Meeting Between Staff of the Federal Reserve Board and Representatives of the National Consumer Law Center (NCLC) and the Structured Finance Association (SFA)
September 8, 2022

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Summary: Staff of the Federal Reserve Board met with representatives of NCLC and SFA to discuss the Board's notice of proposed rulemaking to implement the Adjustable Interest Rate (LIBOR) Act (Docket No. R-1775). Representatives from each organization expressed agreement with the concerns and approaches expressed in the other organization's comment letter (both comment letters attached) with respect to (i) benchmark replacement conforming changes, (ii) covered vs. non-covered contracts, and (iii) synthetic LIBOR.

Attachments

**Proposed Regulation Implementing the
Adjustable Interest Rate (LIBOR) Act**

**Comments
to the**

Board of Governors of the Federal Reserve System

regarding

12 CFR Part 253

[Regulation ZZ; Docket No. R–1775; RIN 7100–AG34]

**87 Fed. Reg. 45268
(published July 28, 2022, due Aug. 29, 2022)**

by the

**National Consumer Law Center
on behalf of its low income clients**

**with Americans for Financial Reform Education Fund
and
Student Borrower Protection Center**

Filed on Aug. 29, 2022

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Thank you for the opportunity to comment on this proposed rule. The National Consumer Law Center (NCLC) submits these comments on behalf of our low-income clients,[1] along with Americans for Financial Reform Education Fund, and Student Borrower Protection Center.

1. SUMMARY—We strongly support the Board's proposed rule, particularly the determination that no conforming changes are needed for consumer loans. But we recommend two clarifications for non-covered consumer contracts:

a) declare that the Board-selected benchmark replacement for non-covered consumer contracts is the same as the replacement selected for covered consumer contracts; and

b) adopt a rule clarifying that any fallback language dependent on the "availability" of the LIBOR shall be triggered on the earlier of the date specified in the contract (if any) or the LIBOR replacement date.

2. Introduction—A summary of the problem

The LIBOR is widely used as an index in adjustable rate consumer mortgages (ARMs),[2] as well as private student loans and credit cards. The index, when added to a "margin" written into the contract, sets the interest rate charged on the debt. But the LIBOR will largely cease to exist or become compromised after June 30, 2023.

While most adjustable-rate contracts include terms allowing the note holder to replace the index if it becomes unavailable, these terms—known as "fallback language"—were often poorly drafted. Most fallback language provides minimal guidance on how to select a replacement index and instead gives broad, and in some cases unlimited, discretion to the note holder. In some contracts—such as closed-end home mortgages—the fallback language does not allow adjusting other relevant parts of the contract, such as the margin added to the index to obtain the applicable interest

[1] These comments were drafted by Andrew Pizor, Staff Attorney, National Consumer Law Center (apizor@nclc.org) and Tara Twomey, Of Counsel, National Consumer Law Center.

[2] Including closed-end, open-end, forward, and reverse mortgages.

rate. And for some corporate contracts, the specified mechanism for replacing the index is entirely impractical.

These defects are important because there is no clear answer to the single biggest question raised by the end of the LIBOR: what to replace it with. There is no other index that offers a precise replacement. All possible alternatives are calculated from different underlying components and, as a result, behave differently than the LIBOR. They are more or less volatile, have a higher or lower historical average value, behave differently under certain market conditions, or differ in some other notable way.

For borrowers, these differences would manifest themselves as loan payments that average higher or lower than they had been with the LIBOR. Payment amounts might also change more significantly and unpredictably. The differences also pose problems for investors. Lower payments for borrowers, higher default rates, or faster pre-payment rates (due to borrowers refinancing to get away from the replacement index) may mean less income for investors.

As a result, regardless of which replacement index note holders choose, someone is likely to be unhappy with the result. So, while note drafters may have originally believed that the broad discretion given to note holders was a benefit, the industry now recognizes that discretion to be a significant liability and source of litigation risk. That risk is believed to be a major reason that, so far, nobody has announced a replacement index for their existing (also known as "legacy") LIBOR contracts.

Consumers face other risks too. A note holder or servicer might use the end of LIBOR as a chance to squeeze something extra out of consumers by making other contract changes under the guise of implementing the new index. There is also the risk of ministerial errors in the process of updating complex servicing platforms that are not designed to handle index replacements.

To address these risks, Congress enacted the Adjustable Interest Rate (LIBOR) Act.[3] The Act does a number of things but, for these comments and the proposed rule, the most relevant are—

- directing the Federal Reserve Board to recommend a replacement benchmark for the LIBOR;[4] and

[3] Public Law 117-103, div. U. (hereinafter the "LIBOR Act").

[4] *Id.* § 103(6).

- establishing a safe harbor for note holders that adopt the Board-selected benchmark replacement for given contracts.[5]

The Federal Reserve's proposed rule designates several benchmark replacements, all based on the Secured Overnight Financing Rate (SOFR) as its preferred alternative to the LIBOR.[6] The supplementary information in the Federal Register notice also addresses aspects of the replacement process, such as whether other changes are necessary and the trigger for replacing the LIBOR in each contract.

3. The Board has correctly determined that no conforming changes are needed for consumer contracts.

The LIBOR Act authorizes the Board to determine whether any benchmark replacement conforming changes are needed.[7] These are "technical, administrative, or operational changes, alterations, or modifications that . . . would address 1 or more issues affecting the implementation, administration, and calculation of the Board-selected benchmark replacement in LIBOR contracts . . . ."[8] In other words, conforming changes are changes—other than the identity of the index—that must be made to the terms of a LIBOR contract in order to make the benchmark replacement fully operational.

The LIBOR Act creates a safe harbor from liability for note holders that adopt the Board-selected benchmark replacement for given contracts. The safe harbor extends to certain conforming changes as well. For non-consumer contracts, conforming changes identified and made by a party under the note holder's control (called a "calculating person" in the Act), are subject to the safe harbor. But for consumer contracts, the only conforming changes eligible for the safe harbor are those determined by the Board, pursuant to the pending rulemaking. While neither the Act nor the proposed rule prevents a calculating person from making changes to a consumer contract for the purpose of implementing the SOFR (or any other replacement benchmark), that decision will not be protected by the safe harbor unless the change is listed in the final

[5] *Id.* § 105.

[6] LIBOR Act, § 103(6) (defining Board-selected benchmark replacement); Proposed § 253.4, 87 Fed. Reg. 45268, 45280 (July 28, 2022).

[7] *See* 87 Fed. Reg. at 45271 (discussing Act).

[8] LIBOR Act, § 103(4).

rule. That ensures that consumers will retain the right to seek relief if they are harmed by bad decisions or mistakes.

According to the supplementary information accompanying the proposed rule, "the Board does not [at this time,] believe any additional conforming changes would be needed for successful implementation of the Board-selected benchmark replacements indicated in . . . the proposed rule."[9] We agree with this decision. The National Consumer Law Center, and the network of private and nonprofit attorneys we work with, have extensive experience with consumer credit contracts, particularly student loans and mortgages. And based on this experience, we see no need for the Board to identify any conforming changes for consumer contracts. The Board's decision does not prevent note holders or their agents from making changes where needed by unusual contracts. But the lack of a safe harbor for such changes will give consumers the right to seek relief where needed.

We wish to emphasize that we take this position not because we are opposed to the safe harbor, but because we believe that the typical consumer contract needs no changes to continue functioning as the parties originally intended—so long as the note holder adopts the Board-selected benchmark replacement.

4. The Board should address ambiguities affecting the majority of consumer LIBOR contracts.

4.1 The majority of consumer LIBOR contracts will be "non-covered."

While we generally support the proposed rule, we are concerned that it does not adequately address ambiguities affecting most consumer LIBOR contracts. The majority of consumer contracts will be considered "non-covered." A "covered contract" is defined as having one of the following characteristics as of the LIBOR replacement date:

1) the LIBOR contract contains no fallback provision;
2) the LIBOR contract has fallback provisions that identify *neither* a specific benchmark nor a determining person; or
3) the LIBOR contract contains fallback provisions that identify a determining person, but the determining person has failed to select a benchmark by the

[9] 87 Fed. Reg. at 45276.

earlier of the LIBOR replacement date and the latest date for selecting a benchmark replacement according to the terms of the LIBOR contract.

Most LIBOR-based ARMs and student loans will be non-covered loans because the note holder is identified as a determining person, and it is anticipated that the determining person will timely select a replacement benchmark. Section 253.3(a)(2)(i)(B) and (C) exclude these loans from the definition of "covered contracts." This poses a problem because this is the most common type of consumer LIBOR contract and, as explained in the next section, the rule has two important ambiguities regarding these contracts.

4.2 The proposed rule is ambiguous in two ways when applied to non-covered consumer loans.

Most non-covered consumer loans will be affected by two significant ambiguities. One will affect all such loans and the other will affect a subset (albeit the vast majority) of non-covered consumer contracts.

Ambiguities:

- The proposed rule can be interpreted as providing a safe harbor even if the determining person selects an inappropriate replacement benchmark from those listed in § 253.4 (such as the benchmark for derivative transactions instead of the benchmark for consumer contracts). This ambiguity will affect all non-covered consumer loans and is discussed in section 4.3 of these comments.
- As recognized by the Board,[10] the fallback language in some loan contracts only refers to the LIBOR becoming *unavailable*. For these contracts, it is unclear whether the index should be replaced if the LIBOR administrator publishes a synthetic LIBOR after the replacement date.[11] As explained in section 4.4 of these comments, this ambiguity will affect the vast majority of ARMs and private student loans.

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[10] 87 Fed. Reg. at 45272.

[11] The "LIBOR replacement date" is defined as "the first London banking day after June 30, 2023, unless the Board determines that any LIBOR tenor will cease to be published or cease to be representative on a different date." Proposed Rule § 253.2.

4.3 The Board should clearly state that the benchmark described in § 253.4(b)(2) is the only Board-selected benchmark replacement for non-covered consumer loans.

One of the most important components of the LIBOR Act is creation of a safe harbor for note holders that adopt the Board-selected benchmark replacement for the LIBOR. We expect the majority of consumer note holders to avail themselves of this safe harbor.

Section 253.3(b)(2) of the proposed rule is addressed to non-covered contracts and states that "a determining person may select the Board-selected benchmark replacement specified in § 253.4 of this rule as the benchmark replacement for a [non-covered] LIBOR contract." But this quoted passage from (b)(2) is ambiguous because § 253.4 does not identify a benchmark replacement for any non-covered loan. Instead, § 253.4 refers only to covered loans and specifies several different versions of the Board-selected benchmark replacement. The reference to "*the* Board-selected benchmark replacement" in § 253.3(b)(2), therefore, refers to a replacement that does not exist.

The only replacement benchmark in § 253.4 that is appropriate for any consumer LIBOR contract is the one identified for covered-contracts in § 253.4(b)(2), and not, for example, the replacement benchmark in § 253.4(a), which is only appropriate for derivative contracts. The Alternative Reference Rate Committee devoted a substantial amount of time and research to identifying the best replacement and appropriate spread adjustments for legacy consumer contracts. It would be inappropriate to grant a safe harbor to note holders that use a replacement benchmark designed for very different contracts, such as the replacement for derivatives or GSE contracts.

We strongly encourage the Board to specifically identify the replacement benchmark in § 253.4(b)(2) as the Board-selected replacement benchmark for non-covered consumer loans. Such a change will not affect any other part of the rule. Instead, it will clarify that the safe harbor only applies to note holders that adopt the replacement in § 253.4(b)(2).

4.4 The rule should provide that the fallback language in consumer contracts is triggered on the earlier of the date specified in the contract or on the LIBOR replacement date.

As the Board explains in the Federal Register, there is "a potential ambiguity regarding the application of the LIBOR Act to a subset of non-covered contracts."[12] Some of these contracts have fallback provisions that are triggered only when the LIBOR becomes unavailable. "Significantly, the fallback provisions in these LIBOR contracts are not triggered expressly when LIBOR is available but nonrepresentative." This could become a problem if the LIBOR administrator publishes a synthetic LIBOR after the LIBOR replacement date. If that occurs, note holders may face uncertainty as to whether they should replace the LIBOR with a new index or use the synthetic LIBOR.

This is a significant issue for consumers because the vast majority of ARM and private student loan contracts only refer to the *availability* of the LIBOR. For example,

- the legacy version the Fannie Mae/Freddie Mac uniform instrument includes fallback language saying "If the Index is no longer available, the Note Holder will choose a new index which is based upon comparable information[;]"[13] and
- a widely used promissory note from Discover Bank includes fallback language saying "If the 3-month LIBOR Index is no longer available, we will substitute an index that is comparable, in our sole opinion . . . ."[14]

To address this problem, the Board is considering a rule that would declare that the LIBOR "shall be replaced . . . on the earlier of (i) the date specified pursuant to the LIBOR contract or (ii) the LIBOR replacement date."[15] We share the Board's concern and urge the Board to adopt this rule. If such a rule is not adopted, and the LIBOR administrator issues a synthetic LIBOR, millions of home owners and student loan borrowers would be subject to the problem the Board anticipates.

While Fannie Mae and Freddie Mac could resolve this ambiguity by issuing new servicing guidance explaining how to proceed, that would not address the many other

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[12] 87 Fed. Reg. at 45272.

[13] ¶4(B) MULTISTATE ADJUSTABLE RATE NOTE—WSJ One-Year LIBOR—Single Family—Fannie Mae UNIFORM INSTRUMENT (Form 3526, 6/01).

[14] Available at https://www.discover.com/content/dam/dfs/student-loans/pdf/PCL_Prom_Note.pdf (last accessed Aug. 17, 2022).

[15] *Id.*

loans written on the uniform instruments but not subject to Fannie or Freddie's guidelines. And there is no similar "fix" for private student loans. Therefore, we strongly urge the Board to adopt a rule specifying that the fallback language in all consumer LIBOR contracts is triggered on the earlier of the date specified in the contract or on the LIBOR replacement date.

We agree with the Board's justification for such a rule. Based on our participation in discussions leading up to the LIBOR Act, we think it is clear that Congress intended the LIBOR Act to apply when the LIBOR becomes nonrepresentative—not just when it ceases to be published. We also agree that providing certainty was a critical reason Congress adopted the LIBOR Act. The need for certainty should be contrasted with the current lack of certainty regarding whether the LIBOR administrator will issue a synthetic LIBOR. Without such clarity, it would be contrary to Congressional intent to allow contracts with the problematic "unavailable" language to remain in limbo until note holders know whether a synthetic LIBOR will be available.

And even if the administrator declares that it will issue a synthetic LIBOR, that will leave note holders with the uncertainty raised in the Board's question: is the LIBOR "unavailable" (triggering the fallback), or are they bound to use the synthetic LIBOR as a continuation of the original LIBOR. As the Board explains, a synthetic LIBOR "would be a fundamentally different rate that would not be representative of the underlying market and economic reality concerning the setting of rates at which banks may lend to, or borrow from, other banks or agents in the money markets."[16] Treating such a rate as a continuation of the LIBOR would frustrate the original purpose of the contract parties. Adopting a rule that triggers the fallback language on the earlier of the LIBOR replacement date or a date specified in the contract would better serve the parties' intent because the note holder would still have the option of selecting the synthetic LIBOR if it met the requirements of the fallback language (although they would not be able to assert the safe harbor).

5. Conclusion

In conclusion, we support the Board's determination that no conforming changes are needed for consumer LIBOR contracts. And we share the Board's concern about non-covered contracts that only address the "unavailability" of the LIBOR

[16] 87 Fed. Reg. at 45273.

without addressing unrepresented-ness. To address that ambiguity, we recommend that the Board adopt a rule stating that the fallback language in all consumer contracts is triggered on the earlier of the date specified in the contract or on the LIBOR replacement date.

We also urge the Board to clarify that the only Board-selected replacement index for *any* consumer LIBOR contract (covered or not) is the index identified in proposed § 253.4(b)(2). Nobody will be required to select this replacement index for a non-covered contract. But the Board should clarify that if a note holder or other determining person wishes to avail themselves of the safe harbor created by the LIBOR Act, they must use the replacement index identified in § 253.4(b)(2) for consumer LIBOR contracts.

6. Appendix: Description of Signatories

National Consumer Law Center: Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness.

Americans for Financial Reform Education Fund: The Americans for Financial Reform Education Fund (AFREF) is a coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups that works through policy analysis, education, advocacy, and outreach to lay the foundation for a strong, stable, and ethical financial system. Formed in the wake of the 2008 financial crisis, AFREF works to protect and strengthen consumer protections for all people, including advocacy for greater protections against predatory lending, increased access to affordable and sustainable credit, and fairness and transparency in all financial transactions.

Student Borrower Protection Center: The Student Borrower Protection Center is a a nonprofit organization focused on alleviating the burden of student debt for millions of Americans. SBPC engages in advocacy, policymaking, and litigation strategy to rein in industry abuses, protect borrowers' rights, and advance economic opportunity for the next generation of students.

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August 29, 2022

Via Electronic Mail: regs.comments@federalreserve.gov

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-A34
Regulation Implementing the Adjustable Interest Rate (LIBOR) Act

Dear Madam Secretary:

The Structured Finance Association ("SFA") appreciates this opportunity to provide feedback to the Board of Governors of the Federal Reserve System (the "Board") regarding the above-referenced proposed regulation (the "Proposal") implementing the Adjustable Interest Rate (LIBOR) Act (the "LIBOR Act").[1] We applaud Congress for taking action on the broad reaching implications of LIBOR's cessation and the Board's continued leadership to support a smooth and efficient transition to a robust replacement rate. Once final, the Proposal would, among other things, establish benchmark replacements for contracts governed by U.S. law that reference certain tenors of U.S. dollar LIBOR and that do not provide for the use of a clearly defined and practicable replacement benchmark rate following the first London banking day after June 30, 2023.

SFA is uniquely situated to comment on the potential effects the Proposal may have on the structured finance and securitization markets. As an association representing participants across the full spectrum of the structured finance and securitization markets – including lenders, securities issuers, institutional investors, financial intermediaries, credit rating agencies, law firms, accounting firms, technology firms, servicers and trustees – SFA plays a vital role in the development of market-consensus solutions that support efficient and stable markets.[2] While our members often have conflicting views and interests, our governance structure requires consensus

[1] Regulation Implementing the Adjustable Interest Rate (LIBOR) Act, 87 Fed. Reg. 45,268 (proposed July 28, 2022) (to be codified at 12 C.F.R. pt. 253); Division U-Adjustable Interest Rate (LIBOR) Act of 2022, Pub. L. No. 117-103, 136 Stat., 825.

[2] SFA is a member-based, trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFA provides an inclusive network for securitization professionals to collaborate and, as industry leaders, to drive necessary changes, to be advocates for the securitization community, to share best practices and innovative ideas and to educate industry members through conferences and other programs. Further information can be found at www.structuredfinance.org.

from all stakeholder groups before SFA takes an advocacy position on legislative or regulatory matters. As such, when we do provide feedback, we do so in a manner that reflects the views of the entire market ecosystem.

In line with the Board's stated goals in the Proposal, SFA has long advocated the importance of ensuring a smooth transition away from LIBOR for those contracts that will not mature before LIBOR ends on June 30, 2023 and currently lack adequate fallback provisions. The introduction of a clearly defined and practicable benchmark replacement by product type will provide all parties to a contract with clarity and instill confidence in their ability to seamlessly adopt a replacement for LIBOR and hopefully minimize, if not preclude, litigation.

SFA and our members have been carefully assessing if, and how, each of the complex provisions in the Proposal might impact "tough legacy" contracts that lack adequate fallback provisions. **We commend the Board on its thorough and well formulated Proposal, especially given its complex nature and incredibly tight time constraints. Our analysis has identified a small number of items that we think the Proposal does not adequately address, and we have requested further clarification or provided suggestions on how the Proposal can address these concerns.**

In this letter we detail the following recommendations related to the Proposal:

I. Derivative Transactions Linked to Certain Securitizations
   - Create a narrow subcategory of LIBOR contracts known as "Structured Finance Swaps" for which the board selected benchmark replacement ("BSBR") would be the same as the related securitization securities

II. Synthetic LIBOR
   - Unambiguously state that that Synthetic LIBOR is not an appropriate benchmark replacement for LIBOR contracts transitioned under the LIBOR Act
   - Do not address contracts that are not within scope of the LIBOR Act
   - Acknowledge Section 104(f)(6) of the LIBOR Act and the Consumer Financial Protection Bureau's ("CFPB") amendment of Regulation Z in the final rule

III. "Covered Contracts" and "Non-Covered Contracts"
   - Remove inconsistencies between the LIBOR Act and the Proposal's use of "covered"/"non-covered" contracts categories

IV. Benchmark Replacement Conforming Changes ("BRCC")
   - Adopt a limited set of identified conforming changes needed to ensure consistent implementation of the BSBR and eliminate unnecessary and frivolous litigation, or address elsewhere in the final rule

V. Eurodollar Deposit Rate Polls
- Confirm that Section 104(b)(2) of the LIBOR Act extends to polls, surveys and inquiries that reference "Eurodollar" deposit rates

VI. Eurodollar Lending Rate Transactions
- Confirm that determining persons can rely on Section 104(c) of the LIBOR Act to select the BSBR in connection with Eurodollar Lending Rate Transactions (as defined below)

VII. Notice Requirements
- Avoid promulgating rules imposing additional notice requirements on deal parties

I. Derivative Transactions Linked to Certain Securitizations

A. For derivative transactions that are linked to certain securitizations, the BSBR should be the same as for the related securities.

A narrow subcategory of derivative transactions should transition to adjusted CME term SOFR to avoid disruptions and preserve the carefully-structured economics of "tough legacy" securitizations in which the benchmarks for the securities are linked to derivative transactions that are embedded in the structures. We propose calling this subcategory of derivative transactions "Structured Finance Swaps." *See* Appendix I hereto.

Basis Risk Associated with Structured Finance Transactions

The relevant securitization transactions are structured with derivative transactions that are integral to the cashflows used to make payments on the related securities. Typically, the issuer (or trustee) for the securities will enter into a swap under which it will receive a LIBOR-based rate to hedge payments owed on the securities. The governing agreements for these transactions generally have specific provisions connecting the payment and other terms of the derivative transaction and the related securities, including benchmark definitions that contain express cross-references or other provisions that link the economics of the instruments. Often, the notional balance used for calculating payments under the swap is specifically tied to the outstanding balance of the related securities. So, as the principal balance of the securities is paid down, including unscheduled prepayments, the notional balance of the swap is also reduced.

Investors, rating agencies and other market participants relied upon the integration of the two financial instruments when analyzing the expected performance and making investment and credit rating decisions. The two instruments need to transition in unison

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for the hedge to maintain the agreed-upon level of investor protection. Any mismatch in the rate, its calculation methodology and timing, or the date for resetting the interest rate, would create basis risk that could result in the reduction of expected cashflows available to make timely interest payments to investors. This is in large part due to the fact that within securitization transactions the only source of repayment on the securities are the cashflows from the collateral, including any derivative transaction embedded in the structure. Consequently, each credit rating agency that provides credit ratings on securitization transactions identifies these basis risks and how the respective agency considers them in their relevant securitization rating criteria.

If the BSBR for the securities moves to adjusted CME Term SOFR and the related derivative moves to "Fallback Rate (SOFR)" (spread adjusted SOFR compounded in arrears), the Proposal would disrupt the careful structuring of this type of securitization, creating unintended consequences for issuers, investors and other market participants. These consequences could include rating downgrades and defaults due to the unplanned mismatch in cashflows as well as potential disruptions arising from disputes over how excess cashflows and shortfalls should be treated under the existing terms of the governing agreements.

Potential Operational Challenges with Structured Finance Swaps

In addition to the above "basis risk" concerns, there are potential operational concerns that may arise depending on what the Board says in the final rule. It is our understanding that Section 253.4(d) of the Proposal requires that the BSBR be "determined as of the day that, under the covered contract, would have been used to determine the LIBOR-based rate that is being replaced."[3] This suggests that the BSBR for the vast majority of Structured Finance Swaps will continue to be determined *in advance* for each calculation period as provided for in the contracts – and in line with the associated securities. However, if the Board changes Section 253.4(d) of the Proposal, and conforms the determination date for a derivative transaction's rate to match the ISDA protocol (i.e. two days before the payment date), the need for creating a sub-category of derivative transactions increases as it would likely introduce operational challenges for securitizations with Structured Finance Swaps unless they use the same forward looking adjusted CME Term SOFR as the related securities.[4]

For a securitization with a Structured Finance Swap, using Fallback Rate (SOFR) for the derivative, calculated in arrears just a day before the securitization's payment date creates multiple operational challenges. With a forward looking rate, such as LIBOR or adjusted CME Term SOFR, the rate is determined a full month ahead of time

[3] 87 Fed. Reg. 45,281.

[4] SFA takes no position as to the Proposal's effect on derivatives other than Structured Finance Swaps.

(typically two days prior to the start of the interest accrual period) and well before collections on the collateral are deposited into the securitization vehicle. The parties administering the securitization then spend a week or more applying these collections using these pre-determined rates. These parties undertake complex distribution schemes in order to calculate often mutually inter-dependent payments owing to investors in multiple securitization tranches and to other interested parties. If the forward looking rate for a Structured Finance Swap is replaced with Fallback Rate (SOFR), which is not determined until the end of the interest accrual period (i.e., just prior to the distribution date), this delay could meaningfully impair—if not eliminate—the securitization parties' ability to timely make the necessary inter-dependent calculations necessary for these distributions. Moreover, Structured Finance Swap payments themselves are often made just one or even two days prior to the distribution date, or may even be contingent upon the swap provider receiving the payment calculations from the securitization vehicle three business days in advance of the payment date—meaning that the backwards looking rate may not be ascertainable at the time the calculations are presumed to have already occurred.

The foregoing illustrates the operational importance of knowing derivatives payment amounts well before payment is to be made in securitization transactions. Fallback Rate (SOFR) is singularly ill-suited for Structured Finance Swaps, whereas adjusted CME Term SOFR would allow these transactions to operate as they were intricately structured to do.

We importantly note that SFA takes no position as to the Proposal's effect on derivatives other than Structured Finance Swaps.

B. The SFA-recommended language in Appendix I provides clarification. SFA proposes that the Board create a narrow subcategory of LIBOR contracts known as "Structured Finance Swaps" for which the BSBR would be the CME Term SOFR rate applicable under the Proposal to the related securitization securities.

As you will see, the proposed definition of a Structured Finance Swap is extremely narrow. It requires a derivative transaction to be directly linked, by objective criteria, to a limited class of securities issued in connection with securitizations. It expressly excludes derivative transactions that are linked to commercial loans (even if they serve as collateral in a structured finance transaction). The proposed definition also would not include derivative transactions that are used by swap providers to hedge Structured Finance Swaps in the interdealer market.

II. Synthetic LIBOR

A. Any publication of Synthetic LIBOR could create confusion regarding its applicability to contracts transitioning under the LIBOR Act.

In the Proposal, the Board acknowledges the potential for the continued publication of a synthetic version of LIBOR beyond the LIBOR replacement date (as defined in the LIBOR Act), that, "although called LIBOR," is "not representative of the underlying market and economic reality LIBOR had been intended to measure" ("Synthetic LIBOR").[5] The publication of Synthetic LIBOR could "give the impression that 'LIBOR' remains available and, therefore, should continue to be used for LIBOR contracts with fallback provisions that lack an express nonrepresentativeness trigger."[6]

We have always understood that Congress' intent was for LIBOR contracts within its scope (i.e., containing no fallback provisions or fallback provisions that identify neither a specific benchmark replacement nor a determining person) to be transitioned away from LIBOR on the LIBOR replacement date (irrespective of whether Synthetic LIBOR – a nonrepresentative rate – is available at that time).[7] For example, if a LIBOR contract simply says "LIBOR" is the rate that appears on "screen [X]"[8] and has no non-LIBOR based fallback or determining person, Section 104(a) of the LIBOR Act would apply the BSBR as of the LIBOR replacement date. Further, Section 103(10) of the LIBOR Act clearly states that a party with the "authority, right or obligation" to select a replacement for LIBOR is a "determining person," and pursuant to Section 104(c)(3) of the LIBOR Act, if that person does not make a selection by the LIBOR replacement date, the BSBR will apply, even if a nonrepresentative rate called "LIBOR" appears on the screen.[9] A plain reading of the language of Section 104(c)(1) of the LIBOR Act supports the conclusion that for LIBOR contracts within the scope of the LIBOR Act, a determining person could select the BSBR as the benchmark replacement regardless of whether a synthetic LIBOR is published on such date, in which case Section 104(c)(2)(C) provides that the BSBR shall be "used in any determinations of the benchmark under or with respect to the LIBOR contract occurring on and after the

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[5] 87 Fed. Reg. 45,269–70, 72–73.

[6] 87 Fed. Reg. 45,272–273.

[7] Division U-Adjustable Interest Rate (LIBOR) Act, 12 U.S.C. § 5803 (a).

[8] Many, if not most, LIBOR contracts definitions referring to a screen rate contain additional descriptors, such as "the offered rate for one-month U.S. dollar deposits as such rate appears on [source page]." Synthetic LIBOR, which appears likely to be based on some version of Term SOFR, will not be representative of U.S. dollar deposit or other interbank lending rates.

[9] Division U-Adjustable Interest Rate (LIBOR) Act, 12 U.S.C. § 5802 (10), 5803 (c)(3).

LIBOR replacement date."[10] However, the Board should confirm so in the final rule. Such confirmation would prevent unnecessary confusion in the market and promote the plain intention of the LIBOR Act.

Reading the LIBOR Act to preclude a person from being a determining person because a nonrepresentative LIBOR rate appears on the screen effectively reads certain contracts without a pre-cessation trigger out of the LIBOR Act. After all, Congress found that "nonrepresentativeness of LIBOR could result in disruptive litigation related to [certain] existing contracts…."[11] Moreover, the LIBOR Act authorizes the Board to change the date on which the LIBOR Act will apply to LIBOR contracts based upon LIBOR becoming nonrepresentative.[12] Every provision of the LIBOR Act described in the previous paragraph is dependent upon the LIBOR replacement date. Given this evidence that Congress intended to avoid nonrepresentative rates like Synthetic LIBOR, the Board should make clear that Synthetic LIBOR should not be allowed to interfere with the implementation of the BSBRs pursuant to the LIBOR Act.

For the reasons outlined above, SFA strongly recommends that the Board unambiguously state that Synthetic LIBOR is not an appropriate benchmark replacement for LIBOR contracts transitioned pursuant to Section 104 of the LIBOR Act.

B. SFA would encourage the Board to acknowledge Section 104(f)(6) of the LIBOR Act and the CFPB's amendment of Regulation Z in the final rule.

Similarly, until recently, Regulation Z promulgated under the Truth in Lending Act ("Regulation Z") did not permit credit card issuers to transition existing balances on LIBOR-based credit card accounts to another index rate unless or until LIBOR became "unavailable." Given the ambiguity about exactly when, if ever, LIBOR will become literally unavailable, including under an event where Synthetic LIBOR is published, the CFPB amended Regulation Z in December of 2021 (before the LIBOR Act was enacted) to provide credit card issuers with a clear path to transition LIBOR-based credit card agreements to another index before LIBOR, including Synthetic LIBOR, becomes "unavailable." Section 104(f)(6) of the LIBOR Act recognized and preserved the CFPB's authority to make that amendment, irrespective of whether Synthetic LIBOR is available at that time.

SFA would encourage the Board to:

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[10] Division U-Adjustable Interest Rate (LIBOR) Act, 12 U.S.C. § 5803 (c)(2)(c).

[11] Division U-Adjustable Interest Rate (LIBOR) Act, 12 U.S.C. § 5801 (a)(3).

[12] Division U-Adjustable Interest Rate (LIBOR) Act, 12 U.S.C. § 5802 (17).

1. either (a) include the language of Section 104(f)(6) of the LIBOR Act, or (b) reference Section 104(f)(6) of the LIBOR Act in the final rule; and

2. acknowledge Section 104(f)(6) of the LIBOR Act and the CFPB's amendment of Regulation Z in the final rule's Supplementary Information / preamble section.

C. On the other hand, the SFA does not believe that the Board should address the potential impact of Synthetic LIBOR on contracts, such as Specific Non-LIBOR Fallback Contracts, that are not within scope of the LIBOR Act.[13]

Section 104(f) of the LIBOR Act provides that the LIBOR Act does not "affect or impair" certain other types of contracts. Among the types of contracts that are carved out by Section 104(f) of the LIBOR Act are (1) those for which the parties have "opted out" of the LIBOR Act, (2) those where a determining person selects a replacement rate other than the BSBR and (3) those that fall back to a specific non-LIBOR benchmark replacement (such as the Prime rate) (except that the last two categories would remain subject to the LIBOR Act's nullification of polling provisions).

While the LIBOR Act groups all of these contracts together as not being affected or impaired by the LIBOR Act, the Board specifically seeks feedback on whether it should address an "ambiguity" about those in the last category (referred to here as "Specific Non-LIBOR Fallback Contracts") and specifically preserves the treatment of those in the "opt out" category. The Proposal does not address the interpretative basis for this distinction but does acknowledge that Specific Non-LIBOR Fallback Contracts are "not expressly addressed by the LIBOR Act and . . . are presumed to be unaffected by the Act."

III. "Covered Contracts" and "Non-Covered Contracts"

A. The categories of "covered" and "non-covered" contracts are unnecessary and create confusion about the treatment of LIBOR contracts under the Proposal and, by extension, the LIBOR Act.

The applicability of the LIBOR Act to LIBOR contracts is set forth in separate sections of the LIBOR Act, each of which addresses various types of contracts in different ways, based upon their various features. For example, Section 104(a) of the LIBOR Act describes certain fallback features that will cause a LIBOR contract to be subject "automatically" to the BSBR, Section 104(c) describes fallback features that permit a determining person to select the BSBR, Section 104(b) describes fallback provisions that should be disregarded, Section 104(f) describes LIBOR contracts that are not

[13] Please also see discussion below under Section III, "Covered Contracts" and "Non-Covered Contracts."

altered or impaired by the LIBOR Act, etc. Collectively, these provisions describe the scope of the LIBOR Act and its treatment of various LIBOR contracts and the parties thereto.

Notwithstanding the LIBOR Act's careful construction regarding the treatment of a wide variety of LIBOR contracts, the Proposal states that its applicability depends on whether a LIBOR contract falls into one of two categories: "covered contracts" or "non-covered contracts." Section 253.3 of the Proposal states that the rule "does not affect" LIBOR contracts that are not covered contracts, except to permit the use of the BSBR.[14] However, these categories are imprecise and lead to confusion about the LIBOR Act.

For example, the term "covered contracts" does not include, among other things, contracts where the determining person has selected the BSBR as the benchmark replacement before June 30, 2023. Excluding these contracts from the applicability of the rule contradicts the LIBOR Act's goal of encouraging proactive transition. This is especially important because the majority of consumer contracts (such as LIBOR-based adjustable rate mortgages and student loans) fit into this category. In fact, most GSE contracts give the noteholder the right to select the benchmark replacement, yet if the noteholder selects the BSBR, the Proposal will not be applicable to these contracts. This could lead to confusion about the protections these contracts are given under the LIBOR Act and therefore discourage proactive transition away from LIBOR.

The Proposal itself seems to suggest confusion about the terms "covered contracts" and "non-covered contracts." As described below, the Board states that its discretion under the LIBOR Act is limited to three areas, yet the Board inconsistently uses the terms "covered" and "non-covered" contracts when discussing two of them (and is silent on the third). First, in Section 253.3 (which sets forth the "applicability" of the rule), the Board defines "covered" and "non-covered" contracts but immediately creates an exception for contracts that use the BSBR, which is the only purpose of the LIBOR Act served by the Proposal. Second, in the preamble of the Proposal, the Board acknowledges that the LIBOR Act contemplates that certain conforming changes may be necessary when the BSBR becomes the benchmark replacement for a LIBOR contract "either by operation of law," which is a "covered contract," or "via the selection of a determining person," which is a "non-covered contract." However, the Board only asks for comment on whether it should consider BRCC for covered contracts. There is no reason why such changes would only be relevant to a contract if the BSBR became applicable by operation of law as opposed to via selection by a determining person. Finally, in estimating the compliance impact of the Proposal under the Regulatory Flexibility Act, the Board does not address how parties to non-covered

[14] 87 Fed. Reg. 45,280.

contracts that are within scope of the LIBOR Act (such as consumer contracts) would need to alter how they perform their contractual obligations.

Although these concepts are imprecise and serve no purpose under the LIBOR Act, they are used pervasively throughout the Proposal, undermining the LIBOR Act's goal of bringing certainty to LIBOR transition. For example, the Proposal treats all of the following as "non-covered contracts," even though they are treated differently under the LIBOR Act:

- contracts where the determining person has selected the BSBR;
- contracts where the determining person has selected any benchmark replacement *other than the BSBR*;
- contracts that fall back to a specific rate (such as Prime); and
- contracts where the parties have opted-out of the LIBOR Act.

Other inconsistencies throughout the Proposal have already raised new questions about the LIBOR Act and unnecessarily create the risk of unintended consequences that may not have surfaced during the very limited comment period for the Proposal.

B. SFA recommends that the categories of "covered contracts" and "non-covered contracts" (and related provisions) should be removed from the final rule.

The Proposal specifically states that "the Board's discretion under the Act is limited to (i) selecting SOFR-based benchmark replacements and adjusting them to include the statutorily prescribed tenor spread adjustment (and, if applicable, transition tenor spread adjustment), (ii) determining any BRCCs and (iii) determining the LIBOR replacement date (in the event that any LIBOR tenor ceases or becomes nonrepresentative prior to the planned LIBOR cessation date)."[15] The Board also stated that "[g]iven its limited discretion, [it] was unable to consider alternatives to the proposed rule that would be *significantly different from the statutory scheme* of the LIBOR Act"[16] (emphasis added).

Grouping all LIBOR contracts into the two categories of "covered" and "non-covered" contracts is significantly different from the statutory scheme of the LIBOR Act. It is also unnecessary in carrying out only one of the above purposes actually addressed by

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[15] 87 Fed. Reg. 45,278.

[16] *Id.*

the Proposal: identifying the specific BSBR that applies to the wide range of LIBOR contracts subject to the LIBOR Act.

Creating categories of "covered contracts" and "non-covered contracts" introduces uncertainty and confusion. This bifurcation has raised concerns among SFA members whether the treatment of a LIBOR contract under the Proposal could affect the interpretation of other provisions of the LIBOR Act, most notably the availability of the safe harbor and other protections under the LIBOR Act. Conceptually, the creation of these categories is not necessary and only leads to further ambiguity and confusion.

For the reasons stated above, SFA believes that it is necessary to remove the categories of "covered contracts" and "non-covered contracts" (and related provisions) from the final rule. To avoid further confusion, Section 253.4 and other provisions of the Proposal would need to preserve the difference between in-scope contracts for which the relevant BSBR applies "automatically" (i.e., under Sections 104(a) and 104(c)(3) of the LIBOR Act) and those for which the relevant BSBR is available to be selected by a determining person (i.e., Sections 104(c)(1) and (2) of the LIBOR Act).

IV. Benchmark Replacement Conforming Changes ("BRCC")

A. The Proposal lacks needed BRCCs, or other clarity in the Proposal, to ensure consistent implementation of the BSBR and to eliminate unnecessary and frivolous litigation.

While the Proposal recognizes that the LIBOR Act "authorizes the Board to require any additional technical, administrative, or operational changes, alterations, or modifications" to facilitate the "implementation, administration, and calculation of the BSBR in LIBOR contracts," the Board determined that such "conforming changes" were not currently needed.[17] However, the Board specifically requested guidance as to what conforming changes it should consider and potentially add to the Proposal.[18]

SFA and its members believe that a limited number of conforming changes would be beneficial to remove uncertainty, including for consumer products, over how payments will be calculated in connection with the BSBR. Congress granted the Board with rulemaking authority to determine whether any BRCCs are needed in order to provide the market with much-needed direction to ensure a smooth and successful transition away from LIBOR. For consumer loans and securitization transactions, these conforming changes are typically needed to adapt the contract, on a consistent and fair

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[17] 87 Fed. Reg. 45,276.

[18] 87 Fed. Reg. 45,277.

basis, to address differences in the publication of SOFR versus LIBOR (e.g., publication dates, publication sources, etc.), lookbacks and other similar provisions. Further, such clarifications are needed to ensure LIBOR contracts are treated consistently and to avoid the potential for class-action lawsuits to arise, which practically may only result in minimal damages for plaintiffs and a boon to class-action lawyers.

B. SFA recommends that the Board adopt the limited set of conforming changes in Appendix II to this letter.

V. Eurodollar Deposit Rate Polls

A. The treatment of "Eurodollar Deposit Rate" polls under Section 104(b)(2) of the LIBOR Act should be clarified.

In the Proposal, the Board asked whether it should clarify that Section 104(b)(2) of the LIBOR Act applies to a contract that requires a person to poll for "Eurodollar" deposit rates.[19] This would be a welcome specification by the Board, which we believe, as outlined below, accords with the clear and plain meaning of the LIBOR Act as Section 104(b)(2) of the LIBOR Act refers to "deposit rates" in a manner that should be sufficient to remove any doubt that references to a relevant poll, survey or inquiry for quotes for "Eurodollar" deposit rates are nullified.

Specifically, the LIBOR Act was designed to apply the BSBR to LIBOR contracts that contain no fallbacks or contain fallback provisions that identify neither a specific benchmark replacement nor a determining person. However, whether a LIBOR contract comports with such conditions such that Section 104(a) of the LIBOR Act applies can only be determined after disregarding "a benchmark replacement that is based in any way on any LIBOR value, except to account for the difference between LIBOR and the benchmark replacement," or "a requirement that a person (other than a benchmark administrator) conduct a poll, survey, or inquiries for quotes or information concerning interbank lending or deposit rates."[20]

Some of the purposes of the LIBOR Act are to "establish a clear and uniform process . . . for replacing LIBOR in existing contracts that do not provide for the use of a clearly defined or practicable replacement benchmark" and "to preclude litigation related to existing contracts" without "clearly defined or practicable replacement benchmark rate[s]."[21] The nullification provisions of the LIBOR Act promote these purposes by

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[19] 87 Fed. Reg. 45,277.

[20] Division U-Adjustable Interest Rate (LIBOR) Act, 12 U.S.C. § 5803 (a) and (b).

[21] Division U-Adjustable Interest Rate (LIBOR) Act, 12 U.S.C. § 5801 (b)(1) and (2).

recognizing that references to LIBOR values or polling concerning interbank lending or deposit rates should be ignored as not practicable. Structured finance industry practice generally has been to use the concepts "Eurodollar" and "LIBOR" interchangeably.

B. SFA recommends that the Board remove any ambiguity in the Proposal by stating that references to polls, surveys or inquiries for "Eurodollar" deposit rates are nullified by Section 104(b)(2) of the LIBOR Act.

VI. Eurodollar Lending Rate Transactions

A. Fallback provisions calling for the selection of an alternative index used for determining Eurodollar lending rates need further clarification.

In addition to clarifying the applicability of Section 104(b)(2) of the LIBOR Act as it may relate to polls for Eurodollar deposit rates, the Board also should take the opportunity to address LIBOR contracts that provide that, if LIBOR cannot be obtained for a specified number of consecutive payment periods (indicating LIBOR is no longer available), a contractual party will select an "alternative index" or an "alternative comparable index" that is "used for determining Eurodollar lending rates" in the applicable tenor ("Eurodollar Lending Rate Transactions").[22]

In particular, SFA requests that the Board explain in its final rule that a party with the contractual right, authority or obligation to choose such an alternative index under an Eurodollar Lending Rate Transaction is a "determining person" authorized by Section 104(c) of the LIBOR Act to select the applicable BSBR and then claim the benefit of the statutory safe harbor under Section 105(c) of the LIBOR Act if ever needed. Ultimately, this is the best reading of the statute when it is read holistically, including Congress' stated purposes.

To minimize any confusion and provide clarity to those who might one day find the LIBOR Act to be ambiguous as applied to the Eurodollar Lending Rate Transactions, we request that the Board take this opportunity to fill any gap and explain by rule two related points: (1) the Eurodollar Lending Rate Transactions are not subject to Section 104(f)(2)'s exclusion from alterations by the LIBOR Act because they do not "identify a benchmark replacement that is not based in any way on any LIBOR value (including the prime rate or the effective Federal funds rate)" and, therefore, (2) a determining person for a Eurodollar Lending Rate Transaction may select the applicable BSBR in accordance with Section 104(c) of the LIBOR Act.

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[22] *See*, *e.g.*, https://www.sec.gov/Archives/edgar/data/1371060/000114420406045202/v056286_ex4-1.htm

B. SFA recommends that the Board remove any ambiguity in the Proposal regarding whether a determining person under a Eurodollar Lending Rate Transaction is authorized by Section 104(c) of the LIBOR Act to select the applicable BSBR.

VII. Notice Requirements

A. Any notification requirements under the final rule could create confusion and inconsistency with existing statutory, regulatory or contractual obligations.

The Board requested comments on whether a determining person should provide notice to one or more parties concerning the selection of a benchmark replacement and, if so, what specific notification requirements would be appropriate and why.[23] The Board further requested feedback on what, if any, potential risks could result from such notification requirements.[24]

A final rule imposing additional notice requirements will create confusion and potential inconsistency with existing statutory obligations and rulemaking from other agencies that are unaffected by the LIBOR Act. For example, the CFPB has promulgated amendments to Regulation Z that implicate notice requirements for transitioning a consumer contract away from LIBOR.[25] A final rule affecting notices would introduce uncertainty over the applicability of such existing guidance and analysis and present operational difficulties for persons responsible for implementing or using the BSBR, particularly if the notice regimes differ meaningfully.

For the reasons outlined above, SFA recommends that the Board not promulgate a final rule imposing additional notice requirements on deal parties.

B. Notwithstanding, SFA strongly recommends that market participants continue ongoing efforts to mitigate any operational barriers and burdens impacting notification processes.

There are certain legacy securitization transactions where the notifying person no longer exists or it is not clear who should take on the role of providing notice to investors of transition particulars, including most notably, the related benchmark replacement. Such issues create risk that some investors will not have advance and/or adequate notice of such transition details, potentially resulting in confusion. Market participants, including relevant noticing parties, have been working together, including through SFA and the Alternative Reference Rates Committee, to ensure a degree of

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23 87 Fed. Reg. 45,277.

24 *Id.*

25 See 86 Fed. Reg. 69,716 et seq.

uniformity and certainty in notice programs and such efforts will continue. SFA strongly recommends that market participants continue ongoing efforts to mitigate any operational barriers and burdens impacting notification processes.

VIII. Further Comments

We again thank the Board for the opportunity to submit this letter. SFA's membership stands ready to provide further input regarding this important topic and our comments in this letter. If you have any questions about this matter, please contact Kristi Leo, SFA President, at 917.415.8999 or kristi.leo@structuredfinance.org.

Sincerely,

Kristi Leo
President, Structured Finance Association

APPENDIX I

Derivative Transactions Linked to Certain Securitizations – Proposed Language

Notwithstanding any other section(s) of this Part 253 to the contrary, on the LIBOR Replacement Date, a LIBOR contract that is a Structured Finance Swap shall use the following Benchmark Replacement: in place of the one-, three-, six-, or 12-month tenor of LIBOR, the Benchmark Replacement shall be the corresponding one-, three-, six-, or 12-month CME Term SOFR plus the applicable tenor spread adjustment identified in paragraph (c) of this section.

This Part 253.XX shall only apply to a Structured Finance Swap and the Related Security if a different Board-selected benchmark replacement would otherwise be applicable to each of them under the LIBOR Act and these regulations.

"Structured Finance Swap" means, solely for purposes of these regulations: a LIBOR Contract that is a derivative transaction (as defined in §253.XX) to which the parties are a swap provider and the issuer of Related Securities (or a trustee or agent on behalf of such issuer, or in respect of Related Securities) and either:

(1) by its terms, expressly incorporates by reference the definition of "LIBOR" or the relevant Benchmark from a Related Security Governing Agreement to calculate such derivative transaction's Benchmark or provides that LIBOR be calculated in accordance with the Related Security Governing Agreement; or

(2) is a derivative transaction, commonly referred to as a "balance guaranteed swap", that, by its terms, has a notional amount that is expressly linked to either (i) the outstanding principal balance of a Related Security as that balance is defined in a Related Security Governing Agreement or (ii) the outstanding balance of assets, the cashflows of which are used to make payments to holders of Related Securities pursuant to the terms of a Related Security Governing Agreement.

"Related Security Governing Agreement" means, solely for purposes of these regulations and in relation to a Structured Finance Swap, a LIBOR Contract that (a) is an indenture, trust agreement, pooling and servicing agreement or other similar agreement, which governs the rights of the holders and beneficial owners of a Related Security, and which, (b) as a result of (i) the LIBOR Act and these regulations, or (ii) a Determining Person's selection of the relevant Board-selected benchmark replacement in accordance with the LIBOR Act, will have a Benchmark Replacement that is a tenor of CME Term SOFR plus the applicable tenor spread adjustment on or after the LIBOR Replacement Date.

"Related Security" means, solely for purposes of these regulations, an asset-backed security as defined in Regulation AB[26] regardless of whether Regulation AB currently applies (or ever applied) to such security. For the avoidance of doubt, commercial loans held by the issuer of Related Securities are not Related Securities.

[26] 17 C.F.R. § 229.1101 (2014).

APPENDIX II

Conforming Changes

1. **Contracts with Lookback Periods before the LIBOR replacement date**. A benchmark replacement conforming change is requested to address a scenario where a contractually-defined lookback period in a LIBOR contract straddles the period that is before and after the LIBOR replacement date of July 3, 2023. For example, a contract may state that the "current index" for an upcoming interest period "shall be the USD LIBOR rate for the previous month." Similarly, a contract may contain a lookback that is employed on July 15, 2023 pointing the servicer or lender to what that "current index" was on June 1, 2023. While the LIBOR Act and the Proposal do address these issues, clarifying the lookback approach in the actual enumerated final rule would likely assist the market, particularly since there was a lack of clarity around this issue before the proposal.

   SFA recommends a BRCC reinforcing that the LIBOR Act does not override contractual lookback provisions, and instead would require the relevant USD LIBOR rate that was available on a relevant lookback date prior to July 3, 2023 to be used in determining the benchmark, with the BSBR being used once the contractually-defined benchmark is no longer available.

2. **Contracts with Lookback Period that Simultaneously Includes Dates Before and After the LIBOR replacement date, Resulting in Bifurcation of Rate Calculation for Certain Consumer Lines of Credit.** A benchmark replacement conforming change is requested to address a population of legacy consumer lines of credit and loans that use the average of 1-month LIBOR (typically determined as of the first of each month) over the previous 12-month period. These contracts are similar to the LIBOR contracts discussed above that contain more traditional "lookback" provisions. In this scenario, the BSBR for consumer loans (published by Refinitiv) cannot be used before June 30, 2023 because the transitional consumer spread adjustment does not apply before the LIBOR replacement date. Therefore, determining parties will likely have to bifurcate the calculation of this average using LIBOR before July 3, 2023 and using BSBR rates thereafter.

   SFA recommends a BRCC clarifying that any such bifurcated calculation of this average over the previous 12-month period is permissible. This approach allows the contract to operate according to its terms, which is a stated purpose of the Act, and would assist the market, particularly consumers.[27]

[27] Division U-Adjustable Interest Rate (LIBOR) Act, 12 U.S.C. § 5801 (b)(3).

3. **Contracts with Residual References to LIBOR's "Source."** A benchmark replacement conforming change is requested with respect to a definition for the applicable "SOFR Source" by reference to the corresponding publication site (such as the FRBNY website page or its successor or replacement page) maintained by the applicable administrator (such as FRBNY, or its successor in such capacity). Similarly, there is a reference in many consumer loans to LIBOR as an index "published in the Wall Street Journal," and since we do not know if the Refinitiv Fallback Rates will be published in the Wall Street Journal, guidance is also arguably needed to provide clarity.

   SFA recommends that the Board clarify that, where the Proposal says that the BSBR will be the benchmark replacement for LIBOR, what it means is that the BSBR, *together with the sources where it can be found*, will be the benchmark replacement for LIBOR and *the sources that reference LIBOR in the contract* that comprise the contract's current benchmark.

4. **Contracts Requiring Index Rounding**. The BSBR for a given LIBOR contract may be published by different sources (e.g., CME, Refinitiv, Bloomberg and possibly others) and with a different number of decimal places than currently used in LIBOR market conventions, in LIBOR contracts and in the infrastructure employed by the tens of thousands of market participants who will need to transition to the BSBR. These differences could result in disputes and even slightly different calculations due to rounding that, in the aggregate, could be significant to the market (and possibly lead to class action litigation).

   Irrespective of the number of decimal places used by the source for a particular BSBR, SFA strongly recommends that the Board provide guidance that the rounding conventions used in a LIBOR contract continue to apply to the use of the BSBR for that contract.

September 19, 2022

Ann E. Misback, Secretary
Board of Governors of the Federal Reserve System
20th St. & Constitution Ave. NW
Washington, DC 20551

Filed by email to regs.comments@federalreserve.gov

Re: Supplemental comments on Docket No. R-1775 and RIN 7100-AG34 submitted by the Structured Finance Association and the National Consumer Law Center (on behalf of our low-income clients)

Dear Ms. Misback:

Please accept these supplemental comments on the above rulemaking. As explained during our September 8, 2022 meeting with Board staff members, the National Consumer Law Center and Structured Finance Association recommend making the following changes to the proposed rule. These changes will provide needed clarity to all parties in the residential mortgage and student loan markets.

1. Amend § 253.4 by adding the following to subsection (b)(2)(iii):

> . . . as published at [official source-probably Refinitiv's website for consumer loans] or any service based on [same source] chosen by the calculating person where the [Refinitiv Limited "USD IBOR Cash Fallbacks" for "Consumer"] products are published or otherwise made available.

**Note from the Structured Finance Association: Corresponding "source" identification changes would be recommended for each non-consumer product category in §§ 253.4(a), (b)(1), and (b)(3).

2. Add to § 253.4(d):

(d) Date for determining Board-selected benchmark replacement.

(i) For purposes of this part, any Board-selected benchmark replacement shall be determined as of the day that, under the LIBOR contract, would have been used to determine the LIBOR-based rate that is being replaced or, if the Board-selected benchmark replacement is not published on the day indicated in the LIBOR contract, the most recently available publication should be used.

(ii) LIBOR contracts using a Board-selected benchmark replacement shall use the Board-selected benchmark replacement to determine a benchmark value on or after the LIBOR replacement date unless the LIBOR contract requires a determination or calculation to be made using one or more LIBOR values for dates prior to the benchmark replacement date, in which case the LIBOR values for such dates shall be used.

(iii) when a Board-selected benchmark replacement is to be used in a LIBOR contract that, on or after the LIBOR replacement date, would require using a combination (such as an average) of LIBOR value as of dates before the LIBOR replacement date and of the Board-selected benchmark replacement for dates on or after the LIBOR replacement date, the respective LIBOR value(s) and Board-selected benchmark replacement value(s) shall be used.

(iv) Nothing in this § 253.4(d) is intended to preclude referencing or otherwise using the Board-selected benchmark replacement in connection with disclosures or notices that are provided prior to the LIBOR replacement date.

3. Add a new § 253.4(e) *Rounding*.

In connection with using the Board-selected benchmark replacement to determine the benchmark for a LIBOR contract, the calculating person shall round the Board-selected benchmark replacement, in accordance with the terms of the LIBOR contract or the parties' existing practice. If a LIBOR contract requires the use of more decimal places than available in the published Board-selected benchmark replacement, the rate shall be rounded in accordance with the terms of the LIBOR contract to the maximum number of decimal places available in the published Board-selected benchmark replacement.

Thank you for your consideration.

Sincerely,

/s/ Andrew Pizor	/s/ Kristi Leo
Staff Attorney	President
National Consumer Law Center	Structured Finance Association