

December 1, 2020

## LIBOR Transition

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### **LIBOR Benchmark Administrator Proposes Extending Publication of Widely Used USD LIBOR Settings to June 30, 2023; Federal Banking Agencies Issue Guidance that Banks Should Generally Cease Entering Into New Contracts Referencing USD LIBOR by End of 2021, and Observes the Extended Date Will Facilitate the Roll-Off of Legacy Contracts**

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#### **SUMMARY**

Yesterday, ICE Benchmark Administration Limited (“IBA”), the benchmark administrator for the U.S. Dollar (“USD”) London Interbank Offered Rate (“LIBOR”), announced a proposal to extend the publication of the most commonly used USD LIBOR settings until June 30, 2023.<sup>1</sup> In light of IBA’s proposal, in an interagency statement, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency issued guidance (the “Guidance”) strongly encouraging banks to cease entering into “new contracts” that use USD LIBOR as a reference rate “as soon as practicable and in any event by December 31, 2021”; only in “limited circumstances” will it be appropriate for banks to enter into new contracts referencing USD LIBOR after December 31, 2021.<sup>2</sup> Both the Federal Reserve and the U.K. Financial Conduct Authority (the “FCA”), which supervises IBA under the Benchmark Regulation, issued statements supporting IBA’s proposal, which, combined with the Guidance, they described as facilitating an orderly transition away from USD LIBOR.<sup>3</sup>

The principal objective, and result, of these actions appears to be that “legacy” LIBOR-based instruments (*i.e.*, those maturing after December 31, 2021) will continue to have LIBOR as a reference rate through June 30, 2023, without undermining the regulators’ determination that LIBOR should not be available for any other purpose.

## DISCUSSION

LIBOR is an international benchmark that is expressed in five currencies, and USD LIBOR is the most widely used. On November 18, 2020, IBA announced that it will initiate a consultation on its intention to cease the publication of LIBOR settings in four currencies: the Pound sterling, Euro, Swiss franc, and Japanese yen, immediately following the LIBOR publication on December 31, 2021.<sup>4</sup> Yesterday's announcement by IBA addressed the projected cessation dates for the USD LIBOR settings as follows:

- The one-week and two-month USD LIBOR settings immediately following the LIBOR publication of December 31, 2021; and
- The overnight, one-month, three-month, six-month, and twelve-month LIBOR settings immediately following the LIBOR publication of June 30, 2023.

IBA states that it engaged in a process with end users, panel banks, the FCA, and other official sector bodies on the potential to continue publication of widely used LIBOR settings after December 31, 2021 "where necessary to support transition."

In the Guidance (which applies to "banks," including depository institutions, U.S. branches and agencies of foreign banks, Edge and agreement corporations, and depository institution holding companies), the Federal Reserve, FDIC, and OCC explained that the IBA proposal would "allow most legacy USD LIBOR contracts to mature before LIBOR experiences disruptions." However, the agencies cautioned that, in their view, "[g]iven consumer protection, litigation, and reputation risks," entering into "new contracts" that use USD LIBOR as a reference rate after December 31, 2021 "would create safety and soundness risks." The agencies, therefore, "will examine bank practices accordingly." For this purpose, "new contracts" are defined broadly to include new USD LIBOR lending; new USD LIBOR debt, preferred stock, or securitization issuance; and new USD LIBOR derivatives transactions. Prior to December 31, 2021, new contracts should either use a reference rate other than LIBOR or have "robust fallback language that includes a clearly defined alternative reference rate after LIBOR's discontinuation."

Notwithstanding the expectation that banks will cease entering into new contracts that use USD LIBOR as a reference rate after December 31, 2021, the agencies recognize there may be "limited circumstances" in which it may be appropriate for a bank to enter into a new contract referencing USD LIBOR after that date. The Guidance then specifies that USD LIBOR may be appropriate with respect to the following kinds of new contracts, even after December 31, 2021:

- Transactions executed for purposes of required participation in a central counterparty auction procedure in the case of a member default, including transactions to hedge resulting USD LIBOR exposure;
- Market making in support of client activity related to USD LIBOR transactions executed before January 1, 2022;
- Transactions that reduce or hedge the bank's or any bank client's USD LIBOR exposure on contracts entered into before January 1, 2022; and

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- Novations of USD LIBOR transactions executed before January 1, 2022.

In its separate statement, the Federal Reserve describes IBA's proposed USD LIBOR end dates and the Guidance on new contracts that reference USD LIBOR as "lay[ing] out a path forward in which banks should stop writing new USD LIBOR contracts by the end of 2021, while most legacy contracts will be able to mature before LIBOR stops." According to John Williams, President of the Federal Reserve Bank of New York, in his capacity as Co-Chair of the Financial Stability Board's Official Sector Steering Group, the IBA proposal, the FCA support, and the Guidance are "critical steps in the effort to facilitate an orderly wind-down of USD LIBOR" and to "help support transition planning over the next year and beyond."

The FCA, in its statement, similarly describes the IBA proposal as "incentivi[z]ing swift transition, while allowing time to address a significant proportion of the legacy contracts that reference [USD] LIBOR." The FCA also welcomes the Guidance, noting that the FCA will coordinate with U.S. regulators and relevant authorities in other jurisdictions to consider whether and how to limit new use of USD LIBOR consistent with the FCA's "objectives of protecting consumers and market integrity." The FCA also pointed to new powers it may soon receive under proposed legislation in the United Kingdom. This legislation would permit the FCA to prohibit some or all new use by supervised entities in the United Kingdom of a critical benchmark, such as LIBOR settings, if a benchmark administrator has confirmed its intention that the benchmark will cease. The FCA plans to consult in the second quarter of 2021 on its proposed policy approach for using this anticipated power, which the FCA would not expect to use before the end of 2021. The FCA will also consider whether any new powers could be used to help with "tough legacy" contracts—that is, legacy contracts that reference a USD LIBOR setting but cannot convert to a non-LIBOR rate or be amended to add fallbacks prior to the cessation of the relevant LIBOR setting.<sup>5</sup>

Yesterday's statements include language clarifying that they are not to be read as announcing that the LIBOR benchmark has ceased, or will cease, to be provided permanently or indefinitely or that it is not, or no longer will be, representative for the purposes of language adopted by the International Swaps and Derivatives Association ("ISDA"). ISDA similarly clarified that it does not view the statements as constituting an "index cessation event" under the IBOR Fallbacks Supplement or the ISDA 2020 IBOR Fallbacks Protocol, or triggering fallbacks under the 2018 ISDA Benchmarks Supplement or its protocol.<sup>6</sup>

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ENDNOTES

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- <sup>1</sup> Intercontinental Exchange, Inc., *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* (Nov. 30, 2020), available at <https://ir.theice.com/press/news-details/2020/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/default.aspx>.
- <sup>2</sup> Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, *Statement on LIBOR Transition* (Nov. 30, 2020), available at <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201130a1.pdf>.
- <sup>3</sup> Board of Governors of the Federal Reserve System, *Federal Reserve Board Welcomes and Supports Release of Proposal and Supervisory Statements that Would Enable Clear End Date for U.S. Dollar (USD) LIBOR and Would Promote the Safety and Soundness of the Financial System* (Nov. 30, 2020), available at <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20201130b.htm>; Financial Conduct Authority, *FCA Response to IBA's Proposed Consultation on Intention to Cease US\$ LIBOR* (Nov. 30, 2020), available at <https://www.fca.org.uk/news/statements/fca-response-iba-proposed-consultation-intention-cease-us-dollar-libor>.
- <sup>4</sup> Intercontinental Exchange, Inc., *ICE Benchmark Administration to Consult On Its Intention to Cease the Publication of GBP, EUR, CHF and JPY LIBOR* (Nov. 18, 2020), available at <https://ir.theice.com/press/news-details/2020/ICE-Benchmark-Administration-to-Consult-On-Its-Intention-to-Cease-the-Publication-of-GBP-EUR-CHF-and-JPY-LIBOR/default.aspx>.
- <sup>5</sup> See Speech by Andrew Bailey, Chief Executive of the FCA, at the Securities Industry and Financial Markets Association's (SIFMA) LIBOR Transition Briefing (July 15, 2019) (describing the "tough legacy" question), available at <https://www.fca.org.uk/news/speeches/libor-preparing-end>.
- <sup>6</sup> International Swaps and Derivatives Association, *ISDA Statement on IBA, UK FCA and Federal Reserve Board Announcements on US Dollar LIBOR Consultation* (Nov. 30, 2020), available at <https://www.isda.org/2020/11/30/isda-statement-on-iba-uk-fca-and-federal-reserve-board-announcements-on-us-dollar-libor-consultation/>.

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