

TYPES NOT MAPPED YET March 30, 2022 | TTR not mapped yet | Ruthanne C. Hammett

An introduction to the Adjustable Interest (LIBOR) Act: The federal response to LIBOR replacement

As we have previously reported, all **London Interbank Offered Rate (LIBOR)** tenors (if they haven't already been discontinued) will no longer be available after June 30, 2023. In response to the litigation risks created by the elimination of LIBOR, President Biden signed H.R. 2471 (Consolidated Appropriations Act) into law on March 15, 2022.

The **Adjustable Interest Rate (LIBOR) Act** (the "**LIBOR Act**"), Division U of the legislation, establishes a clear and uniform process, on a nationwide basis, for replacing LIBOR in existing contracts that do not provide for the use of a clearly defined or practicable replacement benchmark rate (so-called "tough legacy" contracts), without affecting the ability of parties to use any appropriate benchmark rate in new contracts.

The highlighted material provisions of the LIBOR Act are:

- The LIBOR Act applies to agreements and other legal documents that use U.S. Dollar LIBOR (other than one-week or two-month U.S. Dollar LIBOR) (each a "**Covered Agreement**").
- Each Covered Agreement that does not have fallback provisions or contains fallback provisions that don't identify (i) a specific benchmark replacement or (ii) a determining person, then effective on the first banking day after **June 30, 2023** (the "**LIBOR Replacement Date**"), the benchmark selected by the **Board of Governors of the Federal Reserve System** (the "**Board**") shall replace LIBOR as the benchmark for each Covered Agreement. The "**Board selected benchmark**" is based on the **Secured Overnight Financing Rate (SOFR)**.
- If a Covered Agreement has fallback provisions that give any person the authority, right or obligation to determine a benchmark replacement, then the determining person may, but shall not be required to, select the Board-selected benchmark as the applicable benchmark replacement. If the determining person selects the Board-selected benchmark, such selection shall be (i) irrevocable and (ii) made by the earlier of the LIBOR Replacement Date and the latest date for selecting a benchmark according to the terms of said Covered Agreement.
- Also, if a Covered Agreement has fallback provisions that refer to LIBOR, those fallback provisions shall be disregarded, deemed null and void and the selection or use of a Board-selected benchmark replacement shall not be deemed to (i) impair or affect the right of any person to receive a payment, or affect the amount or timing of such payment, under any Covered Agreement, (ii) discharge or excuse performance under any Covered Agreement for any reason, claim or defense, (iii) give any person the right to unilaterally terminate or suspend performance under any Covered Agreement, (iv) constitute a breach of a Covered Agreement or (v) void or nullify any Covered Agreement.
- A Board-selected benchmark replacement shall constitute under the LIBOR Act: (i) a commercially reasonable replacement for and a commercially substantial equivalent to LIBOR; (ii) a reasonable, comparable or analogous rate, index or term for LIBOR; (iii) a replacement that is based on a methodology or information that is similar or comparable to LIBOR; (iv) substantial performance by any person of any right or obligation relating to or based on LIBOR; and (v) a replacement that has historical fluctuations that are substantially similar to those of LIBOR for purposes of the Truth in Lending Act and regulations promulgated thereunder.
- The LIBOR Act provides for a "**safe harbor**" such that no person shall be subject to any claim or cause of action in law or equity or request for equitable relief, or have liability for damages, arising out of the selection or use of

a Board-selected benchmark replacement, the implementation of benchmark replacement conforming changes or, other than with respect to consumer loans, the determination of benchmark replacement conforming changes.

- The LIBOR Act may not be construed to create any negative inference or negative presumption regarding the validity or enforceability of any benchmark replacement (including any method for calculating, determining or implementing an adjustment to the benchmark replacement to account for any historical differences between LIBOR and the benchmark replacement).
- A bank or other institution subject to examination by a federal financial institutions regulatory agency may use any benchmark, including a benchmark that is not SOFR that the bank determines to be appropriate for the funding model of the bank, the needs of the customers of the bank and the products, risk profile, risk management capabilities and operational capabilities of the bank; provided, however, that the use of any benchmark shall remain subject to the terms of the subject loan and applicable law and no federal supervisory agency may take any enforcement action against the bank solely because that benchmark is not SOFR.
- Please note that the following are excluded from the LIBOR Act: (i) any written agreement specifying that a Covered Agreement shall not be subject to the LIBOR Act, (ii) any Covered Agreement that contains fallback provisions that identify a benchmark replacement that is not based in any way on LIBOR, including (such as the prime rate or the federal funds rate), (iii) any Covered Agreement as to which a determining person does not elect to use a Board-selected benchmark replacement, except as otherwise expressly stated in the LIBOR Act and (iv) the application to a Board-selected benchmark replacement of any cap, floor, modifier or spread adjustment to which LIBOR had been subject pursuant to the terms of a Covered Agreement.

The LIBOR Act supersedes any similar state or local law (to date, only New York and Alabama enacted state-level LIBOR replacement legislation).

The LIBOR Act mandates the Board to promulgate resolutions to carry out the LIBOR Act not later than 180 days after enactment (**September 11, 2022**).

The LIBOR Act goes a long way to solve the LIBOR-replacement issues that have arisen with loan agreements and other financial contracts that either have ineffective LIBOR-replacement language or do not address LIBOR replacement. By anointing SOFR as the Board-selected landmark, banks and other financial institutions have a roadmap to redesign their pricing policies and language while allowing use of other benchmarks that they see as more appropriate for their institutions.

If you have any questions about the LIBOR Act or anything else relating to the transition from LIBOR to SOFR, please contact us.

[Ruthanne Hammett](#) is a partner in Thompson Coburn's Banking and Commercial Finance group.

authorsTest

ruthanne

Ruthanne C. Hammett