LIBOR Transition: Important Recent Developments

Thomas D'Ambrosio, Partner, Morgan, Lewis & Bockius LLP

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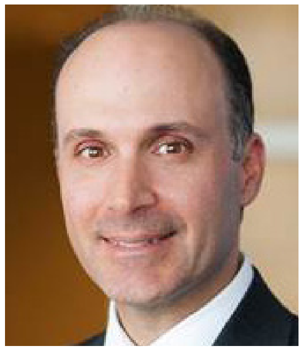
Background. 2021 has been a busy year so far for the transition away from LIBOR. On March 5, 2021 the United Kingdom's Financial Conduct Authority (FCA) confirmed that all LIBOR settings will either cease to be provided by an administrator or no longer be representative (i) immediately after December 31, 2021 in the case of all sterling, euro, Swiss franc and Japanese yen settings, and the 1-week and 2-month U.S. dollar settings, and (ii) immediately after June 30, 2023, in the case of the remaining U.S. dollar settings. That confirmation by the FCA had the effect of crystalizing the relevant dates for the cessation of the applicable LIBORs and propelling the financial industry toward preparing for such events. The FCA's confirmation also had the effect of constituting an **index cessation event** under the International Swaps and Derivatives Association, Inc. (ISDA) IBOR Fallbacks Supplement and protocol, triggering a fixing of the fallback spread adjustment on the date of the FCA's announcement. Also, on April 6, the governor of New York State signed into law a bill designed to address U.S. dollar LIBOR transition for legacy contracts that mature after June 30, 2023 and do not have effective reference rate fallbacks. (See related article in the IAA Legal & Regulatory Update Column.) This Compliance Corner will discuss these recent developments and what advisers should consider in the coming months.



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U.K. FCA. Although the FCA had previously indicated that LIBOR would be discontinued after December 2021, there was some uncertainty as to whether rates would continue to be published even though those rates might not be representative, and there was a lack of clarity as to what would happen with respect to some of the more ubiquitous settings of LIBOR. In its March 5 statement, the FCA clearly announced the future cessation or loss of representativeness of the 35 LIBOR benchmark settings currently published by ICE Benchmark Administration (IBA), an authorized administrator regulated and supervised by the FCA. In that confirmation, the FCA stated that it would not require any panel banks to continue to make LIBOR submissions beyond the dates from which the banks notify the administrator of their departure from the submission process. The FCA also stated that it would not require the IBA to continue to publish LIBOR on the basis of panel bank submissions beyond such dates. Addressing the issue of "synthetic" LIBOR (*i.e.,* a LIBOR rate that is published using a different methodology from the submission process that is currently used to produce such LIBOR rate), the FCA stated that it currently has no intention to use its powers to compel the IBA to continue to publish any of the following 26 LIBOR settings based upon a synthetic basis after the following dates:

- Publication of all 7 euro LIBOR settings, all 7 Swiss franc LIBOR settings, the Spot Next, 1-week, 2-month and 12-month Japanese yen LIBOR settings, the overnight, 1-week, 2-month and 12-month sterling LIBOR settings, and the 1-week and 2-month U.S. dollar LIBOR settings will cease immediately after December 31, 2021 with no subsequent synthetic basis publication.

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- Publication of the overnight and 12-month U.S. dollar LIBOR settings will cease immediately after June 30, 2023 with no subsequent synthetic basis publication.

The FCA may gain additional powers from the United Kingdom Parliament to require the publication of certain LIBOR settings on a synthetic basis. If those additional powers are granted, then the FCA will consult on requiring the IBA to continue to publish on a synthetic basis the 1-month, 3-month and 6-month sterling LIBOR settings for a further undefined period after the end of December 2021, and the 1-month, 3-month and 6-month Japanese yen LIBOR settings after the end of December 2021 for one additional year. The FCA does not envision compelling the IBA to continue to publish any Japanese yen LIBOR settings after the end of December 2022, and, absent notice to the contrary, publication of these settings will cease permanently immediately after a final publication on December 30, 2022. The FCA will continue to consider the case for requiring continued publication on a synthetic basis of the 1-month, 3-month and 6-month U.S. dollar LIBOR settings for a further period after June 30, 2023, taking into account views and evidence from the U.S. regulators and other stakeholders. Even if the foregoing LIBOR settings are published on a synthetic basis, however, the synthetic settings will not be representative from the dates earlier specified above for cessation.

The FCA's statements on March 5, 2021 engage certain contractual triggers for the calculation and future application of fallbacks that are activated by pre-cessation or cessation announcements made by the FCA. One of the most important fallback triggers are those contained in documentation published by ISDA, which cover over-the-counter derivative transactions including interest rate products that utilize LIBOR rates. Advisers should understand that the ISDA fallback triggers will apply if the adviser has adhered to the ISDA 2020 IBOR Fallbacks Protocol and will also apply to the extent the current version of the 2006 ISDA Definitions are utilized, whether or not the adviser has adhered to such protocol. The fallback rates that will apply differ with respect to each LIBOR. With respect to U.S. dollar LIBOR, the fallback reference rate will be the term adjusted **Secured Overnight Financing Rate (SOFR)** plus the spread relating to U.S. dollar LIBOR for the relevant maturity as provided by Bloomberg Index Services Limited. While derivative contracts using ISDA documentation will now automatically adjust from LIBOR to the relevant rate, cash investments in which advisers may invest on behalf of clients will not necessarily adjust in the same manner or at the same time. Consequently, advisers should carefully consider the universe of their cash investments, whether any adjustments to these instruments need to be consistent with any adjustments of the adviser's derivative contracts, and how and when such cash investments may adjust.

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New York State. Subsequent to the actions of the FCA, on April 6, 2021, the governor of New York State signed a bill into law which became effective immediately and adds new Article 18-C to the New York General Obligations Law. The purpose of the law is to provide a statutory solution for legacy contracts that reference U.S. dollar LIBOR as a benchmark interest rate but do not include appropriate fallback provisions if the U.S. dollar LIBOR rate is no longer published or is no longer representative. The law states that if the applicable contract contains no fallback provisions or contains fallback provisions that reference U.S. dollar LIBOR, then the replacement SOFR rate, including the applicable spread adjustments that are necessary to convert the U.S. dollar LIBOR rate to SOFR, that is recommended by the appropriate recommending body or regulatory authority (*i.e.,* the Federal Reserve Board, Federal Reserve Bank of New York or the Alternative Reference Rates Committee) will be the replacement rate for the contract. Importantly, under the law, neither the cessation of U.S. dollar LIBOR nor the use of the replacement rate will have the effect of (i) discharging or excusing performance under the relevant contract for any reason, including, but not limited to, any force majeure provision in any relevant contract; (ii) giving any person the right to unilaterally terminate or suspend performance under any relevant contract; (iii) constituting a breach of any relevant contract; or (iv) voiding or nullifying any relevant contract. Under the law, the selection or use of a recommended benchmark replacement rate or the determination, implementation, or performance of any technical, administrative or operational changes, alterations or modifications that are associated with and reasonably necessary to the use, adoption, calculation or implementation of a recommended benchmark replacement rate (collectively referred to as Conforming Changes) is not considered to be an amendment or modification of the relevant contract and does not prejudice, impair or affect any person's rights, interests or obligations under the relevant contract. The law also limits liability for parties who are involved with the substitution of the U.S. dollar LIBOR rate. Under its provisions, no person will have any liability for damages to any person

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or be subject to any claim or request for equitable relief arising out of or related to the selection or use of a recommended benchmark replacement rate or the determination, implementation or performance of the Conforming Changes, and such selection or use of the recommended benchmark replacement rate or such determination, implementation or performance of the Conforming Changes will not give rise to any claim or cause of action by any person in law or in equity. While this new law provides some much needed comfort to market participants, it is not a complete solution. The law does not apply to contracts that are not governed by New York law or that reference a LIBOR rate other than U.S. dollar LIBOR.

U.S. Securities and Exchange Commission. The Securities and Exchange Commission staff has and continues to encourage advisers to proactively manage the transition away from LIBOR, including determining their exposure to contracts and transactions that refer to LIBOR and establishing appropriate systems and procedures that work with the new replacement reference rates.

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**Thomas D'Ambrosio is a partner with Morgan, Lewis & Bockius LLP, where he concentrates in the area of derivatives and structured products. Mr. D'Ambrosio can be reached at (212) 309-6964 or* thomas.dambrosio@morganlewis.com.

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