

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

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

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

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

22  
23 A BILL  
24 TO BE ENTITLED  
25 AN ACT  
26

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:

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.

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

(2) BENCHMARK REPLACEMENT. A benchmark, or an interest rate, discount 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, discount rate, or dividend rate based on LIBOR, whether on a temporary, permanent, or indefinite basis, under or with respect to a contract, security, or instrument.

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

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

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

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

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

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

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

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

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

(8) LIBOR DISCONTINUANCE EVENT.

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

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

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

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.

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

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

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

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

(14) SOFR. With respect to any day, the Secured Overnight Financing Rate published for that day by the Federal 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.

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

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

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

(1) Be irrevocable.

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

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

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

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

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

(2) Any contract, security or instrument that contains fallback provisions that would result in a benchmark replacement that is not based on LIBOR, including, but not 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.

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

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

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

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

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

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

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

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

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:

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

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

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

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

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