



BULLETIN – 200610/50

ICMSA Bulletin – The discontinuation of LIBOR/IBORS – timeline of a consent solicitation

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The challenge to transition legacy floating rate securities maturing after 2021 that reference IBOR rates to new risk free reference rates will be a formidable one. As of August 2019, it was estimated that there were US\$870 billion outstanding bonds with a maturity date beyond 2021 which reference LIBOR across the five currencies for which it is quoted¹. As reported in ICMSA Bulletin 181018/44 - *The discontinuation of LIBOR/IBORS - implications for English-law note trustees* (available [here](#)), fall-back language in legacy bonds was not drafted in contemplation of the permanent discontinuation of the relevant reference rate. For instance, in many cases the ultimate fall-back is for the rate to be fixed at the rate which applied at the last determination date. On other floating rate note transactions, benchmark replacement depends on the input of third parties that may be unwilling or unable to select an alternative rate for the remaining life of the bonds. These fall-backs are unlikely to be workable in the current environment. Accordingly issuers and investors are likely to want to either agree to wind up transactions and redeem the relevant securities or to amend the interest rate provisions to provide for a suitable long-term alternative reference rate. The new reference rate could be applied either immediately or once LIBOR is discontinued. Alternatively, rather than selecting the alternative rate now, issuers may prefer a two-stage process. This would involve obtaining noteholder agreement to amend transactions to provide for the transition to an alternative rate at a later date, for example on the occurrence of certain triggers, without further consent being required from the noteholders.

As discussed in Bulletin 181018/44, trustees (where applicable) will not be able in most cases to agree to amend interest rate provisions without noteholder consent. Equally, in respect of those transactions with a fiscal agency structure, the contractual counterparties will generally not have the power to modify the reference rate without investor input. Accordingly, in order to make the amendments, issuers may need to launch a consent solicitation process. Legacy deals could also be updated to include new fall-back language that has been developed by market participants in order to allow the issuer to facilitate a smooth transition of the interest rate to a suitable replacement in the event the applicable rate is discontinued. Consent solicitations have been successfully undertaken across a number of different transactions and product types, with the first being completed in June 2019 by Associated British Ports in relation to £65 million floating rate notes due in 2022. Although this bulletin deals with the timeline for a consent solicitation in respect of floating rate notes governed by English law, issuers of New York law notes should be aware that a different approach to transition will be necessary. One reason for this is because New York law indentures typically require the consent of all noteholders to amend the reference rate rather than the lower consent thresholds required by English law trust deeds, which are described in greater detail in the following paragraphs.

Considerable work has been undertaken by industry working groups, supervisory authorities and market participants to identify suitable alternatives to LIBOR across the five currencies for which it is quoted. For instance, in the United Kingdom, the Bank of England Working Group on Sterling Risk-Free Reference Rates selected reformed Sterling Overnight Index Average (SONIA) as its proposed benchmark for use in sterling derivatives and relevant financial contracts. Issuers of floating rate

¹ Source: Royal Bank of Canada Capital Markets



securities maturing after 2021 which reference LIBOR should now be able to identify the appropriate replacement rate to propose to noteholders as part of any consent solicitation exercise.

Issuers should start considering, with their advisers, the options open to them for dealing with legacy LIBOR (and other IBOR) transactions now. Consent solicitations can be more time consuming and can involve significant cost. They also require the active engagement and participation of a wide range of different parties and advisers as well as co-ordination between the issuer, investors, transaction service providers, the clearing systems and sometimes the rating agencies. Whilst a series of successful exercises in 2019 has proven that consent solicitations will be an indispensable tool for many issuers in managing the transition to risk-free rates in the bond market, issuers should be keenly aware of the timescales involved in convening noteholder meetings and completing the required modifications.

One of the options potentially available to issuers will be to amend interest rate provisions by way of written resolution. Written resolutions are usually provided for in the noteholder meeting provisions and require the votes of all or a very high percentage (usually 75% or 90%) of votes in favour. Written resolutions can significantly reduce timescales and costs for issuers because they dispense with the need for a meeting, do not involve any formal notice periods and streamline the number of parties and advisers necessary to facilitate the process. However, issuers should be aware that written resolutions will only be a suitable option in a narrow spectrum of transactions where a very small number of known investors hold the requisite amount of notes. The procedure for implementing written resolutions normally involves noteholders blocking their notes in the clearing systems and delivering verification of their note holding position to the trustee/fiscal agent on the date the written resolution is executed. It is possible, but much rarer, for written resolutions to be implemented without the blocking of notes, for instance on private deals with a single noteholder. Lining up and verifying the necessary proofs of holding (e.g. a custodian letter and a clearing system screenshot) on the date of the written resolution can be far from straightforward. In practice, this means that written resolutions will only be feasible where no more than three investors hold the requisite amount of notes. Several newer transactions may also provide for resolutions to be passed by way of electronic consents through the clearing systems. This approach would carry many of the same advantages as the use of written resolutions since an electronic consent mechanism removes the need for the issuer to hold a meeting. An additional benefit of the electronic consent mechanism is that noteholders do not need to furnish the trustee/fiscal agent with proofs of holding because they are delivering their consents directly through the clearing systems. The issuer should prepare a notice to be sent through the clearing systems announcing the results of the written resolution or electronic consent exercise and summarising the key modifications that have been made to the note conditions.

Meeting provisions in bond documents

There is not a uniform consent solicitation timeline applicable to all bonds impacted by the discontinuation of LIBOR. However, noteholder meeting provisions in typical English law bond contracts are somewhat standardised and the timeline set out below reflects terms typically found in these provisions. The timeline assumes that the notes are in global form held in Euroclear and/or Clearstream, Luxembourg. Clearly issuers will need to carefully review the specific noteholder meeting provisions in their notes to ascertain the particular notice periods, consent thresholds and other conditions for convening noteholder meetings that apply. There may also be additional practical challenges and considerations in relation to certain debt products, for instance regulatory capital securities and certain structured notes or issues with particularly complicated or unusual investor demographics, which could impact the feasibility and/or timing of any consent solicitation exercise. In the case of structured finance transactions with multiple tranches of notes, it is expected that any proposed modifications will need to be voted on by each tranche of notes or, depending on the terms and conditions of the notes, the most senior class of notes or the most junior class of notes (although this is unlikely where the modification is a "basic terms modification" or "reserved matter").



Typical consent solicitation overview

Commence process

Day 1

Launch

c. Day 30

Voting deadline

c. Day 51

Noteholder meeting

c. Day 53

Adjourned meeting

c. Day 66

Closing

c. Day 53 or 66



Pre-Launch

- Issuer to identify replacement rate and scope of proposed modifications.
- Appointment of legal counsel, advisers and agents (e.g. tabulation agent and solicitation agent).
- Preparation of legal and other documentation (e.g. Consent Solicitation Memorandum, Notice of Meeting, amendment documentation).
- Issuer to liaise with agents and clearing systems to prepare for launch.

Launch to Voting Deadline

- Launch of Event via the clearing systems and the applicable stock exchange channels to the noteholders.
- Noteholders to submit votes through the clearing systems or to make arrangements to attend the meeting to vote in person.
- Tabulation Agent to collate incoming consent instructions, validate final numbers with the clearing systems and send this information onto the Principal Paying Agent and the Issuer.
- Counsel for the Issuer typically prepares the noteholder meeting pack.

The noteholder meeting

- Minimum notice period = typically 21 clear days.
- The proposed modifications are likely to constitute a "basic terms modification" and to require sanction by means of an extraordinary resolution.
- Typical quorum: one or more persons holding 2/3 or 75% of the principal amount of the bonds.
- Typical voting threshold: at least 75% of the votes cast at the meeting.
- As soon as reasonably practicable following meeting – Issuer to publish results of voting.

Adjourned meeting

- Minimum period between original meeting and adjourned meeting = typically 13 clear days.
- Typical quorum: one or more persons holding 25% or 1/3 of the principal amount of the bonds.
- Typical voting threshold: at least 75% of the votes cast at the meeting.
- As soon as reasonably practicable following meeting – Issuer to publish results of voting.

Closing

- Delivery of amended transaction documentation and legal opinions.



Day 1 – c. Day 30 - pre-launch – selection of risk-free rate, notification of existing parties, appointment of new parties and preparation of documents

The pre-launch phase involves establishing the team of advisers and agents and settling on the terms of the proposed consent solicitation. How long this takes can vary. Issuers need to build in enough time for all parties involved in the consent solicitation exercise to provide quotes for acting and to clear conflicts (where applicable).

After the issuer has reviewed its back-book of outstanding securities referencing LIBOR and has identified those notes that it wishes to amend, it will need to review the contractual terms of the notes in order to decide on the scope of modifications that will be required to the transaction documentation. The issuer will also need to select the suitable replacement risk-free rate. This may involve the issuer seeking financial advice on the new rate so that it is in a position to confirm to noteholders that the new rate is appropriate and consistent with the market. Another important consideration for issuers at the genesis of the consent solicitation exercise will be to procure the adjustment of any cash flow models to reflect the use of a new reference rate and the introduction of a margin adjustment. The issuer may also wish to consider, possibly with its financial advisers, whether it needs to engage in additional communication with noteholders on the commercial aspects of the exercise.

The issuer will want to time the consent solicitation exercise such that it completes and the new rate is set prior to the beginning of the proposed first interest period under the new rate. LIBOR is fixed at the beginning of an interest period, whereas its risk-free rate replacement will only be determined a certain number of days prior to the end of each interest period. For instance, the market is coalescing around conventions for calculating backwards-compounded daily SONIA as a replacement for GBP LIBOR where the interest determination date is the fifth London banking day prior to the end of each interest period. If the consent solicitation completes in the middle of the interest period for which the issuer would like the new rate to be payable, the old term rate will already be locked in. There could also be a detrimental impact on post-trade processing if the new rate has not been determined and the interest rate provisions have not been updated prior to the beginning of the first interest period under the new rate.

Once the issuer has identified the replacement rate and the scope of the proposed modifications to the terms of the notes, it will need to liaise with its service providers, including the trustee/fiscal agent, the paying agents and the calculation agent, to notify them of the consent solicitation. The issuer will also need to appoint certain new agents, such as a tabulation agent and a solicitation agent, in order to facilitate the solicitation, including the calculation of the margin adjustment applicable to the securities. The role of the tabulation agent is primarily to manage events through the clearing systems throughout the duration of the consent solicitation exercise. For example, one or more representatives of the tabulation agent will typically be appointed by the registrar or the principal paying agent as the proxy for the noteholders to attend the noteholder meeting and to vote in the manner specified or identified in a block voting instruction in respect of the extraordinary resolutions being proposed. Most tabulation agents will also be able to provide tailored and on-going reporting of participation and voting specific to each security and to assist with the dissemination of the results of the noteholder meeting to the market. In short, the tabulation agent is appointed to receive instructions from noteholders regarding the consent solicitation proposal, to count votes at the meeting and to report on consent results. The tabulation agent is also customarily responsible for making certain documents relating to the consent solicitation, including copies of all announcements, notice and press releases, available to the noteholders between the launch and the date of the meeting.



The solicitation agent would be the bank or financial adviser that the issuer has appointed to advise generally on the transaction. Its formal role is to field queries and respond to requests for assistance from the noteholders throughout the life cycle of the consent solicitation exercise. The solicitation agent may also be the party responsible for calculating the margin adjustment necessary to be added to the risk free rate in order to give an economically equivalent rate to the old LIBOR rate.

The issuer, the solicitation agent and the trustee will all typically require legal advice. In most cases this will mean outside counsel to assist with the preparation and negotiation of the documentation associated with the consent solicitation. Outside counsel should be appointed as early as possible in the process. The issuer, the solicitation agent and the trustee/fiscal agent, together with their respective legal counsel, will comment on the consent solicitation and agree the legal documentation necessary to prepare for launch, and in the case of the issuer, formally appoint any additional agents (e.g. the tabulation agent and the solicitation agent). The precise scope of the documentation necessary to facilitate the consent solicitation will depend on the transaction being amended. The issuer (with the assistance of the tabulation agent) will also need to set up the operational aspects of the consent solicitation with the relevant agents, the common depositary/common service provider and the clearing systems prior to launch in order to ensure the event can be supported operationally without delay on the launch date. The operational mechanics involved in setting up a consent solicitation and the information flow between the paying agents, the common depositaries/common service providers, the clearing systems and direct participants will be explored in greater detail in a future bulletin.

The issuer and its counsel will need to prepare a consent solicitation memorandum to be sent to noteholders on the launch date setting out the background to and rationale for the proposal to amend the securities. The consent solicitation memorandum should also contain information on the location, time and date of the proposed noteholder meeting, an indicative timetable, disclosure on voting procedure and thresholds and a form of the notice of meeting which will include the text of the resolution to be voted on. Where several tranches of notes are being amended as part of the same consent solicitation exercise, as might be the case for securitisations and certain repackaged securities, the clearing systems will expect a single consent solicitation memorandum, notice of meeting and extraordinary resolution(s) to cover all the relevant tranches of notes subject to the amendment exercise. The consent solicitation memorandum should include contact details for the issuer, the solicitation agent and the tabulation agent in order to allow the noteholders to initiate direct bilateral communication. Issuers should also consider providing a high level document which will focus primarily on operational aspects of the event in order to facilitate a smooth launch and execution without delay. This high level document will be defined in greater detail and its importance will be discussed in a future bulletin.

Modifying the method of calculating the interest payable on debt securities represents a fundamental commercial change to the terms of the notes and so will almost invariably constitute a "basic terms modification" or "reserved matter". Such modifications are generally only capable of being sanctioned by way of an extraordinary resolution of the noteholders. The consent solicitation memorandum will also set out the detailed provisions relating to the calculation of the new interest rate.

A supplemental trust deed or an amended and restated agency agreement (as appropriate) making the necessary modifications to the interest rate provisions in the note conditions is typically drawn up and agreed. Other important documentation that will potentially need to be prepared and agreed between the parties before launch will include amended and restated transaction documents to reflect the changes to the interest rate provisions and any consequential amendments, and agency agreements between the issuer and the agents appointed to facilitate the consent solicitation exercise. The full suite of draft amendment documents can then be made available to the noteholders by the tabulation agent



or another suitable agent from the date of the launch of the consent solicitation so that the noteholders have full visibility of the changes being proposed to the notes and are in a position to vote on the proposal.

In respect of those transactions with a trustee structure, the draft of any notice to go to noteholders is typically required to be provided to the trustee a certain number of days prior to distribution to holders. In practice issuers should ensure that the whole pack of documents required for launch is provided in draft form to the trustee a reasonable time in advance of the proposed launch date in order for the trustee to review and provide substantive input on the documents. The document suite should also be shared with the principal paying agent, the common depository/common service provider and the clearing systems (where required) in order to ensure the event can be supported operationally.

c. Day 30 - Launch

Launch is the date that the consent solicitation is announced to the noteholders through the publication through the clearing systems of the notice of meeting appending the text of the resolution to be voted on. On the proposed launch date, the issuer or the solicitation agent (and their respective legal counsel) will need to provide the information necessary for launch (e.g. the notice of meeting and the specific changes and updates to the note conditions and transaction documents) to the principal paying agent or the tabulation agent together with an authorisation to release such information to the clearing systems. The principal paying agent or the tabulation agent will then provide this information, together with authorisation to release such information, to the clearing systems and the common depository or the common service provider (depending on whether the global note is a classic global note or a new global note). The tabulation agent or the common depository or the common service provider will need to receive the information necessary for launch by 12pm London time in order to ensure that launch is able to take place that day. The tabulation agent or the common depository or the common service provider will then notify the clearing systems of the information relevant for launch and the clearing systems will on-send this information to their account holders on the same day provided the relevant information is received by the clearing systems before the cut-off time of 17:00 CET. The issuer should also announce the consent solicitation in the manner required by any stock exchange on which the notes are listed and the notice of meeting will need to be delivered through the clearing systems. This notice will set out the location, date and time of the noteholder meeting, the general nature of the business to be deliberated and usually the full text of the extraordinary resolution.

c. Day 30 – c. Day 51 – Launch to the voting deadline

In the period between launch and the voting deadline, the pack of documents for the noteholder meeting will need to be prepared which will include, among other things, a pro forma block voting instruction, a pro forma voting certificate and voting cards for the meeting. Noteholders will usually have two options to enable them to vote on the proposal tabled as part of the consent solicitation. They can either obtain a voting certificate from the principal paying agent or registrar allowing the bearer to attend the meeting and vote in person in respect of a specified principal amount of securities or request a proxy to attend and vote on his/her behalf by procuring the issue of a "block voting instruction" as part of a solicitation instruction mechanism. The solicitation instruction mechanism involves the principal paying agent or the registrar issuing a block voting instruction whereby the tabulation agent is appointed as a proxy in respect of all the relevant voting rights. Electronic instructions will be submitted by direct participants to the tabulation agent through the relevant clearing system in accordance with prescribed procedures. The tabulation agent, as the appointed proxy, will then vote in the manner specified in the block voting instruction at the meeting. If noteholders are not direct participants at the clearing systems, they will



have to arrange for the custodian through which they hold their notes to submit an electronic instruction on their behalf to the relevant clearing system before the voting deadline.

The notice of meeting will set out the date on which notes held and blocked at the clearing systems to facilitate voting will be automatically released to the relevant direct participants. Automatic release of the notes will usually occur immediately on the conclusion of the meeting (including any adjourned meeting). If no specific date is set in the notice of meeting for the "un-blocking" of the notes, then the issuer will need to instruct the principal paying agent to provide approval to the common depositary/common service provider or the solicitation agent to unblock the notes. The common depositary/common service provider or the solicitation agent will then advise the clearing systems of this approval and the clearing systems will take the necessary action to release the notes. The issuer will normally deliver an instruction to release the notes as soon as reasonably practicable after the conclusion of the meeting. Although it is more common for issuers to adopt the blocking methodology described above when running consent solicitations, it is also possible for issuers to set a record date for voting instead. If the issuer elects a record date for voting, restrictions on the transfer of the notes by the noteholders will apply for the instructed balance until the end of the record date.

The noteholder meeting provisions normally provide that the (last) voting deadline is 48 hours before the time fixed for the noteholder meeting. The 48 hours will relate only to days upon which banks are open for business both in the place where the meeting is to be held and in each of the places where the paying agents have their specified offices.

c. Day 53 – the noteholder meeting

The minimum notice period required to call a noteholder meeting is typically 21 "clear" days (excluding the day the notice is deemed given and the day on which the meeting is held). At the meeting, the chairman (appointed by the trustee) will announce whether the necessary quorum is present and (once the vote has taken place) whether the extraordinary resolution has passed. The usual quorum necessary to vote on a "basic terms modification" is one or more persons present in person or represented by a proxy and holding or representing two-thirds or 75% of the principal amount of the notes. For the extraordinary resolution to pass, the noteholder meeting provisions typically require at least 75% of the votes cast at the meeting to be cast in favour of the extraordinary resolution. Following the meeting, the issuer is obliged to publish a notice to the noteholders, in accordance with the note conditions, of the result of the voting as soon as reasonably practicable after the conclusion of the meeting. Any blocked notes will be automatically released on the date disclosed in the consent solicitation memorandum (usually the date on which the meeting (including any adjourned meeting) concludes) or, if there is no set date disclosed in the consent solicitation memorandum, on the express instruction of the issuer (acting through the principal paying agent). The issuer may also wish to prepare a press release for a recognised news service (e.g. Reuters or Bloomberg) setting out the outcome of the meeting. If the notes are listed, the issuer will also procure the delivery of a notice setting out the results of the voting on the website of the relevant stock exchange.

c. Day 66 - the adjourned noteholder meeting

If the original meeting is adjourned for lack of quorum, an adjourned meeting will need to be called in order for the noteholders to sanction the proposal. Notice of an adjourned meeting will need to be given typically at least 10 "clear" days prior to the time of the adjourned meeting and will need to set out the time and location of the adjourned meeting. The adjourned meeting may only deal with business which might lawfully have been transacted at the original meeting and typically must be held not less than 13 "clear" days after the original meeting.



A lower quorum normally applies at an adjourned meeting. For "basic terms modifications" this tends to be one or more persons representing one-third or 25% of the principal amount of the notes. The required voting threshold at an adjourned meeting is typically the same as for an original meeting – at least 75% of the votes cast at the adjourned meeting must be cast in favour of the extraordinary resolution in order for it to pass.

c. Day 55 or 66 – Pricing and Closing

As soon as reasonably practicable after all the necessary extraordinary resolutions have been passed by the noteholders, the amendment documents (including the supplemental trust deed/amended and restated agency agreement and, if applicable, the amended and restated final terms) should be executed and delivered by the relevant transaction parties. If the amendment documents provide that the benchmark amendments will become immediately effective, the solicitation agent or some other suitable agent will proceed to calculate the margin adjustment pursuant to the formula disclosed to the noteholders in the consent solicitation memorandum. This calculation should be made as soon as possible after the execution and delivery of the amendment documents.

In addition to preparing a notice setting out the results of the noteholder meeting, the issuer may wish to prepare a separate notice to be sent through the clearing systems and to be published on the website of the relevant stock exchange (if the notes are listed) announcing the amount of the margin adjustment, the execution of the relevant amendment documentation and a summary of the modifications to the note conditions. Legal opinions covering the enforceability of the obligations created by the amendment documents and the capacity of the relevant obligors will often be delivered at closing to give the parties comfort of the legal integrity of the implementation of the replacement of the interest rate and any associated updates to the transaction documents.

Next steps

The advice from the regulator is now clear – "Those who can transition should do so"². Issuers should appreciate that there are some legal, logistical and practical challenges with achieving this transition through consent solicitations which mean they should not leave it too late. Consent solicitations require the active participation of a range of different parties and can be time-consuming and incur material costs. Given the volume of deals that are likely to require amendments to effect the transition away from LIBOR, the clearing systems, service providers, rating agencies and law firms will not all have the institutional bandwidth or capacity to facilitate all the necessary consent solicitations during the same period; investors may be similarly overwhelmed. Although LIBOR discontinuance is scheduled for the end of 2021, issuers who are contemplating a consent solicitation to change the reference rate would be well advised not to delay and certainly not to leave the exercise until the end of 2021. The use of consent solicitations is a viable market-based solution but it is vital to launch these exercises as soon as possible in order to mitigate the risk of operational lag and execution risk.

² Andrew Bailey: *LIBOR: Preparing for the End*, New York, 15 July 2019.