulations, you should anticipate



that non-EU entities may also wish to incorporate the Benchmarks Supplement into their transactions out of a desire to improve contractual certainty generally.

At a minimum, adhering to the Protocol will cause the Benchmarks Supplement to be incorporated into relevant transactions between two counterparties entered into on or after the date on which those counterparties complete the exchange of Protocol questionnaires. However, through the "Legacy Election" in the Protocol questionnaire, the Protocol also allows parties the option to incorporate the Benchmarks Supplement into transactions entered into *prior* to that date. As with all material amendments to legacy transactions, careful consideration should be given to the implications of such amendments when deciding which elections to make in respect of this Protocol.

We encourage clients to review the Benchmarks Supplement and the Protocol and to develop a view as to their preferred approach to the subject matter.

If you have any questions regarding the Benchmarks Supplement or the Protocol, please contact one of the following or your usual T-H contact.

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