IBA and UK FCA Announce New Consultations Addressing LIBOR Cessation and “Tough Legacy” Contracts

On November 18, 2020, **Intercontinental Exchange, Inc.** announced that ICE Benchmark Administration Limited (“**IBA**”) will, in the near future, consult on its intention to cease the publication of all GBP, EUR, CHF and JPY LIBOR settings after December 31, 2021. The press release notes that this consultation does not include USD LIBOR as there are currently discussions involving IBA, the UK Financial Conduct Authority (the “**FCA**”), other official sector bodies and the panel banks on the future of USD LIBOR and that there likely will be further USD LIBOR announcements when those discussions conclude. IBA importantly notes that “[t]here can be no certainty or guarantee that IBA will be able to publish any USD LIBOR settings after December 31, 2021,” suggesting that market participants should not rely exclusively on the possibility of relief under these consultations.

Also on November 18, the **FCA** published a statement that sets out its potential use of proposed new powers under the recently introduced UK Financial Services Bill to ensure an orderly wind-down of LIBOR (please see our previous **client memorandum** on this proposal). The **FCA** further published consultations regarding these new powers (assuming that the bill passed in its current form).

The consultations address the FCA’s proposed new ability to require continued publication of critical benchmarks with a modified methodology in certain circumstances.

The FCA states that there would be a case for using the proposed new powers to require a change to the LIBOR methodology where:

- LIBOR currency-tenor settings are widely used in outstanding contracts and/or instruments that cannot practicably be transitioned away from the benchmark rate by actions or agreements by or between contract counterparties themselves (i.e., so-called “tough legacy” contracts); and
- using the powers would contribute to protecting consumers or preserving market integrity.

Under the proposed policy, the FCA would **not** envisage using its powers where:

- benchmarks (such as LIBOR currency-tenor settings) are little used;
- the contracts referencing the benchmark can be amended by contractual counterparties without the FCA’s intervention;
- using the powers would not be necessary to protect consumers or market integrity; or
- appropriate inputs are not available.

With respect to GBP LIBOR, the FCA says that forward-looking SONIA term rates are available and tough legacy contracts exist in significant amounts in the sterling market, so the most heavily-used sterling currency-tenor settings would likely meet the conditions for use of its proposed new powers when publication of GBP LIBOR is proposed to cease. The FCA further notes that, although IBA has not yet set out specific proposals on USD LIBOR, its policy framework would also be relevant to USD LIBOR.

Summarizing its proposed approach, the FCA says:

> Any decision to use the power to require a methodology change in respect of LIBOR settings will take into account evidence and views from market participants and our counterpart global authorities, and will be consulted upon in due course. While powers proposed under the

> Financial Services Bill can be used to assist the holders of legacy LIBOR contracts if the relevant conditions apply, they also include prohibitions on new use of the benchmark. The aim of these powers is not to enable us to restore the representativeness of LIBOR, but, subject to the various conditions and consultation processes described above, they could enable its continued publication under a new methodology to assist legacy contract holders.

The FCA's statement notes at the end that this announcement does not constitute a cessation or determination of non-representativeness for purposes of the benchmark fallback language adopted by the International Swaps and Derivatives Association, Inc. ("**ISDA**"). Similarly, **ISDA** has also stated that neither of the IBA or FCA announcements constitutes an index cessation event under the IBOR Fallbacks Supplement or the ISDA 2020 IBOR Fallbacks Protocol, nor do they trigger fallbacks under the 2018 ISDA Benchmarks Supplement or its protocol.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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