



ICI Global’s response to the Commission’s proposal regarding the designation of replacement benchmarks for certain benchmarks in cessation

ICI Global¹ appreciates the opportunity to provide feedback on the European Commission’s proposal to amend the European Union Benchmark Regulation (BMR).² ICI Global understands “it remains the central assumption that firms cannot rely on LIBOR being published after the end of 2021.”³ Like market participants around the globe, regulated funds⁴ are actively preparing for LIBOR discontinuation and implementing programs to transition to alternative reference rates.

We understand that the BMR proposal would allow the Commission to designate a replacement rate in certain legacy contracts⁵ that still reference a benchmark rate, such as LIBOR, after a statement from the benchmark’s administrator that it is permanently discontinued or no longer representative. We support the Commission in addressing one of the most intractable issues concerning LIBOR discontinuation through this proposal. In particular, we appreciate the Commission’s approach in considering industry-recommended replacement rates to discontinued benchmarks and recognizing the need for coordination to prevent disruptions to the financial system.

We recommend that the Commission build on the strengths of its BMR proposal by providing consistent solutions for the market, clarifying the legal authority of the BMR over multijurisdictional

¹ ICI Global carries out the international work of the Investment Company Institute, the leading association representing regulated funds globally. ICI’s membership includes regulated funds publicly offered to investors in jurisdictions worldwide, with total assets of US\$31.7 trillion. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of regulated investment funds, their managers, and investors. ICI Global has offices in London, Hong Kong, and Washington, DC.

² 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.

³ See Working Group on Sterling Risk-Free Rates (UK), Further statement from the Risk-Free Rates Working Group on the impact of Coronavirus on the timeline for firms’ LIBOR transition plans (April 2020), *available at* <https://www.bankofengland.co.uk/-/media/boe/files/markets/benchmarks/rfr/rfrwg-further-statement-on-the-impact-of-coronavirus-on-timeline-for-firms-libor-transition-plans.pdf>.

⁴ 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.

⁵ For purposes of this statement, “legacy contracts” are contracts referencing such a discontinued or non-representative benchmark that are still pending at the date of cessation of the benchmark.

contracts, synchronizing the conventions for LIBOR replacement rates, and promoting a comprehensive approach to all EU legacy contracts.

Consider how the BMR will align with other global legacy contract solutions

We recognize that stakeholders around the globe, including the EU, are considering different approaches to resolving the issue of legacy contracts. ICI Global supports those solutions that provide legal certainty and minimize changes to the economic value of contracts, while being narrowly tailored to the effects of the LIBOR transition.

These goals are best achieved by legacy contract solutions that are consistent or complementary among global regulators, central banks, and risk-free working groups, particularly as to the scope and approaches of proposed solutions and the timing of their implementation and fallback triggers. Consistency will reduce risk and market disruption, accelerate the progress of updates to market participants' operational systems, and reduce regulatory arbitrage.

Clarify the authority of the BMR over multijurisdictional contracts to minimize litigation risk

The proposed BMR amendments will introduce a statutory power for the Commission to designate a replacement rate and to replace all references to a discontinued benchmark rate in all contracts entered into by an EU-supervised entity. We request that the Commission clarify how the BMR would apply to contracts, including those

- between EU-supervised entities and those entities not subject to EU regulation, including those entities that are incorporated or regulated by another jurisdiction, and
- between EU-supervised entities but governed by the laws of a third country.

For example, an EU-supervised entity may have a legacy contract with a non-EU entity that would include a New York choice of law provision. If New York state adopts legislation regarding LIBOR transition, as the Alternative Reference Rate Committee (ARRC) has proposed in the United States,⁶ there would be uncertainty about whether the EU BMR or New York legislation would govern the contract. Similarly, an EU-supervised entity may have a legacy contract with an entity based in the UK. It is not clear whether the EU BMR or UK Financial Conduct Authority's proposed power to convert the calculation methodology for LIBOR would apply to that contract.⁷

Such potential conflicts between the BMR and the governing law of a contract may provoke costly litigation by causing legal ambiguity over a key element – the replacement rate – of a legacy contract.

⁶ See Alternative Reference Rates Committee, Proposed Legislative Solution to Minimize Legal Uncertainty and Adverse Economic Impact Associated with LIBOR Transition (2020), *available at* <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC-Proposed-Legislative-Solution.pdf>.

⁷ See UK Financial Conduct Authority statement on planned amendments to the Benchmarks Regulation (Jun. 23, 2020), *available at* <https://www.fca.org.uk/news/statements/fca-statement-planned-amendments-benchmarks-regulation>.

Further, the Commission should keep in mind that any solution that overrides contractual counterparties' agreed-upon choice of law also may increase litigation risk, especially if the governing law would lead to a different economic outcome than the BMR would mandate.⁸ Recognizing that the Commission identified legal certainty as a main goal of the BMR proposal, we recommend that the Commission coordinate with relevant authorities in non-EU jurisdictions to resolve conflicts between governing laws, apply consistent approaches to legacy contracts, and provide certainty over the scope of the BMR.

Harmonize rate conventions for replacement rates in legacy contracts by tracking the recommendations of global industry groups

We commend the Commission for proposing to take into account the recommendations of risk-free rate working groups convened by central banks in relevant jurisdictions to identify replacements for LIBOR and other discontinued benchmarks. In following the recommendations of industry groups responsible for setting a replacement rate for a benchmark denominated in a particular currency, the Commission would be promoting standardization in conventions for replacement rates.

Global standardization of rate conventions (including terms, tenors, and calculation methodologies) for replacement rates would provide a consistent approach to benchmark replacement in legacy contracts. Such globally standardized replacement rates would ease the operational and technological functioning of market participants and their vendors in addressing discontinued rates and facilitate the valuation of legacy contracts. Further, such an approach would promote legal certainty and financial stability.

We further recommend that the Commission tailor the replacement rate to the type of legacy contract or security, as recommended by relevant risk-free rate working groups or central banks. Doing so would allow market participants to benefit from global, standardized rate conventions as well as the particular rate conventions best aligned with certain types of assets.

Promote a comprehensive and coordinated approach to EU legacy contracts involving non-EU-supervised entities

The BMR proposal is limited in scope to legacy contracts involving EU-supervised entities. To promote consistency and coordination throughout the EU, we recommend that the EU encourage Member States to complement the BMR with national statutes mandating the use of the EU statutory replacement rate in contracts between non-supervised entities that are governed by the laws of their jurisdiction. Alternatively, we would support an extension of the scope of the BMR to contracts between EU counterparties when the contract is governed by the laws of an EU Member State. Comprehensive and harmonized approaches to legacy contracts within the EU will foster a level playing field and legal certainty for all market participants.

⁸ The Commission also should clarify how its proposed solution would affect tough legacy bonds with terms that require noteholders to consent to changes. Overriding such provisions may similarly heighten litigation risk.