Investment Company Institute response to the ICE Benchmark Administration Consultation on Potential Cessation

The Investment Company Institute, including ICI Global,[1] appreciates the opportunity to provide feedback to ICE Benchmark Administration Limited (IBA) on its consultation on the potential cessation of LIBOR currencies and tenors.[2] As the trade association representing regulated funds globally,[3] ICI has a significant interest in the orderly transition away from LIBOR benchmarks.

We value IBA's important work in promoting the orderly transition of the market from LIBOR as well as its engagement with market participants. We appreciate that the transition is a complex process involving numerous legal jurisdictions, regulatory regimes and regulators. ICI's principal concerns are:

- To support proposals that provide legal certainty to market participants and minimize changes to the economic value of affected contracts;
- To promote global alignment on benchmark reform to reduce potential friction and differences in regulatory or legislative approaches to transition; and
- To promote transparency with respect to the policies developed by global policymakers.

Overall, ICI believes that global alignment and consistency of approach is critical to achieving an orderly transition for each of the affected benchmarks. With these concerns in mind, we recommend that IBA consider the impact and timing of any cessation or representativeness announcements on derivatives subject to the ISDA Protocol and Supplement, particularly for USD LIBOR currencies and tenors that will not end until 2023, and consider the interaction of any

[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$27.7 trillion in the United States, serving more than 100 million US shareholders, and US$8.3 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

[2] ICE LIBOR Consultation on Potential Cessation (December 4, 2020), available at https://www.theice.com/publicdocs/ICE_LIBOR_Consultation_on_Potential_Cessation.pdf.

[3] The term "regulated funds" includes US funds, which are comprehensively regulated under the Investment Company Act of 1940 (Investment Company Act), and non-US funds, that are organized or formed outside the US and substantively regulated to make them eligible for sale to retail investors, such as funds domiciled in the European Union and qualified under the UCITS Directive (EU Directive 2009/65/EC, as amended), Canadian investment funds subject to National Instrument 81-102, and investment funds subject to the Hong Kong Code on Unit Trusts and Mutual Funds.

announcement with the proposed amendments to the EU Benchmarks Regulation (EU BMR).[4] We discuss these recommendations in further detail below.

Consider the impact on the ISDA Fallbacks Protocol

ICI recommends that IBA take into account the impact of an announcement of the cessation of a LIBOR currency/tenor on derivative contracts subject to the ISDA 2020 IBOR Fallbacks Protocol and the Supplement to the 2006 Definitions.[5] The Protocol and Supplement provide fallback language to existing derivatives (upon counterparty adherence to the Protocol) and to new contracts and would apply a fallback rate to derivatives contracts that reference LIBOR (or certain other IBORs) when those rates are discontinued. One element of the fallback rate is a spread adjustment, which will be published by Bloomberg Index Services Limited.[6] When a regulatory supervisor or the administrator for LIBOR (*i.e.*, IBA) makes a statement that LIBOR will permanently cease to be available or is deemed to be non-representative, the spread component of the fallback rate will be fixed, although the fallback rates themselves would only apply on the date that LIBOR actually ceases to be available.

The timing of such an announcement may be particularly salient in the context of any announcements about USD LIBOR. If IBA makes a cessation announcement for all USD LIBOR tenors on the same date, the spread adjustment for contracts that are subject to the IBOR Fallbacks Protocol or Supplement will be fixed on that date, notwithstanding that different USD LIBOR tenors would have staggered cessation dates that are years apart. We recommend that IBA be mindful of the impact of any announcements of cessation dates on derivatives contracts.

Finally, we recommend that IBA clearly indicate those of its announcements regarding rate cessation or non-representativeness that are being made in the awareness that they will engage contractual triggers, such as those in the ISDA Protocol and Supplement.

Consider the impact on proposed global tough legacy solutions

As discussed above, we believe global alignment and coordination is crucial for benchmark transition progress. We note that there are market, legislative, and regulatory initiatives currently underway and recommend that IBA be mindful of the timing of any cessation or non-representativeness announcements on those current or signaled future initiatives. For example, we note that the proposed amendments to the EU BMR would provide authority to impose a statutory replacement rate on certain tough legacy contracts with EU-established counterparties that are

---

[4] Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 as amended, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R1011-20191210&from=EN. It is unclear how this power could be exercised, as it is not clear that the jurisdiction whose law governs the contract would recognize the statutory replacement rate.

[5] *See* Amendments to the 2006 ISDA Definitions to include new IBOR fallbacks (Oct. 23, 2020), *available at* http://assets.isda.org/media/3062e7b4/23aa1658-pdf/?_zs=rHJ4P1&_zl=EEa16; and ISDA 2020 IBOR Fallbacks Protocol, available at http://assets.isda.org/media/3062e7b4/08268161-pdf/?_zs=rHJ4P1&_zl=FEa16.

[6] *See* ISDA, Bloomberg, and Linklaters, Fact Sheet: IBOR Fallbacks, *available at* https://assets.bbhub.io/professional/sites/10/Factsheet-IBOR-Fallbacks.pdf.

governed by the laws of third country if that third country has not undertaken an orderly wind-down of the discontinued benchmark. We recommend that IBA consider whether making any cessation or non-representativeness announcement before market, regulatory, or legislative solutions are fully developed in major jurisdictions globally would trigger that power and create any changes in affected contracts.