

ARKANSAS A COMMUNITY BANKER

Spring 2022

THE VOICE FOR ARKANSAS' COMMUNITY BANKS



CFPB Small Business
Fair Lending Review
page 7

Arkansas Banks Finish 2021
in Strong Position
page 20

Create Work-From-Home
Accountability with IT
page 22

OFFICIAL PUBLICATION of the
ARKANSAS COMMUNITY BANKERS ASSOCIATION



Adjustable Interest Rate (LIBOR) Act: Key Information for Lenders

BY ANN CAROL FARMER



On March 15, 2022, the Adjustable Interest Rate (LIBOR) Act (the “LIBOR Act”) was enacted as part of the Consolidated Appropriations Act of 2022. The LIBOR Act aims to reduce uncertainty and provide a clear process for replacing LIBOR in existing contracts following its anticipated discontinuance on June 30, 2023.

The LIBOR Act broadly applies to any contract, agreement, instrument, or other obligation which uses any of the overnight one-month, three-month, six-month, or 12-month tenors of the U.S. Dollar LIBOR for the determination of interest and (i) does not identify a specific replacement following the discontinuance of LIBOR or (ii) does not identify a person with the authority, right or obligation to determine a replacement rate, referred to as a “determining person” under the LIBOR Act.

On the first London banking day following the discontinuance of LIBOR (the “Replacement Date”), affected contracts will automatically shift to a replacement rate selected by the Board of Governors of the Federal Reserve System (the “Benchmark Replacement”). Moreover, this automatic shift will also apply if an agreement identifies a determining person, and such person has not selected a replacement rate by the Replacement Date. The Benchmark Replacement will be based on the Secured Overnight Financing Rate (the “SOFR”), provided, the Federal Reserve will identify which version of the SOFR will apply to contracts and agreements under the LIBOR Act.

The LIBOR Act also provides a safe harbor for lenders in the transition from LIBOR to the Benchmark Replacement. Foremost, the LIBOR Act specifically details that the Benchmark Replacement constitutes (i) a commercially reasonable replacement for and a commercially substantial equivalent to LIBOR; (ii) a reasonable, comparable or analogous rate, index or term for LIBOR; (iii) a replacement that is based on a methodology or information that is similar or comparable to LIBOR; (iv) substantial performance by any person of any right or obligation relating to or based on LIBOR; and (v) a replacement that has historical fluctuations that are substantially similar to those of

LIBOR for purposes of the Truth in Lending Act and regulations promulgated thereunder.

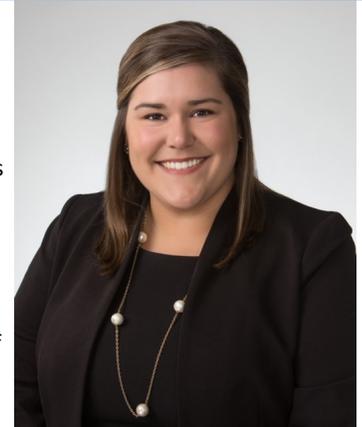
Additionally, the LIBOR Act provides insulation from liability arising out of the selection or use of the Benchmark Replacement, the implementation of the Benchmark Replacement into existing contracts, and the determination of conforming changes to contracts, apart from consumer loans. Such selection, implementation, and determination will not (i) be deemed to impair or affect the right of any person to receive a payment, or to affect the amount or timing of such payment, under any LIBOR based contract, (ii) have the effect of discharging or excusing performance under any LIBOR

contract for any reason, claim, or defense, (iii) give any person the right to unilaterally terminate or suspend performance under any LIBOR contract, (iv) constitute a breach of any LIBOR contract, or (v) void or nullify any LIBOR contract.

The LIBOR Act supersedes any similar state or local law, and for contracts subject to the Trust Indenture Act of 1939 (“TIA”), the LIBOR Act amends Section 316(b) of the TIA to provide that the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security shall not be deemed to be impaired or affected by any change occurring by the application of the LIBOR Act to any indenture security.

It is important to note that the provisions of the LIBOR Act are not mandatory. Lenders and borrowers have the freedom to establish their own replacement rate and specifically agree to exclude a contract from the provisions of the LIBOR Act; however, these agreements would not be protected by the safe harbor provisions discussed above.

Lenders should carefully analyze their adjustable-rate loans to determine (i) if the adjustment is based on LIBOR, (ii) how the LIBOR Act affects their unique LIBOR exposure, and (iii) how, or whether, they should rely on the LIBOR Act to mitigate risk and facilitate a smooth transition.



Ann Carol Farmer is an Associate Attorney at Quattelbaum, Grooms, Tull, PLLC, an ACB Preferred Services Provider. She can be reached at afarmer@qgtlaw.com.

