

Clients & Friends Memo

UK Government Proposes Increased Powers for the FCA over the LIBOR Wind-Down Process

24 June 2020

I. UK Proposal

On 23 June 2020, the UK government announced its intent to enact legislation to amend the UK regulatory framework applicable to critical benchmarks, including LIBOR.¹ The proposed amendments would give the UK Financial Conduct Authority (the “**FCA**”) additional powers in circumstances where LIBOR ceases to be representative of the market it seeks to measure and will not be restored to representativeness. The UK government has recognized that this scenario may occur in the lead-up to the cessation of the LIBOR rate (scheduled for the end of 2021), as panel banks will no longer be compelled to take part in the LIBOR calculation process.

In May of this year, a taskforce of the Bank of England (the “**Taskforce**”) published a paper on issues related to certain existing contracts, known as “tough legacy” contracts, considered to be those that cannot “realistically” be amended or renegotiated to refer to an alternative reference rate.² The Taskforce considered several routes to avoid market disruption in such circumstances, such as legislative relief or a temporary synthetic rate.

While the UK government and the FCA continue to encourage parties to renegotiate affected contracts, they recognize the issues posed by tough legacy contracts. To address the concerns about these contracts, the UK government plans to enhance the FCA’s powers to deal with the LIBOR wind-down process. Specifically, the proposed legislation would grant the FCA powers to require an administrator of LIBOR to alter its methodology in calculating the benchmark to protect market integrity and/or consumers. The FCA would also be able to permit the continued use of LIBOR for a narrow category of tough legacy contracts.

¹ See Financial Services Regulation: Written Statement – HCWS307 (23 June 2020), available [here](#).

² Paper on the Identification of Tough Legacy Issues, Tough Legacy Taskforce of the Working Group on Sterling Risk-Free Reference Rates (May 2020), available [here](#).

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In connection with this announcement, the FCA has issued a statement³ and a Q&A⁴ on the proposed new powers, and has committed to publish statements of policy on its approach to the use of these powers following further engagement with stakeholders in the UK and internationally.

II. Implications

The proposed changes to the powers of the FCA would create additional options to manage the wind-down of LIBOR (or other critical benchmarks) during a “pre-cessation” period, but these changes will not affect a decision that the relevant critical benchmark is unrepresentative for the purposes of the regulatory regime applicable to benchmarks in the UK.

Market participants should closely follow the proposed legislation and the related FCA consultations. We expect that some of the key issues will centre around the definition of “tough legacy” contracts to which the proposed FCA powers will apply and what may be a reasonable period during which the FCA may be willing to exercise such powers, as well as what may be a feasible and robust methodology to create a temporary synthetic benchmark.

These announcements are a valuable contribution to addressing the challenges of “tough legacy” transactions, but they are not a total solution. Market participants should continue to focus on active transition to alternative rates, in order to have certainty about contractual continuity and control over their contractual terms when LIBOR ceases or is deemed no longer representative. Consensual amendment remains the preferred course where possible, and other strategies will play an important role in addressing the large volume and range of transactions affected by LIBOR transition, including the Alternative Reference Rates Committee’s legislative proposal for New York State.⁵

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys or a member of the Cadwalader [LIBOR Preparedness Team](#). Additional detail on the LIBOR transition can be found on the *Cadwalader Cabinet* [here](#).

Lary Stromfeld	+1 212 504 6291	lary.stromfeld@cwt.com
Assia Damianova	+44 (0) 20 7170 8647	assia.damianova@cwt.com
Nihal Patel	+1 212 504 5645	nihal.patel@cwt.com

³ FCA Statement on Planned Amendments to the Benchmarks Regulation (23 June 2020), available [here](#).

⁴ Benchmarks Regulation – Proposed New Powers (23 June 2020), available [here](#).

⁵ ARRC’s legislative proposal, available [here](#).

Michael Sholem	+44 (0) 20 7170 8629	michael.sholem@cwt.com
Danielle Wheeler	+1 212 504 6175	danielle.wheeler@cwt.com