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C H A N C E

Briefing note | 28 September 2012

The Wheatley Review on LIBOR: publication of the final report

The final report of the Wheatley Review on LIBOR has been published today. The report concludes that LIBOR should be retained as a benchmark, but, as expected, recommends a comprehensive reform of LIBOR, which includes replacing the British Bankers Association (BBA) with a new independent administrator of LIBOR. Given the different contexts (as well as the number and types of transactions) in which LIBOR is used, the report raises various questions which should be considered by market participants as to the implications of the recommendations for existing and future transactions.

This briefing outlines the ten-point plan for reform set out in the report. It concludes by setting out some of the matters which should be considered by market participants involved in LIBOR linked transactions.

Regulation of LIBOR

(1) The report concludes that the existing definition of LIBOR based on unsecured inter-bank lending should be retained and continue to be calculated using daily estimates from a panel of submitting banks. However, the report has recommended that the administration of, and submissions to, LIBOR should be regulated by statute and become regulated activities under the Financial Services and Markets Act (Regulated Activities) Order 2001, with an Approved Persons regime. This would mean that independent supervision is provided which is underpinned by criminal and civil sanctions. The report also recommends that the manipulation of LIBOR should be brought within the scope of market abuse legislation.

Institutional reform

(2) The report recommends that the BBA should transfer responsibility for LIBOR to a new administrator and that a tendering process should be commenced for the role.

(3) The new administrator will be responsible for all operational aspects of LIBOR including compiling and distributing the rate, as well as the general governance and oversight of LIBOR. Transparency is to be key with a particular focus on the scrutiny of LIBOR submissions in order to ensure the integrity and credibility of the benchmark.

The report also recommends the establishment of an independent and separate external oversight committee which will take responsibility for certain aspects of LIBOR which require input from a

Key points

- LIBOR to be retained and reformed
- LIBOR submissions and administration to be regulated
- transfer of responsibility for LIBOR from BBA to new administrator
- new LIBOR submission guidelines with immediate effect
- LIBOR for certain currencies and tenors to be phased out
- wider bank panel for LIBOR calculation (with potential compulsion)
- more robust contingency planning – alternatives to reference bank model.

wider pool of stakeholders such as market participants.

Rules and guidance for LIBOR

(4) The report calls for the immediate reform of the LIBOR submission process and recommends that LIBOR submission guidelines should be followed with immediate effect by submitting banks. The guidelines include an emphasis on actual transactions undertaken by the submitting bank and set out a hierarchy of transactions to be taken into account by the submitting bank when calculating its LIBOR submission. The guidelines also suggest that the information obtained should be adjusted by reference to certain variables, including any interval between the transactions and time of submission.

(5) In the longer term, the report recommends that an industry-led code of conduct is produced by the oversight committee providing detailed guidance in respect of LIBOR submissions.

Immediate improvements to LIBOR

The report sets out certain key reforms to be undertaken within a 12 month time (or, if possible, a shorter) time frame.

Such reforms include:

(6) ceasing the publication of LIBOR for certain currencies and tenors where there is insufficient trade data to corroborate submissions. Recommended currencies for discontinued publication of LIBOR are Australian Dollars, Canadian Dollars, Danish Kroner, New Zealand Dollars and Swedish Kroner and the affected tenors are 4, 5, 7, 8, 10 and 11 months;

(7) publishing individual LIBOR submissions after 3 months to increase transparency and prevent their manipulation;

(8) encouraging certain banks not currently submitting to LIBOR to join the process (and compelling them if necessary); and

(9) encouraging market participants to evaluate the use of LIBOR and consider whether their contracts contain adequate contingency provisions in the event that LIBOR is not available.

The report questions the use of reference banks as an effective alternative to LIBOR in the event of LIBOR being unavailable and recommends that industry bodies like the Loan Market Association and the International Swaps and Derivatives Association develop robust long term contingency measures which do not rely on submissions from reference banks. In chapter 6 of the report, alternative benchmark rates are considered.

International co-ordination

(10) The ten-point plan concludes with the recommendation that the UK authorities work closely with the European and international community to consider the long-term future of LIBOR and other global benchmarks and how such benchmarks can be most effective as well as adequately underpinned with clear guidelines and principles.

Timing

As mentioned above, some of the report's recommendations are to have immediate effect or are to be phased in over the course of the next year.

If the Government accepts those recommendations requiring statutory effect, they will become effective at the same time as the Financial Services Bill (which is currently being considered by the House of Lords) in 2013.

Mr Wheatley noted himself in the foreword to the report that, while it is the Wheatley Review's final report, it is far from the last word on the subject. Clifford Chance is monitoring the progress of the report and market responses, as well as considering in further detail the findings of the report and their impact on different commercial contracts. We will keep you updated as our thinking and that of the market develops. For further advice on the implementation of the report, including its potential implications for documentation, please contact one of the people listed in this briefing or your usual Clifford Chance contact.

Matters to consider

There are clearly a number of matters arising from the report which market participants should consider – including for submitting banks, the new submission guidelines. Market participants should also consider whether any existing or new documents:

- reference the currencies or tenors of LIBOR which the report has recommended are discontinued;
- refer to the BBA interest settlement rate specifically. Where an existing document refers to the BBA rate, market participants should consider whether the document may need to be amended or whether it could be interpreted so as to apply to any LIBOR rate which replaces the BBA LIBOR rate;
- contain any "successor page" language in the absence of the BBA screen rate; and/or
- provide for a switch to a reference bank rate in the absence of the BBA interest settlement rate.

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