LIBOR *NEWSFLASH*: FCA ANNOUNCES DATES FOR OFFICIAL CESSATION AND LOSS OF REPRESENTATIVENESS OF LIBOR

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On March 5, 2021, the Financial Conduct Authority (the "**FCA**") announced the dates for the cessation and loss of representativeness of the London Interbank Offered Rate ("**LIBOR**").[1] The FCA's announcement marks an important and definitive step forward towards the permanent cessation of LIBOR. In this bulletin, we summarize the FCA's announcement and briefly discuss its implications for lenders.

1. *FCA's Announcement on LIBOR Cessation*

The FCA's highly anticipated announcement builds on the conclusions of the administrator of LIBOR, the Ice Benchmark Administration's (the "**IBA**"), recent consultation on the cessation of LIBOR settings.[2] The FCA's announcement consists of three key parts: (i) all tenors of EUR, CHF, JPY and GBP LIBOR and 1-week and 2-month tenors of USD LIBOR will cease or become unrepresentative on December 31, 2021; (ii) tenors of overnight, 1, 3, 6, and 12 month USD LIBOR will cease or become unrepresentative on June 30, 2023; and (iii) the FCA will consult on the limited use of an unrepresentative "synthetic" LIBOR based on a changed methodology for certain tenors of LIBOR beyond the applicable cessation dates,[3] as discussed in more detail below. The FCA has confirmed that it does not intend to use its powers to compel panel banks to make LIBOR submissions, or require the IBA to publish LIBOR based on such panel submissions, after the above dates, at which point the applicable LIBOR tenors will permanently cease to be available.[4]

2. *Further Consultations on use of Synthetic LIBOR*

The FCA's regulatory powers with respect to LIBOR are in the process of being expanded by way of an amendment to the UK Benchmarks Regulation. These new powers will, among other things, allow the FCA to change LIBOR's methodology if LIBOR is not representative, but its continued publication is determined to be in the best interest of consumers and the integrity of the market – creating what is referred to as a "synthetic" LIBOR.[5] Other expanded powers will allow the FCA to prohibit supervised entities from (i) using an unrepresentative LIBOR, except in certain legacy contracts and (ii) using LIBOR in new loan agreements when a benchmark administrator has confirmed its intention that LIBOR will cease and the FCA has assessed how the benchmark will cease.[6]

The FCA's announcement reflects these expected new powers. The FCA announced that it will consult on requiring the IBA to publish tenors of 1-month, 3-month and 6-month GBP LIBOR after the end of 2021, for an unspecified period of time, on a modified "synthetic" basis. Similarly, the FCA will consult on requiring the IBA to publish tenors of 1-month, 3-month and 6-month JPY LIBOR after the end of 2021 for one additional year on a "synthetic" basis. The FCA may also consult on requiring the publication of tenors of 1-month, 3-month and 6-month USD LIBOR after the end of June 2023 on a "synthetic" basis, taking into consideration the perspectives of US authorities and other market stakeholders.[7]

These "synthetic" LIBOR tenors will not be representative. Therefore, representativeness will cease for 1-month, 3-month and 6-month JPY and GBP LIBOR after December 31, 2021, and for 1-month, 3-month and 6-month USD LIBOR after June 30, 2023.[8] The use of "synthetic" LIBOR is intended only for "tough legacy" loan agreements and other contracts, and would be generally prohibited for use in new loan agreements in the UK and in the US.[9] The FCA plans to consult on the potential permitted uses of "synthetic" LIBOR for legacy contracts in the second quarter of 2021.[10] As a reminder, the extension for certain USD LIBOR tenors until June 30, 2023 is also meant for legacy loan agreements, and not for new loan agreements.[11]

3. Implications for Lenders

The FCA's announcement confirms that most LIBOR settings will cease on the relevant dates noted above, and that tenors of 1-month, 3-month and 6-month GBP, JPY and USD LIBOR are expected to become unrepresentative on the same dates. As a result, the announcement constitutes a permanent cessation trigger under the Alternative Reference Rates Committee's (the "**ARRC**") hardwired and amendment fallback language.[12] It also constitutes an index cessation event under the ISDA 2020 IBOR Fallbacks Protocol, and accordingly, the spread adjustment between LIBOR and the applicable alternate risk-free rates ("**RFRs**") was fixed on the date of the announcement.[13]

If a loan agreement incorporates either of the ARRC's recommended hardwired or amendment fallback language, then the FCA's announcement constitutes a "Benchmark Transition Event" activating several provisions under such fallback language.[14] In both the hardwired and amendment fallback language, the administrative agent is required to notify the other parties of the occurrence of the Benchmark Transition Event together with related details, such as the expected replacement date. The announcement also activates amendment provisions in the ARRC's amendment fallback language, which provide that upon the occurrence of a Benchmark Transition Event, the parties may amend the loan agreement to replace LIBOR with the Benchmark Replacement rate. Such amendment would be effective on the earlier of the actual cessation of LIBOR and, if the announcement is prospective (as in the case of the FCA's announcement), the 90th day (or such other period agreed to by the parties) prior to the expected date of cessation (for example, in the case of USD LIBOR, this would be April 1, 2023, or such other period agreed to by the parties). The actual wording in loan agreements varies depending on how closely the parties followed the ARRC's recommended language, therefore, a careful review of the fallback language in each particular loan agreement is advised.

In addition to the above considerations, parties should recall the ARRC's recommendation that if a loan agreement specifies that one or more parties have the discretion to select a replacement rate for USD LIBOR, such parties should disclose the anticipated RFR and any related spread methodology at least 6 months prior to the effectiveness of the replacement rate.[15]

The transition away from LIBOR under a particular loan agreement that uses the ARRC's recommended fallback language would take place on the date that LIBOR actually ceases or is deemed unrepresentative, and not on the date of the FCA's announcement.

4. Conclusion

The FCA's announcement provides certainty to loan parties about the timing of the permanent cessation of LIBOR and, due to the fixing of the spread adjustments, adds clarity about the economic outcomes of using an RFR instead of LIBOR.

The FCA concluded its announcement with the following statement: "[w]ith limited time remaining, [the] message to firms is clear – act now and complete your transition by the end of 2021."[16] We similarly end this bulletin by encouraging all loan parties to hasten their efforts in transitioning away from LIBOR to an RFR. We will continue to monitor the phase-out of LIBOR and will provide further updates as developments occur.

[1][ps2id id='1' target=''/] Financial Conduct Authority, "Announcements on the end of LIBOR" (5 March 2021), [LIBOR Announcement]; and Financial Conduct Authority, "FCA announcement on future cessation and loss of representativeness of the LIBOR benchmarks" (5 March 2021), [Future Cessation].
[2][ps2id id='2' target=''/] ICE Benchmark Administration, "ICE LIBOR Consultation on Potential Cessation" (December 2020), [Ice Consultation]. For a discussion about the consultation and the anticipated announcement, please see our earlier bulletin: Kathy Martin and Maria Sagan, "LIBOR Newsflash: Announcement on Official Cessation of LIBOR is Expected Soon" (18 February 2021).
[3][ps2id id='3' target=''/] *Supra* note 1, Future Cessation.
[4][ps2id id='4' target=''/] *Ibid*.
[5][ps2id id='5' target=''/] *Ibid*, Ice Consultation at 7, and Financial Conduct Authority, "Proposed amendments to the Benchmarks Regulation" (5 March 2021), online [Benchmarks Regulation].
[6][ps2id id='6' target=''/] *Ibid*, Ice Consultation and Benchmarks Regulation.
[7][ps2id id='7' target=''/] *Supra* note 1, Future Cessation.
[8][ps2id id='8' target=''/] *Ibid*.
[9][ps2id id='9' target=''/] *Ibid*, Alternative Reference Rates Committee, "ARRC Commends Decisions Outlining

the Definitive Endgame for LIBOR" (5 March 2021), and Loan Syndications & Trading Association, "FCA Announcement: Spread Adjustments Set; Anticipated LIBOR Timeline Confirmed" (5 March 2021).
[10][ps2id id='10' target=''/] *Supra* note 1, Future Cessation.
[11][ps2id id='11' target=''/] Financial Conduct Authority, "LIBOR – Are You Ready for Life Without LIBOR from end-2021?" (26 January 2021).
[12][ps2id id='12' target=''/] Alternative Reference Rates Committee, "ARRC Recommendations Regarding More Robust Fallback Language for New Originations of LIBOR Syndicated Loans" (30 June 2020).
[13][ps2id id='13' target=''/] International Swaps and Derivatives Association, Inc., "ISDA Statement on UK FCA LIBOR Announcement" (5 March 2021). Please see Bloomberg Professional Services, "IBOR Fallbacks" (5 March, 2021) for a list of the fixed spread adjustments.
[14][ps2id id='14' target=''/] *Supra* note 12.
[15][ps2id id='15' target=''/] Alternative Reference Rates Committee, "ARRC Recommended Best Practices for Completing the Transition from LIBOR" (3 September 2020).
[16][ps2id id='16' target=''/] *Supra* note 1, LIBOR Announcement.

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A Cautionary Note