

1 SB279
2 210577-2
3 By Senators Roberts, Orr, Shelnutt, Waggoner, Smitherman,
4 Singleton and Givhan
5 RFD: Banking and Insurance
6 First Read: 02-MAR-21

SYNOPSIS: This bill would enact provisions relating to the discontinuance of LIBOR, the London Interbank Offered Rate, a benchmark for short-term interest rates, discount rates, or dividend rates used in certain financial contracts.

This bill would prohibit parties to a contract, security, or instrument from refusing to perform contractual obligations or declaring a breach of contract as a result of the discontinuance of LIBOR or the use of a replacement interest rate index for LIBOR.

This bill would also provide a safe harbor from litigation for the use of a recommended benchmark replacement.

A BILL
TO BE ENTITLED
AN ACT

1 Relating to financial transactions; to add Chapter
2 28, commencing with Section 5-28-1, to Title 5 of the Code of
3 Alabama 1975; to provide that parties to a contract would be
4 prohibited from refusing to perform contractual obligations or
5 declaring a breach of contract as a result of the
6 discontinuance of the London Interbank Offered Rate or the use
7 of a replacement interest rate index that is a replacement
8 interest rate index to LIBOR; to provide for replacement
9 interest rate indexes to LIBOR; and to provide a safe harbor
10 from litigation for the use of the recommended benchmark
11 replacement.

12 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

13 Section 1. Chapter 28, commencing with Section
14 5-28-1, is added to Title 5 of the Code of Alabama 1975, to
15 read as follows:

16 §5-28-1. Short title.

17 This chapter shall be known and may be cited as the
18 LIBOR Discontinuance and Replacement Act of 2021.

19 §5-28-2. Definitions.

20 As used in this chapter, the following terms have
21 the following meanings:

22 (1) BENCHMARK. An index for interest rates, discount
23 rates, or dividend rates that is used, in whole or in part, as
24 the basis of, or as a reference for, calculating or
25 determining any valuation, payment, or other measurement
26 under or with respect to a contract, security, or instrument.

1 (2) BENCHMARK REPLACEMENT. A benchmark, or an
2 interest rate, discount rate, or dividend rate which may or
3 may not be based in whole or in part on a prior setting of
4 LIBOR, to replace LIBOR or any interest rate, discount rate,
5 or dividend rate based on LIBOR, whether on a temporary,
6 permanent, or indefinite basis, under or with respect to a
7 contract, security, or instrument.

8 (3) BENCHMARK REPLACEMENT CONFORMING CHANGES. With
9 respect to any type of contract, security, or instrument, any
10 technical, administrative, or operational changes,
11 alterations, or modifications that are associated with or
12 considered necessary for the use, adoption, calculation, or
13 implementation of a recommended benchmark replacement and that
14 have been selected or recommended by a relevant recommending
15 body, provided that if, in the judgment of the determining
16 person, the benchmark replacement conforming changes selected
17 or recommended pursuant to this subdivision do not apply to
18 the contract, security, or instrument, or are insufficient to
19 permit administration and calculation of the recommended
20 benchmark replacement, then the term includes such other
21 changes, alterations, or modifications that, in the judgment
22 of the determining person, are necessary to permit
23 administration, and calculation of the recommended benchmark
24 replacement under or with respect to such contract, security,
25 or instrument in a manner determined by the determining person
26 to be consistent with market practice for similar contracts,
27 securities, or instruments and, to the extent practicable, the

1 manner in which the contract, security, or instrument was
2 administered immediately prior to the LIBOR replacement date.

3 (4) CONTRACT, SECURITY, OR INSTRUMENT. Without
4 limitation, any contract, agreement, promissory note,
5 mortgage, deed of trust, lease, derivative, swap, security
6 (whether representing debt or equity, and including any
7 interest in a corporation, a partnership, or a limited
8 liability company), instrument, or other obligation.

9 (5) DETERMINING PERSON. With respect to any
10 contract, security, or instrument, any person, lender, agent,
11 or other entity, except for borrowers or lessees, with the
12 authority, right, or obligation to do any of the following:

13 a. Determine the benchmark replacement that will
14 take effect on the LIBOR replacement date.

15 b. Calculate or determine a valuation, payment, or
16 other measurement based on a benchmark.

17 c. Notify borrowers, lessees, co-lenders, or other
18 persons of the occurrence of a LIBOR discontinuance event, a
19 LIBOR replacement date, or a benchmark replacement.

20 (6) FALLBACK PROVISIONS. Terms in a contract,
21 security, or instrument that set forth a methodology or
22 procedure for determining a benchmark replacement, including
23 any terms relating to the date on which the benchmark
24 replacement becomes effective, without regard to whether a
25 benchmark replacement can be determined in accordance with
26 that methodology or procedure.

1 (7) LIBOR. The London Interbank Offered Rate as
2 administered by ICE Benchmark Administration, or any
3 predecessor or successor thereof, or any tenor thereof, as
4 applicable, that is used in making any calculation or
5 determination thereunder. The term also includes, but is not
6 limited to, any interest rate index rate determined in whole
7 or in part by reference to LIBOR.

8 (8) LIBOR DISCONTINUANCE EVENT.

9 a. The earliest to occur of any of the following:

10 1. A public statement or publication of information
11 by or on behalf of the administrator of LIBOR announcing that
12 the administrator has ceased or will cease to provide LIBOR,
13 permanently or indefinitely, provided that, at the time of the
14 statement or publication, there is no successor administrator
15 that will continue to provide LIBOR.

16 2. A public statement or publication of information
17 by any one of the following: The regulatory supervisor for the
18 administrator of LIBOR, the United States Federal Reserve
19 System, an insolvency official with jurisdiction over the
20 administrator for LIBOR, a resolution authority with
21 jurisdiction over the administrator for LIBOR, or a court or
22 an entity with similar insolvency or resolution authority over
23 the administrator for LIBOR, which states that the
24 administrator of LIBOR has ceased or will cease to provide
25 LIBOR permanently or indefinitely, provided that, at the time
26 of the statement or publication, there is no successor
27 administrator that will continue to provide LIBOR.

1 3. A public statement or publication of information
2 by the regulatory supervisor for the administrator of LIBOR
3 announcing that LIBOR is no longer representative.

4 b. For purposes of this subdivision, a public
5 statement or publication of information that affects one or
6 more tenors of LIBOR shall not constitute a LIBOR
7 discontinuance event with respect to any contract, security,
8 or instrument that provides for only one tenor of LIBOR, if
9 the contract, security, or instrument requires interpolation
10 and the tenor can be interpolated from LIBOR tenors that are
11 not so affected, or permits a party to choose from more than
12 one tenor of LIBOR and any of those tenors is not so affected
13 or if the contract, security, or instrument requires
14 interpolation, it can be interpolated from LIBOR tenors that
15 are not so affected.

16 (9) LIBOR REPLACEMENT DATE.

17 a.1. In the case of a LIBOR discontinuance event
18 described in subparagraph (8)a.1. or (8)a.2., the later of:
19 (i) The date of the public statement or publication of
20 information referenced therein; and (ii) the date on which the
21 administrator of LIBOR permanently or indefinitely ceases to
22 provide LIBOR, provided that, at the time of the statement or
23 publication, there is no successor administrator that will
24 continue to provide LIBOR.

25 2. In the case of a LIBOR discontinuance event
26 described in subparagraph (8)a.3., the date of the public
27 statement or publication of information referenced therein.

1 b. For purposes of this definition, a date that
2 affects one or more tenors of LIBOR shall not constitute a
3 LIBOR replacement date with respect to any contract, security,
4 or instrument that provides for only one tenor of LIBOR, if
5 the contract, security, or instrument requires interpolation
6 and the tenor can be interpolated from LIBOR tenors that are
7 not so affected, or permits a party to choose from more than
8 one tenor of LIBOR and any of those tenors is not so affected
9 or if the contract, security, or instruments requires
10 interpolation, it can be interpolated from LIBOR tenors that
11 are not so affected.

12 (10) RECOMMENDED BENCHMARK REPLACEMENT. With respect
13 to any particular type of contract, security, or instrument, a
14 benchmark replacement based on any one the following, as
15 selected by the determining person:

16 a. Term SOFR, which shall include, if applicable,
17 any recommended spread adjustment and any benchmark
18 replacement conforming changes, that shall have been selected
19 or recommended by a relevant recommending body with respect to
20 the type of contract, security, or instrument.

21 b. SOFR, which shall include, if applicable, any
22 recommended spread adjustment and any benchmark replacement
23 conforming changes, that shall have been selected or
24 recommended by a relevant recommending body with respect to
25 the type of contract, security, or instrument.

26 c. Any other benchmark that is recommended by a
27 relevant recommending body.

1 d. Any other benchmark that is compliant with
2 international organizations' of securities commissions'
3 principles for financial benchmarks.

4 (11) RECOMMENDED SPREAD ADJUSTMENT. A spread
5 adjustment, or method for calculating or determining the
6 spread adjustment (which may be a positive or negative value
7 or zero) that shall have been selected or recommended by a
8 relevant recommending body for a recommended benchmark
9 replacement for a particular term or tenor to account for the
10 effects of the transition or change from LIBOR to a
11 recommended benchmark replacement.

12 (12) REFERENCE TIME. With respect to LIBOR, 11:00
13 a.m. GMT on the day that is two London business days preceding
14 the date of the setting, and if the benchmark is not LIBOR,
15 the time determined by the determining person in its
16 discretion.

17 (13) RELEVANT RECOMMENDING BODY. As applicable, the
18 Federal Reserve Board or any Federal Reserve Bank, the Office
19 of the Comptroller of the Currency, the Federal Deposit
20 Insurance Corporation, the Consumer Financial Protection
21 Bureau, the Alternative Reference Rates Committee, the
22 Internal Revenue Service, the Alabama State Banking
23 Department, or any successor entity to any aforementioned
24 body.

25 (14) SOFR. With respect to any day, the Secured
26 Overnight Financing Rate published for that day by the Federal
27 Reserve Bank of New York, as the administrator of the

1 Benchmark, or a successor administrator, on the Federal
2 Reserve Bank of New York's website.

3 (15) TERM SOFR. For the applicable corresponding
4 tenor as of the applicable reference time, the forward-looking
5 term rate based on SOFR that has been selected or recommended
6 by a relevant governmental body.

7 §5-28-3. Applicability.

8 Notwithstanding any other law of this state, this
9 chapter shall apply to all contracts, securities, and
10 instruments, including contracts, with respect to commercial
11 transactions, and shall not be deemed to be displaced by any
12 other law of this state.

13 §5-28-4. Effect of LIBOR Discontinuance.

14 (a) On the LIBOR replacement date, the recommended
15 benchmark replacement selected by the determining person for
16 any contract, security, or instrument shall, by operation of
17 law, without need for notice to or consent of any party, be
18 the benchmark replacement for the contract, security, or
19 instrument that uses LIBOR as a benchmark and that meets one
20 of the following:

21 (1) Contains no fallback provisions.

22 (2) Contains fallback provisions that the
23 determining person determines are not viable or cannot be
24 operationalized.

25 (3) Contains fallback provisions that result in a
26 benchmark replacement, other than a recommended benchmark
27 replacement, that is based in any way on any LIBOR value.

1 (b) Following the occurrence of a LIBOR
2 discontinuance event, any fallback provisions in a contract,
3 security, or instrument that provide for a benchmark
4 replacement based on or otherwise involving a poll, survey, or
5 inquiries for quotes or information concerning interbank
6 lending rates or any interest rate, discount rate, or dividend
7 rate based on LIBOR shall be disregarded as if not included in
8 the contract, security, or instrument and shall be deemed null
9 and void and without any force or effect.

10 (c) This section shall apply to any contract,
11 security, or instrument that, retrospectively or
12 prospectively, uses LIBOR as a benchmark and contains fallback
13 provisions that permit or require the selection of a benchmark
14 replacement that is based in any way on any LIBOR value.

15 (d) A determining person shall have the authority
16 under this section, but shall not be required, to select on or
17 after the occurrence of a LIBOR discontinuance event, the
18 recommended benchmark replacement as the benchmark replacement
19 for a contract, security, or instrument. Any such selection of
20 the recommended benchmark replacement shall meet all of the
21 following:

22 (1) Be irrevocable.

23 (2) Be made by the earlier of either the LIBOR
24 replacement date or the latest date for selecting a benchmark
25 replacement according to the contract, security, or
26 instrument.

1 (3) Be used in any determinations of the benchmark
2 under or with respect to the contract, security, or instrument
3 occurring on and after the LIBOR replacement date.

4 (e) If a recommended benchmark replacement becomes
5 the benchmark replacement for any contract, security, or
6 instrument pursuant to this section, then, all benchmark
7 replacement conforming changes that are applicable (in
8 accordance with the definition of benchmark replacement
9 conforming changes) to the recommended benchmark replacement
10 shall become an integral part of the contract, security, or
11 instrument by operation of law.

12 (f) The provisions of this section shall not alter
13 or impair any of the following:

14 (1) Any contract, security, or instrument between
15 requisite parties that, retrospectively or prospectively,
16 provides that the contract, security, or instrument shall not
17 be subject to this chapter, without necessarily referring
18 specifically to this chapter. For purposes of this
19 subdivision, "requisite parties" means all parties required to
20 amend the terms and provisions of a contract, security, or
21 instrument that would otherwise be altered or affected by this
22 chapter.

23 (2) Any contract, security or instrument that
24 contains fallback provisions that would result in a benchmark
25 replacement that is not based on LIBOR, including, but not
26 limited to, the prime rate or the federal funds rate, except

1 that the contract, security, or instrument shall be subject to
2 subsection (b).

3 (3) Any contract, security, or instrument subject to
4 this section as to which a determining person does not elect
5 to use a recommended benchmark replacement or as to which a
6 determining person elects to use a recommended benchmark
7 replacement prior to the occurrence of a LIBOR discontinuance
8 event, except that the contract, security, or instrument shall
9 be subject to subsection (b).

10 (4) The application to a recommended benchmark
11 replacement of any cap, floor, modifier, or spread adjustment
12 to which LIBOR had been subject pursuant to the terms of a
13 contract, security, or instrument.

14 §5-28-5. Continuity of Contracts and Safe Harbor.

15 (a) The selection or use of a recommended benchmark
16 replacement as a benchmark replacement by a designated person
17 under or with respect to a contract, security, or instrument
18 by operation of Section 5-28-4 shall constitute all of the
19 following:

20 (1) A commercially reasonable replacement for and a
21 commercially substantial equivalent to LIBOR.

22 (2) A reasonable, comparable, or analogous term for
23 LIBOR under or with respect to the contract, security, or
24 instrument.

25 (3) A replacement that is based on a methodology or
26 information that is similar or comparable to LIBOR.

1 (4) Substantial performance by any person, lender,
2 agent, or other entity of any right or obligation relating to
3 or based on LIBOR under or with respect to a contract,
4 security, or instrument.

5 (b) A LIBOR discontinuance event or a LIBOR
6 replacement date, the selection or use of a recommended
7 benchmark replacement as a benchmark replacement or the
8 determination, implementation, or performance of benchmark
9 replacement, conforming changes, in each case, by operation of
10 Section 5-28-3, shall not do either of the following:

11 (1) Be deemed to impair or affect the right of any
12 person, lender, agent, or other entity to receive a payment,
13 or affect the timing of a payment under any contract,
14 security, or instrument.

15 (2) Have the effect of any of the following:

16 a. Discharging or excusing performance under any
17 contract, security, or instrument for any reason, claim, or
18 defense, including, but not limited to, any force majeure or
19 other provision in any contract, security, or instrument.

20 b. Giving any person the right to unilaterally
21 terminate or suspend performance under any contract, security,
22 or instrument.

23 c. Constituting a breach of a contract, security, or
24 instrument.

25 d. Voiding or nullifying any contract, security, or
26 instrument.

1 (c) No person, lender, agent, or other entity shall
2 have any liability for damages to any person, lender, agent,
3 or other entity or be subject to any claim or request for
4 equitable relief arising out of or related to the selection or
5 use of a recommended benchmark replacement or the
6 determination, implementation, or performance of benchmark
7 replacement conforming changes, in each case, by operation of
8 Section 5-28-4, and the selection or use of the recommended
9 benchmark replacement or the determination, implementation, or
10 performance of benchmark replacement conforming changes shall
11 not give rise to any claim or cause of action by any person,
12 lender, agent, or other entity in law or in equity.

13 (d) The selection or use of a recommended benchmark
14 replacement or the determination, implementation, or
15 performance of benchmark replacement conforming changes, by
16 operation of Section 5-28-4, shall be deemed to do all of the
17 following:

18 (1) Not be an amendment or modification of any
19 contract, security, or instrument.

20 (2) Not prejudice, impair, or affect any person's,
21 lender's, agent's, or other entity's rights, interests, or
22 obligations under or with respect to any contract, security,
23 or instrument.

24 (3) Conform with generally accepted accounting
25 principles and not result in a taxable event with respect to
26 any contract, security, or instrument for federal and state
27 income tax purposes.

1 (e) Except as provided in Section 5-28-4, this
2 section shall not be interpreted as creating any negative
3 inference or negative presumption regarding the validity or
4 enforceability of any of the following:

5 (1) Any benchmark replacement that is not a
6 recommended replacement benchmark.

7 (2) Any spread adjustment, or method for calculating
8 or determining a spread adjustment, that is not a recommended
9 spread adjustment.

10 (3) Any changes, alterations, or modifications to or
11 with respect to a contract, security, or instrument that are
12 not benchmark replacement conforming changes.

13 Section 2. This act shall become effective
14 immediately following its passage and approval by the
15 Governor, or its otherwise becoming law.