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3 HOUSE FINANCIAL SERVICES COMMITTEE SUBSTITUTE FOR SB279, AS
4 ENGROSSED

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

13 This bill would prohibit parties to a
14 contract from refusing to perform contractual
15 obligations or declaring a breach of contract as a
16 result of the discontinuance of LIBOR or the use of
17 a replacement that is a commercially reasonable
18 equivalent to 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 U.S. dollar London Interbank Offered
7 Rate or the use of a replacement interest rate index that is a
8 replacement interest rate index to U.S. dollar LIBOR; to
9 provide for replacement interest rate indexes to U.S. dollar
10 LIBOR; and to provide a safe harbor from litigation for the
11 use of the recommended benchmark 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.

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

19 §5-28-2.

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

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

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

7 (3) BENCHMARK REPLACEMENT CONFORMING CHANGES. With
8 respect to any type of contract, security, or instrument, any
9 technical, administrative, or operational changes,
10 alterations, or modifications that are associated with and
11 reasonably necessary to the use, adoption, calculation, or
12 implementation of a recommended benchmark replacement and that
13 both:

14 a. Have been selected or recommended by a relevant
15 recommending body; and

16 b. If, in the reasonable judgment of the calculating
17 person, the benchmark replacement conforming changes selected
18 or recommended pursuant to paragraph a. do not apply to the
19 contract, security, or instrument or are insufficient to
20 permit administration and calculation of the recommended
21 benchmark replacement, then benchmark replacement conforming
22 changes shall include other changes, alterations, or
23 modifications that, in the reasonable judgment of the
24 calculating person, are necessary to permit administration and
25 calculation of the recommended benchmark replacement under or
26 in respect of the contract, security, or instrument in a
27 manner consistent with market practice for substantially

1 similar contracts, securities, or instruments and, to the
2 extent practicable, the manner in which the contract,
3 security, or instrument was administered immediately prior to
4 the LIBOR replacement date; and would not result in a
5 disposition of the contract, security, or instrument for U.S.
6 federal income tax purposes.

7 (4) CALCULATING PERSON. With respect to any
8 contract, security, or instrument, any person responsible for
9 calculating or determining any valuation, payment, or other
10 measurement based on a benchmark. This person may be the
11 determining person.

12 (5) CONTRACT, SECURITY, OR INSTRUMENT. Includes,
13 without limitation, any contract, agreement, mortgage, deed of
14 trust, lease, instrument, other obligation, or security,
15 whether representing debt or equity, and including any
16 interest in a corporation, a partnership, or a limited
17 liability company.

18 (6) DETERMINING PERSON. With respect to any
19 contract, security, or instrument, in the following order of
20 priority:

21 a. Any person so specified.

22 b. Any person with the authority, right, or
23 obligation to do any of the following:

24 1. Determine the benchmark replacement that will
25 take effect on the LIBOR replacement date.

26 2. Calculate or determine a valuation, payment, or
27 other measurement based on a benchmark.

1 3. Notify other persons of the occurrence of a LIBOR
2 discontinuance event, a LIBOR replacement date, or a benchmark
3 replacement.

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

11 (8) LIBOR. For purposes of the application of this
12 act to any particular contract, security, or instrument, U.S.
13 dollar LIBOR, formerly known as the London Interbank Offered
14 Rate, as administered by ICE Benchmark Administration Limited,
15 or any predecessor or successor thereof, or any tenor thereof,
16 as applicable, that is used in making any calculation or
17 determination thereunder.

18 (9) LIBOR DISCONTINUANCE EVENT. The earliest to
19 occur of any of the following:

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

26 b. A public statement or publication of information
27 by the regulatory supervisor for the administrator of LIBOR,

1 the United States Federal Reserve System, an insolvency
2 official with jurisdiction over the administrator for LIBOR, a
3 resolution authority with jurisdiction over the administrator
4 for LIBOR, or a court or an entity with similar insolvency or
5 resolution authority over the administrator for LIBOR, which
6 states that the administrator of LIBOR has ceased, or will
7 cease, to provide LIBOR permanently or indefinitely, provided
8 that, at the time of the statement or publication, there is no
9 successor administrator that will continue to provide LIBOR.

10 c. A public statement or publication of information
11 by the regulatory supervisor for the administrator of LIBOR
12 announcing that LIBOR is no longer representative. For
13 purposes of this definition, a public statement or publication
14 of information that affects one or more tenors of LIBOR shall
15 not constitute a LIBOR discontinuance event with respect to
16 any contract, security, or instrument that does either of the
17 following:

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

22 2. Permits a party to choose from more than one
23 tenor of LIBOR and any of the tenors is not so affected or if
24 the contract, security, or instrument requires interpolation,
25 can be interpolated from LIBOR tenors that are not so
26 affected.

1 (10) LIBOR REPLACEMENT DATE. a. In the case of a
2 LIBOR discontinuance event described in paragraph a. or b. of
3 subdivision (9), the later of:

4 1. The date of the public statement or publication
5 of information referenced therein.

6 2. The date on which the administrator of LIBOR
7 permanently or indefinitely ceases to provide LIBOR.

8 b. In the case of a LIBOR discontinuance event
9 described in paragraph c. of subdivision (9), the date of the
10 public statement or publication of information referenced
11 therein. For purposes of this chapter, a date that affects one
12 or more tenors of LIBOR shall not constitute a LIBOR
13 replacement date with respect to any contract, security, or
14 instrument that does either of the following:

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

19 2. Permits a party to choose from more than one
20 tenor of LIBOR and any of the tenors is not so affected, or if
21 the contract, security, or instrument requires interpolation,
22 can be interpolated from LIBOR tenors that are not so
23 affected.

24 (11) RECOMMENDED BENCHMARK REPLACEMENT. With respect
25 to any particular type of contract, security, or instrument, a
26 benchmark replacement based on SOFR, which shall include any
27 recommended spread adjustment and any benchmark replacement

1 conforming changes, that shall have been selected or
2 recommended by a relevant recommending body with respect to
3 the type of contract, security, or instrument.

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

13 (13) RELEVANT RECOMMENDING BODY. The Federal Reserve
14 Board, the Federal Reserve Bank of New York, or the
15 Alternative Reference Rates Committee, or any successor to any
16 of them.

17 (14) SOFR. With respect to any day, the secured
18 overnight financing rate published for the day by the Federal
19 Reserve Bank of New York, as the administrator of the
20 benchmark, or a successor administrator, on the Federal
21 Reserve Bank of New York's website.

22 §5-28-3.

23 (a) On the LIBOR replacement date, the recommended
24 benchmark replacement, by operation of law, shall be the
25 benchmark replacement for any contract, security, or
26 instrument that uses LIBOR as a benchmark and meets one of the
27 following requirements:

1 (1) Contains no fallback provisions.

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

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

14 (c) (1) This subsection shall apply to any contract,
15 security, or instrument that uses LIBOR as a benchmark and
16 contains fallback provisions that permit or require the
17 selection of a benchmark replacement that is either of the
18 following:

19 a. Based in any way on any LIBOR value.

20 b. The substantive equivalent of subdivision (1),
21 (2), or (3) of subsection (a) of Section 5-28-4.

22 (2) A determining person shall have the authority
23 under this act, but shall not be required, to select on or
24 after the occurrence of a LIBOR discontinuance event the
25 recommended benchmark replacement as the benchmark
26 replacement. The selection of the recommended benchmark
27 replacement shall be all of the following:

1 a. Irrevocable.

2 b. Made by the earlier of either the LIBOR
3 replacement date, or the latest date for selecting a benchmark
4 replacement according to the contract, security, or
5 instrument.

6 c. Used in any determinations of the benchmark under
7 or with respect to the contract, security, or instrument
8 occurring on and after the LIBOR replacement date.

9 (d) If a recommended benchmark replacement becomes
10 the benchmark replacement for any contract, security, or
11 instrument pursuant to this section, then all benchmark
12 replacement conforming changes that are applicable to the
13 recommended benchmark replacement shall become an integral
14 part of the contract, security, or instrument by operation of
15 law.

16 (e) The provisions of this chapter shall not alter
17 or impair any of the following:

18 (1) Any written agreement by all requisite parties
19 that, retrospectively or prospectively, a contract, security,
20 or instrument shall not be subject to this chapter without
21 necessarily referring specifically to this chapter. For
22 purposes of this section, "requisite parties" means all
23 parties required to amend the terms and provisions of a
24 contract, security, or instrument that would otherwise be
25 altered or affected by this chapter.

26 (2) Any contract, security, or instrument that
27 contains fallback provisions that would result in a benchmark

1 replacement that is not based on LIBOR, including, but not
2 limited to, the prime rate or the federal funds rate, except
3 that the contract, security, or instrument shall be subject to
4 subsection (b).

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

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

16 (f) Notwithstanding the uniform commercial code or
17 any other law of this state, this act shall apply to all
18 contracts, securities, and instruments, including contracts,
19 with respect to commercial transactions, and shall not be
20 deemed to be displaced by any other law of this state.

21 §5-28-4.

22 (a) The selection or use of a recommended benchmark
23 replacement as a benchmark replacement under or in respect of
24 a contract, security, or instrument by operation of Section
25 5-28-3 shall constitute all of the following:

26 (1) A commercially reasonable replacement for and a
27 commercially substantial equivalent to LIBOR.

1 (2) A reasonable, comparable, or analogous term for
2 LIBOR under or in respect of the contract, security, or
3 instrument.

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

6 (4) Substantial performance by any person of any
7 right or obligation relating to or based on LIBOR under or in
8 respect of a contract, security, or instrument.

9 (b) None of: a LIBOR discontinuance event, a LIBOR
10 replacement date, the selection or use of a recommended
11 benchmark replacement as a benchmark replacement, or the
12 determination, implementation, or performance of benchmark
13 replacement conforming changes, in each case, by operation of
14 Section 5-28-3, shall do any of the following:

15 (1) Be deemed to impair or affect the right of any
16 person to receive a payment, or affect the amount or timing of
17 the payment, under any contract, security, or instrument.

18 (2) Have the effect of discharging or excusing
19 performance under any contract, security, or instrument for
20 any reason, claim, or defense, including, but not limited to,
21 any force majeure or other provision in any contract, security
22 or instrument.

23 (3) Have the effect of giving any person the right
24 to unilaterally terminate or suspend performance under any
25 contract, security, or instrument.

26 (4) Have the effect of constituting a breach of a
27 contract, security, or instrument.

1 (5) Have the effect of voiding or nullifying any
2 contract, security, or instrument.

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

14 (d) The selection or use of a recommended benchmark
15 replacement or the determination, implementation, or
16 performance of benchmark replacement conforming changes, by
17 operation of Section 5-28-3, shall be deemed to do both of the
18 following:

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

21 (2) Not prejudice, impair, or affect any person's
22 rights, interests, or obligations under or in respect of any
23 contract, security, or instrument.

24 (e) Except as provided in either subsection (a) or
25 subsection (c) of Section 5-28-3, this act shall not be
26 interpreted as creating any negative inference or negative

1 presumption regarding the validity or enforceability of any of
2 the following:

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

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

8 (3) Any changes, alterations, or modifications to or
9 in respect of a contract, security, or instrument that are not
10 benchmark replacement conforming changes.

11 §5-28-5.

12 If any provision of this chapter or application
13 thereof to any person or circumstance is held invalid, the
14 invalidity shall not affect other provisions or applications
15 of this chapter that can be given effect without the invalid
16 provision or application, and to this end the provisions of
17 this chapter shall be severable.

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