

MEMO# 33108

February 16, 2021

LIBOR Update: UK Treasury Issues Consultation on Safe Harbor for Benchmarks Regulation

[33108]

February 16, 2021 TO: ICI Members

ICI Global Members

ICI Global Regulated Funds Committee

LIBOR Transition Working Group SUBJECTS: Compliance

Financial Stability

Operations RE: LIBOR Update: UK Treasury Issues Consultation on Safe Harbor for Benchmarks Regulation

The UK HM Treasury (HMT) issued a consultation seeking feedback on whether to add a legal safe harbor as a supplement to the amendments to the Benchmarks Regulation (BMR)^[1] that Parliament has been considering through the Financial Services Bill.^[2] In general, the amendments to the BMR would enable the Financial Conduct Authority (FCA) to designate a benchmark, such as LIBOR, as unrepresentative and to change that benchmark's calculation methodology in order to facilitate an orderly cessation of the benchmark.

The HMT consultation discusses whether to introduce further provisions for a legal safe harbor. The legal safe harbor would apply to legacy contracts^[3] and would reinforce the interpretation that references to a designated benchmark in those contracts should continue to be read as such following any FCA changes to its calculation methodology. Further, the legal safe harbor would provide that neither the FCA designation of a benchmark nor any changes to its methodology could be a basis for either a cause of action, liability, or grounds for litigation between parties to those contracts. Specifically, a potential legal safe harbor could disallow:

- Discharging or excusing performance under any contract (including, but not limited to force majeure or other provision that alters the parties' obligations and/or liabilities);
- Giving any party the right unilaterally to terminate or suspend performance under any contract;
- Giving rise to liability for a facility agent / calculation agent (or any person in a similar role or role ancillary to the main contract) where they use the rate after designation;
- Constituting a breach of contract;

- Voiding any contract; and
- Amending, modifying or novating a contract.

As described below, the consultation solicits feedback on whether a safe harbor is necessary, whether it should apply broadly, and how a safe harbor should interact with previously agreed-upon contractual language. Responses to the consultation are due to HMT by March 15, 2021.

Rationale for any legal safe harbor provisions

HMT explains that any legislation providing a safe harbor would need to be supported by strong evidence of an actual detriment that needed to be addressed. As such, it is asking for more information on the likely causes of action, potential liabilities, or grounds for litigation that could arise from legacy contracts where a legal safe harbor would be helpful. HMT also asks whether there should be any circumstances to exclude from the application of a legal safe harbor, and whether the protection of the safe harbor should extend to third parties such as facility agents, trustees or parties to contracts ancillary/collateral to the main contract.

Scope of any legal safe harbor

HMT acknowledges that the UK legislation can only provide a possible legal safe harbor for contracts governed by UK law. In particular, HMT expects that any legal safe harbor would cover contracts where the law of England and Wales is the choice of law, regardless of the jurisdiction of the parties to the contracts, but solicits feedback on broadening that scope.

HMT also recognizes that although the BMR purports to apply narrowly to UK supervised entities and specified financial instruments, financial contracts, or investment funds, contracts referencing critical benchmarks are widespread, across varying sectors, industries and product types. HMT asks whether the scope of any legal safe harbor should go beyond supervised and apply to a broader set of contracts.

Further, HMT is considering whether and how any legal safe harbor should apply to not only legacy contracts that make explicit reference to a critical benchmark but also those that describe the benchmark or the underlying market it intends to measure. HMT provides an example of contracts that do not refer to LIBOR specifically, but reference the 'screen rate' or an underlying market that is intended to be measured by LIBOR.

Finally, HMT states that any legal safe harbor provisions should not seek to override "suitable" contractual fallbacks that allow for contracts to move away from referencing or relying upon a critical benchmark. HMT asks for feedback on how safe harbor provisions should interact with contractual fallbacks.

Legal immunity for the administrator of a critical benchmark

In addition to the possibility of providing users of a critical benchmark with a legal safe harbor, HMT is also considering whether there is a case for providing legal protections for the administrator of a critical benchmark in making a determination to designate a benchmark.

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endnotes

[1] See HM Treasury, Supporting the wind-down of critical benchmarks (February 2021), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961317/HMT_Safe_harbour_Consultation.pdf.

[2] See ICI Memorandum No. 32855, available at https://www.ici.org/my_ici/memorandum/memo32855 See also ICI's recent comment letters in response to other consultations regarding the FCA's expected powers under the BMR, available at https://www.ici.org/my_ici/memorandum/memo33057.

[3] Under the consultation, a "legacy contract" means a contract written before the FCA would designate a benchmark as unrepresentative.

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