

In our letter to Treasury and the IRS dated December 9, 2019 (the “Letter”),¹ the Alternative Reference Rates Committee (the “ARRC”) requested that Treasury and the IRS provide guidance stating that the modification of a contract through adherence to the Protocol (as defined in the Letter) or the entry into comparable bilateral modifications is not a taxable event under Section 1001 of the Code. At the request of the IRS and Treasury, the ARRC is submitting examples of the manner in which parties may alter the terms of the Protocol when bilaterally agreeing to include the Amended Definitions (or comparable contractual terms) in legacy contracts.

Examples:

- If the Amended Definitions do not include a pre-cessation trigger event (as defined in the Letter), it is possible that parties will want to include one through bilateral amendment.²
- Parties may wish to make revisions to the ISDA fallback provisions necessary to address certain administrative and technical issues applicable to the particular terms of their agreement, such as changes related to determination dates, calculation agents, dispute resolution procedures and payment dates.
- Parties may amend contracts other than those documented under a Master Agreement (as defined in the Letter) that nonetheless use, or after amendment will use, fallback provisions based on the ISDA definitions, adjusted as appropriate to the nature or mechanics of the particular transaction. For example:
 - Market participants who amend legacy derivative contracts (as defined in the Letter) may also desire to concurrently bilaterally amend the fallback provisions applicable to debt instruments hedged by such derivative contracts.
 - Market participants may wish to incorporate fallback provisions based on the Amended Definitions into “over-the-counter” derivative contracts that use non-ISDA-based documentation (e.g., local documentation that is standard in a non-US jurisdiction), revised appropriately to conform to such derivative contract documentation.

While in some cases it may be possible to use the Protocol to effect such amendments, in other cases a bilateral amendment will be necessary. A bilateral amendment will be necessary, for example, if (1) adherence to the Protocol does not create an enforceable amendment under the local governing law of the contract or (2) the legacy contract does not already incorporate the Definitions and therefore changes to the standard Protocol language are necessary to make the amendments operate properly with the specific terms of the legacy contract.

- In order to accommodate counterparty requests, market participants may enter into comparable bilateral amendments that are tailored to the counterparty’s particular documents or scope of transactions.

¹ The Letter is available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARRC_Tax_Letter_re_ISDA_Protocol.pdf.

² The ARRC understands that ISDA is not including pre-cessation trigger events in the Amended Definitions at this time. However, ISDA has submitted a letter to the Financial Stability Board noting that it continues to consider pre-cessation trigger events. This letter is available at <https://www.isda.org/2019/12/04/isda-letter-to-fsb-oss-g-on-pre-cessation-issues/>. Such events could be provided for in complementary or supplementary documents that could be incorporated bilaterally or multilaterally.