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THE LONG FAREWELL: IS USD LIBOR FINALLY IN THE REARVIEW MIRROR?*

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The June 30, 2023 "end-date" for the final major U.S. dollar tenors of the London Interbank Offered Rate ("LIBOR"), as we've long known it, has come and gone. And much of the financial world has suddenly gone eerily silent concerning the "LIBOR transition." This is a tribute to the years of preparation by the International Swaps and Derivatives Association, Inc. ("ISDA"), the Alternative Reference Rates Committee (the "ARRC"), and market participants more generally, as well as various regulators, including the Board of Governors of the Federal Reserve (the "Federal Reserve Board") and the Commodity Futures Trading Commission ("CFTC"). But it also is thanks, in large part, to the U.S. Congress, which enacted the Adjustable Interest Rate (LIBOR) Act (the "LIBOR Act") in the nick of time.[1]

As a result of the hard work of so many,

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more than $200 trillion[2] in over-the-counter ("OTC") and exchange-traded derivatives that referenced U.S. dollar LIBOR have successfully transitioned to an alternative reference rate derived from the Secured Overnight Financing Rate ("SOFR"), plus a series of "tenor spread adjustments" pioneered by ISDA.[3] At its core, SOFR is a broad Treasury "repo" financing rate. Unlike LIBOR, SOFR is a fully transaction-based, nearly risk-free reference rate.[4] In particular, it is designed to be "a broad measure of the cost of borrowing cash overnight collateralized by U.S. Treasury securities" and covers the largest volume of transactions of any rate based on the U.S. Treasury repurchase agreement (repo) market.[5] Thus, unlike LIBOR, SOFR is *not* a so-called "credit sensitive rate" (*i.e.*, a rate that reflects the credit risk of large global banks). Moreover, because SOFR is derived from activity in the U.S. Treasury securities market, it is generally expected to decline in times of stress or market disruptions as demand for U.S. Treasury securities increases. LIBOR, by contrast, was generally expected to rise in response to market stress events absent central bank intervention. Finally, unlike LIBOR, SOFR is not a forward-looking term rate. Instead, it looks backwards.

To be sure, while the transition appears to be going smoothly with respect to the overwhelming majority of derivatives and related instruments, disputes could still arise. Indeed, it would be surprising if a frictionless transition occurred given the staggering notional value of LIBOR instruments impacted by the move to alternative references rates. After all, the transition has likely created many winners and losers. It also raised some interesting legal and regulatory questions, many of which remain unresolved. Some of those questions impact large swaths of LIBOR contracts and others impact bespoke agreements. Industry participants are only beginning to digest the legal and regulatory repercussions.

While the LIBOR story may not be over just yet, the official cessation of LIBOR as we knew it is an important historical event that merits some reflection. What was LIBOR? Why did it go away? How did the industry come together to smooth the transition? What were the most important bumps in the road? What role did the government and regulators play? And what remains to be seen? Will there be litigation? Or perhaps regulatory investigations? This article attempts to address these questions with a historical accounting of the journey taken by derivatives markets these last few years in connection with the LIBOR transition.

AN OVERVIEW OF LIBOR AND ITS HISTORY

LIBOR was a set of reference interest rates intended to represent the rates at which leading internationally active banks with access to the wholesale unsecured funding market in London could obtain funding for certain tenors (*i.e.*, overnight and one, three, six and 12 months). LIBOR[6] traces its origins to a syndicated $80 million dollar loan to the Iranian government in 1969. Communist and OPEC nations had, by that point, long held "eurodollar" deposits (*i.e.*, U.S. Dollars) in London to avoid regulated deposit rates and political risk in the United States. Manufacturers Hanover led the syndicate. It conceived of a "floating rate" as a hedge against the inflationary pressures which were then becoming a serious risk in the market. The solution was for the syndicate banks to self-report a proxy for their cost of funding periodically, and for the

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average of these rates, plus a spread, to set the interest rate for the loan.[7] What eventually became known as LIBOR was born.

By the early 1980s, the floating rate market had spread to include bonds and other instruments. Polling the relevant transaction parties began to become unwieldy. Meanwhile, instruments such as forward rate agreements and interest rate swaps had begun to emerge. All of this gave rise to a call for standardized terms and indices. The British Bankers Association ("BBA"), a U.K. trade organization for banks, worked with the Bank of England to develop the standards. In 1985 it published the BBA London Interbank Interest Rate Swaps Recommended Terms and Conditions ("BBAIRS Terms") and Forward Rate Agreements Recommended Terms and Conditions ("FRABBA Terms"), which led to "bbalibor" (the trademarked name for LIBOR as calculated by the BBA) for dollars, pounds and yen in January 1986.[8]

LIBOR ostensibly functioned without material incident until April 2008, when the *Wall Street Journal* reported in the midst of the financial crisis on concerns that LIBOR was becoming "unreliable" because "some banks don't want to report the high rates they're paying for short-term loans because they don't want to tip off the market that they're desperate for cash."[9] The *Wall Street Journal* also cited a March 2008 report from the Bank for International Settlements that "banks might have an incentive to provide false rates to profit from derivatives transactions."[10]

By 2009, the U.K. Financial Services Authority ("FSA"), together with regulators and public authorities in a number of different jurisdictions-including the United States-began to investigate a number of institutions for alleged misconduct relating to LIBOR and other benchmarks. Class action lawsuits, regulatory penalties and criminal prosecutions followed, resulting in billions of dollars in civil, criminal and regulatory settlements and penalties and indictments and convictions of multiple individuals.[11]

In or around June 2012, the U.K. Chancellor of the Exchequer commissioned Martin Wheatley who, at the time, was the managing director of the FSA and CEO-designate of the U.K.'s then-recently created Financial Conduct Authority ("FCA"), to conduct an independent review of various aspects of LIBOR. In September 2012, Wheatley published a final report reflecting his findings and recommendations regarding the setting and usage of LIBOR.[12] His report also included a "blueprint for LIBOR reform," which ushered in various changes in the financial markets, including changes related to LIBOR. The Wheatley Report recommended robust regulation of the administration of "benchmarks" such as LIBOR. It also led to the replacement of the BBA as LIBOR's administrator with the ICE Benchmark Administration Limited ("IBA").

Around the same time, the Board of the International Organization of Securities Commissions (IOSCO) published its Final Report on the Principles for Financial Benchmarks, which attempted to articulate principles and guidance for benchmark-related activities. Among other things, ISOCO noted that benchmarks should be designed to result in a "reliable representation of the economic realities of the interest that the benchmark seeks to measure. . . ."[13] This has come to be known as "representativeness."

Starting on February 1, 2014, IBA began to

calculate, publish and otherwise administer LIBOR. Like the BBA, it used submissions made by a number of so-called "panel banks." In particular, on each London business day, the LIBOR panel banks submitted quotations to IBA based on (or derived from) actual transaction data, and if such data was insufficient for a given panel bank, that panel bank's "expert judgment."[14] In accordance with the Wheatley Report's recommendations, the FCA served as the primary regulator of IBA, as well as panel banks. It also supervised most entities that used LIBOR in the UK.[15]

July 27, 2017 proved to be a watershed moment in the life of LIBOR. That day, Andrew Bailey, the then-CEO of the FCA, gave a speech[16] in which he explained that numerous LIBOR panel banks had approached the FCA and expressed a desire to cease providing LIBOR-related submissions to IBA. International bank regulatory frameworks implemented after the financial crisis, including minimum capital requirement regulations designed to reduce systemic risk had altered the way banks funded themselves. In particular, banks in the London market no longer relied on robust interbank loans thereby reducing the number of actual transactions LIBOR panel banks could reference when making submissions to IBA. As a result, panel banks had become increasingly reliant on "expert judgment" when preparing their LIBOR panel submissions.

According to Mr. Bailey, the panel banks felt "discomfort" relying on "expert judgment" because there were too few actual transactions to validate that judgment, which could invite unwarranted allegations of impropriety.[17] The Bailey speech was careful to acknowledge the "significant improvements" to LIBOR that had taken place since the FCA began to regulate it in 2013 and that the FCA did "not suspect further wrongdoing." However, the pervasive and continuing absence of "real transactions" in the unsecured wholesale term loan market for banks had rendered LIBOR, in the view of the FCA, incapable of ever being "genuinely representative of market conditions." Mr. Bailey further noted that the FCA was negotiating an agreement with each of the panel banks that would see them continue to voluntarily submit information to IBA through the end of 2021.[18] On November 24, 2017, the FCA confirmed that the panel banks had agreed to support LIBOR through December 31, 2021, but they made no commitment to continue doing so after that date.[19] As discussed below, this "expiration date" for most USD LIBOR settings would ultimately be extended to June 30, 2023.

ISDA'S RESPONSE TO LIBOR'S EXPECTED CESSATION

When Mr. Bailey gave his July 2017 speech, derivatives presented an enormous risk to the financial markets. By that time, hundreds of trillions of dollars of LIBOR-linked derivatives had been documented using ISDA documentation and standard ISDA definitions, which, at the time, contemplated a calculation agent polling banks in the event LIBOR did not appear on a predefined screen for the chosen "Reset Date." [20] Even if such polling mechanisms were intended to apply in the context of the permanent cessation of LIBOR (as opposed to solely in the context of LIBOR being temporarily unavailable due to a technological glitch, weather event or terrorist attack),[21] the financial services industry came to expect such polls would "fail"[22] when they

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were most needed (*i.e.*, in the context where LIBOR was no longer being published), ostensibly for the same reason that LIBOR was expected to cease being published-banks would not wish to provide the information if polled. Accordingly, unless remediated in some fashion before IBA ceased to publish LIBOR, there would be uncertainty and numerous legal disputes, as well as safety and soundness concerns for individual institutions that could lead to broader systemic risk.

To limit these risks, ISDA conducted a number of market consultations and, thereafter, took certain critical steps to help market participants reduce the potential for legal disputes:

1. ISDA selected so-called "adjusted SOFR compounded in arrears" as its preferred alternative reference rate for USD LIBOR ("Fallback Rate (SOFR)"). Fallback Rate (SOFR) is derived from compounding SOFR, an overnight "risk free" rate, on a daily basis, with a two-day "lookback" over the applicable tenor and adding a tenor-specific "spread adjustment."[23] The "tenor spread adjustments" were intended to minimize value transfer that otherwise might occur if a swap simply transitioned from LIBOR-a credit-sensitive rate-to SOFR compounded in arrears. To that end, they would reflect the median difference between that applicable LIBOR tenor and SOFR compounded in arrears, measured daily for five years before an Index Cessation Event, which ISDA defined to include an announcement by the FCA that LIBOR was not, or would no longer be as of a date certain, "representative" of the underlying market and economic reality that LIBOR is intended to measure.[24]

2. ISDA published "Supplement 70" to its ISDA 2006 Definitions, which operated to incorporate Fallback Rate (SOFR) as a fallback to USD LIBOR into all swaps transacted using those definitions on or after January 25, 2021.[25]

3. ISDA published its "2020 IBOR Fallbacks Protocol" (the "IBOR Protocol"),[26] which permits "Adhering Parties" to amend all of their swaps retroactively with all other Adhering Parties to incorporate Fallback Rate (SOFR) as a fallback to USD LIBOR. A market participant would become an Adhering Party by means of electronic delivery to ISDA of a simple "Adherence Letter." By June 30, 2023, well over 16,000 market participants had become Adhering Parties to the IBOR Protocol, including all or virtually all registered swap dealers.[27]

4. ISDA published the 2021 ISDA Interest Rate Derivatives Definitions (the "2021 Definitions"), which went live on October 4, 2021. [28] The 2021 Definitions similarly incorporated Fallback Rate (SOFR) as a fallback to USD LIBOR and replaced references to specific screens in favor of the applicable LIBOR setting "as administered by" IBA.

THE ARRC AND ITS RECOMMENDATIONS

In 2014, the Federal Reserve Board and the Federal Reserve Bank of New York ("FRBNY") had convened the ARRC with the original purpose of, among other things, identifying potential alternative reference rates for USD LIBOR, and creating a plan to support the voluntary adoption of its recommended rate should one ever be

needed.[29] In June 2017, just a month before Mr. Bailey's July 2017 speech, the ARRC announced SOFR as its recommended alternative to LIBOR.

In the wake of Mr. Bailey's July 2017 announcement, the Federal Reserve and FRBNY jointly re-convened the ARRC and expanded its membership with the goal of ensuring the financial services industry could successfully transition away from LIBOR.[30] The ARRC in its current incarnation is comprised of a group of private market participants—including banks, asset managers, insurers, and industry trade organizations like ISDA—as well as official sector *ex-officio* members—including the CFTC, the U.S. Securities and Exchange Commission and the U.S. Treasury.

Once reconstituted, the ARRC began to make numerous recommendations concerning how market participants should address the expected discontinuance of LIBOR. Critically, in early 2018, the ARRC reiterated its support for SOFR as the recommended replacement for LIBOR.[31] The ARRC subsequently recommended various SOFR-variants for use in certain new and legacy products.[32] For example, recognizing that many market participants wanted a forward-looking replacement rate, the ARRC eventually recommended CME Term SOFR for use in certain new and legacy financial products.[33] CME Term SOFR is a benchmark designed to be the forward-looking measurement of overnight SOFR for different tenors (*e.g.*, 1-month, 3-month, 6-month), based on market expectations implied from SOFR *futures* markets.[34]

In relation to derivatives, the ARRC largely deferred to ISDA (including adopting the "ISDA tenor spread adjustments" for all products),[35] but the ARRC also made recommendations relative to, among other things, cross-currency swaps (which required a degree of international monetary authority harmonization) and swaptions (which implicated clearinghouses and were beyond the purview of ISDA's standard OTC documentation).[36]

THE ARRC RECOMMENDS LIMITING THE USE OF CME TERM SOFR IN DERIVATIVES

Although its recommendations are voluntary and not legally binding, the ARRC repeatedly took a strong stand against the wide-spread use of CME Term SOFR. Its stance was especially strong with respect to the derivatives market, particularly use by the largest swap dealers. The ARRC's stated motivation was a fear that CME Term SOFR derivatives trading could cannibalize derivatives trading in overnight SOFR, and thereby create the very "inverted pyramid" that doomed LIBOR by having a relatively small number of actual transactions determining how trillions of dollars of financial instruments would be priced.

As alternative term rates like the Bloomberg Short-Term Bank Yield Index[37] began to gain traction in the cash markets, the ARRC's objection to term SOFR rates began to soften. That pivot culminated with the ARRC's release of a series of "best practices" for use of "term rates," and a formal, albeit qualified, recommendation of CME Term SOFR one week later.[38] The ARRC Best Practices are now directly incorporated, on an "all reasonable efforts" basis, into the CME Term SOFR license agreement.

Paragraph 2 of the ARRC Best Practices stated, unequivocally, that "The ARRC **does not sup-**

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port the use of the SOFR Term Rate for the vast majority of the derivatives markets . . ." (emphasis in original). The ARRC Best Practices also sketched out a limited "hedging" exception for "end-users" as follows: "The ARRC recommends that any use of SOFR Term Rate derivatives be limited to end-user facing derivatives intended to hedge cash products that reference the SOFR Term Rate." This raised numerous questions for the industry about the scope of the "hedging exception" the ARRC attempted to create.

In response, the ARRC released FAQs,[39] which attempted to articulate a somewhat more workable and practical set of "rules of the road" for those following its recommendations. FAQ No. 2 answered the question "what constitutes an end-user facing derivative hedging a SOFR Term Rate cash product?" by effectively identifying lenders who have entered into CME Term SOFR swaps with borrowers as "end-users" for purposes of seeking to hedge the resulting swap exposure, provided the applicable lender is not a "swap market maker," which the ARRC described as an entity that makes "two-way prices in interest rate derivatives and is . . . a market maker in the interdealer market for such derivatives in the regular course of its business." The ARRC deemed swap market makers as capable of warehousing and managing Term SOFR risk using overnight SOFR derivatives on the theory that the basis risk between the two rates "will typically be small and well within their capacity to manage effectively." FAQ 2 enunciated a presumption that banks that are not registered as swap dealers with the Commodity Futures Trading Commission ("CFTC") would not be swap market makers, but it also noted that being a registered swap dealer does not necessarily equate to being a "swap market maker."

Many in the industry remained dissatisfied. Fearing an inability on the part of swap market makers to hedge their CME Term SOFR exposure and seeing an apparent impact on swap pricing, some urged the ARRC to revisit its recommended scope of use for CME Term SOFR in derivatives. In April 2023, the ARRC ultimately broadened the Best Practices, albeit slightly,[40] recognizing that swap market makers should be able to freely hedge CME Term SOFR exposure by way of basis swaps, but only with non-swap market makers. CME Term SOFR derivatives trading *between* swap market makers remains outside the ARRC's recommended scope of use.

THE CESSATION DATE FOR THE DOMINANT TENORS OF USD LIBOR IS EXTENDED TO JUNE 30, 2023

On November 30, 2020, IBA announced it would consult the market on its intention to cease the publication of one-week and two-month USD LIBOR settings at year-end 2021, and to extend the remaining USD LIBOR settings until June 30, 2023.[41] That same day, the Federal Reserve Board and other bank regulators issued a joint statement acknowledging IBA's announcement and noting that "[e]xtending the publication of certain USD LIBOR tenors until June 30, 2023 would allow most legacy USD LIBOR contracts to mature before LIBOR experiences disruptions."[42] The U.S. banking regulators went on to encourage supervised financial institutions to cease entering into new LIBOR contracts "as soon as practicable and in any event by December 31, 2021," and to use "robust fallback language

that includes a clearly defined alternative reference rate after LIBOR's discontinuation" in any new LIBOR contracts entered prior to December 31, 2021.[43]

On March 5, 2021, after IBA completed its market consultation, IBA and the FCA made public statements regarding the future cessation of LIBOR (the "March 5 Announcements").[44] According to the March 5 Announcements, IBA would permanently cease to publish each of the dominant LIBOR settings on June 30, 2023 (with one-week and two-month USD LIBOR ceasing to be published on December 31, 2021). The FCA further indicated that it might compel IBA to publish a so-called "synthetic LIBOR" after June 30, 2023 if and when it received the power to do so, but made clear that "synthetic LIBOR" would not be "representative." As discussed below, the FCA ultimately compelled IBA to publish a "synthetic LIBOR" for certain USD LIBOR settings.

THE ISDA SPREAD ADJUSTMENTS ARE FIXED

ISDA issued a statement in response to the March 5 Announcements.[45] Among other things, ISDA confirmed that the March 5 Announcements constituted an Index Cessation Event under Supplement 70 and the IBOR Protocol for all LIBOR settings. This, ISDA explained, had the effect of fixing the fallback spread adjustments to be added to SOFR when calculating Fallback Rate (SOFR) for each LIBOR tenor, including 11.448, 26.161, and 71.514 basis points for one, three and 12-month LIBOR, respectively.[46]

NEW YORK'S LIBOR LEGISLATION IS ENACTED IN APRIL 2021

In 2018, recognizing the enormous legal risks that would arise from the LIBOR transition, the ARRC began to contemplate and eventually draft proposed legislation-focused on New York.[47] Input was solicited from various industry groups, as well as ARRC members and their outside counsel.[48] In late-2020, LIBOR legislation was introduced in the New York State Senate before being reintroduced and passing the New York State legislature during the 2021-2022 legislative session.[49] On April 6, 2021, the Governor of New York signed the LIBOR transition legislation into law (the "New York State LIBOR Legislation").[50]

The New York State LIBOR Legislation impacted LIBOR-linked contracts governed by New York law, including, among other things, derivatives, commercial loans that involve hedges, and securitizations that involve derivatives. Critically, the New York State LIBOR Legislation nullified the polling mechanisms found in most LIBOR-linked derivatives upon the occurrence of a LIBOR Discontinuance Event. As the ARRC would later explain, the March 5 Announcements constituted the LIBOR Discontinuance Event contemplated by the New York State LIBOR Legislation.[51] Consequently, as a result of § 18-401(2) of the New York State LIBOR Legislation, such derivatives would transition by operation of law after June 30, 2023 to a SOFR-based rate to be recommended by the Federal Reserve, the FRBNY or the ARRC. *See* N.Y. Gen. Oblig. Law § 18-401(1)(A).

THE FEDERAL LIBOR ACT

On April 15, 2021, the U.S. House of Repre-

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sentatives held a hearing concerning the LIBOR transition and the need for federal legislation.[52] On July 22, 2021, Rep. Brad Sherman (D-CA) introduced LIBOR legislation in the U.S. House of Representatives.[53] On December 8, 2021, the U.S. House of Representatives passed a LIBOR transition bill it called the "Adjustable Interest Rate (LIBOR) Act of 2021."[54] The U.S. Senate Committee on Banking, Housing and Urban Affairs considered federal LIBOR legislation. On March 2, 2022, after making certain changes to the U.S. House of Representatives' bill, Senators Tester (D-MT), Tillis (R-NC), Brown (D-OH) and Toomey (R-PA) introduced a LIBOR transition bill in the U.S. Senate.[55]

On March 15, 2022, President Biden signed into law the Consolidated Appropriations Act of 2022,[56] Division "U" of which is the LIBOR Act.[57] The LIBOR Act is intended to, among other things, "establish a clear and uniform process, on a nationwide basis, for replacing LIBOR in existing contracts, the terms of which do not provide for the use of a clearly defined or practicable replacement benchmark rate, without affecting the ability of parties to use any appropriate benchmark rate in new contracts," and to "preclude litigation related to existing contracts the terms of which do not provide for the use of a clearly defined or practicable replacement benchmark rate." *See* Section 102(b)(1).[58] The LIBOR Act expressly "supersede[s] any provision of any State or local law, statute, rule, regulation, or standard—relating to the selection or use of a benchmark replacement or related conforming changes." Section 107(1).

Like the New York State LIBOR Legislation, the LIBOR Act nullified references to polling used in LIBOR contracts as fallback mechanisms. And like the New York State LIBOR Legislation, the LIBOR Act called for contracts left without fallback provisions to be transitioned by operation of law to a SOFR-based rate. Unlike the New York State LIBOR Legislation, however, the LIBOR Act did not empower the ARRC to make recommendations that would have the force of law. Instead, the LIBOR Act required the Federal Reserve Board to select benchmark replacements for contracts that lacked fallback provisions. *See* Section 103(6). This effort would include selecting SOFR-based benchmark replacement rates for each of several different financial product types or asset classes, and adjusting them using the ISDA tenor spread adjustments, which were codified in the LIBOR Act. *See* Sections 103(6) (Board-selected Benchmark Replacement to be "based on SOFR"); 103(20) (codifying ISDA tenor spread adjustments). These adjusted SOFR rates, along with any conforming changes, are referred to inclusively in the LIBOR Act as the "Board-selected benchmark replacements." Section 103(6).

Critically, the LIBOR Act provides a statutory "safe harbor" for parties that use the applicable Board-selected benchmark replacement ("BSBR") in accordance with the statute, thereby protecting them from any claim or cause of action in law or equity or request for equitable relief, or have liability for damages, arising out of, among other things, the selection or use of a Board-selected benchmark replacement.

Finally, aside from nullifying certain poll mechanisms, the LIBOR Act does not alter or impair any LIBOR contract that contains fallback provisions that identify a benchmark replacement that is not based in any way on any LIBOR value (including the prime rate or the effective Federal

funds rate). As a result, parties to large swaths of cash products (and a much smaller number of derivatives) that reference prime in their fallback paths, were left to grapple with state law contract interpretation issues in connection with transitioning their LIBOR contracts.

THE FEDERAL RESERVE BOARD'S LIBOR REGULATIONS

The Federal Reserve Board released a set of proposed rules under the LIBOR Act for public comment on July 19, 2022[59] and its final rules on December 16, 2022.[60] The final LIBOR rules became effective on February 27, 2023.

The Federal Reserve Board designated CME Term SOFR plus the ISDA tenor spread adjustments as the BSBR for most securities and business loans and Fallback Rate (SOFR) (which includes the ISDA tenor spread adjustments) as the BSBR for derivatives. Indeed, the Federal Reserve Board defined Fallback Rate (SOFR) entirely by reference to the IBOR Protocol and attached it as Appendix A to the LIBOR Regulations. Those market participants who chose not to adhere to the IBOR Protocol are treated, by operation of law, as if they had.

The selection of Fallback Rate (SOFR) as the BSBR for *all* derivatives disappointed certain market participants and members of certain industry groups (*e.g.*, the Structured Finance Association), who had requested the Federal Reserve Board take a more nuanced approach for derivatives that are tied into larger, nearly impossible to amend, securitization structures (which per the LIBOR Act regulations would generally use CME Term SOFR as their benchmark replacement at the securities-level). According to the Federal Reserve Board, even definitional cross-references found in a swap (*e.g.*, "LIBOR for purposes of this derivative instrument shall have the meaning set forth in the Indenture") would be insufficient to avoid the application of Fallback Rate (SOFR) by operation of law when required by the LIBOR Act.[61]

The Federal Reserve Board also made only modest "benchmark replacement conforming changes" despite the LIBOR Act's invitation to do more. References to particular screens and times of day would be replaced by their CME Term SOFR and Fallback Rate (SOFR) equivalents, but the Federal Reserve Board left intact the London business day calendar that had been used for LIBOR fixings for fear of unintended consequences if it waded into "business day" definitions that might be important for other reasons, and provided simply that if CME Term SOFR is not published on the London business day called for in a contract then the previous day's CME Term SOFR will be used. Fallback Rate (SOFR) incorporates the original LIBOR observation dates into its formulae as well.

THE FCA ANNOUNCES THE PUBLICATION OF SYNTHETIC USD LIBOR

In April 2021, the FCA received additional powers to manage the orderly wind down of critical benchmarks, including the authority to compel IBA to change the methodology it uses to administer LIBOR.[62] This has led to the creation of so-called "synthetic LIBOR," which is among the most prominent lingering uncertainties from the LIBOR transition. The FCA deployed synthetic LIBOR for a limited period upon GBP and JPY LIBOR cessation at the end of 2021.[63] It has done the same for USD LIBOR, whereby "syn-

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thetic USD LIBOR" will equate to the appropriate tenor of CME Term SOFR plus the appropriate tenor spread adjustment (which is the economic equivalent to the BSBR for most securities and commercial loans.)[64]

The FCA's theory behind synthetic LIBOR is that it can cause IBA to publish something called "LIBOR" to appear on the same screens as LIBOR had previously, thereby giving parties to contracts in the UK that reference such screens the ability to use synthetic LIBOR if their contracts could not be amended in time. Many of those same screens, however, are referenced in contracts governed by U.S. law. This raised some degree of confusion in the U.S. markets. Although it had the opportunity to do so, the Federal Reserve Board declined to directly address the issue in a clear and meaningful way during the LIBOR Act rulemaking process. As a result, parties have been left to grapple with contract interpretation issues, including how LIBOR was defined in their contracts, to determine whether synthetic LIBOR applies to their agreements.[65] Parties also have been left to analyze the LIBOR Act, including its preemption provisions, to determine in what contexts, if any, synthetic LIBOR might apply. In any event, the economic equivalence of "synthetic LIBOR" and the BSBR used for most securities and commercial loans has removed much of the economic incentive for disputes to arise, except where, on its face, a LIBOR contract may have contemplated using the prime rate as a benchmark replacement.

LIBOR DERIVATIVES POST-CESSATION

The following is an overview of what generally occurred with respect to LIBOR-linked swaps and other derivatives after June 30, 2023, with an emphasis on the impact (if any) the LIBOR Act has had on the transition where applicable. This summary touches on OTC cleared and uncleared swaps, exchange-traded futures and options and a number of "special cases," in each case governed by New York or other domestic law.

***OTC Uncleared Swaps*:** OTC uncleared swaps all transitioned to Fallback Rate (SOFR) unless separately amended on an individual basis to a different reference rate (most commonly, CME Term SOFR). Transactions executed on or after January 25, 2021, using ISDA-standard documentation, utilized Fallback Rate (SOFR) as a "hard-wired" fallback by virtue of Supplement 70 to the 2006 Definitions or the 2021 Definitions. Mutual adherents to the IBOR Protocol in effect amended their swaps retroactively to insert Fallback Rate (SOFR) as a "hard-wired" fallback. The LIBOR Act does not "alter or impair" LIBOR contracts that "contain[] fallback provisions that identify a benchmark replacement that is not based in any way on any LIBOR value." Section 104(f)(2). The LIBOR Act, accordingly, had zero impact on these swaps.

Other swaps, including swaps that hedge loans and other instruments that were being actively amended to transition to CME Term SOFR or another non-LIBOR alternate rate, were amended by agreement of the parties to match that rate prior to June 30, 2023. These amendments caused both instruments to cease to be "LIBOR contracts" and thereby to escape operation of the LIBOR Act.

The CFTC, for its part, has granted copious relief to market participants engaged in amendments (via the IBOR Protocol or otherwise) of

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LIBOR swaps to prevent them from being "new" swaps for Dodd-Frank clearing, trading, and margining purposes[66] and has issued guidance on somewhat relaxed reporting requirements to accommodate the IBOR Protocol "big bang."[67]

All other LIBOR-linked swaps transitioned to Fallback Rate (SOFR) pursuant to Section 104(a) of the LIBOR Act. In particular, the LIBOR Act provided Fallback Rate (SOFR) as the benchmark replacement by operation of law because they lacked a fallback provision because their polling mechanisms were nullified either under Section 104(b)(2) of the LIBOR Act, or because they already have had their poll-based fallback provisions nullified by the New York State LIBOR Legislation (Gen. Oblig. Law § 18-401(2)). The number of such swaps is apparently modest and consists primarily of swaps that could not be amended due to securityholder consent rights in securitizations, swaps for which banks could not engage the counterparty in amendment discussions and swaps that were overlooked for whatever reason.[68]

One irreducible problem with Fallback Rate (SOFR) is that few other products use it, which more or less guarantees that hedges will be broken and parties' careful allocations of risk at the inception of legacy transactions has been frustrated to some degree due to the Federal Reserve Board's approach. In extreme circumstances, there also may be adverse accounting and tax consequences. Unhappy counterparties can of course seek to amend their swaps to something more to their satisfaction, but other market participants, such as investors in securitizations that cannot be amended, are powerless to do anything absent judicial intervention and reformation.

***Clearinghouses: Cleared Swaps and Exchange-Traded Futures and Options*:** Clearinghouses have the unique ability to alter contracts unilaterally through changes to their rulebooks. Fortunately, they were active and vocal participants in the financial services industry's ongoing LIBOR transition dialogue, and took proactive steps to transition contracts away from LIBOR well in advance of June 30, 2023, most notably in transitioning to SOFR discounting and price alignment interest ("PAI")[69] in 2020 and in relation to the cessation of "panel bank" EUR, CHF, JPY and GBP LIBOR at the end of 2021.[70] Indeed, only a handful of issues relevant to clearinghouses and futures commission merchants ("FCMs") have been brought to the CFTC's attention, including, for example, the need for relaxing the "real-time" reporting rules for the October 2020 clearinghouse transition to SOFR discounting and PAI,[71] and allowing FCMs to invest customer funds in SOFR-denominated paper.[72]

***Cleared LIBOR Swaps*:** The principal USD interest rate swap clearinghouses, CME and LCH, adopted the 2021 Definitions and their incorporation of Fallback Rate (SOFR),[73] but decided to convert cleared LIBOR swaps to SOFR compounded in arrears with a two-day payment delay (rather than the two day lookback that pertains under Fallback Rate (SOFR)).[74] This is to promote fungibility between legacy LIBOR swaps and "market standard" SOFR OIS interdealer swaps that use the same "payment lag" convention. These conversions primarily occurred in April and May 2023.

***Eurodollar Futures and Options on Futures*:** With regard to the CME's "benchmark" Eurodollar futures contract on three-month LIBOR, the

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CME cancelled Eurodollar futures and options contracts and replaced them with their SOFR equivalents in April 2023.[75]

***Special Case 1: LIBOR Swaptions With Exercise Dates After LIBOR Cessation*:** Successive changes in regulatory and market dynamics have led to a mind-boggling array of different permutations and potential outcomes for LIBOR swaptions of different vintages.[76] LIBOR swaptions are options that one party acquires from the other to enter into a LIBOR swap (the "Underlying Swap") on pre-existing terms at some point in the future. They can be settled physically (by triggering the effectiveness of the actual Underlying Swap) or financially (by payment to the buyer of the option in the amount of any increase in value of the Underlying Swap between the Trade Date of the swaption and the Exercise Date).

Market-standard swaptions are cash-settled on the present value basis of an annuity for the life of the Underlying Swap equal to the difference between the fixed rate leg of the Underlying Swap and the "Settlement Rate." "Settlement Rate" is defined by the relevant ISDA definitions to be the fixed rate that would be applicable to the Underlying Swap if it were being transacted at market terms on the "Exercise Date" (*i.e.*, the date the option may be exercised to enter a swap or elect cash settlement). For many swaptions, the Settlement Rate for the Underlying Swap will need to be determined from quotations obtained by the Calculation Agent from "Cash Settlement Reference Banks."[77]

An issue arises because the LIBOR Act does not expressly address what happens to a market standard fixed rate, like a Settlement Rate, derived from the prevailing market rate for LIBOR swaps (*i.e.*, the "Swap Rate"), which would be used to calculate a cash settlement payment if the swaption is exercised. In particular, while the LIBOR Act nullifies polls, surveys and inquiries used in LIBOR contracts as benchmark replacement mechanisms, there are certain polls that may remain relevant, including those used to determine Settlement Rates.

On November 10, 2021, IBA commenced publishing SOFR swap rates,[78] and ISDA amended the 2006 Definitions and the 2021 Definitions to incorporate the SOFR swap rates and fallbacks for LIBOR swap rates (the "LIBOR Settlement Rate Fallbacks") for USD swaptions executed on or after that date.[79] The ARRC had earlier in the year articulated what changes to SOFR swap rates would be necessary to derive the LIBOR Settlement Rate Fallbacks,[80] and these mathematical formulae operated under the 2006 Definitions and the 2021 Definitions as the "Calculated USD ISR Fallback Rate" until IBA began to publish the USD SOFR Spread-Adjusted ICE Swap Rates formally, following a lengthy "beta testing" phase, on June 30, 2023.[81]

For swaptions with Exercise Dates that post-dated June 30, 2023, the LIBOR Act has likely caused the LIBOR leg of the Underlying Swap to become Fallback Rate (SOFR). But for LIBOR swaptions having a Trade Date prior to November 10, 2021, absent bilateral remediation by the parties,[82] the Settlement Rate for the Underlying Swap (denominated in SOFR) will need to be determined from quotations obtained by the Calculation Agent from "Cash Settlement Reference Banks."[83] This is likely to create challenges for parties to swaptions if and when they are unable to obtain quotations from reference banks.

Special case 2: LIBOR Swaps with Desig-

***nated Maturities of One Week or Two Months*:** The LIBOR Act should have had zero impact on contracts that exclusively reference either one-week or two-month USD LIBOR. Section 103(15)(B) of the LIBOR Act specifically excludes the one-week and two-month tenors of LIBOR from the statutory definition of "LIBOR," likely in part because they were not widely used (particularly in either consumer products or LIBOR contracts that could not be amended), and because IBA already had ceased publishing those tenors prior to enactment of the LIBOR Act. Thus, market participants will likely have to look to New York law to remediate such swaps. The New York State LIBOR Legislation addresses one-week and two-month LIBOR contracts. On December 3, 2021, the ARRC published recommendations concerning financial products, including derivatives, referencing those minor LIBOR tenors that, in accordance with the New York State LIBOR Legislation, have the effect of legally binding law.[84] One might think that "problems" with one-week or two-month LIBOR would have surfaced by now, given that IBA ceased publishing them almost two years ago. However, swaps with "stub" periods falling due many years from now exist and will require careful analysis of the New York State LIBOR Legislation, the ARRC's "recommendations" thereunder, and their interplay with the LIBOR Act.

CONCLUSION

June 30, 2023, will be remembered by many as the end of LIBOR as we knew it. The historic nature of retiring a benchmark used in hundreds of trillions of dollars of financial instruments cannot be understated. Books written about the history of the financial markets will surely contain chapters dedicated to LIBOR and its demise. Pages will be spent touting the successes of what now seems like a smooth transition to alternative rates. Indeed, there is much to celebrate. However, the story of LIBOR is probably not complete. Given the sheer amount of money at stake, post-transition friction is likely to arise. The same kind of creativity and entrepreneurial spirit that led to the birth of LIBOR will likely extend the LIBOR story as a final chapter to be written in courtrooms around the globe. And regulators—with the benefit of hindsight—may decide to scrutinize conduct related to the transition. If not, then all the better for the financial markets, which will enjoy the happy ending to a long farewell.

ENDNOTES:

[1]Codified at 12 U.S.C.A. §§ 5801 *et seq*.

[2]The ARRC estimated an aggregate USD LIBOR exposure at year-end 2016 as $199 trillion, of which derivatives made up $190 trillion. *See* ARRC, *Second Report* (March 2018), available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-Second-report. By March 2021, the ARRC estimated that those numbers had increased to $223 trillion and $214 trillion, respectively. *See* ARRC, *Progress Report: The Transition from U.S. Dollar LIBOR* (March 2021), available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/USD-LIBOR-transition-progress-report-mar-21.pdf.

[3]ISDA created "fallbacks" and "tenor spread adjustments" for "IBORs" in a variety of currencies with a methodology in common. We focus on the fallbacks for USD LIBOR, as did Congress under the LIBOR Act, in this article.

[4]*See* https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/ARRC-faq.pdf at 3; *see also* https://www. newyorkfed.org/medialibrary/Microsites/arrc/files/ARRC-faq.pdf at 3-10.

[5] https://www.newyorkfed.org/medialibrary/

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Microsites/arrc/files/ARRC-faq.pdf at 3.

[6]Unless otherwise noted below, "LIBOR" as used in the remainder of this piece refers to USD LIBOR. Prior to January 1, 2022, USD LIBOR also was determined for two additional tenors, one-week and two-month, as well as all seven tenors for four other currencies—the euro, British pound, Japanese yen, and Swiss franc.

[7]Gavin Finch and Liam Vaughan, The Fix (2016), excerpted at https://www.bloomberg.com/news/features/2016-11-29/the-man-who-invented-libor-iw3fpmed.

[8]*See* "Welcome to bbalibor: Historical Perspective" (available at https://web.archive.org/web/20101015044134/ http://www.bbalibor.com:80/bbalibor-explained/historical-perspective).

[9]Carrick Mollenkamp, *LIBOR Fog: Bankers Cast Doubt on Key Rate Amid Crisis*, Wall Street Journal (April 16, 2008) (available at https://www.wsj.com/articles/SB120831164167818299).

[10]*Id.*

[11]Brendan Pierson and Jonathan Stempel, *U.S. Accuses Former Societe Generale Bank Managers of Libor Scheme*, Reuters (Aug. 27, 2017) (available at https://www.reuters.com/article/us-ste-generale-libor/u-s-accuses-former-societe-generale-bank-managers-of-libor-scheme-idUSKCN1B42IS). All U.S. convictions have by now been reversed on appeal, Dave Michaels, *All U.S. Trial Convictions in Crisis-Era Libor Rigging Have Now Been Overturned*, Wall Street Journal (Jan. 27, 2022) (available at ://www.wsj.com/articles/all-u-s-trial-convictions-in-crisis-era-libor-rigging-have-now-been-overturned-11643310178) and the most prominent convict in the United Kingdom, Tom Hayes, has been granted an extraordinary right to appeal his conviction. Kirstin Ridley, *Ex UBS trader Hayes allowed to appeal Libor conviction*, Reuters (July 6, 2023) (available at https://www.reuters.com/business/britains-tom-hayes-former-libor-trader-allowed-appeal-conviction-2023-07-06/#:~:text=SCAPEGOAT,dropped%20their%20charges%20against%20him).

[12]*See* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf

[13] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf at 13.

[14]*See generally* https://www.theice.com/iba/libor.

[15]*See generally* FCA, *UK Benchmarks Regulation*, https://www.fca.org.uk/markets/benchmarks/regulation (Sept. 7, 2021). The "UK Benchmarks Regulation" was originally part of European law. Regulation (EU) 2016/1011 of the European Parliament and of the Council, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.171.01.0001.01.ENG&toc=OJ:L:2016:171:TOC (June 8, 2016). The Benchmarks Regulation was "imported" into UK law wholesale with all or most other European Union law in connection with the UK's departure from the European Union under the European Union (Withdrawal) Act 2018, https://www.legislation.gov.uk/ukpga/2018/16/contents/enacted.

[16]Andrew Bailey, The Future of LIBOR (July 27, 2017) (hereinafter, the "Bailey speech," available at https://www.fca.org.uk/news/speeches/the-future-of-libor).

[17]*Id.*

[18]*Id.*

[19]*See* FCA, *Statement on LIBOR Panels* (Nov. 24, 2017), https://www.fca.org.uk/news/statements/fca-statement-libor-panels.

[20]*See, e.g.*, 2006 Definitions, Section 7.1(ab)(xx). The formulation has remained essentially unchanged since ISDA published its Code of Standard Wording, Assumptions and Provisions for Swaps in 1985 and also appeared in the 1991 ISDA Definitions and the 2000 ISDA Definitions.

[21]*See* ARRC, *Frequently Asked Questions* (updated June 9, 2022), https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/ARRC-faq.pdf, at 16 (FAQ 19: "Until recently, fallback provisions for LIBOR-based derivatives contracts were written under the assumption that any interruptions in LIBOR publication would be temporary rather than permanent (*e.g.* a computer

glitch).”

[22]*See* ARRC, *FAQs Regarding New York State LIBOR Legislation* (Dec. 3, 2021), https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC-NYS-Libor-legislation-faq.pdf, at *3(“The fallback provisions of many legacy contracts include a step that requires a party to the contract to conduct a poll or survey of large dealer banks for LIBOR quotes. However, banks may be unlikely, after the end of LIBOR has been announced, to respond to such polls, or the results may not be representative.”).

[23]*See generally* Jones Day, *ISDA's IBOR Supplement and Protocol: Background, Operation, Prognosis*, https://www.jonesday.com/en/insights/2020/10/isdas-ibor-supplement-and-protocol (Oct. 2020) (hereinafter, the “Jones Day IBOR White Paper”).

[24]*Id*.

[25]Available at https://www.isda.org/a/6t4TE/ISDA-IBOR-Fallbacks-Supplement.pdf.

[26]Available at http://assets.isda.org/media/3062e7b4/08268161-pdf/.

[27]*See* https://www.isda.org/protocol/isda-2020-ibor-fallbacks-protocol/adhering-parties.

[28]See ISDA, *Landmark Change in Interest Rate Derivatives Market as New Definitions Take Effect*, https://www.isda.org/2021/10/04/landmark-change-in-interest-rate-derivatives-market-as-new-definitions-take-effect/ (Oct 4, 2021).

[29] https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC-Best-Practices.pdf at 1.

[30] https://www.newyorkfed.org/medialibrary/microsites/arrc/files/2018/ARRC-Minutes-for-March-22-2018.pdf at 2 (¶ 5); https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/ARRC-faq.pdf at 2 (FAQ # 1).

[31]*See* https://www.newyorkfed.org/medialibrary/microsites/arrc/files/2018/ARRC-Minutes-for-March-22-2018.pdf; *see also* https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-second-report-press-release.

[32]*See* https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/spread-adjustments-narrative-oct-6-2021.

[33] https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Press_Release_Term_SOFR.pdf; https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/ARRC-faq.pdf (FAQ 13).

[34] https://www.cmegroup.com/market-data/files/cme-term-sofr-reference-rates-benchmark-methodology.pdf.

[35]*See*, *e.g.*, https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/ARRC-faq.pdf at 16-17.

[36]*See*, *e.g.*, https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC-Scope-of-Use-FAQ.pdf; https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/Recommendations_for_Interdealer_Cross-Currency_Swap_Market_Conventions.pdf; https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC-swaptions-recommendations.pdf.

[37] https://www.bloomberg.com/professional/product/indices/bsby/. Bloomberg recently announced a market consultation regarding potentially terminating its publication of BSBY. See Consultation on the Proposed Cessation of the Bloomberg Short-Term Bank Yield Index (“BSBY”), https://assets.bbhub.io/professional/sites/10/BSBY-Consultation_final.pdf (Sept. 13, 2023).

[38]ARRC, *ARRC Best Practice Recommendations Related to Scope of Use of the Term Rate* (July 21, 2021) (the “Best Practices;” available at www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Scope_of_Use.pdf) .

[39]ARRC, *Frequently Asked Questions on Best Practice Recommendations Related to Scope of Use of the Term Rate* (August 27, 2021) (the “FAQs;” available at www.newyorkfed.org/medialibrary/Microsites/arrc/ files/2021/ARRC-Scope-of-Use-FAQ.pdf).

[40]ARRC, *Summary and Update of the ARRC's Term SOFR Scope of Use Best Practice Recommendations* (April 21, 2023) (available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2023/ARRC-Term-SOFR-Scope-of-Use-Best-Practice-Recommendations.pdf).

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[41]*See* https://ir.theice.com/press/news-details/2020/ICE-Benchmark-Administration-to-Consult-on-Its-Intention-to-Cease-the-Publication-of-One-Week-and-Two-Month-USD-LIBOR-Settings-at-End-December-2021-and-the-Remaining-USD-LIBOR-Settings-at-End-June-2023/default.aspx.

[42] https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201130a1.pdf.

[43]The U.S. banking regulators also acknowledged that there may be exceptions to this "no new LIBOR contracts" rule, including for "(i) transactions executed for purposes of required participation in a central counterparty auction procedure in the case of a member default, including transactions to hedge the resulting USD LIBOR exposure; (ii) market making in support of client activity related to USD LIBOR transactions executed before January 1, 2022; (iii) transactions that reduce or hedge the bank's or any client of the bank's USD LIBOR exposure on contracts entered into before January 1, 2022; and (iv) novations of USD LIBOR transactions executed before January 1, 2022." *Id.*

[44]The IBA's public statement is available at: https://ir.theice.com/press/news-details/2021/ICE-Benchmark-Administration-Publishes-Feedback-Statement-for-the-Consultation-on-Its-Intention-to-Cease-the-Publication-of-LIBOR-Settings/default.aspx, and the FCA's announcement is available at: https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf.

[45]ISDA. *ISDA Statement on UK FCA LIBOR Announcement*, https://www.isda.org/2021/03/05/isda-statement-on-uk-fca-libor-announcement/ (March 5, 2021).

[46]*Id.*

[47]*See, e.g.*, https://www.newyorkfed.org/medialibrary/microsites/arrc/files/2018/ARRC-Minutes-October-2018.pdf; https://www.newyorkfed.org/medialibrary/microsites/arrc/files/2019/ARRC-Minutes-Nov-2019.pdf; *see also* https://www.newyorkfed.org/medialibrary/microsites/arrc/files/2020/October-21-ARRC-Meeting-Minutes.pdf.

[48]The authors contributed to those efforts in various capacities.

[49]N.Y. Gen. Oblig. Law §§ 18-400 *et seq*. See also ARRC, *ARRC Endorses Decision to Sign New York State LIBOR Legislation into Law*, https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/20210407-arrc-press-release-nys-legislation (April 7, 2021).

[50] https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/20210407-arrc-press-release-nys-legislation.

[51]*Id.* at 6.

[52] https://financialservices.house.gov/events/eventsingle.aspx?EventID=407534.

[53] https://www.congress.gov/bill/117th-congress/house-bill/4616/all-info.

[54] https://www.congress.gov/bill/117th-congress/house-bill/4616.

[55] https://www.banking.senate.gov/newsroom/majority/tester-tillis-brown-toomey-introduce-bipartisan-legislation-to-protect-consumers-provide-certainty-for-financial-institutions.

[56] https://www.congress.gov/bill/117th-congress/house-bill/2471/text.

[57]The Consolidated Appropriations Act of 2022 included the version of the LIBOR transition bill introduced in the U.S. Senate (with the exception of certain tax-related provisions).

[58]Unless otherwise noted, all references and citations herein to "Section 10X" are to the relevant provisions of the LIBOR Act, which is now codified at 12 U.S.C.A. §§ 5801 *et seq*.

[59]87 Fed. Reg. 45268 (July 28, 2022).

[60]Federal Reserve Board, Regulations Implementing the Adjustable Interest Rate (LIBOR) Act, 88 Fed. Reg. 5204 (Jan. 26, 2023).

[61]88 Fed. Reg. at 5213.

[62]Financial Services Act 2021, https://www.legislation.gov.uk/ukpga/2021/22/contents/enacted (April 29, 2021).

[63]*See generally* ICE, *Administering Global Benchmarks and Services-LIBOR*, https://www.theice.com/iba; FCA, *Further arrangements for the orderly wind-down of LIBOR at end-2021*,

https://www.fca.org.uk/news/press-releases/further-arrangements-orderly-wind-down-libor-end-2021 (Sept. 9, 2021); FCA, *FCA confirms rules for legacy use of synthetic LIBOR rates and no new use of US dollar LIBOR*, https://www.fca.org.uk/news/press-releases/fca-confirms-rules-legacy-use-synthetic-libor-no-new-use-us-dollar-libor (Nov. 16, 2021).

[64]*See*, *e.g.*, FCA, "FCA announces decision on synthetic US dollar LIBOR" (April 3, 2023) (available at https://www.fca.org.uk/news/news-stories/fca-announces-decision-synthetic-us-dollar-libor).

[65]A rough, but far from universal, industry consensus seems to have formed around the conclusion that "descriptive" language in a contract's definition of LIBOR and elsewhere will render synthetic LIBOR immaterial to those contracts that contain such language. ISDA-standard derivative contracts contain such "descriptive" language. For example, the 2006 Definitions define "USD-LIBOR-BBA" in relevant part as "the rate for deposits in U.S. Dollars."

[66]CFTC, *Market Participants Division*, Letter Nos. 21-26 (https://www.cftc.gov/csl/21-26/download), *Division of Market Oversight*, 21-27 (https://www.cftc.gov/csl/21-27/download), *Division of Clearing and Risk*, 21-28 (https://www.cftc.gov/csl/21-28/download) (Dec. 20, 2021). These no-action letters restate, expand and extend prior no-action relief by the three divisions dating back to 2019.

[67]CFTC, *Division of Market Oversight; Division of Data*, Letter No. 23-09, https://www.cftc.gov/csl/23-09/download (June 29, 2023).

[68]Anecdotal evidence suggests that perhaps 10% or more of swapped loan relationships remained unremediated as of June 30, 2023.

[69]LCH, *LCH Successfully completes transition to SOFR discounting*, https://www.lch.com/resources/news/lch-successfully-completes-transition-sofr-discounting (Oct. 20, 2020); CME, *SOFR Discounting Transition Process for Cleared Swaps*, https://www.cmegroup.com/trading/interest-rates/files/discounting-transition-proposal-aug-2020.pdf (Aug. 2020).

[70]*See*, *e.g.*, LCH, *Supplementary Statement on LCH's Solution for Outstanding Cleared LIBOR Contracts*, https://www.lch.com/membership/ltd-membership/ltd-member-updates/supplementary-statement-lchs-solution-outstanding (March 18, 2021); CME, *CME LIBOR Conversion Plans for Cleared Swaps*, https://www.cmegroup.com/trading/interest-rates/files/cleared-swaps-considerations-for-ibor-fallbacks-and-conversion-plan.pdf (June 9, 2021); Eurex, *Eurex OTC Clear: Transition plan for transactions referencing the CHF, GBP, JPY and USD LIBOR benchmarks*, https://www.eurex.com/ec-en/find/circulars/clearing-circular-2569796 (March 11, 2021).

[71]CFTC, *LCH Limited*, Letter No. 20-32 (Oct. 13, 2020), file://ctxprofiles/ctxprofiles$/2016/FolderRedirection/JP017106/Downloads/20-32.pdf; CFTC, *CME Group*, Letter No. 20-33 (Oct. 13, 2020), file://ctxprofiles/ctxprofiles$/2016/FolderRedirection/JP017106/Downloads/20-33%20(1).pdf.

[72]CFTC, *CFTC Regulation 1.25*, Letter No, 21-02 (Jan. 4, 2021), file://ctxprofiles/ctxprofiles$/2016/FolderRedirection/JP017106/Downloads/21-02.pdf.

[73]*See* ISDA, *Landmark Change in Interest Rate Market as New Definitions Come Into Effect*, https://www.isda.org/2021/10/04/landmark-change-in-interest-rate-derivatives-market-as-new-definitions-take-effect/ (Oct. 4, 2021) ("Most major central counterparties have announced they will reflect the 2021 Definitions in their rules from today").

[74]*See* LCH, *SwapClear USD LIBOR Conversion Quick Guide*, https://www.lch.com/system/files/media_root/SwapClear/LCH_USD_LIBOR_ConversionQuickGuide_A4_040523-05_1.pdf; CME, *Advisory Notice - Modification of Cleared Over-the-Counter ("OTC") U.S. Dollar ("USD") Denominated Interest Rate Swap Products Referencing the London Interbank Offered Rate ("LIBOR") and Limitation of Acceptance for Clearing*, https://www.cmegroup.com/notices/clearing/2023/03/Chadv23-103.pdf (March 28, 2023).

[75]*See* CME, *LIBOR Fallback; ED-to-SOFR Fallbacks Conversion Production Weekend*, https://www.cmegroup.com/notices/clearing/

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2023/03/Chadv23-082R.pdf (March 15, 2023).

[76]*See generally* ISDA, *Swaption outcomes with and without application of the terms of Supplement 70 to the 2006 ISDA Definitions and the Swap Rate Supplements to the 2006 ISDA Definitions*, https://www.isda.org/a/deUgE/Swaptions-outcomes-with-and-without-Supplement-70-November-2021-update.pdf (Nov. 5, 2021).

[77]2006 Definitions (through Supplement 64 (published March 30, 2020, available at https://www.isda.org/a/X67TE/Supplement-64-to-the-2006-ISDA-Definitions.pdf)), Section 18.2(f)(iii); 2021 Definitions, Section 18.2.6(iv) (Calculation Agent to request quotations from Cash Settlement Reference Banks for the "Collateralized Cash Price," which is the standard cash settlement measure for USD swaptions, if the parties cannot agree on the Collateralized Cash Price).

[78]*See* IBA, *ICE Benchmark Administration Launches U.S. Dollar SOFR ICE Swap Rate for Use as a Benchmark*, https://ir.theice.com/press/news-details/2021/ICE-Benchmark-Administration-Launches-U.S.-Dollar-SOFR-ICE-Swap-Rate-for-Use-as-a-Benchmark/default.aspx (Nov. 10, 2021).

[79]*See* ISDA, *Supplement number 88 to the 2006 ISDA Definitions*, https://www.isda.org/a/K3UgE/Supplement-88-to-the-2006-ISDA-Definitions-Fallbacks-for-USD-LIBOR-ISR-and-JPY-LIBOR-TSR-and-new-Rate-Options-for-SOFR-ISR-and-TONA-TSR.pdf (Nov. 10, 2021); 2021 Definitions, November 10, 2021 Release.

[80]*See* ARRC, *White Paper on Suggested Formula for USD LIBOR ICE Swap Rate*, https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/arrc-white-paper-on-suggested-fallback-formula-for-the-usd-libor-ice-swap-rate (March 2021).

[81]IBA, *ICE Benchmark Administration Provides Update on its Intention to Launch USD SOFR Spread-Adjusted ICE Swap Rate(r) as a Benchmark* (April 13, 2023), https://ir.theice.com/press/news-details/2023/ICE-Benchmark-Administration-Provides-Update-on-its-Intention-to-Launch-USD-SOFR-Spread-Adjusted-ICE-Swap-Rate-as-a-Benchmark/default.aspx.

[82]ISDA has published a protocol to permit parties retroactively to amend their legacy swaptions to incorporate the LIBOR Settlement Rate Fallbacks, but fewer than 250 market participants have adhered to this protocol. See https://www.isda.org/protocol/june-2022-benchmark-module-of-the-isda-2021-fallbacks-protocol/.

[83]2006 Definitions (through Supplement 64 (published March 30, 2020, available at https://www.isda.org/a/X67TE/Supplement-64-to-the-2006-ISDA-Definitions.pdf)), Section 18.2(f)(iii); 2021 Definitions, Section 18.2.6(iv) (Calculation Agent to request quotations from Cash Settlement Reference Banks for the "Collateralized Cash Price," which is the standard cash settlement measure for USD swaptions, if the parties cannot agree on the Collateralized Cash Price.).

[84]*See* ARRC, *Statement of the Alternative Reference Rates Committee as the "Relevant Recommending Body" under State LIBOR Legislation with respect to 1-week and 2-month USD LIBOR tenors* (Dec. 3, 2021), available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC-Statement-LIBOR-tenors-Legislation.pdf. The ARRC "recommended" that the "ISDA USD LIBOR Fallback Rate" apply to "Financial Market Transactions," which are defined to mean derivatives and other transactions that would be covered by the IBOR Protocol, which include securities forward purchases and options, repurchase agreements, securities lending, physical commodities trading, and similar other products.

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