

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 925 Benchmark Replacements for London Interbank Offered Rate

**SPONSOR(S):** Insurance & Banking Subcommittee, Stevenson

**TIED BILLS:** IDEN./SIM. BILLS: SB 1246

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	15 Y, 0 N, As CS	Hinshelwood	Luczynski
2) Civil Justice & Property Rights Subcommittee	16 Y, 0 N	Mawn	Jones
3) Commerce Committee			

### SUMMARY ANALYSIS

The London Interbank Offered Rate (LIBOR) is the reference rate at which large banks indicate that they can borrow short-term wholesale funds from one another on an unsecured basis in the interbank market. LIBOR has been used in setting interest rates for adjustable rate mortgages, asset-backed securities, municipal bonds, credit default swaps, private student loans, and other types of debt. Prior to the end of 2021, LIBOR was calculated in five currencies (UK Pound Sterling, the Swiss Franc, the Euro, the Japanese Yen, and the U.S. Dollar), and LIBOR was produced in seven maturity terms or “tenors” (overnight/spot next, 1-week, 1-month, 2-month, 3-month, 6-month, and 12-month).

In 2014, the Federal Reserve Board and the Federal Reserve Bank of New York convened the Alternative Reference Rates Committee (ARRC) to address already-known risks related to the U.S. Dollar LIBOR. In 2017, the entity regulating LIBOR stated that LIBOR would cease after the end of 2021. However, most U.S. Dollar LIBOR tenors have been extended to the end of June 2023 to enable time for the market to transition away from LIBOR, and in 2017, the ARRC identified the Secured Overnight Financing Rate (SOFR) as its recommended alternative to the U.S. Dollar LIBOR. The Federal Reserve Bank of New York currently publishes SOFR data daily, as well as SOFR Averages and a SOFR Index.

The total exposure to the U.S. Dollar LIBOR, as of the fourth quarter of 2020, was \$223 trillion. Although the derivatives market accounts for a large majority of the outstanding value of all financial products referencing the U.S. Dollar LIBOR, LIBOR is also referenced in several trillion dollars of corporate loans, floating-rate mortgages, floating-rate notes, and securitized products. While an estimated 67 percent of current LIBOR exposures will mature before LIBOR ceases at the end of June 2023, an estimated \$74 trillion will remain outstanding. This fact underscores the importance of finding solutions for legacy contracts, including legacy LIBOR contracts that have no provisions to replace LIBOR upon its cessation.

For contracts and instruments lacking transition provisions, CS/HB 925 provides for a transition to SOFR as the replacement rate for LIBOR; provides for conforming changes to be made to the contract or instrument; voids fallback provisions based on LIBOR; and provides for construction of rights and duties under contracts affected by the bill. The bill also precludes liability, a claim, or a cause of action arising out of or related to the selection or use of a recommended benchmark replacement or the determination, implementation, or performance of a benchmark replacement conforming change. The bill provides a statement demonstrating the overpowering public necessity for the bill and a finding that there are no alternative means to meet this public necessity. Additionally, the bill contains a statement of legislative intent indicating that the bill is remedial in nature and applies retroactively to all contracts, agreements, mortgages, deeds of trust, leases, instruments, obligations, or securities, whether representing debt or equity, and including all interests in a corporation, partnership, or limited liability company, in existence on December 31, 2021.

The bill has no fiscal impact on state or local governments and an indeterminate fiscal impact on the private sector.

The bill will take effect upon becoming law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

The London Interbank Offered Rate (LIBOR) is the reference rate at which large banks indicate that they can borrow short-term wholesale funds from one another on an unsecured basis in the interbank market.<sup>1</sup> The origins of LIBOR can be traced back to a loan transaction in 1969 in which multiple banks were joint lenders (i.e., a syndicated loan) on a large loan of \$80 million.<sup>2</sup> The interest rate of the loan was based on the weighted average of the funding costs for each of the participating banks plus a spread for profit.<sup>3</sup> The rate was recalculated periodically; hence, the rate was variable and reflected market conditions.<sup>4</sup> The idea caught on, and eventually nearly all syndicated loans used LIBOR to calculate the interest charged.<sup>5</sup> Soon the rate was adopted by bankers outside the loan market who were looking for an elegant proxy for bank borrowing costs that was simple, fair, and appeared to be independent.<sup>6</sup>

In addition to providing loans at rates tied to LIBOR, banks whose submissions determined the fixing of LIBOR had also begun to borrow heavily using LIBOR-based contracts by the mid-1980s, creating an incentive to underreport funding costs.<sup>7</sup> As a result, the British Bankers' Association (BBA) took control of the rate in 1986 to formalize the data collection and governance process.<sup>8</sup> In that year, LIBOR settings were calculated for the U.S. dollar, the British pound, and the Japanese yen.<sup>9</sup> Over time, the inclusion of additional currencies and integration of existing currencies into the euro left the BBA with oversight of settings for over ten currencies as of 2012.<sup>10</sup> Fifteen maturity terms were reported for each currency, ranging from overnight to a 1 year term.<sup>11</sup>

Today, LIBOR is calculated daily by the Intercontinental Exchange (ICE) Benchmark Administration.<sup>12</sup> Eighteen international banks submit rates that each bank believes it would pay, not what it actually pays, if it had to borrow money from another bank on the interbank lending market in London.<sup>13</sup> The four highest and four lowest submissions are then removed in order to calculate LIBOR.<sup>14</sup> Prior to the end of 2021, the ICE Benchmark Administration calculated the rate in five currencies (UK Pound Sterling, the Swiss Franc, the Euro, Japanese Yen, and the U.S. Dollar), and LIBOR was produced in seven maturity terms or "tenors" (overnight/spot next, 1-week, 1-month, 2-month, 3-month, 6-month, and 12-month).<sup>15</sup>

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<sup>1</sup> David Hou & David Skeie, *LIBOR: Origins, Economics, Crisis, Scandal, and Reform*, Federal Reserve Bank of New York Staff Reports (Mar. 2014), [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr667.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr667.pdf) (last visited Jan. 21, 2022).

<sup>2</sup> *Id.*

<sup>3</sup> Gavin Finch and Liam Vaughan, *The Man Who Invented the World's Most Important Number* (Nov. 29, 2016), <https://www.bloomberg.com/news/features/2016-11-29/the-man-who-invented-libor-iw3fmed> (last visited Jan. 21, 2022).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> David Hou & David Skeie, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Miranda Marquit and Benjamin Curry, *What Is Libor And Why Is It Being Abandoned?*, Forbes (Dec. 16, 2020), <https://www.forbes.com/advisor/investing/what-is-libor/> (last visited Jan. 21, 2022).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; Financial Conduct Authority, *About LIBOR Transition*, <https://www.fca.org.uk/markets/libor-transition> (last visited Jan. 21, 2022).

LIBOR has come under increasing scrutiny from regulators and financial markets alike following the 2008 financial crisis as well as documented patterns of manipulation by participating banks.<sup>16</sup> Others have noted the declining correlations between LIBOR and actual bank funding costs.<sup>17</sup> In 2017, the entity that regulates LIBOR, the Financial Conduct Authority (FCA) of the United Kingdom, stated that LIBOR would cease after the end of 2021.<sup>18</sup> However, most U.S. Dollar LIBOR tenors have been extended to the end of June 2023 to enable time for the market to transition away from LIBOR.<sup>19</sup> The 1-week and 2-month U.S. Dollar LIBOR ended at the end of 2021.<sup>20</sup> The FCA has recommended transitions to alternative rates before these dates.<sup>21</sup>

In 2014, the Federal Reserve Board and the Federal Reserve Bank of New York convened the Alternative Reference Rates Committee (ARRC) to address risks related to the U.S. Dollar LIBOR.<sup>22</sup> The ARRC's initial objectives were to identify risk-free alternative reference rates for the U.S. Dollar LIBOR, identify best practices for contract robustness, and create an implementation plan with metrics of success and a timeline to support an orderly adoption.<sup>23</sup> The ARCC was reconstituted in 2018 with an expanded membership to serve as a forum to coordinate planning across cash and derivatives products as well as market participants currently using the U.S. Dollar LIBOR.<sup>24</sup> The ARRC is comprised of a diverse set of private-sector entities, each with an important presence in markets affected by the U.S. Dollar LIBOR, and a wide array of official-sector entities, including banking and financial sector regulators, as ex-officio members.<sup>25</sup>

In 2017, the ARRC identified the Secured Overnight Financing Rate (SOFR) as its recommended alternative to the U.S. Dollar LIBOR.<sup>26</sup> SOFR is fully-transaction based and is a broad measure of the cost of borrowing cash overnight collateralized by U.S. Treasury securities.<sup>27</sup> SOFR is based on transaction data from three segments of the Treasury repurchase agreement market: (1) tri-party repurchase agreements, (2) General Collateral Finance repurchase agreements; and (3) bilateral repurchase agreement transactions cleared through the Fixed Income Clearing Corporation.<sup>28</sup> The Federal Reserve Bank of New York currently publishes SOFR data daily, as well as SOFR Averages and a SOFR Index.<sup>29</sup>

LIBOR has been used in setting interest rates for adjustable rate mortgages, asset-backed securities, municipal bonds, credit default swaps, private student loans, and other types of debt.<sup>30</sup> The total exposure to the U.S. Dollar LIBOR, as of the fourth quarter of 2020, was \$223 trillion.<sup>31</sup> Although the derivatives market accounts for a large majority of the outstanding value of all financial products referencing the U.S. Dollar LIBOR, LIBOR is also referenced in several trillion dollars of corporate loans, floating-rate mortgages, floating-rate notes, and securitized products.<sup>32</sup> Financial institutions and other market participants have been in the process of assessing their exposure to the discontinuation of LIBOR, and various financial regulators have discouraged the use of

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<sup>16</sup> Marquit and Curry, *supra* note 12.

<sup>17</sup> Bowman et al., *How Correlated is LIBOR with Bank Funding Costs?* (June 29, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/how-correlated-is-libor-with-bank-funding-costs-20200629.htm> (last visited Jan. 21, 2022).

<sup>18</sup> Financial Conduct Authority, *supra* note 15.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Alternative Reference Rates Committee, *Frequently Asked Questions* (Aug. 27, 2021), <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/ARRC-faq.pdf> (last visited Jan. 21, 2022).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Marquit and Curry, *supra* note 12.

<sup>31</sup> Alternative Reference Rates Committee, *supra* note 22.

<sup>32</sup> *Id.*

LIBOR as a reference rate in new contracts after December 31, 2021.<sup>33</sup> Some financial contracts that reference LIBOR include robust fallback language that contemplates a replacement interest rate index or replacement interest rate calculation in the event that the rate referenced in the contract is discontinued. While an estimated 67 percent of current LIBOR exposures will mature before LIBOR ceases at the end of June 2023, an estimated \$74 trillion will remain outstanding.<sup>34</sup> This fact underscores the importance of finding solutions for legacy contracts, including legacy LIBOR contracts that have no provisions to replace LIBOR upon its cessation.<sup>35</sup> The ARRC believes that legislation is a necessary step to address those contracts.<sup>36</sup>

Similar to the bill, federal legislation (H.R. 4616) has been proposed that would provide for the transition of certain financial contracts away from LIBOR.<sup>37</sup> In the event a contract referencing LIBOR does not have a fallback or replacement rate provision in effect when LIBOR is retired, or a replacement rate is not selected by a determining person as defined by H.R. 4616, H.R. 4616 provides for a transition to SOFR as the replacement rate.<sup>38</sup> H.R. 4616 also provides for conforming changes to these contracts, the continuity and enforceability of these contracts, and protections against liability as a result of such a transition.<sup>39</sup> H.R. 4616 passed the House but has not yet been acted upon in the Senate.<sup>40</sup>

New York<sup>41</sup> and Alabama<sup>42</sup> have passed similar legislation.

### Effect of Proposed Changes

CS/HB 925 provides the following legislative finding:

The Legislature finds that the discontinuation of [LIBOR]<sup>43</sup> as a viable interest rate threatens the continued viability of certain contracts, securities, and instruments and the rights of the parties to those contracts, securities, or instruments. Furthermore, the threat of unknown and potentially unbounded liability and the viability of contracts, securities, and instruments threatens the state's economy and has created an overpowering public necessity to provide an immediate and remedial legislative solution. Therefore, the Legislature intends for parties to certain contracts, securities, or instruments, as provided in [the bill], to enjoy heightened legal protections as a result of the discontinuation of LIBOR. The Legislature also finds that there are no alternative means to meet this public necessity. The Legislature finds that the public interest as a whole is best served by providing certainty to these contracts, securities, and instruments and the parties thereto, so that these contracts, securities, and instruments may remain viable and continue to be enforceable in the state.

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<sup>33</sup> See, e.g., U.S. Securities and Exchange Commission Office of Compliance Inspections and Examinations, *Risk Alert* (June 18, 2020), [https://www.sec.gov/files/Risk%20Alert%20-%20OCIE%20LIBOR%20Initiative\\_1.pdf](https://www.sec.gov/files/Risk%20Alert%20-%20OCIE%20LIBOR%20Initiative_1.pdf) (last visited Jan. 21, 2022); Board of Governors of the Federal Reserve System et al., *Statement on LIBOR Transition* (Nov. 30, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201130a1.pdf> (last visited Jan. 21, 2022); Rohit Chopra, *Joint Statement on Managing the LIBOR Transition* (Oct. 20, 2021), <https://www.consumerfinance.gov/about-us/newsroom/joint-statement-on-managing-the-libor-transition/#note5> (last visited Jan. 21, 2022).

<sup>34</sup> Alternative Reference Rates Committee, *supra* note 22.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Adjustable Interest Rate (LIBOR) Act of 2021, H.R. 4616, 117th Cong., <https://www.congress.gov/bill/117th-congress/house-bill/4616/text> (last visited Jan. 21, 2022).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Discontinuance of the London interbank offered rate, Assembly Bill 164B, <https://legislation.nysenate.gov/pdf/bills/2021/A164B> (last visited Jan. 21, 2022).

<sup>42</sup> Financial transactions, Senate Bill 279, <https://legiscan.com/AL/text/SB279/id/2379813> (last visited Jan. 21, 2022).

<sup>43</sup> "LIBOR" means, for purposes of the application of the bill to any particular contract, security, or instrument, the United States Dollar LIBOR, formerly known as 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 of benchmark rates.

Under the bill, various LIBOR discontinuance events<sup>44</sup> trigger a LIBOR replacement date<sup>45</sup> for a contract, security, or instrument<sup>46</sup> that uses LIBOR as a benchmark<sup>47</sup> and that:

- Does not contain a fallback provision;<sup>48</sup> or
- Contains fallback provisions resulting in a benchmark replacement<sup>49</sup> that is based in any way on a LIBOR value.

For such a contract, security, or instrument, on the LIBOR replacement date, the recommended benchmark replacement will be the benchmark replacement by operation of law. The recommended benchmark is a benchmark replacement based on SOFR<sup>50</sup> and must include any recommended spread adjustment<sup>51</sup> and any benchmark replacement conforming change<sup>52</sup> that have been selected or

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<sup>44</sup> "LIBOR discontinuance event" means the earliest to occur of any of the following:

a. 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, if, at the time of the statement or publication, there is no successor administrator that will continue to provide LIBOR.

b. A public statement or publication of information by the regulatory supervisor for the administrator of LIBOR, the Federal Reserve System, an insolvency official with jurisdiction over the administrator of LIBOR, a resolution authority with jurisdiction over the administrator of LIBOR, or a court or an entity with similar insolvency or resolution authority over the administrator of LIBOR, announcing that the administrator of LIBOR has ceased or will cease to provide LIBOR permanently or indefinitely, if, at the time of the statement or publication, there is no successor administrator that will continue to provide LIBOR.

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

A public statement or publication of information that affects one or more tenors of LIBOR does not constitute a LIBOR discontinuance event with respect to a contract, security, or instrument that:

a. Provides for only one tenor of LIBOR, if the contract, security, or instrument requires interpolation and the tenor can be interpolated from LIBOR tenors that are not so affected; or

b. Allows a party to choose from more than one tenor of LIBOR and any of the tenors is not so affected or, if the contract, security, or instrument requires interpolation, can be interpolated from LIBOR tenors that are not so affected.

<sup>45</sup> "LIBOR replacement date" means:

a. In the case of a LIBOR discontinuance event described in a. or b. (*supra* note 44), the later of:

(I) The date of the public statement or publication of information referenced in a. or b. (*supra* note 44); or

(II) The date on which the administrator of LIBOR permanently or indefinitely ceases to provide LIBOR.

b. In the case of a LIBOR discontinuance event described in c. (*supra* note 44), the date of the public statement or publication of information referenced in c. (*supra* note 44).

2. A date that affects one or more tenors of LIBOR does not constitute a LIBOR replacement date with respect to a contract, security, or instrument that:

a. Provides for only one tenor of LIBOR, if the contract, security, or instrument requires interpolation and the tenor can be interpolated from LIBOR tenors that are not so affected; or

b. Allows a party to choose from more than one tenor of LIBOR and any of the tenors is not so affected or, if the contract, security, or instrument requires interpolation, can be interpolated from LIBOR tenors that are not so affected.

<sup>46</sup> "Contract, security, or instrument" includes, without limitation, any contract, agreement, mortgage, deed of trust, lease, instrument, obligation, or security, whether representing debt or equity, and including any interest in a corporation, partnership, or limited liability company.

<sup>47</sup> "Benchmark" means an index of interest rates or dividend rates that is used, in whole or in part, as the basis of, or as a reference for, calculating or determining a valuation, payment, or other measurement under or with respect to a contract, security, or instrument.

<sup>48</sup> "Fallback provision" means a term in a contract, security, or instrument which sets forth a methodology or procedure for determining a benchmark replacement, including any term relating to the date on which the benchmark replacement becomes effective, without regard to whether a benchmark replacement can be determined in accordance with the methodology or procedure.

<sup>49</sup> "Benchmark replacement" means a benchmark, an interest rate, or a dividend rate that may or may not be based, in whole or in part, on a prior setting of LIBOR, to replace LIBOR or any interest 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.

<sup>50</sup> "SOFR" means, with respect to any day, the secured overnight financing rate published for the day by the Federal Reserve Bank of New York as the administrator of the benchmark, or a successor administrator, on the Federal Reserve Bank of New York's website.

<sup>51</sup> "Recommended spread adjustment" means a spread adjustment, or method for calculating or determining the spread adjustment, which has been selected or recommended by a relevant recommending body for a recommended benchmark replacement for a particular type of contract, security, or instrument and for a particular term to account for the effects of

recommended by a relevant recommending body<sup>53</sup> with respect to the type of contract, security, or instrument.

After the occurrence of a LIBOR discontinuance event, any fallback provisions in a contract, security, or instrument which provide for a benchmark replacement based on or otherwise involving a poll, survey, or inquiry for quotes or information concerning interbank lending rates or any interest rate or dividend rate based on LIBOR will be void and of no force or effect.

For any contract, security, or instrument that uses LIBOR as a benchmark and that contains fallback provisions allowing or requiring the selection of a benchmark replacement that is based in any way on a LIBOR value or a benchmark replacement that is similar to LIBOR, a determining person<sup>54</sup> may, but is not required to, select the recommended benchmark replacement as the benchmark replacement after the occurrence of a LIBOR discontinuance event. In such case, the selection of the recommended benchmark replacement must be:

- Irrevocable;
- Made by the earlier of the LIBOR replacement date or the latest date for selecting a benchmark replacement according to the contract, security, or instrument; and
- Used in any determination of the benchmark under or with respect to the contract, security, or instrument occurring on and after the LIBOR replacement date.

If a recommended benchmark replacement becomes the benchmark replacement for a contract, security, or instrument under the bill, then all benchmark replacement conforming changes that are applicable to the recommended benchmark replacement must become an integral part of the contract, security, or instrument by operation of law.

The selection or use of a recommended benchmark replacement as a benchmark replacement under or with respect to a contract, security, or instrument, by operation of the bill, constitutes:

- A commercially reasonable replacement for and a commercially substantial equivalent to LIBOR.

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the transition or change from LIBOR to a recommended benchmark replacement. This term may be a positive or negative value or zero.

<sup>52</sup> "Benchmark replacement conforming change" means, with respect to any type of contract, security, or instrument, a technical, administrative, or operational change, alteration, or modification that is associated with and reasonably necessary to the use, adoption, calculation, or implementation of a recommended benchmark replacement and that has been selected or recommended by a relevant recommending body. However, if, in the reasonable judgment of a calculating person, the change, alteration, or modification selected or recommended by a relevant recommending body does not apply to the contract, security, or instrument or is insufficient to allow administration and calculation of the recommended benchmark replacement, the benchmark replacement conforming change may include other changes, alterations, or modifications that, in the reasonable judgment of the calculating person:

1. Are necessary to allow administration and calculation of the recommended benchmark replacement under or with respect to the contract, security, or instrument in a manner consistent with market practice for substantially similar contracts, securities, or instruments and, to the extent practicable, the manner in which the contract, security, or instrument was administered immediately before the LIBOR replacement date.
2. Would not result in a disposition of the contract, security, or instrument for federal income tax purposes.

"Calculating person" means, with respect to any contract, security, or instrument, a person responsible for calculating or determining a valuation, payment, or other measurement based on a benchmark. This person may be the determining person. See *infra* note 54 for the definition of "determining person".

<sup>53</sup> "Relevant recommending body" means the Federal Reserve Board, the Federal Reserve Bank of New York, the ARRC, or a successor to any of these.

<sup>54</sup> "Determining person" means, with respect to any contract, security, or instrument, the following persons in decreasing order of priority:

1. A person so specified.
2. A person 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 other persons of the occurrence of a LIBOR discontinuance event, a LIBOR replacement date, or a

- A reasonable, comparable, or analogous term for LIBOR under or with respect to the contract, security, or instrument.
- A replacement that is based on a methodology or information that is similar or comparable to LIBOR.
- Substantial performance by any person of any right or obligation relating to or based on LIBOR under or with respect to a contract, security, or instrument.

A LIBOR discontinuance event, a LIBOR replacement date, the selection or use of a recommended benchmark replacement as a benchmark replacement, or the determination, implementation, or performance of a benchmark replacement conforming change, in each case, by operation of the bill, may not:

- Be deemed to impair or affect the right of any person to receive a payment, or affect the amount or timing of the payment, under a contract, security, or instrument;
- Have the effect of discharging or excusing performance under a contract, security, or instrument for any reason, claim, or defense, including, but not limited to, any force majeure or other provision in a contract, security, or instrument;
- Have the effect of giving any person the right to unilaterally terminate or suspend performance under a contract, security, or instrument;
- Have the effect of constituting a breach of a contract, security, or instrument; or
- Have the effect of voiding or nullifying a contract, security, or instrument.

A person is not liable for damages to any other person, and is not subject to any claim or request for equitable relief, arising out of or related to the selection or use of a recommended benchmark replacement or the determination, implementation, or performance of a benchmark replacement conforming change, in each case, by operation of the bill. The selection or use of the recommended benchmark replacement or the determination, implementation, or performance of a benchmark replacement conforming change may not give rise to any claim or cause of action by any person in law or in equity.

The selection or use of a recommended benchmark replacement or the determination, implementation, or performance of a benchmark replacement conforming change, by operation of the bill, may not be deemed to:

- Be an amendment or modification of a contract, security, or instrument.
- Prejudice, impair, or affect a person's rights, interests, or obligations under or with respect to a contract, security, or instrument.

Except as otherwise provided in the bill, the bill may not be interpreted as creating a negative inference or negative presumption regarding the validity or enforceability of any of the following:

- A benchmark replacement that is not a recommended benchmark replacement.
- A spread adjustment, or method for calculating or determining a spread adjustment, which is not a recommended spread adjustment.
- A change, alteration, or modification to or with respect to a contract, security, or instrument which is not a benchmark replacement conforming change.

The bill does not alter or impair any of the following:

- A written agreement by all requisite parties<sup>55</sup> which, retrospectively or prospectively, provides that a contract, security, or instrument is not subject to the bill without necessarily referring specifically to the statute created by the bill.
- A 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. However, after the occurrence of a LIBOR discontinuance event, any fallback provisions in a contract, security, or instrument which provide for a benchmark replacement based on or otherwise involving a poll, survey, or inquiry for quotes or information concerning interbank lending rates or any interest rate or dividend rate based on LIBOR will be void and of no force or effect.
- A contract, security, or instrument as to which a determining person does not elect to use a recommended benchmark replacement or as to which a determining person elects to use a recommended benchmark replacement before the occurrence of a LIBOR discontinuance event. However, after the occurrence of a LIBOR discontinuance event, any fallback provisions in a contract, security, or instrument which provide for a benchmark replacement based on or otherwise involving a poll, survey, or inquiry for quotes or information concerning interbank lending rates or any interest rate or dividend rate based on LIBOR will be void and of no force or effect.
- The application to a recommended benchmark replacement of any cap, floor, modifier, or spread adjustment to which LIBOR had been subject pursuant to the terms of a contract, security, or instrument.

Notwithstanding the Uniform Commercial Code<sup>56</sup> or any other law of this state, and except as otherwise provided in the bill, the bill applies to all contracts, securities, and instruments, including contracts with respect to commercial transactions, and may not be superseded by any other law of this state.

The bill provides that it is remedial in nature and applies retroactively to all contracts, agreements, mortgages, deeds of trust, leases, instruments, obligations, or securities, whether representing debt or equity, and including all interests in a corporation, partnership, or limited liability company, in existence on December 31, 2021.

The bill takes effect upon becoming a law.

#### B. SECTION DIRECTORY:

**Section 1.** Amends s. 687.15, F.S., relating to benchmark replacements for the London Interbank Offered Rate.

**Section 2.** Provides that this act is remedial in nature and applies retroactively.

**Section 3.** Provides that this act shall take effect upon becoming a law.

## II. FICAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

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<sup>55</sup> "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 the bill.

<sup>56</sup> Chapters 670-680, F.S., comprise the Uniform Commercial Code. s. 671.101, F.S.



1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill has an indeterminate impact on the private sector. The bill may have both positive and negative impacts on private sector entities. Replacing LIBOR with SOFR could result in a different interest rate under the contract or instrument, though the ARCC has recommended spread adjustments for various types of financial contracts and instruments for which SOFR replaces LIBOR. Additionally, the bill could prevent an aggrieved party from bringing a claim in court relating to the replacement of LIBOR with SOFR and any accompanying conforming changes, but elimination of such liability and claims may have the effect of quieting financial markets.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Impairment of Contracts and Due Process

Both the Florida and the United States Constitutions prohibit the state from passing a law impairing contractual obligations.<sup>57</sup> However, the Legislature may provide that a non-criminal law, including one that affects existing contractual obligations, applies retroactively in certain situations.<sup>58</sup> In determining whether a law may be applied retroactively, courts first determine whether the law is procedural, remedial, or substantive in nature.<sup>59</sup> A purely procedural or remedial law may apply retroactively without offending the Constitution, but a substantive law generally may not apply retroactively absent clear legislative intent to the contrary.<sup>60</sup> However, even where the Legislature has expressly stated that a law will have retroactive application, a court may reject that application if the law impairs a vested right, creates a new obligation, or imposes a new penalty.<sup>61</sup> Further, where a law is designed to serve a remedial purpose, a court may decide not to apply the law retroactively where doing so “would attach new legal consequences to events completed before its enactment.”<sup>62</sup>

Moreover, both the Florida and United States Constitutions prohibit the taking of life, liberty, or property without due process of law.<sup>63</sup> The right to contract, as long as no fraud or deception is involved and the contract is otherwise legal, is both a liberty and a property right subject to due

<sup>57</sup> U.S. Const. art. I, s. 10; Art. I, s. 10, Fla. Const.

<sup>58</sup> U.S. Const. art. I, ss. 9 and 10; Art. 1, s. 10, Fla. Const.

<sup>59</sup> A procedural law merely establishes the means and methods for applying or enforcing existing duties or rights. A remedial law confers or changes a remedy, i.e., the means employed in enforcing an existing right or in redressing an injury. A substantive law creates, alters, or impairs existing substantive rights. *Windom v. State*, 656 So. 2d 432 (Fla. 1995); *St. John's Village I, Ltd. v. Dept. of State*, 497 So. 2d 990 (Fla. 5th DCA 1986); *McMillen v. State Dept. of Revenue*, 74 So. 2d 1234 (Fla. 1st DCA 1999).

<sup>60</sup> *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).

<sup>61</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010).

<sup>62</sup> *L. Ross, Inc. v. R.W. Roberts Const. Co.*, 481 So. 2d 484 (Fla. 1986).

<sup>63</sup> U.S. Const. amends. V and XIV; Art. I, s. 21, Fla. Const.

process protections, and the impairment of contracts may, in certain instances, be viewed as the taking of property without due process.<sup>64</sup>

For certain contracts and instruments, the bill provides for a transition to SOFR as the replacement rate for LIBOR, provides for conforming changes to be made to the contract or instrument, voids fallback provisions that are based on LIBOR, and provides for construction of rights and duties under contracts affected by the bill. Additionally, the bill contains a statement of legislative intent indicating that the bill is remedial in nature and applies retroactively to all contracts, agreements, mortgages, deeds of trust, leases, instruments, obligations, or securities, whether representing debt or equity, and including all interests in a corporation, partnership, or limited liability company, in existence on December 31, 2021. Whether the Legislature's retroactive modification of such contracts and instruments is procedural, remedial, or substantive, and whether such modification implicates the constitutional right to contract or the constitutional right to due process, is for the courts to decide.

### Access to Courts

In *Kluger v. White*,<sup>65</sup> the Florida Supreme Court evaluated to what extent the Legislature may alter a civil cause of action. The Court stated that it would not completely prohibit the Legislature from altering a cause of action, but neither would it allow the Legislature "to destroy a traditional and long-standing cause of action upon mere legislative whim . . ." The takeaway from *Kluger* and other relevant case law is that the Legislature may:

- Reduce the right to bring a cause of action as long as the right is not entirely abolished.<sup>66</sup>
- Abolish a cause of action that is not "traditional and long-standing" – that is, a cause of action that did not exist at common law, and that did not exist in statute before the adoption of the Florida Constitution's Declaration of Rights.<sup>67</sup>
- Abolish a cause of action if the Legislature either:
  - Provides a reasonable commensurate benefit in exchange;<sup>68</sup> or
  - Shows an "overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."<sup>69</sup>

The bill precludes liability, a claim, or a cause of action arising out of or related to the selection or use of a recommended benchmark replacement or the determination, implementation, or performance of a benchmark replacement conforming change. The bill also provides a statement demonstrating the overpowering public necessity for the bill and a finding that there are no alternative means to meet this public necessity.

### B. RULE-MAKING AUTHORITY:

None.

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<sup>64</sup> *Miles v. City of Edgewater Police Dept.*, 190 So. 3d 171 (Fla. 1st DCA 2016); see, e.g., *Griffin v. Sharpe*, 65 So. 2d 751 (Fla. 1953) (finding that a statute removing a specific deed restriction's expiration date both impaired contracts and constituted a taking of private property without due process).

<sup>65</sup> *Kluger*, 281 So. 2d 1 (Fla. 1973).

<sup>66</sup> See *Achord v. Osceola Farms Co.*, 52 So. 3d 699 (Fla. 2010).

<sup>67</sup> See *Anderson v. Gannett Comp.*, 994 So. 2d 1048 (Fla. 2008) (false light was not actionable under the common law); *McPhail v. Jenkins*, 382 So. 2d 1329 (Fla. 1980) (wrongful death was not actionable under the common law); see also *Kluger*, 281 So. 2d at 4 ("We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State . . . the Legislature is without power to abolish such a right without providing a reasonable alternative . . . unless the Legislature can show an overpowering public necessity . . .").

<sup>68</sup> *Kluger*, 281 So. 2d at 4; see *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993) (upholding statutory cap on medical malpractice damages because the Legislature provided arbitration, which is a "commensurate benefit" for a claimant); accord *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974); but see *Smith v. Dept. of Ins.*, 507 So. 2d 1080 (Fla. 1992) (striking down noneconomic cap on damages, which, although not wholly abolishing a cause of action, did not provide a commensurate benefit).

<sup>69</sup> *Kluger*, 281 So. 2d at 4-5 (noting that in 1945, the Legislature abolished the right to sue for several causes of action, but successfully demonstrated "the public necessity required for the total abolition of a right to sue") (citing *Rotwein v. Gersten*, 36 So. 2d 419 (Fla. 1948)); see *Echarte*, 618 So. 2d at 195 ("Even if the medical malpractice arbitration statutes at issue did not provide a commensurate benefit, we would find that the statutes satisfy the second prong of *Kluger* which requires a legislative finding that an 'overpowering public necessity' exists, and further that 'no alternative method of meeting such public necessity can be shown'").

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On January 13, 2022, the Insurance & Banking Subcommittee considered one amendment, which was adopted, and reported the bill favorably as a committee substitute. The committee substitute:

- Clarifies the definition of “benchmark replacement conforming change” to reflect that subparagraph 2 (relating to a calculating person’s discretion to choose benchmark replacement conforming changes) is permissive rather than a mandatory requirement for every contract, security, or instrument subject to the bill.
- Amends s. 687.15(7), F.S., as created in the bill, to clarify that the bill deems the statements in paragraphs (a) – (d) to be true when a recommended benchmark replacement is selected or used.
- Changes the phrase “recommended replacement benchmark” to “recommended benchmark replacement,” as “recommended benchmark replacement” is the defined term.

The staff analysis has been updated to reflect the committee substitute as passed by the Insurance & Banking Subcommittee.