Submitted Electronically to the Federal eRulemaking Portal and by E-mail to the CFPB

August 4, 2020

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

RE: Docket No. CFPB-2020-0014 or RIN 3170-AB01

The undersigned organizations write to thank you for your efforts in providing assistance to lenders, service providers, and consumers concerning the upcoming transition from LIBOR to an alternative index on account of the expected discontinuance of LIBOR. We commend the Consumer Financial Protection Bureau ("the Bureau") for your active and constructive participation in the various workgroups established by the Alternative Reference Rates Committee ("ARRC") convened by the Federal Reserve Board and the New York Fed.

These comments pertain to the June 4, 2020 Notice of Proposed Rulemaking ("Proposed Rule") to amend Regulation Z, which implements the Truth in Lending Act (TILA), and its Official Interpretation to facilitate creditors' transition away from LIBOR as an index for variable rate consumer credit products. The undersigned organizations represent a substantial portion of the organizations that originate, hold or service variable rate private education loans.

Regulation Z includes general rules for closed-end consumer loans and special rules for private education loans. However, the special rules do not address replacement indexes and the Proposed Rule does not propose any amendments to the special rules. Therefore, the general rules for closed-end credit are the operative sections that cover the transition away from LIBOR as an index for variable rate private education loans.

The Proposed Rule addresses open-end Home Equity Lines of Credit ("HELOCs") and credit cards through revisions to Regulation Z itself. However, the closed-end products are revised through revisions to the Official Interpretations and not through amendments to Regulation Z, and therefore do not provide the same force of law and certainty.[1] We request that closed-end provisions be similarly included in Regulation Z itself with the level of clarity and detail as provided in the Proposed Rule for HELOCs and credit card accounts. We also identify several proposed amendments to HELOCs and credit card accounts that are not applied to closed-end products. We cannot find any policy or other reason for this lack of parity, and we recommend they should be included as amendments to Regulation Z for closed-end products as well. Lastly, we identify an area not addressed by the Proposed Rule and provide a suggestion to prevent issues from arising further down the road.

[1] See proposed Sections 1026.40(f)(3) and 1026.55(b)(7). All references herein to Regulation Z and to the Official Interpretations are to 12CFR Part 1026.

Closed-End Loans Should be Addressed in the Amendments to Regulation Z Itself

Private education loan participants agree with the policy stated in the Official Interpretation that "a creditor [of a closed-end loan] does not add a variable rate feature by changing the index of a variable-rate transaction from the 1-month, 3-month, 6-month, or 1-year U.S. Dollar LIBOR index to the spread-adjusted index based on SOFR recommended by the Alternative Reference Rates Committee to replace the 1-month, 3-month, 6-month, or 1-year U.S. Dollar LIBOR index respectively because the replacement index is a comparable index to the corresponding U.S. Dollar LIBOR index."[2] We interpret this to mean the replacement of LIBOR with the applicable spread-adjusted Secured Overnight Financing Rate ("SOFR"), as determined by the ARRC, does not constitute a refinancing subject to full TILA disclosure. This policy will help ensure a fair and orderly transition from LIBOR to SOFR, but to be fully effective for closed-end loans, and to carry the force of law, it should be included as an amendment to Regulation Z and not just in the Official Interpretation. Otherwise, courts and other regulators, including state regulators, may choose to ignore the Bureau's interpretations and instead take alternative positions.

Open-End and Closed-End Loans Should be Treated Similarly

The Proposed Rules for HELOCs and credit card accounts revise Regulation Z to state that a creditor may change the LIBOR index and margin on or after March 15, 2021 so long as the replacement index value in effect on December 31, 2020 and the replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020.[3] We recommend that, if the December 31, 2020 test is met, the creditor be authorized to change to the alternative index and margin at any time thereafter. Given the possibility of disruption as LIBOR approaches its sunset date, or that it is no longer reliable or representative, creditors should not be required to wait until March 15, 2021. In any case, the same text providing specific authority for the replacement of specific tenors of LIBOR with SOFR, and the timing of replacement, should be included in the closed-end products section of Regulation Z.

The Proposed Rule amends the Official Interpretations for HELOCs and credit cards to provide that "The Bureau has determined that effective [applicable date] the prime rate published in *The Wall Street Journal* has historical fluctuations that are substantially similar to those of the 1-month and 3-month U.S. Dollar LIBOR indices."[4] This amended text and related requirements should be incorporated into the closed-end products section as well. While many private education loan participants may choose to use SOFR as the replacement index, others may choose another index, such as the prime rate published by *The Wall Street Journal.* It would be helpful if the Bureau could provide examples of other possible alternative indices, as well as an explanation of how the Bureau would determine any alternative index as being "comparable" or "substantially similar," after considering any adjustment to the margin.

Following the preexisting rule for HELOCs and credit card accounts, we recommend that the closed-end rule specifically mention that the creditor may change both the index and margin to make the new interest rate substantially similar to the previous LIBOR-based rate. While a change to the margin presumably would not be necessary if the index were changed to a spread-adjusted SOFR (because the spread adjustment should make SOFR comparable to LIBOR), this would not be the case if the rate were

[2] Section 20(a)(3)(ii)(B) of the Proposed Interpretations.
[3] Proposed revisions to Sections 1026.20(a)(3)(ii)(B) and 1026.55(b)(7)(ii).
[4] Sections 40(f)(3)(ii)(A) and 55(b)(7)(i) of the Proposed Interpretations.

changed to another index, such as the prime rate. In that case, the margin may need to be changed to make the interest rate formula comparable to the LIBOR-based rate previously in effect. Regulation Z has provided this flexibility for HELOCs and credit card accounts for many years, but parallel language was not added for closed-end loans. There is no policy reason for this lack of parity. In addition, the Proposed Rule amends Regulation Z for both HELOCs and credit card accounts to affirm that a creditor may change both the index and the margin and clarifies how this may be done, but once again fails to provide parity to closed-end loans.[5] These provisions should be included for closed-end loans because, while consumer credit agreements typically permit the lender to replace the index, some are silent regarding a change to the margin. A margin change (either higher or lower) may be necessary to make the replacement rate comparable to the previous rate.

Another area where parity between open-end and closed-end products should be considered relates to disclosure to a borrower. For open-ended (not home secured) loans, a disclosure is required but it is not addressed for closed-end loans. The proposed rule amends the Official Interpretation for open-ended loans to read as follows:

> "2. *Changing index for calculating a variable rate.* If a creditor is changing the index used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new index) and indicate that the rate varies and how the rate is determined, as explained in § 1026.6(b)(2)(i)(A). For example, if a creditor is changing from using a prime index to using a SOFR index in calculating a variable rate, the creditor would disclose in the table the new rate (using the new index) and indicate that the rate varies with the market based on a SOFR index."[6]

Similar language does not appear in the closed-end loan section. If the Bureau determines that a notice is required for closed-end loans, we recommend that the proposed rule or interpretation suggest that the notice be provided at least 45 days prior to the index and margin change.

Additional Topic to Include in the Proposed Rule

The Proposed Rule addresses the scenario where a credit agreement provides that LIBOR may be replaced when it becomes unavailable but does not explicitly address the situation where LIBOR continues to be published but may not be reliable or representative. United Kingdom ("UK") regulators are seeking the cessation of LIBOR precisely because of past manipulation and other concerns about its integrity. Commentators have suggested that some benchmark functionality like LIBOR may continue to be reported even after the UK regulators take formal action, or the published LIBOR rate may no longer be reliable or representative before LIBOR is formally discontinued, thus creating uncertainty about whether regulatory or contractual triggers for replacement have occurred. In this regard, we note that the proposed Interpretations for both HELOCs and credit card accounts state that the creditor is not excused from complying with contract provisions.[7] We request clarification, applicable to all variable-rate loan products, that a creditor may replace the LIBOR index before the publication of LIBOR is discontinued, even when the contract only provides for replacement upon the unavailability of LIBOR. We also recommend that the Proposed Rule make clear that a creditor can replace both the index and

[5] Proposed Sections 1024.40(f)(3) and 1026.55(b)(7).
[6] Section 9(c)(2)(iv) of the Proposed Interpretations.
[7] Sections 40(f)(3)(ii)(1) and 55(b)(7)(1) of the Proposed Interpretations.

the margin even in cases where the consumer credit agreement does not explicitly contemplate replacement of the pre-existing LIBOR index and margin.

Thank you for your attention and consideration of these critical issues. Our organizations and members look forward to continuing to work with the CFPB on these issues. If you have any questions, please do not hesitate to reach out to any of our organizations. Contact information is provided below.

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