ROPES & GRAY

ALERT

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Some things you may not have known about the end of LIBOR

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As the long-anticipated end date of USD LIBOR approaches, an interesting nuance relating to the LIBOR/SOFR transition has newly come into focus. The end of LIBOR began in the summer of 2017 with the FCA's announcement of its decision to wind down the wearied reference rate, and June 30, 2023 has been cited again and again as USD LIBOR's final day. As parties have begun to transition credits from LIBOR to SOFR, a question has arisen with respect to LIBOR-based interest periods that were elected by a borrower and set prior to June 30, 2023, but scheduled to end after that date. A careful look at many loan agreements shows that LIBOR replacement provisions often disallow election of a new LIBOR *interest period* after June 30, 2023, as opposed to disallowing the use of LIBOR itself after that date. The import of this distinction is that a borrower could elect a new interest period (of perhaps six months, for example), just prior to June 30, 2023, and continue to have loans on LIBOR until the expiration of that interest period, which could be much later than June 30, 2023. In that case, the conversion from LIBOR to SOFR would become effective after the latest date that a borrower could reach on the LIBOR interest period in current use as of June 30, 2023. Given the challenges of today's loan markets, staying on LIBOR for some time beyond June 30, 2023 may be a better option for certain borrowers. Borrowers who wish to consider this option should confirm that it is supported by the provisions of their loan agreements.

Another recent development is the availability of Synthetic USD LIBOR for certain credits (as detailed below). The FCA is expected to adopt a recommendation that Synthetic USD LIBOR be published from June 30, 2023, until September 30, 2024, on a non-representative basis. The Synthetic USD LIBOR would consist of CME Term SOFR *plus* the relevant tenor-based credit spread adjustment ("CSA") recommended by the Alternative Rates Reference Committee (the "ARRC"). Notably, the CSAs suggested by the ARRC are higher than the current market trends. Additionally, synthetic USD LIBOR would not be available for any loan document with fallback provisions that include a 'non-representativeness' or 'pre-cessation' prong in the benchmark replacement triggers, *i.e.* a public statement or announcement declaring that LIBOR is no longer representative of the underlying market the rate seeks to measure. Synthetic USD LIBOR could potentially be available for (i) loan agreements that do not contemplate the unavailability of LIBOR at all, and (ii) loan agreements that do contemplate the end of LIBOR but do not include a trigger for non-representativeness. Loan agreements in the latter category could include agreements executed after 2017 but prior to the ARRC's publication of recommended fallback language in 2019. Parties to those agreements may have included language to address LIBOR cessation, but without the benefit of the ARRC's suggested language.

As June 30, 2023 approaches, and the legal, administrative, technical and economic details of LIBOR cessation come into view, we can expect greater clarity on the precise mechanics and cost of this enormous transition.