

December 1, 2020

PROPOSAL TO PUBLISH LIBOR BEYOND 2021

To Our Clients and Friends:

Announcements

On November 30, 2020, ICE Benchmark Administration (“IBA”), the administrator of LIBOR, with the support of the Federal Reserve Board and the UK Financial Conduct Authority, announced plans to consult on specific timing for the path forward to cease the publication of USD LIBOR. In particular, IBA plans to consult on ceasing the publication of USD LIBOR on December 31, 2021 for only the one week and two month USD LIBOR tenors, and on June 30, 2023 for all other USD LIBOR tenors (*i.e.*, overnight, one month, three month, six month and 12 month tenors). This announcement is significant as regulators had indicated that all USD LIBOR tenors would cease to exist or become non-representative at the end of 2021. This proposal significantly lengthens the transition period to June 30, 2023 for most legacy contracts, allowing time for many contracts to mature before USD LIBOR ceases to exist. Legacy contracts with maturities beyond June 30, 2023 would still need to be amended to incorporate appropriate fallback provisions to address the ultimate cessation of USD LIBOR.

This announcement follows on the heels of IBA’s November 18th announcement that it plans to consult on ceasing publication of all GBP, EUR, CHF and JPY LIBOR settings after December 31, 2021. IBA plans to close the consultation for feedback on both proposals by the end of January 2021. IBA noted that any publication of the overnight and one, three, six and 12 month USD LIBOR settings based on panel bank submissions beyond December 31, 2021 will need to comply with applicable regulations, including as to representativeness.

Concurrently, a statement by the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation included supervisory guidance that encourages banks to stop new USD LIBOR issuances by the end of 2021, noting that entering into new USD LIBOR-based contracts creates safety and soundness risks.

The regulators and IBA make clear that these announcements should not be read as an index cessation event for purposes of contractual fallback language (*i.e.*, they should not be read to say that LIBOR has ceased, or will cease, to be provided permanently or indefinitely or that it is not, or no longer will be, representative). IBA will need to receive feedback on the consultation and will make separate announcement(s) regarding the cessation dates once final. Accordingly, the IBA proposal is not final and is subject to the feedback on the consultation.

The Alternative Reference Rates Committee (the “ARRC”) also released a statement in support of the announcements, expressing that the developments “would support a smooth transition for legacy contracts by allowing time for most to mature before USD LIBOR is proposed to cease, subject to consultation outcomes.” The ARRC further stated that “these developments align with the ARRC’s

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transition efforts, and will accelerate market participants' use of the Secured Overnight Financing Rate (SOFR), the ARRC's preferred alternative to USD LIBOR.”

Impact

If commonly used USD LIBOR tenors continue to be published and remain representative until June 30, 2023, this will provide an extra 18 months for the completion of the LIBOR transition process beyond what was previously expected. Fallback provisions in existing contracts using these USD LIBOR tenors would not be triggered until June 30, 2023, when, under the proposal, LIBOR would ultimately cease to exist. This will also allow additional time for the development of a forward-looking version of SOFR (“Term SOFR”), which could further ease the transition.

Counterparties with existing loans, derivatives and other contracts that mature prior to June 30, 2023 and reference most USD LIBOR rates would not need to incorporate fallback amendments, since these contracts will terminate before the transition. Additionally, with respect to derivatives and loans that reference USD LIBOR and have maturities beyond June 30, 2023, counterparties are likely to consider delaying adoption of fallback amendments because there no longer is an immediate threat of application of the fallback, yet uncertainty remains as to the extent of the mismatch between the ARRC-recommended fallback provisions for loans (Term SOFR, if available, or, otherwise, daily simple SOFR) and the ISDA 2020 IBOR Fallbacks Protocol for derivatives (SOFR compounded in arrears).

Furthermore, counterparties may opt to wait and see how the market develops before amending legacy contracts, especially given uncertainty around the appropriate adjustment to contractually specified spreads over the reference rate when adopting SOFR in place of LIBOR.

Although certain tenors of USD LIBOR may continue to be published until mid-2023, banks have now been advised, for safety and soundness concerns, not to enter into any new contracts that reference LIBOR after December 31, 2021. This will result in a longer period during which banks and other market participants will have both LIBOR loans and swaps and SOFR loans and swaps. Banks and other market participants should consider the operational and pricing impacts of maintaining products based on both benchmarks and confirm whether they have any contracts that reference one week or two month USD LIBOR, which are expected to be discontinued after December 31, 2021.



Gibson Dunn's Capital Markets, Derivatives, and Financial Institutions practice groups are available to answer questions about the LIBOR transition in general and these developments in particular. Please contact any member of the Gibson Dunn team, the Gibson Dunn lawyer with whom you usually work in the firm's Capital Markets, Derivatives, or Financial Institutions practice group, or the authors of this client alert:

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