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Comment Intake—LIBOR
Bureau of Consumer Financial Protection
1700 G Street NW
Washington DC 20552

Re: Facilitating the LIBOR Transition
Amendments to Regulation Z (Truth in Lending Act)
85 *Federal Register* 36938 (June 18, 2020)
Docket No. CFPB-2020-0014

To Whom It May Concern:

The American Bankers Association (ABA)¹ and the Consumer Bankers Association (CBA)² are pleased to submit their comments to the Bureau of Consumer Financial Protection (Bureau) on its proposed amendments to Regulation Z (Truth in Lending Act) to address the cessation of the London Inter-Bank Overnight Rate (LIBOR), which is expected to be discontinued after December 31, 2021. To assist in the transition from LIBOR, the Bureau is proposing changes to open-end and closed-end Regulation Z provisions to provide examples of replacement indices for LIBOR that meet certain standards of that regulation. In addition, the Bureau is proposing to permit creditors for home equity lines of credit (HELOCs) and credit card accounts to transition existing accounts that use a LIBOR index to a replacement index on or after March 15, 2021 if certain conditions are met.

ABA and CBA generally support the proposal and appreciate the Bureau's initiative to provide helpful clarification to Regulation Z in anticipation of LIBOR cessation and reduce some of the uncertainty and expected disruption. The proposed roadmap to choose a compliant replacement index will be useful for compliance with Regulation Z and is also likely to be used by courts and others in interpreting contracts that, for compliance and other reasons, mirror regulatory text. We strongly urge the Bureau to finalize amendments quickly so that there is sufficient opportunity for banks and other creditors to prepare for and proceed with the

¹ The American Bankers Association is the voice of the nation's \$18 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$14 trillion in deposits and extend more than \$10.4 trillion in loans.

² The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

transition from LIBOR beginning on the March 15, 2021 date proposed by the Bureau. In addition, we recommend that the Bureau take the opportunity to identify additional indices which might meet the Regulation Z standards and to provide a framework in the Commentary for analyzing other indices and an example of methodologies creditors may use to determine whether a replacement index is substantially similar or comparable.

Criteria for Substantially Similar or Comparable Replacement Indices

Regulation Z conditions changes to indices and margins of variable rate HELOCs and credit cards. Under §1026.40(f)(3)(ii), creditors may only change the index and margin of a variable rate HELOC if the original index is “no longer available, the new index has an historical movement substantially similar to that of the original index, and the new index and margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the original index became unavailable.”

Under §1026.55(b)(7), card issuers may not increase a variable annual percentage rate (APR) unless the APR varies according to an index that is not under the card issuer’s control and is available to the general public. Comment 6 to that section provides that card issuers may change the index and margin if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became available.

Under the proposal, creditors may change a LIBOR index and margin on HELOCs and credit card accounts on or after March 15, 2021 to a replacement index and a replacement margin as long as:

1. Historical fluctuations in the LIBOR index and replacement index were substantially similar and
2. The replacement index value in effect on December 31, 2020 and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

In addition, a newly established index may be used if the replacement index value in effect on December 31, 2020 and the replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020 and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index. The proposal provides that, for open-end loans, both the Wall Street Journal Prime (Prime) and certain spread-adjusted indices based on the “Secured Overnight Financing Rate” (SOFR) have historical fluctuations substantially similar to those of certain US LIBOR indices.

For variable rate closed-end loans, changing the index to an index that is not a “comparable index” may constitute a refinancing for purposes of Regulation Z triggering new disclosures for

a new transaction and a full underwriting to determine the borrower's ability to repay.³ The proposal identifies the spread-adjusted index based on SOFR as an example of a comparable index. Prime is not identified as an example of a comparable index for closed-end loans as it is for HELOCs and credit cards, even though the open-end provisions applicable to HELOCs and credit cards identify prime as a replacement index with historical fluctuations that are substantially similar to LIBOR.

While not endorsing any particular index as an appropriate replacement for LIBOR, ABA and CBA agree with the Bureau's analysis and conclusions that SOFR and Prime have substantially similar fluctuations to those of LIBOR and that the spread-adjusted index based on SOFR is comparable to LIBOR for purposes of Regulation Z.

We recommend that the Bureau make clearer that for both the open-end and closed-end loan provisions, the replacement indices identified in the regulation are illustrative only and that they are not the only index replacement options.⁴ Further, we urge the Bureau to take advantage of the opportunity to minimize the potentially significant disruption associated with LIBOR's cessation by identifying other acceptable replacements and by including in the Commentary criteria for evaluating whether an index is comparable to LIBOR for purposes of Regulation Z.

The Bureau should specifically identify Prime as an example of a comparable index for variable-rate closed-end loans⁵ for the same reasons it has concluded SOFR is comparable—its fluctuations are substantially similar to LIBOR. The Commentary should also provide that having substantially similar fluctuations is an *example* of an appropriate criterion for determining comparability but not a mandatory or exclusive one.

The criteria and principles for analyzing whether an index is an appropriate replacement index for existing consumer loans for purposes of Regulation Z (and under a consumer loan contract) are narrower than the criteria and principles that have been and are being used to identify appropriate indices to use in new contracts for a wide array of financial contracts and products that involve volumes and values far greater than those associated with consumer credit contracts. For example, the Alternative Reference Rates Committee (ARRC) rejected some indices as a general replacement index for a broad range of wholesale and retail products that include cash products and derivatives. One of its criteria was the replacement index's ability to withstand the weight of potentially having hundreds of trillions of dollars of contracts

³ Comment 3(ii) to 12 C.F.R. § 1026.20(a) (2020).

⁴ In the section-by-section discussion of §1026.20, the Bureau notes that the example of certain SOFR indices "comparable" to LIBOR "would be illustrative only, and the Bureau does not intend to suggest that the spread-adjusted SOFR indices recommended by the ARRC are the only indices that would be comparable to the LIBOR indices." See *Facilitating the LIBOR Transition*, 85 Fed. Reg. 36938, 36947 (proposed Aug. 4, 2020).

⁵ While not typically used for mortgage loans, Prime is not an uncommon index used in other closed-end loans such as car loans and student loans.

referencing it and remaining durable over time.⁶ Such factors are largely irrelevant for purposes of replacement indices for existing consumer loans and Regulation Z's criteria, which is limited to having substantially similar fluctuation or being comparable to LIBOR. Thus, the ARRC's choice of SOFR (only) as a general replacement for LIBOR for new contracts involving a wide array of financial products does not exclude it as an appropriate replacement for other purposes, such as existing consumer loans.

Moreover, we urge the Bureau to consider including other indices that may be appropriate replacement indices as examples in the Commentary. There may be other indices beyond SOFR and Prime that are comparable or that have substantially similar fluctuations to LIBOR for purposes of Regulation Z such as AMERIBOR and Constant Maturity Treasury.

In addition to specifying other indices, we recommend that the Bureau provide in the Commentary a framework for analyzing other indices and an example of methodologies creditors may use to determine whether a replacement index is comparable. While the Bureau pointed to historical fluctuations in determining a comparable index, we caution that this may not always be a viable point of comparison. For example, a creditor considering AMERIBOR would not have the ability to compare historical fluctuations. Pointing to historical fluctuations may also invite debate over the appropriate period for comparison, as well as how similar the fluctuations must be to be considered "comparable."

We recommend that the Bureau provide guidance in the Commentary to the closed-end provisions on how creditors should compare indices to minimize uncertainty around the transition from LIBOR transition. Specifically, the Commentary should make clear that creditors are allowed to use any reasonable method to determine if a new index is comparable to the existing index by taking into account the components of each index as they exist in either a dynamic or static manner including the overnight risk-free rate, the expected change of the risk-free rate over the term, and a term credit component. This approach aligns the ARRC's approach for purposes of concluding that SOFR is a reasonable replacement for LIBOR, for example, by taking into account the desire for a term credit component and establishing a framework for a static credit spread adjustment as part of the plans to transition from LIBOR.

We suggest that the Bureau amend proposed Comment 3(ii) to §1026.20(a) so that it reads as follows (addition in italics):

- ii. Even if it is not accomplished by the cancellation of the old obligation and substitution of a new one, a new transaction subject to new disclosures results if the creditor either:
 - A. Increases the rate based on a variable-rate feature that was not previously disclosed; or

⁶ Alternative Reference Rates Comm., Second Report 8 (2019), <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-Second-report>.

B. Adds a variable-rate feature to the obligation. A creditor does not add a variable-rate feature by changing the index of a variable-rate transaction to a comparable index, whether the change replaces the existing index or substitutes an index for one that no longer exists. *A creditor may use any reasonable method to determine if a new index is comparable to the existing index by taking into account the components of each index as they exist in either a dynamic or static manner including the overnight risk free rate, the expected change of the risk free rate over the term and a term credit component.* For example, a creditor does not add a variable-rate feature by changing the index of a variable-rate transaction from the 1-month, 3-month, 6-month, or 1-year U.S. Dollar LIBOR index to the spread-adjusted index based on SOFR recommended by the Alternative Reference Rates Committee to replace the 1-month, 3-month, 6-month, or 1-year U.S. Dollar LIBOR index respectively because the replacement index is a comparable index to the corresponding U.S. Dollar LIBOR index.

ABA and CBA also support the proposed provision that an index of an open-end loan has substantially similar fluctuations if, in addition to the fluctuations being substantially similar, the replacement index value in effect on December 31, 2020 and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020 and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. As the Bureau notes, the proposed provision will create consistency in indices between creditors limited by contract from replacing the LIBOR index until it has become unavailable with those who do not. Consistency in creditor offerings will also assist consumers in comparing rates. Moreover, the proposed provision addresses concerns that LIBOR may become less representative or reliable before it is no longer available.

Meaning of “Unavailable”

A critical aspect of replacing the index of consumer variable rate loans is the meaning of the index becoming “unavailable,” as unavailability is the single event that allows a replacement under the regulation and under some contracts, which often rely on and imitate regulatory text for compliance and other purposes. The Bureau has not proposed guidance or examples of when an index becomes “unavailable” but has asked whether it should. Given the criticality of its meaning and role in determining when index replacement is permitted, we strongly recommend that the Bureau offer guidance through examples. The Bureau should include in the Commentary the examples contained in the ARRC model fallback language that an index is no longer available if:

- The Administrator [of the index] has permanently or indefinitely stopped providing the index to the general public; or

- The Administrator or its regulator issues an official public statement that the index is no longer reliable or representative.⁷

Change in Terms Notices

The proposed amendments allow creditors to replace the LIBOR index of existing credit card accounts and HELOCs on or after March 15, 2021 if certain conditions are met without waiting for LIBOR to become unavailable. The proposed provision is necessary as a practical matter because creditors must send consumers advance notices of a change in the index, but that change is triggered by LIBOR's unavailability, which is unknown. Thus, creditors may not know when to apply the replacement index to the account and cannot send out advance notices. Allowing early transition will allow time to implement the change and to prepare consumers. Moreover, allowing transition to a replacement index prior to LIBOR becoming unavailable addresses concerns that LIBOR may continue to be available but may become less representative or reliable.


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ABA and CBA welcome the Bureau's proposal and urge it to consider our suggestions and finalize amendments soon, given LIBOR's expected cessation date of December 31, 2021. We support the identification of SOFR and Prime as having "substantially similar" fluctuations as LIBOR and SOFR being "comparable" to LIBOR for purposes of Regulation Z but urge the Bureau to make clearer that they are illustrative examples only. We also urge the Bureau to review other indices that might qualify as appropriate replacement indices. The regulation should specifically identify Prime as comparable to LIBOR for variable close-end loans. Finally, the Bureau should include in the Commentary a framework setting forth criteria for evaluating the comparability of other indices.

Sincerely,



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⁷ Alternative Reference Rates Comm., AARC Recommendations Regarding More Robust Libor Fallback Contract Language for New Closed-End, Residential Adjustable Rate Mortgages 5 (2019), https://www.newyorkfed.org/medialibrary/Microsites/arcc/files/2019/ARM_Fallback_Language.pdf.