

December 3, 2020

Recent Developments Impacting LIBOR Transition

Extension of the Publication of Certain USD LIBOR Settings and Regulatory Emphasis on Transition from USD LIBOR Due to Safety and Soundness Concerns

On November 30, 2020, Intercontinental Exchange, Inc. announced that ICE Benchmark Administration (“IBA”), which administrates LIBOR, expects in early December 2020 to solicit market feedback regarding its intention to cease the publication of:

- the one-week and two-month USD LIBOR settings after December 31, 2021; and
- the overnight and one, three, six and 12 month USD LIBOR settings after June 30, 2023.¹

As a result, market participants should expect that the most commonly used USD LIBOR settings will likely be published well past the previously expected deadline of December 31, 2021. IBA expects to close its solicitation for feedback by the end of January 2021.² IBA noted that panel bank submissions after December 31, 2021 will need to comply with applicable regulations, including as to representativeness.³ This statement is presumably intended to avoid what commentators have described as a “zombie LIBOR” scenario, where LIBOR continues to be published through a limited set of panel bank submissions, but ceases to be representative of the market.

Also, on November 30, the Board of Governors of the Federal Reserve System (“Fed”), the Office of the Comptroller of the Currency (“OCC”) and the Federal Deposit Insurance Corporation (“FDIC”) (collectively, the “Banking Regulators”) issued a joint statement encouraging banks to cease entering into new contracts that use USD LIBOR as a reference rate as soon as practicable and no later than December 31, 2021.⁴ The Banking Regulators identified consumer protection, litigation and reputation risks that might result from entering into new contracts that reference USD LIBOR after this date, which “would create safety and soundness risks,” and cautioned that they “will examine bank practices accordingly.”⁵ As for new contracts entered into before December 31, 2021, the Banking Regulators encouraged banks to use an alternative reference rate or have robust contractual fallback language that includes a clearly defined alternative reference rate after LIBOR’s discontinuation.⁶ The Banking Regulators signaled that such “actions are necessary to facilitate an orderly—and safe and sound—LIBOR transition.”⁷

Still, the Banking Regulators acknowledged IBA’s intent to solicit market feedback regarding the continued publication of certain USD LIBOR settings until June 30, 2023. According to the Banking Regulators’ statement, this potential extension “would allow most legacy USD LIBOR contracts to mature before LIBOR experiences disruptions.”⁸ If USD LIBOR is extended beyond the 2021 deadline, the Banking Regulators

recognized that there may be limited circumstances where it would be appropriate for banks to enter into new USD LIBOR contracts after December 31, 2021.⁹

In light of this announcement, banks may wish to reassess their LIBOR transition plans with an eye towards examinations, and ensure their LIBOR transition plans address the consumer protection, litigation and reputation risks identified by the Banking Regulators.

Also, on November 30, 2020, the U.K. Financial Conduct Authority (“FCA”) issued a statement welcoming these USD LIBOR regulatory developments.¹⁰ In particular, the FCA stated that the IBA’s announcement will incentivize prompt LIBOR transition, while providing time to address a “significant proportion” of legacy contracts that reference USD LIBOR.¹¹

Federal Legislation on Legacy Contracts

In November 2020, the U.S. Congress began working on a draft version of federal legislation that would provide for a statutory replacement benchmark rate for contracts that use LIBOR as a benchmark and do not contain any fallback provisions independent of LIBOR.¹² This effort is led by Brad Sherman, the Democratic Representative for California’s 30th District and Chairman of the House Financial Services Subcommittee on Investor Protection, Entrepreneurship and Capital Markets. If enacted, the proposed legislation would convert the interest rate in these contracts to a new replacement benchmark selected or recommended by the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York or the Alternative Reference Rate Committee (“ARRC”)¹³ when LIBOR is no longer available. The recommended replacement rate could include the Federal Reserve Bank of New York-endorsed Secured Overnight Financing Rate (“SOFR”).¹⁴ The proposed legislation also contemplates that a spread adjustment (or a method for calculating one) may also be recommended, depending on the type of instrument at issue.

The proposed legislation at the federal level largely mirrors legislative bills proposed by the ARRC and currently pending in the New York State Legislature. As discussed in our previous client memorandum, in March 2020, the ARRC proposed a New York-specific legislative solution to minimize legal uncertainty and adverse economic impact associated with the LIBOR transition.¹⁵ On October 28, 2020, a legislative bill that largely tracks ARRC’s proposed language was introduced in the New York State Legislature. This bill is currently in committee and unlikely to be adopted before the current legislative session ends on December 31, but it is expected to be re-introduced in January 2021, when the New York State Legislature reconvenes. In addition to the legislative procedural hurdles, the proposed legislation at both the federal and state levels may be susceptible to other legal challenges, as we have previously discussed.¹⁶

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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¹ *ICE Benchmark Administration to Consult on Its Intention to Cease the Publication of One Week and Two Month USD LIBOR Settings at End-December 2021, and the Remaining USD LIBOR Settings at End-June 2023*, Intercontinental Exchange, Inc., Nov. 30, 2020, available [here](#) (last visited Dec. 2, 2020) (hereinafter "ICE Announcement").

² *Id.* On November 18, 2020, IBA announced it will consult on its intention to cease the publication of all GBP, EUR, CHF and JPY LIBOR settings after December 31, 2021. See *ICE Benchmark Administration to Consult On Its Intention to Cease the Publication of GBP, EUR, CHF and JPY LIBOR*, Nov. 18, 2020, available [here](#) (last visited Dec. 2, 2020).

³ *ICE Announcement, Intercontinental Exchange, Inc.*, Nov. 30, 2020, available [here](#) (last visited Dec. 2, 2020).

⁴ Statement on LIBOR Transition, Fed, OCC and FDIC, Nov. 30, 2020, available [here](#) (last visited Dec. 2, 2020).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* (noting that it may be "appropriate for a bank to enter into new USD LIBOR contracts after December 31, 2021, such as: (i) transactions executed for purposes of required participation in a central counterparty auction procedure in the case of a member default, including transactions to hedge the resulting USD LIBOR exposure; (ii) market making in support of client activity related to USD LIBOR transactions executed before January 1, 2022; (iii) transactions that reduce or hedge the bank's or any client of the bank's USD LIBOR exposure on contracts entered into before January 1, 2022; and (iv) novations of USD LIBOR transactions executed before January 1, 2022.")

¹⁰ *FCA Response to IBA's Proposed Consultation on Intention to Cease USS LIBOR*, FCA, Nov. 30, 2020, available [here](#) (last visited Dec. 2, 2020).

¹¹ *Id.*

¹² See Robert Mackenzie Smith, *Congress Readies Surprise "Tough Legacy" Libor Fix*, Risk.net, Nov. 9 2020, available [here](#) (accessible by subscription only).

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- ¹³ The ARRC is a group of private-market participants convened by the U.S. Federal Reserve Bank and the Federal Reserve Bank of New York to help ensure a successful transition from USD LIBOR.
- ¹⁴ SOFR is the Federal Reserve Bank of New York-endorsed benchmark rate that best represents for USD LIBOR derivative and other financial contract instruments.
- ¹⁵ See Paul, Weiss March 30, 2020 Client Memorandum, *COVID-19: LIBOR 2021 Cessation Timing Unchanged Though Planning Delays Expected*, available [here](#) (last visited December 2, 2020); see, e.g., *Proposed Legislative Solution to Minimize Legal Uncertainty and Adverse Economic Impact Associated with LIBOR Transition*, ARRC, Mar. 6, 2020, available [here](#) (last visited December 2, 2020).
- ¹⁶ See Paul, Weiss July 7, 2020 Client Memorandum, *LIBOR Transition Update: Efforts Continue to Transition from LIBOR to Alternative Reference Rates by the End of 2021*, available [here](#) (last visited December 2, 2020). In the event that the proposed pieces of legislation at both the New York and federal levels are enacted, the federal legislation would govern.