

Clients & Friends Memo

ARRC Publishes LIBOR Legacy Playbook

July 11, 2022

On July 11, 2022, the Alternative Reference Rates Committee (the “ARRC”) published a [“Playbook”](#) to assist market participants in transitioning their legacy LIBOR contracts to an alternative rate by June 30, 2023. The Playbook is primarily focused on legacy cash products, which the ARRC estimates will total approximately \$5 trillion.¹ This memorandum summarizes the following steps described in the Playbook for the successful implementation of fallbacks in legacy LIBOR contracts:

- First, if market participants have not yet done so, they should conduct a thorough assessment of the fallbacks that are embedded (either contractually or through legislation) in every LIBOR contract.
- Second, because of the large number of contracts that will need to transition, the ARRC continues to encourage remediating those contracts where feasible to reference SOFR before June 30, 2023.
- Finally, for those LIBOR contracts that remain, market participants will then need to adopt plans to communicate each contract's fallback with the affected parties. They will need to make sure that they have sufficient resources allocated to ensure that these rate changes are successfully put into effect.

I. Contract Assessment

The ARRC recommends that market participants assess the fallback terms of their USD LIBOR contracts in consultation with their legal counsel, including but not limited to the trigger events, fallback language, and jurisdiction of law under which the contract is governed. The Playbook includes the following table in which the ARRC depicts, in broad terms, the anticipated status of these contracts after June 30, 2023 based on different potential combinations of these factors:

¹ The ARRC notes that derivative products, which account for over 90% of legacy LIBOR exposures, are either centrally cleared and covered by CCP rulebooks or can be (and in most cases, have been) remedied through adherence to the International Swaps and Derivatives Association's (“ISDA”) IBOR Protocol.

Anticipated Status of Different Broad Categories of USD LIBOR Contracts After June 30, 2023^a

Trigger Events/Governing Law:			
Fallback Type:	Precession Trigger Included	No Precession Trigger, Contract Under US Law	No Precession Trigger, Contract Under Foreign Law
Hardwired fallback to ARRC recommended or other specific rate	Contract will move to ARRC recommended or other specified hardwired replacement after June 30, 2023	Contract may reference synthetic LIBOR, if published, until LIBOR ceases publication, then move to the hardwired replacement rate	Contract likely to reference synthetic LIBOR, if published, until LIBOR ceases publication, then to move to the specified replacement rate
Fallback to be selected by a Determining Person	Contract will move to rate selected by Determining Person after June 30, 2023 or to the Fed selected replacement if the Determining Person does not choose any replacement	Contract will move to Fed selected replacement after June 30, 2023 if Determining Person chooses it or does not choose any replacement, but may remain on synthetic LIBOR, if published, otherwise, until LIBOR ceases publication and then move to the rate selected by the Determining Person	Contract likely to reference synthetic LIBOR, if published, until LIBOR ceases publication, then to move to rate selected by Determining Person
No fallback, or only references to dealer polls or previously published LIBOR values	Contract will move to Fed selected replacement after June 30, 2023	Contract will move to Fed selected replacement after June 30, 2023	Contract likely to reference synthetic LIBOR, if published, until LIBOR ceases publication, then may convert to fixed rate (if a previous LIBOR value is referenced) or may be subject to legal uncertainty

^a Specific outcomes will depend on the precise details of any given contract and the laws it is under; market participants should consult with their legal advisors to understand the exact nature of each contract they are a party to.

The U.K. Financial Conduct Authority ("FCA") recently published a [consultation](#) that seeks market feedback on whether to publish, on a temporary basis, 1-, 3-, or 6-month synthetic USD LIBOR rates. The Playbook notes that certain contracts under US law may continue to reference synthetic LIBOR if the FCA compels publication of such rates; in particular, those contracts that do not include a pre-cessation trigger but have a hardwired fallback rate or a Determining Person that elects to move to some other rate than the one selected by the Federal Reserve. Parties to these contracts should closely monitor future FCA communications on USD synthetic LIBOR and consult with their legal counsel as to the possible impacts of a synthetic USD LIBOR.

Regarding contracts governed by the laws of the European Union or the United Kingdom, the Playbook states:

- The UK Benchmark Regulation provides the FCA with the authority to compel ICE Benchmark Administration (“IBA”) to continue to publish LIBOR rates using a “synthetic” methodology for a period of time.
- For contracts that are subject to the laws of one of the EU Member States, the European Commission may choose to designate one or more replacements for LIBOR in the event that LIBOR ceases publication or is found to be no longer representative. These replacement rates would only apply to contracts or financial instruments that do not have fallback provisions or that have fallback provisions that are considered to not be sufficiently robust.

The Playbook includes the following best-practice recommendations of the ARRC related to contract assessment:

- Counterparties should assess each LIBOR contract they are party to and construct a full assessment of the all the fallback terms, including trigger events, fallback rates, and governing laws of each in consultation with their legal advisors.
- Counterparties to contracts for which there is a Determining Person who is meant to select a replacement rate to LIBOR should ensure that they understand exactly who the Determining Person is in each contract of this type – for example, it may be the issuer, calculation agent, or trustee.
- Parties to contracts that are covered by the LIBOR Act should monitor the Federal Reserve’s rulemaking under the Act.
- Parties to contracts that do not have a pre-cessation trigger and that may be impacted by a decision by the FCA to require publication of synthetic USD LIBOR rates should consider responding to the FCA’s consultation and should monitor any communications from the FCA in regard to the potential publication of synthetic USD LIBOR rates. Likewise, parties to contracts that are subject to the EU Benchmark Regulation should monitor any communications from the European Commission in regard to the potential use of its powers to designate replacement rates for LIBOR.

II. Contract Remediation

The Playbook sets forth several reasons why the ARRC recommends that, where feasible and appropriate to the circumstances, parties remediating their contracts consider moving their contracts from LIBOR to SOFR ahead of the LIBOR cessation:

- Remediating contracts by moving off LIBOR can allow counterparties to set the terms of the LIBOR transition that best suit them, rather than needing to rely on fallback language or the LIBOR Act to set those terms.
- Even in cases where the contract is deemed to have a workable fallback, counterparties still need to assess whether they are in a position to operationally handle the potentially large

number of contracts that may be changing after June 30, 2023. Remediating contracts by moving them out of LIBOR before this date will help to lessen those operational challenges. These potential operational challenges may be greatest for products such as business loans, where many banks will face the prospect of converting a large number of loan agreements across many borrowers over a short period of time if they do not attempt to work down the stock of LIBOR loans before June 30, 2023.

The ARRC made the following best-practice recommendations related to contract remediation:

- Counterparties to OTC LIBOR derivatives contracts should adhere to ISDA's IBOR Protocol and consider novating these contracts to move from LIBOR to SOFR prior to June 30, 2023. Counterparties to centrally cleared derivatives should monitor and understand the processes to be instituted by the relevant CCPs to move the LIBOR contracts they clear to SOFR.
- Counterparties to derivatives referencing USD LIBOR ICE Swap Rates should quickly move to adhere to ISDA's protocol covering these instruments.
- Counterparties to USD LIBOR debt and securitization instruments under US law that do not have pre-cessation triggers and clear, hardwired replacement rates and that are not directly covered by the LIBOR Act should consider the feasibility and desirability of remediation.
- Counterparties to debt and securitization instruments that reference the USD LIBOR ICE Swap Rates and that do not have pre-cessation triggers and clear, hardwired replacement rates, should strongly consider steps to remediate contracts, including considering the use of buybacks or exchanges.
- Counterparties to securities contracts under non-US law should not rely on the potential publication of any synthetic USD LIBOR rates, nor assume that the EU will exercise its powers; accordingly, counterparties should work to remediate any contracts that do not have suitable fallbacks and are feasible to amend prior to June 30, 2023.
- Where business loans are being remediated or opportunities for renegotiation or renewal are available, both business loan lenders and borrowers should consider moving their loan agreements away from LIBOR prior to June 30, 2023, especially in cases where the number of LIBOR loans issued by the lender are large enough to pose potential challenges to operationalizing a wave of loan transitions in the period immediately following June 2023.

III. Fallback Communication and Implementation

The Playbook notes that parties will need to carefully consider strategies to communicate what the fallback rate to any given contract will be. These considerations will necessarily entail analyses of parties' respective legal and operational roles in transactions. The ARRC emphasized the importance of candid discussions with counterparties of any perceived ambiguities or other issues. For contracts that provide for a Determining Person to select the replacement rate, the Playbook reminds market participants that there is an added step that needs to be taken, in that the

Determining Person first needs to select the rate they intend to use to replace LIBOR. Notably, the Playbook includes certain updates to the ARRC's previous recommendations for consumer loans and non-consumer cash products, summarized below.

Parties will also need to ensure that the details of the rate and any associated conforming changes are communicated to affected counterparties or investors in an effective and operationally practical manner. In this regard, the Playbook describes steps that are being taken to enhance DTCC's LENS service to notify holders of securities in the US and other market-data providers.

The Playbook includes the following ARRC best-practice recommendations related to fallback communication and implementation:

- Servicers of any consumer loans using LIBOR and maturing after June 2023 should have developed robust programs for notifications and consumer education and outreach to the borrowers. They should ensure that their planned notifications are compliant with all relevant consumer regulations.
- For other contracts specifying that a given party (the Determining Person) will select a replacement rate at their discretion following a LIBOR transition event, that Determining Person or other specified contractual party should seek to disclose their planned selection to relevant parties at least six (6) months prior to the earlier of either the date that a replacement rate would become effective, or June 30, 2023, using the channels of communication that are available at the time.
- Counterparties to contracts for which a Determining Person has not disclosed their planned selection at least six months prior to the earlier of either the date that a replacement rate would become effective, or June 30, 2023, should seek to determine whether the party (a) agrees that they serve this role under the terms of the contract, (b) intends to fulfill the responsibility of selecting a replacement rate, and (c) can communicate the nature of the replacement rate they expect to select and when they intend to formally select the replacement rate.
- Determining persons, their agents, or other parties responsible for the dissemination of the change information regarding LIBOR debt and securitizations should use DTCC's enhanced LENS system for communicating rate and conforming changes once it is available.
- In addition to ensuring efficient communication of rate changes, lenders should ensure that they have adequate resources on hand to implement the large number of changes that will occur after June 30, 2023.

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In recognition of our market-leading practice, the attorneys on Cadwalader's LIBOR transition team have won numerous awards, including the Financial Times North America Innovative Lawyers award (2021) in the highly competitive category of "Creating New Standards" and the prestigious

“Outstanding Achievement Award” (2022) by International Financial Law Review/Euromoney for “Contribution to Regulatory Reform.”

With our LIBOR legal expertise and market knowledge, Cadwalader offers customized solutions that work with in-house teams and existing outside counsel and vendors. We also offer a “turn-key” end-to-end LIBOR legal solution for large-scale remediation projects through our arrangement with a cost-effective alternative legal services provider and project manager.

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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