Proposed Rules

Federal Register

Vol. 87, No. 144

Thursday, July 28, 2022

FEDERAL RESERVE SYSTEM

12 CFR Part 253

[Regulation ZZ; Docket No. R–1775]

RIN 7100–AG34

Regulation Implementing the Adjustable Interest Rate (LIBOR) Act

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Board is inviting comment on a proposed regulation that would implement the Adjustable Interest Rate (LIBOR) Act. The proposed rule would establish benchmark replacements for contracts governed by U.S. law that reference certain tenors of U.S. dollar LIBOR (the overnight and one-, three-, six-, and 12-month tenors) and that do not have terms that provide for the use of a clearly defined and practicable replacement benchmark rate following the first London banking day after June 30, 2023. The proposed rule also would provide additional definitions and clarifications consistent with the Adjustable Interest Rate (LIBOR) Act.

DATES: Comments must be submitted by August 29, 2022.

ADDRESSES: You may submit comments, identified by Docket No. R–1775, RIN 7100–AG34, by any of the following methods:

- *Agency website: https://www.federalreserve.gov.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Email: regs.comments@federalreserve.gov.* Include docket and RIN numbers in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C Street NW, Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. during Federal business weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments. For users of TTY–TRS, please call 711 from any telephone, anywhere in the United States.

FOR FURTHER INFORMATION CONTACT: David Bowman, Senior Associate Director, 202–452–2334, Division of Monetary Affairs; Lucy Chang, Special Counsel, 202–475–6331, or Cody Gaffney, Attorney, 202–452–2674, both of the Legal Division; or Lesley Chao, Lead Financial Institution Policy Analyst, 202–974–7063, Division of Supervision and Regulation. For users of TTY–TRS, please call 711 from any telephone, anywhere in the United States.

SUPPLEMENTARY INFORMATION:

I. Background

A. LIBOR

LIBOR, formerly known as the London Interbank Offered Rate, is an interest rate benchmark that was the dominant reference rate used in financial contracts in recent decades and remains in extensive use today, serving as the benchmark rate in more than $200 trillion worth of contracts worldwide.[1] While over-the-counter and exchange-traded derivatives account for the vast majority of this estimated exposure to LIBOR, LIBOR is also referenced in trillions of dollars' worth of business and consumer loans, bonds, securitizations, and nonfinancial corporate contracts.

LIBOR is intended to reflect the rate at which large banks can borrow wholesale funds on an unsecured basis. LIBOR is calculated based on submissions contributed by a panel of large, globally active banks (LIBOR panel banks). Until December 31, 2021, LIBOR's administrator calculated and published LIBOR each London business day for five currencies (USD, GBP, EUR, CHF, and JPY) and seven borrowing periods, known as tenors (overnight, one week, one month, two months, three months, six months, and twelve months).

Over the past decade, financial regulators have expressed growing concern regarding the structural vulnerabilities and robustness of LIBOR.[2] Following the financial crisis of 2007–2009, other forms of borrowing have largely replaced short-term unsecured wholesale borrowing as a source of funds for most banks, resulting in far fewer market transactions on which LIBOR panel banks can base their submissions. At the same time, weaknesses in the governance of LIBOR created the opportunity for LIBOR panel banks to manipulate LIBOR, and numerous high-profile examples of such manipulation were exposed.[3] Following these scandals, in 2013, the administration of LIBOR was transferred to a new administrator, ICE Benchmark Administration Limited (IBA), which is regulated by the U.K.'s Financial Conduct Authority (FCA).

Despite increased regulatory oversight and efforts to improve LIBOR, confidence in LIBOR continued to wane, and financial regulators and market participants began to search for alternative reference rates and develop plans for a transition away from LIBOR. In the United States, this effort has been led by the Alternative Reference Rates

[1] Adjustable Interest Rate (LIBOR) Act, Public Law 117–103, div. U, section 102(a)(1).

[2] *See, e.g.,* Financial Stability Oversight Council, *2013 Annual Report* at 137–42.

[3] *See, e.g.,* U.S. Dep't of Justice, *Barclays Bank PLC Admits Misconduct Related to Submissions for London Interbank Offered Rate and the Euro Interbank Offered Rate and Agrees to Pay $160 Million Penalty* (June 27, 2012), *https://www.justice.gov/opa/pr/barclays-bank-plc-admits-misconduct-related-submissions-london-interbank-offered-rate-and;* U.S. Dep't of Justice, *Rabobank Admits Wrongdoing in Libor Investigation, Agrees to Pay $325 Million Criminal Penalty* (Oct. 29, 2013), *https://www.justice.gov/opa/pr/rabobank-admits-wrongdoing-libor-investigation-agrees-pay-325-million-criminal-penalty;* U.S. Dep't of Justice, *Deutsche Bank's London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR* (Apr. 23, 2015), *https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation.*

Committee (ARRC), a group of private-sector firms convened jointly by the Board and the Federal Reserve Bank of New York (FRBNY) in 2014.[4] Among other work, the ARRC identified the Secured Overnight Financing Rate (SOFR) as its recommended replacement for USD LIBOR and developed a Paced Transition Plan to support the transition from USD LIBOR to SOFR.[5] SOFR is a broad measure of the cost of borrowing cash overnight collateralized by U.S. Treasury securities.[6] Similar groups were convened in other jurisdictions and identified comparable risk-free rates as recommended replacements for the other LIBOR currencies.

In July 2017, following the departure of some panel banks, the FCA announced that the remaining LIBOR panel banks had voluntarily agreed to sustain LIBOR through the end of 2021 to facilitate an orderly transition away from LIBOR.[7] On March 5, 2021, the FCA announced that, after December 31, 2021, IBA would cease publishing 24 currency and tenor pairs (known as settings). The discontinued LIBOR settings included one-week and two-month USD LIBOR, as well as all EUR and CHF LIBOR tenors and most GBP and JPY LIBOR tenors.[8] However, the FCA required IBA to continue publishing, on a temporary basis, certain GBP and JPY LIBOR tenors on a ''synthetic'' basis, stating that any such synthetic LIBOR settings ''will no longer be representative of the underlying market and economic reality the setting is intended to measure.''[9]

To allow most legacy USD LIBOR contracts to mature without disruption, the FCA also announced that the panels for the remaining five tenors of USD LIBOR would continue through, but cease after, June 30, 2023. The FCA has signaled that it could consider whether to require IBA to continue publishing one-, three-, or six-month USD LIBOR on a synthetic basis for some period after June 30, 2023 (synthetic LIBOR).[10] As with synthetic GBP or JPY LIBOR settings, the FCA has announced that synthetic LIBOR, if published, would ''no longer be representative of the underlying market and economic reality the setting is intended to measure.''[11]

In response to the planned cessation of USD LIBOR, U.S. financial regulators have encouraged market participants to transition away from USD LIBOR as a reference rate as soon as practicable. For example, in November 2020, the Office of the Comptroller of the Currency (OCC), the Board, and the Federal Deposit Insurance Corporation (FDIC) issued an interagency statement stating that banking organizations generally should not enter into new contracts referencing USD LIBOR after December 31, 2021.[12] The ARRC and other private industry groups also have worked to encourage an orderly transition away from USD LIBOR. For example, as discussed further below, the International Swaps and Derivatives Association (ISDA) has developed a contractual protocol by which parties to derivative transactions governed by ISDA documentation and other financial contracts can agree to incorporate more robust contractual fallback provisions that replace references to LIBOR with an alternative benchmark based on SOFR in the event that a given LIBOR rate ceases publication or is found by the FCA to no longer be representative.[13] The ARRC has developed guiding principles for similar fallback language for cash products such as business loans, securitizations, floating rating notes, and consumer products, including specific recommended language for certain cash products.[14] ISDA's IBOR protocol and the ARRC fallback language recommendations were both subject to numerous public consultations, and they have received widespread adoption subsequent to their release.[15]

B. Legacy Contracts and the Adjustable Interest Rate (LIBOR) Act

Notwithstanding governmental and private-sector efforts to encourage market participants to prepare for the cessation of USD LIBOR, there are a significant number of existing contracts that reference USD LIBOR, will not mature by June 30, 2023, and cannot be easily amended. Of particular concern are so-called ''tough legacy contracts,'' which are contracts that reference USD LIBOR and will not mature by June 30, 2023, but which lack adequate fallback provisions providing for a clearly defined or practicable replacement benchmark following the cessation of USD LIBOR. To address these tough legacy contracts, multiple states adopted legislation, initially proposed by the ARRC, to provide a statutory remedy for financial contracts governed by the laws of the enacting states that reference USD LIBOR, will not mature until after USD LIBOR ceases or becomes nonrepresentative, and have no effective

[4] *See* ARRC, *About, https://www.newyorkfed.org/arrc/about* (last visited July 7, 2022).

[5] ARRC, *The ARRC Selects a Broad Repo Rate as its Preferred Alternative Reference Rate* (June 22, 2017), *https://www.newyorkfed.org/medialibrary/microsites/arrc/files/2017/ARRC-press-release-Jun-22-2017.pdf;* ARRC, *Second Report* (Mar. 2018) at 17, *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-Second-report.*

[6] SOFR is published daily by the FRBNY in cooperation with the U.S. Department of the Treasury's Office of Financial Research. *See* Fed. Res. Bk. of New York, *Secured Overnight Financing Rate Data, https://www.newyorkfed.org/markets/reference-rates/sofr* (last visited July 7, 2022). SOFR is calculated as a volume-weighted median of transaction-level tri-party repurchase agreement (repo) data collected from the Bank of New York Mellon, as well as general collateral financing repo transaction data and data on bilateral Treasury repo transactions cleared through the Fixed Income Clearing Corporation's delivery-versus-payment service, which are obtained from the U.S. Department of the Treasury's Office of Financial Research. *Id.*

[7] *See* Andrew Bailey, Chief Executive, FCA, *The Future of LIBOR* (July 27, 2017), *https://www.fca.org.uk/news/speeches/the-future-of-libor.*

[8] *See* FCA, *FCA Announcement on Future Cessation and Loss of Representativeness of the LIBOR Benchmarks* (Mar. 5, 2021), *https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf.*

[9] *Id.*

[10] *See* FCA, *Further Arrangements for the Orderly Wind-down of LIBOR at End-2021* (Sept. 29, 2021), *https://www.fca.org.uk/news/press-releases/further-arrangements-orderly-wind-down-libor-end-2021* (''The decisions to require publication of some sterling and Japanese yen LIBOR settings on a synthetic basis are not determinative of any future decisions in respect of US dollar LIBOR from end-June 2023.'').

[11] *See* FCA, *FCA Announcement on Future Cessation and Loss of Representativeness of the LIBOR Benchmarks* (Mar. 5, 2021), *https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf.*

[12] *See* Board, FDIC, OCC, *Statement on LIBOR Transition* (Nov. 30, 2020), *https://www.federalreserve.gov/supervisionreg/srletters/SR2027a1.pdf.*

[13] ISDA, ISDA 2020 IBOR Fallbacks Protocol, *https://www.isda.org/protocol/isda-2020-ibor-fallbacks-protocol/.*

[14] *See, e.g.,* ARRC, *ARRC Guiding Principles for More Robust LIBOR Fallback Contract Language in Cash Products* (July 9, 2018), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-principles-July2018;* ARRC, *Summary of ARRC's LIBOR Fallback Language* (Nov. 15, 2019), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/LIBOR_Fallback_Language_Summary;* ARRC, *ARRC Recommendations Regarding More Robust Fallback Language for New Issuance of LIBOR Securitizations* (May 31, 2019), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/Securitization_Fallback_Language.pdf;* ARRC, *ARRC Recommendations Regarding More Robust LIBOR Fallback Contract Language for New Closed-End, Residential Adjustable Rate Mortgages* (Nov. 15, 2019), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2019/ARM_Fallback_Language.pdf.*

[15] *See, e.g.,* ISDA, *ISDA 2020 IBOR Fallbacks Protocol List of Adhering Parties* (May 27, 2022), *https://www.isda.org/protocol/isda-2020-ibor-fallbacks-protocol/adhering-parties.* The U.S. Department of Justice (DOJ) also reviewed ISDA's IBOR protocol, concluded that it is unlikely to harm competition, and stated that the DOJ would not challenge ISDA's IBOR protocol under federal antitrust laws. *See* DOJ, *Justice Department Issues Favorable Business Review Letter to ISDA for Proposed Amendments to Address Interest Rate Benchmarks* (Oct. 1, 2020), *https://www.justice.gov/opa/pr/justice-department-issues-favorable-business-review-letter-isda-proposed-amendments-address.*

means to replace USD LIBOR after it ceases or becomes nonrepresentative.[16] While these state laws provided a solution for a large number of tough legacy contracts, further legislative action was needed to address tough legacy contracts governed by the laws of other states.

Recognizing the need for a uniform, nationwide solution for replacing references to USD LIBOR in tough legacy contracts, on March 15, 2022, Congress enacted the Adjustable Interest Rate (LIBOR) Act (the ''Act'') as part of the Consolidated Appropriations Act, 2022.[17] Among other things, the Act lays out a set of default rules that apply to tough legacy contracts subject to U.S. law.

Section 104 is the main operative provision of the Act. Section 104 generally distinguishes between three categories of LIBOR contracts with different types of fallback provisions. For these purposes, the Act defines ''LIBOR contract'' broadly to include any obligation or asset that, by its terms, uses the overnight, one-month, three-month, six-month, or 12-month tenors of USD LIBOR as a benchmark.[18] Consistent with this definition, the proposed rule and the remainder of the discussion will focus on these stated tenors of USD LIBOR only. The Act defines ''fallback provisions'' to mean the terms in a LIBOR contract for determining a benchmark replacement, including any terms relating to the date on which the benchmark replacement becomes effective.[19]

The first category of LIBOR contracts encompasses contracts that contain fallback provisions identifying a specific benchmark replacement that is not based in any way on any of the Act's USD LIBOR values (except to account for the difference between LIBOR and the benchmark replacement) and that do not require any person (other than a benchmark administrator)[20] to conduct a poll, survey, or inquiries for quotes or information concerning interbank lending or deposit rates. These LIBOR contracts generally can be expected to transition to the contractually agreed-upon benchmark replacement as provided by their fallback provisions on or before the LIBOR replacement date—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).[21]

The second category of LIBOR contracts encompasses contracts that contain no fallback provisions, as well as LIBOR contracts with fallback provisions that do not identify a determining person (as described below) and that only (i) identify a benchmark replacement that is based in any way on any of the Act's USD LIBOR values (except to account for the difference between LIBOR and the benchmark replacement) or (ii) require that a person (other than a benchmark administrator) conduct a poll, survey, or inquiries for quotes or information concerning interbank lending or deposit rates.[22] For this second category of LIBOR contracts, the Act provides that the benchmark replacement on the LIBOR replacement date will be the Board-selected benchmark replacement—that is, a benchmark replacement identified by the Board that is based on SOFR, including any tenor spread adjustments required under the Act.[23] Thus, any references to USD LIBOR in LIBOR contracts in this second category will, by operation of law, be replaced by the Board-selected benchmark replacement on the LIBOR replacement date.

For contracts that fall into this second category, the Act provides a series of statutory protections, enumerated in section 105 of the Act, for persons who use the Board-selected benchmark replacement, including 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 use of the Board-selected benchmark replacement as a benchmark replacement.[24]

The third category of LIBOR contracts encompasses LIBOR contracts that contain fallback provisions authorizing a determining person to determine a benchmark replacement.[25] The application of the Act to LIBOR contracts in this third category depends on the determination, if any, made by the determining person. Where a determining person does not select a benchmark replacement by the LIBOR replacement date or the latest date for selecting a benchmark replacement according to the terms of the LIBOR contract (whichever is earlier), the Act provides that the benchmark replacement for such LIBOR contract will be, by operation of law, the Board-selected benchmark replacement on and after the LIBOR replacement date.[26] Where a determining person selects the Board-selected benchmark replacement as the benchmark replacement, the Act provides that such selection shall be (i) irrevocable, (ii) made by the earlier of the LIBOR replacement date and the latest date for selecting a benchmark replacement according to the terms of the LIBOR contract, and (iii) used in any determinations of the benchmark under or with respect to the LIBOR contract occurring on and after the LIBOR replacement date.[27]

Although the Act does not require a determining person to select the Board-selected benchmark replacement as the benchmark replacement for a LIBOR contract, the Act provides a series of statutory protections, enumerated in section 105 of the Act, for any determining person who does so, including that a determining person generally shall not be subject to any claim or cause of action in law or equity or request for equitable relief, or have

[16] *See, e.g.,* N.Y. Gen. Oblig. Law art. 18–C; Ala. Code tit. 5, ch. 28; 2022 Fla. Laws ch. 57 (to be codified at Fla. Stat. 687.15); S. Bill No. 2133, 112th Gen. Assemb., Reg. Sess. (Tenn. 2022) (to be codified at Tenn. Code Ann. 47–33–101 *et seq.*); S. 371, 122nd Gen. Assemb., Reg. Sess. (Ind. 2022) (to be codified at Ind. Code 38–10–2); Leg. Bill 707, 107th Leg., 2nd Sess. (Neb. 2022).

[17] Public Law 117–103, div. U.

[18] *See* Act section 103(16) (definition of ''LIBOR contract''); Act section 103(15) (definition of ''LIBOR''). The Act does not apply to contracts that use the one-week or two-month tenors of USD LIBOR as a benchmark. *Id.* The Act defines ''benchmark'' to mean an index of interest rates or dividend rates that is used, in whole or in part, as the basis of or as a reference for calculating or determining any valuation, payment, or other measurement. Act section 103(1).

[19] Act section 103(11). The Act defines ''benchmark replacement'' to mean a benchmark, or an interest rate or dividend rate (which may or may not be based in whole or in part on a prior setting of LIBOR), to replace LIBOR or any interest rate or dividend rate based on LIBOR, whether on a temporary, permanent, or indefinite basis, under or with respect to a LIBOR contract. Act section 103(3).

[20] *See* Act section 104(b). The Act defines ''benchmark administrator'' to mean a person that publishes a benchmark for use by third parties. Act § 103(2).

[21] Act sections 104(f)(2), 103(17) (definition of ''LIBOR replacement date''). At this time, the Board does not expect to determine a LIBOR replacement date earlier than the first London banking day after June 30, 2023. As discussed in more detail below, the potential publication of synthetic LIBOR on and after the LIBOR replacement date may create ambiguity regarding the application of the LIBOR Act to a subset of these LIBOR contracts. The Board invites comment on whether to clarify this issue in the final rule.

[22] The Act deems these types of fallback provisions to be null and void by operation of law. Act section 104(b). To the extent a contract contains fallback provisions that specify these types of replacements would be applied ahead of another, separate benchmark replacement, then under the Act, these fallback provisions would be disregarded and the separate benchmark replacement would apply.

[23] Act section 104(a)–(b); *see also* Act section 103(6) (definition of ''Board-selected benchmark replacement'').

[24] Act section 105(a)–(b), (c)(1), (d).

[25] The Act defines ''determining person'' to mean, with respect to any LIBOR contract, any person with the authority, right, or obligation, including on a temporary basis (as identified by the LIBOR contract or by the governing law of the LIBOR contract, as appropriate) to determine a benchmark replacement. Act section 103(10).

[26] Act section 104(c)(3).

[27] Act section 104(c)(2).

liability for damages, arising out of the selection of the Board-selected benchmark replacement as a benchmark replacement.[28]

Where the Board-selected benchmark replacement becomes the benchmark replacement for a LIBOR contract (either by operation of law or via the selection of a determining person), the Act contemplates that certain conforming changes to a LIBOR contract may be necessary to facilitate the transition from USD LIBOR to the Board-selected benchmark replacement. These ''benchmark replacement conforming changes'' may arise in one of two ways. First, the Act authorizes the Board to determine benchmark replacement conforming changes that, in its discretion, would address one or more issues affecting the implementation, administration, and calculation of the Board-selected benchmark replacement in LIBOR contracts.[29] Second, for a LIBOR contract that is not a consumer loan, a calculating person may, in its reasonable judgment, determine that benchmark replacement conforming changes are otherwise necessary or appropriate to permit the implementation, administration, and calculation of the Board-selected benchmark replacement under or with respect to a LIBOR contract after giving due consideration to any benchmark replacement conforming changes determined by the Board.[30] For this purpose, the Act defines ''calculating person'' to mean, with respect to any LIBOR contract, any person, including the determining person, responsible for calculating or determining any valuation, payment, or other measurement based on a benchmark.[31]

Section 104 of the Act provides that all benchmark replacement conforming changes (whether determined by the Board or, if applicable, a calculating person) shall become an integral part of the LIBOR contract, and a calculating person shall not be required to obtain consent from any other person prior to the adoption of benchmark replacement conforming changes.[32] In addition, the determination, implementation, and performance of benchmark replacement conforming changes are generally subject to the statutory protections enumerated in section 105 of the Act, which are designed to ensure continuity of contract.[33] Finally, where a calculating person implements or (in the case of a LIBOR contract that is not a consumer loan) determines benchmark replacement conforming changes, the Act provides that the calculating person shall not be subject to any claim or cause of action in law or equity or request for equitable relief, or have liability for damages.[34]

The Act includes various other provisions beyond the main operative provisions in section 104 and the statutory protections enumerated in section 105.[35] Section 106 of the Act generally provides that a bank may use any benchmark (including a benchmark that is not SOFR) in any non-IBOR loan made before, on, or after the date of enactment of the Act that the bank determines to be appropriate, and that no Federal supervisory agency may take enforcement or supervisory action against the bank solely because that benchmark is not SOFR.[36] Sections 108 and 109 of the Act amend the Trust Indenture Act of 1939 (15 U.S.C. 77ppp(b)) and the Higher Education Act of 1965 (20 U.S.C. 1087–1(b)(2)(I)), respectively, to facilitate the transition from USD LIBOR.[37] Finally, section 107 of the Act expressly preempts any provision of State or local law relating to the selection or use of a benchmark replacement or related conforming changes, or expressly limiting the manner of calculating interest (including the compounding of interest) as that provision applies to the selection or use of a Board-selected benchmark replacement or benchmark replacement conforming changes.[38]

Section 110 of the Act directs the Board to promulgate regulations to carry out the Act not later than 180 days after enactment. Pursuant to this authority, the Board is proposing a new regulation to implement the Act.

II. Section-by-Section Analysis

A. Section 253.1 Authority, Purpose, and Scope

Proposed § 253.1 sets forth the authority for, purpose of, and scope of the proposed rule. Significantly, and consistent with the statute as described above, the proposal does not apply to (i) contracts that do not reference the overnight or one-, three-, six-, or 12-month tenors of LIBOR or (ii) LIBOR contracts that have terms providing for the use of a clearly defined and practicable replacement benchmark for LIBOR (including LIBOR contracts where the determining person selects a benchmark replacement other than the Board-selected benchmark replacement), except as provided for in proposed § 253.3(b), which is discussed further below.[39] The proposed rule also applies only to existing contracts governed by federal law or the law of any state. In addition, proposed § 253.1 states that the parties to a LIBOR contract may by written agreement specify that a LIBOR contract shall not be subject to the proposed rule.[40]

B. Section 253.2 Definitions

Proposed § 253.2 provides definitions for many of the terms used in the proposed rule. Most of the defined terms in proposed § 253.2 are substantially the same as the defined terms in the LIBOR Act. In addition, however, proposed § 253.2 includes definitions for the terms ''CME Term SOFR,'' ''covered contract,'' ''covered GSE contract,'' ''derivative transaction,'' ''ISDA protocol,'' and ''non-covered contract,'' each of which is discussed below in connection with their use in proposed § 253.3 or § 253.4, as applicable.

Additionally, proposed § 253.2 defines ''business day'' to mean any day except for (i) a Saturday, (ii) a Sunday, (iii) a day on which the Securities Industry and Financial Markets Association recommends that the fixed income departments of its members be closed for the entire day for purposes of trading in United States government securities, or (iv) a day on which the FRBNY, with advance notice, chooses not to publish its Treasury repo reference rates if participants in the Treasury repo market broadly expect to treat that day as a holiday. This definition of ''business day'' is relevant for purposes of proposed § 253.4, discussed below, and is consistent with the FRBNY's publication dates for SOFR.[41]

[28] Act section 105(c)(1); *see also* Act section 105(a)–(b), (d). This statutory safe harbor also applies to the use of the Board-selected benchmark replacement other than at the selection of a determining person.

[29] Act section 103(4)(A).

[30] Act section 103(4)(B). The Act defines ''consumer loan'' to mean a consumer credit transaction, which is defined by cross-reference to the Truth in Lending Act. Act section 103(9) (definition of ''consumer loan); section 103(8) (definitions of ''consumer'' and ''credit'').

[31] Act section 103(7).

[32] Act section 104(d).

[33] *See* Act section 105(a)–(b), (d).

[34] Act section 105(c)(1).

[35] The Board views these provisions, along with the statutory protections enumerated in section 105 of the Act, as self-executing.

[36] Act section 106.

[37] Act sections 108–09.

[38] Act section 107.

[39] Act section 104(f)(2)–(3).

[40] *See* Act section 104(f)(1).

[41] Fed. Res. Bk. of New York, *Additional Information about Reference Rates Administered by the New York Fed, https://www.newyorkfed.org/markets/reference-rates/additional-information-about-reference-rates#treasury_repo_details_on_publication_and_revisions* (last visited July 7, 2022) (where section entitled ''Details on Publication and Revisions for the Treasury Repo Reference Rates'' details publication days).

Finally, proposed § 253.2 defines ''state'' to mean any state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands. This definition of ''state'' is relevant for purposes of the scope of the proposed rule, and the preemption provisions in proposed § 253.6. As stated in proposed § 253.1(c), the LIBOR Act and the proposed regulation apply to certain LIBOR contracts governed by federal law or the law of any state. Because Congress intended the LIBOR Act to apply on a nationwide basis,[42] the Board believes it is appropriate to define ''state'' expansively to include U.S. territories and possessions and the District of Columbia.

C. Section 253.3 Applicability

Proposed § 253.3 addresses the applicability of the regulation to LIBOR contracts. Specifically, for LIBOR contracts that do not provide for the use of a clearly defined or practicable replacement benchmark rate (referred to as ''covered contracts'' in the proposed rule), the applicable Board-selected benchmark replacement indicated in § 253.4 of the proposed rule shall be the benchmark replacement for the contract on and after the LIBOR replacement date.[43] Proposed § 253.3 also clarifies that, consistent with § 253.1 of the proposed rule, in general, the regulation does not affect LIBOR contracts that are not covered contracts, with one exception discussed further below.[44]

Covered contracts. The proposed rule defines ''covered contract'' to mean a LIBOR contract that has one of the following characteristics as of the LIBOR replacement date: (i) the LIBOR contract contains no fallback provisions; (ii) the LIBOR contract has fallback provisions that identify neither a specific benchmark replacement nor a determining person; or (iii) the LIBOR contract contains fallback provisions that identify a determining person, but the determining person has failed to select a benchmark replacement by the earlier of the LIBOR replacement date and the latest date for selecting a benchmark replacement according to the terms of the LIBOR contract.[45] In evaluating whether a LIBOR contract has any of these characteristics on the LIBOR replacement date, the proposed regulation would mirror the statute and disregard any reference in any fallback provisions of the LIBOR contract to the following: (i) 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 (ii) 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.[46] The proposed rule further clarifies that a ''covered contract'' would not include any LIBOR contract that the parties have agreed in writing shall not be subject to the LIBOR Act.[47]

Under the proposed rule, ''covered contract'' would include, for example, a LIBOR contract that does not specify any benchmark replacement or identify a determining person who could select such a benchmark replacement. Pursuant to proposed § 253.3(a)(2)(i)(B), on the LIBOR replacement date, the LIBOR contract would be a covered contract.

Another example would be a LIBOR contract that specifies the last published LIBOR value as the benchmark replacement. Pursuant to proposed § 253.3(a)(2)(ii)(A), this benchmark replacement would be disregarded as of the LIBOR replacement date. As a result, on the LIBOR replacement date, the LIBOR contract would be a covered contract because it has no fallback provisions, as described in proposed § 253.3(a)(2)(i)(A).

Non-covered contracts. As defined in the proposed rule, a LIBOR contract would not be a covered contract if, after giving effect to proposed § 253.3(a)(2)(ii)(B) on the LIBOR replacement date, (i) the LIBOR contract has fallback provisions that identify a specific benchmark replacement, (ii) the LIBOR contract identifies a determining person that has selected a benchmark replacement, or (iii) the parties to the contract have agreed in writing that the contract shall not be subject to the LIBOR Act.[48] Consistent with the statute, the proposed regulation generally would not affect LIBOR contracts that are not covered contracts.[49]

However, the Board's proposed rule would clarify that a determining person may select the Board-selected benchmark replacement specified in § 253.4 of the proposed rule as the benchmark replacement for a LIBOR contract.[50] Consistent with the LIBOR Act, the proposed rule would indicate that any such selection by a determining person shall be (i) irrevocable; (ii) made by the earlier of the LIBOR replacement date and the latest date for selecting a benchmark replacement according to the terms of the LIBOR contract; and (iii) used in any determinations of the benchmark under or with respect to the LIBOR contract occurring on and after the LIBOR replacement date.

Separately, the Board is aware of a potential ambiguity regarding the application of the LIBOR Act to a subset of non-covered contracts. Specifically, the Board is aware that some LIBOR contracts contain fallback provisions that (i) either identify a clear and practicable benchmark replacement or authorize a determining person to select a benchmark replacement, but (ii) are triggered only when LIBOR is unavailable. Significantly, the fallback provisions in these LIBOR contracts are not triggered expressly when LIBOR is available but nonrepresentative.

As mentioned previously, the Board understands it is possible that, on and after the LIBOR replacement date, IBA (or any successor administrator) may continue to publish a synthetic version of LIBOR that, although called ''LIBOR,'' has been expressly pronounced by the FCA as not representative of the underlying market and economic reality LIBOR had been intended to measure—namely, the rate at which banks may lend to, or borrow from, other banks or agents in the money markets.[51] If this occurs, the continued publication of synthetic LIBOR on and after the LIBOR replacement date arguably could give

[42] *See* Act section 102(b)(1).

[43] Section 253.3(a)(1) of the proposed rule.

[44] Section 253.3(b) of the proposed rule; *see also* Act section 104(f)(1)–(3).

[45] Section 253.3(a)(2)(i) of the proposed rule.

[46] Section 253.3(a)(2)(ii) of the proposed rule. Under the statute, any such references in any fallback provisions of the LIBOR contract would be disregarded as if not included in the fallback provisions of the contract and would be deemed null and void and without any force or effect. Act section 104(b).

[47] Section 253.3(a)(2)(iii) of the proposed rule; *see also* Act section 104(f)(1).

[48] Section 253.3(b)(1) of the proposed rule; *see also* Act section 104(a). Pursuant to the statute, any references in the fallback provisions of a LIBOR contract to any of the following would be disregarded and deemed null and void and without any force or effect: (i) 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 (ii) 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. Act section 104(b); *see also* § 253.3(a)(2)(ii) of the proposed rule.

[49] Section 253.3(b)(1) of the proposed rule; *see also* Act sections 102(b)(3) and 104(f).

[50] Section 253.3(b)(2) of the proposed rule.

[51] FCA, *FCA Announcement on Future Cessation and Loss of Representative of the LIBOR Benchmarks* par.7 (Mar. 5, 2021), *https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf;* FCA, *UK Benchmarks Regulation, https://www.fca.org.uk/markets/benchmarks/regulation* (last visited July 7, 2022) (describing regulation).

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, notwithstanding the fact that the LIBOR contract's fallback provisions may identify a clear and practicable benchmark replacement. In this scenario, because the LIBOR contract contains such fallback provisions, it would not be a covered contract for purposes of the proposed rule.[52] Yet, to the extent synthetic LIBOR continues to be published on or after the LIBOR replacement date, there may be confusion as to whether references to LIBOR in the contract should be replaced pursuant to that fallback provision, or whether synthetic LIBOR should apply.

In light of this potential ambiguity, the Board is considering whether, for clarity, the final rule should provide that, with respect to any LIBOR contract that is not a covered contract (other than a LIBOR contract where the parties have agreed in writing that the contract shall not be subject to the LIBOR Act), LIBOR shall be replaced with the benchmark replacement specified pursuant to the LIBOR contract on the earlier of (i) the date specified pursuant to the LIBOR contract or (ii) the LIBOR replacement date. Under such a rule, the benchmark replacement specified pursuant to a non-covered contract would become operative on or before the LIBOR replacement date (depending on the contract's terms), even in the event a nonrepresentative rate called ''LIBOR'' in the form of synthetic LIBOR continues to be published on and after the LIBOR replacement date. The Board believes that, for the reasons described below, such a clarification may promote the purposes of the LIBOR Act.

First, the findings and purpose of the LIBOR Act indicates that Congress sought to ''establish a clear and uniform process . . . for *replacing LIBOR* in existing contracts the terms of which do not provide for the use of a clearly defined or practicable replacement benchmark rate'' based on a finding that ''the cessation or nonrepresentativeness of LIBOR could result in disruptive litigation related to existing contracts that do not provide for the use of a clearly defined or practicable replacement benchmark rate.'' [53] In addition, Congress sought to ''allow existing contracts that reference LIBOR but provide for the use of a clearly defined and practicable replacement rate, to operate according to their terms.'' [54] Considering these findings, the Board believes that Congress intended that, in the event LIBOR ceases to be published *or becomes nonrepresentative* on the LIBOR replacement date, a LIBOR contract with a clear and practicable benchmark replacement would replace references to LIBOR in the contract with the specified benchmark replacement, even if synthetic LIBOR continues to be published on and after the LIBOR replacement date.

Second, in light of the fact that a non-covered contract would provide for use of a clear and practicable benchmark replacement, the Board believes a sensible and reasonable expectation of the parties at the time of the agreement would have been that, upon the nonrepresentativeness of LIBOR, this fallback provision would operate to replace LIBOR, rather than binding the parties to a synthetic LIBOR rate that may not have been anticipated to exist at the time of the agreement. As discussed, although synthetic LIBOR would be called ''LIBOR,'' it 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.[55]

For these reasons, the Board seeks feedback on whether the final rule should provide generally that the benchmark replacement specified pursuant to a non-covered contract would replace references to LIBOR in that contract on the earlier of the date specified pursuant to the LIBOR contract or the LIBOR replacement date. If adopted, the provision would not, however, apply to a LIBOR contract that is a non-covered contract because the parties have agreed in writing that the contract shall not be subject to the LIBOR Act.[56] The Board believes such a provision could provide a useful clarification and also may promote the LIBOR Act's intention to preclude disruptive ligation related to existing contracts' references to LIBOR.[57] Alternatively, the Board could offer no particular interpretation or clarification concerning non-covered contracts that do not contain an express nonrepresentativeness or similar triggering provision should synthetic LIBOR be published on and after the LIBOR replacement date. This position may be reasonable since the particular situation is not expressly addressed by the LIBOR Act and non-covered contracts include a provision for a clear and practicable replacement rate that otherwise are generally are presumed to be unaffected by the Act. Therefore, it may be prudent for the final rule, like the proposed rule, to leave these contracts unaffected.

D. Section 253.4 Board-Selected Benchmark Replacements

Proposed § 253.4 identifies the Board-selected benchmark replacements for various types of covered contracts. The Board agrees with the ARRC's observation that different benchmark replacements may be appropriate for derivative transactions and other transactions (hereafter, ''cash transactions'').[58] Therefore, under the proposed rule, the Board would select different benchmark replacements for derivative transactions and for cash transactions. The Board also would select a separate benchmark replacement for certain contracts to which government-sponsored enterprises are a party (covered GSE contracts). Consistent with the LIBOR Act, all of the proposed replacements (i) would be based upon SOFR and (ii) would incorporate spread adjustments for each specified tenor of LIBOR.[59]

The spread adjustments specified in the Act are intended to address certain differences between SOFR and LIBOR, including the fact that LIBOR is unsecured and therefore includes an element of bank credit risk which may cause it to be higher than SOFR.[60] LIBOR also may include term premia and reflect supply and demand conditions in wholesale unsecured funding markets, each of which may cause LIBOR to be higher than SOFR.[61] The LIBOR Act prescribes static spread adjustments based on the tenor of LIBOR referenced in the contract (tenor spread adjustments)—specifically, 0.644

[52] Section 253.3(b) of the proposed rule; *see also* Act 104(f)(2).

[53] Act section 102(a)(3)–(b)(1).

[54] Act section 102(b)(3).

[55] Specifically, the Board understands that synthetic LIBOR also would be a SOFR-based rate and, therefore, would not be representative of the rates at which banks may lend to, or borrow from, other banks or agents in the money markets.

[56] In agreeing in writing that the contract shall not be subject to the Act, the Board anticipates that those parties have agreed upon a method in which to address LIBOR references in that contract.

[57] *See* Act section 102(b)(2); *see also* Act section 102(a)(3).

[58] ARRC, *ARRC Best Practice Recommendations Related to Scope of Use of the Term Rate* (May 4, 2022), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Scope_of_Use.pdf.*

[59] *See* § 253.4 of the proposed rule. *See also* Act sections 103 and 104.

[60] ARRC, *ARRC Consultation on Spread Adjustment Methodologies for Fallbacks in Cash Products Referencing USD LIBOR* 7 (Jan. 21, 2020), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Spread_Adjustment_Consultation.pdf.*

[61] *Id.*

basis points (bps) (0.00644 percent) for overnight LIBOR, 11.448 bps (0.11448 percent) for one-month LIBOR, 26.161 bps (0.26161 percent) for three-month LIBOR, 42.826 bps (0.42826 percent) for six-month LIBOR, and 71.513 bps (0.71513 percent) for 12-month LIBOR.[62]

1. Derivative Transactions

With respect to derivative transactions, the Board observes that many derivative market participants have adhered to the ISDA 2020 IBOR Fallbacks Protocol (ISDA protocol) to amend their existing derivative transaction contracts to incorporate fallback provisions that would replace references to USD LIBOR with a SOFR-based rate.[63] Specifically, the ISDA protocol replaces references to USD LIBOR in adhering parties' derivative transaction contracts with a rate equal to (i) SOFR, compounded in arrears for the appropriate tenor,[64] plus (ii) a stated spread adjustment based on the appropriate tenor (the ''Fallback Rate (SOFR)''). The stated spread adjustments of the ISDA protocol are identical to the tenor spread adjustments specified in the LIBOR Act.[65] As of July 6, 2022, over 15,200 entities have adhered to the ISDA protocol to amend their derivative transactions.[66]

The Board has reviewed the ISDA protocol and believes the rate specified in the ISDA protocol would be a reasonable, SOFR-based benchmark replacement for LIBOR for derivative transactions. Further, as derivatives markets already appear to reference SOFR compounded in arrears and there has been significant adherence to the ISDA protocol, the Board believes it would be sensible to avoid disruption to these markets' efforts to transition away from referencing LIBOR. Promoting use of a consistent approach to replace LIBOR references in derivative transactions should enhance financial stability. This approach also is consistent with the recommendations of the ARRC.[67] For these reasons, the proposed rule would select the Fallback Rate (SOFR) in the ISDA protocol as the Board-selected benchmark for derivative transactions. For purposes of the proposed rule, a ''derivative transaction'' is defined as ''a contract that would satisfy the criteria to be a 'Protocol Covered Document' under the ISDA protocol but for the fact that one or more parties to such contract is not an 'Adhering Party' as such term is used in the ISDA protocol, provided that, for purposes of this definition, 'Protocol Effective Date' as such term is used in the ISDA protocol means the LIBOR replacement date for the relevant covered contract.'' [68]

ISDA has selected Bloomberg Index Services Limited (Bloomberg) to calculate and publish the Fallback Rate (SOFR) referenced in its ISDA protocol.[69] Similar to how IBA requires a license for certain uses of LIBOR,[70] the use of the Fallback Rate (SOFR) is subject to certain licensing or other usage terms imposed by Bloomberg.[71] Under its present usage terms, Bloomberg waives usage fees for users with less than $5 billion of total assets and charges one annual license fee for use of its IBOR fallbacks data.[72]

2. Cash Transactions

a. Cash Transactions That Are Not Consumer Loans or Covered GSE Contracts

With respect to cash transactions that are not consumer loans or covered GSE contracts, consistent with the ARRC's recommendations,[73] the Board believes that references to overnight LIBOR should be replaced by SOFR plus the static spread adjustment in the LIBOR Act for overnight LIBOR (0.644 bps). With respect to such cash transactions that reference one-month, three-month, six-month, or 12-month LIBOR, the Board believes that a forward-looking term rate based on SOFR, including the applicable tenor spread adjustment specified in the LIBOR Act, would be an appropriate replacement. For these LIBOR contracts, the Board notes that, in July 2021, the ARRC formally recommended the forward-looking SOFR term rates administered by CME Group Benchmark Administration, Ltd. (CME Group).[74] These forward-looking SOFR term rates are calculated by first projecting a possible path of overnight rates that is consistent with the observable averages implied by SOFR-based derivative contracts and then creating averages over standard tenors of that projected path of overnight rates.[75]

---

[62] *See* Act section 103(20) (defining ''tenor spread adjustment''). These spread adjustments were based on a methodology originally advanced by ISDA that uses the historical median over a five-year lookback period calculating the difference between USD LIBOR and SOFR. ARRC, *ARRC Announces Further Details Regarding Its Recommendation of Spread Adjustments for Cash Products* (June 30, 2020), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Recommendation_Spread_Adjustments_Cash_Products_Press_Release.pdf.*

[63] ISDA, ISDA 2020 IBOR Fallbacks Protocol (Oct. 23, 2020), *https://assets.isda.org/media/3062e7b4/08268161-pdf.*

[64] For purposes of this calculation, SOFR generally is compounded in arrears over an accrual period corresponding to the tenor of the LIBOR referenced in the covered contract. That compounded rate is annualized, and the day count convention is adjusted to match that of LIBOR. Bloomberg Professional Services, *Fact Sheet: IBOR Fallbacks* (Dec. 13, 2021), *https://assets.bbhub.io/professional/sites/10/Factsheet-IBOR-Fallbacks_V4_Dec2021.pdf* (cited in response to FAQ 3 of ISDA's ''2020 IBOR Fallbacks Protocol (IBOR Fallbacks Protocol) FAQs''). *See also* Bloomberg Professional Services, *IBOR Fallback Rate Adjustments Rule Book* (Dec. 13, 2021), *https://assets.bbhub.io/professional/sites/10/IBOR-Fallback-Rate-Adjustments-Rule-Book_V3_Dec2021.pdf* (for complete discussion of the calculation).

[65] ISDA based its spread adjustments on a historical median over a five-year lookback period calculating the difference between USD LIBOR and SOFR. ARRC, *ARRC Announces Further Details Regarding Its Recommendation of Spread Adjustments for Cash Products* (June 30, 2020), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Recommendation_Spread_Adjustments_Cash_Products_Press_Release.pdf.*

[66] *See* ISDA, *ISDA 20202 IBOR Fallbacks Protocol—List of Adhering Parties, https://www.isda.org/protocol/isda-2020-ibor-fallbacks-protocol/adhering-parties* (last visited July 7, 2022).

[67] *See* ARRC, *ARRC Best Practice Recommendations Related to Scope of Use of the Term Rate* (May 4, 2022), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Scope_of_Use.pdf* (recommending against the use of CME Term SOFR for the vast majority of the derivatives markets because these markets already reference SOFR compounded in arrears).

[68] Section 253.2 of the proposed rule. ''Protocol Covered Documents'' include (i) master agreements incorporating certain ISDA definitions booklets (each a ''covered ISDA definitions booklet''), including the 2006 ISDA Definitions and the 2000 ISDA Definitions, as published by ISDA, and referencing LIBOR or another specified IBOR (each a ''covered master agreement''); (ii) confirmations that supplement, form part of and are subject to, or are otherwise governed by, a covered master agreement; and (iii) any ISDA credit support document, including the 1994 ISDA Credit Support Annex and the 2014 Standard Credit Support Annex, that incorporates a covered ISDA definition booklet and references LIBOR or another specified IBOR. ISDA, ISDA 2020 IBOR Fallbacks Protocol 14–16(Oct. 23, 2020), *https://assets.isda.org/media/3062e7b4/08268161-pdf.*

[69] ISDA, *Bloomberg Selected as Fallback Adjustment Vendor* (July 31, 2019), *https://www.isda.org/2019/07/31/bloomberg-selected-as-fallback-adjustment-vendor.*

[70] IBA, *About, https://www.theice.com/iba/about#licensing* (last visited July 7, 2022).

[71] *See* Bloomberg Prof'l Servs., *IBOR Fallback Usage Terms* (Sept. 27, 2021), *https://assets.bbhub.io/professional/sites/27/ISDA-IBOR-Fallbacks-Web-Terms1.pdf.*

[72] *Id.* The asset threshold of $5 billion applies to a user and its affiliates as one group and can be based on assets under management, the value of assets on its balance sheet, or another objective measure that Bloomberg may reasonably employ. *Id.*

[73] *See* ARRC, *ARRC Best Practice Recommendations Related to Scope of Use of the Term Rate* (May 4, 2022), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Scope_of_Use.pdf.*

[74] ARRC, *ARRC Formally Recommends Term SOFR* (July 29, 2021), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Press_Release_Term_SOFR.pdf.*

[75] In projecting the path of overnight rates, CME Group uses a combination of one-month and three-month SOFR futures contracts to ensure that as

The ARRC made its recommendation after considering, among other things: (i) the fact that CME Group's term rates were rooted in a robust and sustainable base of derivative transactions over time; (ii) the rates' limited scope of use that should support their stability over time; (iii) continued growth in overnight SOFR-linked derivatives volumes; (iv) visible progress to deepen SOFR derivative transactions' liquidity; and (v) visible growth in offerings of cash transactions linked to averages of SOFR.[76] For similar reasons, the Board believes that the forward-looking SOFR term rates administered by CME Group and published in one-, three-, six-, and 12-month tenors (together, ''CME Term SOFR'') generally would be an appropriate basis for a benchmark replacement for one-, three-, six-, and 12-month LIBOR, respectively. Therefore, for cash transactions that are not consumer loans or covered GSE contracts, the proposed rule would replace references to one-, three-, six-, and 12-month LIBOR with (i) the corresponding one-, three-, six-, or 12-month CME Term SOFR, plus (ii) the applicable tenor spread adjustment specified in the LIBOR Act.

CME Group calculates and publishes CME Term SOFR.[77] Similar to how IBA requires a license for certain uses of LIBOR,[78] the use of CME Term SOFR is subject to certain licensing or other usage terms imposed by CME Group.[79] Under its present usage terms, an end user seeking only to enter into a transaction does not need a license from CME Group.[80] In addition, CME Group has waived fees for users of CME Term SOFR for cash transactions through 2026.[81]

b. Cash Transactions That Are Consumer Loans

Under the LIBOR Act, any Board-selected benchmark replacement applicable to consumer loans shall, for the one-year period beginning on the LIBOR replacement date, incorporate an amount that modifies the otherwise-applicable tenor spread adjustment specified in the Act.[82] Specifically, section 104(e)(2) of the LIBOR Act requires that, during the one-year period, the Board-selected benchmark replacement for consumer loans incorporate an amount that transitions linearly for each business day during that period from (i) the difference between the Board-selected benchmark replacement and the corresponding LIBOR tenor determined as of the day immediately before the LIBOR replacement date to (ii) the applicable tenor spread adjustment specified in the LIBOR Act (the transition tenor spread adjustment).[83] This transition tenor spread adjustment is intended to prevent consumer borrowers from experiencing significant, unexpected shifts in borrowing rates on and immediately following the LIBOR replacement date.

The Board believes that a forward-looking term rate based on SOFR would be an appropriate benchmark replacement for consumer loans. Accordingly, for consumer loans during the one-year period beginning on the LIBOR replacement date, the proposed rule would replace one-, three-, six-, and 12-month LIBOR with (i) the corresponding one-, three-, six-, or 12-month CME Term SOFR, plus (ii) the transition tenor spread adjustment.

Refinitiv Limited has stated it will publish and provide rates for consumer loans that sum (i) CME Term SOFR and (ii) the transition tenor spread adjustment (for the one-year period beginning on the LIBOR replacement date) or the tenor spread adjustment specified in the LIBOR Act (after that one-year period), consistent with the proposed rule and the recommendations of the ARRC.[84] Refinitiv identifies these rates as ''USD IBOR Cash Fallbacks'' for ''Consumer'' products. For clarity, and particularly because calculation of the transition tenor spread adjustment applicable to consumer loans during the one-year period beginning on the LIBOR replacement rate may be complex, the proposed rule indicates that these rates from Refinitiv would be deemed equal to the rates in the proposed rule.[85] Use of these ''USD IBOR Cash Fallbacks'' for ''Consumer'' products may be subject to certain licensing or other usage terms imposed by Refinitiv Limited.

c. Cash Transactions That Are Covered GSE Contracts

Under the proposed rule, a ''covered GSE contract'' would be ''a covered contract for which a GSE is identified as a party in the transaction documents and that is (i) a commercial or multifamily mortgage loan, (ii) a commercial or multifamily mortgage-backed security, (iii) a collateralized mortgage obligation, (iv) a credit risk transfer transaction, or (v) a Federal Home Loan Bank advance.'' [86]

many data points as possible are used to calculate the term structure. CME Grp., *CME Term SOFR Reference Rates Benchmark Methodology* (May 9, 2022), *https://www.cmegroup.com/market-data/files/cme-term-sofr-reference-rates-benchmark-methodology.pdf.*

[76] ARRC, *ARRC Formally Recommends Term SOFR* (July 29, 2021), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Press_Release_Term_SOFR.pdf. See also* ARRC, *ARRC Announces Key Principles for a Forward-Looking SOFR Term Rate* (Apr. 20, 2021), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/20210420-arrc-press-release-term-rate;* ARRC, *ARRC Identifies Market Indicators to Support a Recommendation of a Forward-Looking SOFR Term Rate* (May 6, 2021), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/20210506-term-rate-indicators-press-release.*

[77] CME Grp., *CME Term SOFR Rates, https://www.cmegroup.com/market-data/cme-group-benchmark-administration/term-sofr.html* (last visited July 7, 2022).

[78] IBA, *About, https://www.theice.com/iba/about#licensing* (last visited July 7, 2022).

[79] *See* CME Grp., *CME Data Terms of Use, https://www.cmegroup.com/trading/market-data-explanation-disclaimer.html* (last visited July 7, 2022); CME Grp., *CME Term SOFR Reference Rates—Frequently Asked Questions,* FAQ 8–10 (Apr. 19, 2022), *https://www.cmegroup.com/articles/faqs/cme-term-sofr-reference-rates.html.*

[80] CME Group defines an ''end user'' as an individual or entity that is a counterparty or guarantor to the applicable cash transaction or derivative transaction with the licensee of CME Term SOFR. CME Grp., *CME Term SOFR Reference Rates—Frequently Asked Questions,* FAQ 10 (Apr. 19, 2022), *https://www.cmegroup.com/articles/faqs/cme-term-sofr-reference-rates.html.*

[81] CME Grp., *CME Group Benchmark Fee List* (Dec. 2021), *https://www.cmegroup.com/files/download/benchmark-data-fee-list.pdf.*

[82] Act section 104(e)(2). *See* § 253.2 of the proposed rule for the definition of ''consumer loan.''

[83] *Id.*

[84] The ARRC selected Refinitiv Limited to publish its recommended spread adjustments and spread-adjusted rates for cash products. ARRC, *ARRC Announces Refinitiv as Publisher of its Spread Adjustment Rates for Cash Products* (Mar. 17, 2021), *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/20210317-press-release-Spread-Adjustment-Vendor-Refinitiv.pdf.* With respect to the transition tenor spread adjustment, Refinitiv has stated it will incorporate a two-week lookback period for SOFR (from June 19, 2023, through June 30, 2023) in determining the difference between the Board-selected benchmark replacement and the corresponding LIBOR tenor as of the day before the LIBOR replacement date. Refinitiv Benchmark Servs. (UK) Ltd., *USD IBOR Institutional Cash Fallbacks Benchmark, USD IBOR Consumer Cash Fallbacks (1 Week, 2 Months) Benchmark, USD IBOR Consumer Cash Fallbacks (1, 3, 6 Months) Prototype Methodology* 11 (Jan. 3, 2022), *https://www.refinitiv.com/content/dam/marketing/en_us/documents/methodology/refinitiv-usd-ibor-cash-fallbacks-methodology.pdf.* The Board believes this method of determining the difference between the Board-selected benchmark replacement and the corresponding LIBOR tenor as of June 30, 2023, is consistent with the provision in the Act.

[85] *See* § 253.4(b)(2)(iii) of the proposed rule. Refinitiv also has stated it will publish ''USD IBOR Cash Fallbacks'' for ''Institutional'' products. These rates are expected to be consistent with the proposed rule's benchmark replacement for cash transactions that are not consumer loans. The Board observes that parties to cash transactions that are not consumer loans should be able to compute easily the proposed benchmark replacement rate and, if needed, verify that any vendor's reported rate (including that of Refinitiv) is consistent with that proposed replacement rate such that no provision similar to § 253.4(b)(2)(iii) is needed for these transactions.

[86] *See* § 253.2 of the proposed rule. A GSE, or government-sponsored enterprise, would be defined

Continued

As with other cash transactions that are not consumer loans, the Board believes that references to overnight LIBOR in covered GSE contracts should be replaced by SOFR plus the static spread adjustment in the LIBOR Act for overnight LIBOR. However, with respect to covered GSE contracts referencing one-month, three-month, six-month, or 12-month LIBOR, the Board notes that, since 2020, the Federal Housing Finance Agency has worked with its supervised GSEs—the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Federal Home Loan Banks—generally to replace USD LIBOR with the 30-calendar-day compounded average of SOFR (30-day Average SOFR), as published by the FRBNY,[87] in their newly issued multifamily loans and other structured products that are covered GSE contracts.[88] To enhance liquidity for both these newly issued and legacy LIBOR-based products, the Board's proposed rule would select as the benchmark replacement for covered GSE contracts (i) 30-day Average SOFR plus (ii) the applicable tenor spread adjustment specified in the LIBOR Act. The Board invites comment as to whether selecting the same SOFR-based replacement for LIBOR for legacy covered GSE contracts as those used for similar, recently issued contracts would promote greater liquidity for legacy and newly issued covered GSE contracts.

3. Determination Date for the Benchmark Replacement

As discussed, under the proposed rule, references to ''LIBOR'' in LIBOR contracts generally would be replaced with the proposed Board-selected benchmark replacement, without any modification of other contractual provisions.[89] For clarity, the proposed rule indicates that selection and use of the Board-selected benchmark replacement would not affect the dates on which the contractual rates are determined.[90] For example, if a covered contract that is a cash transaction originally indicated that a three-month LIBOR rate would be determined on March 31, June 30, September 30, and December 31 of each year, then, following the LIBOR replacement date, the corresponding Board-selected benchmark replacement rate (three-month CME Term SOFR) also would be determined on March 31, June 30, September 30, and December 31 of each year. Similarly, if a covered contract that is a cash transaction originally indicated that a 12-month LIBOR rate would be determined using the value as of a prior date (*e.g.,* 45 days prior to the payment date), then following the LIBOR replacement date, the corresponding Board-selected benchmark replacement rate (12-month CME Term SOFR) also would be determined using that benchmark replacement's value as of the specified prior date. To the extent that the specified prior date precedes the LIBOR replacement date, the benchmark originally specified in the contract—here, 12-month LIBOR—would be used, consistent with the covered contract's terms. However, once the parties would look to a benchmark value as of a date on or after the LIBOR replacement date under the covered contract's terms, the corresponding Board-selected benchmark replacement—here, 12-month CME Term SOFR—would be used.

E. Section 253.5 Benchmark Replacement Conforming Changes

The LIBOR Act authorizes the Board to require any additional technical, administrative, or operational changes, alterations, or modifications to LIBOR contracts based on a determination such changes, alterations, or modifications would address one or more issues affecting the implementation, administration, and calculation of the Board-selected benchmark replacement in LIBOR contracts (conforming changes).[91] At this time, the Board does not believe any additional conforming changes would be needed for successful implementation of the Board-selected benchmark replacements indicated in § 253.4 of the proposed rule. However, the Board reserves the authority, in its discretion, to require any additional conforming changes, by regulation or order.[92]

For clarity, the proposed rule also indicates that, with respect to a LIBOR contract that is not a consumer loan, a calculating person may make any additional technical, administrative, or operational changes, alterations or modifications that, in that person's reasonable judgment, would be necessary or appropriate to permit the implementation, administration, and calculation of the Board-selected benchmark replacement under or with respect to a LIBOR contract after giving due consideration to any changes, alterations, or modifications otherwise required by the Board under the proposed rule.[93] This proposed language mirrors sections 103(4)(B) and 104(d) of the LIBOR Act.

F. Section 253.6 Preemption

As noted, section 107 of the LIBOR Act expressly preempts any provision of state or local law relating to the selection or use of a benchmark replacement or related conforming changes, or expressly limiting the manner of calculating interest (including the compounding of interest) as that provision applies to the selection or use of a Board-selected benchmark replacement or benchmark replacement conforming changes.[94] For clarity, § 253.6 of the proposed rule references and repeats the statutory language concerning preemption of such state or local law, statute, rule, regulation, or standard by a final rule issued by the Board pursuant to the LIBOR Act.

G. Effective Date

The Board proposes that the proposed rule, if finalized, will become effective on the first day of the next calendar quarter that begins 30 days after publication of the final rule in the **Federal Register**. The Board notes that the LIBOR Act directs the Board to promulgate regulations not later than

as an entity established or chartered by the U.S. government to serve public purposes specified by the U.S. Congress but whose debt obligations are not explicitly guaranteed by the full faith and credit of the U.S. government. *Id.*

[87] Fed. Res. Bk. of NY, *Additional Information about Reference Rates Administered by the New York Fed, https://www.newyorkfed.org/markets/reference-rates/additional-information-about-reference-rates#sofr_ai_calculation_methodology* (last visited July 7, 2022) (detailing the calculation methodology for the SOFR averages and index).

[88] Under the proposed rule, ''covered GSE contract'' would be defined to be a contract for which a GSE is identified as a party in the transaction documents that is (i) a commercial or multifamily mortgage loan, (ii) a commercial or multifamily mortgage-backed security, (iii) a collateralized mortgage obligation, (iv) a credit risk transfer transaction, or (v) a Federal Home Loan Bank advance. Section 253.2 of the proposed rule. ''Government-sponsored enterprise (GSE)'' is defined consistent with the Board's capital rule, 12 CFR 217.2, to mean an entity established or chartered by the U.S. government to serve public purposes specified by the U.S. Congress but whose debt obligations are not explicitly guaranteed by the full faith and credit of the U.S. government. Section 253.2 of the proposed rule.

[89] For example, if a LIBOR contract indicated that interest due on borrowings for periods between published LIBOR tenors should be calculated by interpolation, the proposed rule would not affect the parties' ability to use interpolation except that the corresponding Board-selected benchmark replacement values should be used in place of the LIBOR values for the interpolation. Similarly, if the LIBOR contract provided that interest should be on a fixed rate for some specified period and on a floating interest rate based on LIBOR only after that specified period for the remaining maturity of the loan, then the proposed rule only would replace the LIBOR reference with the relevant Board-selected benchmark replacement and would not affect the fixed-rate period or other terms of the contract.

[90] Section 253.4(d) of the proposed rule.

[91] Act section 104(e).

[92] *Id.*

[93] Section 253.5(a)(2) of the proposed rule.

[94] Act section 107.

180 days after the date of enactment.[95] As a result, the effective date of the final rule would be well in advance of the LIBOR replacement date.

III. Request for Comment

The Board invites comment on all aspects of the proposed rule. In addition, the Board invites comment on the following specific questions related to the proposed rule:

- What, if any, alternative SOFR-based benchmark replacements should the Board consider for derivative transactions instead of Fallback Rate (SOFR) as defined in the ISDA protocol (*e.g.,* a type of SOFR average)? What, if any, alternative SOFR-based benchmark replacements should the Board consider for covered GSE contracts instead of 30-day Average SOFR, such as SOFR term rates? What, if any, alternative SOFR-based benchmark replacements should the Board consider for other cash transactions instead of CME Term SOFR, such as a type of SOFR average or SOFR term rates that may be offered by a provider other than CME? Why would those alternatives be better choices than those indicated in the proposed rule? Should the Board identify a single Board-selected benchmark replacement for all covered contracts?
- Are there any categories of covered contracts for which the Board should consider an alternative SOFR-based Board-selected benchmark replacement? What aspects of the nature, circumstances, or characteristics (*e.g.,* issuer type, lender type, borrower type, structure, use) of those contracts warrant consideration of a different SOFR-based benchmark replacement?
- What, if any, additional clarifications should the Board consider regarding the Board-selected benchmark replacements? Why would those clarifications be helpful?
- What, if any, additional clarifications should the Board consider regarding the definition of ''covered contract''? For example, should the Board clarify that § 253.3(a)(2)(ii)(B) of the proposed regulation—which generally nullifies any references in the fallback provisions of a LIBOR contract to 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—applies to a contract that requires a person to poll for ''Eurodollar'' deposit rates? What, if any, additional clarifications should the Board consider regarding other defined terms in the proposed rule?
- Is the proposed provision concerning the application of the proposed rule to non-covered contracts sufficiently clear? What, if any, additional clarifications should the Board consider with respect to non-covered contracts? For example, should the final rule address the ambiguity discussed above regarding LIBOR contracts with fallback provisions that lack an express nonrepresentativeness trigger, perhaps by indicating that those contracts' fallback provisions would be triggered on the LIBOR replacement date?[96]
- What, if any, additional clarifications, should the Board consider regarding selections of benchmark replacements by determining persons, including their ability to select a replacement on or before the LIBOR replacement date? For example, should the Board consider requiring a determining person to provide notice to one or more parties concerning the selection and, if so, what specific notification requirements would be appropriate and why? What, if any, potential litigation or other risks could result from such a notification requirement, and how might the Board address those risks?
- What, if any, benchmark replacement conforming changes should the Board consider (*e.g.,* clarification regarding calculation of any contractual rate cap or floor in light of the Act's specified tenor adjustments, application of any contractual lookback period or other term related to determination of the precise applicable benchmark replacement rate)? Should those conforming changes apply to all covered contracts or just one or more categories of covered contracts?
- Should the Board incorporate into the regulation the statutory protections in section 105 of the Act? If so, should the Board make any clarifications related to these statutory protections?

IV. Regulatory Analyses

A. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), requires an agency to consider the impact of its proposed rules on small entities. In connection with a proposed rule, the RFA generally requires an agency to prepare an Initial Regulatory Flexibility Analysis (IRFA) describing the impact of the rule on small entities, unless the head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities and publishes such certification along with a statement providing the factual basis for such certification in the **Federal Register**. An IRFA must contain (i) a description of the reasons why action by the agency is being considered; (ii) a succinct statement of the objectives of, and legal basis for, the proposed rule; (iii) a description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; (iv) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; (v) an identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap with, or conflict with the proposed rule; and (vi) a description of any significant alternatives to the proposed rule that accomplish its stated objectives.

The Board is providing an IRFA with respect to the proposed rule. The Board invites comment on all aspects of this IRFA.

a. Reasons Action Is Being Considered

The Board is issuing the proposed rule to implement its statutory mandate in the LIBOR Act. Specifically, section 110 of the Act directs the Board to promulgate regulations to carry out the Act not later than 180 days after enactment. In general, the proposed rule would codify into regulation the rules that are laid out in the Act; under the Act, as described below, the Board's discretion is limited to a few key areas, such as the selection of Board-selected benchmark replacements based on SOFR.

b. Objectives of the Proposed Rule

Congress enacted the LIBOR Act to provide a uniform, nationwide solution for replacing references to LIBOR in tough legacy contracts—contracts governed by U.S. law that reference USD LIBOR and that will not mature until after USD LIBOR ceases or becomes nonrepresentative, but have no effective means to replace LIBOR after it ceases or becomes nonrepresentative. The statute directs the Board to select one or more benchmark replacements based on SOFR that will replace LIBOR by operation of law following the LIBOR replacement date. In this way, the Act and the Board's implementing regulation should preclude disruptive litigation related to tough legacy contracts.

[95] One hundred eighty days after the date of enactment, March 15, 2022, is September 11, 2022.

[96] *See* discussion concerning non-covered contracts in section II.C.

c. Description and Estimate of the Number of Small Entities

The proposed rule would primarily apply to the parties to covered contracts, as defined in § 253.3(a)(2) of the proposal.[97] Parties to covered contracts may include firms of any size and in any industry and are not limited to Board-regulated institutions or even firms engaged in financial activities. In general, covered contracts would include (i) LIBOR contracts that contain no fallback provisions, (ii) LIBOR contracts that contain inadequate fallback provisions (defined as LIBOR contracts with fallback provisions that identify neither a specific benchmark replacement nor a determining person), or (iii) LIBOR contracts for which a determining person has failed to select a benchmark replacement by the earlier of the LIBOR replacement date or the latest date for selecting a benchmark replacement according to the terms of the LIBOR contract. Covered contracts would not include any LIBOR contract that the parties have agreed in writing shall not be subject to the LIBOR Act. Covered contracts also would not include LIBOR contracts where a determining person selects the Board-selected benchmark replacement by the earlier of the LIBOR replacement date and the latest date for selecting a benchmark replacement according to the terms of the LIBOR contract. The proposed definition of ''covered contract'' is derived from and designed to match the scope of contracts designated in section 104(a)–(c) of the Act.

The Board does not believe that it is feasible to provide an estimate of the number of small entities to which the proposed rule will apply.[98] Although estimates exist of the total outstanding exposure to USD LIBOR across all firms and transactions,[99] the Board is not aware of any method of determining what share of this outstanding exposure is attributable to covered contracts, or of determining the identity, industry, or size of the parties to those covered contracts, and the Board is not aware of any other data sources sufficient to provide an estimate of the number of smaller firms to which the proposed rule would apply.

d. Estimating Compliance Requirements

The proposed rule would not impose any reporting or recordkeeping requirements on the parties to covered or non-covered contracts. With respect to broader compliance requirements, the proposed rule would not require the parties to covered contracts to take any affirmative steps (such as amending their contracts).[100] Rather, the proposed rule would codify requirements under section 104 of the Act that modify the terms of covered contracts by operation of law by replacing references to LIBOR with the applicable Board-selected benchmark replacement (*i.e.,* Fallback Rate (SOFR) as defined in the ISDA protocol, 30-day Average SOFR, or CME Term SOFR), as defined in § 253.2 and § 253.4 of the proposal. As a result of this modification, parties to covered contracts may need to alter how they perform their contractual obligations. For example, in the case of a bilateral loan agreement that is a covered contract, the proposal would, as required by the Act, replace references to LIBOR with the applicable Board-selected benchmark replacement on and after the LIBOR replacement date. As a result, after that date, amounts due under such loan agreement would need to be determined by reference to the Board-selected benchmark replacement, rather than LIBOR, and those amounts due likely would not be identical. For this reason, the Board expects that the proposal could have a potentially significant economic impact on parties to covered contracts. However, the Act requires the Board to identify one or more Board-selected benchmark replacements based on SOFR, and the Board has proposed benchmark replacements that were recommended by the ARRC and ISDA after wide consultation and that are consistent with market practices. The Board does not believe that selecting alternative SOFR-based benchmark replacements (other than those proposed in § 253.4 of the proposal) would materially reduce the potential economic impact of the proposal.

e. Duplicative, Overlapping, and Conflicting Rules

The Board is not aware of any federal rules that may duplicate, overlap with, or conflict with the proposed rule.

f. Significant Alternatives Considered

Although section 110 of the LIBOR Act directs the Board to promulgate regulations to carry out the Act, 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 benchmark replacement conforming changes, 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).[101] Given its limited discretion, the Board was unable to consider alternatives to the proposed rule that would be significantly different from the statutory scheme of the LIBOR Act.

As discussed, the Board has considered and invites comment on possible alternative SOFR-based benchmark replacements. The Board also invites comment on whether it should consider any benchmark replacement conforming changes.

B. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a valid Office of Management and Budget (OMB) control number. The Board reviewed the proposed rule under the authority delegated to the Board by the OMB and determined that it contains no collections of information under the

[97] The proposed rule also would apply to determining persons and calculating persons in respect of covered contracts, who may not themselves be parties to the covered contract. In addition, § 253.3(b)(2) of the proposed rule would apply to non-covered contracts.

[98] The Board generally uses the industry-specific size standards adopted by the Small Business Administration (SBA) for purposes of estimating the number of small entities to which a proposed rule would apply. *See* 13 CFR 121.210. Consistent with the SBA's General Principles of Affiliation, the Board would include the assets of all domestic and foreign affiliates toward the applicable size threshold when determining whether to classify a particular entity as a small entity. *See* 13 CFR 121.103. The Board has considered the SBA standards and expects that a potentially substantial number of small entities, across many industries, likely would be affected by the proposed rule. However, for the reasons discussed above, the Board does not believe it has sufficient data to provide a reasonable estimate of the precise number of small entities to which the proposed rule would apply.

[99] As of the end of 2020, for example, the outstanding gross notional value of all financial products referencing U.S. dollar (USD) LIBOR was estimated to be $223 trillion. *See* ARRC, *Progress Report: The Transition for U.S. Dollar LIBOR* (Mar. 2021) at 3, *https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/USD-LIBOR-transition-progress-report-mar-21.pdf.*

[100] Similarly, the proposed rule would not require a determining person in respect of a covered contract to select a particular benchmark replacement (or select any benchmark replacement at all) and would not require a calculating person in respect of a covered contract to make any or a particular benchmark replacement conforming change.

[101] At this time, the Board does not propose to determine any benchmark replacement conforming changes and does not propose to determine that any LIBOR tenor will cease or become nonrepresentative prior to the first London banking day after June 30, 2023.

PRA.[102] Accordingly, there is no paperwork burden associated with the rule.

C. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338, 1471, 12 U.S.C. 4809) requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board has sought to present the proposed rule in a simple and straightforward manner and invites comment on the use of plain language and whether any part of the proposed rule could be more clearly stated.

List of Subjects in 12 CFR Part 253

Banks and banking, Interest rates

Authority and Issuance

For the reasons stated in the preamble, the Board of Governors of the Federal Reserve System proposes to add new part 253 to 12 CFR chapter II, as follows:

PART 253—REGULATIONS IMPLEMENTING THE ADJUSTABLE INTEREST RATE (LIBOR) ACT (REGULATION ZZ)

■ 1. Add part 253 to read as follows:

PART 253—REGULATIONS IMPLEMENTING THE ADJUSTABLE INTEREST RATE (LIBOR) ACT (REGULATION ZZ)

Sec.

Authority: Pub. L. 117–103, div. U.

§ 253.1 Authority, Purpose, and Scope.

(a) *Authority.* The Board of Governors of the Federal Reserve System (Board) has issued this part (Regulation ZZ) under the authority of Public Law 117–103, division U (the ''Adjustable Interest Rate (LIBOR) Act'').

(b) *Purpose.* The purposes of the Adjustable Interest Rate (LIBOR) Act are to establish a clear and uniform process, on a nationwide basis, for replacing the overnight and one-, three-, six-, and 12-month tenors of U.S. dollar LIBOR in existing contracts that do not provide for the use of a clearly defined or practicable replacement benchmark rate; to preclude litigation related to such existing contracts; to allow existing contracts that reference LIBOR but provide for the use of a clearly defined and practicable replacement rate to operate according to their terms; and to address LIBOR references in Federal law.[1] This regulation implements the statute by defining terms used in the statute and establishing Board-selected benchmark replacements for LIBOR contracts.

(c) *Scope.* As described in § 253.3(a), the Adjustable Interest Rate (LIBOR) Act and this regulation apply by their terms to existing contracts governed by federal law or the law of any state that reference the overnight and one-, three-, six-, and 12-month tenors of U.S. dollar LIBOR and do not have terms that provide for the use of a clearly defined and practicable replacement benchmark rate following the LIBOR replacement date, unless the parties to that contract agree in writing that the contract is not subject to the Adjustable Interest Rate (LIBOR) Act. Except as provided in § 253.3(b)(2), this regulation does not apply to or affect existing or prospective contracts that do not reference the overnight or one-, three-, six-, or 12-month tenors of U.S. dollar LIBOR or have terms providing for the use of a clearly defined and practicable replacement benchmark for LIBOR (either directly or through selection by a determining person), even if that rate differs from the otherwise applicable Board-selected benchmark replacement.

§ 253.2 Definitions.

30-day Average SOFR means the 30-calendar-day compounded average of SOFR, as published by the Federal Reserve Bank of New York or any successor administrator.

Benchmark means an index of interest rates or dividend rates that is used, in whole or in part, as the basis of or as a reference for calculating or determining any valuation, payment, or other measurement.

Benchmark administrator means a person that publishes a benchmark for use by third parties.

Benchmark replacement means a benchmark, or an interest rate or dividend rate (which may or may not be based in whole or in part on a prior setting of LIBOR) to replace LIBOR or any interest rate or dividend rate based on LIBOR, whether on a temporary, permanent, or indefinite basis, under or with respect to a LIBOR contract.

Benchmark replacement conforming change means any technical, administrative, or operational change, alteration, or modification that (i) the Board determines, in its discretion, would address one or more issues affecting the implementation, administration, and calculation of the Board-selected benchmark replacement in LIBOR contracts; or (ii) solely with respect to a LIBOR contract that is not a consumer loan, in the reasonable judgment of a calculating person, are otherwise necessary or appropriate to permit the implementation, administration, and calculation of the Board-selected benchmark replacement under or with respect to a LIBOR contract after giving due consideration to any benchmark replacement conforming changes determined by the Board under item (i) of this definition.

Board-selected benchmark replacement means the benchmark replacements identified in § 253.4 of this part.

Business day means any day except for (i) a Saturday, (ii) a Sunday, (iii) a day on which the Securities Industry and Financial Markets Association recommends that the fixed income departments of its members be closed for the entire day for purposes of trading in United States government securities, or (iv) a day on which the Federal Reserve Bank of New York, with advance notice, chooses not to publish its Treasury repurchase agreement reference rates if participants in the Treasury repurchase agreement market broadly expect to treat that day as a holiday.

Calculating person means, with respect to any LIBOR contract, any person, including the determining person, responsible for calculating or determining any valuation, payment, or other measurement based on a benchmark.

CME Term SOFR means the CME Term SOFR Reference Rates published for one-, three-, six-, and 12-month tenors as administered by CME Group Benchmark Administration, Ltd. (or any successor administrator thereof).

Consumer has the same meaning as in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

Consumer loan means a consumer credit transaction.

Covered contract is defined in § 253.3(a) of this part.

Covered GSE contract means a covered contract for which a GSE is identified as a party in the transaction documents and that is (i) a commercial or multifamily mortgage loan, (ii) a commercial or multifamily mortgage-backed security, (iii) a collateralized mortgage obligation, (iv) a credit risk

[102] *See* 44 U.S.C. 3502(3).

[1] The Act does not affect the ability of parties to use any appropriate benchmark rate in new contracts.

transfer transaction, or (v) a Federal Home Loan Bank advance.

Credit has the same meaning as in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

Derivative transaction means a contract that would satisfy the criteria to be a ''Protocol Covered Document'' under the ISDA protocol but for the fact that one or more parties to such contract is not an ''Adhering Party'' as such term is used in the ISDA protocol, provided that, for purposes of this definition, ''Protocol Effective Date'' as such term is used in the ISDA protocol means the LIBOR replacement date for the relevant covered contract.

Determining person means, with respect to any LIBOR contract, any person with the authority, right, or obligation, including on a temporary basis (as identified by the LIBOR contract or by the governing law of the LIBOR contract, as appropriate) to determine a benchmark replacement.

Fallback provisions means terms in a LIBOR contract for determining a benchmark replacement, including any terms relating to the date on which the benchmark replacement becomes effective.

Government-sponsored enterprise (GSE) means an entity established or chartered by the U.S. government to serve public purposes specified by the U.S. Congress but whose debt obligations are not explicitly guaranteed by the full faith and credit of the U.S. government.

ISDA protocol means the ISDA 2020 IBOR Fallbacks Protocol published by the International Swaps and Derivatives Association, Inc., on October 23, 2020, and minor or technical amendments thereto.

LIBOR (i) means the overnight and one-, three-, six-, and 12-month tenors of U.S. dollar LIBOR (formerly known as the London interbank offered rate) as administered by ICE Benchmark Administration Limited (or any predecessor or successor administrator thereof) and (ii) does not include the one-week or two-month tenors of U.S. dollar LIBOR.

LIBOR contract means any contract, agreement, indenture, organizational document, guarantee, mortgage, deed of trust, lease, security (whether representing debt or equity, including any interest in a corporation, a partnership, or a limited liability company), instrument, or other obligation or asset that, by its terms, uses LIBOR as a benchmark.

LIBOR replacement date means 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.

Non-covered contract is a LIBOR contract that is not a covered contract.

Security has the same meaning as in section 2(a) of the Securities Act of 1933 (15 U.S.C. 77b(a)).

SOFR means the Secured Overnight Financing Rate published by the Federal Reserve Bank of New York or any successor administrator.

State means any state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

§ 253.3 Applicability.

(a) *Covered contracts.*

(1) *General requirement.* On and after the LIBOR replacement date, the applicable Board-selected benchmark replacement shall be the benchmark replacement for a covered contract.

(2) *Definition.* (i) For purposes of this part, a covered contract means a LIBOR contract with one of the following characteristics as of the LIBOR replacement date, after giving effect to paragraph (a)(2)(ii) of this section:

(A) The LIBOR contract contains no fallback provisions;

(B) The LIBOR contract contains fallback provisions that identify neither—

(*1*) A specific benchmark replacement; nor

(*2*) A determining person; or

(C) The LIBOR contract contains fallback provisions that identify a determining person, but the determining person has failed to select a benchmark replacement by the earlier of the LIBOR replacement date and the latest date for selecting a benchmark replacement according to the terms of the LIBOR contract.

(ii) For purposes of this part, on the LIBOR replacement date, any reference in any fallback provisions of a LIBOR contract to the following shall be disregarded as if not included in the fallback provisions of such LIBOR contract and shall be deemed null and void and without any force or effect:

(A) 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

(B) 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.

(iii) Notwithstanding paragraphs (a)(2)(i) through (ii) of this section, the term ''covered contract'' does not include any LIBOR contract that the parties have agreed in writing shall not be subject to the Adjustable Interest Rate (LIBOR) Act.

(b) *Non-covered contracts.*

(1) *In general.* This regulation does not affect LIBOR contracts that are not covered contracts.

(2) *Selection of Board-selected benchmark replacement by determining person.* Notwithstanding paragraph (b)(1) of this section, a determining person may select the Board-selected benchmark replacement specified in § 253.4 of this rule as the benchmark replacement for a LIBOR contract. Any such selection shall be—

(i) Irrevocable;

(ii) Made by the earlier of the LIBOR replacement date and the latest date for selecting a benchmark replacement according to the terms of the LIBOR contract; and

(iii) Used in any determinations of the benchmark under or with respect to the LIBOR contract occurring on and after the LIBOR replacement date.

§ 253.4 Board-selected Benchmark Replacements.

(a) *Derivative transactions.* On the LIBOR replacement date, a covered contract that is a derivative transaction shall use the benchmark replacement identified as the ''Fallback Rate (SOFR)'' in the ISDA protocol. For clarity, the reference to ''spread relating to U.S. dollar LIBOR'' in the definition of ''Fallback Rate (SOFR)'' in the ISDA protocol is equal to the applicable tenor spread adjustment identified in paragraph (c) of this section.

(b) *All other transactions.* On the LIBOR replacement date, a covered contract that is not a derivative transaction shall use the following benchmark replacements:

(1) For a covered contract that is not a consumer loan or a covered GSE contract—

(i) In place of overnight LIBOR, the benchmark replacement shall be SOFR plus the tenor spread adjustment identified in paragraph (c)(1) of this section; and

(ii) In place of one-, three-, six-, or 12-month tenors 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.

(2) For a covered contract that is a consumer loan—

(i) During the one-year period beginning on the LIBOR replacement date:

(A) In place of overnight LIBOR, the benchmark replacement shall be SOFR plus an amount that transitions linearly for each business day during that period from:

(*1*) The difference between SOFR and overnight LIBOR determined as of the day immediately before the LIBOR replacement date; to

(*2*) The tenor spread adjustment identified in paragraph (c)(1) of this section; or

(B) In place of the one-, three-, six-, or 12-month tenors of LIBOR, the benchmark replacement shall be the corresponding one-, three-, six-, or 12-month CME Term SOFR plus an amount that transitions linearly for each business day during that period from:

(*1*) The difference between the relevant CME Term SOFR and the relevant LIBOR tenor determined as of the day immediately before the LIBOR replacement date; to

(*2*) The applicable tenor spread adjustment identified in paragraph (c) of this section.

(ii) On the date one year after the LIBOR replacement date and thereafter:

(A) In place of overnight LIBOR, the benchmark replacement shall be SOFR plus the tenor spread adjustment identified in paragraph (c)(1) of this section; and

(B) In place of one-, three-, six-, or 12-month tenors 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.

(iii) The rates published or provided by Refinitiv Limited as ''USD IBOR Cash Fallbacks'' for ''Consumer'' products shall be deemed equal to the rates identified in paragraphs (b)(2)(i) and (ii) of this section.

(3) For a covered contract that is a covered GSE contract—

(i) In place of overnight LIBOR, the benchmark replacement shall be SOFR plus the tenor spread adjustment identified in paragraph (c)(1) of this section; and

(ii) In place of one-, three-, six-, or 12-month tenors of LIBOR, the benchmark replacement shall be the 30-day Average SOFR plus the applicable tenor spread adjustment identified in paragraph (c) of this section.

(c) *Tenor spread adjustments.* The following tenor spread adjustments shall be included as part of the Board-selected benchmark replacements as indicated in paragraphs (a) and (b) of this section:

(1) 0.00644 percent for overnight LIBOR;

(2) 0.11448 percent for one-month LIBOR;

(3) 0.26161 percent for three-month LIBOR;

(4) 0.42826 percent for six-month LIBOR; and

(5) 0.71513 percent for 12-month LIBOR.

(d) *Date for determining Board-selected benchmark replacement.* For purposes of this part, any Board-selected benchmark replacement shall 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 or, if the Board-selected benchmark replacement is not published on the day indicated in the covered contract, the most recently available publication should be used.

§ 253.5 Benchmark Replacement Conforming Changes.

(a) *Benchmark replacement conforming changes.*

(1) The Board may, in its discretion, by regulation or order, require any additional technical, administrative, or operational changes, alterations, or modifications in LIBOR contracts based on a determination that such changes, alterations, or modifications would address one or more issues affecting the implementation, administration, and calculation of a Board-selected benchmark replacement in LIBOR contracts.

(2) Solely with respect to a LIBOR contract that is not a consumer loan, a calculating person may make any additional technical, administrative, or operational changes, alterations or modifications that, in that person's reasonable judgment, would be necessary or appropriate to permit the implementation, administration, and calculation of the Board-selected benchmark replacement under or with respect to a LIBOR contract after giving due consideration to any changes, alterations, or modifications otherwise required by the Board in this part or pursuant to paragraph (a)(1) of this section.

§ 253.6 Preemption.

(a) Pursuant to section 107 of the Adjustable Interest Rate (LIBOR) Act, this part supersedes any provision of any state or local law, statute, rule, regulation, or standard—

(1) Relating to the selection or use of a benchmark replacement or related conforming changes; or

(2) Expressly limiting the manner of calculating interest, including the compounding of interest, as that provision applies to the selection or use of a Board-selected benchmark replacement or benchmark replacement conforming changes.

By order of the Board of Governors of the Federal Reserve System.

Ann Misback,

Secretary of the Board.

[FR Doc. 2022–15658 Filed 7–27–22; 8:45 am]

BILLING CODE 6210–01–P

FARM CREDIT ADMINISTRATION

12 CFR Part 609

RIN 3052–AD53

Cyber Risk Management

AGENCY: Farm Credit Administration.

ACTION: Proposed rule.

SUMMARY: The Farm Credit Administration (FCA, we, our, or Agency) proposes to rescind and revise our regulations to reflect developments in cyber risk and continuously evolving business practices concerning electronic business (E-business) and to rename the regulations ''Cyber Risk Management''.

DATES: Comments on this proposed rule must be submitted on or before September 26, 2022.

ADDRESSES: We offer a variety of methods for you to submit comments. For accuracy and efficiency, commenters are encouraged to submit comments by email or through the FCA's website. As facsimiles (fax) are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, we do not accept comments submitted by fax. Regardless of the method you use, please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *Email:* Send us an email at *reg-comm@fca.gov.*
- *FCA website: https://www.fca.gov.* Click inside the ''I want to . . .'' field near the top of the page; select ''comment on a pending regulation'' from the dropdown menu; and click ''Go.'' This takes you to an electronic public comment form.
- *Mail:* Autumn R. Agans, Deputy Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.

You may review copies of all comments we receive at our office in McLean, Virginia, or on our website at *https://www.fca.gov.* Once you are in the website, click inside the ''I want to . . .'' field near the top of the page; select ''find comments on a pending regulation'' from the dropdown menu; and click ''Go.'' This will take you to the Comment Letters page where you can select the regulation for which you would like to read the public comments.