

**MEMO# 32855**

October 22, 2020

# **LIBOR Update: Tough Legacy Contract Developments from the UK Financial Services Bill and EU Benchmark Regulation Proposal**

[32855]

October 22, 2020 TO: ICI Members

ICI Global Members

Derivatives Markets Advisory Committee

ICI Global Regulated Funds Committee

LIBOR Transition Working Group

SEC Rules Committee SUBJECTS: Compliance

Derivatives

Financial Stability

Operations RE: LIBOR Update: Tough Legacy Contract Developments from the UK Financial Services Bill and EU Benchmark Regulation Proposal

We wanted to alert you to recent developments in the transition from LIBOR from the UK and European Union (EU).

## **UK Financial Services Bill**

On October 21, the UK Government introduced the Financial Services Bill in Parliament that would amend the UK Benchmarks Regulation (UK BMR) and provide the Financial Conduct Authority (FCA) with new powers to oversee the orderly wind down of LIBOR.[\[1\]](#)

The bill is largely in line the FCA's statement in June 2020 that the UK government intended to initiate legislation to reduce disruption to tough legacy LIBOR contracts[\[2\]](#) by enabling the continued publication of LIBOR past its cessation date using different methodology and inputs.[\[3\]](#) Notably, the bill would:

- Enable the designation of a benchmark as “critical” even if there were market-produced substitutes for that benchmark, so long as it would not be reasonable or practicable for one or more users of that benchmark to switch to the substitute rate.
- Allow the FCA to require a benchmark administrator to change how a critical benchmark is determined, including its input data and the rules for the benchmark. The FCA may exercise these powers to secure an orderly wind down of a benchmark

and to further consumer protection and market integrity. The bill would also allow the FCA to consider the likely effect of the exercise of power outside the UK.

- Allow the FCA to prohibit new use of a critical benchmark that plans to cease publication. “New use” broadly would mean creating new financial instruments or contracts that reference the benchmark or using the benchmark in existing contracts, instruments, or funds where the benchmark was not used before.
- For critical benchmarks that the FCA requires to be continued to be published, require the FCA to conduct an assessment of the benchmark’s capability to measure the underlying market and economic reality. Administrators to critical benchmarks that are based on contributions would conduct an assessment on the representativeness of those benchmarks biennially or when a contributor gives notice that it will cease providing contributions.
- Extend the expiration of the transitional period for third country benchmarks until the end of 2025.

For benchmarks that are provided in different currencies or tenors, which the bill calls “umbrella benchmarks,” the bill would permit the FCA to exercise its powers in different ways in relation to different versions of the benchmark.

## **EU Benchmark Regulation**

ICI Global submitted a comment letter in response to the EU Parliament’s draft approach to amending the EU Benchmark Regulation.[\[4\]](#) The EU Parliament approach, which is broadly consistent with the proposal issued by the European Commission in July,[\[5\]](#) would allow a replacement rate to substitute for LIBOR in tough legacy contracts.

ICI Global’s comment letter supports the EU Parliament approach overall. It recommends, however, that the EU coordinate with other global authorities on tough legacy contract solutions. Avoiding material differences, overlaps, or gaps in coverage among tough legacy solutions will minimize the risk of litigation, accelerate the progress of operational readiness, and reduce the opportunity for regulatory arbitrage.

Regarding amendments to the proposal that the EU Parliament has made, ICI Global supported treating OTC derivatives that are amended or novated to replace a discontinued benchmark as legacy trades for clearing and margining purposes.

ICI Global recommended that the Parliament bring further legal certainty to investors by:

- Clarifying the authority of the BMR over contracts and financial instruments governed by third-country law;
- Extending the authority of the BMR to contracts and financial instruments subject to the laws of an EU Member State; and
- Explicitly identifying the fallback language to which the BMR will apply, consistent with that in other proposed tough legacy contract solutions.[\[6\]](#)

Bridget Farrell  
Assistant General Counsel

## [Attachment](#)

### endnotes

- [1] Financial Services Bill (Bill 200) (Oct. 21, 2020), *available at* <https://publications.parliament.uk/pa/bills/cbill/58-01/0200/200200.pdf>. See also Financial Services Bill Explanatory Notes (Bill 200-EN), *available at* <https://publications.parliament.uk/pa/bills/cbill/58-01/0200/en/200200en.pdf>; HM Treasury Policy Statement on Amendments to the Benchmarks Regulation to summer LIBOR transition (Oct. 2020), *available at* [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/928238/LIBOR\\_Policy\\_Statement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/928238/LIBOR_Policy_Statement.pdf). Currently, the FCA regulates LIBOR under the EU BMR, which has directly applied in the UK since 2018. The UK Financial Services Bill indicates that the UK BMR, which retains portions of the EU BMR, would take effect at the end of the Brexit transition period. See Explanatory Notes at paragraph 233. The Brexit transition period ends on December 31, 2020.
- [2] Generally, tough legacy contracts are those that are not able to be renegotiated or amended by the time of LIBOR cessation, which is expected at the end of 2021.
- [3] See FCA, Benchmarks Regulation – proposed new powers (June 23, 2020), *available at* <https://www.fca.org.uk/markets/transition-libor/benchmarks-regulation-proposed-new-powers>.
- [4] See European Parliament Draft Report (Oct. 6, 2020), *available at* [https://www.europarl.europa.eu/doceo/document/ECON-PR-658859\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/ECON-PR-658859_EN.pdf). A summary of the EU Parliament approach is *available at* ICI Memorandum No. 32824, [https://www.ici.org/my\\_ici/memorandum/memo32824](https://www.ici.org/my_ici/memorandum/memo32824).
- [5] See European Commission’s proposal to amend EU rules on financial benchmarks (Jul. 24, 2020), *available at* [https://ec.europa.eu/info/publications/200722-proposal-benchmarks\\_en](https://ec.europa.eu/info/publications/200722-proposal-benchmarks_en). ICI Global submitted a comment letter on the European Commission proposal in September. See ICI Memorandum No. 32777, *available at* [https://www.ici.org/my\\_ici/memorandum/memo32777](https://www.ici.org/my_ici/memorandum/memo32777).
- [6] See, e.g., ARRC New York State Proposed Legislation, *available at* <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC-Proposed-Legislative-Solution.pdf>.