THE END OF LIBOR: JANUARY 2022 UPDATE

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As of the end of December 31, 2021, (i) most tenors of LIBOR (24 out of 35) ceased to be published, (ii) certain popular tenors of USD LIBOR will continue to be published, subject to limitations on use, and cease or become unrepresentative on June 30, 2023, and (iii) a few of the most widely used GBP and JPY LIBOR tenors were deemed permanently unrepresentative, but will continue to be published on a synthetic basis, for a limited time period for the purpose of legacy contracts.[1] In this bulletin, we summarize the current stage of the discontinuation of LIBOR and briefly discuss the implications of the changes for lenders.

1. Cessation of 24 Tenors of LIBOR on December 31, 2021

As of the end of 2021, all tenors of EUR and CHF LIBOR, the overnight/spot next, 1-week, 2-month and 12-month GBP and JPY LIBOR tenors, and the 1-week and 2-month tenors of USD LIBOR ceased to be published. As a result, these LIBOR tenors can no longer be referenced in financial contracts. Instead, market participants must use their preferred alternative risk-free rate.

2. Certain Popular Tenors of USD LIBOR Continue to be Published

Tenors of overnight, 1, 3, 6, and 12-month USD LIBOR will continue to be calculated using panel bank submissions until June 30, 2023 for the purpose of legacy contracts.[2] This extended timeline is intended to ease the transition away from LIBOR, given the volume of documents that reference these particular USD LIBOR tenors, by providing additional time for parties to renegotiate or wind-down such legacy contracts.

Although these tenors of USD LIBOR will continue to be published, they are not to be used in *new* LIBOR contracts. The US and UK regulatory supervisors[3] have prohibited supervised entities from entering into new LIBOR contracts, including contracts for derivatives, after December 31, 2021, as this would create various risks, including undermining financial stability, and the safety and soundness of the practices of financial institutions, as well as litigation, operational and consumer protection risks.[4] The regulators have enumerated limited exceptions to this general prohibition.[5] According to the US regulatory supervisors, a new LIBOR contract includes "an agreement that (i) creates additional LIBOR exposure for a supervised institution or (ii) extends the term of an existing LIBOR contract", but a "draw on an existing agreement that is legally enforceable (e.g., a committed credit facility) would not be viewed as a new contract."[6]

3. Synthetic LIBOR for Certain Tenors of GBP and JPY LIBOR

The 1-month, 3-month and 6-month GBP and JPY LIBOR tenors have been designated by the Financial Conduct Authority (the "**FCA**") as "Article 23A" benchmarks, which means that they are permanently unrepresentative because their calculation is no longer based on panel bank submissions.[7] These tenors of LIBOR will, however, remain available for a limited period of time for legacy contracts, other than cleared derivatives, using a synthetic calculation methodology, and are now generally referred to by market participants as "synthetic LIBOR".[8] Synthetic JPY LIBOR will cease at the end of 2022, and while there is no specific end-date for synthetic GBP LIBOR, the availability of synthetic GBP LIBOR is not guaranteed after the end of 2022.[9] The FCA has prohibited the use of synthetic LIBOR in new contracts by supervised entities.[10]

4. Implications for Lenders

The transition away from USD LIBOR in loan agreements that use the Alternative Reference Rate Committee's (the "**ARRC**") recommended fallback language is triggered on the date that *all* tenors of USD LIBOR actually cease or are deemed unrepresentative, or pursuant to an early-opt in election for an alternative risk-free rate.[11] Therefore, such loan agreements will not transition away from USD LIBOR at this time (unless pursuant to an early-opt in election), since certain tenors of USD LIBOR remain available.[12] Fallback language varies between documents and not all loan documents have incorporated the ARRC's recommendations, therefore, a careful review of fallback language in loan agreements is advised.

Lenders are cautioned against originating new loan agreements using any of the remaining tenors of LIBOR. As discussed above, the regulatory authorities in the UK and US have prohibited the use of LIBOR in new contracts by supervised entities. Lenders should be issuing loans using their preferred alternative risk-free rate, and should ensure that any existing loan agreements that reference USD LIBOR incorporate appropriate fallback language or are amended to replace USD LIBOR with an alternative risk-free rate, along with a fallback mechanism. Since the ARRC's formal recommendation, on July 29, 2021, of the forward-looking Secured Overnight Financing Rate term rates ("**Term SOFR**") developed by the CME Group, lenders now have a viable alternative rate which functions similar to LIBOR,[13] subject to their operational capabilities to implement Term SOFR at this time.

5. Conclusion

The first quarter of 2022 will show what, if any, challenges emerge from the discontinuation of the above-referenced LIBOR tenors, which challenges may become lessons for when the remaining LIBOR tenors are discontinued.[14] At this point, there should be no new LIBOR loan issuances, and lenders should not only be familiar with the alternative risk-free rates but also should be adopting such rates in loan agreements entered into as of January 2022.

We conclude with a quote from Edwin Schooling Latter of the FCA, "[g]oodbye then, panel bank sterling, Swiss franc, yen and euro LIBOR – after your final appearance just in time for those New Year's Eve celebrations and parties."[15] Farewell LIBOR, and here's to new beginnings.

We will continue to monitor the discontinuation of LIBOR and emerging trends with respect to alternative risk-free rates, and will continue to publish updates.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

[1][ps2id id='1' target=''/] Financial Conduct Authority, "Changes to LIBOR as of end-2021" (4 January 2022).
[2][ps2id id='2' target=''/] *Ibid*.
[3][ps2id id='3' target=''/] These regulatory supervisors include the Financial Conduct Authority in the UK and, in the US, the Board of Governors of the Federal Reserve System, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and various state bank and credit union regulators.
[4][ps2id id='4' target=''/] Office of the Comptroller of the Currency, "Joint Statement on Managing the LIBOR Transition" (20 October 2021) [Joint Statement]; Financial Conduct Authority, "Article 21A Benchmarks Regulations – Notice of Prohibition of New Use of a Critical Benchmark " (16 November 2021) [USD LIBOR Benchmark Prohibition].
[5][ps2id id='5' target=''/] For a list of these exceptions, see *ibid.*, Joint Statement and USD LIBOR Benchmark Prohibition.
[6][ps2id id='6' target=''/] *Supra*, note 4 [Joint Statement]. For a brief analysis of what constitutes a new LIBOR contract, see: Loan Syndications & Trading Association, "Answer to the $64,000 Question: What is a New LIBOR Contract?" (October 25, 2021).
[7][ps2id id='7' target=''] Financial Conduct Authority, "Article 23C Benchmarks Regulation – Notice of Permitted Legacy Use By Supervised Entities " (1 January 2022).
[8][ps2id id='8' target=''/] *Ibid*. Synthetic GBP LIBOR is calculated by adding the applicable tenor of the Term SONIA reference rate to the relevant ISDA spread adjustment. A similar methodology is used for JPY LIBOR. For more information, see Financial Conduct Authority, "Article 23D Benchmarks Regulation – Notice of Requirements" (1 January 2022).
[9][ps2id id='9' target=''/] *Supra*, note 1.

[10][ps2id id='10' target=''/] *Supra,* note 7.
[11][ps2id id='11' target=''/] Alternative Reference Rates Committee, "ARRC Supplemental Recommendations of Hardwired Fallback Language for LIBOR Syndicated and Bilateral Business Loans"(25 March 2021).
[12][ps2id id='12' target=''/] *Ibid*. The ARRC's recommended fallback language includes a provision that states that the administrative agent (in syndicated loans) or lender (in bilateral loans) may remove a tenor of LIBOR that is unavailable or unrepresentative.
[13][ps2id id='13' target=''/] For a more detailed discussion of the CME Group's Term SOFR, see our bulletin: "Start of New Term: ARRC Recommends CME Group's Term SOFR" (7 September 2021).
[14][ps2id id='14' target=''/] Financial Conduct Authority, "So long LIBOR – 3 weeks to go" (10 December 2021).
[15][ps2id id='15' target=''/] *Ibid*.