

NOTES

ALL TOGETHER NOW: INTERNATIONAL REGULATORY RESPONSE TO THE LIBOR RATE SETTING CONSPIRACY

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I. INTRODUCTION

The regulatory agencies of seven different countries and regions are currently investigating an alleged conspiracy by sixteen major international banks to manipulate the London Interbank Offered Rate (LIBOR) during a period of at least two years, coinciding with the decline of the world economy in 2007–2008.¹ LIBOR began in 1986 as a tool for banks to use in setting a common interest rate for loans that the banks issued jointly, but it grew to become the “world’s most important number.”² Today, around the world, financial institutions, investment markets, mortgage companies, and private investment funds use LIBOR as the reference point for determining interest rates.³ In this way, LIBOR impacts “trillions of dollars in financial instruments worldwide.”⁴ Around the world, regulators, private entities, and other government institutions accused the sixteen banks on the LIBOR board of submitting false information to the entity that sets LIBOR in order to manipulate the rate.⁵ The alleged purpose of this manipulation was two-fold: (1) to generate higher returns on bank investments and financial tools and (2) to hide the growing riskiness of the banks’ debts, and in turn financial distress, as the world economy began to crumble.⁶ The impact of this conspiracy is international in scope, affecting the profits earned by financial institutions, investors, pension funds, and national, state, and local governments.

While the regulatory agencies of many countries are now investigating the impact of this conspiracy within their borders, the responsibility for

¹ Consol. Amended Complaint for Mayor and City Council of Balt. at 3, *In re LIBOR-Based Financial Instruments Antitrust Litigation* (S.D.N.Y. 2012) (No. 1:11-md-2262-NRB), 2012 WL 1522306 [hereinafter *Consol. Amended Complaint Balt.*]. In 2011, a series of class-action lawsuits was filed in the United States against the sixteen banks that make up the LIBOR rate-setting board. The lawsuits initially filed make up a series of complaints, but all of which allege injuries from the alleged conspiracy to set LIBOR below the market rate. These complaints describe much of the background of the conspiracy, as well as the current regulatory efforts to control it. The lawsuits are ongoing.

² David Enrich & Max Colchester, *Before Scandal, Clash Over Control of LIBOR*, WALL ST. J., Sept. 11, 2012, at A1 (describing the struggle by the British Bankers’ Association (BBA) to ensure the integrity of LIBOR in the wake of evidence of manipulation by BBA members, increasing pressure from regulators from abroad, and the early hands-off approach taken by the Bank of England).

³ *Consol. Amended Complaint Balt.*, *supra* note 1, at 2.

⁴ *Id.*

⁵ *Id.* at 2–3.

⁶ *Id.* at 2; Peter J. Henning, *In UBS Convictions, Parallels to the LIBOR Investigation*, DEALBOOK, Sept. 4, 2012, available at 2012 WLNR 18820693.

regulating the LIBOR setting process fell on the U.K., as LIBOR is set daily by the British Bankers' Association.⁷ This Note will examine international pressures on the U.K. to regulate LIBOR prior to the uncovering of the conspiracy to manipulate the rate. Additionally, the Note will lay out the U.K.'s proposed solutions to the crisis through an examination of the Wheatley Review of LIBOR, which lays out a blueprint for LIBOR reform.⁸ This Note will then examine existing international banking regulatory mechanisms and how the Wheatley Review's proposed solutions may fit into these existing structures. Finally, this Note will present future issues that must be addressed in order to fill the growing need for stronger international mechanisms for banking regulation as banking continues to expand to global markets. Of particular importance is how to address the need for an international enforcement mechanism in the banking industry.

II. BACKGROUND: LIBOR

First, to understand the need for an international response to the LIBOR scandal, one must understand the vital role that LIBOR plays in international financial markets. Often called the "world's most important number," LIBOR is the rate against which the interest rates for trillions of dollars of financial instruments around the world are set.⁹

LIBOR is an invention of the British Bankers' Association (BBA),¹⁰ a trade association for the United Kingdom's (UK) banking and financial industry. The BBA represents more than 170 banks from 180 countries.¹¹ The BBA's self-described role is "to promote a legislative and regulatory system for banking and financial services—in the UK, Europe and internationally—which takes account of [BBA] members' needs and concerns."¹² While on the one hand, the BBA is essentially a lobbying group on behalf of its members,¹³ it also oversaw the setting of LIBOR for the past

⁷ Consol. Amended Complaint Balt., *supra* note 1, at 2.

⁸ Her Majesty's Treasury, *The Wheatley Review of LIBOR: Final Report* (2012), available at http://cdn.hm-treasury.gov.uk/wheatley_review_libor_finalreport_280912.pdf [hereinafter *The Wheatley Review*].

⁹ Enrich & Colchester, *supra* note 2; Consol. Amended Complaint Balt., *supra* note 1, at 2.

¹⁰ Enrich & Colchester, *supra* note 2; *About Us*, BRITISH BANKERS' ASS'N, <http://www.bba.org.uk/about-us> (last visited Oct. 12, 2012) [hereinafter *BBA About Us*].

¹¹ Enrich & Colchester, *supra* note 2.

¹² *BBA About Us*, *supra* note 10.

¹³ *Id.*

thirty years.¹⁴ So, how did what started out as a trade association and advocacy center for the U.K. banking industry come to oversee the world's most important number?

A. The History of LIBOR: Growth of LIBOR to the World's Most Important Number

In short, it happened by accident. LIBOR was never intended to be such an integral part of the world market.¹⁵ The BBA created LIBOR in the 1980s as a response to the desire of members to create an easier way to set collective interest rates for a new type of financial product, Forward Rate Agreements. Forward Rate Agreements were unique in that they required parties to agree to the interest rates underlying the products at the outset.¹⁶ The BBA member banks asked the BBA to facilitate these agreements by developing a benchmark that could be used to set these interest rates.¹⁷

Thus, in 1984 the BBA standard for Interest Settlement rates (BBAIRS)—LIBOR's predecessor—was born.¹⁸ From 1985 to 1986 the use of the BBAIRS became standard practice by banks in setting the rates for Forward Swap Agreements and other types of financial tools. In 1986, the BBA published LIBOR for the first time, offered in three different currencies: the U.S. Dollar, the Japanese Yen, and the British Pound. LIBOR had begun.¹⁹

B. LIBOR Explained: LIBOR's Impact on the Global Economic Marketplace

In essence, LIBOR is the interest rate at which BBA member banks believe they would be able to borrow money on the global market.²⁰ The rate is set in ten different currencies daily, based on the reports of member

¹⁴ Enrich & Colchester, *supra* note 2. In this article, the authors address the apparent growing tension between the BBA's role as a trade association and its position as the overseer (and for all intents and purposes the regulator) of LIBOR. Additionally, the authors describe the ongoing conversations between the BBA and regulators, such as the Bank of England and the Federal Reserve Board of New York.

¹⁵ *Id.*

¹⁶ *BBALIBOR Explained: Historical Perspective*, BBALIBOR, <http://www.bbalibor.com/explained/historical-perspective>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *BBALIBOR Explained: The Basics*, BRITISH BANKERS' ASS'N, <http://www.bbalibor.com/bbalibor-explained/the-basics> [hereinafter *BBALIBOR Basics*].

banks about their perceived individual ability to borrow funds on the global market.²¹ In the same way that consumer credit card rates indicate the riskiness of lending to that particular borrower, the individual bank's reported rate to LIBOR is supposed to reveal how risky a loan to a BBA member bank is at the time of reporting, because the rate should indicate on how much interest another bank would charge the member to borrow money.²² Just as a credit card company charges a higher interest rate to a consumer with a low credit score based on the risk that the company will not be repaid, a lending bank will charge a higher interest rate on a loan to another bank if the lending bank perceives that the bank receiving the loan may not be able to pay that loan back.

LIBOR is calculated daily based on submissions by a group of BBA member banks that sit on the LIBOR panel for each of the ten different currencies.²³ For example, sixteen different banks made up the board for the U.S. Dollar LIBOR rate during the mid-to-late 2000s.²⁴ Some of the banks overlap currencies; for example nine of the sixteen banks that made up the U.S. Dollar LIBOR panel during the late mid-to-late 2000s also "served on the Japanese Yen, Swiss Franc, and Euro LIBOR panels."²⁵ The banks that sit on LIBOR panels call into the BBA daily to give a submission, based on the following question: "[A]T WHAT RATE COULD YOU BORROW FUNDS, WERE YOU TO DO SO BY ASKING FOR AND THEN ACCEPTING INTER-BANK OFFERS IN A REASONABLE MARKET SIZE JUST PRIOR TO 11 AM?"²⁶

The banks' submissions do not need to be based on actual borrowing rates, as every bank will not attempt to borrow funds daily.²⁷ Instead, a bank might calculate its perceived borrowing rate based on its credit and liquidity risk profile.²⁸ The bank then can construct a curve to predict the correct rate for currencies or maturities in which it has not been actively borrowing on any particular day.²⁹ Once each bank on a LIBOR panel makes its daily submissions, the BBA then takes an average of the submissions to set LIBOR for each currency.³⁰

²¹ *Id.*; Consol. Amended Complaint Balt., *supra* note 1, at 8.

²² *BBALIBOR Basics*, *supra* note 20; Consol. Amended Complaint Balt., *supra* note 1, at 9.

²³ Consol. Amended Complaint Balt., *supra* note 1, at 9.

²⁴ *Id.* at 8.

²⁵ *Id.*

²⁶ *BBALIBOR Basics*, *supra* note 20.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Consol. Amended Complaint for Balt., *supra* note 1, at 9.

The average is not taken from all submissions, however. BBA attempts to eliminate outliers in the submission pool by dropping the highest 25% and the lowest 25% of submissions each day.³¹ The rate is then published by Thomson Reuters, and reported along with the submissions of the individual banks on which the BBA based its calculation.³² Banks are not allowed to see other banks' submissions until after the rate is published.³³

C. The World's Most Important Number: The Impact of LIBOR on Global Financial Markets

Once used only to set the rates for financial instruments between banks, LIBOR rates now impact almost every industry, consumer, and financial tool in the global market.³⁴ LIBOR is the benchmark for setting short-term interest rates globally.³⁵ When most types of commercial financial contracts are entered into around the world, LIBOR determines the interest rate, whether for a sophisticated derivatives contract, a commercial loan for a small business, a family's mortgage, or a credit card.³⁶ It is astonishing that all of these financial contracts are based on a rate that is entirely unregulated.³⁷

D. LIBOR in Scandal: The Conspiracy to Set the LIBOR Rate and the Impact on Global Economic Markets

In the last few years, the banks that make up the LIBOR panel have been accused of colluding to artificially suppress the LIBOR rate by international regulatory agencies and private parties alike.³⁸ Seven countries and political entities, including the United States, Switzerland, Japan, the United Kingdom, Canada, the European Union, and Singapore, instituted civil and criminal investigations into the alleged manipulation.³⁹ In 2011 the first lawsuits against the sixteen banks that made up the U.S. Dollar LIBOR board were filed, alleging, among other claims, antitrust violations marked by a

³¹ *Id.*

³² *Id.*

³³ *BBALIBOR Basics*, *supra* note 20.

³⁴ *Id.*; Enrich & Colchester, *supra* note 2.

³⁵ *BBALIBOR Basics*, *supra* note 20.

³⁶ Enrich & Colchester, *supra* note 2.

³⁷ *Id.*

³⁸ Consol. Amended Complaint Balt., *supra* note 1, at 9.

³⁹ *Id.* at 3.

conspiracy to set the LIBOR rate.⁴⁰ And by the spring of 2012, the U.S. and U.K. regulators had uncovered evidence that the BBA member banks that make up the LIBOR panels manipulated the LIBOR rate.⁴¹

These accusations stem from evidence that the LIBOR rate did not match up to other information regarding the health of the banks and the overall economy.⁴² Banks on the LIBOR panel could potentially benefit from the artificial suppression of LIBOR in two ways.⁴³ First, by underreporting their LIBOR submission, a bank could cover its precarious financial positions and lower the level of risk associated with that bank.⁴⁴ This picture of financial health became particularly important in the wake of the 2007 financial crisis, when financial markets started becoming particularly wary of increasing investment risk.⁴⁵ A higher LIBOR submission by any bank indicated more need of cash to cover poorly-performing investments and, in turn, a higher risk for anyone lending to that bank.⁴⁶

Second, by lowering the LIBOR rate, a bank could pay lower interest rates on any of the LIBOR-based financial instruments that bank sold to investors.⁴⁷ As discussed above, LIBOR is the global standard for all short-term interest rates, so if a bank sells a security to a pension fund, for example, when the LIBOR rate goes up so does the rate of return on that investment. This relationship between the rate of return and LIBOR means that the bank has to pay a higher rate of return to the pension fund and, as a result, loses money. For example, in 2009 JPMorgan Chase reported that if interest rates increased by 1%, the bank would lose over \$500 million.⁴⁸ Therefore, by artificially suppressing rates, the banks on the LIBOR panel could both conceal the apparent riskiness of their current financial status and

⁴⁰ *Id.* at 2; Amended Consol. Class Action Complaint for Exchange-based Plaintiffs, *In re* LIBOR-Based Financial Instruments Antitrust Litigation (S.D.N.Y. 2012) (No. 2262, 11 Civ. 2613.), 2012 WL 1522305, at 1.

⁴¹ Enrich & Colchester, *supra* note 2.

⁴² Consol. Amended Complaint Balt., *supra* note 1, at 10–15 (describing the work of independent consultants hired in anticipation of litigation to determine whether the LIBOR rate appeared to be artificially suppressed based on other financial data, as well as discussing a variety of news articles describing concerns about the seemingly low LIBOR rates).

⁴³ *Id.* at 9 (describing the alleged financial incentives of LIBOR member banks to keep LIBOR rates low generally and particularly to suppress the LIBOR rate during the financial crisis of 2007–2008).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 10.

⁴⁷ *Id.*

⁴⁸ *Id.*

also keep from having to pay out large sums in interest owed to investors on their products.⁴⁹

From a plaintiff's perspective, artificial suppression causes an owner of any product with an interest rate set to LIBOR to lose money owed to the owner during the period of suppression.⁵⁰ Additionally, anyone buying an investment with a risk calculation based on LIBOR is actually exposed to greater risk than the reported LIBOR rate indicated.⁵¹ The lawsuits against the banks stem from these types of alleged losses.⁵²

E. Who was Minding the Store? The Historic Regulation of LIBOR in the U.K.

No regulatory agency oversees the setting of LIBOR by the BBA, which is a private entity.⁵³ In fact, the administration of and submission to LIBOR currently fall under no statutory authority at all.⁵⁴ Therefore the ongoing regulatory investigations by countries are proceeding only by connecting LIBOR to already regulated banking activities. However, as the rate is set in London by a British organization the main purview for overseeing the regulation of the group falls either with the Bank of England, the U.K.'s Central Bank (akin in its role to the U.S. Federal Reserve Bank), H.M. Treasury (similar to the U.S. Treasury Department), or the Financial Services Authority (a nongovernmental entity established to oversee banking in the U.K.).⁵⁵ In 2007, the Bank of England held a meeting where executives of several banks indicated that they were concerned that LIBOR seemed

⁴⁹ *Id.*

⁵⁰ *Id.* at 2–3 (describing the specific alleged injuries suffered by the plaintiffs here, as well as the general role that LIBOR plays in investments, and the harm that necessarily stems from the LIBOR rate being set artificially low).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 8.

⁵⁴ *The Wheatley Review*, *supra* note 8, at 11 (describing the need to move LIBOR under the statutory regulatory authority of a U.K. regulatory body).

⁵⁵ *About the Bank: Core Purposes*, BANK OF ENGLAND, <http://www.bankofengland.co.uk/about/Pages/corepurposes/default.aspx>; *Memorandum of Understanding between HM Treasury, the Bank of England and the Financial Services Authority*, BANK OF ENGLAND, <http://www.bankofengland.co.uk/financialstability/Documents/mou.pdf> [hereinafter *UK Regulatory Body MOU*] (describing the delineation of duties and the relationship between the key U.K. banking regulatory institutions: HM Treasury, the Bank of England, and the FSA); *Who are we?*, FINANCIAL SERVICES AUTHORITY, <http://www.fsa.gov.uk/about/who> [hereinafter *FSA Who*].

artificially low.⁵⁶ Concerns were expressed that perhaps LIBOR contributor banks were underreporting borrowing rates in an attempt to stave off concerns about shaky financial conditions.⁵⁷ In spite of these concerns, however, the Bank of England declined to take action at the time, given that the BBA assured the group that the current rate-setting process was sufficient to prevent any such problems.⁵⁸

But the concerns about potential underreporting did not go away. In 2008 *The Wall Street Journal* began reporting about the apparent problems with LIBOR calculation, setting off a series of articles highlighting the red flags surrounding the rate's integrity.⁵⁹ After the first article was printed, the BBA immediately sent a memo to all the banks as a reminder to make honest submissions about its rates.⁶⁰ Additionally, the BBA contacted the Bank of England to discuss the regulator engaging in a process, along with the U.S. Federal Reserve, to develop a framework for the regulators to provide oversight to LIBOR.⁶¹ However the Bank of England declined to participate, and eventually the Federal Reserve backed out as well.⁶² Neither entity wanted to be seen as officially endorsing the rate or the BBA's review of the rate.⁶³ These decisions again left LIBOR in the hands of the BBA, which oversees LIBOR through a separate legal entity, BBA LIBOR Ltd.⁶⁴

The impact that LIBOR has on financial markets is incalculable, and the fact that the U.K. regulators had no direct oversight authority may be partly responsible for creating an opportunity for a conspiracy to thrive. The LIBOR scandal revealed just how much one country's regulatory institutions can impact the entire world market. In order to solve this problem, each country cannot be left to the whim of the government's political attitudes

⁵⁶ Enrich & Colchester, *supra* note 2.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ A long series of articles was released in the *Wall Street Journal* beginning in 2008 describing the building concerns over LIBOR, tracking the investigations by international regulatory bodies, and examining private litigation resulting from the conspiracy. For a small sampling, see Carrick Mollenkamp, *Bankers Cast Doubt on Key Rate Amid Crisis*, WALL ST. J., Apr. 16, 2008; Carrick Mollenkamp, *LIBOR Surges after Scrutiny Does, Too*, WALL ST. J., Apr. 18, 2008; Carrick Mollenkamp, *LIBOR's Accuracy Becomes Issue Again*, WALL ST. J., Sept. 24, 2008.

⁶⁰ Enrich & Colchester, *supra* note 2.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *BBALIBOR Basics*, *supra* note 20; Enrich & Colchester, *supra* note 2.

toward regulation at a given time or in a given market; instead, a common solution must be developed.

Over the last several months, regulators around the world have been meeting to discuss the future of LIBOR, and the U.K. Government has released “The Wheatley Review,” a ten-point plan for re-tooling LIBOR in the wake of the rate-setting conspiracy.⁶⁵ This Note explores the Wheatley Review’s regulatory solutions and compares those solutions to international responses to past crises and the effectiveness of current international banking regulatory bodies. Additionally, this Note explores the tension of a proposed national regulatory solution in the wake of a problem with vast international impacts. Finally, this Note proposes finding an international solution that can address the problems raised by the LIBOR conspiracy.

III. NATIONAL REGULATORY RESPONSES TO INTERNATIONAL BANKING CRISES: THE TENSIONS IN ENFORCING BANKING REGULATION IN A GLOBAL ECONOMIC MARKET

For more than twenty years, national regulatory bodies of the banking industry have acknowledged the need for international cooperation to regulate financial instruments, particularly derivatives.⁶⁶ There already exist several international regulatory bodies, such as the Bank for International Settlements’ Basel Committee on Banking Supervision (Basel Committee) and the International Organization of Securities Commissions (IOSCO), that issue guidelines developed cooperatively with their different memberships, which are then implemented by the national regulatory institutions that comprise those bodies.⁶⁷ These committees do not have any independent regulatory or enforcement power but instead use international cooperation among national regulators to develop guidelines for the global banking

⁶⁵ Her Majesty’s Treasury, *Independent Review into Libor Published*, Sept. 28, 2012, at http://www.hm-treasury.gov.uk/wheatley_review_pn_280912.htm.

⁶⁶ Thomas C. Singher, *Regulating Derivatives: Does Transnational Regulatory Cooperation Offer a Viable Alternative to Congressional Action*, 18 *FORDHAM INT’L L.J.* 1397, 1461–68 (1995).

⁶⁷ *Id.* at 1461–63 (describing the role of these bodies in issuing guidelines for the regulation of derivatives-related risks); *About the Basel Committee*, BANK FOR INTERNATIONAL SETTLEMENTS, <http://www.bis.org/bcbs/about.htm/> [hereinafter *About Basel Committee*]; *IOSCO Historical Background*, INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, <http://www.iosco.org/about/index.cfm?section=background> [hereinafter *IOSCO Historical Background*].

market, and those guidelines are then implemented and enforced by each body's respective members.⁶⁸

This type of international cooperation, while it provides some level of international cohesiveness in regulatory policy, still leaves much of the regulatory policy-setting in banking to national entities. This level of national autonomy in an increasingly global world leaves open the question of how national regulators take into account the global impacts of their regulatory decisions and how regulatory bodies with no jurisdiction over key global economic measures or entities, such as BBALIBOR, ward off coming global crises.

First, this section examines the proposed U.K. plan for shifting the regulatory structure of LIBOR, and the sufficiency of that plan in taking into account the international impacts of the conspiracy to fix LIBOR. Next, it examines how current Basel Committee and IOSCO policies and enforcement mechanisms may come into play in the enforcement and implementation of such new regulations.

A. Why the Ten-Point Plan? The Underlying Policy Goals of the Recommendations by the Wheatley Review

In 2009, the Financial Services Authority (FSA) of the U.K. collaborated with regulators in a number of nations to investigate LIBOR misconduct.⁶⁹ The FSA is a non-governmental entity in the U.K. empowered by the British Parliament to regulate and supervise banks in cooperation with Her Majesty's (H.M.) Treasury and the Bank of England.⁷⁰ As a result of the investigations, the FSA announced in June 2012 that it would be fining Barclays Bank £59.5 million for that bank's role in the 2012 LIBOR rate-setting crisis.⁷¹

⁶⁸ Singher, *supra* note 66, at 1465; *IOSCO Historical Background*, *supra* note 67; *About Basel Committee*, *supra* note 67.

⁶⁹ *The Wheatley Review*, *supra* note 8, at 5 (describing how the Wheatley Review provided an overview of the report).

⁷⁰ FSA *Who*, *supra* note 55; *UK Regulatory Body MOU*, *supra* note 55.

⁷¹ FINANCIAL SERVICES AUTHORITY, BARCLAYS FINED £59.5 MILLION FOR SIGNIFICANT FAILINGS IN RELATION TO LIBOR AND EURIBOR, June 27, 2012, FSA/PN/070/2012, available at <http://www.fsa.gov.uk/library/communication/pr/2012/070.shtml> [hereinafter FSA *Barclays Findings*] (reproducing the final report of the FSA's findings that Barclays's had engaged in continuous misconduct in regards to LIBOR including: making submissions that unlawfully took into account requests from the bank's interest rate derivatives traders in order to benefit bank trading positions; seeking to influence submissions of other banks

Following that announcement, the British government called on Martin Wheatley to conduct a review of the setting and usage of LIBOR.⁷² Wheatley is the current director of the FSA, and also is the CEO designate of a new U.K. regulatory body to be established within the next year, the Financial Conduct Authority (FCA).⁷³ The purpose of the Wheatley Review was to look not at the specific allegations regarding any particular bank's or individual's attempts to manipulate LIBOR;⁷⁴ instead the review was intended to examine LIBOR for the purpose of making recommendations for reform to the British Government, the BBA, banks, and other regulatory bodies.⁷⁵ The Report examines opportunities to regulate and reform LIBOR itself, but it also examines whether an alternative benchmark should replace LIBOR and makes recommendations about the future of LIBOR and other potential interest rate setting benchmarks.⁷⁶ Ultimately, the Wheatley Review lays out a ten-point plan for the reformation of LIBOR without any recommendation to actually end the use of the benchmark.⁷⁷

Three conclusions shape the foundation of this ten-point plan.⁷⁸ First, the Wheatley Review concluded that, at least in the short term, rather than replacing LIBOR with an alternate benchmark, efforts should focus on reforming it.⁷⁹ One reason for this conclusion is the interest in limiting risk and uncertainty in an already shaky global economy.⁸⁰ The Wheatley Review argues that the transition to a new benchmark rate would impose too high a risk on the global financial market.⁸¹ The Wheatley Review examines not only how the shift might create financial instability as the markets try to understand the new rate, but also how the shift could result in large-scale litigation as parties who hold contracts referencing LIBOR attempt to

involved in setting LIBOR; and reducing the bank's own LIBOR submissions in order to avoid negative media publicity during the financial crisis).

⁷² *The Wheatley Review*, *supra* note 8, at 5.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1, 5–6.

⁷⁷ *Id.* at 8–9.

⁷⁸ *Id.* at 7.

⁷⁹ *Id.*

⁸⁰ *Id.* (describing the vast number of contracts impacted by LIBOR, amounting to at least \$300 trillion, as the main reason and concluding that opening those contracts up to litigation by replacing LIBOR would be too disruptive and costly, given that LIBOR has not been irreparably damaged).

⁸¹ *Id.*

renegotiate the terms.⁸² Additionally, while some might question whether LIBOR can really ever be reformed given the serious credibility issues the benchmark suffered after the rate-setting crisis, the Wheatley Review points out that the evidence does not bear out these concerns, considering that there has been “no noticeable decline in the use of LIBOR by market participants.”⁸³ The Review goes on to point out that most market participants consulted on the issue argued for the use of some form of LIBOR rather than an alternative mechanism.⁸⁴ However, the question remains whether the choice to merely reform rather than replace LIBOR is a feasible long-term solution.⁸⁵ The Wheatley Review points out that an internationally coordinated effort to analyze potential alternative benchmarks is required before any major change is imposed.⁸⁶

Second, the Wheatley Review concluded that submissions must be verifiable based on transaction data, rather than simply based on each bank’s own estimate of the rate at which it could borrow on any given day.⁸⁷ If a bank’s submission is verified with data about the bank’s transactions, rather than simply being taken at face value, the rate-setting process is less susceptible to manipulation.⁸⁸ These strict procedures have both internal and external regulatory components and contain both intermediate measures that allow for immediate implementation as well as longer-term mechanisms to prevent future scandals.⁸⁹

Finally, the Wheatley Review determined that the role of setting LIBOR should remain in the hands of the market participants, i.e., the financial institutions, rather than being set by the government.⁹⁰ The Wheatley Review states that the setting of a global benchmark such as LIBOR is most appropriately done by a private entity that engages market participants in the development of the tool itself.⁹¹ The Review highlights two reasons for

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Evan Weinberger, *Proposed Libor Fixes May Open Door to New Benchmark*, LAW 360, Sept. 28, 2012, <http://www.law360.com/banking/articles/382575/proposed-libor-fixes-may-open-door-to-new-benchmark>.

⁸⁶ *The Wheatley Review*, *supra* note 8, at 7.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 31–33 (describing the proposed submission process, including the types of data that would be acceptable to use to form submissions and the internal and external process for verifying those submissions).

⁹⁰ *Id.* at 7.

⁹¹ *Id.*

keeping the LIBOR rate-setting process in the hands of private participants. First, it points to the role that market participants play in setting other benchmarks, even though none of those benchmarks are as widely used as LIBOR. Second, it points to the expertise that market participants have about which benchmark to use for a particular type of financial contract.⁹² However, the authors of the Review also designate a new external regulatory role over LIBOR submissions, stating that the role of such external bodies is to ensure that the benchmark is reliable and verifiable and maintains its integrity.⁹³

The Wheatley Review's Ten-Point Plan stems entirely from these three conclusions and offers an implementation process for the U.K. going forward.⁹⁴ It presents specific recommendations, which going forward will represent the U.K.'s entire regulatory response to the LIBOR rate-setting scandal.⁹⁵ The BBA, in cooperation with U.K. regulators, began implementing many of these recommendations in 2013.⁹⁶ LIBOR was sold to NYSE Euronet, the U.S. company that runs the New York Stock Exchange, in July of 2013.⁹⁷ While NYSE Euronet has assured investors that it will continue to implement LIBOR reforms, LIBOR will no longer be under the purview of U.K. regulators, and no information is available as to whether the Wheatley review recommendations will be the regulations implemented.⁹⁸

B. The Ten-Point Plan: Recommendations to the U.K. for a National Response to the LIBOR Rate-Setting Scandal

The Ten-Point Plan has several overarching recommendations focused on making LIBOR a safer tool for setting worldwide interest rates. The first of these recommendations is that the administration of and submission to

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*; Julia Irvine, *Government adopts Wheatley in full*, ECONOMIA, Oct. 17, 2012, available at <http://economia.icaew.com/News/October2012/Government-adopts-Wheatley-in-full>.

⁹⁵ Irvine, *supra* note 94.

⁹⁶ *BBALIBOR Basics*, *supra* note 20.

⁹⁷ David Enrich, Jacob Bunge & Cassel Bryan-Lowe, *NYSE Euronext to Take Over LIBOR: British Authorities Started Looking for New Owner Last Year*, WALL ST. J., July 9, 2013, available at <http://online.wsj.com/article/SB1000142412788732450740457859524333548714.html>.

⁹⁸ *Id.*

LIBOR should be statutorily regulated.⁹⁹ This recommendation involves bringing LIBOR under the U.K.'s Financial Services and Markets Act (FSMA).¹⁰⁰ Regulation will include an "Approved Persons regime," which will require each bank submitting a LIBOR proposal to designate someone whose responsibility will be to manage the LIBOR submissions process and to submit independent audits periodically to regulators.¹⁰¹ Additionally, the recommendations include making the manipulation or attempted manipulation of LIBOR a criminal offense in the U.K., particularly given the likelihood that such manipulation "occur[s] in full awareness of the potentially serious and wide ranging [sic] impact that manipulation of LIBOR may have in light of its global use."¹⁰²

The recommendations also take on an international regulatory slant, in that the Wheatley Review recognizes ongoing efforts by the EU and IOSCO to create general guidelines around benchmarks and acknowledges that the recommendations for LIBOR perhaps should extend to other financial benchmarks in the future.¹⁰³ This Note proposes an addition to this idea, an examination of how an international body can enforce such guidelines and hold manipulators of benchmarks responsible at a global level. This is particularly important considering the ongoing civil and criminal investigations by regulatory bodies around the world. An international enforcement mechanism is crucial in the case of LIBOR, given the far-reaching consequences of any manipulation of such a rate.

The second recommendation suggests the BBA turn over the administration of LIBOR to a new body, which would be responsible not only for compilation and distribution of the rate but also for providing internal governance and oversight.¹⁰⁴ However, the Wheatley Review does not recommend that the new administrator of LIBOR be a public institution.¹⁰⁵ Instead, the review recommends that LIBOR should remain a market-led benchmark and should be administered by a private entity.¹⁰⁶ The reasons for this conclusion are grounded on the belief that LIBOR must be

⁹⁹ *The Wheatley Review*, *supra* note 8, at 8.

¹⁰⁰ *Id.* at 11.

¹⁰¹ *Id.*; Maureen Kraten & Michael Kraten, *The Wheatley Report: A LIBOR Solution?*, AQPQ BLOG, Oct. 8, 2012, <http://aqpq.org/2012/10/08/the-wheatley-report-a-libor-solution/>.

¹⁰² *The Wheatley Review*, *supra* note 8, at 18.

¹⁰³ *Id.* at 13.

¹⁰⁴ *Id.* at 8.

¹⁰⁵ *Id.* at 22.

¹⁰⁶ *Id.*

able to evolve to meet the needs of the market and that a private organization will have a greater incentive to ensure that flexibility.¹⁰⁷

The Wheatley Review also states that other problems could arise if LIBOR was administered by a public agency. It specifically raises a concern about establishing a global precedent of transferring other benchmarks to public entities for administration rather than simply oversight and regulation.¹⁰⁸ Again, here the authors of the Wheatley Review recognize the important role that LIBOR plays in the global financial market and how regulation and oversight of LIBOR may impact international regulatory policy and precedent.

Building upon the transfer of LIBOR from BBA administration, the third recommendation is that the new administrator of LIBOR conduct ongoing surveillance to ensure that LIBOR submissions are accurate and statistically valid.¹⁰⁹ First, the review recommends that the BBA delegate the process of transferring LIBOR to the new administrator to an independent committee put together by the British government and the FSA.¹¹⁰ This committee will then be responsible for ensuring that the new administrator reforms the LIBOR governance structure to increase its credibility.¹¹¹

While the Wheatley Review allows for some flexibility in establishing the new governance structure, the review makes clear the purposes of such a structure, including requiring the new administrator “to analyse [sic] and scrutinise [sic] submissions from contributing banks.”¹¹² Additionally, the Review strongly recommends that the structure “include a prominent decision-making and oversight role conducted by an independent and powerful committee with the ability to operate autonomously.”¹¹³

Additionally, the Wheatley Review recommendations provide for the administrator to take on some specific roles “in order to ensure that confidence in the integrity of LIBOR as a benchmark is widely restored.”¹¹⁴ These recommendations are particularly focused on ensuring the integrity and accuracy of the member banks’ submissions process. Included in these recommendations are requirements that the administrator ensure that LIBOR

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 8.

¹¹⁰ *Id.* at 23.

¹¹¹ *Id.*

¹¹² *Id.* at 24.

¹¹³ *Id.*

¹¹⁴ *Id.*

is not reserved only for specific market participants, that the bank submissions are strictly scrutinized both before and after publication utilizing statistical analysis, and that a process for accepting banks as members is clearly developed.¹¹⁵

The next recommendation also encompasses the role of the independent oversight committee.¹¹⁶ The Wheatley Review particularly recommends involving the oversight committee in the development of a code of conduct for contributing banks, the administrator, and the committee itself.¹¹⁷ The purpose of this oversight committee is to provide an additional layer of transparency, and to this end the review authors recommend that the committee's meetings should be published along with details of elections to the committee.¹¹⁸ However, the review also recommends that such membership not include regulators, as the purpose of the committee is to establish an internal oversight mechanism that works in tandem with the additional external regulation of LIBOR.¹¹⁹

Most of these recommendations are focused on the establishment of external LIBOR structures, but questions remain regarding the role that international players may have in the governance of the new LIBOR structure. Given that the existing LIBOR board represents banks from around the world,¹²⁰ it is also unclear whether the home base of LIBOR should remain in the U.K. and how the make-up of the membership board will reflect the global nature of LIBOR, given that the responsibility for regulation under this new plan will lie solely with the U.K.¹²¹

¹¹⁵ *Id.* As discussed herein at Parts II.C and II.D, LIBOR was easily manipulated by the banks participating in it, for several reasons. First, because LIBOR was reserved only for specific market participants, these participants could more easily collude due to the amount of control they exercised. Additionally, LIBOR only painted a limited picture of bank risk, as some banks, potentially ones facing more or less risk than the participants, were not included in the setting process. Second, because submissions were not scrutinized for accuracy, the participants had the ability to—and did—falsify submissions in order to hide potential financial problems facing them. Finally because no clear criteria existed for banks to be accepted to the LIBOR board, there was no way to broaden market participation in LIBOR or ensure that LIBOR was providing an accurate picture of the overall health of the banking industry.

¹¹⁶ *Id.* at 25.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Consol. Amended Complaint Balt., *supra* note 1, at 3.

¹²¹ *The Wheatley Review*, *supra* note 8, at 11.

The fourth recommendation in the ten-point plan shifts gears into concern over the specific rules governing LIBOR.¹²² This recommendation requires immediate compliance with the guidelines from the banks making LIBOR submissions.¹²³ Particularly, immediate compliance is sought on requirements that banks support their submissions to LIBOR with transactional data.¹²⁴ The authors of the Wheatley Review suggest some intermediate submission guidelines to govern this process while the formal code of conduct and regulatory guidelines continue to be developed.¹²⁵ These intermediate guidelines set out the specific types of data that banks should use to verify their submissions. Because not all banks borrow funds daily, as every bank does not need to borrow money daily to meet business needs, the data requirements must be specific to govern submissions not based on actual borrowing rates for the day.¹²⁶ Examples of some types of transactions a bank could use to verify its submission include transactions in the unsecured inter-bank deposit market or other unsecured deposit markets, such as certificates of deposit and commercial paper.¹²⁷

The goal of utilizing these intermediate measures is to introduce much-needed immediate reforms before the full regulatory recommendations.¹²⁸ Interestingly, the Wheatley Review notes that these submission guidelines are modeled on those set forth in a settlement between the Commodities Futures Trading Commission (CFTC), and Barclays Bank.¹²⁹ Again, this type of transfer of regulatory models across national boundaries reveals the closely tied global regulatory market into which these new LIBOR regulations are being introduced.

With recommendation five, the Wheatley Review again focuses on longer term solutions with the recommendation that the future administrator of LIBOR set forth a Code of Conduct to “serve as a manual for internal governance and organisation [sic] of LIBOR submission.”¹³⁰ Additionally, this code of conduct should serve as a guide to the FSA regulation of

¹²² *Id.* at 8.

¹²³ *Id.*

¹²⁴ *Id.* at 27–28.

¹²⁵ *Id.* at 28.

¹²⁶ *Id.*; *BBALIBOR Basics*, *supra* note 20.

¹²⁷ *The Wheatley Review*, *supra* note 8, at 28.

¹²⁸ *Id.*

¹²⁹ *Id.* at 29.

¹³⁰ *Id.* at 30.

LIBOR.¹³¹ However, the authors of the Wheatley Review recommend that industry participants, not the FSA, draft the code.¹³²

The Wheatley Review outlines the code of conduct's scope to include information about submission procedures, internal system and control policies, requirements for submitting banks regarding recording transactional data, and industry guidelines for assurance and audit.¹³³ Essentially this code of conduct would operate as a detailed rulebook for both LIBOR contributors as well as the administrator of LIBOR and the independent review committee.¹³⁴

Recommendations six through nine deal with immediate actions to be taken by the BBA while other recommendations are still in the implementation phase.¹³⁵ The sixth recommendation directs the BBA to stop compiling and publishing LIBOR for any currency for which the trade data is insufficient to corroborate the submissions.¹³⁶ At the time of the Wheatley Review's publication, LIBOR was published for ten currencies and fifteen different maturities.¹³⁷ The authors of the review recommend that where the volume of transactions for a LIBOR benchmark is low or where another benchmark or domestic alternative is generally preferred, that currency should be phased out of the submissions process.¹³⁸ The purpose of the phasing out, according to the review, is to ensure that LIBOR submissions can be verified by supporting transactional data.¹³⁹

Accordingly, the Wheatley Review recommends that some currencies, including the Australian Dollar, the Canadian Dollar, the Danish Kroner, the New Zealand Dollar, and the Swedish Kronor, be phased out after the BBA creates a plan in consultation with both users and submitters.¹⁴⁰ In order to implement this recommendation, it will be vital that the administrator of LIBOR reach out to market participants and users of LIBOR in these

¹³¹ *Id.* at 30–31.

¹³² *Id.*

¹³³ *Id.* at 31–33.

¹³⁴ *Id.* at 30.

¹³⁵ *Id.* at 8.

¹³⁶ *Id.*

¹³⁷ *Id.* at 35; Maturities refer to the length of time the particular interest rate would hold for a loan to a bank in that currency. For example, LIBOR submissions are provided for a range of maturities, from overnight to twelve months, for which the rates vary depending on the length of time the bank would have before a particular loan would be due. *BBALIBOR Basics*, *supra* note 20.

¹³⁸ *The Wheatley Review*, *supra* note 8, at 35–36.

¹³⁹ *Id.* at 36.

¹⁴⁰ *Id.* at 8, 37.

currencies to avoid creating large unintended consequences from the phase-out, such as large-scale litigation to redefine outstanding contracts that reference LIBOR in these currencies.¹⁴¹ Again, the implementation of this recommendation will require that the administrator and regulator of LIBOR have a clear understanding of the impact these decisions regarding LIBOR will have on the global financial market.

The seventh recommendation directs the BBA to cease the daily publication of the LIBOR submissions and, instead, to shift to publishing each bank's submissions every three months.¹⁴² This recommendation arises from a concern that the daily publication of rates, while thought to promote transparency and accountability for the sake of accuracy of submissions, actually facilitated the manipulation surrounding the recent LIBOR scandal.¹⁴³ As mentioned earlier, the BBA publishes each bank's individual submission after the LIBOR rate is set for the day.¹⁴⁴ The thinking behind this publication process is that the banks, knowing the rates will be published, are less likely to submit false rates that can be identified by the public.¹⁴⁵ However, in reality, this immediate publication could instead facilitate manipulation, in that the publication allows banks to estimate the likely impact of their submission in advance and therefore tamper with that submission to get the desired result.¹⁴⁶ Also, the LIBOR submission by a particular bank often provides an implicit signal to the public regarding that bank's credit-worthiness;¹⁴⁷ therefore, daily publication may create an incentive to a bank to submit a lower rate to uphold this implication.¹⁴⁸ The recommendation of the Wheatley Review is to delay the submission for at least three months in order to circumvent both of these potential incentives for manipulation and to retain the transparency and accountability goals of publication.¹⁴⁹

The eighth recommendation in the ten-point plan focuses on broadening participation in LIBOR, suggesting that banks, even those currently not on the LIBOR board, should be encouraged to participate as widely as possible

¹⁴¹ *Id.*

¹⁴² *Id.* at 37–38.

¹⁴³ *Id.*

¹⁴⁴ Consol. Amended Complaint Balt., *supra* note 1, at 8; *BBALIBOR Basics*, *supra* note 20.

¹⁴⁵ *BBALIBOR Basics*, *supra* note 20; *The Wheatley Review*, *supra* note 8, at 37.

¹⁴⁶ *The Wheatley Review*, *supra* note 8, at 37.

¹⁴⁷ *Id.* at 38.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 37–38.

in the process of compiling the rate.¹⁵⁰ The Wheatley Review even suggests making such participation compulsory through new regulatory reforms if necessary.¹⁵¹ The Wheatley Review notes that the broader the sample size of banks submitting to set the LIBOR rate, the more accurate and credible the rate will become.¹⁵² This increase in accuracy and credibility is specifically derived from the decreasing impact that individual submissions will have on the published rates and the hope that the rate overall may become more representative of the actual global market.¹⁵³ The role of international regulatory bodies in encouraging broader participation is vital to ensuring this recommendation meets its actual goal, particularly considering the importance of LIBOR in the global financial market.¹⁵⁴ In the review, international authorities are asked to engage in encouraging participation among banks in their jurisdictions.¹⁵⁵ The ninth recommendation focuses on limiting the risk posed by a potential failure of LIBOR to market participants.¹⁵⁶ Again, LIBOR is the rate against which the interest rates on trillions of dollars of financial instruments around the world are set.¹⁵⁷ One of the fears that the Wheatley Review raises about the idea of scrapping LIBOR for another benchmark rate is the risk that such a decision would pose to market participants who used LIBOR as a benchmark for these trillions of dollars of contract liabilities.¹⁵⁸ The Wheatley Review acknowledges the problems that would result from a failure to publish LIBOR—even for one day—and states that the current contingency plan for such a failure in most standard LIBOR-based financial contracts is unworkable.¹⁵⁹ Most contracts referencing LIBOR require an alternate rate to be calculated by simply replicating, at the participant level, the submission process.¹⁶⁰ Just as the LIBOR submission process involves a set of banks calling in to report their proposed borrowing rates that day, the contingency

¹⁵⁰ *Id.* at 8, 38.

¹⁵¹ *Id.*

¹⁵² *Id.* at 38.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 9.

¹⁵⁷ Enrich & Colchester, *supra* note 2; Consol. Amended Complaint Balt., *supra* note 1, at 2.

¹⁵⁸ *The Wheatley Review*, *supra* note 8, at 7.

¹⁵⁹ *Id.* at 39–40.

¹⁶⁰ *Id.* at 39.

plan requires the market participant to call a set of reference banks to get similar quotes for the currency and maturity specified in the contract.¹⁶¹

The reasons this contingency plan is unworkable are three-fold:

1. The sheer volume of contracts referencing LIBOR around the world makes the number of contacting market participants unwieldy;
2. If LIBOR has failed, then the reference banks, who are also likely to be the banks submitting to LIBOR, may not be prepared to provide such quotes; and
3. Because the use of such contingencies would be so widespread, differences in individual contract provisions could lead counterparties to have different interest rates payable between them.¹⁶²

“The Wheatley Review recommends that industry bodies that publish standardized legal documentation in relation to contracts referencing LIBOR, as well as LIBOR users, . . . develop robust contingency procedures to take effect in the event of a longer-term disruption to the publication of LIBOR.”¹⁶³ However, this recommendation again highlights the on-going need for international regulatory cooperation. Currently, many of these industry players who publish such model contracts operate across international channels.¹⁶⁴ For example, the International Swaps and Derivatives Association, which developed the commonly used ISDA Master Agreement, has members from over fifty-nine countries.¹⁶⁵ In order to get this standardized contingency plan in place, organizations such as ISDA will have to come to a cooperative solution trans-nationally on an alternative benchmark to use if LIBOR is not available.

The final recommendation focuses on international cooperation and is key to the purposes of this Note.¹⁶⁶ The tenth recommendation of the Wheatley Review ten-point plan calls for the U.K. to work closely with the international community regarding the long-term future of LIBOR and other

¹⁶¹ *Id.*

¹⁶² *Id.* at 39–40.

¹⁶³ *Id.* at 40.

¹⁶⁴ Singher, *supra* note 66, at 1460–61; *About ISDA*, INT'L SWAPS AND DERIVATIVES ASS'N, <http://www2.isda.org/about-isda/> [hereinafter *About ISDA*].

¹⁶⁵ *About ISDA*, *supra* note 164.

¹⁶⁶ *The Wheatley Review*, *supra* note 8, at 9.

global benchmarks, including the establishment of principles for other global benchmarks, both those already in use and those that might be created in the future.¹⁶⁷ First, the authors of the review note that international regulatory authorities should take up a discussion of the existing uses of rates such as LIBOR and the role regulators should play in effecting a potential shift toward an alternative benchmark.¹⁶⁸ Second, the authors of the review examine the role of the international community in developing a clear set of principles to govern the regulation of all benchmarks.¹⁶⁹

First, in looking at the role of international bodies in examining the potential to transition from LIBOR to an alternative global rate, the authors of the Wheatley Review recommend such a transition from LIBOR as necessary only when an alternative benchmark might be a more appropriate measure for setting the rate of a particular product.¹⁷⁰ For example, if a financial product does not depend on interbank liquidity and credit risk, then LIBOR may be an inappropriate method for setting rates for that product because those factors are the primary considerations on which LIBOR is based.¹⁷¹ In these instances, the Wheatley Review believes that international regulators, brought together by a group such as ISDA, might be able to manage the risk posed for future contracts when the benchmark rate changes.¹⁷² Additionally, the Wheatley Review also believes that international regulators could encourage market participants to change their use of global benchmarks by encouraging the use of the reference rate that most fits the needs and requirements of a particular financial transaction, rather than the most common rate.¹⁷³ However, as a review sponsored by the FSA—a U.K. regulatory entity—the Wheatley Review can offer little more than encouragement.

Finally, the Wheatley Review notes the role the international community can play in establishing “principles for effective global benchmarks.”¹⁷⁴ The Wheatley Review authors point to ongoing work that IOSCO and other international entities are currently beginning to undertake. Particularly interesting is the IOSCO Board-Level Task Force on Financial Market

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 43.

¹⁶⁹ *Id.* at 53.

¹⁷⁰ *Id.* at 43–44.

¹⁷¹ *Id.* at 44.

¹⁷² *Id.* at 43, 46.

¹⁷³ *Id.* at 46.

¹⁷⁴ *Id.* at 53.

Benchmarks, established to look at benchmarks other than LIBOR and chaired by Martin Wheatley, author of the Wheatley Review, and Gary Gensler, Chairman of the CFTC.¹⁷⁵ The purpose of the taskforce is to identify benchmark rates, define the types of benchmarks relevant to financial markets, propose regulatory and oversight policies for these benchmarks, and develop global policy guidance and principles for the benchmarks in government regulation and self-regulation.¹⁷⁶ But, the establishment of this committee raises questions of how these international policy-setting efforts may result in actual enforcement of regulations, particularly any focus that may be given to establishing such enforcement mechanisms at an international level.

C. International Regulatory Responses: Fitting LIBOR into Current Models for International Regulatory Response

Two of the most important bodies that provide international responses to banking regulation issues are the Basel Committee and IOSCO.¹⁷⁷ Examining how these bodies currently operate may provide some insight into how the new regulatory responses to LIBOR can be implemented and enforced at an international level. Both of these bodies currently operate through a similar membership structure, issuing guidelines developed cooperatively among members but implemented nationally by the regulatory bodies that make up those memberships.¹⁷⁸ However, the two bodies have different missions and areas of coverage.¹⁷⁹ While IOSCO governs the regulation of the securities markets, such as how to trade securities, the Basel Committee examines the regulation of banks themselves, looking at the amount of liquidity a bank should have on hand.¹⁸⁰ As LIBOR is primarily a benchmark used in the setting of rates for securities transactions and IOSCO is establishing the Task Force on Financial Market Benchmarks, IOSCO's model is most relevant to the international regulatory response discussed in this Note.¹⁸¹

¹⁷⁵ *Id.* at 56–57.

¹⁷⁶ *Id.* at 57.

¹⁷⁷ Singher, *supra* note 66, at 1461–63 (describing the role of these bodies in issuing guidelines for the regulation of derivatives-related risks); *IOSCO Historical Background*, *supra* note 67; *About Basel Committee*, *supra* note 67.

¹⁷⁸ *IOSCO Historical Background*, *supra* note 67; *About Basel Committee*, *supra* note 67.

¹⁷⁹ *IOSCO Historical Background*, *supra* note 67; *About Basel Committee*, *supra* note 67.

¹⁸⁰ *IOSCO Historical Background*, *supra* note 67; *About Basel Committee*, *supra* note 67.

¹⁸¹ *BBALIBOR Basics*, *supra* note 20; *The Wheatley Review*, *supra* note 8, at 56–57.

Securities markets allow for the exchange of a variety of financial instruments, many of which use LIBOR as a benchmark, including stocks, treasury stocks, certificates of interest in profit-sharing agreements, investment contracts, and more.¹⁸² Founded in 1983, IOSCO shifted from an organization focused solely on the Americas to one focused on creating a global body for the cooperative development of securities regulations.¹⁸³ IOSCO has adopted a three-fold purpose:

1. To cooperate in the development, implementation, and promotion of international standards of regulation and enforcement;
2. To enhance investor protection and confidence in the securities markets by exchanging information about and cooperating in the enforcement of misconduct as it relates to the supervision of securities markets; and
3. To exchange information at a global level for the purpose of strengthening markets and providing appropriate regulation.¹⁸⁴

As discussed previously, IOSCO is already working to provide regulatory guidance around both LIBOR and global benchmarks generally by creating the Task Force on Financial Market Benchmarks.¹⁸⁵ The focus of this task force is to develop policy guidelines for the regulation of global benchmarks, including but not limited to LIBOR.¹⁸⁶ The task force, in conjunction with IOSCO more generally, will also develop recommendations for how

¹⁸² *Securities*, THE LEGAL INFORMATION INSTITUTE OF CORNELL UNIVERSITY SCHOOL OF LAW, <http://www.law.cornell.edu/wex/securities>.

¹⁸³ *IOSCO Historical Background*, *supra* note 67.

¹⁸⁴ *The International Organization of Securities Commissions: General Information*, INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, <http://www.iosco.org/about/>.

¹⁸⁵ Caroline Allen, *IOSCO creates task force on financial market benchmarks*, INVESTMENT EUROPE (Sept. 14, 2012), <http://www.investmenteurope.net/investment-europe/news/2205686/iosco-creates-task-force-on-financial-market-benchmarks>; David Bannister, *IOSCO creates board level task force on financial market benchmarks*, BANKING TECHNOLOGY (Sept. 17, 2012), <http://www.bankingtech.com/48909/IOSCO-creates-board-level-task-force-on-financial-market-benchmarks/> (describing the creation of the Task Force on Financial Market Benchmarks to create a cooperative framework for regulating global benchmarks such as LIBOR); Gavin Finch, *Wheatley, Gensler to Head IOSCO Task Force on Benchmark Rates*, BLOOMBERG (Sept. 14, 2012), <http://www.bloomberg.com/news/2012-09-14/wheatley-gensler-to-head-iosco-task-force-on-benchmark-rates.html>.

¹⁸⁶ Allen, *supra* note 185; Bannister, *supra* note 185; Finch, *supra* note 185.

countries should enforce regulatory policies within their own regulatory structures.¹⁸⁷

Enforcement of banking regulation is particularly important in the LIBOR crisis, as the investigations into the conspiracy cross multiple national boundaries.¹⁸⁸ IOSCO first addressed this need for international cooperation in enforcement in 2002, and again in 2012 when the members of IOSCO drafted the “Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information” (IOSCO MOU).¹⁸⁹ This IOSCO MOU provided signatory countries with the right to exchange information across national borders to assist one another in the investigation of regulatory violations.¹⁹⁰ The purpose of IOSCO was to create a cooperative commitment to this type of information sharing and to show a desire to engage in international enforcement of national regulatory policy.¹⁹¹ The IOSCO MOU contains provisions that provide for the sharing of both information about ongoing investigations and facts discovered in bringing criminal charges, as well as ones not allowing national policy or legislation barring the sharing of such information to hinder participation as required by the MOU.¹⁹² To become a signatory to the IOSCO MOU, a regulatory institution must show its ability to comply with the requirements, although non-signatory countries could endorse and utilize the MOU’s guidelines to inform their regulatory policies without making such a showing.¹⁹³ To prove such ability, the regulatory institutions must show that the laws of their nation are in compliance with the general policy guidelines set forth by IOSCO in regards to securities regulation.¹⁹⁴ This additional requirement not only promotes regulatory consistency but also provides additional ammunition to ensure that information collected by signatory

¹⁸⁷ Bannister, *supra* note 185.

¹⁸⁸ Consol. Amended Complaint Balt., *supra* note 1, at 9.

¹⁸⁹ *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information*, INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, May 2002, 1 [hereinafter *IOSCO MOU*].

¹⁹⁰ Press Release, Securities and Exchange Commission, SEC Announces IOSCO Unveiling of Multilateral Agreement on Enforcement Cooperation (Oct. 31, 2003) (on file with author).

¹⁹¹ *Id.*

¹⁹² *IOSCO MOU*, *supra* note 189, at 3–4.

¹⁹³ *Id.* at 11–12

¹⁹⁴ Janet Austin, *IOSCO’S Multilateral Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information*, 23 CRIM. L.F. 393, 395 (describing the impact of the IOSCO MOU on the criminal prosecution of securities fraud at a national level).

countries in investigations is useful to others.¹⁹⁵ However, this tool did not work in the case of LIBOR, primarily because the benchmark was unregulated prior to the rate-setting conspiracy.¹⁹⁶

As this task force moves forward, this author is interested to see how the following questions get answered. First, will the recommendations provided by the Wheatley Review will largely reflect the general guidelines developed by this task force for global benchmarks more broadly? Second, will the task force recommends replacing LIBOR altogether or will it develop a more precise set of tools both broadening the number of global benchmarks and the regulatory bodies governing them?

IV. CONCLUSION

The results of the LIBOR crisis and its impact on the international regulatory environment are still unraveling. However, the recent global banking and regulatory crises, such as the liquidity and credit crisis of 2008 and the LIBOR rate-setting scandal, raise an additional question about whether the mechanisms currently in place sufficiently address the needs of the international banking industry. While the Wheatley Review notes that its purpose is only to deal with LIBOR regulation from a national perspective, the review calls for international action on these issues. International action would provide consistency across borders as well as provide clear expectations to financial markets regarding ongoing regulatory decisions. The need for the stability provided by international standards is even more clear, given that LIBOR was recently sold to a U.S.-based company, transferring regulatory responsibility to the U.S. Currently, without global regulatory policy for benchmarks, no evidence exists to ensure that the Wheatley Review recommendations currently being implemented will continue upon the transfer of LIBOR to this new owner.

IOSCO currently appears to be the place where these issues will be addressed, given the establishment of the committee to study global benchmarks such as LIBOR. However, the depth and breadth of global financial crises of recent years raises additional questions of whether purely cooperative models such as IOSCO are sufficient to regulate the global banking industry.

¹⁹⁵ *Id.*

¹⁹⁶ Consol. Amended Complaint Balt., *supra* note 1, at 8.

Perhaps the banking industry should move away from a purely cooperative model and look to a more binding model of regulatory enforcement. A binding regulatory enforcement entity could not only provide enforcement between state actors but also allow private actors to hold banks and financial institutions responsible before an international tribunal. The current lack of an international legal body to enforce such public and private rights of action is particularly pertinent to LIBOR, given the fact that no regulatory body had taken on an active role in overseeing LIBOR. Arguably that misstep resulted in the failure to stop the conspiracy early on.

The current IOSCO entity or the BASEL III could expand to include such capacity similar to how the World Trade Organization writes a dispute settlement system into its negotiated agreements.¹⁹⁷ However, to encompass such a shift in roles these existing bodies, particularly IOSCO, would need to change their current models of gaining international cooperation, in several key ways. First, IOSCO will need to begin monitoring new and current global benchmarks and financial tools to ensure that these tools are under regulatory purview. For example, if IOSCO was monitoring LIBOR's regulation, the body could have played a role in influencing the British regulatory entities' decision not to regulate LIBOR and curbed the crisis by placing pressure on these entities to regulate the benchmark. Additionally, IOSCO does not currently contain a dispute-resolution arm, and it would either need to form one or to delegate dispute-resolution authority to another body in order to create a forum for hearing such disputes. In this way, when the LIBOR crisis comes to a head, the dispute resolution body could play a role in determining state actor responsibility in failing to regulate.

A lack of regulation of financial tools and benchmarks was a key issue in the explosion of the financial crises of recent years. From the subprime mortgage market to LIBOR, the failure of state actors to properly regulate financial instruments created a ripple effect in economies across the globe costing both public and private actors billions of dollars in recent years. An international approach is essential in preventing such future crises and mitigating the current impacts of such crises. However, the current mechanisms are insufficient to meet such demands. Over the next several years, the financial industry will need to look to models in international trade and human rights for examples of how to create a global approach to

¹⁹⁷ *Understanding the WTO: Who We Are*, WORLD TRADE ORGANIZATION, http://www.wto.org/English/thewto_e/whatis_e/who_we_are_e.htm.

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regulation that balances the need for flexibility with the need for enforcement.

