August 29, 2022

Ms. Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Docket No. R-1775, RIN 7100-AG34
Regulation Implementing the Adjustable Interest Rate (LIBOR) Act, 87 Federal Register 45268 (Jul 28, 2022)

The American Bankers Association (ABA)¹ is pleased to submit our comments to the Board of Governors of the Federal Reserve System (Board) to its proposed rule that would implement the Adjustable Interest Rate (LIBOR) Act (Act).² The proposed rule would establish benchmark replacements for contracts governed by U.S. law that reference certain tenors of U.S. Dollar LIBOR and that do not have terms that provide for the use of a clearly defined and practicable replacement benchmark rate following the first London banking day after June 30, 2023. The proposed rule also would provide additional definitions and clarifications consistent with the Act.

ABA appreciates the Board’s efforts to complete implementation of the Act so that banks and other market participants can continue moving forward expeditiously to complete the transition from LIBOR and, in particular, to realize the benefits of the Act’s provisions to address “tough legacy” contracts. To further that goal, ABA recommends that the Board address three additional points, described below.

First, we recommend that the Board specifically include in the final regulation the text of §104(f)(6)³ specifying that the Act does not alter or impair the rights or obligations of any person, or the authorities of any agency, under Federal consumer financial law. In addition, we recommend that in the Supplementary Information to the final regulation it offer as an illustration of its application the Consumer Financial Protection Bureau’s (Bureau) Regulation Z amendments.⁴ Second, we believe that it would be useful if the

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¹ The American Bankers Association is the voice of the nation’s $24.0 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.9 trillion in deposits and extend $11.4 trillion in loans.
³ Id. at 136 Stat. 829-30.
Board can address the ambiguity of LIBOR being “nonrepresentative,” even if a “synthetic” LIBOR continues to be published. Third, in light of the Board’s determination to identify no benchmark replacement conforming changes, we believe the Board should clarify that such changes made as permitted under the terms of existing LIBOR contracts would not conflict with the application of the Act to the determining person’s determination and implementation of the Board-selected benchmark replacement for such contracts, including availability of the Act’s safe harbor.

**Discussion**

LIBOR, formerly known as the London Interbank Offered Rate, is an interest rate benchmark that was the dominant reference rate used in financial contracts in recent decades and remains in extensive use today. However, for various reasons, U.S. Dollar LIBOR (USD LIBOR) is expected to be discontinued after June 30, 2023. In response to its planned cessation, financial regulators have encouraged market participants to transition away from USD LIBOR as a reference rate as soon as practicable.

**Expediting the Transition of Consumer Assets Away from LIBOR**

As part of that effort, with respect to the consumer finance context, the Bureau amended Regulation Z (the Truth in Lending Act’s implementing regulation) in December 2021 to provide example replacement indices for LIBOR indices that meet certain Regulation Z standards. Specifically, the Bureau amended Regulation Z to permit creditors for home equity lines of credit and credit card issuers to transition existing accounts that use a LIBOR index to a replacement index as early as April 1, 2022. Notably, the Bureau also amended Regulation Z to memorialize its determination that the prime rate published in the Wall Street Journal (Prime) and certain spread-adjusted Secured Overnight Financing Rates (SOFR) meet the regulation’s standards for replacement indices for HELOCs and credit card accounts.

About three months after finalization of the Regulation Z amendments, on March 15, 2022, Congress passed the Act to address so called “tough legacy contracts,” contracts that reference USD LIBOR but will not mature by June 30, 2023, cannot be easily amended, and lack adequate fallback provisions providing for a clearly defined or practicable replacement benchmark following cessation of USD LIBOR. The Act provides that “the Board-selected benchmark replacement shall be the benchmark replacement” for any LIBOR contract that contains no fallback provisions (or that contains fallback provisions that identify neither a specific benchmark replacement nor a determining person). However, §104(f)(6) of the Act also provides in relevant part, “Nothing in this division may be construed to alter or impair… the rights or obligations of any person, or the authorities of any agency, under Federal consumer financial law, as defined in section 1002 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5481).” The Federal consumer financial laws include the Truth in Lending Act and

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6 Id. at 69,781.
7 Id. at 69,793, cmt. 2-40(f)(3)(ii)(A).
8 See 136 Stat. 828 (§ 104(a) of the Act) (emphasis added).
Regulation Z, which the Bureau amended pursuant to its authority under the Consumer Financial Protection Act of 2010.  

The proposed rule mirrors the Act in providing that the Board-selected benchmark replacement shall be the benchmark replacement for a covered contract.  However, the proposed rule does not mention or reference §104(f)(6) of the Act.

While this omission in the proposed rule would not change the validity and force of §104(f)(6) of the Act, to avoid confusion and it being overlooked when determining or reviewing a creditor’s selection of an index other than one identified as a Board-selected benchmark replacement rate, there is merit in including the statutory language in the final regulation. In addition, the Supplementary Information to the final regulation should use the example of the Bureau’s amendments to Regulation Z to illustrate its application.

The Regulation Z amendments encouraged creditors to not wait for USD LIBOR’s cessation to proceed with the transition away from USD LIBOR by specifically allowing creditors to transition away from USD LIBOR prior to its expected sunset. Furthermore, the Bureau’s proposed and final amendments prompted some card issuers to choose to replace the USD LIBOR with Prime, as the Bureau found that Prime has historical fluctuations that are substantially similar to certain USD LIBOR indices and anticipated that some card issuers might choose Prime to replace a USD LIBOR index. In recognition and support of these Regulation Z amendments and the consequential and expected creditor decision to choose Prime as a replacement index, Congress included §104(f)(6) in the Act. The proposed rule should similarly support and recognize those amendments and creditor reactions to the amendments.

Not only does §104(f)(6) of the Act recognize and support the amended Regulation Z, the goals of the Regulation Z amendments are consistent with the Act’s goal “to preclude litigation related to existing contracts the terms of which do not provide for the use of a clearly defined or practicable replacement benchmark rate.” The Bureau’s purpose in amending Regulation Z identifying Prime and USD LIBOR as compliant replacements for USD LIBOR and providing a roadmap for HELOC creditors and card issuers to choose an alternative compliant replacement index was to facilitate

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10 See 87 Fed. Reg. at 45,279 (Section 253.3(a)(1) of the proposed rule).
11 “The Bureau determined ... that consumers, HELOC creditors, and card issuers would benefit substantially if HELOC creditors and card issuers could transition away from a LIBOR index before LIBOR is expected to become unavailable.” 86 Fed. Reg. at 69,716, 69,716 (emphasis added).
12 Id. at 69,760.
13 “The Bureau understands that some card issuers may choose to replace a LIBOR index with Prime.” Id. at 69,758.
14 See 136 Stat. 826 (§ 102(b)(2) of the Act).
compliance with Regulation Z and reduce the uncertainty with regard to the selection of a replacement index.\textsuperscript{15}

For these reasons, we urge the Board to specifically include in the final regulation the text of §104(f)(6) and, in the Supplementary Information to the final regulation, to offer as an illustration of its application the Regulation Z amendments.

\textit{“Synthetic” LIBOR as “Nonrepresentative”}

In addition, the Board has noted that some LIBOR contracts contain fallback provisions that (i) either identify a clear and practicable benchmark replacement or authorize a determining person to select a benchmark replacement, but (ii) are triggered only when LIBOR is unavailable. Significantly, the fallback provisions in these LIBOR contracts are not triggered expressly when LIBOR is available but “nonrepresentative.”\textsuperscript{16} This situation may arise if publication of a “synthetic” LIBOR continues after June 30, 2023, but is declared “nonrepresentative” by the United Kingdom’s Financial Conduct Authority, which regulates LIBOR’s administrator.\textsuperscript{17} Some market participants are concerned that the continued publication of synthetic LIBOR on and after June 30, 2023, even if determined to be nonrepresentative, could arguably give the impression that “LIBOR” remains available. Thus, they are concerned that they could face pressure to continue to use it for LIBOR contracts with fallback provisions that lack an express nonrepresentativeness trigger. In this scenario, because the LIBOR contract contains fallback provisions that identify a clear and practicable benchmark replacement, it would not be a covered contract for purposes of the proposed rule.

We note simply that, if the Board determines to address this situation in the final regulation, it could eliminate ambiguity and avoid confusion. Such a result would be consistent with the intent of the Act in further outlining a clear transition path for market participants to appropriate replacement benchmarks.

\textsuperscript{15} \textit{See, e.g.}, 86 Fed. Reg. at 69,741 (“To reduce uncertainty with respect to selecting a replacement index that meets the standards under proposed §1026.40(f)(3)(ii)(A), the Bureau proposed in proposed comment 40(f)(3)(ii)(A)-2 i to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of the 1- month and 3-month USD LIBOR indices.”); \textit{id.} at 69,751 (“To facilitate compliance, comment 40(f)(3)(ii)(B)-1 i includes a determination that Prime has historical fluctuations that are substantially similar to those of the 1- month and 3-month USD LIBOR indices.”); \textit{id.} at 69,758 (“To facilitate compliance, proposed comment 55(b)(7)(i)-1 i included a proposed determination that Prime has historical fluctuations that are substantially similar to those of the 1- month and 3-month USD LIBOR indices…”).

\textsuperscript{16} 87 Fed. Reg. at 45,272.

\textsuperscript{17} Such an FCA determination, if made, would reflect a determination that a “synthetic” LIBOR is not representative of the underlying market and economic reality LIBOR had been intended to measure—namely, the rate at which banks may lend to, or borrow from, other banks or agents in the money markets.
Benchmark Replacement Conforming Changes Permitted by the Existing Contract

The Act provides that the Federal Reserve can require any additional technical, administrative, or operational changes, alterations, or modifications to LIBOR contracts based on a determination that such changes, alterations, or modifications would address one or more issues affecting the implementation, administration, and calculation of the Board-selected benchmark replacement in LIBOR contracts (conforming changes).18 Under the proposed rule, the Board would not require any such changes, though it reserves the right to do so in the future by regulation or order.19 The proposed rule also indicates that, consistent with the Act, with respect to a LIBOR contract that is not a consumer loan, a calculating person may make any additional technical, administrative, or operational changes, alterations or modifications that, in that person’s reasonable judgment, would be necessary or appropriate to permit the implementation, administration, and calculation of the Board-selected benchmark replacement under or with respect to a LIBOR contract after giving due consideration to any changes, alterations, or modifications otherwise required by the Board under the proposed rule.20 This formulation reflects the decision to not extend the Act’s safe harbor protections under Section 105(c) to the determination of conforming changes made by calculating persons to LIBOR contracts that are consumer loans.

Though the Board essentially concludes that, with respect to most LIBOR contracts that are consumer loans, successful implementation of the Board-selected benchmark replacements indicated in the proposed rule should not require additional conforming changes, we note that there may be exceptions. For example, more complex consumer loans may have pricing language that more closely resembles language common in commercial loans, and conforming changes may avoid operational or interpretive complications.21

We note also that, in many such cases, these loans already include contract language that authorizes the lender to make conforming changes to facilitate administration of the loan. In such transactions, the desired conforming changes would be contractually permitted without reliance on the Board’s rulemaking authority under the Act and the proposed rule. Nevertheless, we urge the Board to clarify in the final regulation the potential ambiguity that such conforming changes independently permitted by a contract would not conflict with the application of the Act to the determining person’s determination and implementation of the Board-selected benchmark replacement for such contract, including availability of the Act’s safe harbor under Sections 105(c)(1) and (c)(2) of the Act. Without such clarification, this potential ambiguity could result in contracts that implement the Board-selected benchmark

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21 For purposes of this discussion, we assume that such loans will have been made in conformity with all applicable consumer protection laws and regulations.
replacement but create other operational risks or risks of disputes among parties, even when the calculating person has the contractual right to prevent such risks from arising. We acknowledge that interpretation of the contract language and the permissible scope of such conforming changes would be the responsibility of the lender.

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We appreciate your consideration of these concerns. Should you have any questions, please do not hesitate to contact the undersigned at Nfeddis@aba.com and Hbenton@aba.com.

Sincerely,
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