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FCA Compels the Publication of 'Synthetic' USD LIBOR

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After USD LIBOR stops being published on June 30, 2023, "synthetic" USD LIBOR will continue to be published for a limited period, according to the UK's Financial Conduct Authority ("FCA"). The FCA said that the "synthetic" version of USD LIBOR will not be a "representative" rate provided by panel banks but instead would be based on the CME Term SOFR Rate plus the same credit spread adjustment used for legacy contracts by ISDA and the Alternative Reference Rates Committee ("ARRC").

The FCA said it was compelling LIBOR's administrator to publish "synthetic" versions of USD LIBOR in 1-, 3- and 6-month tenors in order to provide for a more orderly transition of "a small but material subset of contracts that will not be able to transition away from using USD LIBOR" by June 30, 2023. The synthetic version will be available for at least 12 months. The FCA said that it intends to use its powers to compel the publication of the synthetic USD LIBOR until the end of September 2024, "but not beyond that date."

The primary focus of the FCA's action is legacy USD LIBOR contracts that are not governed by U.S. law. The FCA has previously acknowledged that most legacy U.S. law contracts would transition away from LIBOR under workable contractual fallbacks (such as those published by the ARRC or implemented through ISDA's protocol) or pursuant to the federal Adjustable Interest Rate (LIBOR) Act. The ARRC and ISDA fallback provisions specifically include a "trigger" that occurs when LIBOR is no longer "representative" (*i.e.*, is published in a "synthetic" version). Similarly, the Federal law applies to legacy contracts within its scope when LIBOR is no longer representative.

However, there are certain legacy contracts governed by U.S. law that do not fall into either of those categories, such as those that fall back to the prime rate when LIBOR "is no longer available" or similar language. The language of these contracts must be analyzed closely to determine whether their conditions to implementing the new rate (*e.g.*, prime) have been satisfied or whether the synthetic version of

USD LIBOR would apply. Given the difference in value between the two rates, the outcome of that analysis could have significant economic consequences for the parties.