FRB Publishes Final Rule to Implement the LIBOR Act*

On March 15, 2022, the president signed an omnibus bill, H.R. 2471, the "Consolidated Appropriations Act, 2022," which enacted the "Adjustable Interest Rate (LIBOR) Act" (LIBOR Act), set forth in Division U of H.R. 2471. The LIBOR Act is intended to establish a clear and uniform nationwide process to replace LIBOR in contracts that do not provide for a clearly defined or practicable replacement benchmark rate once LIBOR ceases to be published for certain U.S. dollar (USD) tenors after June 30, 2023 or an earlier date if the FRB declares LIBOR to be unrepresentative sooner (the "Cessation Date").

Generally speaking, the LIBOR Act provides that as of the Cessation Date for the following types of contracts (such as promissory notes) the index tied to LIBOR will be replaced by operation of law with the Federal Reserve Board (FRB) selected benchmark replacement: (i) the contract lacks any fallback provisions; (ii) the contract contains fallback provisions identifying a benchmark replacement that is not workable; or (iii) the contract contains fallback language that identifies a "determining person" (such as the lender) with authority to replace the index once it ceases to be published (or becomes unrepresentative or unreliable), and the determining person either fails to select a replacement before the Cessation Date or selects the FRB-selected benchmark replacement and the selection meets certain specified conditions (such as the selection being irrevocable).

Additionally, the LIBOR Act also provides lenders with a number of statutory protections and safe harbors for replacing the index with the FRB-selected benchmark replacement, including that the lender is not to be subject to any claims or causes of action, or have liability for damages, due to the application of the FRB-selected benchmark replacement to a covered contract.

The LIBOR Act required the FRB to issue additional regulations to interpret and implement its various requirements. On July 28, 2022, the FRB issued a notice of proposed rulemaking (NPR) and request for comment entitled, "Regulation Implementing the Adjustable Interest Rate (LIBOR) Act" (the "LIBOR NPR"). 87 FR 45268. On December 16, 2022, the FRB adopted a final rule which is substantially similar to the LIBOR NPR with certain clarifying changes made in response to comments and adds a new regulation (12 CFR Part 253) to implement the LIBOR Act ("LIBOR Final Rule").

The LIBOR Final Rule closely follows the LIBOR Act in terms of the contracts that are covered by the rulemaking, and also specifies the FRB-selected benchmark replacement that will be applied to such contracts. The FRB-selected benchmark replacement is based on the Secured

1920 Main Street, Suite 800, Irvine, California 92614
Phone: (800) 742-3600 • Fax: (949) 474-0617
Email: bcg@ablawyers.com • Website: www.bankerscompliancegroup.com

Overnight Financing Rate ("SOFR") plus a tenor spread adjustment added to the rate. The type of SOFR that will be applied to a contract (such as CME Term SOFR, daily SOFR, average SOFR, etc.) will depend on the type of contract, such as whether the contract governs consumer loans, commercial loans, government-sponsored entity (GSE) loans, or derivatives (such as swaps).

In terms of the differences between the LIBOR Final Rule and the LIBOR NPR, the primary changes are that the final rule better mirrors certain continuity-of-contract and safe harbor provisions of the LIBOR Act, and also makes certain clarifications, including with regard to the definition of a "determining person" who contractually can select a replacement for LIBOR and the treatment of references to Eurodollar rates.

The final rule will be effective 30 days after publication in the Federal Register, and is available at https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20221216a1.pdf. The LIBOR Final Rule will be discussed in more detail at the upcoming BCG Monthly Telephone Briefing on January 20, 2023. Please contact Joel Cook, a principal attorney at the firm, at **JCook@ABLawyers.com** with any questions.