Great Expectations – IBOR Transition for Funds and Asset Managers

Introduction

The previous decade has seen concerted action in the US, the UK and other jurisdictions to find alternative rates to the London Interbank Offered Rate (**LIBOR**) and other interbank offered rates (**IBORs**), particularly in the wake of the LIBOR-rigging scandal that came to light in 2012. The issue was given fresh urgency following a number of UK Financial Conduct Authority (**FCA**) statements, starting in July 2017, that panel banks who submit data to support LIBOR calculations would not be compelled to continue to do so beyond the end of 2021. This, as a practical matter, will likely lead to the cessation of LIBOR at that time. While certain regulators have adjusted interim milestones because of the Covid-19 crisis, they have held firm to the final deadline of LIBOR transition by the end of 2021.

Regulators and industry participants in relevant jurisdictions have been working to introduce a range of 'risk free' (or near risk free) rates (**RFRs**) to replace IBORs. Over the next 18 months, industry participants will need to amend a wide range of IBOR-based agreements that may extend past 2021 to accommodate the discontinuation of the reference rate, develop new products based on RFRs, and update systems and models to reflect the operations and economics of various RFRs.

In many cases, existing contracts do not contemplate the cessation of IBOR rates or circumstances where IBOR rates cease to be representative in the view of regulators. For these legacy contracts, a failure to make the amendments ahead of this point will mean the relevant contracts are unlikely to operate as originally intended, giving rise to uncertainty and significant legal risk. There is also potential for significant adverse financial impact on investment strategy, for example where floating rate bonds in a portfolio are likely to become fixed rate instruments automatically if no action is taken to amend them.

LIBOR and other IBORs are currently used in the funds and asset management industry in a wide variety of structures and agreements, including: benchmarks; investment restrictions; the calculation of hurdle rates in performance fees; consequences of investor defaults and closing rebalancing rates; late payment of fees; primary and secondary market lending strategies; subscription lines and other third party borrowing taken out by funds; downstream shareholder funding; downstream joint-venture arrangements; hedging, FX and other derivatives contracts used in investment strategies; custody agreements; securities lending arrangements; and front office allocation, pricing and risk tools.

Asset managers will need to seriously consider the impact of the IBOR transition on their businesses and, consistent with regulators' expectations, take action significantly before the end of 2021 to enable them to properly prepare. For example, the FCA, in its Dear CEO letter to UK asset managers dated 27 February 2020[1], stated:

> "If your firm has LIBOR exposures or dependencies, but does not have a plan in place, you must act now."

[1] https://www.fca.org.uk/publication/correspondence/dear-ceo-asset-management-libor.pdf

Where asset managers are investing on behalf of clients, the FCA is expecting them, amongst other things to be assessing and working to manage their clients' exposure to LIBOR in a way that protects their clients' best interests. This includes assessing and managing the impact on contract continuity, expected interest payments and the risks of declining liquidity in LIBOR-referencing products.

Firms should be wary of assuming that the responsibility for the IBOR transition lies with banks and other financial counterparties, as investors will expect managers to be proactive in their discussions regarding affected structures, contracts and processes and the management of associated risk. The FCA's Dear CEO letter has also made its expectations clear for UK asset managers on this front:

We expect your firm to take all reasonable steps to ensure the end of LIBOR does not lead to markets being disrupted or harm to consumers, and to support industry initiatives to ensure a smooth transition. Firms, such as yours, in the asset management sector, should be in no doubt that they have a responsibility to facilitate and contribute to an orderly end to LIBOR.

Due to the widespread use of IBORs in asset management products, strategies and operations, other regulators have similar expectations.

Key Differences between IBORs and RFRs

Calculation

LIBOR and other IBORs were designed to indicate the average rate of interest at which the contributor banks can, on a given day, borrow on an unsecured basis for seven specified borrowing periods, ranging from overnight to 12 months, in different currencies. As such, a fundamental difference is that IBORs are forward-looking rates that are calculated to account for (among other things) (i) bank credit risk (ie the risk that the borrowing bank defaults) and (ii) term-liquidity risk (ie the risk related to the length of the term). An IBOR is based on what the contributor banks report that they could borrow, were they to do so in a reasonable market size; the rate does not necessarily reflect the rate at which actual transactions are entered into.

Regulators have been focused on developing replacement rates that are based on objective criteria and actual market transactions. To date, the RFRs replacing IBORs have been overnight rates. To use RFRs to calculate a rate of interest over a longer borrowing period (eg, over 12 months) therefore requires a backward-looking approach to determining the rate of interest over that longer borrowing period; in other words, the amount of interest due at the end of an interest period (eg, at the end of the 12 months) would only be determined at the end of the period based on the daily overnight RFR rates throughout the period. Accordingly, amending existing agreements to reference an RFR may, among other things, require asset managers to revise interest calculations and payment mechanics and to update their internal systems.

Consider, for example, a hurdle rate used in a performance fee for a credit fund determined by reference to 12-month LIBOR (eg plus a fixed percentage spread). At the beginning of the annual measurement period, the basis for the hurdle rate would be established by reference to 12-month LIBOR. Economically, this rate is intended to reflect the expected performance of the market over the forthcoming 12 months.

To use an overnight RFR as the basis for the hurdle rate, in determining any out performance of the market at the end of the measurement period, it would be necessary to compound the overnight RFR rates for each of the days in the period.

While efforts are under way to seek to develop forward-looking term rates (ie not just overnight rates) compiled from transactions in the derivatives markets for some RFRs, it is not clear when such rates may be available or how widely-adopted they would be.

Economics

RFRs are not economic equivalents of the overnight IBORs they replace. As risk free (or nearly risk free) rates, RFRs have historically sat at lower rates than IBORs (which include elements of counterparty credit risk, liquidity premiums, etc). In order to replicate the economics of the standard "IBOR plus a spread", therefore, the interest definition in amended agreements would typically require an adjustment spread to the RFR as well as the original spread. Various workstreams are underway to determine approaches to calculating adjustment spreads, but RFRs are based on and represent different economics than IBORs and move differently from IBORs so an RFR plus an adjustment spread will invariably be different from the IBOR it replaces.

Accordingly, in the performance fee hurdle rate example described above, in addition to calculating the reference rate at the end of the year, rather than the beginning of the year, an adjustment spread would need to be added to the compounded RFR to create a base rate that reflects similar economics to the original 12-month LIBOR. The original spread over the base would then be added to establish the hurdle rate. For example, a rate equal to 12-month LIBOR + 150 bps would become [12-month-compounded-in-arrears RFR + an adjustment spread] + 150 bps.

RFRs replacing LIBOR and Key Timings

Regulators have been establishing interim milestones to be met in advance of the cessation of LIBOR that will require market participants to take action well in advance of the end of 2021. For example:

- the FCA and the Bank of England have targeted Q1 2021 for the cessation of issuances of new cash products based on GBP LIBOR that mature beyond the end of 2021, with the FCA stating in February that it expected asset managers to consider, by the end of Q3 2020, (i) not making any new investments in GBP LIBOR based cash products maturing beyond 2021 and (ii) ceasing launching new products with benchmarks or performance fees linked to LIBOR. However, the FCA has more recently recognised that, due to the impact of Covid-19, there will likely be a continued use of some LIBOR-referencing products into Q4 2020[2];
- the U.S. Alternative Reference Rate Committee recently published "best practices" for transitioning from LIBOR that identified milestones for amending existing agreements by as early as 30 June 2020 and for the cessation of new products based on USD LIBOR starting as early as 30 September 2020[3]; and
- the Hong Kong Monetary Authority wrote to local institutions in March 2019 to remind them of the risks associated with the transition to alternative reference rates and has since (in April 2020) published the results of the survey to assess the progress of banking sector in preparing for the transition to RFRs.

The table below sets out the preferred RFRs for each LIBOR currency, as well as providing some brief commentary on the nature of the proposed RFR. The table demonstrates that, even amongst RFRs, the nature of the rates differs and care should be taken to ensure that any RFR selected for a particular purpose is fit for that purpose.

Jurisdiction	Current rate	RFR	Description
Europe	EUR LIBOR	**€STR** – Euro short-term rate	**Unsecured** rate based on overnight wholesale deposit transactions
Japan	JPY LIBOR	**TONAR** – Tokyo Overnight Average Rate	**Unsecured** rate based on overnight call rate market
Switzerland	CHF LIBOR	**SARON** – Swiss Average Rate Overnight	**Secured** rate based on interest paid on overnight interbank repo transactions
UK	GBP LIBOR	**SONIA** – Sterling Overnight Index Average	**Unsecured** rate based on overnight wholesale deposit transactions
U.S.	USD LIBOR	**SOFR** – Secured Overnight Financing Rate	**Secured** rate based on transactions in multiple overnight U.S. Treasuries repo market segments

EURIBOR, a separate Euro IBOR, has been reformed to comply with the EU's Benchmark Regulation and remains available for use by market participants.

[2] https://www.fca.org.uk/news/statements/further-statement-rfrwg-impact-coronavirus-timeline-firms-libor-transition-plans
[3] https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC-Best-Practices.pdf

Likely Scope of IBOR Transition Impact on Funds and Asset Management Firms

Closed-ended fund structures (typically for private illiquid asset funds)

Closed-ended funds generally tend to use IBORs less at the fund level than open-ended structures and so are likely to be less impacted at this level. For example, it is fairly unusual to see in a closed-ended fund a hurdle rate used in a performance fee or carried interest calculation based on an IBOR; rather, they are typically based on a fixed IRR or a multiple. The main areas that may be impacted in partnership agreements and other governing documents are:

– the rate of default interest for an investor who fails to satisfy a capital call;

– the rate of interest paid to the general partner in the extremis situation of it having to lend money to a limited partnership to allow it to meet its debts;

– occasionally, later closing rebalancing interest rates (as a proxy for changes in capital values) for investors subscribing to a pooled fund after the initial closing date (typically that rate matches the fixed IRR hurdle rate); and

– interest rates on subscription lines and other third party borrowing at the fund level.

Contractual due diligence will be required to identify the scope of IBOR use and the exact wording, as existing IBOR definitions may already include some kind of fallback language (such as the last posted rate (effectively converting LIBOR to a fixed rate upon permanent cessation), a base rate or cost of funds). These rates are generally impractical and/or undesirable in the bond, loan or swap context, but might be acceptable in certain asset management agreements where (i) the impact is minor (eg only default rates are affected) or (ii) changes would require liaising with multiple counterparties who are unwilling to engage. A risk/benefit analysis should therefore be run before a decision is made on any such contractual changes.

Managers will need to consider whether investor consent would be required to rely on fallback language within an existing IBOR definition (or make changes to that language) and/or to transition to an RFR or another calculation methodology at the appropriate time. Changes to borrowing agreements may be more involved, depending on the lender and the commercial and operational impact of the changes they are proposing.

The manager should also conduct due diligence as to whether any of its internal processes around allocation, pricing, valuation and/or risk (such as models or spreadsheets) use IBORs in any way.

Open-ended fund structures (both public and private funds)

Open-ended structures often have more involvement with IBORs and benchmarks generally at the fund level, in particular in relation to valuation and the calculation of performance fees, as well as the points flagged in relation to closed-ended structures above.

Where a performance fee uses an IBOR as a hurdle rate, then the manager will probably want or need to make any transition to a RFR before any performance fee measurement period (eg before 1 January 2021). Changes to such valuation and fee methodologies are likely to be material changes that impact the fees paid to the manager that either require investor consent and/or the manager may need to give investors sufficient notice (and detail) to enable them to make a redemption notice and be redeemed ahead of the proposed changes taking affect. In some structures, the notice period for redemption can be up to six months (although it can be much shorter than this), so in certain cases the manager will need to engage with investors at an early stage about the proposed changes. Either way, the manager will need to be able to explain any proposed change to the board of directors (or equivalent) for the fund and investors based on its "house" view of the market position on choosing a replacement RFR and what the appropriate RFR should be.

While UCITS[4] do not typically charge performance fees, the reasonable number of UCITS that do so (eg in a fixed income space) and have a hurdle return often use an IBOR in the calculation of those fees. For those UCITS and retail AIFs[5] that do charge such fees (often hedge funds and absolute return strategies), any IBOR transition by the manager will need to factor in ESMA's *Guidelines on performance fees in UCITS and certain types of AIFs* from April 2020[6], which require "*consistency between the performance fee model and the fund's investment objectives, strategy and policy*". Illustrative of the principle (more than the point in discussion, but still helpful to note), the guidelines state that "*it should not be deemed appropriate for a fund with a predominantly long equity-focused strategy to calculate the performance fee with reference to a money market index*".

As discussed above, since a replacement RFR may behave differently to a IBOR and may actually result in a lower rate, consideration will need to be given to treating customers fairly in taking a decision as to moving to a RFR which may result in a lower performance fee hurdle return. See "Conflicts of Interest" below for more details.

[4] Undertakings for the Collective Investment in Transferable Securities

[5] Alternative Investment Funds

[6] https://www.esma.europa.eu/sites/default/files/library/esma_34-39-968_final_report_guidelines_on_performance_fees.pdf

Illiquid asset portfolios

For illiquid asset classes (such as real estate, private equity, infrastructure and private debt), contracts and arrangements at the asset level are typically between a holding company and the relevant counterparty. This means managers will need to be alive to the issues throughout the downstream structure and ensure that holding vehicle directors (including any independent non-executive directors) are on-board with the process.

There are also likely to be shareholder loans in place between holding companies used in the downstream structuring, which may be using IBOR references for the purposes of determining upstream interest payments.

The UK FCA is expecting asset managers to proactively engage with the issuers of LIBOR-referencing securities as well as derivatives and loans counterparties, to convert these instruments and products to RFRs, for example through consent solicitation processes or bond buy-backs.

The types of contracts that may contain IBOR references include service provider agreements (eg default rates), interest rate, FX and other hedging agreements, holding vehicle and asset-level financing agreements and guarantees, and insurance contracts. There may also be joint-venture arrangements that have similar issues to those set out for closed-ended funds above. Managers will want to take a consistent approach across all portfolios where possible, although this is likely to prove more difficult in situations where portfolios contain assets denominated in multiple currencies where different RFRs may have be used. Amendments to existing contracts are likely to require the consent of the relevant counterparty.

Primary and secondary market lending strategies

For funds and segregated managed accounts that undertake either primary direct lending strategies or acquire on the secondary markets loans, managers will need to identify which IBORs are being used and consider appropriate fallback language in the interim, which will require early engagement with borrowers.

Firms will need to form a "house" view for the appropriate RFR to use at the point of transition and the timing of that transition. In particular, those who have taken on the loan agency role for floating rate loans will have to identify the new base rate and ensure that such rate can be set in accordance with the criteria in the relevant agreements (eg x days before the reset date). Various industry associations, including the U.S. Alternative Reference Rate Committee and the Loan Market Association, have been working to support loan markets through the LIBOR transition, but consensus has yet to be reached on a variety of key topics.

Liquid asset portfolios

For liquid asset classes (such as CLOs, publicly traded securities, cash, money market assets and commodities), there is typically no holding company structure so any affected contracts are likely to be directly between the fund or segregated managed account vehicle and the relevant counterparty. The largest impact is likely to be on the fund's/manager's relationships with lenders, borrowers, and derivatives and trading counterparties. These institutional counterparties are likely to have their own standard fallback approaches and language, but managers will need to carefully review any proposed changes to ensure their clients are not disadvantaged by such proposals and that they are within the range of "market standard" at that time.

For OTC derivatives, where managers trade under an existing ISDA Master Agreement, transactions referencing an IBOR and continuing beyond 2021 this will need to be amended to include appropriate fallback language. ISDA currently has an IBOR fallbacks working group (in which a number of asset managers have participated), and the proposed changes to the 2006 ISDA Definitions are now expected to go live by some time in November 2020. ISDA will also be publishing a protocol to enable wide-scale amendment of relevant transactions to reference the new Definitions, although asset managers will need to consider whether adherence to such a protocol is appropriate for their particular transaction mix (eg if exposures hedged by swap transaction are taking a different approach to LIBOR transition than is provided for the hedge under the ISDA protocol).

The situation is particularly pressing for asset managers that enter into swaps on behalf of their clients, as the FCA and the Bank of England identified 2 March 2020 as the target for the GBP interest rate swap markets to switch from LIBOR to SONIA.[7]

Custody and securities lending

Managers may have agreed custody or depositary agreements (including in relation to EEA AIFs and UCITS) and/or securities lending agreements, either on behalf of their funds/clients. The manager will need to identify where IBOR is used in those contracts and consider proposals put forward by institutional custodians in relation to fallback language and RFRs to ensure that any changes are acceptable.

[7] https://www.fca.org.uk/publication/correspondence/dear-ceo-asset-management-libor.pdf

Key Action Areas

Particular areas that managers will need to consider, review and take action on are as follows:

(a) **Fallback language**: Contracts or arrangements that are currently being negotiated that make reference to an IBOR should at least contain appropriate contractual fallback language to cover the IBOR transition, to minimise the risk of requiring investor/counterparty consents at a later stage to amend the rate. For example, if in a performance fee an IBOR is being used in the hurdle rate, allowing the fund (through its directors) to choose a substitute rate is an appropriate step to be doing now. Ideally, the fallback language should address not only permanent cessation of the relevant IBOR, but also regulatory actions that make the IBOR an inappropriate rate, such as a determination by a competent regulator that the IBOR is no longer "representative";

(b) **Existing contract review**: Due diligence will need to be undertaken on contracts that are already in place, both at the fund/investment management level and the downstream portfolio level, to identify:

(i) which of those contracts make reference to an IBOR and, of those, which are most reliant on the construct;

(ii) whether investor/counterparty consent is likely to be required to change to another rate and, if so, how much notice and information about the change needs to be given; and

(iii) in the case of open-ended funds, how much notice the manager will need to give investors of any proposed changes to allow investors time to exercise their redemption rights.

As we have seen, the exact nature of a manager's or a fund's use of IBOR will depend on the nature of the structure, the relevant asset class(es) and the types of counterparties involved. This review process is a potentially significant exercise and will require various stakeholders in the business to be on-board with the process;

(c) **Awareness of RFRs**: For both existing and future contracts, managers will need to have a clear idea about the RFR(s) to which they are transitioning contracts and calculations. They will need to be able to justify those rates to investors (ie on the basis of industry standard or other specific commercial or practical reasoning) and effectively analyse counterparties' proposals in relation to borrowing, custody arrangements and so on, to mitigate commercial and operational risks and satisfy investors – see also "Investor Communications" below; and

(d) **Internal operations review**: Due diligence will also need to be done to identify any affected internal operations and outsourcing arrangements that use IBORs (for example in modelling, calculation and pricing systems, and risk analysis). If IBORs are used in this way, the manager will need to consider the most appropriate alternative and what is required to transition to this.

Transition Planning and Senior Managers' Involvement

As regulators now impose greater accountability on senior management of asset managers for the running of their businesses, regulators are seeking to mitigate the systemic risks associated with IBOR transition by requiring senior management to demonstrate that they are engaging in identifying risks associated with the IBOR transition and how it will impact on their clients and businesses. Senior managers need to be aware of the risks of IBOR transition, and firms must clear about who is accountable for managing each aspect of transition where this is appropriate.

In the UK, the FCA has made it clear that it expects asset management firms to put in place a "transition plan", including appropriate milestones, resourced adequately and devised holistically, across all relevant business functions within the firm. The firm's board of directors should have oversight of the transition process, and seek support and challenge from second and third lines of defence.

The transition plan should, according to the FCA:

"carefully quantify all investments, operations and activities with [L]IBOR exposures and vdependencies for a firm and its clients";

"consider both how the firm will remove or ameliorate existing exposures and dependencies in a timely manner and avoid creating new ones"; and

"include a strategy for keeping clients appropriately informed of such changes as they are developed and implemented".

The FCA has also published a Q&A for asset managers about the conduct risk during the LIBOR transition[8].

[8] https://www.fca.org.uk/markets/libor/conduct-risk-during-libor-transition

Conflicts of Interest

There are likely to be a number of conflicts of interest arising for asset managers in implementing IBOR transitions. Those include the extent to which a client that is being unreasonably exposed to unpredictable outcomes due to how a replacement RFR is implemented should pay for costs associated with moving to RFRs or take greater risk in amended performance fees. These conflicts need to be managed in line with regulatory and legal duties and may require careful explanation to clients (eg the boards of directors of funds) and/or investors.

Investor Communications

As the impact of the IBOR transition becomes better understood by managers across their client base, there will be a regulatory, contractual and investor-relations based need for managers to have a clear communications policy with both existing and prospective investors regarding the manager's approach to selecting or agreeing to replacement RFRs. This may involve having to prepare FAQs and, where amending fund or other investor facing documentation, having a consistent approach as to what RFRs the manager is using as substitutes for relevant IBORs.

Regulator Communications

Similar communications considerations will arise in relation to regulators, which are likely to seek to ensure that managers have taken adequate steps to manage the client and business risks associated with IBOR cessation impact. For example, the FCA has stated that if, following careful review, the board of an FCA-authorised asset manager decides that a barrier to LIBOR transition is insurmountable, or that its transition preparations will not be completed in time, it should inform the FCA immediately and keep it up to date on developments.

Record Keeping

In line with general regulatory record-keeping obligations, managers need to ensure that they are keeping appropriate records of their decision making in relation to the IBOR transition, particularly around matters that affect clients. For example, in relation to amending products or building new products, the rationale for decisions around RFRs being used in those products should be appropriately recorded, in line with normal record keeping procedures.

How A&O can help you

We are helping a number of asset management and bank clients in a variety of jurisdictions tackle the issues that the IBOR transition is raising. We would be happy to answer any questions you have or provide you with more details about the ways we can support you with your IBOR transition process.

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