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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

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[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

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

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[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.

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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

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[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

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

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

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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 <u>Appendix II</u> 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.

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"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.

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[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]

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[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.