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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

Docket No. CFPB-2020-0014

RIN 3170-AB01

Facilitating the LIBOR Transition (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is proposing to amend Regulation Z, which implements the Truth in Lending Act (TILA), generally to address the sunset of LIBOR, which is expected to be discontinued after 2021. Some creditors currently use LIBOR as an index for calculating rates for open-end and closed-end products. The Bureau is proposing changes to open-end and closed-end provisions to provide examples of replacement indices for LIBOR indices that meet certain Regulation Z standards. The Bureau also is proposing to permit creditors for home equity lines of credit (HELOCs) and card issuers for credit card accounts to transition existing accounts that use a LIBOR index to a replacement index on or after March 15, 2021, if certain conditions are met. The proposal also addresses change-in-terms notice provisions for HELOCs and credit card accounts and how they apply to accounts transitioning away from using a LIBOR index. Lastly, the Bureau is proposing to address how the rate reevaluation provisions applicable to credit card accounts apply to the transition from using a LIBOR index to a replacement index.

DATES: Comments must be received on or before August 4, 2020.

ADDRESSES: You may submit comments, identified by Docket No. CFPB-2020-0014 or RIN

3170-AB01, by any of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email*: *2020-LIBOR-NPRM@cfpb.gov*. Include Docket No. CFPB-2020-0014 or RIN 3170-AB01 in the subject line of the message.
- *Hand Delivery/Mail/Courier*: Comment Intake—LIBOR, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552. Please note that due to circumstances associated with the COVID-19 pandemic, the Bureau discourages the submission of comments by hand delivery, mail, or courier.

Instructions: The Bureau encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, and in light of difficulties associated with mail and hand deliveries during the COVID-19 pandemic, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov*. In addition, once the Bureau's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street, NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. At that time, you can make an appointment to inspect the documents by telephoning 202-435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Angela Fox, Counsel, or Krista Ayoub, Kristen Phinnessee, or Amanda Quester, Senior Counsels, Office of Regulations, at 202-435-7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

The Bureau is proposing several amendments to Regulation Z, which implements TILA, for both open-end and closed-end credit to address the sunset of LIBOR.[1] At this time, LIBOR is expected to be discontinued after 2021. These proposed changes are discussed in more detail below. As discussed in part VI, the Bureau generally is proposing that the final rule would take effect on March 15, 2021, except for the updated change-in-term disclosure requirements for HELOCs and credit card accounts that would apply as of October 1, 2021. The Bureau also is issuing additional written guidance related to the LIBOR transition on its website as discussed in part II.C. The Bureau solicits comment on the changes proposed in this document and whether

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[1] When amending commentary, the Office of the Federal Register requires reprinting of certain subsections being amended in their entirety rather than providing more targeted amendatory instructions. The sections of regulatory text and commentary included in this document show the language of those sections if the Bureau adopts its changes as proposed. In addition, the Bureau is releasing an unofficial, informal redline to assist industry and other stakeholders in reviewing the changes that it is proposing to make to the regulatory text and commentary of Regulation Z. This redline can be found on the Bureau's website, at https://www.consumerfinance.gov/policy-compliance/rulemaking/rules-under-development/amendments-facilitate-libor-transition-regulation-z/. If any conflicts exist between the redline and the text of Regulation Z, its commentary, or this proposed rule, the documents published in the *Federal Register* are the controlling documents.

there are any additional regulatory changes or guidance that would be helpful as creditors and card issuers transition away from using LIBOR indices.

A. Open-End Credit

The Bureau is proposing several amendments to the open-end credit provisions in Regulation Z to address the sunset of LIBOR. First, the Bureau is proposing a detailed roadmap for HELOC creditors and card issuers to choose a compliant replacement index for the LIBOR index.[2] Regulation Z already permits HELOC creditors and card issuers to change an index and margin they use to set the annual percentage rate (APR) on a variable-rate account under certain conditions, when the original index "becomes unavailable" or "is no longer available." The Bureau has preliminarily determined, however, that consumers, HELOC creditors, and card issuers would benefit substantially if HELOC creditors and card issuers could transition away from a LIBOR index before LIBOR becomes unavailable. The Bureau is therefore proposing new provisions that detail specifically how HELOC creditors and card issuers may replace a LIBOR index with a replacement index for accounts on or after March 15, 2021. These proposed new provisions are in proposed § 1026.40(f)(3)(ii)(B) for HELOCs and in proposed § 1026.55(b)(7)(ii) for credit card accounts.

Under the proposal, HELOC creditors and card issuers must ensure that the APR calculated using the replacement index is substantially similar to the rate calculated using the LIBOR index, based on the values of these indices on December 31, 2020. The proposal also imposes other requirements on a replacement index. Under the proposal, HELOC creditors and card issuers may select a replacement index that is newly established and has no history, or an

[2] Reverse mortgages structured as open-end credit are HELOCs subject to the provisions in §§ 1026.40 and 1026.9(c)(1).

index that is not newly established and has a history. HELOC creditors and card issuers may replace a LIBOR index with an index that has a history only if the index has historical fluctuations substantially similar to those of the LIBOR index. The Bureau is proposing to determine that the prime rate published in the Wall Street Journal (Prime) has historical fluctuations substantially similar to those of certain U.S. Dollar (USD) LIBOR indices. The Bureau also is proposing to determine that certain spread-adjusted[3] indices based on the Secured Overnight Financing Rate (SOFR) recommended by the Alternative Reference Rates Committee (ARRC) have historical fluctuations that are substantially similar to those of certain USD LIBOR indices.

Second, the Bureau is proposing to make clarifying changes to the existing provisions on the replacement of an index when the index becomes unavailable. These proposed changes are in proposed § 1026.40(f)(3)(ii)(A) for HELOCs and in proposed § 1026.55(b)(7)(i) for credit card accounts.

Third, the Bureau is proposing to revise change-in-terms notice requirements for HELOCs and credit card accounts to ensure that consumers know how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced. The proposal would ensure that the change-in-terms notices for these accounts will disclose the index that is replacing the LIBOR index and any adjusted margin that will be used to calculate a consumer's rate, regardless of whether the margin is being reduced or increased. These proposed changes, if

[3] The spread between two indices is the difference between the levels of those indices, which may vary from day to day. For example, if today index X is 5% and index Y is 4%, then the X-Y spread today is one percentage point (or, equivalently, 100 basis points). A spread adjustment is a term that is added to one index to make it more similar to another index. For example, if the X-Y spread is typically around 100 basis points, then one reasonable spread adjustment may be to add 100 basis points to Y every day. Then the spread-adjusted value of Y will typically be much closer to the value of X than Y is, although there may still be differences between X and the spread-adjusted Y from day to day.

adopted, would become effective October 1, 2021. The proposed changes are in § 1026.9(c)(1)(ii) for HELOCs and in § 1026.9(c)(2)(v)(A) for credit card accounts.

Fourth, the Bureau is proposing to add an exception from the rate reevaluation provisions applicable to credit card accounts. Currently, when a card issuer increases a rate on a credit card account, the card issuer generally must complete an analysis reevaluating the rate increase every six months until the rate is reduced to a certain degree. To facilitate compliance, the proposal would add an exception from these requirements for increases that occur as a result of replacing a LIBOR index using the specific proposed provisions described above for transitioning from a LIBOR index or as a result of the LIBOR index becoming unavailable. This proposed exception is in proposed § 1026.59(h)(3). This proposed exception would not apply to rate increases that are already subject to the rate reevaluation requirements prior to the transition from the LIBOR index. The proposal also would address cases where the card issuer was already required to perform a rate reevaluation review prior to transitioning away from LIBOR and LIBOR was used as the benchmark for comparison for purposes of determining whether the card issuer can terminate the six-month reviews. To facilitate compliance, these proposed changes would address how a card issuer can terminate the obligation to review where the rate applicable immediately prior to the increase was a variable rate calculated using a LIBOR index. These proposed changes are set forth in proposed § 1026.59(f)(3).

Fifth, in relation to the open-end credit provisions, the Bureau is proposing several technical edits to comments 9(c)(2)(iv)-2 and 59(d)-2 to replace LIBOR references with references to a SOFR index.

B. Closed-End Credit

The Bureau is proposing amendments to the closed-end credit provisions in Regulation Z to address the sunset of LIBOR. First, the Bureau is proposing to identify specific indices as an example of a "comparable index" for purposes of the closed-end refinancing provisions. Currently, under Regulation Z, if the creditor changes the index of a variable-rate closed-end loan to an index that is not a "comparable index," the index change may constitute a refinancing for purposes of Regulation Z, triggering certain requirements. The Bureau is proposing to add an illustrative example to identify the SOFR-based spread-adjusted replacement indices recommended by the ARRC as an example of a "comparable index" for the LIBOR indices that they are intended to replace. These proposed changes are in comment 20(a)(3)-ii.

Second, in relation to the closed-end credit provisions, the Bureau is proposing technical edits to § 1026.36(a)(4)(iii)(C) and (a)(5)(iii)(B), comment 37(j)(1)-1, and sample forms H-4(D)(2) and H-4(D)(4) in appendix H. These proposed technical edits would replace LIBOR references with references to a SOFR index and make related changes and corrections.

II. Background

A. LIBOR

Introduced in the 1980s, LIBOR (originally an acronym for London Interbank Offered Rate) was intended to measure the average rate at which a bank could obtain unsecured funding in the London interbank market for a given period, in a given currency. LIBOR is calculated based on submissions from a panel of contributing banks and published every London business day for five currencies (USD, British pound sterling (GBP), euro (EUR), Swiss franc (CHF), and

Japanese yen (JPY)) and for seven tenors[4] for each currency (overnight, 1-week, 1-month, 2-month, 3-month, 6-month, and 1-year), resulting in 35 individual rates (collectively, LIBOR). As of March 2020, the panel for USD LIBOR is comprised of sixteen banks, and each bank contributes data for all seven tenors.[5] In 2017, the chief executive of the U.K. Financial Conduct Authority (FCA), which regulates LIBOR, announced that it did not intend to persuade or compel banks to submit information for LIBOR past the end of 2021 and that the panel banks had agreed to voluntarily sustain LIBOR until then in order to provide sufficient time for the market to transition from using LIBOR indices to alternative indices.[6] However, the Intercontinental Exchange (ICE) Benchmark Administration, which administers LIBOR, announced a goal to continue publishing certain LIBOR tenors past 2021 though it declined to guarantee their continued availability.[7] The FCA has indicated that it would conduct "representativeness tests" if LIBOR continues to be published for some time after 2021 based on submissions from a smaller number of panel banks (and thus a smaller number of transactions), raising the possibility that LIBOR could be declared to be unrepresentative by its regulator.[8] As a result, industry faces uncertainty about the publication and representativeness of LIBOR, which is neither guaranteed to continue nor guaranteed to cease.

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[4] The tenor refers to the to the length of time remaining until a loan matures.

[5] *ICE LIBOR,* (last visited Mar. 26, 2020), https://www.theice.com/iba/libor.

[6] Andrew Bailey, *The Future of LIBOR*, U.K. FCA, (July 27, 2017), https://www.fca.org.uk/news/speeches/the-future-of-libor; *FCA Statement on LIBOR Panels*, U.K. FCA, (Nov. 24, 2017), https://www.fca.org.uk/news/statements/fca-statement-libor-panels.

[7] Intercontinental Exch. Benchmark Admin., *ICE Benchmark Administration Survey on the Use of LIBOR,* https://www.theice.com/iba/ice-benchmark-administration-survey-on-the-use-of-libor (last visited May 18, 2020).

[8] Andrew Bailey, *LIBOR: Preparing for the End,* U.K. FCA, (July 15, 2019), https://www.fca.org.uk/news/speeches/libor-preparing-end.

B. Consumer Products Using LIBOR

In the United States, financial institutions have used LIBOR as a common benchmark rate for a variety of adjustable-rate consumer financial products, including mortgages, credit cards, HELOCs, reverse mortgages, and student loans. Typically, the consumer pays an interest rate that is calculated as the sum of a benchmark index and a margin. For example, a consumer may pay an interest rate equal to the 1-year USD LIBOR plus two percentage points.

Financial institutions have been developing plans and procedures to transition from the use of LIBOR indices to replacement indices for products that are being newly issued and existing accounts that were originally benchmarked to a LIBOR index. In some markets, such as for HELOCs and credit cards, the vast majority of newly originated lines of credit are already based on indices other than a LIBOR index.

C. Additional Written Guidance

In addition to this proposed rule, the Bureau is issuing separate written guidance in the form of Frequently Asked Questions (FAQs) for creditors and card issuers to use as they transition away from using LIBOR indices. These FAQs address regulatory questions where the existing rule is clear on the requirements and already provides necessary alternatives needed for the LIBOR transition. The guidance can be found at: https://www.consumerfinance.gov/policy-compliance/rulemaking/rules-under-development/amendments-facilitate-libor-transition-regulation-z/. This guidance deals with issues related to: (1) existing mortgage servicing notice requirements (including how servicers may notify consumers of the index change when sending the interest rate adjustment notices and periodic statements); (2) existing HELOC and adjustable-rate mortgage (ARM) loan program notice requirements disclosing historical index examples; (3) existing Alternative Mortgage Transaction Parity Act requirements for index changes that result in an increased interest rate or finance charge for alternative mortgage transactions; and (4) identification of implementation and consumer impacts for creditors or card issuers as they prepare for the LIBOR transition.

III. Outreach

The Bureau has received feedback through both formal and informal channels, regarding ways in which the Bureau could use rulemaking to facilitate the market's orderly transition from using LIBOR indices to alternate indices. The following is a brief summary of some of the Bureau's engagement with industry, consumer advocates, regulators, and other stakeholders regarding the transition away from the use of LIBOR indices. The Bureau discusses feedback received through these various channels that is relevant to this proposal throughout the document.

The Bureau is an *ex officio* member of the ARRC, a group of private-market participants convened by the Board of Governors of the Federal Reserve System (Board) and the Federal Reserve Bank of New York (New York Fed) to ensure a successful transition from the use of LIBOR as an index by December 2021. The group is comprised of financial institutions and other market participants such as exchanges, regulators, and consumer advocates. As an *ex officio* member, the Bureau does not have voting rights and may only offer views and analysis to support the ARRC's objectives. Through its interaction with other ARRC members, the Bureau has received questions and requests for clarification regarding certain provisions in the Bureau's rules that could affect the industry's LIBOR transition plans. For example, the Bureau has received informal requests from members of the ARRC for clarification that the spread-adjusted SOFR-based index being developed by the ARRC is a "comparable index" to the LIBOR index. The Bureau has also, in coordination with the ARRC, actively sought comments regarding a potential rulemaking related to the LIBOR transition. For example, the Bureau convened multiple meetings for members of the ARRC to hear consumer groups' views on potential issues consumers may face during the sunset of LIBOR and solicited suggestions for potential actions the regulators could take to facilitate a smooth transition.

The Bureau has engaged in ongoing market monitoring with individual institutions, trade associations, regulators, and other stakeholders to understand their plans for the LIBOR transition, their concerns, and potential impacts on consumers. Institutions and trade associations have met informally with the Bureau and sent letters outlining their concerns related to the sunset of LIBOR. The Bureau also has received feedback regarding the LIBOR transition through other formal channels that were related to general Bureau activities. For example, in January 2019, the Bureau solicited information from the public about several aspects of the consumer credit card market. The Bureau received comments submitted from a banking trade group regarding changes to Regulation Z that could support the transition away from using LIBOR indices.[9]

Through these various channels, industry trade associations, consumer groups, and other organizations have provided information about provisions in Bureau regulations that could be modified to reduce market confusion, enable institutions and consumers to transition away from using LIBOR indices in a timely manner, and lower market risk related to the LIBOR transition. A number of financial institutions raised concerns that LIBOR may continue for some time after December 2021 but become less representative or reliable if, as expected, some panel banks stop submitting information before LIBOR finally is discontinued. Stakeholders noted that FCA

[9] 84 FR 647 (Jan. 31, 2019).

could declare LIBOR to be "unrepresentative" at some point after 2021 and wanted clarity from U.S. Federal regulators about how U.S. firms should interpret such a declaration. Some industry participants asked that the Bureau declare LIBOR to be "unavailable" for the purposes of Regulation Z. They also requested that the Bureau facilitate a transition timeline that would provide sufficient time for financial institutions to inform consumers of the change and make the necessary changes to their systems.

Industry also recommended that the Bureau announce that it would not deem a replacement index to be unfair, deceptive, or abusive if it were recommended by the Board, the New York Fed, or a committee endorsed or convened by the Board or New York Fed.

Credit card issuers and related trade associations stated that the prime rate should be permitted to replace a LIBOR index, noting that while a SOFR-based index is expected to replace a LIBOR index in many commercial contexts, the prime rate is the industry standard rate index for credit cards. They also requested that the Bureau permit card issuers to replace the LIBOR index used in setting the variable rates on existing accounts before LIBOR becomes unavailable to facilitate compliance. They also requested guidance on how the rate reevaluation provisions applicable to credit card accounts apply to accounts that are transitioning away from using LIBOR indices.

Consumer advocates emphasized the need for transparency as institutions sunset their use of LIBOR indices and indicated a preference for replacement indices that are publicly available. They recommended regulators protect consumers by preventing institutions from changing the index or margin in a manner that would raise the interest rate paid by the consumer. They also shared industry's concerns that LIBOR may continue for some time after December 2021 but become less representative or reliable until LIBOR finally is discontinued. Advocates noted that existing contract language may limit how and when institutions can transition away from LIBOR. They also discussed issues specific to particular consumer products, expressing concern, for example, that the contract language in the private student loan market is ambiguous and gives lenders wide leeway in determining a comparable replacement index for LIBOR indices.

IV. Legal Authority

A. Section 1022 of the Dodd-Frank Act

Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules "as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." Among other statutes, title X of the Dodd-Frank Act and TILA are Federal consumer financial laws.[10] Accordingly, in setting forth this proposal, the Bureau is exercising its authority under Dodd-Frank Act section 1022(b) to prescribe rules under TILA and title X that carry out the purposes and objectives and prevent evasion of those laws.

B. The Truth in Lending Act

TILA is a Federal consumer financial law. In adopting TILA, Congress explained that:

> [E]conomic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against

[10] Dodd-Frank Act section 1002(14) (defining "Federal consumer financial law" to include the "enumerated consumer laws" and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12) (defining "enumerated consumer laws" to include TILA).

inaccurate and unfair credit billing and credit card practices.[11]

TILA and Regulation Z define credit broadly as the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.[12] TILA and Regulation Z set forth disclosure and other requirements that apply to creditors. Different rules apply to creditors depending on whether they are extending "open-end credit" or "closed-end credit." Under the statute and Regulation Z, open-end credit exists where there is a plan in which the creditor reasonably contemplates repeated transactions; the creditor may impose a finance charge from time to time on an outstanding unpaid balance; and the amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.[13] Typically, closed-end credit is credit that does not meet the definition of open-end credit.[14]

The term "creditor" generally means a person who regularly extends consumer credit that is subject to a finance charge or is payable by written agreement in more than four installments (not including a down payment), and to whom the obligation is initially payable, either on the face of the note or contract, or by agreement when there is no note or contract.[15] TILA defines "finance charge" generally as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident

[11] TILA section 102(a), codified at 15 U.S.C. 1601(a).

[12] TILA section 103(f), codified at 15 U.S.C. 1602(f); 12 CFR 1026.2(a)(14).

[13] 12 CFR 1026.2(a)(20).

[14] 12 CFR 1026.2(a)(10).

[15] *See* TILA section 103(g), codified at 15 U.S.C. 1602(g); 12 CFR 1026.2(a)(17)(i).

to the extension of credit.[16]

The term "creditor" also includes a card issuer, which is a person or its agent that issues credit cards, when that person extends credit accessed by the credit card.[17] Regulation Z defines the term "credit card" to mean any card, plate, or other single credit device that may be used from time to time to obtain credit.[18] A charge card is a credit card on an account for which no periodic rate is used to compute a finance charge.[19] In addition to being creditors under TILA and Regulation Z, card issuers also generally must comply with the credit card rules set forth in the Fair Credit Billing Act[20] and in the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act)[21] (if the card accesses an open-end credit plan), as implemented in Regulation Z subparts B and G.[22]

TILA section 105(a). As amended by the Dodd-Frank Act, TILA section 105(a)[23] directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. Pursuant to TILA

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[16] TILA section 106(a), codified at 15 U.S.C. 1605(a); *see* 12 CFR 1026.4.

[17] *See* TILA section 103(g), codified at 15 U.S.C. 1602(g); 12 CFR 1026.2(a)(17)(iii) and (iv).

[18] *See* 12 CFR 1026.2(a)(15).

[19] *See* 12 CFR 1026.2(a)(15)(iii).

[20] Title III of Public Law 93-495, 88 Stat. 1511 (1974).

[21] Public Law 111-24, 123 Stat. 1734 (2009).

[22] *See generally* 12 CFR 1026.5(b)(2)(ii), .7(b)(11), .12, .51-.60.

[23] 15 U.S.C. 1604(a).

section 102(a), a purpose of TILA is to assure a meaningful disclosure of credit terms to enable the consumer to avoid the uninformed use of credit and compare more readily the various credit terms available to the consumer. This stated purpose is tied to Congress's finding that economic stabilization would be enhanced and competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit.[24] Thus, strengthened competition among financial institutions is a goal of TILA, achieved through the effectuation of TILA's purposes.

Historically, TILA section 105(a) has served as a broad source of authority for rules that promote the informed use of credit through required disclosures and substantive regulation of certain practices. Dodd-Frank Act section 1100A clarified the Bureau's section 105(a) authority by amending that section to provide express authority to prescribe regulations that contain "additional requirements" that the Bureau finds are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. This amendment clarified the authority to exercise TILA section 105(a) to prescribe requirements beyond those specifically listed in the statute that meet the standards outlined in section 105(a). As amended by the Dodd-Frank Act, TILA section 105(a) authority to make adjustments and exceptions to the requirements of TILA applies to all transactions subject to TILA, except with respect to the provisions of TILA section 129 that apply to the high-cost mortgages referred to in TILA section 103(bb).[25]

For the reasons discussed in this document, the Bureau is proposing amendments to Regulation Z with respect to certain provisions that impact the transition from LIBOR indices to

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[24] TILA section 102(a), codified at 15 U.S.C. 1601(a).

[25] 15 U.S.C. 1602(bb).

other indices to carry out TILA's purposes and is proposing such additional requirements, adjustments, and exceptions as, in the Bureau's judgment, are necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance. In developing these aspects of the proposal pursuant to its authority under TILA section 105(a), the Bureau has considered the purposes of TILA, including ensuring meaningful disclosures, facilitating consumers' ability to compare credit terms, and helping consumers avoid the uninformed use of credit, and the findings of TILA, including strengthening competition among financial institutions and promoting economic stabilization.

TILA section 105(d). As amended by the Dodd-Frank Act, TILA section 105(d)[26] states that any Bureau regulations requiring any disclosure which differs from the disclosures previously required in certain sections shall have an effective date of that October 1 which follows by at least six months the date of promulgation. The section also states that the Bureau may in its discretion lengthen or shorten the amount of time for compliance when it makes a specific finding that such action is necessary to comply with the findings of a court or to prevent unfair or deceptive disclosure practices. The section further states that any creditor or lessor may comply with any such newly promulgated disclosures requirements prior to the effective date of the requirements.

[26] 15 U.S.C. 1604(d).

V. Section-by-Section Analysis

Section 1026.9 Subsequent Disclosure Requirements

9(c) Change in Terms

9(c)(1) Rules Affecting Home-Equity Plans

9(c)(1)(ii) Notice Not Required

Section 1026.9(c)(1)(i) provides that for HELOCs subject to § 1026.40 whenever any term required to be disclosed in the account-opening disclosures under § 1026.6(a) is changed or the required minimum periodic payment is increased, the creditor must mail or deliver written notice of the change to each consumer who may be affected. The notice must be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer; the notice must be given, however, before the effective date of the change. Section 1026.9(c)(1)(ii) provides that for HELOCs subject to § 1026.40, a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(1) when the change involves a reduction of any component of a finance or other charge or when the change results from an agreement involving a court proceeding.

A creditor for a HELOC subject to § 1026.40 is required under current § 1026.9(c)(1) to provide a change-in-terms notice disclosing the index that is replacing the LIBOR index. The index is a term that is required to be disclosed in the account-opening disclosures under § 1026.6(a) and thus, a creditor must provide a change-in-terms notice disclosing the index that is replacing the LIBOR index.[27] The exception in § 1026.9(c)(1)(ii) that provides that a change-in-terms notice is not required when a change involves a reduction in the finance or other charge

[27] *See* 12 CFR 1026.6(a)(1)(ii) and (iv) and comment 6(a)(1)(ii)-5.

does not apply to the index change. The change in the index used in making rate adjustments is a change in a term required to be disclosed in a change-in-terms notice under § 1026.9(c)(1) regardless of whether there is also a change in the index value or margin that involves a reduction in a finance or other charge.

Under current § 1026.9(c)(1), a creditor generally is required to provide a change-in-terms notice of a margin change if the margin is increasing. In disclosing the variable rate in the account-opening disclosures under § 1026.6(a), the creditor must disclose the margin as part of an explanation of how the amount of any finance charge will be determined.[28] Thus, a creditor must provide a change-in-terms notice under current § 1026.9(c)(1) disclosing the changed margin, unless § 1026.9(c)(1)(ii) applies. Current § 1026.9(c)(1)(ii) applies to a decrease in the margin because that change would involve a reduction in a component of a finance or other charge. Thus, under current § 1026.9(c)(1), a creditor would only be required to provide a change-in-terms notice of a change in the margin under § 1026.9(c)(1) if the margin is increasing.

The Proposal

The Bureau is proposing to revise § 1026.9(c)(1)(ii) to provide that the exception in § 1026.9(c)(1)(ii) under which a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(1) when the change involves a reduction of any component of a finance or other charge does not apply on or after October 1, 2021, where the creditor is reducing the margin when a LIBOR index is replaced as permitted by proposed § 1026.40(f)(3)(ii)(A) or

[28] *See* 12 CFR 1026.6(a)(1)(iv).

§ 1026.40(f)(3)(ii)(B).[29] The proposed changes, if adopted, will ensure that the change-in-terms notices will disclose the replacement index and any adjusted margin that will be used to calculate a consumer's rate, regardless of whether the margin is being reduced or increased.

The Bureau also is proposing to add comment 9(c)(1)(ii)-3 to provide additional detail. Proposed comment 9(c)(1)(ii)-3 provides that for change-in-terms notices provided under § 1026.9(c)(1) on or after October 1, 2021, covering changes permitted by proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B), a creditor must provide a change-in-terms notice under § 1026.9(c)(1) disclosing the replacement index for a LIBOR index and any adjusted margin that is permitted under proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B), even if the margin is reduced. Proposed comment 9(c)(1)(ii)-3 also provides that prior to October 1, 2021, a creditor has the option of disclosing a reduced margin in the change-in-terms notice that discloses the replacement index for a LIBOR index as permitted by proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B).

To effectuate the purposes of TILA, the Bureau is proposing to use its TILA section 105(a) authority to amend § 1026.9(c)(1)(ii). TILA section 105(a)[30] directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may

[29] As discussed in more detail in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A), the Bureau is proposing to move the provisions in current § 1026.40(f)(3)(ii) that allow a creditor for HELOC plans subject to § 1026.40 to replace an index and adjust the margin if the index is no longer available in certain circumstances to proposed § 1026.40(f)(3)(ii)(A) and to revise the proposed moved provisions for clarity and consistency. Also, as discussed in more detail in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(B), to facilitate compliance, the Bureau is proposing to add new LIBOR-specific provisions to proposed § 1026.40(f)(3)(ii)(B) that would permit creditors for HELOC plans subject to § 1026.40 that use a LIBOR index for calculating a variable rate to replace the LIBOR index and change the margin for calculating the variable rate on or after March 15, 2021, in certain circumstances.

[30] 15 U.S.C. 1604(a).

provide for such adjustments and exceptions for all or any class of transactions, that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. The Bureau believes that when a creditor for a HELOC plan that is subject to § 1026.40 is replacing the LIBOR index and adjusting the margin as permitted by proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B), it may be beneficial for consumers to receive notice not just of the replacement index, but also any adjustments to the margin, even if the margin is decreased. The Bureau believes that it may be important that consumers are informed of the replacement index and any adjusted margin (even a reduction in the margin) so that consumers will know how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced. Otherwise, a consumer that is only notified that the LIBOR index is being replaced with a replacement index that has a higher index value but is not notified that the margin is decreasing could reasonably but mistakenly believe that the APR on the plan is increasing. The Bureau solicits comment generally on the proposed revisions to § 1026.9(c)(1)(ii) and proposed comment 9(c)(1)(ii)-3.

The proposed revisions to § 1026.9(c)(1)(ii), if adopted as proposed, would apply to notices provided on or after October 1, 2021. TILA section 105(d) generally requires that changes in disclosures required by TILA or Regulation Z have an effective date of the October 1 that is at least six months after the date the final rule is adopted.[31] Proposed comment 9(c)(1)(ii)-3 clarifies that prior to October 1, 2021, a creditor has the option of disclosing a reduced margin in the change-in-terms notice that discloses the replacement index for a LIBOR index as permitted by proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B). The Bureau believes that

[31] 15 U.S.C. 1604(d).

creditors for HELOC plans subject to § 1026.40 may want to provide the information about the decreased margin in the change-in-terms notice even if they replace the LIBOR index and adjust the margin pursuant to proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B) earlier than October 1, 2021. The Bureau believes that these creditors may want to provide this information to avoid confusion by consumers and because this reduced margin is beneficial to consumers. Thus, proposed comment 9(c)(1)(ii)-3 would permit creditors for HELOC plans subject to § 1026.40 to provide the information about the decreased margin in the change-in-terms notice even if they replace the LIBOR index and adjust the margin pursuant to proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B) earlier than October 1, 2021. The Bureau encourages creditors to include this information in change-in-terms notices provided earlier than October 1, 2021, even though they are not required to do so, to ensure that consumers are informed of how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced.

The Bureau recognizes that a LIBOR index may be replaced on a HELOC plan subject to § 1026.40 for reasons other than those set forth in proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B). For example, pursuant to current § 1026.40(f)(3)(iii), a creditor for a HELOC plan may replace the LIBOR index used under a plan and adjust the margin if a consumer specifically agrees to the change in writing at the time of the change. The Bureau solicits comment on whether the Bureau should revise § 1026.9(c)(1)(ii) to require that the creditor in those cases must disclose any decrease in the margin in change-in-terms notices provided on or after October 1, 2021, in the change-in-terms notice that discloses the replacement index for a LIBOR index used under the plan.

9(c)(2) Rules Affecting Open-End (Not Home-Secured) Plans

TILA section 127(i)(1), which was added by the Credit CARD Act, provides that in the case of a credit card account under an open-end consumer credit plan, a creditor generally must provide a written notice of an increase in an APR not later than 45 days prior to the effective date of the increase.[32] In addition, TILA section 127(i)(2) provides that in the case of a credit card account under an open-end consumer credit plan, a creditor must provide a written notice of any significant change, as determined by rule of the Bureau, in terms (other than APRs) of the cardholder agreement not later than 45 days prior to the effective date of the change.[33]

Section 1026.9(c)(2)(i)(A) provides that for plans other than HELOCs subject to § 1026.40, a creditor generally must provide a written notice of a "significant change in account terms" at least 45 days prior to the effective date of the change to each consumer who may be affected. Section 1026.9(c)(2)(ii) defines "significant change in account terms" to mean a change in the terms required to be disclosed under § 1026.6(b)(1) and (b)(2), an increase in the required minimum periodic payment, a change to a term required to be disclosed under § 1026.6(b)(4), or the acquisition of a security interest. Among other things, § 1026.9(c)(2)(v)(A) provides that a change-in-terms notice is not required when a change involves a reduction of any component of a finance or other charge. The change-in-terms provisions in § 1026.9(c)(2) generally apply to a credit card account under an open-end (not home-secured) consumer credit plan, and to other open-end plans that are not subject to § 1026.40.

[32] 15 U.S.C. 1637(i)(1).

[33] 15 U.S.C. 1637(i)(2).

The creditor is required to provide a change-in-terms notice under § 1026.9(c)(2) disclosing the index that is replacing the LIBOR index pursuant to proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). The index is a term that meets the definition of a "significant change in account terms" under § 1026.6(b)(2)(i)(A) and (4)(ii) and thus, the creditor must provide a change-in-terms notice disclosing the index that is replacing the LIBOR index.[34] The exception in § 1026.9(c)(2)(v)(A) that provides that a change-in-terms notice is not required when a change involves a reduction in the finance or other charge does not apply to the index change. The change in the index used in making rate adjustments is a change in a term required to be disclosed in a change-in-terms notice under § 1026.9(c)(2) regardless of whether there is also a change in the index value or margin that involves a reduction in a finance or other charge.

Under current § 1026.9(c)(2), for plans other than HELOCs subject to § 1026.40, a creditor generally is required to provide a change-in-terms notice of a margin change if the margin is increasing. In disclosing the variable rate in the account-opening disclosures, the creditor must disclose the margin as part of an explanation of how the rate is determined.[35] Thus, a creditor must provide a change-in-terms notice under § 1026.9(c)(2) disclosing the changed margin, unless § 1026.9(c)(2)(v)(A) applies. Current § 1026.9(c)(2)(v)(A) applies to a decrease in the margin because that change would involve a reduction in a component of a finance or other charge. Thus, under current § 1026.9(c)(2), a creditor would only be required to provide a change-in-terms notice of a change in the margin under § 1026.9(c)(2) if the margin is increasing.

[34] *See* 12 CFR 1026.6(a)(2) and (4) and 1026.9(c)(2)(iv)(D)(*1*) and comment 9(c)(2)(iv)-2.

[35] 12 CFR 1026.6(b)(4)(ii)(B).

The Bureau is proposing two changes to the provisions in § 1026.9(c)(2) and its accompanying commentary. First, the Bureau is proposing technical edits to comment 9(c)(2)(iv)-2 to replace LIBOR references with references to SOFR. Second, the Bureau is proposing changes to § 1026.9(c)(2)(v)(A) to provide that for plans other than HELOCs subject to § 1026.40, the exception in § 1026.9(c)(2)(v)(A) under which a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(2) when the change involves a reduction of any component of a finance or other charge does not apply on or after October 1, 2021, to margin reductions when a LIBOR index is replaced as permitted by proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). The proposed changes, if adopted, will ensure that the change-in-terms notices will disclose the replacement index and any adjusted margin that will be used to calculate a consumer's rate, regardless of whether the margin is being reduced or increased.

9(c)(2)(iv) Disclosure Requirements

For plans other than HELOCs subject to § 1026.40, comment 9(c)(2)(iv)-2 explains that, if a creditor is changing the index used to calculate a variable rate, the creditor must disclose the following information in a tabular format in the change-in-terms notice: 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). The comment provides an example, which indicates that, if a creditor is changing from using a prime rate to using LIBOR in calculating a variable rate, the creditor would disclose in the table required by § 1026.9(c)(2)(iv)(D)(*1*) the new rate (using the new index) and indicate that the rate varies with the market based on LIBOR. In light of the anticipated discontinuation of LIBOR, the proposed rule would amend the example in comment 9(c)(2)(iv)-2 to substitute a SOFR index for LIBOR. The proposed rule would also make technical changes for clarity by changing "prime rate" to "prime index."

9(c)(2)(v) Notice Not Required

The Bureau is proposing to revise § 1026.9(c)(2)(v)(A) to provide that for plans other than HELOCs subject to § 1026.40, the exception in § 1026.9(c)(2)(v)(A) under which a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(2) when the change involves a reduction of any component of a finance or other charge does not apply on or after October 1, 2021, to margin reductions when a LIBOR index is replaced as permitted by proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii).[36] The proposed changes, if adopted, will ensure that the change-in-terms notices will disclose the replacement index and any adjusted margin that will be used to calculate a consumer's rate, regardless of whether the margin is being reduced or increased.

The Bureau also is proposing to add comment 9(c)(2)(v)-14 to provide additional detail. Proposed comment 9(c)(2)(v)-14 provides that for change-in-terms notices provided under § 1026.9(c)(2) on or after October 1, 2021, covering changes permitted by proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii), a creditor must provide a change-in-terms notice under § 1026.9(c)(2) disclosing the replacement index for a LIBOR index and any adjusted margin that is permitted under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii), even if the margin is reduced. Proposed comment 9(c)(2)(v)-14 also provides that prior to October 1, 2021, a creditor has the option of disclosing a reduced margin in the change-in-terms notice that discloses the

[36] As discussed in more detail in the section-by-section analysis of proposed § 1026.55(b)(7)(i), the Bureau is proposing to move the provisions in current comment 55(b)(2)-6 that allow a card issuer to replace an index and adjust the margin if the index becomes unavailable in certain circumstances to proposed § 1026.55(b)(7)(i) and to revise the proposed moved provisions for clarity and consistency. Also, as discussed in more detail in the section-by-section analysis of proposed § 1026.55(b)(7)(ii), to facilitate compliance, the Bureau is proposing to add new LIBOR-specific provisions to proposed § 1026.55(b)(7)(ii) that would permit card issuers for a credit card account under an open-end (not home-secured) consumer credit plan that use a LIBOR index under the plan to replace the LIBOR index and change the margin on such plans on or after March 15, 2021, in certain circumstances.

replacement index for a LIBOR index as permitted by proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii).

The Bureau believes that when a creditor for plans other than HELOCs subject to § 1026.40 is replacing the LIBOR index and adjusting the margin as permitted by proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii), it may be beneficial for consumers to receive notice not just of the replacement index but also any adjustments to the margin, even if the margin is decreased. The Bureau believes that it may be important that consumers are informed of the replacement index and any adjusted margin (even a reduction in the margin) so that consumers will know how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced. Otherwise, a consumer that is only notified that the LIBOR index is being replaced with a replacement index that has a higher index value but is not notified that the margin is decreasing could reasonably but mistakenly believe that the APR on the plan is increasing. The Bureau solicits comment generally on the proposed revisions to § 1026.9(c)(2)(v)(A) and proposed comment 9(c)(2)(v)-14.

The proposed revisions to § 1026.9(c)(2)(v)(A), if adopted as proposed, would apply to notices provided on or after October 1, 2021. TILA section 105(d) generally requires that changes in disclosures required by TILA or Regulation Z have an effective date of the October 1 that is at least six months after the date the final rule is adopted.[37] Proposed comment 9(c)(2)(v)-14 clarifies that prior to October 1, 2021, a creditor has the option of disclosing a reduced margin in the change-in-terms notice that discloses the replacement index for a LIBOR index as permitted by proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). The Bureau believes that

[37] 15 U.S.C. 1604(d).

creditors for plans other than HELOCs subject to § 1026.40 may want to provide the information about the decreased margin in the change-in-terms notice, even if they replace the LIBOR index and adjust the margin pursuant to proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) earlier than October 1, 2021. The Bureau believes that these creditors may want to provide this information to avoid confusion by consumers and because this reduced margin is beneficial to consumers. Thus, proposed comment 9(c)(2)(v)-14 would permit creditors for plans other than HELOCs subject to § 1026.40 to provide the information about the decreased margin in the change-in-terms notice even if they replace the LIBOR index and adjust the margin pursuant to proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) earlier than October 1, 2021. The Bureau encourages creditors to include this information in change-in-terms notices provided earlier than October 1, 2021, even though they are not required to do so, to ensure that consumers are informed of how the variable rates on their accounts will be determined going forward after the LIBOR index is replaced.

The Bureau recognizes that there may be open-end credit plans that use a LIBOR index to calculate variable rates on the plan where the plan is not a HELOC that is subject to § 1026.40 and is not a credit card account under an open-end (not home-secured) consumer credit plan. For example, there may be overdraft lines of credit and other types of open-end plans that are not HELOCs and are not credit card accounts that may use a LIBOR index. The proposed changes to § 1026.9(c)(2)(v)(A) requiring any reduced margin to be disclosed in a change-in-terms notice when the LIBOR index is being replaced would not apply to a decrease in the margin when a LIBOR index is replaced for these open-end plans because the proposed changes only apply when a LIBOR index is replaced under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). These open-end plans are not subject to the restrictions set forth in proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) for replacing the LIBOR index and adjusting the margin. The Bureau solicits comment on whether the Bureau should revise § 1026.9(c)(2)(v)(A) to require that creditors for those open-end plans must disclose any decrease in the margin in change-in-terms notices provided on or after October 1, 2021, where the creditor is replacing a LIBOR index used under the plan. The Bureau also solicits comment on the extent to which these types of open-end plans currently use a LIBOR index.

Section 1026.20 Disclosure Requirements Regarding Post-Consummation Events

20(a) Refinancings

Section 1026.20 includes disclosure requirements regarding post-consummation events for closed-end credit. Section 1026.20(a) and its commentary define when a refinancing occurs for closed-end credit and provide that a refinancing is a new transaction requiring new disclosures to the consumer. Comment 20(a)-3.ii.B explains that a new transaction subject to new disclosures results if the creditor adds a variable-rate feature to the obligation, even if it is not accomplished by the cancellation of the old obligation and substitution of a new one. The comment also states that a creditor does not add a variable-rate feature by changing the index of a variable-rate transaction to a comparable index, whether the change replaces the existing index or substitutes an index for one that no longer exists. To clarify comment 20(a)-3.ii.B, the Bureau is proposing to add to the comment an illustrative example, which would indicate that a creditor 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 USD LIBOR index to the spread-adjusted index based on SOFR recommended by the ARRC to replace the 1-month, 3-month, 6-month, or 1-year USD

LIBOR index respectively because the replacement index is a comparable index to the corresponding USD LIBOR index.[38]

As discussed in part III, the Bureau has received requests from stakeholders for clarification that the spread-adjusted SOFR-based index being developed by the ARRC is a "comparable index" to LIBOR. The Bureau recognizes that this issue is of concern for a range of closed-end credit products because issuing new origination disclosures in connection with the LIBOR transition could be quite expensive. The Bureau also recognizes that the issue is of particular concern with respect to existing LIBOR closed-end mortgage loans because, if substitution of an index that is not a "comparable index" constitutes a refinancing under § 1026.20(a) for an ARM, § 1026.43 would require a new ability-to-repay determination if the requirements of § 1026.43 are otherwise applicable.[39]

The Bureau has reviewed the SOFR indices upon which the ARRC has indicated it will base its recommended replacement indices and the spread adjustment methodology that the ARRC is recommending using to develop the replacement indices. Based on this review, the Bureau anticipates that the spread-adjusted replacement indices that the ARRC is developing will provide a good example of a comparable index to the tenors of LIBOR that they are designated to replace.

[38] By "corresponding USD LIBOR index," the Bureau means the specific USD LIBOR index for which the ARRC is recommending the replacement index as a replacement. Thus, if SOFR term rates are not available and the ARRC recommends a specific spread-adjusted 30-day SOFR index as a replacement for the 1-year LIBOR, the 1-year USD LIBOR index would be the "corresponding USD LIBOR index" for that specific spread-adjusted 30-day SOFR index.

[39] Comment 43(a)-1 explains that § 1026.43 does not apply to any change to an existing loan that is not treated as a refinancing under § 1026.20(a). Comment 43(a)-1 further explains that § 1026.43 generally applies to consumer credit transactions secured by a dwelling, but certain dwelling-secured consumer credit transactions are exempt or partially exempt from coverage under § 1026.43(a)(1) through (3), and that § 1026.43 does not apply to an extension of credit primarily for a business, commercial, or agricultural purpose, even if it is secured by a dwelling.

On June 22, 2017, the ARRC identified SOFR as its recommended alternative to LIBOR after considering various potential alternatives, including other term unsecured rates, overnight unsecured rates, other secured repurchase agreements (repo) rates, U.S. Treasury bill and bond rates, and overnight index swap rates linked to the effective Federal funds rate.[40] The ARRC made its final recommendation of SOFR after evaluating and incorporating feedback from a 2016 consultation and from end users on its advisory group.[41]

As the ARRC has explained, SOFR is a broad measure of the cost of borrowing cash overnight collateralized by U.S. Treasury securities.[42] SOFR is determined based on transaction data composed of: (i) tri-party repo, (ii) General Collateral Finance repo, and (iii) bilateral Treasury repo transactions cleared through Fixed Income Clearing Corporation. SOFR is representative of general funding conditions in the overnight Treasury repo market. As such, it reflects an economic cost of lending and borrowing relevant to the wide array of market participants active in the financial markets. In terms of the transactions underpinning SOFR, SOFR has the widest coverage of any Treasury repo rate available. Averaging over $1 trillion of daily trading, transaction volumes underlying SOFR are far larger than the transactions in any other U.S. money market.[43]

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[40] ARRC, *ARRC Consultation on Spread Adjustment Methodologies for Fallbacks in Cash Products Referencing USD LIBOR* at 3 (Jan. 21, 2020), https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Spread_Adjustment_Consultation.pdf.

[41] *Id.*

[42] *Id.* at 3.

[43] Fed. Reserve Bank of N.Y., *Additional Information About SOFR and Other Treasury Repo Reference Rates*, available at https://www.newyorkfed.org/markets/treasury-repo-reference-rates-information (last visited May 11. 2020).

The ARRC intends to endorse forward-looking term SOFR rates provided a consensus among its members can be reached that robust term benchmarks that are compliant with International Organization of Securities Commissions (IOSCO) standards and meet appropriate criteria set by the ARRC can be produced. If the ARRC has not recommended relevant forward-looking term SOFR rates, it will base its recommended indices on a compounded average of SOFR over a selected compounding period.[44] The ARRC has committed to making sure its recommended spread adjustments and the resulting spread-adjusted rates are published and to working with potential vendors to make sure that these spreads and spread-adjusted rates are made publicly available.[45] The New York Fed has already begun daily publication of three compounded averages of SOFR, including a 30-day compounded average of SOFR (30-day SOFR), and a daily index that allows for the calculation of compounded average rates over custom time periods.[46]

The Bureau notes that the government-sponsored enterprises (GSEs) announced in February 2020 that they will begin accepting ARMs based on 30-day average SOFR in 2020.[47] For purposes of this proposed rule, the Bureau has conducted its analysis below assuming that the ARRC will base its recommended replacement indices on 30-day SOFR. Prior to the start of official publication of SOFR in 2018, the New York Fed released data from August 2014 to

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[44] ARRC Consultation on Spread Adjustment Methodologies, *supra* note 40, at 5.

[45] ARRC, *ARRC Announces Recommendation of a Spread Adjustment Methodology for Cash Products* (Apr. 8, 2020), https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Spread_Adjustment_Methodology.pdf.

[46] Fed. Reserve Bank of N.Y., *SOFR Averages and Index Data,* https://apps.newyorkfed.org/markets/autorates/sofr-avg-ind (last visited May 11, 2020).

[47] *See, e.g.,* Fed. Nat'l Mortgage Ass'n, *Lender Letter LL-2020-01* (Feb. 5, 2020), https://singlefamily.fanniemae.com/media/21831/display; Fed. Home Loan Mortgage Corp., *Bulletin 2020-1 Selling* (Feb. 5, 2020), https://guide.freddiemac.com/app/guide/bulletin/2020-1.

March 2018 representing modeled, pre-production estimates of SOFR that are based on the same basic underlying transaction data and methodology that now underlie the official publication.[48] The ARRC and the Bureau have compared the rate history that is available for SOFR (to calculate compounded averages) with the rate history for the applicable LIBOR indices.[49] For the reasons discussed in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A), the Bureau is proposing to determine that the historical fluctuations in the spread-adjusted index based on 30-day SOFR are substantially similar to those of 1-month, 3-month, 6-month, and 1-year USD LIBOR.

While robust, IOSCO-compliant SOFR term rates endorsed by the ARRC do not yet exist, the Board has published data on "indicative" 1-month, 3-month, and 6-month SOFR term rates.[50] The Bureau has compared this data to data for the applicable LIBOR indices. For the reasons discussed in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A), the Bureau is proposing to determine that (1) the historical fluctuations of 1-year and 6-month USD LIBOR are substantially similar to those of the 1-month, 3-month, and 6-month spread-adjusted SOFR term rates; (2) the historical fluctuations of 3-month USD LIBOR are substantially similar to those of the 1-month and 3-month spread-adjusted SOFR term rates; and (3) the historical

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[48] *See* David Bowman, *Historical Proxies for the Secured Overnight Financing Rate* (July 15, 2019), available at https://www.federalreserve.gov/econres/notes/feds-notes/historical-proxies-for-the-secured-overnight-financing-rate-20190715.htm.

[49] *See, e.g.,* ARRC Consultation on Spread Adjustment Methodologies, *supra* note 40, at 4 (comparing 3-month compounded SOFR relative to the 3-month USD LIBOR since 2014). The ARRC and the Bureau have also considered the history of other indices that could be viewed as historical proxies for SOFR. *See, e.g.,* Bowman, *supra* note 48.

[50] Eric Heitfield & Yang Ho-Park, *Indicative Forward-Looking SOFR Term Rates* (Apr. 19, 2019), available at https://www.federalreserve.gov/econres/notes/feds-notes/indicative-forward-looking-sofr-term-rates-20190419.htm. (last updated May 1, 2020).

fluctuations of 1-month USD LIBOR are substantially similar to those of the 1-month spread-adjusted SOFR term rate.

The Bureau is proposing to make these determinations about the historical fluctuations in the spread-adjusted indices based on 30-day SOFR, 1-month term SOFR, 3-month term SOFR, and 6-month term SOFR, while analyzing data on 30-day SOFR, 1-month term SOFR, 3-month term SOFR, and 6-month term SOFR without spread adjustments. This analysis is valid because the ARRC has stated that the spread adjustments will be static, outside of a one-year transition period that has not yet started and so is not in the historical data. A static spread adjustment would have no effect on historical fluctuations.

30-day SOFR, the applicable SOFR term rates, and the applicable LIBOR indices all reflect the cost of borrowing in the United States and have all generally moved together during SOFR's available history. However, the ARRC and the Bureau recognize that the SOFR indices will differ in some respects from the LIBOR indices. The nature and extent of these differences will depend on whether the SOFR indices are based on 30-day SOFR or SOFR term rates.

30-day SOFR is a historical, backward-looking 30-day average of overnight rates, while the LIBOR indices are forward-looking term rates published with several different tenors (overnight, 1-week, 1-month, 2-month, 3-month, 6-month, and 1-year). The LIBOR indices, therefore, reflect funding conditions for a different length of time than 30-day SOFR does, and they reflect those funding conditions in advance rather than with a lag as 30-day SOFR does. The LIBOR indices may also include term premia missing from 30-day SOFR.[51] Moreover, SOFR is a secured rate while the LIBOR indices are unsecured and therefore include an element

[51] The "term premium" is the excess yield that investors require to buy a long-term bond instead of a series of shorter-term bonds.

of bank credit risk. The LIBOR indices also may reflect supply and demand conditions in wholesale unsecured funding markets that also could lead to differences with SOFR.

SOFR term rates, if they are available, will have fewer differences with LIBOR term rates than 30-day SOFR does. Since they are also term rates, they will also include term premia, and these should usually be similar to the term premia embedded in LIBOR. Since SOFR term rates will also be forward-looking, they should adjust quickly to changing expectations about future funding conditions as LIBOR term rates do, rather than following them with a lag as 30-day SOFR does. However, SOFR term rates will still have differences with the LIBOR indices. As mentioned above, SOFR is a secured rate while the LIBOR indices are unsecured. SOFR and LIBOR also reflect supply and demand conditions in different credit markets.

Thus, whether the ARRC bases its recommended indices on forward-looking SOFR term rates or backward-looking historical averages of SOFR, its recommended indices will without adjustments differ in levels from the LIBOR indices. The ARRC intends to account for these differences from the historical levels of LIBOR term rates through spread adjustments in the replacement indices that it recommends. On January 21, 2020, the ARRC released a consultation on spread adjustment methodologies that provided historical analyses of a number of potential spread adjustment methodologies and that showed that the proposed methodology performed well relative to other options, including potential dynamic spread adjustments.[52] The ARRC's consultation received over 70 responses from consumer advocacy groups, asset managers, corporations, banks, industry associations, GSEs, and others.[53] On April 8, 2020, the

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[52] ARRC Consultation on Spread Adjustment Methodologies, *supra* note 40.

[53] ARRC, *Summary of Feedback Received in the ARRC Spread-Adjustment Consultation and Follow-Up Consultation on Technical Details* 2 (May 6, 2020),

ARRC announced that it had agreed on a recommended spread adjustment methodology for cash products referencing USD LIBOR.[54] Following its consideration of feedback received on its public consultation, the ARRC is recommending a long-term spread adjustment equal to the historical median of the five-year spread between USD LIBOR and SOFR. For consumer products, the ARRC is additionally recommending a 1-year transition period to this five-year median spread adjustment methodology.[55] Thus, in the short term, the transition will be gradual. On the date specified by the ARRC, the spread adjustment will not be set immediately to its long-run value. Instead, on the date specified by the ARRC, the spread adjustment will be set to equalize the value of the SOFR-based spread-adjusted index and the LIBOR index. The spread adjustment will then transition steadily over the course of a year to its long-run value. The inclusion of a transition period for consumer products was endorsed by many respondents, including consumer advocacy groups.[56] Although the ARRC has not yet finalized certain aspects of its recommendations for replacement indices, it is actively working on doing so.[57]

The ARRC has stated that each spread-adjusted replacement index that it recommends will incorporate a spread adjustment that will be fixed at a specified time at or before LIBOR's cessation and will remain static after the 1-year transition period.[58] The ARRC intends for the

https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2020/ARRC_Spread_Adjustment_Consultation_Follow_Up.pdf. [hereinafter referred to as ARRC Supplemental Spread-Adjustment Consultation]

[54] ARRC Announces Recommendation of a Spread Adjustment Methodology, *supra* note 45.

[55] *Id.*

[56] ARRC Supplemental Spread-Adjustment Consultation, *supra* note 53, at 1.

[57] The ARRC issued a supplemental consultation on spread adjustment methodology on May 6, 2020, seeking further views on certain technical issues related to spread adjustment methodologies for cash products referencing USD LIBOR. *Id.*

[58] ARRC Consultation on Spread Adjustment Methodologies, *supra* note 40, at 1, 2.

adjustment to reflect and adjust for the historical differences between LIBOR and SOFR in order to make the spread-adjusted rate comparable to LIBOR in a fair and reasonable way, thereby minimizing the impact to borrowers and lenders.[59] Although the methodology will be the same across different tenors of LIBOR, it may be applied to each LIBOR tenor separately, so that there would be a separate recommended spread adjustment calculated for 1-month, 2-month, 3-month, 6-month, and 1-year USD LIBOR.[60]

The Bureau is proposing to determine that the spread-adjusted indices based on SOFR recommended by the ARRC as a replacement for the 1-month, 3-month, 6-month, and 1-year USD LIBOR index are comparable indices to the 1-month, 3-month, 6-month, and 1-year USD LIBOR index respectively. The spread-adjusted indices based on SOFR that the ARRC recommends will be published and made publicly available. The ARRC's Consultation on its spread adjustment methodology presents several pieces of evidence that, in the ARRC's view, suggest that spread-adjusted SOFR rates are likely to experience similar fluctuations to the corresponding tenors of LIBOR.[61] Using them as a replacement for the corresponding tenors of LIBOR does not seem likely to significantly change the economic position of the parties to the contract, given that SOFR and the LIBOR indices have generally moved together and the

[59] *Id.* at 2, 3.

[60] *Id.* at 7. Thus, the calculated spread adjustment may differ for each tenor of LIBOR, even if the methodology used to calculate each is the same. *Id.* The supplemental consultation issued by the ARRC on May 6, 2020, invites participants to consider the option to use the same spread adjustment values that will be used by the International Swaps and Derivatives Association (ISDA) across all of the different fallback rates, rather than using the same adjustment methodology to calculate a different spread adjustment for each potential fallback rate. ARRC Supplemental Spread-Adjustment Consultation, *supra* note 53, at 3-4. The supplemental consultation also seeks views on a second issue: Recognizing that ISDA will now include a pre-cessation trigger, the supplemental consultation seeks views on whether the timing of the calculation of the ARRC's spread adjustment should match ISDA's timing if a pre-cessation event is operative. *Id.*

[61] ARRC Consultation on Spread Adjustment Methodologies, *supra* note 40.

replacement index will be spread adjusted based on a methodology that derived through a public consultation.

The proposed example would be illustrative only, and the Bureau does not intend to suggest that the spread-adjusted SOFR indices recommended by the ARRC are the only indices that would be comparable to the LIBOR indices. The Bureau recognizes that there may be other comparable indices that creditors may use as replacements for the various tenors of LIBOR but believes it would be helpful to add this example in the commentary. The Bureau requests comment on whether it is appropriate to add the proposed example to comment 20(a)-3.ii.B and whether the Bureau should make any other amendments to § 1026.20(a) or its commentary in connection with the LIBOR transition. Specifically, the Bureau requests comment on whether there are any other replacement indices that it should identify as an example of a "comparable index" in comment 20(a)-3.ii.B, and if so, which indices and on what bases.

Section 1026.36 Prohibited Acts or Practices and Certain Requirements for Credit Secured by a Dwelling

36(a) Definitions

36(a)(4) Seller Financiers; Three Properties

36(a)(4)(iii)

36(a)(4)(iii)(C)

Section 1026.36(a)(1) defines the term "loan originator" for purposes of the prohibited acts or practices and requirements for credit secured by a dwelling in § 1026.36. Section 1026.36(a)(4) addresses the three-property exclusion for seller financers and provides that a person (as defined in § 1026.2(a)(22)) that meets all of the criteria specified in § 1026.36(a)(4)(i) to (iii) is not a loan originator under § 1026.36(a)(1). Pursuant to § 1026.36(a)(4)(iii)(C), one such criterion requires that, if the financing agreement has an adjustable rate, the index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or LIBOR. In light of the anticipated discontinuation of LIBOR, the proposed rule would amend the examples of indices provided in § 1026.36(a)(4)(iii)(C) to substitute SOFR for LIBOR.

36(a)(5) Seller Financiers; One Property

36(a)(5)(iii)

36(a)(5)(iii)(B)

Section 1026.36(a)(1) defines the term "loan originator" for purposes of the prohibited acts or practices and requirements for credit secured by a dwelling in § 1026.36. Section 1026.36(a)(5) addresses the one-property exclusion for seller financers and provides that a natural person, estate, or trust that meets all of the criteria specified in § 1026.36(a)(5)(i) to (iii) is not a loan originator under § 1026.36(a)(1). Pursuant to § 1026.36(a)(5)(iii)(B), one such criterion currently requires that, if the financing agreement has an adjustable rate, the index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or LIBOR. In light of the anticipated discontinuation of LIBOR, the proposed rule would amend the examples of indices provided in § 1026.36(a)(5)(iii)(B) to substitute SOFR for LIBOR.

Section 1026.37 Content of Disclosures for Certain Mortgage Transactions (Loan Estimate)

37(j) Adjustable Interest Rate Table

37(j)(1) Index and Margin

Section 1026.37 governs the content of the Loan Estimate disclosure for certain mortgage transactions. If the interest rate may adjust and increase after consummation and the product type is not a step rate, § 1026.37(j)(1) requires disclosure in the Loan Estimate of, *inter alia*, the index upon which the adjustments to the interest rate are based. Comment 37(j)(1)-1 explains that the index disclosed pursuant to § 1026.37(j)(1) must be stated such that a consumer reasonably can identify it. The comment further explains that a common abbreviation or acronym of the name of the index may be disclosed in place of the proper name of the index, if it is a commonly used public method of identifying the index. The comment provides, as an example, that "LIBOR" may be disclosed instead of London Interbank Offered Rate. In light of the anticipated discontinuation of LIBOR, the proposed rule would amend this example in comment 37(j)(1)-1 to provide that "SOFR" may be disclosed instead of Secured Overnight Financing Rate.

Section 1026.40 Requirements for Home Equity Plans

40(f) Limitations on Home Equity Plans

40(f)(3)

40(f)(3)(ii)

TILA section 137(c)(1) provides that no open-end consumer credit plan under which extensions of credit are secured by a consumer's principal dwelling may contain a provision which permits a creditor to change unilaterally any term except in enumerated circumstances set forth in TILA section 137(c).[62] TILA section 137(c)(2)(A) provides that a creditor may change the index and margin applicable to extensions of credit under such a plan if the index used by the creditor is no longer available and the substitute index and margin will result in a substantially similar interest rate.[63] In implementing TILA section 137(c), § 1026.40(f)(3) prohibits a creditor from changing the terms of a HELOC subject to § 1026.40 except in enumerated circumstances set forth in § 1026.40(f)(3). Section 1026.40(f)(3)(ii) provides that a creditor may change the

[62] 15 U.S.C. 1647(c).

[63] 15 U.S.C. 1647(c)(2)(A).

index and margin used under the HELOC plan if the original index is no longer available, the new index has a historical movement substantially similar to that of the original index, and the new index and margin would have resulted in an APR substantially similar to the rate in effect at the time the original index became unavailable.

Current comment 40(f)(3)(ii)-1 provides that a creditor may change the index and margin used under the HELOC plan if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. Current comment 40(f)(3)(ii)-1 also provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable. As discussed in the section-by-section analysis of proposed § 1026.55(b)(7), card issuers for a credit card account under an open-end (not home-secured) consumer credit plan are subject to current comment 55(b)(2)-6, which provides a similar provision on the unavailability of an index as current comment 40(f)(3)(ii)-1.

The Proposal

As discussed in part III, the industry has requested that the Bureau permit card issuers to replace the LIBOR index used in setting the variable rates on existing accounts before LIBOR becomes unavailable to facilitate compliance. Among other things, the industry is concerned that if card issuers must wait until LIBOR become unavailable to replace the LIBOR indices used on existing accounts, these card issuers would not have sufficient time to inform consumers of the replacement index and update their systems to implement the change. To reduce uncertainty with respect to selecting a replacement index, the industry has also requested that the

Bureau determine that the prime rate has "historical fluctuations" that are "substantially similar" to those of the LIBOR indices. The Bureau believes that similar issues may arise with respect to the transition of existing HELOC accounts away from using a LIBOR index.

To address these concerns, as discussed in more detail in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(B), the Bureau is proposing to add new LIBOR-specific provisions to proposed § 1026.40(f)(3)(ii)(B) that would permit creditors for HELOC plans subject to § 1026.40 that use a LIBOR index under the plan to replace the LIBOR index and change the margins for calculating the variable rates on or after March 15, 2021, in certain circumstances without needing to wait for LIBOR to become unavailable.

Specifically, proposed § 1026.40(f)(3)(ii)(B) provides that if a variable rate on a HELOC subject to § 1026.40 is calculated using a LIBOR index, a creditor may replace the LIBOR index and change the margin for calculating the variable rate on or after March 15, 2021, as long as (1) the historical fluctuations in the LIBOR index and replacement index were substantially similar; and (2) the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed § 1026.40(f)(3)(ii)(B) also provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

Also, as discussed in more detail in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(B), to reduce uncertainty with respect to selecting a replacement index that meets the standards in proposed § 1026.40(f)(3)(ii)(B), the Bureau is proposing to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. The Bureau also is proposing to determine that certain spread-adjusted indices based on SOFR recommended by the ARRC have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. The Bureau also is proposing additional detail in comments 40(f)(3)(ii)(B)-1 through -3 with respect to proposed § 1026.40(f)(3)(ii)(B).

In addition, as discussed in more detail in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A), the Bureau is proposing to move the unavailability provisions in current § 1026.40(f)(3)(ii) and current comment 40(f)(3)(ii)-1 to proposed § 1026.40(f)(3)(ii)(A) and proposed comment 40(f)(3)(ii)(A)-1 respectively and to revise the proposed moved provisions for clarity and consistency. The Bureau also is proposing additional detail in comments 40(f)(3)(ii)(A)-2 through -3 with respect to proposed § 1026.40(f)(3)(ii)(A). For example, to reduce uncertainty with respect to selecting a replacement index that meets the standards for selecting a replacement index under proposed § 1026.40(f)(3)(ii)(A), the Bureau is proposing the same determinations described above related to Prime and the spread-adjusted indices based on SOFR recommended by the ARRC in relation to proposed § 1026.40(f)(3)(ii)(A). The Bureau is proposing to make these revisions and provide additional detail because the Bureau understands that some HELOC creditors may use the unavailability provision in proposed § 1026.40(f)(3)(ii)(A) to replace a LIBOR index used under a HELOC plan, depending on the contractual provisions applicable to their HELOC plans, as discussed in more detail below.

Bureau is proposing new proposed LIBOR-specific provisions rather than interpreting when the LIBOR indices are unavailable. For several reasons, the Bureau is proposing new LIBOR-specific provisions under proposed § 1026.40(f)(3)(ii)(B), rather than interpreting the LIBOR indices to be unavailable as of a certain date prior to LIBOR being discontinued under current § 1026.40(f)(3)(ii) (as proposed to be moved to proposed § 1026.40(f)(3)(ii)(A)). First, the Bureau is concerned about making a determination for Regulation Z purposes under current § 1026.40(f)(3)(ii) (as proposed to be moved to proposed § 1026.40(f)(3)(ii)(A)) that the LIBOR indices are unavailable or unreliable when the FCA, the regulator of LIBOR, has not made such a determination.

Second, the Bureau is concerned that a determination by the Bureau that the LIBOR indices are unavailable for purposes of current § 1026.40(f)(3)(ii) (as proposed to be moved to proposed § 1026.40(f)(3)(ii)(A)) could have unintended consequences on other products or markets. For example, the Bureau is concerned that such a determination could unintentionally cause confusion for creditors for other products (*e.g.*, ARMs) about whether the LIBOR indices are unavailable for those products too and could possibly put pressure on those creditors to replace the LIBOR index used for those products before those creditors are ready for the change.

Third, even if the Bureau interpreted unavailability under current § 1026.40(f)(3)(ii) (as proposed to be moved to proposed § 1026.40(f)(3)(ii)(A)) to indicate that the LIBOR indices are unavailable prior to LIBOR being discontinued, this interpretation would not completely solve the contractual issues for creditors whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index. Creditors still would need to decide for their contracts whether the LIBOR indices are unavailable. Thus, even if the Bureau decided that the LIBOR indices are unavailable under Regulation Z as described above, creditors whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index essentially would remain in the same position of interpreting their contracts as they would have been under the current rule.

Thus, the Bureau is not proposing to interpret when the LIBOR indices are unavailable for purposes of current § 1026.40(f)(3)(ii) (as proposed to be moved to proposed § 1026.40(f)(3)(ii)(A)). The Bureau solicits comment, however, on whether the Bureau should interpret when the LIBOR indices are unavailable for purposes of current § 1026.40(f)(3)(ii) (as proposed to be moved to proposed § 1026.40(f)(3)(ii)(A)), and if so, why the Bureau should make that determination and when should the LIBOR indices be considered unavailable for purposes of that provision.

The Bureau also solicits comment on an alternative to interpreting the term "unavailable." Specifically, should the Bureau make revisions to the unavailability provisions in current § 1026.40(f)(3)(ii) (as proposed to be moved to proposed § 1026.40(f)(3)(ii)(A)) in a manner that would allow those creditors who need to transition from LIBOR and, for contractual reasons, may not be able to switch away from LIBOR prior to it being unavailable to be better able to use the unavailability provisions for an orderly transition on or after March 15, 2021? If so, what should these revisions be?

Interaction among proposed § 1026.40(f)(3)(ii)(A) and (B) and contractual provisions. Proposed comment 40(f)(3)(ii)-1 addresses the interaction among the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A), the LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B), and the contractual provisions that apply to the HELOC plan. The Bureau understands that HELOC contracts may be written in a variety of ways. For example, the Bureau recognizes that some existing contracts for HELOCs that use LIBOR as an index for a variable rate may provide that (1) a creditor can replace the LIBOR index and the margin for calculating the variable rate unilaterally only if the LIBOR index is no longer available or becomes unavailable; and (2) the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the LIBOR index becomes unavailable. Other HELOC contracts may provide that a creditor can replace the LIBOR index and the margin for calculating the variable rate unilaterally only if the LIBOR index is no longer available or becomes unavailable but does not require that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the LIBOR index becomes unavailable. In addition, other HELOC contracts may allow a creditor to change the terms of the contract (including the LIBOR index used under the plan) as permitted by law. To facilitate compliance, the Bureau is proposing detail on the interaction among the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A), the LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B), and the contractual provisions for the HELOC.

Proposed comment 40(f)(3)(ii)-1 provides that a creditor may use either the provision in proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B) to replace a LIBOR index used under a HELOC plan subject to § 1026.40 so long as the applicable conditions are met for the provision used. This proposed comment makes clear, however, that neither proposed provision excuses the creditor from noncompliance with contractual provisions. As discussed in more detail below, proposed comment 40(f)(3)(ii)-1 provides examples to illustrate when a creditor may use the provisions in proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B) to replace the LIBOR index used under a HELOC plan and each of these examples assumes that the LIBOR index used under the plan becomes unavailable after March 15, 2021.

Proposed comment 40(f)(3)(ii)-1.i provides an example where a HELOC contract provides that a creditor may not replace an index unilaterally under a plan unless the original index becomes unavailable and provides that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, proposed comment 40(f)(3)(ii)-1.i explains that the creditor may use the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A) to replace the LIBOR index used under the plan so long as the conditions of that provision are met. Proposed comment 40(f)(3)(ii)-1.i also explains that the proposed LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B) provide that a creditor may replace the LIBOR index if the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed comment 40(f)(3)(ii)-1.i notes, however, that the creditor in this example would be contractually prohibited from replacing the LIBOR index used under the plan unless the replacement index and replacement margin also will produce an APR substantially similar to a rate that is in effect when the LIBOR index becomes unavailable. The Bureau solicits comments on this proposed approach and example.

Proposed comment 40(f)(3)(ii)-1.ii provides an example of a HELOC contract under which a creditor may not replace an index unilaterally under a plan unless the original index becomes unavailable but does not require that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the creditor would be contractually prohibited from unilaterally replacing a LIBOR index used under the plan until it becomes unavailable. At that time, the creditor has the option of using proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B) to replace the LIBOR index if the conditions of the applicable provision are met.

The Bureau is proposing to allow the creditor in this case to use either the proposed unavailability provisions in proposed § 1026.40(f)(3)(ii)(A) or the proposed LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B). If the creditor uses the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A), the creditor must use a replacement index and replacement margin that will produce an APR substantially similar to the rate in effect when the LIBOR index became unavailable. If the creditor uses the proposed LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B), the creditor must use the replacement index value in effect on December 31, 2020, and the replacement margin that will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

The Bureau is proposing to allow a creditor in this case to use the index values of the LIBOR index and replacement index on December 31, 2020, under proposed § 1026.40(f)(3)(ii)(B) to meet the "substantially similar" standard with respect to the comparison of the rates even if the creditor is contractually prohibited from unilaterally replacing the LIBOR index used under the plan until it becomes unavailable. The Bureau recognizes that LIBOR may not be discontinued until the end of 2021, which is around a year later than the December 31, 2020, date. Nonetheless, the Bureau is proposing to allow creditors that are restricted by their contracts to replace the LIBOR index used under the HELOC plans until the LIBOR index becomes unavailable to use the LIBOR index values and the replacement index values in effect on December 31, 2020, under proposed § 1026.40(f)(3)(ii)(B), rather than the index values on the day that LIBOR becomes unavailable under proposed § 1026.40(f)(3)(ii)(A). This proposal would allow those creditors to use consistent index values to those creditors that are not restricted by their contracts in replacing the LIBOR index prior to LIBOR becoming unavailable. This proposal would also promote consistency for consumers in that all HELOC creditors would be permitted to use the same LIBOR values in comparing the rates.

In addition, as discussed in part III, the industry has raised concerns that LIBOR may continue for some time after December 2021 but become less representative or reliable until LIBOR finally is discontinued. Allowing creditors to use the December 31, 2020, values for comparison of the rates instead of the LIBOR values when the LIBOR indices become unavailable may address some of these concerns.

Thus, the Bureau is proposing to provide creditors with the flexibility to choose to compare the rates using the index values for the LIBOR index and the replacement index on December 31, 2020, by using the proposed LIBOR-specific provisions under proposed § 1026.40(f)(3)(ii)(B), rather than using the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A). The Bureau solicits comment on this proposed approach and example.

Proposed comment 40(f)(3)(ii)-1.iii provides an example of a HELOC contract under which a creditor may change the terms of the contract (including the index) as permitted by law. Proposed comment 40(f)(3)(ii)-1.iii explains in this case, if the creditor replaces a LIBOR index under a plan on or after March 15, 2021, but does not wait until the LIBOR index becomes unavailable to do so, the creditor may only use proposed § 1026.40(f)(3)(ii)(B) to replace the LIBOR index if the conditions of that provision are met. In this case, the creditor may not use proposed § 1026.40(f)(3)(ii)(A). Proposed comment 40(f)(3)(ii)-1.iii also explains that if the creditor waits until the LIBOR index used under the plan becomes unavailable to replace the LIBOR index, the creditor has the option of using proposed § 1026.40(f)(3)(ii)(A) or § 1026.40(f)(3)(ii)(B) to replace the LIBOR index if the conditions of the applicable provision are met.

The Bureau is proposing to allow the creditor in this case to use either the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A) or the proposed LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B) if the creditor waits until the LIBOR index used under the plan becomes unavailable to replace the LIBOR index. For the reasons explained above in the discussion of the example in proposed comment 40(f)(3)(ii)-1.ii, the Bureau is proposing in the situation described in proposed comment 40(f)(3)(ii)-1.iii to provide creditors with the flexibility to choose to use the index values of the LIBOR index and the replacement index on December 31, 2020, by using the proposed LIBOR-specific provisions under proposed § 1026.40(f)(3)(ii)(B), rather than using the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A). The Bureau solicits comment on this proposed approach and example.

40(f)(3)(ii)(A)

Current § 1026.40(f)(3)(ii) provides that a creditor may change the index and margin used under a HELOC plan subject to § 1026.40 if the original index is no longer available, the new index has a historical movement substantially similar to that of the original index, and the new index and margin would have resulted in an APR substantially similar to the rate in effect at the time the original index became unavailable. Current comment 40(f)(3)(ii)-1 provides that a creditor may change the index and margin used under the plan if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. Current comment 40(f)(3)(ii)-1 also provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

The Proposal

The Bureau is proposing to move the unavailability provisions in current § 1026.40(f)(3)(ii) and current comment 40(f)(3)(ii)-1 to proposed § 1026.40(f)(3)(ii)(A) and proposed comment 40(f)(3)(ii)(A)-1 respectively and revise the moved provisions for clarity and consistency. In addition, the Bureau is proposing to add detail in proposed comments 40(f)(3)(ii)(A)-2 and -3 on the conditions set forth in proposed § 1026.40(f)(3)(ii)(A). For example, to reduce uncertainty with respect to selecting a replacement index that meets the standards under proposed § 1026.40(f)(3)(ii)(A), the Bureau is proposing to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. The Bureau also is proposing to determine that certain spread-adjusted indices based on SOFR recommended by the ARRC have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. The Bureau is proposing to make revisions and provide additional detail with respect to the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A) because the Bureau understands that some HELOC creditors may use these unavailability provisions to replace a LIBOR index used under a HELOC plan, depending on the contractual provisions applicable to their HELOC plans, as discussed above in more detail in the section-by-section of § 1026.40(f)(3)(ii).

The Bureau solicits comments on proposed § 1026.40(f)(3)(ii)(A) and proposed comments 40(f)(3)(ii)(A)-1 through -3. These proposed provisions are discussed in more detail below.

Proposed § 1026.40(f)(3)(ii)(A). Proposed § 1026.40(f)(3)(ii)(A) provides that a creditor for a HELOC plan subject to § 1026.40 may change the index and margin used under the plan if the original index is no longer available, the replacement index has historical fluctuations substantially similar to that of the original index, and the replacement index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the original index became unavailable. Proposed § 1020.40(f)(3)(ii)(A) also provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable.

Proposed § 1026.40(f)(3)(ii)(A) differs from current § 1026.40(f)(3)(ii) in three ways. First, proposed § 1026.40(f)(3)(ii)(A) differs from current § 1040(f)(3)(ii) by using the term "historical fluctuations" rather than the term "historical movement" to refer to the original index and the replacement index. Under current § 1026.40(f)(3)(ii), "historical fluctuations" appears to be equivalent to "historical movement" because the regulatory text provision in § 1026.40(f)(3)(ii) uses the term "historical movement" while current comment 40(f)(3)(ii)-1 (that interprets current § 1026.40(f)(3)(ii)) uses the term "historical fluctuations." For clarity and consistency, the Bureau is proposing to use "historical fluctuations" in both proposed § 1026.40(f)(3)(ii)(A) and proposed comment 40(f)(3)(ii)(A)-1, so that the proposed regulatory text and related commentary use the same term.

Second, proposed § 1026.40(f)(3)(ii)(A) differs from current § 1026.40(f)(3)(ii) by including a provision regarding newly established indices that is not contained in current § 1026.40(f)(3)(ii). This proposed provision is similar to the sentence in current comment 40(f)(3)(ii)-1 on newly established indices except that the proposed provision in proposed § 1026.40(f)(3)(ii)(A) makes clear that a creditor that is using a newly established index also may adjust the margin so that the newly established index and replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable. The newly established index may not have the same index value as the original index, and the creditor may need to adjust the margin to meet the condition that the newly established index and replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable.

Third, proposed § 1026.40(f)(3)(ii)(A) differs from current § 1026.40(f)(3)(ii) by using the terms “replacement index” and “replacement index and replacement margin” instead of using “new index” and “new index and margin,” respectively as contained in current § 1026.40(f)(3)(ii). These proposed changes are designed to avoid any confusion as to when the provision in proposed § 1026.40(f)(3)(ii)(A) is referring to a replacement index and replacement margin as opposed to a newly established index.

Proposed comment 40(f)(3)(ii)(A)-1. The Bureau is proposing to move current comment 40(f)(3)(ii)-1 to proposed comment 40(f)(3)(ii)(A)-1. The Bureau also is proposing to revise this proposed moved comment in three ways for clarity and consistency with proposed § 1026.40(f)(3)(ii)(A). First, proposed comment 40(f)(3)(ii)(A)-1 differs from current comment 40(f)(3)(ii)-1 by providing that if an index that is not newly established is used to replace the original index, the replacement index and replacement margin will produce a rate “substantially similar" to the rate that was in effect at the time the original index became unavailable. Current comment 40(f)(3)(ii)-1 uses the term "similar" instead of "substantially similar" for the comparison of these rates. Nonetheless, this use of the term "similar" in current comment 40(f)(3)(ii)-1 is inconsistent with the use of "substantially similar" in current § 1026.40(f)(3)(ii) for the comparison of these rates. To correct this inconsistency between the regulation text and the commentary provision that interprets it, the Bureau is proposing to use "substantially similar" consistently in proposed § 1026.40(f)(3)(ii)(A) and proposed comment 40(f)(3)(ii)(A)-1 for the comparison of these rates.

Second, consistent with the proposed new sentence in proposed § 1026.40(f)(3)(ii)(A) related to newly established indices, proposed comment 40(f)(3)(ii)(A)-1 differs from current comment 40(f)(3)(ii)-1 by clarifying that a creditor that is using a newly established index may also adjust the margin so that the newly established index and replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable.

Third, proposed comment 40(f)(3)(ii)(A)-1 differs from current comment 40(f)(3)(ii)-1 by using the term "the replacement index and replacement margin" instead of "the replacement index and margin" to make clear when the proposed comment is referring to a replacement margin and not the original margin.

Historical fluctuations substantially similar for the LIBOR index and replacement index. Proposed comment 40(f)(3)(ii)(A)-2 provides detail on determining whether a replacement index that is not newly established has "historical fluctuations" that are "substantially similar" to those of the LIBOR index used under the plan for purposes of proposed § 1026.40(f)(3)(ii)(A). Specifically, proposed comment 40(f)(3)(ii)(A)-2 provides that for purposes of replacing a LIBOR index used under a plan pursuant to proposed § 1026.40(f)(3)(ii)(A), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

Prime has "historical fluctuations" that are "substantially similar" to those of certain USD LIBOR indices. To facilitate compliance, proposed comment 40(f)(3)(ii)(A)-2.i includes a proposed determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices and includes a placeholder for the date when this proposed determination would be effective, if adopted in the final rule. The Bureau understands that some HELOC creditors may choose to replace a LIBOR index with Prime.

The Bureau is proposing this determination after reviewing historical data from January 1986 through January 2020 on 1-month USD LIBOR, 3-month USD LIBOR, and Prime. The spread between 1-month USD LIBOR and Prime increased from roughly 142 basis points in 1986 to 281 basis points in 1993. The spread between 3-month USD LIBOR increased from roughly 151 basis points in 1986 to 270 basis points in 1993. Both spreads were fairly steady after 1993. Given that for the last 27 years of history the spreads have remained relatively stable, the data, analysis, and conclusion discussed below are restricted to the period beginning in 1993.

While Prime has not always moved in tandem with 1-month USD LIBOR and 3-month USD LIBOR after 1993, the Bureau believes that since 1993 the historical fluctuations in 1-

month USD LIBOR and Prime have been substantially similar and that the historical fluctuations in 3-month USD LIBOR and Prime have been substantially similar.[64]

The historical correlation between 1-month USD LIBOR and Prime is .9956. The historical correlation between 3-month USD LIBOR and Prime is .9918. While the correlation between these rates is quite high, correlation is not the only statistical measure of similarity that may be relevant for comparing the historical fluctuations of these rates.[65] The Bureau has reviewed other statistical characteristics of these rates, such as the variance, skewness, and kurtosis,[66] and these characteristics imply that on average both the 1-month USD LIBOR and 3-month USD LIBOR tend to move closely with Prime and that the 1-month USD LIBOR and 3-month USD LIBOR tend to present consumers and creditors with payment changes that are similar to that presented by Prime.[67]

Theoretically, these statistical measures could mask important long-term differences in movements. However, as mentioned above, the spread between 1-month USD LIBOR and Prime and the spread between 3-month USD LIBOR and Prime have remained fairly steady after January 1993 to January 2020. For example, the average spread between 1-month USD LIBOR

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[64] There was a temporary but large difference in the movements of LIBOR rates and Prime for roughly a month after Lehman Brothers filed for bankruptcy on September 15, 2008, reflecting the effects this event had on the perception of risk in the interbank lending market. For example, 1-month USD LIBOR increased over 200 basis points in the month after September 15, 2008, even as Prime and many other interest rates fell. The numbers presented in this analysis include this time period.

[65] For example, consider two wagers on a series of coin flips. The first wins one cent for every heads and loses one cent for every tails. The second wins a million dollars for every heads and loses a million dollars for every tails. These wagers are perfectly correlated (*i.e.* they have a correlation of 1) but have very different statistical properties.

[66] Roughly, variance is a statistical measure of how much a random number tends to deviate from its average value. Skewness is a statistical measure of whether particularly large deviations in a random number from its average value tend to be below or above that average value. Kurtosis is a statistical measure of whether deviations of a random number from its average value tend to be small and frequent or rare and large.

[67] The variance, skewness, and kurtosis of Prime are 4.5605, .3115, and 1.5337 respectively. The variance, skewness, and kurtosis of 1-month USD LIBOR are 4.8935, .2715, and 1.5168 respectively. The variance, skewness, and kurtosis of 3-month USD LIBOR are 4.7955, .2605, and 1.5252, respectively.

and Prime was 281 basis points in 1993, and 306 basis points in 2019. The average spread between 3-month USD LIBOR and Prime was 270 basis points in 1993, and 296 basis points in 2019.

Finally, in performing its analysis, the Bureau also considered the impact different indices would have on consumer payments. To that end, the Bureau considered a specific example of a debt with a variable rate that resets monthly, and a balance that accumulates over time with interest but without further charges, payments, or fees. The Bureau used this example for HELOCs and credit card accounts because the Bureau understands that the rates for many of those accounts reset monthly. The example considers debt that accumulates interest over a period of ten years, beginning in January of every year from 1994 to 2009. For this example, the Bureau found that since 1994 historical fluctuations in 1-month USD LIBOR and Prime, and 3-month USD LIBOR and Prime, produced substantially similar payment outcomes for consumers with debt similar to that considered.[68] For example, if the initial balance in this example is $10,000, the average difference between the debt outstanding under Prime and the debt

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[68] In this example, for each starting year, three versions of debt are considered: (1) one with an interest rate equal to Prime; (2) one with an interest rate equal to the 1-month USD LIBOR plus the average spread between 1-month USD LIBOR and Prime for the 12 months preceding the start date; and (3) one with an interest rate equal to 3-month USD LIBOR plus the average spread between 3-month USD LIBOR and Prime for the 12 months preceding the start date. For the 16 initial starting years considered, the average difference between the debt outstanding under Prime and the debt outstanding under the adjusted 1-month USD LIBOR after ten years is only around 1% of the initial balance. The average absolute value of the difference in debt outstanding is around 2% of the initial balance. For the adjusted 3-month USD LIBOR, the average of the difference is around 1% of the initial balance, and the average of the absolute value of the difference is around 3% of the initial balance.

The average difference can be small if the difference is often far from zero, as long as it is sometimes well above zero and it is sometimes well below zero. The absolute value of the difference will be small only if the difference is usually close to zero. For example, suppose the difference is $1 million one year and -$1 million the next year. The average difference these two years is zero, indicating that the difference is close to zero on average. But the average of the absolute value of the difference is $1 million, indicating that the difference is typically far from zero. Consumers and creditors should care more about the average difference, and less about the average of the absolute value of the difference, if they have more liquidity and risk tolerance.

outstanding under adjusted 1-month USD LIBOR after ten years is about $100. The Bureau also found similar results for Prime versus the adjusted 3-month USD LIBOR.

As discussed in the section-by-section analyses of proposed §§ 1026.40(f)(3)(ii)(B), 1026.55(b)(7)(i) and (ii), the Bureau also is proposing this same determination for purposes of proposed §§ 1026.40(f)(3)(ii)(B) and 1026.55(b)(7)(i) and (ii). The Bureau solicits comment on this proposed determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices pursuant to proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii).

Proposed comment 40(f)(3)(ii)(A)-2.i also clarifies that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(A) that Prime and the replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. This condition for comparing the rates under proposed § 1026.40(f)(3)(ii)(A) is discussed in more detail below.

Certain SOFR-based spread-adjusted indices have "historical fluctuations" that are "substantially similar" to those of certain USD LIBOR indices. To facilitate compliance, proposed comment 40(f)(3)(ii)(A)-2.ii provides a proposed determination that the spread-adjusted indices based on SOFR recommended by the ARRC to replace the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices respectively. The proposed comment also provides a placeholder for the date when this proposed determination would be effective, if adopted in the final rule. The Bureau understands that some

HELOC creditors may choose to replace a LIBOR index with a SOFR-based spread-adjusted index.

As discussed above in the section-by-section analysis of § 1026.20(a), the ARRC intends to endorse forward-looking term SOFR rates provided a consensus among its members can be reached that robust term benchmarks that are compliant with IOSCO standards and meet appropriate criteria set by the ARRC can be produced. If the ARRC has not recommended relevant forward-looking term SOFR rates, it will base its recommended indices on a compounded average of SOFR over a selected compounding period. The Bureau notes that the GSEs announced in February 2020 that they will begin accepting ARMs based on 30-day average SOFR in 2020.[69] For purposes of this proposed rule, the Bureau has conducted its analysis below assuming that the ARRC will base its recommended replacement indices on 30-day SOFR.

In determining whether the SOFR-based spread-adjusted indices have historical fluctuations substantially similar to those of the applicable LIBOR indices, the Bureau has reviewed the historical data on SOFR and historical data on 1-month, 3-month, 6-month, and 1-year LIBOR from August 22, 2014, to March 16, 2020.[70] With respect to the 1-year LIBOR, while 30-day SOFR has not always moved in tandem with 1-year LIBOR, the Bureau is

[69] *See, e.g.,* Lender Letter LL-2020-01; Bulletin 2020-1 Selling, *supra* note 47.

[70] Prior to the start of official publication of SOFR in 2018, the New York Fed released data from August 2014 to March 2018 representing modeled, pre-production estimates of SOFR that are based on the same basic underlying transaction data and methodology that now underlie the official publication. The New York Fed has published indicative SOFR averages going back only to May 2, 2018. *See* Fed. Reserve Bank of N.Y., *SOFR Averages and Index Data*, https://apps.newyorkfed.org/markets/autorates/sofr-avg-ind (last visited May 11, 2020). Therefore, the Bureau has used the estimated SOFR data going back to 2014 to estimate its own 30-day compound average of SOFR since 2014. The methodology to calculate compound averages of SOFR from daily data is described in Fed. Reserve Bank of N.Y., *Statement Regarding Publication of SOFR Averages and a SOFR Index*, https://www.newyorkfed.org/markets/opolicy/operating_policy_200212.

proposing to determine that the historical fluctuations in 1-year LIBOR and the spread-adjusted index based on 30-day SOFR have been substantially similar. As discussed in more detail below, the Bureau also is proposing to determine that the historical fluctuations in the spread-adjusted index based on 30-day SOFR are substantially similar to those of 1-month, 3-month, and 6-month LIBOR.

The Bureau is proposing to make these determinations about the historical fluctuations in the spread-adjusted indices based on 30-day SOFR, while analyzing data on 30-day SOFR without spread adjustments. This analysis is valid because the ARRC has stated that the spread adjustments will be static, outside of a one-year transition period that has not yet started and so is not in the historical data. A static spread adjustment would have no effect on historical fluctuations.

The historical correlation between 1-year LIBOR and 30-day SOFR is .8987. This correlation is high and suggests that on average 30-day SOFR tends to move closely with 1-year LIBOR. However, the raw correlation understates the similarity in the movements of these two rates, because 1-year LIBOR is a forward-looking term rate and 30-day SOFR is a backward-looking moving average. This means that 30-day SOFR often moves closely with 1-year LIBOR, but with a lag. For example, the historical correlation between 30-day SOFR and a 60-day lag of 1-year LIBOR is .9584. However, as discussed above with respect to the proposed determination related to Prime, correlation is not the only statistical measure of similarity that may be relevant for comparing the historical fluctuations of these rates. The Bureau has reviewed other statistical characteristics of these rates, such as the variance, skewness, and kurtosis, and these imply that 30-day SOFR tends to present consumers and creditors with payment changes that are similar to that presented by 1-year LIBOR.[71]

Theoretically, these statistical measures could mask important long-term differences in movements. The spread between 1-year LIBOR and 30-day SOFR decreased from 68 basis points on average in 2015 to 13 basis points on average in 2019. However, this decrease is mainly due to the timing mismatch issue discussed above together with the fact that interest rates in general began to decrease at the end of 2018. Because the backward-looking 30-day moving average of SOFR began to respond to this decrease in rates well after the forward-looking 1-year LIBOR term rate did, 30-day SOFR was temporarily high relative to 1-year LIBOR for a short period in early 2019. The spread between a 60-day lag of 1-year LIBOR and 30-day SOFR was 59 basis points on average in 2015 and 39 basis points on average in 2019.

Finally, in performing this analysis, the Bureau also considered the impact different indices would have on consumer payments. To that end, the Bureau considered a specific example of a debt with a variable rate that resets monthly, and a balance that accumulates over time with interest but without further charges, payments, or fees. The Bureau used this example for HELOCs and credit card accounts because the Bureau understands that the rates for many of those accounts reset monthly. The example considers debt that accumulates interest over the period of four years, beginning in January of 2016 and ending in January 2020. For this example, the Bureau found historical fluctuations in 30-day SOFR and 1-year LIBOR produced

[71] The variance, skewness, and kurtosis of 30-day SOFR are .7179, .4098, and 1.6548 respectively. The variance, skewness, and kurtosis of 1-year LIBOR during the time period are .5829, .1179, and 1.9242, respectively.

substantially similar payment outcomes for consumers with debt similar to that considered.[72] For example, if the initial balance in this example is $10,000, the difference between the debt outstanding under 30-day SOFR and the debt outstanding under adjusted 1-year LIBOR after four years (called "4-year balance difference" in Table 1 below) is roughly $31.

The Bureau also is proposing to determine that historical fluctuations in the spread-adjusted index based on 30-day SOFR are substantially similar to those of 1-month, 3-month, and 6-month LIBOR. For the reasons discussed above, the Bureau is proposing to make these determinations about the historical fluctuations in the spread-adjusted indices based on 30-day SOFR, while analyzing data on 30-day SOFR without spread adjustments.

As discussed above, the largest differences between 30-day SOFR and 1-year LIBOR arise because 30-day SOFR is backward-looking and 1-year LIBOR is forward-looking. Shorter tenors of LIBOR are less forward-looking, and so in general have even smaller differences with 30-day SOFR. Echoing the analysis described above to compare historical fluctuations between 30-day SOFR and 1-year LIBOR, Table 1 provides statistics on the historical fluctuations in 1-month, 3-month, 6-month, and 1-year LIBOR during the time period in which data for 30-day SOFR is available. Based on this analysis, the Bureau is proposing to determine that historical fluctuations in the spread-adjusted index based on 30-day SOFR also are substantially similar to those of 1-month, 3-month, and 6-month LIBOR.

[72] In this example, two versions of debt are considered: (1) one with an interest rate equal to 30-day SOFR; and (2) one with an interest rate equal to 1-year LIBOR plus the average spread between 1-year LIBOR and 30-day SOFR for the 12 months preceding the start date. The average difference between the debt outstanding after four years under 30-day SOFR and the adjusted 1-year LIBOR is only around .3% of the initial debt.

Table 1: Comparison of Historical Fluctuations in Different Tenors of LIBOR and 30-day SOFR

Rate	Correlation with 30-day SOFR	Variance	Skewness	Kurtosis	4-Year Balance Difference
30-day SOFR	N/A	0.7179	0.4098	1.6548	N/A
1-month LIBOR	.9893	0.6977	0.2376	1.5305	$26
3-month LIBOR	.9746	0.7241	0.1952	1.5835	$60
6-month LIBOR	.9436	0.652	0.1038	1.7556	$63
1-year LIBOR	.8987	0.5829	0.1179	1.9242	$31

As discussed above, the ARRC intends to endorse forward-looking term SOFR rates provided a consensus among its members can be reached that robust term benchmarks that are compliant with IOSCO standards and meet appropriate criteria set by the ARRC can be produced. These term rates do not yet exist. However, the Board has produced data on "indicative" SOFR term rates that likely provide a good indication of how SOFR term rates would perform.[73] The Bureau understands that if a SOFR term rate does not exist for a particular LIBOR tenor, the ARRC may use the next-longest SOFR term rate to develop the replacement index for the LIBOR tenor if any applicable SOFR term rate exists. For example, if there is not a 1-year SOFR term rate, the replacement for the 1-year LIBOR may be determined using the SOFR term rates in the following order if they exist: (1) 6-month SOFR; (2) 3-month SOFR; and (3) 1-month SOFR.

[73] *See* Heitfield & Ho-Park, *supra* note 50.

As discussed above, the largest difference between different LIBOR tenors and 30-day SOFR arises because LIBOR is forward-looking and 30-day SOFR is backward-looking. Because SOFR term rates are forward-looking like LIBOR, the differences between SOFR term rates and LIBOR should in general be smaller than the differences between 30-day SOFR and LIBOR. The Bureau has reviewed the historical data on these indicative SOFR term rates and on 1-month, 3-month, 6-month, and 1-year LIBOR from June 11, 2018 to March 16, 2020.[74] While the indicative SOFR term rates have not always moved in tandem with LIBOR, the Bureau is proposing to determine that (1) the historical fluctuations of 1-year and 6-month USD LIBOR are substantially similar to those of the 1-month, 3-month, and 6-month spread-adjusted SOFR term rates; (2) the historical fluctuations of 3-month USD LIBOR are substantially similar to those of the 1-month and 3-month spread-adjusted SOFR term rates; and (3) the historical fluctuations of 1-month USD LIBOR are substantially similar to those of the 1-month spread-adjusted SOFR term rate.

The Bureau is proposing to make these determinations about the historical fluctuations in the spread-adjusted indices based on 1-month term SOFR, 3-month term SOFR, and 6-month term SOFR, while analyzing data on 1-month term SOFR, 3-month term SOFR, and 6-month term SOFR without spread adjustments. This analysis is valid because the ARRC has stated that the spread adjustments will be static, outside of a one-year transition period that has not yet started and so is not in the historical data. A static spread adjustment would have no effect on historical fluctuations.

Statistics that have led the Bureau to propose these determinations are in Tables 2 and 3.

[74] June 11, 2018, is the first date for which indicative SOFR term rate data are available.

Table 2: Correlations Between LIBOR and Indicative SOFR term rates[75]

LIBOR tenor	1-month SOFR	3-month-SOFR	6-month SOFR
1-month	.9890	N/A	N/A
3-month	.8955	.9606	N/A
6-month	.7606	.8923	.9691
1-year	.6295	.8000	.9274

The historical correlations presented in Table 2 are high, suggesting that the given SOFR term rates tend to move closely with the given LIBOR tenors. However, the raw correlations understate the similarity in the movements of the SOFR term rates and the LIBOR tenors when comparing a LIBOR tenor to a shorter SOFR term rate. This is because the SOFR term rate is less forward-looking than the LIBOR tenor, so the SOFR term rate moves closely with the LIBOR tenor but with a lag. This consideration is especially important during the time period for which indicative SOFR term rate data are available, when interest rates in general started to decrease. For example, the historical correlation between 1-month term SOFR and a 60-day lag of 1-year LIBOR is .9039.

Table 3: Statistics on LIBOR and Indicative SOFR Term Rates[76]

Rate	Variance	Skewness	Kurtosis
1-month LIBOR	0.0735	-0.5459	2.1022
3-month LIBOR	0.0852	-0.2913	2.0771

[75] These correlations are for the period beginning June 11, 2018, the first date for which indicative SOFR term rate data are available. These correlations are not directly comparable to those in Table 1, which uses data beginning August 22, 2014, the first date for which data for 30-day SOFR are available.

[76] Table 3 does not report a balance difference as Table 1 does because data on the indicative SOFR term rates are not available for a sufficiently long period.

Rate	Variance	Skewness	Kurtosis
6-month LIBOR	0.1219	-0.3037	1.6886
12-month LIBOR	0.1967	-0.2782	1.4281
1-month SOFR	0.093	-0.4791	1.8832
3-month SOFR	0.0952	-0.4804	1.8558
6-month SOFR	0.1168	-0.4671	1.6877

The Bureau has reviewed other statistical characteristics of the LIBOR rates and the indicative SOFR term rates, such as the variance, skewness, and kurtosis, as shown in Table 3 and these imply that the indicative SOFR term rates tend to present consumers and creditors with payment changes that are similar to that presented by the LIBOR rates.

As discussed in the section-by-section analyses of proposed §§ 1026.40(f)(3)(ii)(B), 1026.55(b)(7)(i) and (ii), the Bureau also is proposing the same determination for purposes of proposed §§ 1026.40(f)(3)(ii)(B) and 1026.55(b)(7)(i) and (ii). The Bureau solicits comment on this proposed determination that spread-adjusted indices based on SOFR recommended by the ARRC to replace the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices respectively, for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii).

The Bureau notes that the SOFR-based spread-adjusted indices are not yet being published and may not be published by the effective date of the final rule, if adopted. Nonetheless, the Bureau believes that it is appropriate to consider the underlying SOFR data that is available in proposing the determinations that the spread-adjusted indices based on SOFR recommended by the ARRC to replace the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices respectively. The Bureau solicits comment, however, on whether the Bureau should alternatively consider these SOFR-based spread-adjusted indices to be newly established indices for purposes of proposed §§ 1026.40(f)(3)(ii)(A) and (B) and 1026.55(b)(7)(i) and (ii), to the extent these indices are not being published by the effective date of the final rule, if adopted.

Proposed comment 40(f)(3)(ii)(A)-2.ii also clarifies that in order to use a SOFR-based spread-adjusted index described above as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(A) that the SOFR-based spread-adjusted index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. This condition under proposed § 1026.40(f)(3)(ii)(A) is discussed in more detail below. Also, as discussed in more detail below, the Bureau solicits comment on whether the Bureau in the final rule, if adopted, should provide for purposes of proposed § 1026.40(f)(3)(ii)(A) that the rate using the SOFR-based spread-adjusted index is "substantially similar" to the rate in effect at the time the LIBOR index becomes unavailable, so long as the creditor uses as the replacement margin the same margin in effect on the day that the LIBOR index becomes unavailable.

The Bureau also solicits comment on whether there are other indices that are not newly established for which the Bureau should make a determination that the index has historical fluctuations that are substantially similar to those of the LIBOR indices. If so, what are these other indices, and why should the Bureau make such a determination with respect to those indices?

Newly established index as replacement for a LIBOR index. Proposed § 1026.40(f)(3)(ii)(A) provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable. The Bureau solicits comment on whether the Bureau should provide any additional guidance on, or regulatory changes addressing, when an index is newly established with respect to replacing the LIBOR indices for purposes of proposed § 1026.40(f)(3)(ii)(A). The Bureau also solicits comment on whether the Bureau should provide any examples of indices that are newly established with respect to replacing the LIBOR indices for purposes of § 1026.40(f)(3)(ii)(A). If so, what are these indices and why should the Bureau determine these indices are newly established with respect to replacing the LIBOR indices?

Substantially similar rate when LIBOR becomes unavailable. Under proposed § 1026.40(f)(3)(ii)(A), the replacement index and replacement margin must produce an APR substantially similar to the rate that was in effect based on the LIBOR index used under the plan when the LIBOR index became unavailable. Proposed comment 40(f)(3)(ii)(A)-3 explains that for the comparison of the rates, a creditor must use the value of the replacement index and the LIBOR index on the day that the LIBOR index becomes unavailable. The Bureau solicits comment on whether it should address the situation where the replacement index is not be published on the day that the LIBOR index becomes unavailable. For example, should the Bureau provide that if the replacement index is not published on the day that the LIBOR index becomes unavailable, the creditor must use the previous calendar day that both indices are published as the date on which the annual percentage rate based on the replacement index must be substantially similar to the rate based on the LIBOR index?

Proposed comment 40(f)(3)(ii)(A)-3 also clarifies that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. Proposed comment 40(f)(3)(ii)(A)-3.i provides an example to illustrate this comment.

The Bureau believes that it may raise compliance issues if the rate calculated using the replacement index and replacement margin at the time the replacement index and replacement margin became effective had to be substantially similar to the rate in effect calculated using the LIBOR index on the date that the LIBOR index became unavailable. Specifically, under § 1026.9(c)(1), the creditor must provide a change-in-terms notice of the replacement index and replacement margin (including disclosing any reduced margin in change-in-terms notices provided on or after October 1, 2021, as would be required by proposed § 1026.9(c)(1)(ii)) at least 15 days prior to the effective date of the changes. The Bureau believes that this advance notice is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced. Because advance notice of the changes must be given prior to the changes becoming effective, a creditor would not be able to ensure that the rate based on the replacement index and margin at the time the change-in-terms notice becomes effective will be substantially similar to the rate in effect calculated using the LIBOR index at the time the LIBOR index becomes unavailable. The value of the replacement index may change after the LIBOR index becomes unavailable and before the change-in-terms notice becomes effective.

The Bureau notes that proposed § 1026.40(f)(3)(ii)(A) would require a creditor to use the index values of the replacement index and the original index on a single day (namely, the day that the original index becomes unavailable) to compare the rates to determine if they are "substantially similar." In using a single day to compare the rates, this proposed provision is consistent with the condition in the unavailability provision in current § 1026.40(f)(3)(ii), in the sense that it provides that the new index and margin must result in an APR that is substantially similar to the rate in effect on a single day. The Bureau notes that if the replacement index and the original index have "historical fluctuations" that are substantially similar, the spread between the replacement index and the original index on a particular day typically will be substantially similar to the historical spread between the two indices. Nonetheless, the Bureau recognizes that there is a possibility that the spread between the replacement index and the original index could differ significantly on a particular day from the historical spread in certain unusual circumstances, such as occurred to spreads between LIBOR and other indices soon after the collapse of Lehman Brothers in 2008.[77] Therefore, it is possible that two rates may typically be substantially similar but may not be substantially similar on a given date. It is also possible that two rates may be substantially similar on a given date but may not typically be substantially similar. To the extent the historical spread better reflects the typical spread between the indices in the long run, it may be more appropriate to use the historical spread rather than the spread on a specific day in comparing the rates to help ensure the rates are "substantially similar" to each other in the long run. However, it is also possible that the spread on a specific, recent date may better reflect the typical spread between the indices in the future than a historical spread would,

[77] The Bureau analyzed the daily spread between Prime and 1-month LIBOR from January 1, 1993, through April 23, 2020. For that timeframe, the median daily spread between those indices was 291 basis points. Since 1993, the spread reached a low of roughly *negative* nine basis points on October 10, 2008, soon after the collapse of Lehman Brothers. Since 1993, the spread has never been below 200 basis points aside from September, October, and November 2008. It has dipped below 250 basis points several times, including in May 2000 during the "dotcom bust" and in spring 2020 during the COVID-19 pandemic. As of April 23, 2020, the Prime-LIBOR spread had recovered to 276 basis points from a low of 223 basis points on April 1, 2020.

if the spread on that specific date deviates from the historical spread for reasons that are permanent rather than temporary.[78] Moreover, considering the historical spread raises questions about how to define the "historical spread," such as the date range to consider, and whether to take a median, mean, trimmed mean, or other statistic from the data for the date range.

Given these considerations, the Bureau solicits comment on whether the Bureau should adopt a different approach to determine whether a rate using the replacement index is "substantially similar" to the rate using the original index for purposes of proposed § 1026.40(f)(3)(ii)(A) and, if so, what criteria the Bureau should use in selecting such a different approach. For example, the Bureau solicits comment on whether it should require creditors to use a historical median or average of the spread between the replacement index and the original index over a certain time frame (*e.g.*, the time period the historical data are available or 5 years, whichever is shorter) for purposes of determining whether a rate using the replacement index is "substantially similar" to the rate using the original index. The Bureau also solicits comments on any compliance challenges that might arise as a result of adopting a potentially more complicated method of comparing the rates calculated using the replacement index and the rates calculated using the original index, and for any identified compliance challenges, how the Bureau could ease those compliance challenges.

The Bureau is not proposing to address for purposes of proposed § 1026.40(f)(3)(ii)(A) when a rate calculated using the replacement index and replacement margin is "substantially similar" to the rate in effect when the LIBOR index becomes unavailable. The Bureau is

[78] For example, the spread between 1-month USD LIBOR and Prime increased from roughly 142 basis points in 1986 to 281 basis points in 1993 but has been fairly steady ever since. Therefore, the LIBOR-Prime spread in early 1993 was much closer to the typical spread from then on than a "historical spread" would have been.

concerned about providing a “range” of rates that would be considered to be “substantially similar” to the rate in effect at the time LIBOR becomes unavailable, and about providing other specific guidance on, or regulatory changes addressing, the “substantially similar” standard, because the rates that will be considered “substantially similar” will be context-specific. The Bureau is concerned that if it provides a range of rates that will be considered substantially similar, this range might be too narrow or too broad in some cases depending on the specific circumstances. The Bureau also is concerned that some creditors may decide to charge an APR that is the highest APR in the range, even though the specific circumstances would indicate that the highest APR should not be considered substantially similar in those circumstances. The Bureau solicits comment, however, on whether the Bureau should provide guidance on, or regulatory changes addressing, the “substantially similar” standard in comparing the rates for purposes of proposed § 1026.40(f)(3)(ii)(A), and if so, what guidance, or regulatory changes, the Bureau should provide. For example, should the Bureau provide a range of rates that would be considered “substantially similar” as described above, and if so, how should the range be determined? Should the range of rates depend on context, and if so, what contexts should be considered? As an alternative to the range of rates approach, the Bureau solicits comment on whether it should provide factors that creditors must consider in deciding whether the rates are “substantially similar” and if so, what those factors should be. Are there other approaches the Bureau should consider for addressing the “substantially similar” standard for comparing rates?

As discussed above, proposed comment 40(f)(3)(ii)(A)-2.ii clarifies that in order to use the SOFR-based spread-adjusted index as the replacement index for the applicable LIBOR index, the creditor must comply with the condition in § 1026.40(f)(3)(ii)(A) that the SOFR-based spread-adjusted index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. The Bureau solicits comment on whether the Bureau in the final rule, if adopted, should provide for purposes of proposed § 1026.40(f)(3)(ii)(A) that the rate using the SOFR-based spread-adjusted index is "substantially similar" to the rate in effect at the time the LIBOR index becomes unavailable, so long as the creditor uses as the replacement margin the same margin in effect on the day that the LIBOR index becomes unavailable. As discussed in more detail in the section-by-section analysis of § 1026.20(a), the spread adjustments for the SOFR-based spread-adjusted indices are designed to reflect and adjust for the historical differences between LIBOR and SOFR in order to make the spread-adjusted rate comparable to LIBOR. Thus, to facilitate compliance, the Bureau believes that it may be appropriate to provide for purposes of proposed § 1026.40(f)(3)(ii)(A) that a creditor complies with the "substantially similar" standard for comparing the rates when the creditor replaces the LIBOR index used under the plan with the applicable SOFR-based spread-adjusted index and uses as the replacement margin the same margin in effect at the time the LIBOR index becomes unavailable.

40(f)(3)(ii)(B)

The Proposal

For the reasons discussed below and in the section-by-section analysis of § 1026.40(f)(3)(ii), the Bureau is proposing to add new LIBOR-specific provisions to § 1026.40(f)(3)(ii)(B) that would permit creditors for HELOC plans subject to § 1026.40 that use a LIBOR index for calculating variable rates to replace the LIBOR index and change the margins for calculating the variable rates on or after March 15, 2021, in certain circumstances. Specifically, proposed § 1026.40(f)(3)(ii)(B) provides that if a variable rate on a HELOC subject to § 1026.40 is calculated using a LIBOR index, a creditor may replace the LIBOR index and change the margin for calculating the variable rate on or after March 15, 2021, as long as (1) the historical fluctuations in the LIBOR index and replacement index were substantially similar; and (2) the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed § 1026.40(f)(3)(ii)(B) also provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

In addition, proposed § 1026.40(f)(3)(ii)(B) provides that if either the LIBOR index or the replacement index is not published on December 31, 2020, the creditor must use the next calendar day that both indices are published as the date on which the APR based on the replacement index must be substantially similar to the rate based on the LIBOR index.

The Bureau also is proposing to add detail in proposed comments 40(f)(3)(ii)(B)-1 through -3 on the conditions set forth in proposed § 1026.40(f)(3)(ii)(B). For example, to reduce uncertainty with respect to selecting a replacement index that meets the standards in proposed § 1026.40(f)(3)(ii)(B), the Bureau is proposing to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. The Bureau also is proposing to determine that certain spread-adjusted indices based on SOFR recommended by the ARRC have historical fluctuations that are substantially similar to those of certain USD LIBOR indices.

To effectuate the purposes of TILA and to facilitate compliance, the Bureau is proposing to use its TILA section 105(a) authority to provide the new LIBOR-specific provisions under proposed § 1026.40(f)(3)(ii)(B). TILA section 105(a)[79] directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. The Bureau is proposing these LIBOR-specific provisions to facilitate compliance with TILA and effectuate its purposes. Specifically, the Bureau interprets "facilitate compliance" to include enabling or fostering continued operation in conformity with the law.

The Bureau is proposing to set March 15, 2021, as the date on or after which HELOC creditors are permitted to replace the LIBOR index used under the plan pursuant to proposed § 1026.40(f)(3)(ii)(B) prior to LIBOR becoming unavailable to facilitate compliance with the change-in-terms notice requirements applicable to creditors for HELOCs. As a practical matter, these proposed changes will allow creditors for HELOCs to provide the 15-day change-in-terms notices required under § 1026.9(c)(1) prior to the LIBOR indices becoming unavailable, and thus will allow those creditors to avoid being left without a LIBOR index to use in calculating the variable rate before the replacement index and margin become effective. Also, these proposed changes will allow HELOC creditors to provide the change-in-terms notices, and replace the LIBOR index used under the plans, on accounts on a rolling basis, rather than having to provide

[79] 15 U.S.C. 1604(a),

the change-in-terms notices, and replace the LIBOR index, for all its accounts at the same time as the LIBOR index used under the plan becomes unavailable.

Without the proposed LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B), as a practical matter, HELOC creditors would have to wait until the LIBOR index becomes unavailable to provide the 15-day change-in-terms notice under § 1026.9(c)(1), disclosing the replacement index and replacement margin (including disclosing any reduced margin in change-in-terms notices provided on or after October 1, 2021, as would be required by proposed § 1026.9(c)(1)(ii)). The Bureau believes that this advance notice is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced.

For several reasons, HELOC creditors would not be able to send out change-in-terms notices disclosing the replacement index and replacement margin prior to LIBOR becoming unavailable. First, although LIBOR is expected to become unavailable around the end of 2021, there is no specific date known with certainty on which LIBOR will become unavailable. Thus, HELOC creditors could not send out the change-in-terms notices prior to LIBOR becoming unavailable because they will not know when it will become unavailable and thus would not know when to make the replacement index and replacement margin effective on the account.

Second, HELOC creditors would need to know the index values of the LIBOR index and the replacement index prior to sending out the change-in-terms notice so that they could disclose the replacement margin in the change-in-terms notice. HELOC creditors will not know these index values until the day that LIBOR becomes unavailable. Thus, HELOC creditors would have to wait until LIBOR becomes unavailable before the creditors could send the 15-day change-in-terms notices under § 1026.9(c)(1) to replace the LIBOR index with a replacement index. Some creditors could be left without a LIBOR index value to use during the 15-day period before the replacement index and replacement margin become effective, depending on their existing contractual terms. The Bureau is concerned this could cause compliance and systems issues.

Also, as discussed in part III, the industry has raised concerns that LIBOR may continue for some time after December 2021 but become less representative or reliable until LIBOR finally is discontinued. Allowing creditors to replace the LIBOR indices on existing HELOC accounts prior to LIBOR becoming unavailable may address some of these concerns.

The Bureau solicits comments on proposed § 1026.40(f)(3)(ii)(B) and proposed comments 40(f)(3)(ii)(B)-1 through -3. The proposed comments are discussed in detail below.

Consistent conditions with proposed § 1026.40(f)(3)(ii)(A). The Bureau is proposing conditions in the LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B) for how a creditor must select a replacement index and compare rates that are consistent with the conditions set forth in the unavailability provisions set forth in proposed § 1026.40(f)(3)(ii)(A). For example, the availability provisions in proposed § 1026.40(f)(3)(ii)(A) and the LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B) contain a consistent requirement that the APR calculated using the replacement index must be "substantially similar" to the rate calculated using the LIBOR index.[80] In addition, both proposed § 1026.40(f)(3)(ii)(A) and (B) contain consistent conditions for how a creditor must select a replacement index.

[80] The conditions in proposed § 1026.40(f)(3)(ii)(A) and (B) are consistent, but they are not the same. For example, although both proposed provisions use the "substantially similar" standard to compare the rates, they use different dates for selecting the index values in calculating the rates. The proposed provisions in proposed § 1026.40(f)(3)(ii)(A) and (B) differ in the timing of when creditors are permitted to transition away from LIBOR, which creates some differences in how the conditions apply.

For several reasons, the Bureau is proposing to keep the conditions for these two provisions consistent. First, as discussed above in the section-by-section analysis of § 1026.40(f)(3)(ii), some HELOC creditors may need to wait until LIBOR become unavailable to transition to a replacement index because of contractual reasons. The Bureau believes that keeping the conditions consistent in the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A) and the LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B) will help ensure that creditors must meet consistent conditions in selecting a replacement index and setting the rates, regardless of whether they are using the unavailability provisions in proposed § 1026.40(f)(3)(ii)(A), or the LIBOR-specific provisions in proposed § 1026.40(f)(3)(ii)(B).

Second, some creditors may have the ability to choose between the unavailability provisions and LIBOR-specific provisions to switch away from using a LIBOR index, and if the conditions between those two provisions are inconsistent, these differences could undercut the purpose of the LIBOR-specific provisions to allow creditors to switch out earlier. For example, if the conditions for selecting a replacement index or setting the rates were stricter in the LIBOR-specific provisions than in the unavailability provisions, this may cause a creditor to wait until LIBOR becomes unavailable to switch to a replacement index, which would undercut the purpose of the LIBOR-specific provisions to allow creditors to switch out earlier and prevent these creditors from having the time to transition from using a LIBOR index.

Historical fluctuations substantially similar for the LIBOR index and replacement index. Proposed comment 40(f)(3)(ii)(B)-1 provides detail on determining whether a replacement index that is not newly established has "historical fluctuations" that are "substantially similar" to those of the LIBOR index used under the plan for purposes of proposed § 1026.40(f)(3)(ii)(B). Specifically, proposed comment 40(f)(3)(ii)(B)-1 provides that for purposes of replacing a

LIBOR index used under a plan pursuant to proposed § 1026.40(f)(3)(ii)(B), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through December 31, 2020, or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier. The Bureau is proposing the December 31, 2020 date to be consistent with the date that creditors generally must use for selecting the index values to use in comparing the rates under proposed § 1026.40(f)(3)(ii)(B). The Bureau solicits comment on the December 31, 2020 date for purposes of proposed comment 40(f)(3)(ii)(B)-1 and whether another date or timeframe would be more appropriate for purposes of that proposed comment.

To facilitate compliance, proposed comment 40(f)(3)(ii)(B)-1.i includes a proposed determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices and includes a placeholder for the date when this proposed determination would be effective, if adopted in the final rule.[81] The Bureau understands that some HELOC creditors may choose to replace a LIBOR index with Prime. Proposed comment 40(f)(3)(ii)(B)-1.i also clarifies that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the creditor also must comply with the condition in proposed § 1026.40(f)(3)(ii)(B) that the Prime index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under

[81] See the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau proposing this determination.

the plan. If either the LIBOR index or the prime rate is not published on December 31, 2020, the creditor must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the prime rate must be substantially similar to the rate based on the LIBOR index. This condition for comparing the rates under proposed § 1026.40(f)(3)(ii)(B) is discussed in more detail below.

To facilitate compliance, proposed comment 40(f)(3)(ii)(B)-1.ii provides a proposed determination that the spread-adjusted indices based on SOFR recommended by the ARRC to replace the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices respectively. The proposed comment also provides a placeholder for the date when this proposed determination would be effective, if adopted in the final rule.[82] The Bureau understands that some HELOC creditors may choose to replace a LIBOR index with a SOFR-based spread-adjusted index.

Comment 40(f)(3)(ii)(B)-1.ii also clarifies that in order to use this SOFR-based spread-adjusted index as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(B) that the SOFR-based spread-adjusted index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of

[82] See the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau proposing this determination. Also, as discussed in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A), the Bureau solicits comment on whether the Bureau should alternatively consider these SOFR-based spread-adjusted indices to be newly established indices for purposes of proposed § 1026.40(f)(3)(ii)(B), to the extent these indices are not being published by the effective date of the final rule, if adopted.

the LIBOR index used under the plan. If either the LIBOR index or the SOFR-based spread-adjusted index is not published on December 31, 2020, the creditor must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the SOFR-based spread-adjusted index must be substantially similar to the rate based on the LIBOR index. This condition for comparing the rates under proposed § 1026.40(f)(3)(ii)(B) is discussed in more detail below. Also, for the reasons discussed below, the Bureau solicits comment on whether the Bureau in the final rule, if adopted, should provide for purposes of proposed § 1026.40(f)(3)(ii)(B) that the rate using the SOFR-based spread-adjusted index is "substantially similar" to the rate calculated using the LIBOR index, so long as the creditor uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index.

The Bureau also solicits comment on whether there are other indices that are not newly established for which the Bureau should make a determination that the index has historical fluctuations that are substantially similar to those of the LIBOR indices for purposes of proposed § 1026.40(f)(3)(ii)(B). If so, what are these other indices, and why should the Bureau make such a determination with respect to those indices?

Newly established index as replacement for the LIBOR index. Proposed § 1026.40(f)(3)(ii)(B) provides if the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on December 31, 2020, and the replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The Bureau solicits comment on whether the Bureau should provide any additional guidance on, or regulatory changes addressing, when an index is newly established with respect to replacing the LIBOR indices for purposes of proposed § 1026.40(f)(3)(ii)(B). The Bureau also solicits comment on whether the Bureau should provide any examples of indices that are newly established with respect to replacing the LIBOR indices for purposes of § 1026.40(f)(3)(ii)(B). If so, what are these indices and why should the Bureau determine these indices are newly established with respect to replacing the LIBOR indices?

Substantially similar rate using index values in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Under proposed § 1026.40(f)(3)(ii)(B), if both the replacement index and LIBOR index used under the plan are published on December 31, 2020, the replacement index value in effect on December 31, 2020, and the replacement margin must produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed comment 40(f)(3)(ii)(B)-2 also explains that the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the creditor provides the change-in-terms notice disclosing the replacement index for the variable rate. Proposed comment 40(f)(3)(ii)(B)-2.i provides an example to illustrate this comment, when the margin used to calculate the variable rate is increased pursuant to a written agreement under § 1026.40(f)(3)(iii), and this change in the margin occurs after December 31, 2020, but prior to the date that the creditor provides a change-in-term notice under § 1026.9(c)(1) disclosing the replacement index for the variable rate.

In calculating the comparison rates using the replacement index and the LIBOR index used under the HELOC plan, the Bureau generally is proposing to require creditors to use the index values for the replacement index and the LIBOR index in effect on December 31, 2020. The Bureau is proposing to require HELOC creditors to use these index values to promote consistency for creditors and consumers in which index values are used to compare the two rates. Under proposed § 1026.40(f)(3)(ii)(B), HELOC creditors are permitted to replace the LIBOR index used under the plan and adjust the margin used in calculating the variable rate used under the plan on or after March 15, 2021, but creditors may vary in the timing of when they provide change-in-terms notices to replace the LIBOR index used on their HELOC accounts and when these replacements become effective.

For example, one HELOC creditor may replace the LIBOR index used under its HELOC plans in April 2021, while another HELOC creditor may replace the LIBOR index used under its HELOC plans in October 2021. In addition, a HELOC creditor may not replace the LIBOR index used under all of its HELOC plans at the same time. For example, a HELOC creditor may replace the LIBOR index used under some of its HELOC plans in April 2021 but replace the LIBOR index used under other of its HELOC plans in May 2021.

Nonetheless, regardless of when a particular creditor replaces the LIBOR index used under its HELOC plans, proposed § 1026.40(f)(3)(ii)(B) generally would require that all creditors for HELOCs use December 31, 2020, as the day for determining the index values for the replacement index and the LIBOR index, to promote consistency for creditors and consumers with respect to which index values are used to compare the two rates.

In addition, using the December 31, 2020 date for the index values in comparing the rates may allow creditors for HELOCs to send out change-in-terms notices prior to March 15, 2021, and have the changes be effective on March 15, 2021, the proposed date on or after which creditors for HELOCs would be permitted to switch away from using LIBOR as an index on an existing HELOC account under proposed § 1026.40(f)(3)(ii)(B). If the Bureau instead required creditors to use the index values on March 15, 2021, creditors for HELOCs as a practical matter would not be able to provide change-in-terms notices of the replacement index and any adjusted margin until after March 15, 2021, because they would need the index values from that date in order to calculate the replacement margin. Thus, using the index values on March 15, 2021, would delay when creditors for HELOCs could switch away from using LIBOR as an index on an existing HELOC account.

Also, as discussed in part III, the industry has raised concerns that LIBOR may continue for some time after December 2021 but become less representative or reliable until LIBOR finally is discontinued. Using the index values for the replacement index and the LIBOR index used under the plan in effect on December 31, 2020, may address some of these concerns.

The Bureau solicits comment specifically on the use of the December 31, 2020 index values in calculating the comparison rates under proposed § 1026.40(f)(3)(ii)(B).

Proposed § 1026.40(f)(3)(ii)(B) provides one exception to the proposed general requirement to use the index values for the replacement index and the LIBOR index used under the plan in effect on December 31, 2020. Proposed § 1026.40(f)(3)(ii)(B) provides that if either the LIBOR index or the replacement index is not published on December 31, 2020, the creditor must use the next calendar day that both indices are published as the date on which the APR based on the replacement index must be substantially similar to the rate based on the LIBOR index.

As discussed above, proposed § 1026.40(f)(3)(ii)(B) would require a creditor to use the index values of the replacement index and the LIBOR index on a single day (generally December 31, 2020)[83] to compare the rates to determine if they are "substantially similar." In using a single day to compare the rates, this proposed provision is consistent with the condition in the unavailability provision in current § 1026.40(f)(3)(ii), in the sense that it provides that the new index and margin must result in an APR that is substantially similar to the rate in effect on a single day. The Bureau notes that if the replacement index and the LIBOR index have "historical fluctuations" that are substantially similar, the spread between the replacement index and the LIBOR index on a particular day typically will be substantially similar to the historical spread between the two indices. Nonetheless, the Bureau recognizes that there is a possibility that the spread between the replacement index and the LIBOR index could differ significantly on a particular day from the historical spread in certain unusual circumstances, such as occurred to spreads between LIBOR and other indices soon after the collapse of Lehman Brothers in 2008.[84] Therefore, it is possible that two rates may typically be substantially similar but may not be substantially similar on a given date. It is also possible that two rates may be substantially similar on a given date but may not typically be substantially similar. To the extent the historical spread better reflects the typical spread between the indices in the long run, it may be more appropriate to use the historical spread rather than the spread on a specific day in comparing the rates to help ensure the rates are "substantially similar" to each other in the long run. However, it is also possible that the spread on a specific, recent date may better reflect the typical spread

[83] If one or both of the indices are not available on December 31, 2020, proposed § 1026.40(f)(3)(ii)(B) would require that the creditor use the index values of the indices on the next calendar day that both indices are published.

[84] *See supra* note 72.

between the indices in the future than a historical spread would, if the spread on that specific date deviates from the historical spread for reasons that are permanent rather than temporary.[85] Moreover, considering the historical spread raises questions about how to define the "historical spread," such as the date range to consider, and whether to take a median, mean, trimmed mean, or other statistic from the data for the date range.

Given these considerations, the Bureau solicits comment on whether the Bureau should adopt a different approach to determine whether a rate using the replacement index is "substantially similar" to the rate using the LIBOR index for purposes of proposed § 1026.40(f)(3)(ii)(B) and, if so, what criteria the Bureau should use in selecting such a different approach. For example, the Bureau solicits comment on whether it should require creditors to use a historical median or average of the spread between the replacement index and the LIBOR index over a certain time frame (*e.g.*, the time period the historical data are available or 5 years, whichever is shorter) for purposes of determining whether a rate using the replacement index is "substantially similar" to the rate using the LIBOR index. The Bureau also solicits comments on any compliance challenges that might arise as a result of adopting a potentially more complicated method of comparing rates calculated using the replacement index and the rates calculated using the LIBOR index, and for any identified compliance challenges, how the Bureau could ease those compliance challenges.

Under proposed § 1026.40(f)(3)(ii)(B), in calculating the comparison rates using the replacement index and the LIBOR index used under the HELOC plan, the creditor must use the margin that applied to the variable rate immediately prior to when the creditor provides the

[85] *See supra* note 78.

change-in-terms notice disclosing the replacement index for the variable rate. The Bureau is proposing that creditors must use this margin, rather than the margin in effect on December 31, 2020. The Bureau recognizes that creditors for HELOCs in certain instances may change the margin that is used to calculate the LIBOR variable rate after December 31, 2020, but prior to when the creditor provides a change-in-terms notice to replace the LIBOR index used under the plan. If the Bureau were to require that the creditor use the margin in effect on December 31, 2020, this would undo any margin changes that occurred after December 31, 2020, but prior to the creditor providing a change-in-terms notice of the replacement of the LIBOR index used under the plan, which would be inconsistent with the purpose of the comparisons of the rates under proposed § 1026.40(f)(3)(ii)(B).

Proposed comment 40(f)(3)(ii)(B)-3 clarifies that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. Proposed comment 40(f)(3)(ii)(B)-3.i also provides an example to illustrate this comment. The Bureau believes that it would raise compliance issues if the rate calculated using the replacement index and replacement margin at the time the replacement index and replacement margin became effective had to be substantially similar to the rate calculated using the LIBOR index in effect on December 31, 2020. Under § 1026.9(c)(1), the creditor must provide a change-in-terms notice of the replacement index and replacement margin (including a reduced margin in a change-in-terms notice provided on or after October 1, 2021, as would be required by proposed § 1026.9(c)(1)(ii)) at least 15 days prior to the effective date of the changes. The Bureau believes that this advance notice is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced. Because advance notice of the changes must be given prior to the changes becoming effective, a creditor would not be able to ensure that the rate based on the replacement index and replacement margin at the time the change-in-terms notice becomes effective will be substantially similar to the rate calculated using the LIBOR index in effect on December 31, 2020. The value of the replacement index may change after December 31, 2020, and before the change-in-terms notice becomes effective.

The Bureau is not proposing to address for purposes of proposed § 1026.40(f)(3)(ii)(B) when a rate calculated using the replacement index and replacement margin is "substantially similar" to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The Bureau is concerned about providing a "range" of rates that would be considered to be "substantially similar" to the LIBOR rate described above, and about providing other specific guidance on, or regulatory changes addressing, the "substantially similar" standard, because the rates that will be considered "substantially similar" will be context-specific. The Bureau is concerned that if it provides a range of rates that will be considered substantially similar, this range might be too narrow or too broad in some cases depending on the specific circumstances. The Bureau also is concerned that some creditors may decide to charge an APR that is the highest APR in the range, even though the specific circumstances would indicate that the highest APR should not be considered substantially similar in those circumstances. The Bureau solicits comment, however, on whether the Bureau should provide guidance on, or regulatory changes addressing, the "substantially similar" standard in comparing the rates for purposes of proposed § 1026.40(f)(3)(ii)(B), and if so, what guidance, or regulatory changes, the Bureau should provide. For example, should the Bureau provide a range of rates that would be considered "substantially similar" as described above, and if so, how should the range be determined? Should the range of rates depend on context, and if so, what contexts should be considered? As an alternative to the range of rates approach, the Bureau solicits comment on whether it should provide factors that creditors must consider in deciding whether the rates are "substantially similar" and if so, what those factors should be. Are there other approaches the Bureau should consider for addressing the "substantially similar" standard for comparing rates?

As discussed above, proposed comment 40(f)(3)(ii)(B)-1.ii clarifies that in order to use the SOFR-based spread-adjusted index as the replacement index for the applicable LIBOR index, the creditor must comply with the condition in § 1026.40(f)(3)(ii)(B) that the SOFR-based spread-adjusted index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If either the LIBOR index or the SOFR-based spread-adjusted index is not published on December 31, 2020, the creditor must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the SOFR-based spread-adjusted index must be substantially similar to the rate based on the LIBOR index. The Bureau solicits comment on whether the Bureau in the final rule, if adopted, should provide for purposes of proposed § 1026.40(f)(3)(ii)(B) that the rate using the SOFR-based spread-adjusted index is "substantially similar" to the rate calculated using the LIBOR index, so long as the creditor uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. As discussed in more detail in the section-by-section analysis of § 1026.20(a), the spread adjustments for the SOFR-based spread-adjusted indices are designed to reflect and adjust for the historical differences between LIBOR and SOFR in order to make the spread-adjusted rate comparable to LIBOR. Thus, the Bureau believes that it may be appropriate to provide for purposes of proposed § 1026.40(f)(3)(ii)(B) that a creditor complies with the "substantially similar" standard for comparing the rates when the creditor replaces the LIBOR index used under the plan with the applicable SOFR-based spread-adjusted index and uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

Section 1026.55 Limitations on Increasing Annual Percentage Rates, Fees, and Charges

55(b) Exceptions

55(b)(7) Index Replacement and Margin Change Exception

TILA section 171(a), which was added by the Credit CARD Act, provides that in the case of a credit card account under an open-end consumer credit plan, no creditor may increase any APR, fee, or finance charge applicable to any outstanding balance, except as permitted under TILA section 171(b).[86] TILA section 171(b)(2) provides that the prohibition under TILA section 171(a) does not apply to an increase in a variable APR in accordance with a credit card agreement that provides for changes in the rate according to the operation of an index that is not under the control of the creditor and is available to the general public.[87]

In implementing these provisions of TILA section 171, § 1026.55(a) prohibits a card issuer from increasing an APR or certain enumerated fees or charges set forth in § 1026.55(a) on a credit card account under an open-end (not home-secured) consumer credit plan, except as provided in § 1026.55(b). Section 1026.55(b)(2) provides that a card issuer may increase an

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[86] 15 U.S.C. 1666i-1(a).

[87] 15 U.S.C. 1666i-1(b)(2).

APR when: (1) the APR varies according to an index that is not under the card issuer's control and is available to the general public; and (2) the increase in the APR is due to an increase in the index.

Comment 55(b)(2)-6 provides that a card issuer may change the index and margin used to determine the APR under § 1026.55(b)(2) if the original index becomes unavailable*,* as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

The Proposal

As discussed in part III, the industry has requested that the Bureau permit card issuers to replace the LIBOR index used in setting the variable rates on existing accounts prior to when the LIBOR indices become unavailable to facilitate compliance. Among other things, the industry is concerned that if card issuers must wait until LIBOR becomes unavailable to replace the LIBOR index used on existing accounts, card issuers would not have sufficient time to inform consumers of the replacement index and update their systems to implement the change. To reduce uncertainty with respect to selecting a replacement index, the industry also has requested that the Bureau determine that the prime rate has "historical fluctuations" that are "substantially similar" to those of the LIBOR indices.

To address these concerns, as discussed in more detail in the section-by-section analysis of proposed § 1026.55(b)(7)(ii), the Bureau is proposing to add new LIBOR-specific provisions to proposed § 1026.55(b)(7)(ii) that would permit card issuers for a credit card account under an open-end (not home-secured) consumer credit plan that uses a LIBOR index under the plan to replace LIBOR and change the margin on such plans on or after March 15, 2021, in certain circumstances.

Specifically, proposed § 1026.55(b)(7)(ii) provides that if a variable rate on a credit card account under an open-end (not home-secured) consumer credit plan is calculated using a LIBOR index, a card issuer may replace the LIBOR index and change the margin for calculating the variable rate on or after March 15, 2021, as long as (1) the historical fluctuations in the LIBOR index and replacement index were substantially similar; and (2) the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on December 31, 2020, and the replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

Also, as discussed in more detail in the section-by-section analysis of proposed § 1026.55(b)(7)(ii), to reduce uncertainty with respect to selecting a replacement index that meets the standards in proposed § 1026.55(b)(7)(ii), the Bureau is proposing to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. The Bureau also is proposing to determine that certain spread-adjusted indices based on SOFR recommended by the ARRC have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. The Bureau is also proposing additional detail in comments 55(b)(7)(ii)-1 through -3 with respect to proposed § 1026.55(b)(7)(ii).

In addition, as discussed in more detail in the section-by-section analysis of proposed § 1026.55(b)(7)(i), the Bureau is proposing to move the unavailability provisions in current comment 55(b)(2)-6 to proposed § 1026.55(b)(7)(i) and to revise the proposed moved provisions for clarity and consistency. The Bureau also is proposing additional detail in comments 55(b)(7)(i)-1 through -2 with respect to proposed § 1026.55(b)(7)(i). For example, to reduce uncertainty with respect to selecting a replacement index that meets the standards under proposed § 1026.55(b)(7)(i), the Bureau is proposing to make the same determinations discussed above related to Prime and the spread-adjusted indices based on SOFR recommended by the ARRC in relation to proposed § 1026.55(b)(7)(i). The Bureau is proposing to make these revisions and provide additional detail in case card issuers use the unavailability provision in proposed § 1026.55(b)(7)(i) to replace a LIBOR index used for their credit card accounts, as discussed in more detail below.

Bureau is proposing new proposed LIBOR-specific provisions rather than interpreting when LIBOR is unavailable. For the same reasons that the Bureau is proposing LIBOR-specific provisions for HELOCs under proposed § 1026.40(f)(3)(ii)(B), the Bureau is proposing these new LIBOR-specific provisions under proposed § 1026.55(b)(7)(ii), rather than interpreting LIBOR indices to be unavailable as of a certain date prior to LIBOR being discontinued under current comment 55(b)(2)-6 (as proposed to be moved to proposed § 1026.55(b)(7)(i)). First, the Bureau is concerned about making a determination for Regulation Z purposes under current comment 55(b)(2)-6 (as proposed to be moved to proposed § 1026.55(b)(7)(i)) that the LIBOR indices are unavailable or unreliable when the FCA, the regulator of LIBOR, has not made such a determination.

Second, the Bureau is concerned that a determination by the Bureau that the LIBOR indices are unavailable for purposes of comment 55(b)(2)-6 (as proposed to be moved to proposed § 1026.55(b)(7)(i)) could have unintended consequences for other products or markets. For example, the Bureau is concerned that such a determination could unintentionally cause confusion for creditors for other products (*e.g.*, ARMs) about whether the LIBOR indices are unavailable for those products too and could possibly put pressure on those creditors to replace the LIBOR index used for those products before those creditors are ready for the change.

Third, even if the Bureau interpreted unavailability under comment 55(b)(2)-6 (as proposed to be moved to proposed § 1026.55(b)(7)(i)) to indicate that the LIBOR indices are unavailable prior to LIBOR being discontinued, this interpretation would not completely solve the contractual issues for card issuers whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index. Card issuers still would need to decide for their contracts whether the LIBOR indices are unavailable. Thus, even if the Bureau decided that the LIBOR indices are unavailable under Regulation Z as described above, card issuers whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index essentially would remain in the same position of interpreting their contracts as they would have been under the current rule.

Thus, the Bureau is not proposing to interpret when the LIBOR indices are unavailable for purposes of current comment 55(b)(2)-6 (as proposed to be moved to proposed § 1026.55(b)(7)(ii)). The Bureau solicits comment on whether the Bureau should interpret when the LIBOR indices are unavailable for purposes of current comment 55(b)(2)-6 (as proposed to be moved to proposed § 1026.55(b)(7)(i)), and if so, why the Bureau should make that determination and when should the LIBOR indices be considered unavailable for purposes of that provision.

The Bureau also solicits comment on an alternative to interpreting the term "unavailable." Specifically, should the Bureau make revisions to the unavailability provisions in current comment 55(b)(2)-6 (as proposed to be moved to proposed § 1026.55(b)(7)(i)) in a manner that would allow those card issuers who need to transition from LIBOR and, for contractual reasons, may not be able to switch away from LIBOR prior to it being unavailable to be better able to use the unavailability provisions for an orderly transition on or after March 15, 2021? If so, what should these revisions be?

Interaction among proposed § 1026.55(b)(7)(i) and (ii) and contractual provisions. Proposed comment 55(b)(7)-1 addresses the interaction among the unavailability provisions in proposed § 1026.55(b)(7)(i), the LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii), and the contractual provisions applicable to the credit card account. The Bureau understands that credit card contracts generally allow a card issuer to change the terms of the contract (including the index) as permitted by law. Proposed comment 55(b)(7)-1 provides detail where this contract language applies. In addition, consistent with the detail proposed in relation to HELOCs subject to § 1026.40 in proposed comment 40(f)(3)(ii)-1, the Bureau also is providing detail on two other types of contract language, in case any credit card contracts include such language.

For example, the Bureau is proposing detail in proposed comment 55(b)(7)-1 for credit card contracts that contain language providing that (1) a card issuer can replace the LIBOR index and the margin for calculating the variable rate unilaterally only if the original index is no longer available or becomes unavailable; and (2) the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable. The Bureau also is providing detail in proposed comment 55(b)(7)-1 for credit card contracts that include language providing that the card issuer can replace the original index and the margin for calculating the variable rate unilaterally only if the original index is no longer available or becomes unavailable, but does not require that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable.

Specifically, proposed comment 55(b)(7)-1 provides that a card issuer may use either the provision in proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) to replace a LIBOR index used under a credit card account under an open-end (not home-secured) consumer credit plan so long as the applicable conditions are met for the provision used. This proposed comment makes clear, however, that neither proposed provision excuses the card issuer from noncompliance with contractual provisions. As discussed below, proposed comment 55(b)(7)-1 provides examples to illustrate when a card issuer may use the provisions in proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) to replace the LIBOR index used under a credit card account under an open-end (not home-secured) consumer credit and each of these examples assumes that the LIBOR index used under the plan becomes unavailable after March 15, 2021.

Proposed comment 55(b)(7)-1.i provides an example where a contract for a credit card account under an open-end (not home-secured) consumer credit plan provides that a card issuer may not unilaterally replace an index under a plan unless the original index becomes unavailable and provides that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, proposed comment 55(b)(7)-1.i explains that the card issuer may use the unavailability provisions in proposed § 1026.55(b)(7)(i) to replace the LIBOR index used under the plan so long as the conditions of that provision are met. Proposed comment 55(b)(7)-1.i also explains that the proposed LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii) provides that a card issuer may replace the LIBOR index if the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed comment 55(b)(7)-1.i notes, however, that the card issuer in this example would be contractually prohibited from replacing the LIBOR index used under the plan unless the replacement index and replacement margin also will produce an APR substantially similar to a rate that is in effect when the LIBOR index becomes unavailable. The Bureau solicits comments on this proposed approach and example.

Proposed comment 55(b)(7)-1.ii provides an example of a contract for a credit card account under an open-end (not home-secured) consumer credit plan under which a card issuer may not replace an index unilaterally under a plan unless the original index becomes unavailable but does not require that the replacement index and replacement margin will result in an APR substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the card issuer would be contractually prohibited from unilaterally replacing a LIBOR index used under the plan until it becomes unavailable. At that time, the card issuer has the option of using proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) to replace the LIBOR index if the conditions of the applicable provision are met.

The Bureau is proposing to allow the card issuer in this case to use either the proposed unavailability provisions in proposed § 1026.55(b)(7)(i) or the proposed LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii). If the card issuer uses the unavailability provisions in proposed § 1026.55(b)(7)(i), the card issuer must use a replacement index and replacement margin that will produce an APR substantially similar to the rate in effect when the LIBOR index became unavailable. If the card issuer uses the proposed LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii), the card issuer generally must use a replacement index value in effect on December 31, 2020, and replacement margin that will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

The Bureau is proposing to allow a card issuer, in this case, to use the index values for the LIBOR index and the replacement index on December 31, 2020, to meet the "substantially similar" standard with respect to the comparison of the rates even if the card issuer is contractually prohibited from unilaterally replacing a LIBOR index used under the plan until it becomes unavailable. The Bureau recognizes that LIBOR may not be discontinued until the end of 2021, which is around a year later than the December 31, 2020 date. Nonetheless, the Bureau is proposing to allow card issuers that are restricted by their contracts to replace the LIBOR index used under the credit card plans until LIBOR becomes unavailable to use the LIBOR index values and the replacement index values in effect on December 31, 2020 under proposed § 1026.55(b)(7)(ii), rather than the index values on the day that the LIBOR indices become unavailable under proposed § 1026.55(b)(7)(i). This proposal would allow those card issuers to use consistent index values to those card issuers that are not restricted by their contracts in replacing the LIBOR index prior to the LIBOR becoming unavailable. This proposal may also promote consistency for consumers in that all card issuers are permitted to use the same LIBOR values in comparing the rates.

In addition, as discussed in part III, the industry has raised concerns that LIBOR may continue for some time after December 2021 but become less representative or reliable until LIBOR finally is discontinued. Allowing card issuers to use the December 31, 2020, values for comparison of the rates instead of the LIBOR values when the LIBOR indices become unavailable may address some of these concerns.

Thus, the Bureau is proposing to provide card issuers with the flexibility to choose to use the index values for the LIBOR index and the replacement index on December 31, 2020, by using the proposed LIBOR-specific provisions under proposed § 1026.55(b)(7)(ii), rather than using the unavailability provisions in proposed § 1026.55(b)(7)(i). The Bureau solicits comment on this proposed approach and example.

Proposed comment 55(b)(7)-1.iii provides an example of a contract for a credit card account under an open-end (not home-secured) consumer credit plan under which a card issuer may change the terms of the contract (including the index) as permitted by law. Proposed comment 55(b)(7)-1.iii explains in this case, if the card issuer replaces a LIBOR index under a plan on or after March 15, 2021, but does not wait until LIBOR becomes unavailable to do so, the card issuer may only use proposed § 1026.55(b)(7)(ii) to replace the LIBOR index if the conditions of that provision are met. In this case, the card issuer may not use proposed § 1026.55(b)(7)(i). Proposed comment 55(b)(7)-1.iii also explains that if the card issuer waits until the LIBOR index used under the plan becomes unavailable to replace the LIBOR index, the card issuer has the option of using proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) to replace the LIBOR index if the conditions of the applicable provision are met.

The Bureau is proposing to allow the card issuer, in this case, to use either the unavailability provisions in proposed § 1026.55(b)(7)(i) or the proposed LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii) if the card issuer waits until the LIBOR index used under the plan becomes unavailable to replace the LIBOR index. For the reasons explained above in the discussion of the example in proposed comment 55(b)(7)-1.ii, the Bureau is proposing in the situation described in proposed comment 55(b)(7)-1.iii to provide card issuers with the flexibility to choose to use the index values for the LIBOR index and the replacement index on December 31, 2020, by using the proposed LIBOR-specific provisions under proposed § 1026.55(b)(7)(ii), rather than using the unavailability provision in proposed § 1026.55(b)(7)(i). The Bureau solicits comment on this proposed approach and example.

55(b)(7)(i)

Section 1026.55(a) prohibits a card issuer from increasing an APR or certain enumerated fees or charges set forth in § 1026.55(a) on a credit card account under an open-end (not home-secured) consumer credit plan, except as provided in § 1026.55(b). Section 1026.55(b)(2) provides that a card issuer may increase an APR when: (1) the APR varies according to an index that is not under the card issuer's control and is available to the general public; and (2) the increase in the APR is due to an increase in the index. Comment 55(b)(2)-6 provides that a card issuer may change the index and margin used to determine the APR under § 1026.55(b)(2) if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and margin will produce a rate similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate substantially similar to the rate in effect when the original index became unavailable.

The Proposal

The Bureau is proposing to move the unavailability provisions in current comment 55(b)(2)-6 to proposed § 1026.55(b)(7)(i) and to revise the proposed moved provisions for clarity and consistency. Proposed § 1026.55(b)(7)(i) provides that a card issuer may increase an APR when the card issuer changes the index and margin used to determine the APR if the original index becomes unavailable, as long as (1) the historical fluctuations in the original and replacement indices were substantially similar; and (2) the replacement index and replacement margin will produce a rate substantially similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce a rate substantially similar to the rate in effect when the original index became unavailable.

The Bureau also is proposing comments 55(b)(7)(i)-1 through -2 with respect to proposed § 1026.55(b)(7)(i). For example, to reduce uncertainty with respect to selecting a replacement index that meets the standards under proposed § 1026.55(b)(7)(i), the Bureau is proposing to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. The Bureau also is proposing to determine that certain spread-adjusted indices based on SOFR recommended by the ARRC have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. The Bureau is proposing to make these revisions and provide additional detail, in case card issuers use the unavailability provisions in proposed § 1026.55(b)(7)(i) to replace a LIBOR index used for credit card accounts, as discussed in more detail above in the section-by-section analysis of proposed § 1026.55(b)(7).

Proposed § 1026.55(b)(7)(i) differs from current comment 55(b)(2)-6 in three ways. First, proposed § 1026.55(b)(7)(i) provides that if an index that is not newly established is used to replace the original index, the replacement index and replacement margin will produce a rate "substantially similar" to the rate that was in effect at the time the original index became unavailable. Currently, comment 55(b)(2)-6 uses the term "similar" instead of "substantially similar" for the comparison of these rates. Nonetheless, comment 55(b)(2)-6 provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if it produces a rate "substantially similar" to the rate in effect when the original index became unavailable. To correct this inconsistency between the comparison of rates when an existing replacement index is used and when a newly established index is used, the Bureau is proposing to use "substantially similar" consistently in proposed § 1026.55(b)(7)(i) for the comparison of rates. As discussed in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A), the Bureau also is proposing to use "substantially similar" as the standard for the comparison of rates for HELOC plans when the LIBOR index used under the plan becomes unavailable.

Second, proposed § 1026.55(b)(7)(i) differs from current comment 55(b)(2)-6 in that the proposed provision makes clear that a card issuer that is using a newly established index may also adjust the margin so that the newly established index and replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable. The newly established index may not have the same index value as the original index, and the card issuer may need to adjust the margin to meet the condition that the newly established index and replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable.

Third, proposed § 1026.55(b)(7)(i) differs from current comment 55(b)(2)-6 in that the proposed provision uses the term "the replacement index and replacement margin" instead of "the replacement index and margin" to make clear when proposed § 1026.55(b)(7)(i) is referring to a replacement margin and not the original margin.

To effectuate the purposes of TILA and to facilitate compliance, the Bureau is proposing to use its TILA section 105(a) authority to propose § 1026.55(b)(7)(i). TILA section 105(a)[88] directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. The Bureau is proposing this exception to facilitate compliance with TILA and effectuate its purposes. Specifically, the Bureau interprets "facilitate compliance" to include enabling or fostering continued operation in conformity with the law.

The Bureau is proposing to move comment 55(b)(2)-6 to proposed § 1026.55(b)(7)(i) as an exception to the general rule in current § 1026.55(a) restricting rate increases. The Bureau believes that an index change could produce a rate increase at the time of the replacement or in the future. The Bureau is proposing to provide this exception to the general rule in § 1026.55(a) in the circumstances in which an index becomes unavailable in the limited conditions set forth in

[88] 15 U.S.C. 1604(a).

proposed § 1026.55(b)(7)(i) to enable or foster continued operation in conformity with the law. If the index that is used under a credit card account under an open-end (not home-secured) consumer credit plan becomes unavailable, the card issuer would need to replace the index with another index, so the rate remains a variable rate under the plan. The Bureau is proposing this exception to facilitate compliance with the rule by allowing the card issuer to maintain the rate as a variable rate, which is also likely to be consistent with the consumer's expectation that the rate on the account will be a variable rate. The Bureau is not aware of legislative history suggesting that Congress intended card issuers, in this case, to be required to convert variable-rate plans to a non-variable-rate plans when the index becomes unavailable.

The Bureau solicits comments on proposed § 1026.55(b)(7)(i) and proposed comments 55(b)(7)(i)-1 through -2. The proposed comments are discussed in more detail below.

Historical fluctuations substantially similar for the LIBOR index and replacement index. Proposed comment 55(b)(7)(i)-1 provides detail on determining whether a replacement index that is not newly established has "historical fluctuations" that are "substantially similar" to those of the LIBOR index used under the plan for purposes of proposed § 1026.55(b)(7)(i). Specifically, proposed comment 55(b)(7)(i)-1 provides that for purposes of replacing a LIBOR index used under a plan pursuant to § 1026.55(b)(7)(i), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier. To facilitate compliance, proposed comment 55(b)(7)(i)-1.i includes a proposed determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices and includes a placeholder for the date when this proposed determination would be effective, if adopted in the final rule.[89] The Bureau understands that some card issuers may choose to replace a LIBOR index with Prime. Proposed comment 55(b)(7)(i)-1.i also clarifies that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(i) that Prime and the replacement margin will produce a rate substantially similar to the rate that was in effect at the time the LIBOR index became unavailable. This condition for comparing the rates under proposed § 1026.55(b)(7)(i) is discussed in more detail below.

To facilitate compliance, proposed comment 55(b)(7)(i)-1.ii provides a proposed determination that the spread-adjusted indices based on SOFR recommended by the ARRC to replace the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices respectively. The proposed comment provides a placeholder for the date when this proposed determination would be effective, if adopted in the final rule.[90] The Bureau is proposing this determination in case some card issuers choose to replace a LIBOR index with the SOFR-based spread-adjusted index.

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[89] See the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau proposing this determination.

[90] See the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau proposing this determination. Also, as discussed in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A), the Bureau solicits comment on whether the Bureau should alternatively consider these SOFR-based spread-adjusted indices to be newly established indices for purposes of proposed § 1026.55(b)(7)(i), to the extent these indices are not being published by the effective date of the final rule, if adopted.

Proposed comment 55(b)(7)(i)-1.ii also clarifies that in order to use this SOFR-based spread-adjusted index as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(i) that the SOFR-based spread-adjusted index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. This condition under proposed § 1026.55(b)(7)(i) is discussed in more detail below. Also, as discussed in more detail below, the Bureau solicits comment on whether the Bureau in the final rule, if adopted, should provide for purposes of proposed § 1026.55(b)(7)(i) that the rate using the SOFR-based spread-adjusted index is "substantially similar" to the rate in effect at the time the LIBOR index becomes unavailable, so long as the card issuer uses as the replacement margin the same margin in effect on the day that the LIBOR index becomes unavailable.

The Bureau also solicits comment on whether there are other indices that are not newly established for which the Bureau should make a determination that the index has historical fluctuations that are substantially similar to those of the LIBOR indices for purposes of proposed § 1026.55(b)(7)(i). If so, what are these other indices, and why should the Bureau make such a determination with respect to those indices?

Newly established index as replacement for a LIBOR index. Proposed § 1026.55(b)(7)(i) provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce an APR substantially similar to the rate in effect when the original index became unavailable. The Bureau solicits comment on whether the Bureau should provide any additional guidance on, or regulatory changes addressing, when an index is newly established with respect to replacing the LIBOR indices for purposes of proposed § 1026.55(b)(7)(i). The Bureau also solicits comment on whether the Bureau should provide any examples of indices that are newly established with respect to replacing the LIBOR indices for purposes of § 1026.55(b)(7)(i). If so, what are these indices and why should the Bureau determine these indices are newly established with respect to replacing the LIBOR indices?

Substantially similar rate when LIBOR becomes unavailable. Under proposed § 1026.55(b)(7)(i), the replacement index and replacement margin must produce an APR substantially similar to the rate that was in effect based on the LIBOR index used under the plan when the LIBOR index became unavailable. Proposed comment 55(b)(7)(i)-2 explains that for the comparison of the rates, a card issuer must use the value of the replacement index and the LIBOR index on the day that LIBOR becomes unavailable. The Bureau solicits comment on whether it should address the situation where the replacement index is not be published on the day that the LIBOR index becomes unavailable. For example, should the Bureau provide that if the replacement index is not published on the day that the LIBOR index becomes unavailable, the card issuer must use the previous calendar day that both indices are published as the date on which the annual percentage rate based on the replacement index must be substantially similar to the rate based on the LIBOR index?

Proposed comment 55(b)(7)(i)-2 clarifies that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. Proposed comment 55(b)(7)(i)-2.i provides an example to illustrate this comment.

The Bureau believes that it may raise compliance issues if the rate calculated using the replacement index and replacement margin at the time the replacement index and replacement margin became effective had to be substantially similar to the rate calculated using the LIBOR index on the date that the LIBOR index became unavailable. Specifically, under § 1026.9(c)(2), the card issuer must provide a change-in-terms notice of the replacement index and replacement margin (including disclosing any reduced margin in change-in-terms notices provided on or after October 1, 2021, which would be required under proposed § 1026.9(c)(2)(v)(A)) at least 45 days prior to the effective date of the changes. The Bureau believes that this advance notice is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced. Because advance notice of the changes must be given prior to the changes becoming effective, a card issuer would not be able to ensure that the rate based on the replacement index and margin at the time the change-in-terms notice becomes effective will be substantially similar to the rate calculated using the LIBOR index in effect at the time the LIBOR index becomes unavailable. The value of the replacement index may change after the LIBOR index becomes unavailable and before the change-in-terms notice becomes effective.

The Bureau notes that proposed § 1026.55(b)(7)(i) would require a card issuer to use the index values of the replacement index and the original index on a single day (namely, the day that the original index becomes unavailable) to compare the rates to determine if they are "substantially similar." In using a single day to compare the rates, this proposed provision is consistent with the condition in the unavailability provision in current comment 55(b)(2)-6, in the sense that it provides that the new index and margin must result in an APR that is substantially similar to the rate in effect on a single day. For the reasons discussed in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A), the Bureau solicits comment on whether the Bureau should adopt a different approach to determine whether a rate using the replacement index is "substantially similar" to the rate using the original index for purposes of § 1026.55(b)(7)(i) and, if so, what criteria the Bureau should use in selecting such a different approach. For example, the Bureau solicits comment on whether it should require card issuers to use a historical median or average of the spread between the replacement index and the original index over a certain time frame (*e.g.*, the time period the historical data are available or 5 years, whichever is shorter) for purposes of determining whether a rate using the replacement index is "substantially similar" to the rate using the original index. The Bureau also solicits comments on any compliance challenges that might arise as a result of adopting a potentially more complicated method of comparing the rates calculated using the replacement index and the rates calculated using the original index, and for any identified compliance challenges, how the Bureau could ease those compliance challenges.

For the reasons discussed in more detail in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A), the Bureau is not proposing to address for purposes of proposed § 1026.55(b)(7)(i) when a rate calculated using the replacement index and replacement margin is "substantially similar" to the rate in effect when the LIBOR index becomes unavailable. The Bureau solicits comment, however, on whether the Bureau should provide guidance on, or regulatory changes addressing, the "substantially similar" standard in comparing the rates for purposes of proposed § 1026.55(b)(7)(i), and if so, what guidance, or regulatory changes, the Bureau should provide. For example, should the Bureau provide a range of rates that would be considered "substantially similar" as described above, and if so, how should the range be determined? Should the range of rates depend on context, and if so, what contexts should be considered? As an alternative to the range of rates approach, the Bureau solicits comment on whether it should provide factors that card issuers must consider in deciding whether the rates are "substantially similar" and if so, what those factors should be. Are there other approaches the Bureau should consider for addressing the "substantially similar" standard for comparing rates?

As discussed above, proposed comment 55(b)(7)(i)-1.ii clarifies that in order to use the SOFR-based spread-adjusted index as the replacement index for the applicable LIBOR index, the card issuer must comply with the condition in § 1026.55(b)(7)(i) that the SOFR-based spread-adjusted index and replacement margin would have resulted in an APR substantially similar to the rate in effect at the time the LIBOR index became unavailable. For the reasons discussed in more detail in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A), the Bureau solicits comment on whether the Bureau in the final rule, if adopted, should provide for purposes of proposed § 1026.55(b)(7)(i) that the rate using the SOFR-based spread-adjusted index is "substantially similar" to the rate in effect at the time the LIBOR index becomes unavailable, so long as the card issuer uses as the replacement margin the same margin in effect on the day that the LIBOR index becomes unavailable.

55(b)(7)(ii)

The Proposal

For the reasons discussed below and in the section-by-section analysis of proposed § 1026.55(b)(7), the Bureau is proposing to add new LIBOR-specific provisions to proposed § 1026.55(b)(7)(ii) that would permit card issuers for a credit card account under an open-end (not home-secured) consumer credit plan that uses a LIBOR index under the plan for calculating variable rates to replace the LIBOR index and change the margins for calculating the variable rates on or after March 15, 2021, in certain circumstances. Specifically, proposed § 1026.55(b)(7)(ii) provides that if a variable rate on a credit card account under an open-end (not home-secured) consumer credit plan is calculated using a LIBOR index, a card issuer may replace the LIBOR index and change the margin for calculating the variable rate on or after March 15, 2021, as long as (1) the historical fluctuations in the LIBOR index and replacement index were substantially similar; and (2) the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed § 1026.55(b)(7)(ii) also provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. In addition, proposed § 1026.55(b)(7)(ii) provides that if either the LIBOR index or the replacement index is not published on December 31, 2020, the card issuer must use the next calendar day that both indices are published as the date on which the APR based on the replacement index must be substantially similar to the rate based on the LIBOR index.

In addition, the Bureau is proposing to add detail in proposed comments 55(b)(7)(ii)-1 through -3 on the conditions set forth in proposed § 1026.55(b)(7)(ii). For example, to reduce uncertainty with respect to selecting a replacement index that meets the standards in proposed § 1026.55(b)(7)(ii), the Bureau is proposing to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of certain USD LIBOR indices. The Bureau also is proposing to determine that certain spread-adjusted indices based on SOFR recommended by the ARRC have historical fluctuations that are substantially similar to those of certain USD LIBOR indices. Proposed § 1026.55(b)(7)(ii) and proposed comments

55(b)(7)(ii)-1 through -3 applicable to credit card accounts under an open-end (not home-secured) consumer credit plan are similar to the LIBOR-specific provisions set forth in proposed § 1026.40(f)(3)(ii)(B) and proposed comments 40(f)(3)(ii)(B)-1 through -3 applicable to HELOCs subject to § 1026.40.

To effectuate the purposes of TILA and to facilitate compliance, the Bureau is proposing to use its TILA section 105(a) authority to propose new LIBOR-specific provisions under proposed § 1026.55(b)(7)(ii). TILA section 105(a)[91] directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance. The Bureau is proposing this exception to facilitate compliance with TILA and effectuate its purposes. Specifically, the Bureau interprets "facilitate compliance" to include enabling or fostering continued operation in conformity with the law.

The Bureau is proposing to set March 15, 2021, as the date on or after which card issuers are permitted to replace the LIBOR index used for a credit card account under an open-end (not home-secured) consumer credit plan under the plan pursuant to proposed § 1026.55(b)(7)(ii) prior to LIBOR becoming unavailable to facilitate compliance with the change-in-terms notice requirements applicable to card issuers by allowing them to provide the 45-day change-in-terms notices required under § 1026.9(c)(2) prior to the LIBOR indices becoming unavailable. This proposed change will allow those card issuers to avoid being left without a LIBOR index to use

[91] 15 U.S.C. 1604(a).

in calculating the variable rate before the replacement index and margin become effective. Also, it will allow card issuers to provide the change-in-terms notices, and replace the LIBOR index used under the plans, on accounts on a rolling basis, rather than having to provide the change-in-terms notices, and replace the LIBOR index, for all its accounts at the same time when the LIBOR index used under the plan becomes unavailable.

Without the proposed LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii), as a practical matter, card issuers would have to wait until LIBOR becomes unavailable to provide the 45-day change-in-terms notice under § 1026.9(c)(2) disclosing the replacement index and replacement margin (including disclosing any reduced margin in change-in-terms notices provided on or after October 1, 2021, which would be required under proposed § 1026.9(c)(2)(v)(A)). The Bureau believes that this advance notice is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced.

Card issuers would not be able to send out change-in-terms notices disclosing the replacement index and replacement margin prior to the LIBOR indices becoming unavailable for several reasons. First, although LIBOR is expected to become unavailable around the end of 2021, there is no specific date known with certainty on which LIBOR will become unavailable. Thus, card issuers could not send out the change-in-terms notices prior to the LIBOR index becoming unavailable because they will not know when it will become unavailable and thus would not know when to make the replacement index and replacement margin effective on the account.

Second, card issuers would need to know the index values of the LIBOR index and the replacement index prior to sending out the change-in-terms notice so that they could disclose the replacement margin in the change-in-terms notice. Card issuers will not know these index values until the day that LIBOR becomes unavailable. Thus, card issuers would have to wait until the LIBOR indices become unavailable before the card issuer could send the 45-day change-in-terms notice under § 1026.9(c)(2) to replace the LIBOR index with a replacement index. Some card issuers could be left without a LIBOR index value to use during the 45-day period before the replacement index and replacement margin become effective, depending on their existing contractual terms. The Bureau is concerned this could cause compliance and systems issues.

Also, as discussed in part III, the industry has raised concerns that LIBOR may continue for some time after December 2021 but become less representative or reliable until LIBOR finally is discontinued. Allowing card issuers to replace the LIBOR indices on existing credit card accounts prior to the LIBOR indices becoming unavailable may address some of these concerns.

The Bureau solicits comments on proposed § 1026.55(b)(7)(ii) and proposed comments 55(b)(7)(ii)-1 through -3. The proposed comments are discussed in more detail below.

Consistent conditions with proposed § 1026.55(b)(7)(i). The Bureau is proposing conditions in the LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii) for how a card issuer must select a replacement index and compare rates that are consistent with the conditions set forth in the unavailability provisions set forth in proposed § 1026.55(b)(7)(i). For example, the availability provisions in proposed § 1026.55(b)(7)(i) and the LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii) contain a consistent requirement that the APR calculated using the replacement index must be "substantially similar" to the rate calculated using the LIBOR index.[92] In addition, both proposed § 1026.55(b)(7)(i) and (ii) would allow a card issuer to use an index that is not newly established as a replacement index only if the index has historical fluctuations that are substantially similar to those of the LIBOR index.

For several reasons, the Bureau is proposing to keep the conditions for these two provisions consistent. First, as discussed above in the section-by-section analysis of proposed § 1026.55(b)(7), to the extent some card issuers may need to wait until the LIBOR indices become unavailable to transition to a replacement index because of contractual reasons, the Bureau believes that keeping the conditions consistent in the unavailability provisions in proposed § 1026.55(b)(7)(i) and the LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii) will help ensure that card issuers must meet consistent conditions in selecting a replacement index and setting the rates, regardless of whether they are using the unavailability provisions in proposed § 1026.55(b)(7)(i), or the LIBOR-specific provisions in proposed § 1026.55(b)(7)(ii).

Second, most card issuers may have the ability to choose between the unavailability provisions and LIBOR-specific provisions to switch away from using a LIBOR index, and if the conditions between those two provisions are inconsistent, these differences could undercut the purpose of the LIBOR-specific provisions to allow card issuers to switch out earlier. For example, if the conditions for selecting a replacement index or setting the rates were stricter in the LIBOR-specific provisions than in the unavailability provisions, this may cause a card issuer to wait until the LIBOR indices become unavailable to switch to a replacement index, which

[92] The conditions in proposed § 1026.55(b)(7)(i) and (ii) are consistent, but they are not the same. For example, although both proposed provisions use the "substantially similar" standard to compare the rates, they use different dates for selecting the index values in calculating the rates. The proposed provisions differ in the timing of when card issuers are permitted to transition away from LIBOR, which creates some differences in how the conditions apply.

would undercut the purpose of the LIBOR-specific provisions to allow card issuers to switch out earlier and prevent these card issuers from having the time required to transition from using a LIBOR index.

Historical fluctuations substantially similar for the LIBOR index and replacement index. Proposed comment 55(b)(7)(ii)-1 provides detail on determining whether a replacement index that is not newly established has "historical fluctuations" that are "substantially similar" to those of the LIBOR index used under the plan for purposes of proposed § 1026.55(b)(7)(ii). Specifically, proposed comment 55(b)(7)(ii)-1 provides that for purposes of replacing a LIBOR index used under a plan pursuant to proposed § 1026.55(b)(7)(ii), a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through December 31, 2020, or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier. The Bureau is proposing the December 31, 2020, date to be consistent with the date that card issuers generally must use for selecting the index values to use in comparing the rates under proposed § 1026.55(b)(7)(ii). The Bureau solicits comment on the December 31, 2020 date for purposes of proposed comment 55(b)(7)(ii)-1 and whether another date or timeframe would be more appropriate for purposes of that proposed comment.

To facilitate compliance, proposed comment 55(b)(7)(ii)-1.i includes a proposed determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR indices and includes a placeholder for the date when this proposed determination would be effective, if adopted in the final rule.[93] The Bureau understands some card issuers may choose to replace a LIBOR index with Prime. Proposed comment 55(b)(7)(ii)-1.i also clarifies that in order to use Prime as the replacement index for the 1-month or 3-month USD LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(ii) that the Prime index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If either the LIBOR index or the prime rate is not published on December 31, 2020, the card issuer must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the prime rate must be substantially similar to the rate based on the LIBOR index. This condition for comparing the rates under proposed § 1026.55(b)(7)(ii) is discussed in more detail below.

To facilitate compliance, proposed comment 55(b)(7)(ii)-1.ii provides a proposed determination that the spread-adjusted indices based on SOFR recommended by the ARRC to replace the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices respectively. The proposed comment provides a placeholder for the date when this proposed determination would be effective, if adopted in the final rule.[94] The Bureau

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[93] See the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau proposing this determination.

[94] See the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A) for a discussion of the rationale for the Bureau proposing this determination. Also, as discussed in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(A), the Bureau solicits comment on whether the Bureau should alternatively consider these

is making this proposed determination in case some card issuers choose to replace a LIBOR index with the SOFR-based spread-adjusted index. Proposed comment 55(b)(7)(ii)-1.ii also clarifies that in order to use this SOFR-based spread-adjusted index as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(ii) that the SOFR-based spread-adjusted index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If either the LIBOR index or the SOFR-based spread-adjusted index is not published on December 31, 2020, the card issuer must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the SOFR-based spread-adjusted index must be substantially similar to the rate based on the LIBOR index. This condition for comparing the rates under proposed § 1026.55(b)(7)(ii) is discussed in more detail below. For the reasons discussed below, the Bureau solicits comment on whether the Bureau in the final rule, if adopted, should provide for purposes of proposed § 1026.55(b)(7)(ii) that the rate using the SOFR-based spread-adjusted index is "substantially similar" to the rate calculated using the LIBOR index, so long as the card issuer uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index.

The Bureau also solicits comment on whether there are other indices that are not newly established for which the Bureau should make a determination that the index has historical fluctuations that are substantially similar to those of the LIBOR indices for purposes of proposed

SOFR-based spread-adjusted indices to be newly established indices for purposes of proposed § 1026.55(b)(7)(ii), to the extent these indices are not being published by the effective date of the final rule, if adopted.

§ 1026.55(b)(7)(ii). If so, what are these other indices, and why should the Bureau make such a determination with respect to those indices?

Newly established index as replacement for a LIBOR index. Proposed § 1026.55(b)(7)(ii) provides that if the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on December 31, 2020, and the replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The Bureau solicits comment on whether the Bureau should provide any additional guidance on, or regulatory changes addressing, when an index is newly established with respect to replacing the LIBOR indices for purposes of proposed § 1026.55(b)(7)(ii). The Bureau also solicits comment on whether the Bureau should provide any examples of indices that are newly established with respect to replacing the LIBOR indices for purposes of § 1026.55(b)(7)(ii). If so, what are these indices and why should the Bureau determine these indices are newly established with respect to replacing the LIBOR indices?

Substantially similar rate using index values on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Under proposed § 1026.55(b)(7)(ii), if both the replacement index and LIBOR index used under the plan are published on December 31, 2020, the replacement index value in effect on December 31, 2020, and replacement margin must produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. Proposed comment 55(b)(7)(ii)-2 explains that the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the card issuer provides the change-in-terms notice disclosing the replacement index for the variable rate. Proposed comment 55(b)(7)(ii)-2.i and ii provides examples to illustrate this comment for the following two different scenarios: (1) when the margin used to calculate the variable rate is increased pursuant to § 1026.55(b)(3) for new transactions; and (2) when the margin used to calculate the variable rate is increased for the outstanding balances and new transactions pursuant to § 1026.55(b)(4) because the consumer pays the minimum payment more than 60 days late. In both these proposed examples, the change in the margin occurs after December 31, 2020, but prior to date that the card issuer provides a change-in-term notice under § 1026.9(c)(2), disclosing the replacement index for the variable rates.

In calculating the comparison rates using the replacement index and the LIBOR index used under a credit card account under an open-end (not home-secured) consumer credit plan, the Bureau generally is proposing to require card issuers to use the index values for the replacement index and the LIBOR index in effect on December 31, 2020. The Bureau is proposing to require card issuers to use these index values to promote consistency for card issuers and consumers in which index values are used to compare the two rates. Under proposed § 1026.55(b)(7)(ii), card issuers are permitted to replace the LIBOR index used under the plan and adjust the margin used in calculating the variable rate used under the plan on or after March 15, 2021, but card issuers may vary in the timing of when they provide change-in-terms notices to replace the LIBOR index used on their credit card accounts and when these replacements become effective. For example, one card issuer may replace the LIBOR index used under its credit card plans in April 2021, while another card issuer may replace the LIBOR index used under its credit card plans in

October 2021. In addition, a card issuer may not replace the LIBOR index used under its credit card plans at the same time. For example, a card issuer may replace the LIBOR index used under some of its credit card plans in April 2021 but replace the LIBOR index used under other of its credit card plans in May 2021. Nonetheless, regardless of when a particular card issuer replaces the LIBOR index used under its credit card plans, proposed § 1026.55(b)(7)(ii) generally would require that all card issuers to use the index values for the replacement index and the LIBOR index in effect on December 31, 2020, to promote consistency for card issuers and consumers in which index values are used to compare the two rates.

In addition, using the December 31, 2020 date for the index values in comparing the rates may allow card issuers to send out change-in-terms notices prior to March 15, 2021, and have the changes be effective on March 15, 2021, the proposed date on or after which card issuers would be permitted to switch away from using LIBOR as an index on an existing credit card account under proposed § 1026.55(b)(7)(ii). If the Bureau instead required card issuers to use the index values on March 15, 2021, card issuers as a practical matter would not be able to provide change-in-terms notices of the replacement index and any adjusted margin until after March 15, 2021, because they would need the index values from that date in order to calculate the replacement margin. Thus, using the index values on March 15, 2021, would delay when card issuers could switch away from using LIBOR as an index on an existing credit card account.

Also, as discussed in part III, the industry has raised concerns that LIBOR may continue for some time after December 2021 but become less representative or reliable until LIBOR finally is discontinued. Using the index values for the replacement index and the LIBOR index used under the plan in effect on December 31, 2020, may address some of these concerns.

The Bureau solicits comment specifically on the use of the December 31, 2020 index values in calculating the comparison rates under proposed § 1026.55(b)(7)(ii).

Proposed § 1026.55(b)(7)(ii) provides one exception to the proposed general requirement to use the index values for the replacement index and the LIBOR index used under the plan in effect on December 31, 2020. Proposed § 1026.55(b)(7)(ii) provides that if either the LIBOR index or the replacement index is not published on December 31, 2020, the card issuer must use the next calendar day that both indices are published as the date on which the APR based on the replacement index must be substantially similar to the rate based on the LIBOR index.

As discussed above, proposed § 1026.55(b)(7)(ii) would require a card issuer to use the index values of the replacement index and the LIBOR index on a single day (generally December 31, 2020)[95] to compare the rates to determine if they are "substantially similar." In using a single day to compare the rates, this proposed provision is consistent with the condition in the unavailability provision in current comment 55(b)(2)-6, in the sense that it provides that the new index and margin must result in an APR that is substantially similar to the rate in effect on a single day. For the reasons discussed in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(B), the Bureau solicits comment on whether the Bureau should adopt a different approach to determine whether a rate using the replacement index is "substantially similar" to the rate using the LIBOR index for purposes of proposed § 1026.55(b)(7)(ii). For example, the Bureau solicits comment on whether it should require card issuers to use a historical median or average of the spread between the replacement index and the LIBOR index over a certain time frame (*e.g.*, the time period the historical data are available or 5 years,

[95] If one or both of the indices are not available on December 31, 2020, proposed § 1026.55(b)(7)(ii) would require that the card issuer use the index values of the indices on the next calendar day that both indices are published.

whichever is shorter) for purposes of determining whether a rate using the replacement index is "substantially similar" to the rate using the LIBOR index The Bureau also solicits comments on any compliance challenges that might arise as a result of adopting a potentially more complicated method of comparing the rates calculated using the replacement index and the rates calculated using the LIBOR index, and for any identified compliance challenges, how the Bureau could ease those compliance challenges.

Under proposed § 1026.55(b)(7)(ii), in calculating the comparison rates using the replacement index and the LIBOR index used under the plan, the card issuer must use the margin that applied to the variable rate immediately prior to when the card issuer provides the change-in-terms notice disclosing the replacement index for the variable rate. The Bureau is proposing that card issuers must use this margin, rather than the margin that applied to the variable rate on December 31, 2020. The Bureau recognizes that card issuers in certain instances may change the margin that is used to calculate the LIBOR variable rate after December 31, 2020, but prior to when the card issuer provides a change-in-terms notice to replace the LIBOR index used under the plan. If the Bureau were to require that the card issuer use the margin that applied to the variable rate on December 31, 2020, this would undo any margin changes that occurred after December 31, 2020, but prior to the card issuer providing a change-in-terms notice of the replacement of the LIBOR index used under the plan, which is inconsistent with the purpose of the comparisons of the rates under proposed § 1026.55(b)(7)(ii).

Proposed comment 55(b)(7)(ii)-3 clarifies that the replacement index and replacement margin are not required to produce an APR that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. Proposed comment 55(b)(7)(ii)-3.i provides an example to illustrate this comment.

The Bureau believes that it may raise compliance issues if the rate calculated using the replacement index and replacement margin at the time the replacement index and replacement margin became effective had to be substantially similar to the rate calculated using the LIBOR index in effect on December 31, 2020. Under § 1026.9(c)(2), the card issuer must provide a change-in-terms notice of the replacement index and replacement margin (including disclosing a reduced margin in a change-in-terms notice provided on or after October 1, 2021, which would be required under proposed § 1026.9(c)(2)(v)(A)) at least 45 days prior to the effective date of the changes. The Bureau believes that this advance notice is important to consumers to inform them of how variable rates will be determined going forward after the LIBOR index is replaced. Because advance notice of the changes must be given prior to the changes becoming effective, a card issuer would not be able to ensure that the rate based on the replacement index and margin at the time the change-in-terms notice becomes effective will be substantially similar to the rate calculated using the LIBOR index in effect on December 31, 2020. The value of the replacement index may change after December 31, 2020, and before the change-in-terms notice becomes effective.

For the reasons discussed in more detail in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(B), the Bureau is not proposing to address for purposes of proposed § 1026.55(b)(7)(ii) when a rate calculated using the replacement index and replacement margin is "substantially similar" to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The Bureau solicits comment, however, on whether the Bureau should provide guidance on, or regulatory changes addressing, the "substantially similar" standard in comparing the rates for purposes of proposed

§ 1026.55(b)(7)(ii), and if so, what guidance, or regulatory changes, the Bureau should provide. For example, should the Bureau provide a range of rates that would be considered "substantially similar" as described above, and if so, how should the range be determined? Should the range of rates depend on context, and if so, what contexts should be considered? As an alternative to the range of rates approach, the Bureau solicits comment on whether it should provide factors that card issuers must consider in deciding whether the rates are "substantially similar" and if so, what those factors should be. Are there other approaches the Bureau should consider for addressing the "substantially similar" standard for comparing rates?

As discussed above, proposed comment 55(b)(7)(ii)-1.ii clarifies that in order to use the SOFR-based spread-adjusted index as the replacement index for the applicable LIBOR index, the card issuer must comply with the condition in § 1026.55(b)(7)(ii) that the SOFR-based spread-adjusted index value in effect on December 31, 2020, and replacement margin will produce an APR substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If either the LIBOR index or the SOFR-based spread-adjusted index is not published on December 31, 2020, the card issuer must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the SOFR-based spread-adjusted index must be substantially similar to the rate based on the LIBOR index. For the reasons discussed in the section-by-section analysis of proposed § 1026.40(f)(3)(ii)(B), the Bureau solicits comment on whether the Bureau in the final rule, if adopted, should provide for purposes of proposed § 1026.55(b)(7)(ii) that the rate using the SOFR-based spread-adjusted index is "substantially similar" to the rate calculated using the LIBOR index, so long as the card issuer uses as the replacement margin the same margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

Section 1026.59 Reevaluation of Rate Increases

TILA section 148, which was added by the Credit CARD Act, provides that if a creditor increases the APR applicable to a credit card account under an open-end consumer credit plan, based on factors including the credit risk of the obligor, market conditions, or other factors, the creditor shall consider changes in such factors in subsequently determining whether to reduce the APR for such obligor.[96] Section 1026.59 implements this provision. The provisions in § 1026.59 generally apply to card issuers that increase an APR applicable to a credit card account, based on the credit risk of the consumer, market conditions, or other factors. For any rate increase imposed on or after January 1, 2009, card issuers are required to review the account no less frequently than once each six months and, if appropriate based on that review, reduce the APR. The requirement to reevaluate rate increases applies both to increases in APRs based on consumer-specific factors, such as changes in the consumer's creditworthiness, and to increases in APRs imposed based on factors that are not specific to the consumer, such as changes in market conditions or the card issuer's cost of funds. If based on its review a card issuer is required to reduce the rate applicable to an account, the rule requires that the rate be reduced within 45 days after completion of the evaluation. Section 1026.59(f) requires that a card issuer continue to review a consumer's account each six months unless the rate is reduced to the rate in effect prior to the increase.

[96] 15 U.S.C. 1665c.

As discussed in part III, the industry has raised concerns about how the requirements in § 1026.59 would apply to accounts that are transitioning away from using LIBOR indices. The Bureau believes that the sunset of the LIBOR indices and transition to a new index for credit card accounts presents two interrelated issues with respect to compliance with § 1026.59 generally. First, the transition from a LIBOR index to a different index on an account under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) may constitute a rate increase for purposes of whether an account is subject to § 1026.59. Under current § 1026.59 that potential rate increase could occur at the time of transition from the LIBOR index to a different index, or it could occur at a later time. Second, § 1026.59(f) states that, once an account is subject to the general provisions of § 1026.59, the obligation to review factors under § 1026.59(a) ceases to apply if the card issuer reduces the APR to a rate equal to or less than the rate applicable immediately prior to the increase, or if the rate immediately prior to the increase was a variable rate, to a rate equal to or less than a variable rate determined by the same index and margin that applied prior to the increase. In the case where the LIBOR index is no longer available to serve as the "same index" that applied prior to the increase, the current regulation does not provide a mechanism by which a card issuer can determine the rate at which it can discontinue the obligation to review factors.

The proposed revisions and additions to the regulation and commentary of § 1026.59 are meant to address these two issues. With respect to the first issue, the addition of proposed § 1026.59(h) excepts rate increases that occur as a result of the transition from the LIBOR index to another index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) from triggering the requirements of § 1026.59. The proposed provision does not except rate increases already subject to the requirements of § 1026.59 prior to the transition from the LIBOR index from the requirements of § 1026.59. With respect to the second issue, proposed § 1026.59(f)(3) provides a mechanism by which card issuers can determine the rate at which they can discontinue the obligations under § 1026.59 where the rate applicable immediately prior to the increase was a variable rate with a formula based on a LIBOR index.

As discussed in more detail below, the Bureau also is proposing technical edits to comment 59(d)-2 to replace references to LIBOR with references to the SOFR index.

59(d) Factors

Section 1026.59(d) identifies the factors that card issuers must review if they increase an APR that applies to a credit card account under an open-end (not home-secured) consumer credit plan. Under § 1026.59(a), if a card issuer evaluates an existing account using the same factors that it considers in determining the rates applicable to similar new accounts, the review of factors need not result in existing accounts being subject to exactly the same rates and rate structure as a creditor imposes on similar new accounts. Comment 59(d)-2 provides an illustrative example in which a creditor may offer variable rates on similar new accounts that are computed by adding a margin that depends on various factors to the value of the LIBOR index. In light of the anticipated discontinuation of LIBOR, the proposed rule would amend the example in comment 59(d)-2 to substitute a SOFR index for the LIBOR index. The proposed rule would also make technical changes for clarity by changing “prime rate” to “prime index.” In addition, the proposed rule would change “creditor” to “card issuer” in the comment to be consistent with the terminology used in § 1026.59.

59(f) Termination of the Obligation to Review Factors

59(f)(3)

Current § 1026.59(f) provides that the obligation to review factors under § 1026.59(a) ceases to apply if the card issuer reduces the APR to a rate equal to or less than the rate applicable immediately prior to the increase, or if the rate applicable immediately prior to the increase was a variable rate, to a rate determined by the same index and margin (previous formula) that applied prior to the increase. Once LIBOR is discontinued, it will not be possible for card issuers to use the "same index." Thus, neither current § 1026.59(f)(1) nor § 1026.59(f)(2) would appear to allow termination of the obligation to review.

Accordingly, proposed § 1026.59(f)(3) provides, effective March 15, 2021, a replacement formula that the card issuers can use to terminate the obligation to review factors under § 1026.59(a) when the rate applicable immediately prior to the increase was a variable rate with a formula based on a LIBOR index. Proposed § 1026.59(f)(3) is intended to apply to situations in which a LIBOR index is used as the index in the formula used to determine the rate at which the obligation to review factors ceases,[97] and is intended to cover situations where LIBOR will be discontinued.

Proposed § 1026.59(f)(3), if adopted, will be effective as of March 15, 2021, for accounts that are subject to § 1026.59 and use a LIBOR index as the index in the formula to determine the rate at which a card issuer can cease the obligation to review factors under § 1026.59(a). The

[97] As noted below in the discussion regarding proposed § 1026.59(h)(3), proposed § 1026.59(f)(3) is not intended to apply to rate increases that may result from the switch from a LIBOR index to another index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) as those potential rate increases will be excepted from the provisions of § 1026.59. Proposed § 1026.59(f)(3) is, however, intended to cover rate increases that were already subject to the provisions of § 1026.59 and use a formula under § 1026.59(f) based on a LIBOR index to determine whether to terminate the review obligations under § 1026.59.

Bureau believes that March 15, 2021, may be a reasonable date at which issuers can begin using the replacement formula outlined in proposed § 1026.59(f)(3). It is the date when the proposed rulemaking generally is proposed to be effective and provides issuers with a sufficient amount of time to transition to the replacement formula before the estimated sunset of LIBOR. The Bureau solicits comment on whether proposed § 1026.59(f)(3) should have an effective date different than March 15, 2021.

Proposed § 1026.59(f)(3) provides a replacement formula that issuers can use to determine the rate at which a card issuer can cease the obligation to review factors under § 1026.59(a). Under proposed § 1026.59(f)(3), the replacement formula, which includes the replacement index on December 31, 2020, plus replacement margin, must equal the LIBOR index value on December 31, 2020, plus the margin used to calculate the rate immediately prior to the increase. Proposed § 1026.59(f)(3) also provides that a card issuer must satisfy the conditions set forth in proposed § 1026.55(b)(7)(ii) for selecting a replacement index. The Bureau believes that the conditions set forth in proposed § 1026.55(b)(7)(ii) may provide a reasonable method of selecting a replacement index to the LIBOR index for the reasons set forth in the discussion regarding proposed § 1026.55(b)(7)(ii), above. Proposed comment 59(f)-4 provides further clarification on how the replacement index must be selected and refers to the requirements described in proposed § 1026.55(b)(7)(ii) and proposed comment 55(b)(7)(ii)-1.

Proposed § 1026.59(f)(3) uses, in part, the values of the replacement index and the LIBOR index on December 31, 2020, to determine the replacement formula. The Bureau believes that using the December 31, 2020, value of both indices provides a static and consistent reference point by which to determine the formula and is consistent with the index values used in proposed § 1026.55(b)(7)(ii). If either the replacement index or the LIBOR index is not published on December 31, 2020, the card issuer must use the next available date that both indices are published as the index values to use to determine the replacement formula. Proposed § 1026.59(f)(3) also provides that in calculating the replacement formula, the card issuer must use the margin used to calculate the rate immediately prior to the rate increase.

In essence, the replacement formula is calculated as: (replacement index on December 31, 2020) plus (replacement margin) equals (LIBOR index on December 31, 2020) plus (margin immediately prior to the rate increase). If the replacement index on December 31, 2020, the LIBOR index on December 31, 2020, and the margin immediately prior to the rate increase are known, the replacement margin can be calculated. Once the replacement margin is calculated, the replacement formula is the replacement index value plus the replacement margin value. Proposed comment 59(f)-3 sets forth two examples of how to calculate the replacement formula. Proposed comment 59(f)-3ii.A provides an example of how to calculate the replacement formula in the scenario where the account was subject to § 1026.59 as of March 15, 2021. Proposed comment 59(f)-3ii.B provides an example of how to calculate the replacement formula in the scenario where the account was not subject to § 1026.59 as of March 15, 2021, but does become subject to § 1026.59 prior to the account being transitioned from a LIBOR index in accordance with proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii).

Proposed § 1026.59(f)(3) provides that the replacement formula must *equal* the previous formula, within the context of the timing constraints (namely the value of the replacement and LIBOR indices as of December 31, 2020). The Bureau believes that providing that the rates must match up when determining the replacement formula may provide the fairest way to produce a replacement mechanism where consumers will not be unduly harmed by the transition away from a LIBOR index used in the formula to determine the rate at which a card issuer may cease its review obligation under § 1026.59.

The Bureau recognizes that this may create some inconsistencies in the rates on some accounts. For example, assume that Account A is a variable-rate account with a LIBOR index where an APR increase occurred under § 1026.55(b)(4) prior to the transition from a LIBOR index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). In order to cease the obligation for review on Account A under § 1026.59, the card issuer must reduce the APR on Account A to an amount based on a formula that is "equal" to the LIBOR index value on December 31, 2020, plus the margin immediately prior to the rate increase. In contrast, Account B is a variable-rate account with a LIBOR index that is not subject to § 1026.59. Account B is transitioned from the LIBOR index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) and the resulting APR on Account B must be "substantially similar" to the account's pre-transition rate, which means the rate does not have to exactly equal to the pre-transition rate. Account B is subject to the exception in proposed § 1026.59(h)(3) with respect to the transition away from the LIBOR index, and will not be required to meet the requirements of proposed § 1026.59(f)(3). Thus, Account A and Account B may be treated differently with respect to what rate must be applied to the account. The Bureau solicits comment on whether the standard for proposed § 1026.59(f)(3) should be that the replacement formula should be substantially similar to the previous formula (rather than equal to as in the current proposal) to provide consistency with the language in proposed § 1026.55(b)(7)(ii).

59(h) Exceptions

59(h)(3) Transition from LIBOR Exception

Current § 1026.59(h) provides two situations that are excepted from the requirements of § 1026.59. Proposed § 1026.59(h)(3) would add a third exception based upon the transition from a LIBOR index to a replacement index used in setting a variable rate. Specifically, proposed § 1026.59(h)(3) excepts from the requirements of § 1026.59 increases in an APR that occur as the result of the transition from the use of a LIBOR index as the index in setting a variable rate to the use of a replacement index in setting a variable rate if the change from the use of the LIBOR index to a replacement index occurs in accordance with proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). Proposed comment 59(h)-1 clarifies that the proposed exception to the requirements of § 1026.59 does not apply to rate increases already subject to § 1026.59 prior to the transition from the use of a LIBOR index as the index in setting a variable rate to the use of a different index in setting a variable rate, where the change from the use of a LIBOR index to a different index occurred in accordance with proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii).

The Bureau is proposing this exception because the requirements of proposed § 1026.55(b)(7)(i) and (ii) may provide sufficient protection for the consumers when a card issuer is replacing an index under these circumstances for the reasons listed above in the discussion of proposed § 1026.55(b)(7)(i) and (ii). The Bureau believes that absent this proposed exception, some of the accounts transitioning away from a LIBOR index to a replacement index in setting a variable rate under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) would become subject to the requirements of § 1026.59, either at the time of transition or at a later date. The Bureau believes that the potential for compliance issues in transitioning away from a LIBOR index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii) while also complying with the requirements of § 1026.59 may be heightened. The Bureau is concerned that requiring card issuers to comply with the rate reevaluation requirements under § 1026.59 with respect to the LIBOR transition under § 1026.55(b)(7)(ii) may cause some card issuers to delay the transition away from the LIBOR index so as to avoid the requirements under § 1026.59. Even if the requirements of § 1026.59 were to apply to the LIBOR transition under § 1026.55(b)(7)(ii), the card issuer would likely only be required to perform one review prior to LIBOR's expected discontinuance sometime after December 2021. Nonetheless, the card issuer could avoid this review if it delayed transitioning the account under § 1026.55(b)(7)(ii) so that the transition occurred within six months of when LIBOR is likely to be discontinued. The Bureau does not believe that this delay in the LIBOR transition would benefit card issuers or consumers. The Bureau seeks comment on issuers' understanding as to whether, and to what extent, the accounts in their portfolios will become subject to § 1026.59 in the transition away from a LIBOR index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii), absent the proposed § 1026.59(h)(3) exception. The Bureau also seeks comment on potential compliance issues in transitioning away from a LIBOR index while also becoming subject to the requirements of § 1026.59.

As noted above, proposed comment 59(h)-1 provides clarification that the exception in proposed § 1026.59(h)(3) does not apply to rate increases already subject to the requirements of § 1026.59 prior to the transition away from a LIBOR index to a replacement index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). In these circumstances, the Bureau is proposing that the accounts should continue to be subject to the requirements of § 1026.59 and consumers should not have to forego reviews on their accounts that could potentially result in rate reductions. The Bureau is proposing not to except these circumstances (where an account is already subject to the requirements of § 1026.59 prior to the transition away from a LIBOR index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii)) because they differ from the situation where an account may become subject to the requirements of § 1026.59 as a result of the transition away from a LIBOR index to a replacement index under proposed § 1026.55(b)(7)(i) or § 1026.55(b)(7)(ii). In particular, proposed § 1026.55(b)(7)(i) and (ii) provide that the replacement index plus replacement margin must produce a rate that is substantially similar to the rate in effect at the time the original index became unavailable or the rate that was in effect based on the LIBOR index on December 31, 2020, depending on the provision. These provisions provide safeguards that the consumer will not be unduly harmed after the transition away from a LIBOR index with a rate that is substantially dissimilar to the rate prior to the transition. No similar safeguard exists for accounts on which a rate increase occurred prior to the transition that subjected the account to the requirements of § 1026.59. Absent the requirements of § 1026.59, issuers would not have to continue to review these accounts for possible rate reductions that could potentially bring the rate on the account in line with the rate prior to the increase, as the requirements of § 1026.59 (and proposed § 1026.59(f)(3)) ensure that the account continues to be reviewed for a rate reduction that could potentially return the rate on the account to a rate that is the same as the rate before the increase.

Appendix H to Part 1026— Closed-End Model Forms and Clauses

Appendix H to part 1026 provides a sample form for ARMs for complying with the requirements of § 1026.20(c) in form H-4(D)(2) and a sample form for ARMs for complying with the requirements of § 1026.20(d) in form H-4(D)(4).[98] Both of these sample forms refer to the 1-year LIBOR. In light of the anticipated discontinuation of LIBOR, the proposed rule

[98] The Bureau notes that these are not required forms and that forms that meet the requirements of § 1026.20(c) or (d) would be considered in compliance with those subsections, respectively.

would substitute the 30-day average SOFR index for the 1-year LIBOR index in the explanation of how the interest rate is determined in sample forms H-4(D)(2) and H-4(D)(4) in appendix H to provide more relevant samples. The proposed rule would also make related changes to other information listed on these sample forms, such as the effective date of the interest rate adjustment, the dates when future interest rate adjustments are scheduled to occur, the date the first new payment is due, the source of information about the index, the margin added in determining the new payment, and the limits on interest rate increases at each interest rate adjustment. To conform to the requirements in § 1026.20(d)(2)(i) and (d)(3)(ii) and to make form H-4(D)(4) consistent with form H-4(D)(3), the Bureau is also proposing to add the date of the disclosure at the top of form H-4(D)(4), which was inadvertently omitted from the original form H-4(D)(4) as published in the *Federal Register* on February 14, 2013.[99]

The Bureau requests comment on whether these revisions to sample forms H-4(D)(2) and H-4(D)(4) are appropriate and whether the Bureau should make any other changes to the forms in appendix H in connection with the LIBOR transition. If the Bureau finalizes the proposed changes to forms H-4(D)(2) and H-4(D)(4), the Bureau also requests comment on whether some creditors, assignees, or servicers might still wish to use the original forms H-4(D)(2) and H-4(D)(4) as published on February 14, 2013, after this final rule's effective date. This might include, for example, creditors, assignees, or servicers who might wish to rely on the original sample forms for notices sent out for LIBOR loans after the proposed March 15, 2021 effective date but before the LIBOR index is replaced or, alternatively, for non-LIBOR loans after the proposed effective date. The Bureau requests comment on whether it would be helpful for the

[99] 78 FR 10902, 11012 (Feb. 14, 2013).

Bureau to indicate in the final rule that the Bureau will deem creditors, assignees, or servicers properly using the original forms H-4(D)(2) and H-4(D)(4) to be in compliance with the regulation with regard to the disclosures required by § 1026.20(c) and (d) respectively, even after the final rule's effective date.

VI. Effective Date

Except as noted below, the Bureau is proposing that the final rule would take effect on March 15, 2021. This proposed effective date generally would mean that the changes to the regulation and commentary would be effective around nine months prior to the expected discontinuation of LIBOR, which is some time after December 2021. For example, creditors for HELOCs and card issuers would have around nine months to transition away from using the LIBOR indices for existing accounts prior to the expected discontinuation of LIBOR. The Bureau requests comment on this proposed effective date.

The Bureau notes that the updated change-in-term disclosure requirements for HELOCs and credit card accounts in the final rule would apply as of October 1, 2021, if the final rule is adopted. This proposed October 1, 2021, date is consistent with TILA section 105(d), which generally requires that changes in disclosures required by TILA or Regulation Z have an effective date of the October 1 that is at least six months after the date the final rule is adopted.[100]

[100] 15 U.S.C. 1604(d).

VII. Dodd-Frank Act Section 1022(b) Analysis

A. Overview

In developing the proposed rule, the Bureau has considered the proposed rule's potential benefits, costs, and impacts.[101] The Bureau requests comment on the preliminary analysis presented below as well as submissions of additional data that could inform the Bureau's analysis of the benefits, costs, and impacts. In developing the proposed rule, the Bureau has consulted, or offered to consult with, the appropriate prudential regulators and other Federal agencies, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The proposed rule is primarily designed to address potential compliance issues for creditors affected by the sunset of LIBOR. At this time, LIBOR is expected to be discontinued some time after 2021.

The proposed rule would amend and add several provisions for open-end credit. First, the proposed rule would add LIBOR-specific provisions that would permit creditors for HELOCs and card issuers for credit card accounts to replace the LIBOR index and adjust the margin used to set a variable rate on or after March 15, 2021, if certain conditions are met. Specifically, under the proposed rule, the APR calculated using the replacement index must be substantially similar to the rate calculated using the LIBOR index, based on the values of these indices on December 31, 2020. In addition, creditors for HELOCs and card issuers would be required to

[101] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act (12 U.S.C. 5512(b)(2)(A)) requires the Bureau to consider the potential benefits and costs of the regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products and services; the impact of proposed rules on insured depository institutions and insured credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act (12 U.S.C. 5516); and the impact on consumers in rural areas.

meet certain requirements in selecting a replacement index. Under the proposed rule, creditors for HELOCs and card issuers can select an index that is not newly established as a replacement index only if the index has historical fluctuations that are substantially similar to those of the LIBOR index. Creditors for HELOCs or card issuers can also use a replacement index that is newly established in certain circumstances. To reduce uncertainty with respect to selecting a replacement index that meets these standards, the Bureau is proposing to determine that Prime is an example of an index that has historical fluctuations that are substantially similar to those of certain USD LIBOR indices.[102] The Bureau is also proposing to determine that certain spread-adjusted indices based on the SOFR recommended by the ARRC are indices that have historical fluctuations that are substantially similar to those of certain USD LIBOR indices.[103]

Second, the proposed rule also would revise existing language in Regulation Z that allows creditors for HELOCs and card issuers to replace an index and adjust the margin on an account if the index becomes unavailable if certain conditions are met.

Third, the proposed rule would revise change-in-terms notice requirements, effective October 1, 2021, for HELOCs and credit card accounts to provide that if a creditor is replacing a LIBOR index on an account pursuant to the proposed LIBOR-specific provisions or because the LIBOR index becomes unavailable as discussed above, the creditor must provide a change-in-terms notice of any reduced margin that will be used to calculate the consumer's variable rate.

[102] Specifically, the Bureau is proposing to add to the commentary a proposed determination that Prime has historical fluctuations that are substantially similar to those of the 1-month and 3-month USD LIBOR.

[103] Specifically, the Bureau is proposing to add to the commentary a proposed determination that the spread-adjusted indices based on SOFR recommended by the ARRC to replace the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year USD LIBOR indices respectively.

This would help ensure that consumers are informed of how their variable rates will be determined after the LIBOR index is replaced.

Fourth, the proposed rule would add a LIBOR-specific exception from the rate reevaluation requirements of § 1026.59 applicable to credit card accounts for increases that occur as a result of replacing a LIBOR index to another index in accordance with the LIBOR-specific provisions or as a result of the LIBOR indices becoming unavailable as discussed above.

Fifth, the proposed rule would add provisions to address how a card issuer, where an account was subject to the requirements of the reevaluation reviews in § 1026.59 prior to the switch from a LIBOR index, can terminate the obligation to review where the rate applicable immediately prior to the increase was a variable rate calculated using a LIBOR index.

Sixth, the proposed rule would make technical edits to several open-end provisions to replace LIBOR references with references to a SOFR index and to make related changes.

The Bureau is also proposing several amendments to the closed-end provisions to address the sunset of LIBOR. First, the Bureau is proposing to amend comment 20(a)-3.ii to identify specific indices as an example of a "comparable index" for purposes of the closed-end refinancing provisions.[104] Second, the Bureau is proposing technical edits to various closed-end provisions to replace LIBOR references with references to a SOFR index and to make related changes and corrections.

[104] Specifically, the Bureau is proposing to add to the comment an illustrative example indicating that a creditor 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 USD LIBOR index to the spread-adjusted index based on the SOFR recommended by the ARRC as replacements for these indices, because the replacement index is a comparable index to the corresponding USD LIBOR index.

B. Provisions to be Analyzed

The analysis below considers the potential benefits, costs, and impacts to consumers and covered persons of significant provisions of the proposed rule (proposed provisions), which include the first, third, and fourth open-end provisions described above. The analysis also includes the first closed-end provision described above.[105] Therefore, the Bureau has analyzed in more detail the following four proposed provisions:

1. LIBOR-specific provisions for index changes for HELOCs and credit card accounts,
2. Revisions to change-in-terms notices requirements for HELOCs and credit card accounts to disclose margin decreases, if any,
3. LIBOR-specific exception from the rate reevaluation provisions applicable to credit card accounts, and
4. Commentary stating that specific indices are comparable to certain LIBOR tenors for purposes of the closed-end refinancing provisions.

Because the proposed rule would address the transition of credit products from LIBOR to other indices, which should be complete within the next several years under both the baseline and the proposed rule, the analysis below is limited to considering the benefits, costs, and impacts of the proposed provisions over the next several years.

C. Data Limitations and Quantification of Benefits, Costs, and Impacts

The discussion below relies on information that the Bureau has obtained from industry, other regulatory agencies, and publicly available sources. The Bureau has performed outreach on many of the issues addressed by the proposed rule, as described in part III. However, as

[105] The Bureau does not believe that the other provisions described above would have any significant costs, benefits, or impacts for consumers or covered persons.

discussed further below, the data are generally limited with which to quantify the potential costs, benefits, and impacts of the proposed provisions.

In light of these data limitations, the analysis below generally provides a qualitative discussion of the benefits, costs, and impacts of the proposed provisions. General economic principles and the Bureau's expertise in consumer financial markets, together with the limited data that are available, provide insight into these benefits, costs, and impacts. The Bureau requests additional data or studies that could help quantify the benefits and costs to consumers and covered persons of the proposed provisions.

D. Baseline for Analysis

In evaluating the potential benefits, costs, and impacts of the proposed rule, the Bureau takes as a baseline the current legal framework governing changes in indices used for variable-rate open-end and closed-end credit products, as applicable. The FCA has announced that it cannot guarantee the publication of LIBOR beyond 2021 and has urged relevant parties to prepare for the transition to alternative reference rates. Therefore, it is likely that even under current regulations, existing contracts for HELOCs, credit card accounts, and closed-end credit tied to a LIBOR index will have transitioned to other indices soon after the end of 2021. Furthermore, for HELOCs, credit card accounts, and closed-end credit, the proposed rule would not significantly alter the requirements that replacement indices for a LIBOR index must satisfy, nor would it alter how these requirements must be evaluated. Hence, the analysis below assumes the proposed rule would not substantially alter the number of HELOCs, credit card accounts, and closed-end credit accounts switched from a LIBOR index to other indices nor would it significantly alter the indices that HELOC creditors, card issuers, and closed-end creditors use to replace a LIBOR index. However, the proposed rule would enable HELOC creditors, card issuers, and closed-end creditors under Regulation Z to transfer existing contracts away from a LIBOR index with more certainty about what is required by and permitted under Regulation Z. The proposed rule would also enable HELOC creditors and card issuers to transfer existing contracts away from a LIBOR index earlier they could under the baseline, if they choose to do so.

The proposed rule, however, would not excuse creditors or card issuers from noncompliance with contractual provisions. For example, a contract for a HELOC or a credit card account may provide that the creditor or card issuer respectively may not replace an index unilaterally under a plan unless the original index becomes unavailable. In this case, even under the proposed rule, the creditor or card issuer would be contractually prohibited from unilaterally replacing a LIBOR index used under the plan until LIBOR becomes unavailable.

E. Potential Benefits and Costs of the Proposed Rule for Consumers and Covered Persons

Reliable data on the indices credit products are linked to is not generally available, so the Bureau cannot estimate the dollar value of debt tied to LIBOR in the distinct credit markets that may be impacted by the proposed rule. However, the ARRC has estimated that, at the end of 2016, there was $1.2 trillion of mortgage debt (including ARMs, HELOCs, and reverse mortgages) and $100 billion of non-mortgage debt tied to LIBOR.[106]

1. LIBOR-Specific Provisions for Index Changes for HELOCs and Credit Card Accounts

For consumers with HELOCs and credit card accounts with APRs tied to a LIBOR index, and for creditors of HELOCs and card issuers with APRs tied to a LIBOR index, the main effect of the LIBOR-specific provisions that allows HELOC creditors or card issuers under Regulation

[106]ARRC, *Second Report* (Mar. 2018), https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-Second-report.

Z to replace a LIBOR index before it becomes unavailable would be that some creditors and card issuers for HELOCs and credit card accounts respectively would switch those contracts from a LIBOR index to other indices earlier than they would have without the proposed provision. Since the LIBOR indices are likely to become unavailable some time after December 2021, and the proposed provision would allow many creditors and card issuers under Regulation Z to switch on or after March 15, 2021, creditors and card issuers would likely switch contracts from a LIBOR index to other indices at most around nine months earlier than they would without the proposed provision (if permitted by the contractual provisions as discussed above). The Bureau cannot estimate when these accounts will be switched from a LIBOR index under the proposed provision. The Bureau also cannot estimate the number of accounts that contractually cannot be switched from a LIBOR index until that LIBOR index becomes unavailable, although the Bureau believes that a larger proportion of HELOC contracts than credit card contracts are affected by this issue.[107]

The proposed provision also would include revisions to commentary to Regulation Z to state that certain SOFR-based indices have historical fluctuations that are substantially similar to those of certain tenors of LIBOR and that Prime has historical fluctuations that are substantially similar to those of certain tenors of LIBOR. The Bureau believes that market participants, using analysis similar to that the Bureau has performed, would come to these conclusions even without the proposed commentary. Therefore, the Bureau estimates that the proposed commentary

[107] Furthermore, some HELOC creditors and card issuers may be able to switch indices from LIBOR to replacement indices even before LIBOR becomes unavailable (under the baseline) or March 15, 2021 (under the proposed rule). For HELOCs, some creditors may be able to switch earlier if the consumer specifically agrees to the change in writing under § 1026.40(f)(3)(iii). For credit card accounts that have been open for at least a year, card issuers may be able to switch indices earlier for new transactions under § 1026.55(b)(3). The Bureau cannot estimate the number of such accounts that could be switched early.

would not significantly change the indices that HELOC creditors or card issuers switch to, the dates on which indices are switched, or the manner in which those switches are made.

Potential Benefits and Costs to Consumers

The Bureau believes that the proposed provision would benefit consumers primarily by making their experience transitioning from a LIBOR index more informed and less disruptive than it otherwise could be, although the Bureau does not have the data to quantify the value of this benefit. The Bureau expects this consumer benefit to arise because creditors for HELOCs and card issuers would have more time to transition contracts from LIBOR indices to replacement indices, giving them more time to plan for the transition, communicate with consumers about the transition, and avoid technical or system issues that could affect consumers' accounts during the transition.

The Bureau does not anticipate that the proposed provision would impose any significant costs on consumers on average. Under the proposed provision, creditors for HELOCs and card issuers would have to adjust margins used to calculate the variable rates on the accounts so that consumers' APRs calculated using the value of the replacement index in effect on December 31, 2020, and the replacement margin will produce a rate that is substantially similar to their rates calculated using the value of the LIBOR index in effect on December 31, 2020, and the margins that applied to the variable rates immediately prior to the replacement of the LIBOR index. After the transition, consumers' APRs will be tied to the replacement indices and not to the LIBOR indices. Because the replacement indices creditors for HELOCs and card issuers would switch to are not identical to the LIBOR indices, they will not move identically to the LIBOR indices, and so for the roughly nine months affected by this proposed provision, affected consumers' payments will be different under the proposed provision than they would be under the baseline. On some dates in which indexed rates reset, some replacement indices may have increased relative to the LIBOR index. Consumers with these indices would then pay a cost due to the proposed provision until the next rate reset. On some dates in which indexed rates reset, some replacement indices may have decreased relative to the LIBOR index. Consumers with these indices would then benefit from the proposed provision until the next rate reset. Consumers vary in their constraints and preferences, the credit products they have, the dates those credit products reset, the replacement indices their creditors or card issuers would choose, and the transition dates their creditors or card issuers would choose. The benefits and costs that would accrue to consumers from the proposed provision and that arise because of differences in index movements will vary across consumers and over time. However, the Bureau expects ex-ante for these benefits and costs to be small on average, because the rates creditors or card issuers switch to must be substantially similar to existing LIBOR-based rates using index values in effect on December 31, 2020, and because replacement indices that are not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index.

Potential Benefits and Costs to Covered Persons

The Bureau believes the proposed provision will have three primary benefits for creditors for HELOCs and card issuers. First, under the proposed provision these creditors and card issuers would have more certainty about the transition date and more time to make the transition away from the LIBOR indices. This should increase the ability of HELOC creditors and card issuers to plan for the transition, improving their communication with consumers about the transition, and decreasing the likelihood of technical or system issues that affect consumers' accounts during the transition. Both of these effects should lower the cost of the transition to creditors. Second, the proposed provision will provide creditors for HELOCs and card issuers with additional detail for how to comply with their legal obligations under Regulation Z with respect to the LIBOR transition. This should decrease the cost of legal and compliance staff time preparing for the transition beforehand and dealing with litigation after. Third, the proposed provision also would include revisions to commentary on Regulation Z stating that certain SOFR-based indices have historical fluctuations that are substantially similar to those of certain tenors of LIBOR and that Prime has historical fluctuations that are substantially similar to those of certain tenors of LIBOR. This should decrease the cost of compliance staff time coming to the same conclusions as the proposed commentary before the transition from LIBOR, and it should decrease the cost of litigation after.

As discussed under "Potential Benefits and Costs to Consumers" above, because the replacement indices creditors for HELOCs and card issuers would switch to are not identical to the LIBOR indices, they will not move identically to the LIBOR indices, and so for the roughly nine months affected by this proposed provision, affected consumers' payments will be different under the proposed provision than they would be under the baseline. On some dates in which indexed rates reset, some replacement indices will have increased relative to the LIBOR index. HELOC creditors and card issuers with rates linked to these indices will then benefit from the proposed provision until the next rate reset. On some dates in which indexed rates reset, some replacement indices will have decreased relative to the LIBOR index. HELOC creditors and card issuers with rates linked to these indices will then pay a cost due to the proposed provision until the next rate reset. Creditors and card issuers vary in their constraints and preferences, the credit products they issue, the dates those credit products reset, the replacement indices they would choose under the proposed provision, and the transition dates they would choose under the proposed provision. The benefits and costs that would accrue to HELOC creditors and card issuers from the proposed provision and that arise because of differences in index movements will vary across creditors and card issuers and over time. However, the Bureau expects ex-ante for these benefits and costs to be small on average, because the rates creditors or card issuers switch to must be substantially similar to existing LIBOR-based rates using index values in effect on December 31, 2020, and replacement indices that are not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index.

The proposed provision would allow creditors for HELOCs and card issuers under Regulation Z to switch contracts from a LIBOR index earlier than they otherwise would have, but it does not require them to do so. Therefore, this aspect of the proposed provision does not impose any significant costs on HELOC creditors and card issuers. The proposed commentary would not determine that any specific indices have historical fluctuations that are not substantially similar to those of LIBOR, so the proposed revisions would not prevent creditors or card issuers from switching to other indices as long as those indices still satisfy regulatory requirements. Therefore, the proposed commentary also does not impose any significant costs on HELOC creditors and card issuers. However, as noted above, the replacement indices HELOC creditors and card issuers choose may move less favorably for them than the LIBOR indices would have.

2. Revisions to Change-in-Terms Notices Requirements for HELOCs and Credit Card Accounts to Disclose Margin Decreases, if Any

The proposed provision would, effective October 1, 2021, require creditors for HELOCs and card issuers to disclose margin reductions to consumers when they switch contracts from using LIBOR indices to other indices. Under both the existing regulation and this proposed provision, creditors for HELOCs and card issuers are required to send consumers change-in-term notices when indices change, disclosing the replacement index and any increase in the margin. Therefore, this proposed provision would not affect the number of consumers who receive change-in-terms notices nor the number of change-in-terms notices creditors for HELOCs or card issuers must provide.

The benefits, costs, and impacts of this proposed provision depend on whether HELOC creditors or card issuers would choose to disclose margin decreases even if not required to do so under the existing regulation. Creditors for HELOCs or card issuers that would not otherwise disclose margin decreases in their change-in-term notices would bear the cost of having to provide slightly longer notices. They may also have to develop distinct notices for different groups of consumers with different initial margins. Consumers with HELOC or credit card accounts from those creditors or card issuers would benefit by having an improved understanding of how and why their APRs would change. However, the Bureau believes it is likely that most creditors for HELOCs and card issuers would choose to disclose margin decreases in their change-in-terms notices even if the existing regulation does not require them to so, because margin decreases are beneficial for consumers, and because in these situations the creditors or card issuers likely benefit from improved consumer understanding. Further, this proposed provision would be effective only beginning October 1, 2021. HELOC creditors and card issuers that would prefer not to disclose margin decreases could choose to change indices before this proposed provision becomes effective (if the change in indices are permitted by the contractual provisions at that time). Therefore, the Bureau expects that both the benefits and costs of this proposed provision for consumers and for HELOC creditors and card issuers would be small.

3. LIBOR-Specific Exception from the Rate Reevaluation Provisions Applicable to Credit Card Accounts

Rate increases may occur due to the LIBOR transition either at the time of transition from the LIBOR index to a different index or at a later time. Under current § 1026.59, in these scenarios card issuers would have to reevaluate the APRs until they equal or fall below what they would have been had they remained tied to LIBOR. The proposed provision would except card issuers from these rate reevaluation requirements for rate increases that occur as a result of the transition from the LIBOR index to another index under the LIBOR-specific provisions discussed above or under the existing regulation that allows card issuers to replace an index when the index becomes unavailable. The proposed provision does not except rate increases already subject to the rate reevaluation requirements prior to the transition from the LIBOR index to another index as discussed above. Because relative rate movements are hard to anticipate ex-ante, it is unlikely that this proposed provision would affect the indices that card issuers use as replacements. Because card issuers can only switch from LIBOR-based rates to rates that are substantially similar using index values in effect on December 31, 2020, and use a replacement index (if the replacement index is not newly established) that has historical fluctuations that are substantially similar to those of the LIBOR index, it is unlikely such rate reevaluations would result in significant rate reductions for consumers before LIBOR is discontinued. Therefore, before LIBOR is discontinued, the impact of this proposed provision on consumers is likely to be small. After LIBOR is discontinued, it will not be possible to compute what consumer rates would have been under the LIBOR indices, and so it is not clear how card issuers would conduct such rate reevaluations after that time. Therefore, after LIBOR is discontinued, the impact of this proposed provision on consumers is not clear. This proposed provision would benefit affected card issuers by saving them the cost of reevaluating rates until LIBOR is discontinued. This proposed provision would impose no costs on affected card issuers because they could still perform rate reevaluations if they choose to do so prior to LIBOR being discontinued.

4. Commentary Stating that Specific Indices are Comparable to Certain LIBOR Tenors for Purposes of the Closed-End Refinancing Provisions

The Bureau is proposing to revise comment 20(a)-3.ii to Regulation Z to state that certain SOFR-based indices are comparable to certain tenors of LIBOR. The Bureau believes that market participants, using analysis similar to that the Bureau has performed, would come to this conclusion even without the proposed commentary. Therefore, the Bureau believes that the proposed commentary would not significantly change the indices that creditors switch to, the dates on which indices are switched, or the manner in which those switches are made. Hence, the Bureau estimates that the proposed revisions would have no significant benefits, costs, or impacts for consumers.

For covered persons, the proposed provision would decrease costs by providing additional clarity and certainty about whether indices are comparable for purposes of Regulation Z. For creditors that would switch from certain LIBOR indices to certain SOFR indices, the proposed provision would decrease the compliance staff time required to come to the conclusion that the SOFR index is comparable to the LIBOR index. The proposed provision could also decrease litigation costs for creditors after the transition from certain LIBOR indices to certain SOFR indices.

The proposed commentary would not determine that any specific indices are not comparable to LIBOR. Therefore, the proposed provision would not prevent creditors from switching to other indices as long as those indices still satisfy regulatory requirements. Therefore, the proposed provision would impose no significant costs on creditors.

F. Alternative Provisions Considered

As discussed above in the section-by-section analyses of § 1026.40(f)(3)(ii) and proposed § 1026.55(b)(7), the Bureau considered interpreting the LIBOR indices to be unavailable as of a certain date prior to LIBOR being discontinued. The Bureau briefly discusses the costs, benefits, and impacts of the considered interpretation below.

If the Bureau were to interpret the LIBOR indices to be unavailable under the existing Regulation Z rules prior to LIBOR being discontinued, it could provide benefits similar to those of the proposed rule by allowing creditors and card issuers to switch away from LIBOR indices before LIBOR is discontinued. It might also potentially provide some benefit to consumers and covered persons whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index, by providing some additional clarity in interpreting that provision of their contracts.

However, a determination by the Bureau that the LIBOR indices are unavailable could have unintended consequences on other products or markets. For example, the Bureau is concerned that such a determination could unintentionally cause confusion for creditors for other products (*e.g.*, ARMs) about whether the LIBOR indices are also unavailable for those products and could possibly put pressure on those creditors to replace the LIBOR index used for those products before those creditors are ready for the change. This could impose significant costs on affected consumers and creditors in the markets for these other products.

In addition, even if the Bureau interpreted unavailability to indicate that the LIBOR indices are unavailable prior to LIBOR being discontinued, this interpretation would not completely solve the contractual issues for creditors and card issuers whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index. Creditors and card issuers still would need to decide for their contracts whether the LIBOR indices are unavailable, and that decision could result in litigation or arbitration under the contracts. Thus, even if the Bureau decided that the LIBOR indices are unavailable under Regulation Z as described above, creditors and card issuers whose contracts require them to wait until the LIBOR indices become unavailable before replacing the LIBOR index essentially would be in the same position under the proposed rule as they would be under the current rule. Therefore, the benefits of the considered interpretation would be small even for the main intended beneficiaries of such an interpretation, specifically the consumers, creditors, and card issuers under contracts that require creditors and card issuers to wait until the LIBOR indices become unavailable before replacing the LIBOR index.

G. Potential Specific Impacts of the Proposed Rule

1. Depository Institutions and Credit Unions with $10 Billion or Less in Total Assets, As Described in Section 1026

The Bureau believes that the consideration of benefits and costs of covered persons presented above provides a largely accurate analysis of the impacts of the proposed provisions on depository institutions and credit unions with $10 billion or less in total assets that issue credit products that are tied to LIBOR and are covered by the proposed provisions.

2. Impact of the Proposed Rule on Consumer Access to Credit and on Consumers in Rural Areas

Because the proposed rule would affect only existing accounts that are tied to LIBOR and would generally not affect new loans, the proposed rule would not directly impact consumer access to credit. While the proposed rule would provide some benefits and costs to creditors and card issuers in connection to the transition away from LIBOR, it is unlikely to affect the costs of providing new credit and therefore the Bureau believes that any impact on creditors and card issuers from the proposed rule is not likely to have a significant impact on consumer access to credit.

Consumers in rural areas may experience benefits or costs from the proposed rule that are larger or smaller than the benefits and costs experienced by consumers in general if credit products in rural areas are more or less likely to be linked to LIBOR than credit products in other areas. The Bureau does not have any data or other information to understand whether this is the case. The Bureau will further consider the impact of the proposed rule on consumers in rural areas. The Bureau therefore asks interested parties to provide data, research results, and other information on the impact of the proposed rule on consumers in rural areas.

VIII. Regulatory Flexibility Act Analysis

A. Overview

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[108] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives before proposing a rule for which an IRFA is required.[109]

[108] 5 U.S.C. 601 *et seq*.

[109] 5 U.S.C. 609.

An IRFA is not required for this proposed rule because the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

B. Impact of Proposed Provisions on Small Entities

The analysis below evaluates the potential economic impact of the proposed provisions on small entities as defined by the RFA.[110] A card issuer or depository institution is considered "small" if it has $600 million or less in assets.[111] Except for card issuers, non-depository creditors are considered "small" if their average annual receipts are less than $41.5 million.[112]

Based on its market intelligence, the Bureau believes that there are few, if any, small card issuers with LIBOR-based cards. Based on its market intelligence, the Bureau estimates that there are approximately 200 to 300 small institutional lenders with variable-rate student loans tied to LIBOR. There are also a few state-sponsored nonbank lenders that offer variable-rate student loans based on LIBOR.

To estimate the number of small mortgage lenders that may be impacted by the proposed rule, the Bureau has analyzed the 2018 Home Mortgage Disclosure Act (HMDA) data.[113] The HMDA data cover mortgage originations, while entities may be impacted by the proposed rule if

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[110] For purposes of assessing the impacts of the proposed rule on small entities, "small entities" is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A "small business" is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. 5 U.S.C. 601(3). A "small organization" is any "not-for-profit enterprise which is independently owned and operated and is not dominant in its field." 5 U.S.C. 601(4). A "small governmental jurisdiction" is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[111] U. S. Small Bus. Admin., *Table of Small Business Size Standards Matched to North American Industry Classification System Codes,* https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf (current SBA size standards).

[112] *Id.*

[113] *See* Bureau of Consumer Fin. Prot., *Introducing New and Revised Data Points in HMDA* (Aug. 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_new-revised-data-points-in-hmda_report.pdf.

they hold debt tied to LIBOR. The data will therefore not include entities that originated LIBOR-linked debt before 2018 but not during 2018, even if those entities still hold that debt. The data will include entities that originated LIBOR-linked debt in 2018 but will have sold it before the proposed rule would come into effect, and so would not be impacted by the proposed rule. Other limitations of the data are discussed below. Despite these limitations, the HMDA data are the best data source currently available to the Bureau to quantify the number of small mortgage lenders that may be impacted by the proposed rule.

The HMDA data include entities that originate ARMs, HELOCs, and reverse mortgages. The data include information on whether mortgages are open-end or closed-end, although some entities are exempt from reporting this information.[114] The data do not include information on whether or not mortgages have rates that are tied to LIBOR. The data do indicate whether or not mortgages have rates that may change. This measure is used as a proxy for potential exposure to the proposed rule. Mortgages may have rates that are linked to indices besides LIBOR. They may also have "step rates" that switch from one pre-determined rate to another pre-determined rate that is not linked to any index. Therefore, the proxy for potential exposure to the proposed rule likely overstates the number of entities with rates tied to LIBOR.

Based on this data, the Bureau estimates that there are 117 small depositories that originated at least one closed-end adjustable-rate mortgage product in 2018 and so may be

[114] In May 2017, Congress passed the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) that granted certain HMDA reporters partial exemptions from HMDA reporting. The closed-end partial exemption applies to HMDA reporters that are insured depository institutions or insured credit unions and that originated fewer than 500 closed-end mortgages in each of the two preceding years. HMDA reporters that are insured depository institutions or insured credit unions that originated fewer than 500 open-end lines of credit in each of the two preceding years also qualify for a partial exemption with respect to reporting their open-end transactions. The insured depository institutions must also not have received certain less than satisfactory examination ratings under the Community Reinvestment Act of 1977 to qualify for the partial exemptions.

affected by the closed-end provisions of the proposed rule, and there are 669 small depositories that originated at least one open-end adjustable-rate mortgage product and so may be affected by the open-end provisions of the proposed rule. Of these, 82 small depositories originated at least one closed-end adjustable rate mortgage product and one open-end adjustable rate mortgage product, and so may be affected by both the open-end and closed-end provisions of the proposed rule.

The definition of "small" for purposes of the RFA for non-depository institutions that originate mortgages depends on average annual receipts. The HMDA data do not include this information, and so the Bureau cannot estimate the number of small non-depository mortgage lenders that may be affected by the proposed rule. The Bureau estimates that there are 50 non-depository mortgage lenders that originated at least one closed-end adjustable-rate mortgage product and 640 non-depository mortgage lenders that originated at least one open-end adjustable-rate mortgage product. Of these, 43 originated at least one closed-end and one open-end adjustable-rate mortgage product.

The numbers above do not include entities that reported originating mortgages but under the EGRRCPA were exempt from reporting whether or not those mortgages had adjustable rates. There are 1,530 such small depositories in the 2018 HMDA data. There are five such non-depository institutions in the 2018 HMDA data. These entities may have originated adjustable-rate mortgage products that were not explicitly reported as such.

Finally, the numbers above also do not include entities that may have originated adjustable-rate mortgages in 2018 that were exempt entirely from reporting any 2018 HMDA data. The Bureau has estimated that approximately 11,800 institutions originated at least one closed-end mortgage loan in 2018, and 5,666 institutions reported HMDA data in 2018.[115] This implies that approximately 6,134 institutions originated at least one closed-end mortgage in 2018 but are not in the HMDA data. Because these institutions are not in the HMDA data, the Bureau cannot estimate the number that may have originated adjustable-rate mortgages. Furthermore, the Bureau cannot confirm that they are small for purposes of the RFA, although it is likely they are because HMDA reporting thresholds are based in part on origination volume. Finally, the Bureau cannot estimate the number of institutions that did not report HMDA data in 2018 but did originate at least one open-end mortgage loan in 2018, or at least one closed-end and one open-end mortgage loan in 2018.

As discussed above in part VII, there are four main proposed provisions:

1. LIBOR-specific provisions for index changes for HELOCs and credit card accounts,
2. Revisions to change-in-terms notices requirements for HELOCs and credit card accounts to disclose margin decreases, if any,
3. LIBOR-specific exception from the rate reevaluation provisions applicable to credit card accounts, and
4. Commentary stating that specific indices are comparable to certain LIBOR tenors for purposes of the closed-end refinancing provisions.

The proposed LIBOR-specific provisions for index change requirements for open-end credit would allow HELOC creditors and card issuers, including small entities, under Regulation Z to switch away from LIBOR earlier than they would under the baseline, but it does not require

[115] *See* Bureau of Consumer Fin. Prot., *Data Point: 2018 Mortgage Market Activity and Trends* (Aug. 2019), available at https://files.consumerfinance.gov/f/documents/cfpb_2018-mortgage-market-activity-trends_report.pdf.

them to do so.[116] This additional flexibility would benefit small entities with these outstanding credit products tied to LIBOR, by reducing uncertainty and allowing them to implement the switch in a more orderly way. This additional flexibility would not impose any significant costs on HELOC creditors and card issuers, including small entities.

The proposed LIBOR-specific provisions for index change requirements for open-end credit also would include revisions to commentary to Regulation Z to state that certain SOFR-based indices have historical fluctuations that are substantially similar to those of certain tenors of LIBOR and that Prime has historical fluctuations that are substantially similar to those of certain tenors of LIBOR. The proposed commentary would not determine that any specific indices have historical fluctuations that are not substantially similar to those of LIBOR, so the proposed revisions would not prevent creditors or card issuers from switching to other indices as long as those indices still satisfy regulatory requirements. Therefore, the proposed commentary does not impose any significant costs on HELOC creditors and card issuers, including small entities. Therefore, the proposed LIBOR-specific provisions for index change requirements for open-end credit would impose no significant burden on small entities.

The proposed revisions to change-in-terms notices requirements to disclose margin decreases, if any, expand regulatory requirements for creditors for HELOCs and card issuers, including small entities, and therefore may increase their compliance costs. The proposed provision would, effective October 1, 2021, require creditors for HELOCs and card issuers,

[116] As discussed in the section-by-section analyses of § 1026.40(f)(3)(ii) and proposed § 1026.55(b)(7) above, the proposal, however, would not excuse creditors or card issuers from noncompliance with contractual provisions. For example, a contract for a HELOC or a credit card account may provide that the creditor or card issuer respectively may not replace an index unilaterally under a plan unless the original index becomes unavailable. In this case, even under the proposal the creditor or card issuer would be contractually prohibited from unilaterally replacing a LIBOR index used under the plan until it becomes unavailable.

including small entities, to disclose margin reductions to consumers when they switch contracts from using LIBOR indices to other indices. Under both the existing regulation and the proposed provision, creditors for HELOCs and card issuers, including small entities, are required to send consumers change-in-term notices when indices change, disclosing the replacement index and any increase in the margin. Therefore, this proposed provision would not affect the number of consumers who receive change-in-terms notices nor the number of change-in-terms notices creditors for HELOCs or card issuers, including small entities, must provide.

The benefits, costs, and impacts of this proposed provision depend on whether HELOC creditors or card issuers, including small entities, would choose to disclose margin decreases even if not required to do so under the existing regulation. Creditors for HELOCs or card issuers, including small entities, that would not otherwise disclose margin decreases in their change-in-term notices would bear the cost of having to provide slightly longer notices. They may also have to develop distinct notices for different groups of consumers with different initial margins. However, the Bureau believes it is likely that most creditors for HELOCs and card issuers, including small entities, would choose to disclose margin decreases in their change-in-terms notices even if the existing regulation does not require them to so, because margin decreases are beneficial for consumers, and because in these situations the creditors or card issuers likely benefit from improved consumer understanding. Further, this proposed provision would be effective only beginning effective October 1, 2021. HELOC creditors and card issuers, including small entities, that would prefer not to disclose margin decreases could choose to change indices before this proposed provision becomes effective (if the change in indices are permitted by the contractual provisions at that time). Therefore, the Bureau expects that both the benefits and costs of this proposed provision for HELOC creditors and card issuers, including small entities, would be small. Therefore, this proposed provision would not impose significant costs on a significant number of small entities.

The LIBOR-specific exception from the rate reevaluation provisions applicable to credit card accounts would benefit affected card issuers, including small entities, by saving them the cost of reevaluating rate increases that occur as a result of the transition from the LIBOR index to another index under the LIBOR-specific provisions discussed above or under the existing regulation that allows card issuers to replace an index when the index becomes unavailable. This proposed provision would impose no costs on affected card issuers, including small entities, because they could still perform rate reevaluations if they choose to do so until LIBOR is discontinued. Therefore, this proposed provision would impose no significant burden on small entities.

The Bureau is proposing to revise comment 20(a)-3.ii to Regulation Z to state that certain SOFR-based indices are comparable to certain tenors of LIBOR. The proposed commentary would not determine that any specific indices are not comparable to LIBOR. Therefore, the proposed provision would not prevent creditors from switching to other indices as long as those indices still satisfy regulatory requirements. Therefore, the proposed provision would impose no significant costs on creditors, including small entities.

Accordingly, the Director hereby certifies that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Thus, neither an IRFA nor a small business review panel is required for this proposal. The Bureau requests comment on the analysis above and requests any relevant data.

IX. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[117] Federal agencies are generally required to seek the Office of Management and Budget's (OMB's) approval for information collection requirements prior to implementation. The collections of information related to Regulation Z have been previously reviewed and approved by OMB and assigned OMB Control number 3170–0015. Under the PRA, the Bureau may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays a valid control number assigned by OMB.

The Bureau has determined that this proposed rule would not impose any new or revised information collection requirements (recordkeeping, reporting or disclosure requirements) on covered entities or members of the public that would constitute collections of information requiring OMB approval under the PRA.

X. Signing Authority

The Director of the Bureau, having reviewed and approved this document, is delegating the authority to electronically sign this document to Laura Galban, a Bureau Federal Register Liaison, for purposes of publication in the *Federal Register.*

List of Subjects in 12 CFR Part 1026

Advertising, Appraisal, Appraiser, Banking, Banks, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

[117] 44 U.S.C. 3501 *et seq*.

Authority and Issuance

For the reasons set forth above, the Bureau proposes to amend Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603-2605, 2607, 2609, 2617, 3353, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart B—Open-End Credit

2. Section 1026.9 is amended by revising paragraphs (c)(1)(ii) and (c)(2)(v)(A) to read as follows:

§ 1026.9 Subsequent disclosure requirements.

*   *   *   *   *

(c) * * *

(1) * * *

(ii) *Notice not required.* For home-equity plans subject to the requirements of § 1026.40, a creditor is not required to provide notice under this section when the change involves a reduction of any component of a finance or other charge (except that on or after October 1, 2021, this provision on when the change involves a reduction of any component of a finance or other charge does not apply to any change in the margin when a LIBOR index is replaced, as permitted by § 1026.40(f)(3)(ii)(A) or (B)) or when the change results from an agreement involving a court proceeding.

*   *   *   *   *

(2) * * *

(v) * * *

(A) When the change involves charges for documentary evidence; a reduction of any component of a finance or other charge (except that on or after October 1, 2021, this provision on when the change involves a reduction of any component of a finance or other charge does not apply to any change in the margin when a LIBOR index is replaced, as permitted by § 1026.55(b)(7)(i) or (ii)); suspension of future credit privileges (except as provided in paragraph (c)(2)(vi) of this section) or termination of an account or plan; when the change results from an agreement involving a court proceeding; when the change is an extension of the grace period; or if the change is applicable only to checks that access a credit card account and the changed terms are disclosed on or with the checks in accordance with paragraph (b)(3) of this section;

*   *   *   *   *

Subpart E—Special Rules for Certain Home Mortgage Transactions

§ 1026.36 [Amended]

3. Section 1026.36 is amended by removing “LIBOR” and adding in its place “SOFR” in paragraphs (a)(4)(iii)(C) and (a)(5)(iii)(B).

4. Section 1026.40 is amended by revising paragraph (f)(3)(ii) to read as follows:

§ 1026.40 Requirements for home equity plans.

*   *   *   *   *

(f) * * *

(3) * * *

(ii)(A) Change the index and margin used under the plan if the original index is no longer available, the replacement index has historical fluctuations substantially similar to that of the original index, and the replacement index and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce an annual percentage rate substantially similar to the rate in effect when the original index became unavailable; or

(B) If a variable rate on the plan is calculated using a LIBOR index, change the LIBOR index and the margin for calculating the variable rate on or after March 15, 2021, to a replacement index and a replacement margin, as long as historical fluctuations in the LIBOR index and replacement index were substantially similar, and as long as the replacement index value in effect on December 31, 2020, and 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, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is newly established and therefore does not have any rate history, it may be used if 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, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If either the LIBOR index or the replacement index is not published on December 31, 2020, the creditor must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the replacement index must be substantially similar to the rate based on the LIBOR index.

*	*	*	*	*

Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

5. Section 1026.55 is amended by adding paragraph (b)(7) to read as follows:

§ 1026.55 Limitations on increasing annual percentage rates, fees, and charges.

*	*	*	*	*

(b) * * *

(7) *Index replacement and margin change exception*. A card issuer may increase an annual percentage rate when:

(i) The card issuer changes the index and margin used to determine the annual percentage rate if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and replacement margin will produce a rate substantially similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce a rate substantially similar to the rate in effect when the original index became unavailable; or

(ii) If a variable rate on the plan is calculated using a LIBOR index, the card issuer changes the LIBOR index and the margin for calculating the variable rate on or after March 15, 2021, to a replacement index and a replacement margin, as long as historical fluctuations in the LIBOR index and replacement index were substantially similar, and as long as the replacement index value in effect on December 31, 2020, and 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, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is newly established and therefore does not have any rate history, it may be used if 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, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If either the LIBOR index or the replacement index is not published on December 31, 2020, the card issuer must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the replacement index must be substantially similar to the rate based on the LIBOR index.

* * * * *

6. Section 1026.59 is amended by adding paragraphs (f)(3) and (h)(3) to read as follows:

§ 1026.59 Reevaluation of rate increases.

* * * * *

(f) * * *

(3) Effective March 15, 2021, in the case where the rate applicable immediately prior to the increase was a variable rate with a formula based on a LIBOR index, the card issuer reduces the annual percentage rate to a rate determined by a replacement formula that is derived from a replacement index value on December 31, 2020, plus replacement margin that is equal to the LIBOR index value on December 31, 2020, plus the margin used to calculate the rate

immediately prior to the increase (previous formula). A card issuer must satisfy the conditions set forth in § 1026.55(b)(7)(ii) for selecting a replacement index. If either the LIBOR index or the replacement index is not published on December 31, 2020, the card issuer must use the values of the indices on the next calendar day that both indices are published as the index values to use to determine the replacement formula.

* * * * *

(h) * * *

(3) *Transition from LIBOR*. The requirements of this section do not apply to increases in an annual percentage rate that occur as a result of the transition from the use of a LIBOR index as the index in setting a variable rate to the use of a replacement index in setting a variable rate if the change from the use of the LIBOR index to a replacement index occurs in accordance with § 1026.55(b)(7)(i) or (ii).

7. Appendix H to part 1026 is amended by revising the entries for H-4(D)(2) and H-4(D)(4) to read as follows:

Appendix H to Part 1026—Closed-End Model Forms and Clauses

* * * * *

H-4(D)(2) Sample Form for § 1026.20(c)

July 20, 2021

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Springside Mortgage
1234 Main St
Memphis, TN 31801

Changes to Your Mortgage Interest Rate and Payments on September 1, 2021

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a three-year period during which your interest rate stayed the same. That period ends on September 1, 2021, so on that date your interest rate and mortgage payment change. After that, your interest rate may change every six months for the rest of your loan term.

	Current Rate and Monthly Payment	**New** Rate and Monthly Payment
Interest Rate	4.25%	6.25%
Total Monthly Payment	**$983.88**	**$1,211.81 (due October 1, 2021)**

Interest Rate: We calculated your interest rate by taking a published “index rate” and adding a certain number of percentage points, called the “margin.” Under your loan agreement, your index rate is the 30-day Average SOFR (SOFR) and your margin is 2.75%. The SOFR index is published daily on the website of the Federal Reserve Bank of New York.

Rate Limits: Your rate cannot go higher than 11.625% over the life of the loan. Your rate can change every six months by no more than 1.00%.

New Interest Rate and Monthly Payment: The table above shows your new interest rate and new monthly payment. Your new payment is based on the SOFR index, your margin, your loan balance of $189,440, and your remaining loan term of 324 months.

Prepayment Penalty: Keep in mind that if you pay off your loan, refinance or sell your home before September 1, 2021, you could be charged a penalty. Contact Springside Mortgage at (800) 765-4321 for more information, such as the maximum amount of the penalty you could be charged.

* * * * *

H-4(D)(4) Sample Form for § 1026.20(d)

February 15, 2021

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Springside Mortgage
1234 Main St
Memphis, TN 31801

Changes to Your Mortgage Interest Rate and Payments on September 1, 2021

Under the terms of your Adjustable-Rate Mortgage (ARM), you had a three-year period during which your interest rate stayed the same. That period ends on September 1, 2021, so on that date your interest rate may change. After that, your interest rate may change every six months for the rest of your loan term. Any change in your interest rate may also change your mortgage payment. Also, as of September 1, 2021 your mortgage payment will include principal as well as interest.

	Current Rate and Monthly Payment	**Estimated** **New** Rate and Monthly Payment
Interest Rate	4.25%	6.25%
Principal	- **none** -	$237.70
Interest	$708.33	$1,041.66
Escrow (Taxes and Insurance)	$450.00	$450.00
Total Monthly Payment	**$1,158.33**	**$1,729.36 (due October 1, 2021)**

Interest Rate: We calculated your interest rate by taking a published "index rate" and adding a certain number of percentage points, called the "margin." Under your loan agreement, your index rate is the 30-day Average SOFR (SOFR) and your margin is 2.75%. The SOFR index is published daily on the website of the Federal Reserve Bank of New York.

Rate Limits: Your rate cannot go higher than 11.625% over the life of the loan. Your rate can change every six months by no more than 1.00%. We did not include an additional 1.00% interest rate increase to your new rate because a rate limit applied. This additional increase may be applied to your interest rate when it adjusts again on March 1, 2022.

New Interest Rate and Monthly Payment: The table above shows our estimate of your new interest rate and new monthly payment. These amounts are based on the SOFR index as of now, your margin, your loan balance of $200,000, and your remaining loan term of 324 months. **However, if the SOFR index has changed when we calculate the exact amount of your new interest rate and payment, your new interest rate and payment may be different from the estimate above. We will send you another notice with the exact amount of your new interest rate and payment 2 to 4 months before the first new payment is due, if your new payment will be different from your current payment.**

Prepayment Penalty: None

If You Anticipate Problems Making Your Payments:

- Contact Springside Mortgage at 1-800-555-4567 as soon as possible.
- If you seek an alternative to the upcoming changes to your interest rate and payment, the following options **may** be possible (most are subject to lender approval):
  - Refinance your loan with us or another lender;
  - Sell your home and use the proceeds to pay off your current loan;
  - Modify your loan terms with us;
  - Payment forbearance temporarily gives you more time to pay your monthly payment.
- If you would like contact information for counseling agencies or programs in your area, call the U.S. Department of Housing and Urban Development (HUD) at 800-569-4287 or visit www.hud.gov/offices/hsg/sfh/hcc/hcs.cfm. If you would like contact information for a State housing finance agency, visit the U.S. Consumer Financial Protection Bureau (CFPB) at http://www.consumerfinance.gov.

* * * * *

8. In supplement I to part 1026:

a. Under *Section 1026.9—Subsequent Disclosure Requirements*, revise *9(c)(1)(ii) Notice not Required*, *9(c)(2)(iv) Disclosure Requirements*, and *9(c)(2)(v) Notice not Required*.

b. Under *Section 1026.20—Disclosure Requirements Regarding Post-Consummation Events*, revise *20(a) Refinancings*.

c. Under *Section 1026.37—Content of Disclosures for Certain Mortgage Transactions (Loan Estimate)*, revise *37(j)(1) Index and margin*.

d. Under *Section 1026.40—Requirements for Home-Equity Plans*, revise *Paragraph 40(f)(3)(ii)* and add *Paragraph 40(f)(3)(ii)(A)* and *Paragraph 40(f)(3)(ii)(B)*.

e. Under *Section 1026.55—Limitations on Increasing Annual Percentage Rates, Fees, and Charges*, revise *55(b)(2) Variable rate exception* and add *55(b)(7) Index replacement and margin change exception*.

f. Under *Section 1026.59—Reevaluation of Rate Increases*, revise *59(d) Factors* and *59(f) Termination of Obligation to Review Factors* and add *59(h) Exceptions*.

The revisions and additions read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Section 1026.9—Subsequent Disclosure Requirements

* * * * *

9(c)(1)(ii) Notice not Required

1. *Changes not requiring notice.* The following are examples of changes that do not require a change-in-terms notice:

i. A change in the consumer's credit limit.

ii. A change in the name of the credit card or credit card plan.

iii. The substitution of one insurer for another.

iv. A termination or suspension of credit privileges. (But see § 1026.40(f).)

v. Changes arising merely by operation of law; for example, if the creditor's security interest in a consumer's car automatically extends to the proceeds when the consumer sells the car.

2. *Skip features.* If a credit program allows consumers to skip or reduce one or more payments during the year, or involves temporary reductions in finance charges, no notice of the change in terms is required either prior to the reduction or upon resumption of the higher rates or payments if these features are explained on the initial disclosure statement (including an explanation of the terms upon resumption). For example, a merchant may allow consumers to skip the December payment to encourage holiday shopping, or a teachers' credit union may not require payments during summer vacation. Otherwise, the creditor must give notice prior to resuming the original schedule or rate, even though no notice is required prior to the reduction. The change-in-terms notice may be combined with the notice offering the reduction. For example, the periodic statement reflecting the reduction or skip feature may also be used to notify the consumer of the resumption of the original schedule or rate, either by stating explicitly when the higher payment or charges resume, or by indicating the duration of the skip option. Language such as "You may skip your October payment," or "We will waive your finance charges for January," may serve as the change-in-terms notice.

3. *Replacing LIBOR*. The exception in § 1026.9(c)(1)(ii) under which a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(1) when the change involves a reduction of any component of a finance or other charge does not apply on or after October 1,

2021, to margin reductions when a LIBOR index is replaced, as permitted by § 1026.40(f)(3)(ii)(A) or (f)(3)(ii)(B). For change-in-terms notices provided under § 1026.9(c)(1) on or after October 1, 2021 covering changes permitted by § 1026.40(f)(3)(ii)(A) or (f)(3)(ii)(B), a creditor must provide a change-in-terms notice under § 1026.9(c)(1) disclosing the replacement index for a LIBOR index and any adjusted margin that is permitted under § 1026.40(f)(3)(ii)(A) or (f)(3)(ii)(B), even if the margin is reduced. Prior to October 1, 2021, a creditor has the option of disclosing a reduced margin in the change-in-terms notice that discloses the replacement index for a LIBOR index as permitted by § 1026.40(f)(3)(ii)(A) or (f)(3)(ii)(B).

*   *   *   *   *

9(c)(2)(iv) Disclosure Requirements

1. *Changing margin for calculating a variable rate.* If a creditor is changing a margin used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new margin) in the table described in § 1026.9(c)(2)(iv), and include a reminder that the rate is a variable rate. For example, if a creditor is changing the margin for a variable rate that uses the prime rate as an index, the creditor must disclose in the table the new rate (as calculated using the new margin) and indicate that the rate varies with the market based on the prime rate.

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.

3. *Changing from a variable rate to a non-variable rate.* If a creditor is changing a rate applicable to a consumer's account from a variable rate to a non-variable rate, the creditor generally must provide a notice as otherwise required under § 1026.9(c) even if the variable rate at the time of the change is higher than the non-variable rate. However, a creditor is not required to provide a notice under § 1026.9(c) if the creditor provides the disclosures required by § 1026.9(c)(2)(v)(B) or (c)(2)(v)(D) in connection with changing a variable rate to a lower non-variable rate. Similarly, a creditor is not required to provide a notice under § 1026.9(c) when changing a variable rate to a lower non-variable rate in order to comply with 50 U.S.C. app. 527 or a similar Federal or state statute or regulation. Finally, a creditor is not required to provide a notice under § 1026.9(c) when changing a variable rate to a lower non-variable rate in order to comply with § 1026.55(b)(4).

4. *Changing from a non-variable rate to a variable rate.* If a creditor is changing a rate applicable to a consumer's account from a non-variable rate to a variable rate, the creditor generally must provide a notice as otherwise required under § 1026.9(c) even if the non-variable rate is higher than the variable rate at the time of the change. However, a creditor is not required to provide a notice under § 1026.9(c) if the creditor provides the disclosures required by § 1026.9(c)(2)(v)(B) or (c)(2)(v)(D) in connection with changing a non-variable rate to a lower variable rate. Similarly, a creditor is not required to provide a notice under § 1026.9(c) when changing a non-variable rate to a lower variable rate in order to comply with 50 U.S.C. app. 527 or a similar Federal or state statute or regulation. Finally, a creditor is not required to provide a notice under § 1026.9(c) when changing a non-variable rate to a lower variable rate in order to

comply with § 1026.55(b)(4). *See* comment 55(b)(2)-4 regarding the limitations in § 1026.55(b)(2) on changing the rate that applies to a protected balance from a non-variable rate to a variable rate.

5. *Changes in the penalty rate, the triggers for the penalty rate, or how long the penalty rate applies.* If a creditor is changing the amount of the penalty rate, the creditor must also redisclose the triggers for the penalty rate and the information about how long the penalty rate applies even if those terms are not changing. Likewise, if a creditor is changing the triggers for the penalty rate, the creditor must redisclose the amount of the penalty rate and information about how long the penalty rate applies. If a creditor is changing how long the penalty rate applies, the creditor must redisclose the amount of the penalty rate and the triggers for the penalty rate, even if they are not changing.

6. *Changes in fees.* If a creditor is changing part of how a fee that is disclosed in a tabular format under § 1026.6(b)(1) and (2) is determined, the creditor must redisclose all relevant information related to that fee regardless of whether this other information is changing. For example, if a creditor currently charges a cash advance fee of "Either $5 or 3% of the transaction amount, whichever is greater (Max: $100)," and the creditor is only changing the minimum dollar amount from $5 to $10, the issuer must redisclose the other information related to how the fee is determined. For example, the creditor in this example would disclose the following: "Either $10 or 3% of the transaction amount, whichever is greater (Max: $100)."

7. *Combining a notice described in § 1026.9(c)(2)(iv) with a notice described in § 1026.9(g)(3).* If a creditor is required to provide a notice described in § 1026.9(c)(2)(iv) and a notice described in § 1026.9(g)(3) to a consumer, the creditor may combine the two notices.

This would occur if penalty pricing has been triggered, and other terms are changing on the consumer's account at the same time.

8. *Content.* Sample G-20 contains an example of how to comply with the requirements in § 1026.9(c)(2)(iv) when a variable rate is being changed to a non-variable rate on a credit card account. The sample explains when the new rate will apply to new transactions and to which balances the current rate will continue to apply. Sample G-21 contains an example of how to comply with the requirements in § 1026.9(c)(2)(iv) when the late payment fee on a credit card account is being increased, and the returned payment fee is also being increased. The sample discloses the consumer's right to reject the changes in accordance with § 1026.9(h).

9. *Clear and conspicuous standard. See* comment 5(a)(1)-1 for the clear and conspicuous standard applicable to disclosures required under § 1026.9(c)(2)(iv)(A)(*1*).

10. *Terminology. See* § 1026.5(a)(2) for terminology requirements applicable to disclosures required under § 1026.9(c)(2)(iv)(A)(*1*).

11. *Reasons for increase.* i. *In general.* Section 1026.9(c)(2)(iv)(A)(*8*) requires card issuers to disclose the principal reason(s) for increasing an annual percentage rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan. The regulation does not mandate a minimum number of reasons that must be disclosed. However, the specific reasons disclosed under § 1026.9(c)(2)(iv)(A)(*8*) are required to relate to and accurately describe the principal factors actually considered by the card issuer in increasing the rate. A card issuer may describe the reasons for the increase in general terms. For example, the notice of a rate increase triggered by a decrease of 100 points in a consumer's credit score may state that the increase is due to "a decline in your creditworthiness" or "a decline in your credit score." Similarly, a notice of a rate increase triggered by a 10% increase in the card issuer's cost of

funds may be disclosed as “a change in market conditions.” In some circumstances, it may be appropriate for a card issuer to combine the disclosure of several reasons in one statement. However, § 1026.9(c)(2)(iv)(A)(*8*) requires that the notice specifically disclose any violation of the terms of the account on which the rate is being increased, such as a late payment or a returned payment, if such violation of the account terms is one of the four principal reasons for the rate increase.

ii. *Example.* Assume that a consumer made a late payment on the credit card account on which the rate increase is being imposed, made a late payment on a credit card account with another card issuer, and the consumer’s credit score decreased, in part due to such late payments. The card issuer may disclose the reasons for the rate increase as a decline in the consumer’s credit score and the consumer’s late payment on the account subject to the increase. Because the late payment on the credit card account with the other issuer also likely contributed to the decline in the consumer’s credit score, it is not required to be separately disclosed. However, the late payment on the credit card account on which the rate increase is being imposed must be specifically disclosed even if that late payment also contributed to the decline in the consumer’s credit score.

9(c)(2)(v) Notice not Required

1. *Changes not requiring notice.* The following are examples of changes that do not require a change-in-terms notice:

i. A change in the consumer’s credit limit except as otherwise required by § 1026.9(c)(2)(vi).

ii. A change in the name of the credit card or credit card plan.

iii. The substitution of one insurer for another.

iv. A termination or suspension of credit privileges.

v. Changes arising merely by operation of law; for example, if the creditor's security interest in a consumer's car automatically extends to the proceeds when the consumer sells the car.

2. *Skip features.* i. *Skipped or reduced payments.* If a credit program allows consumers to skip or reduce one or more payments during the year, no notice of the change in terms is required either prior to the reduction in payments or upon resumption of the higher payments if these features are explained on the account-opening disclosure statement (including an explanation of the terms upon resumption). For example, a merchant may allow consumers to skip the December payment to encourage holiday shopping, or a teacher's credit union may not require payments during summer vacation. Otherwise, the creditor must give notice prior to resuming the original payment schedule, even though no notice is required prior to the reduction. The change-in-terms notice may be combined with the notice offering the reduction. For example, the periodic statement reflecting the skip feature may also be used to notify the consumer of the resumption of the original payment schedule, either by stating explicitly when the higher resumes or by indicating the duration of the skip option. Language such as "You may skip your October payment" may serve as the change-in-terms notice.

ii. *Temporary reductions in interest rates or fees.* If a credit program involves temporary reductions in an interest rate or fee, no notice of the change in terms is required either prior to the reduction or upon resumption of the original rate or fee if these features are disclosed in advance in accordance with the requirements of § 1026.9(c)(2)(v)(B). Otherwise, the creditor must give notice prior to resuming the original rate or fee, even though no notice is required prior to the reduction. The notice provided prior to resuming the original rate or fee must comply with the timing requirements of § 1026.9(c)(2)(i) and the content and format requirements of § 1026.9(c)(2)(iv)(A), (B) (if applicable), (C) (if applicable), and (D). *See* comment 55(b)-3 for guidance regarding the application of § 1026.55 in these circumstances.

3. *Changing from a variable rate to a non-variable rate.* See comment 9(c)(2)(iv)-3.

4. *Changing from a non-variable rate to a variable rate.* See comment 9(c)(2)(iv)-4.

5. *Temporary rate or fee reductions offered by telephone.* The timing requirements of § 1026.9(c)(2)(v)(B) are deemed to have been met, and written disclosures required by § 1026.9(c)(2)(v)(B) may be provided as soon as reasonably practicable after the first transaction subject to a rate that will be in effect for a specified period of time (a temporary rate) or the imposition of a fee that will be in effect for a specified period of time (a temporary fee) if:

i. The consumer accepts the offer of the temporary rate or temporary fee by telephone;

ii. The creditor permits the consumer to reject the temporary rate or temporary fee offer and have the rate or rates or fee that previously applied to the consumer's balances reinstated for 45 days after the creditor mails or delivers the written disclosures required by § 1026.9(c)(2)(v)(B), except that the creditor need not permit the consumer to reject a temporary rate or temporary fee offer if the rate or rates or fee that will apply following expiration of the temporary rate do not exceed the rate or rates or fee that applied immediately prior to commencement of the temporary rate or temporary fee; and

iii. The disclosures required by § 1026.9(c)(2)(v)(B) and the consumer's right to reject the temporary rate or temporary fee offer and have the rate or rates or fee that previously applied to the consumer's account reinstated, if applicable, are disclosed to the consumer as part of the temporary rate or temporary fee offer.

6. *First listing.* The disclosures required by § 1026.9(c)(2)(v)(B)(*1*) are only required to be provided in close proximity and in equal prominence to the first listing of the temporary rate or fee in the disclosure provided to the consumer. For purposes of § 1026.9(c)(2)(v)(B), the first statement of the temporary rate or fee is the most prominent listing on the front side of the first page of the disclosure. If the temporary rate or fee does not appear on the front side of the first page of the disclosure, then the first listing of the temporary rate or fee is the most prominent listing of the temporary rate on the subsequent pages of the disclosure. For advertising requirements for promotional rates, see § 1026.16(g).

7. *Close proximity—point of sale.* Creditors providing the disclosures required by § 1026.9(c)(2)(v)(B) of this section in person in connection with financing the purchase of goods or services may, at the creditor's option, disclose the annual percentage rate or fee that would apply after expiration of the period on a separate page or document from the temporary rate or fee and the length of the period, provided that the disclosure of the annual percentage rate or fee that would apply after the expiration of the period is equally prominent to, and is provided at the same time as, the disclosure of the temporary rate or fee and length of the period.

8. *Disclosure of annual percentage rates.* If a rate disclosed pursuant to § 1026.9(c)(2)(v)(B) or (c)(2)(v)(D) is a variable rate, the creditor must disclose the fact that the rate may vary and how the rate is determined. For example, a creditor could state "After October 1, 2009, your APR will be 14.99%. This APR will vary with the market based on the Prime Rate."

9. *Deferred interest or similar programs.* If the applicable conditions are met, the exception in § 1026.9(c)(2)(v)(B) applies to deferred interest or similar promotional programs under which the consumer is not obligated to pay interest that accrues on a balance if that

balance is paid in full prior to the expiration of a specified period of time. For purposes of this comment and § 1026.9(c)(2)(v)(B), "deferred interest" has the same meaning as in § 1026.16(h)(2) and associated commentary. For such programs, a creditor must disclose pursuant to § 1026.9(c)(2)(v)(B)(*1*) the length of the deferred interest period and the rate that will apply to the balance subject to the deferred interest program if that balance is not paid in full prior to expiration of the deferred interest period. Examples of language that a creditor may use to make the required disclosures under § 1026.9(c)(2)(v)(B)(*1*) include:

i. "No interest if paid in full in 6 months. If the balance is not paid in full in 6 months, interest will be imposed from the date of purchase at a rate of 15.99%."

ii. "No interest if paid in full by December 31, 2010. If the balance is not paid in full by that date, interest will be imposed from the transaction date at a rate of 15%."

10. *Relationship between §§ 1026.9(c)(2)(v)(B) and 1026.6(b)*. A disclosure of the information described in § 1026.9(c)(2)(v)(B)(*1*) provided in the account-opening table in accordance with § 1026.6(b) complies with the requirements of § 1026.9(c)(2)(v)(B)(*2*), if the listing of the introductory rate in such tabular disclosure also is the first listing as described in comment 9(c)(2)(v)-6.

11. *Disclosure of the terms of a workout or temporary hardship arrangement.* In order for the exception in § 1026.9(c)(2)(v)(D) to apply, the disclosure provided to the consumer pursuant to § 1026.9(c)(2)(v)(D)(*2*) must set forth:

i. The annual percentage rate that will apply to balances subject to the workout or temporary hardship arrangement;

ii. The annual percentage rate that will apply to such balances if the consumer completes or fails to comply with the terms of, the workout or temporary hardship arrangement;

iii. Any reduced fee or charge of a type required to be disclosed under § 1026.6(b)(2)(ii), (b)(2)(iii), (b)(2)(viii), (b)(2)(ix), (b)(2)(xi), or (b)(2)(xii) that will apply to balances subject to the workout or temporary hardship arrangement, as well as the fee or charge that will apply if the consumer completes or fails to comply with the terms of the workout or temporary hardship arrangement;

iv. Any reduced minimum periodic payment that will apply to balances subject to the workout or temporary hardship arrangement, as well as the minimum periodic payment that will apply if the consumer completes or fails to comply with the terms of the workout or temporary hardship arrangement; and

v. If applicable, that the consumer must make timely minimum payments in order to remain eligible for the workout or temporary hardship arrangement.

12. *Index not under creditor's control. See* comment 55(b)(2)-2 for guidance on when an index is deemed to be under a creditor's control.

13. *Temporary rates—relationship to § 1026.59.* i. *General.* Section 1026.59 requires a card issuer to review rate increases imposed due to the revocation of a temporary rate. In some circumstances, § 1026.59 may require an issuer to reinstate a reduced temporary rate based on that review. If, based on a review required by § 1026.59, a creditor reinstates a temporary rate that had been revoked, the card issuer is not required to provide an additional notice to the consumer when the reinstated temporary rate expires, if the card issuer provided the disclosures required by § 1026.9(c)(2)(v)(B) prior to the original commencement of the temporary rate. *See* § 1026.55 and the associated commentary for guidance on the permissibility and applicability of rate increases.

i. *Example.* A consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan on January 1, 2011. The annual percentage rate applicable to purchases is 18%. The card issuer offers the consumer a 15% rate on purchases made between January 1, 2012 and January 1, 2014. Prior to January 1, 2012, the card issuer discloses, in accordance with § 1026.9(c)(2)(v)(B), that the rate on purchases made during that period will increase to the standard 18% rate on January 1, 2014. In March 2012, the consumer makes a payment that is ten days late. The card issuer, upon providing 45 days' advance notice of the change under § 1026.9(g), increases the rate on new purchases to 18% effective as of June 1, 2012. On December 1, 2012, the issuer performs a review of the consumer's account in accordance with § 1026.59. Based on that review, the card issuer is required to reduce the rate to the original 15% temporary rate as of January 15, 2013. On January 1, 2014, the card issuer may increase the rate on purchases to 18%, as previously disclosed prior to January 1, 2012, without providing an additional notice to the consumer.

14. *Replacing LIBOR*. The exception in § 1026.9(c)(2)(v)(A) under which a creditor is not required to provide a change-in-terms notice under § 1026.9(c)(2) when the change involves a reduction of any component of a finance or other charge does not apply on or after October 1, 2021, to margin reductions when a LIBOR index is replaced as permitted by § 1026.55(b)(7)(i) or (b)(7)(ii). For change-in-terms notices provided under § 1026.9(c)(2) on or after October 1, 2021, covering changes permitted by § 1026.55(b)(7)(i) or (b)(7)(ii), a creditor must provide a change-in-terms notice under § 1026.9(c)(2) disclosing the replacement index for a LIBOR index and any adjusted margin that is permitted under § 1026.55(b)(7)(i) or (b)(7)(ii), even if the margin is reduced. Prior to October 1, 2021, a creditor has the option of disclosing a reduced

margin in the change-in-terms notice that discloses the replacement index for a LIBOR index as permitted by § 1026.55(b)(7)(i) or (b)(7)(ii).

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Section 1026.20—Disclosure Requirements Regarding Post-Consummation Events

20(a) Refinancings

1. *Definition.* A refinancing is a new transaction requiring a complete new set of disclosures. Whether a refinancing has occurred is determined by reference to whether the original obligation has been satisfied or extinguished and replaced by a new obligation, based on the parties' contract and applicable law. The refinancing may involve the consolidation of several existing obligations, disbursement of new money to the consumer or on the consumer's behalf, or the rescheduling of payments under an existing obligation. In any form, the new obligation must completely replace the prior one.

i. Changes in the terms of an existing obligation, such as the deferral of individual installments, will not constitute a refinancing unless accomplished by the cancellation of that obligation and the substitution of a new obligation.

ii. A substitution of agreements that meets the refinancing definition will require new disclosures, even if the substitution does not substantially alter the prior credit terms.

2. *Exceptions.* A transaction is subject to § 1026.20(a) only if it meets the general definition of a refinancing. Section 1026.20(a)(1) through (5) lists 5 events that are not treated as refinancings, even if they are accomplished by cancellation of the old obligation and substitution of a new one.

3. *Variable-rate.* i. If a variable-rate feature was properly disclosed under the regulation, a rate change in accord with those disclosures is not a refinancing. For example, no new

disclosures are required when the variable-rate feature is invoked on a renewable balloon-payment mortgage that was previously disclosed as a variable-rate transaction.

ii. Even if it is not accomplished by the cancellation of the old obligation and substitution of a new one, a new transaction subject to new disclosures results if the creditor either:

A. Increases the rate based on a variable-rate feature that was not previously disclosed; or

B. Adds a variable-rate feature to the obligation. A creditor does not add a variable-rate feature by changing the index of a variable-rate transaction to a comparable index, whether the change replaces the existing index or substitutes an index for one that no longer exists. For example, a creditor 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.

iii. If either of the events in paragraph 20(a)-3.ii.A or ii.B occurs in a transaction secured by a principal dwelling with a term longer than one year, the disclosures required under § 1026.19(b) also must be given at that time.

4. *Unearned finance charge.* In a transaction involving precomputed finance charges, the creditor must include in the finance charge on the refinanced obligation any unearned portion of the original finance charge that is not rebated to the consumer or credited against the underlying obligation. For example, in a transaction with an add-on finance charge, a creditor advances new money to a consumer in a fashion that extinguishes the original obligation and replaces it with a new one. The creditor neither refunds the unearned finance charge on the original obligation to

the consumer nor credits it to the remaining balance on the old obligation. Under these circumstances, the unearned finance charge must be included in the finance charge on the new obligation and reflected in the annual percentage rate disclosed on refinancing. Accrued but unpaid finance charges are included in the amount financed in the new obligation.

5. *Coverage.* Section 1026.20(a) applies only to refinancings undertaken by the original creditor or a holder or servicer of the original obligation. A "refinancing" by any other person is a new transaction under the regulation, not a refinancing under this section.

Paragraph 20(a)(1)

1. *Renewal.* This exception applies both to obligations with a single payment of principal and interest and to obligations with periodic payments of interest and a final payment of principal. In determining whether a new obligation replacing an old one is a renewal of the original terms or a refinancing, the creditor may consider it a renewal even if:

i. Accrued unpaid interest is added to the principal balance.

ii. Changes are made in the terms of renewal resulting from the factors listed in § 1026.17(c)(3).

iii. The principal at renewal is reduced by a curtailment of the obligation.

Paragraph 20(a)(2)

1. Annual *percentage rate reduction.* A reduction in the annual percentage rate with a corresponding change in the payment schedule is not a refinancing. If the annual percentage rate is subsequently increased (even though it remains below its original level) and the increase is effected in such a way that the old obligation is satisfied and replaced, new disclosures must then be made.

2. *Corresponding change.* A corresponding change in the payment schedule to implement a lower annual percentage rate would be a shortening of the maturity, or a reduction in the payment amount or the number of payments of an obligation. The exception in § 1026.20(a)(2) does not apply if the maturity is lengthened, or if the payment amount or number of payments is increased beyond that remaining on the existing transaction.

Paragraph 20(a)(3)

1. *Court agreements.* This exception includes, for example, agreements such as reaffirmations of debts discharged in bankruptcy, settlement agreements, and post-judgment agreements. (See the commentary to § 1026.2(a)(14) for a discussion of court-approved agreements that are not considered "credit.")

Paragraph 20(a)(4)

1. *Workout agreements.* A workout agreement is not a refinancing unless the annual percentage rate is increased or additional credit is advanced beyond amounts already accrued plus insurance premiums.

Paragraph 20(a)(5)

1. *Insurance renewal.* The renewal of optional insurance added to an existing credit transaction is not a refinancing, assuming that appropriate Truth in Lending disclosures were provided for the initial purchase of the insurance.

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Section 1026.37—Content of Disclosures for Certain Mortgage Transactions (Loan Estimate)

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37(j)(1) Index and margin.

1. *Index and margin.* The index disclosed pursuant to § 1026.37(j)(1) must be stated such that a consumer reasonably can identify it. A common abbreviation or acronym of the name of the index may be disclosed in place of the proper name of the index, if it is a commonly used public method of identifying the index. For example, "SOFR" may be disclosed instead of Secured Overnight Financing Rate. The margin should be disclosed as a percentage. For example, if the contract determines the interest rate by adding 4.25 percentage points to the index, the margin should be disclosed as "4.25%."

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Section 1026.40—Requirements for Home-Equity Plans

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Paragraph 40(f)(3)(ii)

1. Replacing LIBOR. A creditor may use either the provision in § 1026.40(f)(3)(ii)(A) or (f)(3)(ii)(B) to replace a LIBOR index used under a plan so long as the applicable conditions are met for the provision used. Neither provision, however, excuses the creditor from noncompliance with contractual provisions. The following examples illustrate when a creditor may use the provisions in § 1026.40(f)(3)(ii)(A) or (f)(3)(ii)(B) to replace the LIBOR index used under a plan.

i. Assume that LIBOR becomes unavailable after March 15, 2021, and assume a contract provides that a creditor may not replace an index unilaterally under a plan unless the original index becomes unavailable and provides that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the creditor may use § 1026.40(f)(3)(ii)(A) to replace the LIBOR index used under the plan so long as the conditions of that provision are met. Section 1026.40(f)(3)(ii)(B) provides that a creditor may replace the LIBOR index if, among other conditions, the replacement index value in effect on December 31, 2020, and 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, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. In this case, however, the creditor would be contractually prohibited from replacing the LIBOR index used under the plan unless the replacement index and replacement margin also will produce an annual percentage rate substantially similar to a rate that is in effect when the LIBOR index becomes unavailable.

ii. Assume that LIBOR becomes unavailable after March 15, 2021, and assume a contract provides that a creditor may not replace an index unilaterally under a plan unless the original index becomes unavailable but does not require that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the creditor would be contractually prohibited from unilaterally replacing a LIBOR index used under the plan until it becomes unavailable. At that time, the creditor has the option of using § 1026.40(f)(3)(ii)(A) or (f)(3)(ii)(B) to replace the LIBOR index if the conditions of the applicable provision are met.

iii. Assume that LIBOR becomes unavailable after March 15, 2021, and assume a contract provides that a creditor may change the terms of the contract (including the index) as permitted by law. In this case, if the creditor replaces a LIBOR index under a plan on or after March 15, 2021, but does not wait until the LIBOR index becomes unavailable to do so, the creditor may only use § 1026.40(f)(3)(ii)(B) to replace the LIBOR index if the conditions of that provision are met. In this case, the creditor may not use § 1026.40(f)(3)(ii)(A). If the creditor waits until the LIBOR index used under the plan becomes unavailable to replace the LIBOR index, the creditor has the option of using § 1026.40(f)(3)(ii)(A) or (f)(3)(ii)(B) to replace the LIBOR index if the conditions of the applicable provision are met.

Paragraph 40(f)(3)(ii)(A)

1. *Substitution of index.* A creditor may change the index and margin used under the plan if the original index becomes unavailable, as long as historical fluctuations in the original and replacement indices were substantially similar, and as long as the replacement index and replacement margin will produce a rate substantially similar to the rate that was in effect at the time the original index became unavailable. If the replacement index is newly established and therefore does not have any rate history, it may be used if it and the replacement margin will produce a rate substantially similar to the rate in effect when the original index became unavailable.

2. *Replacing LIBOR*. For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

i. 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. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(A) that the prime rate and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the LIBOR index became unavailable. See also comment 40(f)(3)(ii)(A)-3.

ii. The Bureau has determined that effective [applicable date] the spread-adjusted indices based on SOFR recommended by the Alternative Reference Rates Committee to replace the 1-month, 3-month, 6-month, and 1-year U.S. Dollar LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year U.S. Dollar LIBOR indices respectively. In order to use this SOFR-based spread-adjusted index as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(A) that the SOFR-based spread-adjusted index and replacement margin would have resulted in an annual percentage rate substantially similar to the rate in effect at the time the LIBOR index became unavailable. See also comment 40(f)(3)(ii)(A)-3.

3. *Substantially similar rate when LIBOR becomes unavailable*. Under § 1026.40(f)(3)(ii)(A), the replacement index and replacement margin must produce an annual percentage rate substantially similar to the rate that was in effect based on the LIBOR index used under the plan when the LIBOR index became unavailable. For this comparison of the rates, a creditor must use the value of the replacement index and the LIBOR index on the day that LIBOR becomes unavailable. The replacement index and replacement margin are not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. The following example illustrates this comment.

i. Assume that the LIBOR index used under a plan becomes unavailable on December 31, 2021, and on that day the LIBOR index value is 2%, the margin is 10%, and the annual percentage rate is 12%. Also, assume that a creditor has selected a prime index as the replacement index, and the value of the prime index is 5% on December 31, 2021. The creditor would satisfy the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable by selecting a 7% replacement margin. (The prime index value of 5% and the replacement margin of 7% would produce a rate of 12% on December 31, 2021.) Thus, if the creditor provides a change-in-terms notice under § 1026.9(c)(1) on January 2, 2022, disclosing the prime index as the replacement index and a replacement margin of 7%, where these changes will become effective on January 18, 2022, the creditor satisfies the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable. This is true even if the prime index value changes after December 31, 2021, and the annual percentage rate calculated using the prime index value and 7% margin on January 18, 2022, is not substantially similar to the rate calculated using the LIBOR index value on December 31, 2021.

Paragraph 40(f)(3)(ii)(B)

1. *Replacing LIBOR*. For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through December 31, 2020, or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

i. 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. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(B) that the prime rate index value in effect on December 31, 2020, and 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, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If either the LIBOR index or the prime rate is not published on December 31, 2020, the creditor must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the prime rate must be substantially similar to the rate based on the LIBOR index. See also comments 40(f)(3)(ii)(B)-2 and -3.

ii. The Bureau has determined that effective [applicable date] the spread-adjusted indices based on SOFR recommended by the Alternative Reference Rates Committee to replace the 1-month, 3-month, 6-month, and 1-year U.S. Dollar LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year U.S. Dollar LIBOR indices respectively. In order to use this SOFR-based spread-adjusted index as the replacement index for the applicable LIBOR index, the creditor also must comply with the condition in § 1026.40(f)(3)(ii)(B) that the SOFR-based spread-adjusted index value in effect on December 31, 2020, and 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, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If either the LIBOR index or the SOFR-based spread-adjusted index is not published on December 31, 2020, the creditor must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the SOFR-based spread-adjusted index must be substantially similar to the rate based on the LIBOR index. See also comments 40(f)(3)(ii)(B)-2 and -3.

2. *Using index values on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.* Under § 1026.40(f)(3)(ii)(B), if both the replacement index and the LIBOR index used under the plan are published on December 31, 2020, the replacement index value in effect on December 31, 2020, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the creditor provides the change-in-terms notice disclosing the replacement index for the variable rate. The following example illustrates this comment.

i. Assume a variable rate used under the plan that is based on a LIBOR index and assume that LIBOR becomes unavailable after March 15, 2021. On December 31, 2020, the LIBOR index value is 2%, the margin on that day is 10% and the annual percentage rate using that index value and margin is 12%. Assume on January 1, 2021, a creditor provides a change-in-terms notice under § 1026.9(c)(1) disclosing a new margin of 12% for the variable rate pursuant to a written agreement under § 1026.40(f)(3)(iii), and this change in the margin becomes effective on January 1, 2021, pursuant to § 1026.9(c)(1). Assume that there are no more changes in the margin that is used in calculating the variable rate prior to February 27, 2021, the date on which the creditor provides a change-in-term notice under § 1026.9(c)(1), disclosing the replacement index and replacement margin for the variable rate that will be effective on March 15, 2021. In this case, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is 12%. Assume that the creditor has selected a prime index as the replacement index, and the value of the prime index is 5% on December 31, 2020. A replacement margin of 9% is permissible under § 1026.40(f)(3)(ii)(B) because that replacement margin combined with the prime index value of 5% on December 31, 2020, will produce an annual percentage rate of 14%, which is substantially similar to the 14% annual percentage rate calculated using the LIBOR index value in effect on December 31, 2020, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan (which is 12%).

3. *Substantially similar rates using index values on December 31, 2020*. Under § 1026.40(f)(3)(ii)(B), if both the replacement index and the LIBOR index used under the plan are published on December 31, 2020, the replacement index value in effect on December 31, 2020, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The replacement index and replacement margin are not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. The following example illustrates this comment.

i. Assume that the LIBOR index used under the plan has a value of 2% on December 31, 2020, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is 10%, and the annual percentage rate based on that LIBOR index value and that margin is 12%. Also, assume that the creditor has selected a prime index as the replacement index, and the value of the prime index is 5% on December 31, 2020. A creditor would satisfy the requirement to use a replacement index value in effect on December 31, 2020, and replacement margin that will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, by selecting a 7% replacement margin. (The prime index value of 5% and the replacement margin of 7% would produce a rate of 12%.) Thus, if the creditor provides a change-in-terms notice under § 1026.9(c)(1) on February 27, 2021, disclosing the prime index as the replacement index and a replacement margin of 7%, where these changes will become effective on March 15, 2021, the creditor satisfies the requirement to use a replacement index value in effect on December 31, 2020, and replacement margin that will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This is true even if the prime index value or the LIBOR index value changes after December 31, 2020, and the annual percentage rate calculated using the prime index value and 7% margin on March 15, 2021, is not substantially similar to the rate calculated using the LIBOR index value on December 31, 2020, or substantially similar to the rate calculated using the LIBOR index value on March 15, 2021.

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Section 1026.55—Limitations on Increasing Annual Percentage Rates, Fees, and Charges

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55(b)(2) Variable rate exception

1. *Increases due to increase in index.* Section 1026.55(b)(2) provides that an annual percentage rate that varies according to an index that is not under the card issuer's control and is available to the general public may be increased due to an increase in the index. This section does not permit a card issuer to increase the rate by changing the method used to determine a rate that varies with an index (such as by increasing the margin), even if that change will not result in an immediate increase. However, from time to time, a card issuer may change the day on which index values are measured to determine changes to the rate.

2. *Index not under card issuer's control.* A card issuer may increase a variable annual percentage rate pursuant to § 1026.55(b)(2) only if the increase is based on an index or indices outside the card issuer's control. For purposes of § 1026.55(b)(2), an index is under the card issuer's control if:

i. The index is the card issuer's own prime rate or cost of funds. A card issuer is permitted, however, to use a published prime rate, such as that in the *Wall Street Journal,* even if the card issuer's own prime rate is one of several rates used to establish the published rate.

ii. The variable rate is subject to a fixed minimum rate or similar requirement that does not permit the variable rate to decrease consistent with reductions in the index. A card issuer is permitted, however, to establish a fixed maximum rate that does not permit the variable rate to increase consistent with increases in an index. For example, assume that, under the terms of an account, a variable rate will be adjusted monthly by adding a margin of 5 percentage points to a publicly-available index. When the account is opened, the index is 10% and therefore the variable rate is 15%. If the terms of the account provide that the variable rate will not decrease below 15% even if the index decreases below 10%, the card issuer cannot increase that rate pursuant to § 1026.55(b)(2). However, § 1026.55(b)(2) does not prohibit the card issuer from providing in the terms of the account that the variable rate will not increase above a certain amount (such as 20%).

iii. The variable rate can be calculated based on any index value during a period of time (such as the 90 days preceding the last day of a billing cycle). A card issuer is permitted, however, to provide in the terms of the account that the variable rate will be calculated based on the average index value during a specified period. In the alternative, the card issuer is permitted to provide in the terms of the account that the variable rate will be calculated based on the index value on a specific day (such as the last day of a billing cycle). For example, assume that the terms of an account provide that a variable rate will be adjusted at the beginning of each quarter by adding a margin of 7 percentage points to a publicly-available index. At account opening at the beginning of the first quarter, the variable rate is 17% (based on an index value of 10%). During the first quarter, the index varies between 9.8% and 10.5% with an average value of 10.1%. On the last day of the first quarter, the index value is 10.2%. At the beginning of the second quarter, § 1026.55(b)(2) does not permit the card issuer to increase the variable rate to 17.5% based on the first quarter's maximum index value of 10.5%. However, if the terms of the account provide that the variable rate will be calculated based on the average index value during the prior quarter, § 1026.55(b)(2) permits the card issuer to increase the variable rate to 17.1% (based on the average index value of 10.1% during the first quarter). In the alternative, if the terms of the account provide that the variable rate will be calculated based on the index value on the last day of the prior quarter, § 1026.55(b)(2) permits the card issuer to increase the variable rate to 17.2% (based on the index value of 10.2% on the last day of the first quarter).

3. *Publicly available.* The index or indices must be available to the public. A publicly-available index need not be published in a newspaper, but it must be one the consumer can independently obtain (by telephone, for example) and use to verify the annual percentage rate applied to the account.

4. *Changing a non-variable rate to a variable rate.* Section 1026.55 generally prohibits a card issuer from changing a non-variable annual percentage rate to a variable annual percentage rate because such a change can result in an increase. However, a card issuer may change a non-variable rate to a variable rate to the extent permitted by one of the exceptions in § 1026.55(b). For example, § 1026.55(b)(1) permits a card issuer to change a non-variable rate to a variable rate upon expiration of a specified period of time. Similarly, following the first year after the account is opened, § 1026.55(b)(3) permits a card issuer to change a non-variable rate to a variable rate with respect to new transactions (after complying with the notice requirements in § 1026.9(b), (c) or (g)).

5. *Changing a variable rate to a non-variable rate.* Nothing in § 1026.55 prohibits a card issuer from changing a variable annual percentage rate to an equal or lower non-variable rate. Whether the non-variable rate is equal to or lower than the variable rate is determined at the time the card issuer provides the notice required by § 1026.9(c). For example, assume that on March 1 a variable annual percentage rate that is currently 15% applies to a balance of $2,000 and the card issuer sends a notice pursuant to § 1026.9(c) informing the consumer that the variable rate will be converted to a non-variable rate of 14% effective April 15. On April 15, the card issuer

may apply the 14% non-variable rate to the $2,000 balance and to new transactions even if the variable rate on March 2 or a later date was less than 14%.

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55(b)(7) Index replacement and margin change exception

1. Replacing LIBOR. A card issuer may use either the provision in § 1026.55(b)(7)(i) or (b)(7)(ii) to replace a LIBOR index used under the plan so long as the applicable conditions are met for the provision used. Neither provision, however, excuses the card issuer from noncompliance with contractual provisions. The following examples illustrate when a card issuer may use the provisions in § 1026.55(b)(7)(i) or (b)(7)(ii) to replace a LIBOR index on the plan.

i. Assume that LIBOR becomes unavailable after March 15, 2021, and assume a contract provides that a card issuer may not replace an index unilaterally under a plan unless the original index becomes unavailable and provides that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. The card issuer may use § 1026.55(b)(7)(i) to replace the LIBOR index used under the plan so long as the conditions of that provision are met. Section 1026.55(b)(7)(ii) provides that a card issuer may replace the LIBOR index if, among other conditions, the replacement index value in effect on December 31, 2020, and 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, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. In this case, however, the card issuer would be contractually prohibited from replacing the LIBOR index used under the plan unless the replacement index and replacement margin also will produce an annual percentage rate substantially similar to a rate that is in effect when the LIBOR index becomes unavailable.

ii. Assume that LIBOR becomes unavailable after March 15, 2021, and assume a contract provides that a card issuer may not replace an index unilaterally under a plan unless the original index becomes unavailable but does not require that the replacement index and replacement margin will result in an annual percentage rate substantially similar to a rate that is in effect when the original index becomes unavailable. In this case, the card issuer would be contractually prohibited from unilaterally replacing the LIBOR index used under the plan until it becomes unavailable. At that time, the card issuer has the option of using § 1026.55(b)(7)(i) or (b)(7)(ii) to replace the LIBOR index used under the plan if the conditions of the applicable provision are met.

iii. Assume that LIBOR becomes unavailable after March 15, 2021, and assume a contract provides that a card issuer may change the terms of the contract (including the index) as permitted by law. In this case, if the card issuer replaces the LIBOR index used under the plan on or after March 15, 2021, but does not wait until the LIBOR index becomes unavailable to do so, the card issuer may only use § 1026.55(b)(7)(ii) to replace the LIBOR index if the conditions of that provision are met. In that case, the card issuer may not use § 1026.55(b)(7)(i). If the card issuer waits until the LIBOR index used under the plan becomes unavailable to replace LIBOR, the card issuer has the option of using § 1026.55(b)(7)(i) or (b)(7)(ii) to replace the LIBOR index if the conditions of the applicable provisions are met.

Paragraph 55(b)(7)(i)

1. *Replacing LIBOR*. For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are

substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through when the LIBOR index becomes unavailable or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

i. 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. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(i) that the prime rate and replacement margin will produce a rate substantially similar to the rate that was in effect at the time the LIBOR index became unavailable. See also comment 55(b)(7)(i)-2.

ii. The Bureau has determined that effective [applicable date] the spread-adjusted indices based on SOFR recommended by the Alternative Reference Rates Committee to replace the 1-month, 3-month, 6-month, and 1-year U.S. Dollar LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year U.S. Dollar LIBOR indices respectively. In order to use this SOFR-based spread-adjusted index as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(i) that the SOFR-based spread-adjusted index replacement margin will produce a rate substantially similar to the rate that was in effect at the time the LIBOR index became unavailable. See also comment 55(b)(7)(i)-2.

2. *Substantially similar rate when LIBOR becomes unavailable*. Under § 1026.55(b)(7)(i), the replacement index and replacement margin must produce an annual percentage rate substantially similar to the rate that was in effect at the time the LIBOR index

used under the plan became unavailable. For this comparison of the rates, a card issuer must use the value of the replacement index and the LIBOR index on the day that LIBOR becomes unavailable. The replacement index and replacement margin are not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. The following example illustrates this comment.

i. Assume that the LIBOR index used under the plan becomes unavailable on December 31, 2021, and on that day the LIBOR value is 2%, the margin is 10%, and the annual percentage rate is 12%. Also, assume that a card issuer has selected a prime index as the replacement index, and the value of the prime index is 5% on December 31, 2021. The card issuer would satisfy the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable by selecting a 7% replacement margin. (The prime index value of 5% and the replacement margin of 7% would produce a rate of 12% on December 31, 2021.) Thus, if the card issuer provides a change-in-terms notice under § 1026.9(c)(2) on January 2, 2022, disclosing the prime index as the replacement index and a replacement margin of 7%, where these changes will become effective on February 17, 2022, the card issuer satisfies the requirement to use a replacement index and replacement margin that will produce an annual percentage rate substantially similar to the rate that was in effect when the LIBOR index used under the plan became unavailable. This is true even if the prime index value changes after December 31, 2021, and the annual percentage rate calculated using the prime index value and 7% margin on February 17, 2022, is not substantially similar to the rate calculated using the LIBOR index value on December 31, 2021.

Paragraph 55(b)(7)(ii)

1. *Replacing LIBOR*. For purposes of replacing a LIBOR index used under a plan, a replacement index that is not newly established must have historical fluctuations that are substantially similar to those of the LIBOR index used under the plan, considering the historical fluctuations up through December 31, 2020, or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier.

i. 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. In order to use this prime rate as the replacement index for the 1-month or 3-month U.S. Dollar LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(ii) that the prime rate index value in effect on December 31, 2020, and 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, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If either the LIBOR index or the prime rate is not published on December 31, 2020, the card issuer must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the prime rate must be substantially similar to the rate based on the LIBOR index. See also comments 55(b)(7)(ii)-2 and -3.

ii. The Bureau has determined that effective [applicable date] the spread-adjusted indices based on SOFR recommended by the Alternative Reference Rates Committee to replace the 1-month, 3-month, 6-month, and 1-year U.S. Dollar LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year U.S. Dollar LIBOR indices respectively. In order to use this SOFR-based spread-adjusted index as the replacement index for the applicable LIBOR index, the card issuer also must comply with the condition in § 1026.55(b)(7)(ii) that the SOFR-based spread-adjusted index value in effect on December 31, 2020, and 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, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If either the LIBOR index or the SOFR-based spread-adjusted index is not published on December 31, 2020, the card issuer must use the next calendar day that both indices are published as the date on which the annual percentage rate based on the SOFR-based spread-adjusted index must be substantially similar to the rate based on the LIBOR index. See also comments 55(b)(7)(ii)-2 and -3.

2. *Using index values on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan*. Under § 1026.55(b)(7)(ii), if both the replacement index and the LIBOR index used under the plan are published on December 31, 2020, the replacement index value in effect on December 31, 2020, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is the margin that applied to the variable rate immediately prior to when the card issuer provides the change-in-terms notice disclosing the replacement index for the variable rate. The following examples illustrate how to determine the margin that

applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan.

i. Assume a variable rate used under the plan that is based on a LIBOR index, and assume that LIBOR becomes unavailable after March 15, 2021. On December 31, 2020, the LIBOR index value is 2%, the margin on that day is 10% and the annual percentage rate using that index value and margin is 12%. Assume that on November 16, 2020, pursuant to § 1026.55(b)(3), a card issuer provides a change-in-terms notice under § 1026.9(c)(2) disclosing a new margin of 12% for the variable rate that will apply to new transactions after November 30, 2020, and this change in the margin becomes effective on January 1, 2021. The margin for the variable rate applicable to the transactions that occurred on or prior to November 30, 2020, remains at 10%. Assume that there are no more changes in the margin used on the variable rate that applied to transactions that occurred after November 30, 2020, or to the margin used on the variable rate that applied to transactions that occurred on or prior to November 30, 2020, prior to when the card issuer provides a change-in-terms notice on January 28, 2021, disclosing the replacement index and replacement margins for both variable rates that will be effective on March 15, 2021. In this case, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for transactions that occurred on or prior to November 30, 2020, is 10%. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for transactions that occurred after November 30, 2020, is 12%. Assume that the card issuer has selected a prime index as the replacement index, and the value of the prime index is 5% on December 31, 2020. A replacement margin of 7% is permissible under § 1026.55(b)(7)(ii) for transactions that occurred on or prior to November 30, 2020, because that replacement margin combined with the prime index value of 5% on

December 31, 2020, will produce an annual percentage rate of 12%, which is substantially similar to the 12% annual percentage rate calculated using the LIBOR index value in effect on December 31, 2020, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for that balance (which is 10%). A replacement margin of 9% is permissible under § 1026.55(b)(7)(ii) for transactions that occurred after November 30, 2020, because that replacement margin combined with the prime index value of 5% on December 31, 2020, will produce an annual percentage rate of 14%, which is substantially similar to the 14% annual percentage rate calculated using the LIBOR index value in effect on December 31, 2020, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for transactions that occurred after November 30, 2020, (which is 12%).

ii. Assume a variable rate used under the plan that is based on a LIBOR index, and assume that LIBOR becomes unavailable after March 15, 2021. On December 31, 2020, the LIBOR index value is 2%, the margin on that day is 10% and the annual percentage rate using that index value and margin is 12%. Assume that on November 16, 2020, pursuant to § 1026.55(b)(4), a card issuer provides a penalty rate notice under § 1026.9(g) increasing the margin for the variable rate to 20% that will apply to both outstanding balances and new transactions effective January 1, 2021, because the consumer was more than 60 days late in making a minimum payment. Assume that there are no more changes in the margin used on the variable rate for either the outstanding balance or new transactions prior to January 28, 2021, the date on which the card issuer provides a change-in-terms notice under § 1026.9(c)(2) disclosing the replacement index and replacement margin for the variable rate that will be effective on March 15, 2021. The margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for the outstanding balance and new transactions is 12%. Assume that the card issuer has selected a prime index as the replacement index, and the value of the prime index is 5% on December 31, 2020. A replacement margin of 17% is permissible under § 1026.55(b)(7)(ii) for the outstanding balance and new transactions because that replacement margin combined with the prime index value of 5% on December 31, 2020, will produce an annual percentage rate of 22%, which is substantially similar to the 22% annual percentage rate calculated using the LIBOR index value in effect on December 31, 2020, (which is 2%) and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan for the outstanding balance and new transactions (which is 20%).

3. *Substantially similar rate using index values on December 31, 2020*. Under § 1026.55(b)(7)(ii), if both the replacement index and the LIBOR index used under the plan are published on December 31, 2020, the replacement index value in effect on December 31, 2020, and replacement margin must produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. A card issuer is not required to produce an annual percentage rate that is substantially similar on the day that the replacement index and replacement margin become effective on the plan. The following example illustrates this comment.

i. Assume that the LIBOR index used under the plan has a value of 2% on December 31, 2020, the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan is 10%, and the annual percentage rate based on that LIBOR index value and that margin is 12%. Also, assume that the card issuer has selected a prime index as the replacement index, and the value of the prime index is 5% on December 31, 2020. A card issuer would satisfy the requirement to use a replacement index value in effect on December 31, 2020, and replacement margin that will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan, by selecting a 7% replacement margin. (The prime index value of 5% and the replacement margin of 7% would produce a rate of 12%.) Thus, if the card issuer provides a change-in-terms notice under § 1026.9(c)(2) on January 28, 2021, disclosing the prime index as the replacement index and a replacement margin of 7%, where these changes will become effective on March 15, 2021, the card issuer satisfies the requirement to use a replacement index value in effect on December 31, 2020, and replacement margin that will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR value in effect on December 31, 2020, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. This is true even if the prime index value or the LIBOR value change after December 31, 2020, and the annual percentage rate calculated using the prime index value and 7% margin on March 15, 2021, is not substantially similar to the rate calculated using the LIBOR index value on December 31, 2020, or substantially similar to the rate calculated using the LIBOR index value on March 15, 2021.

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Section 1026.59—Reevaluation of Rate Increases

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59(d) Factors

1. *Change in factors.* A creditor that complies with § 1026.59(a) by reviewing the factors it currently considers in determining the annual percentage rates applicable to similar new credit card accounts may change those factors from time to time. When a creditor changes the factors it considers in determining the annual percentage rates applicable to similar new credit card accounts from time to time, it may comply with § 1026.59(a) by reviewing the set of factors it considered immediately prior to the change in factors for a brief transition period, or may consider the new factors. For example, a creditor changes the factors it uses to determine the rates applicable to similar new credit card accounts on January 1, 2012. The creditor reviews the rates applicable to its existing accounts that have been subject to a rate increase pursuant to § 1026.59(a) on January 25, 2012. The creditor complies with § 1026.59(a) by reviewing, at its option, either the factors that it considered on December 31, 2011 when determining the rates applicable to similar new credit card accounts or the factors that it considers as of January 25, 2012. For purposes of compliance with § 1026.59(d), a transition period of 60 days from the change of factors constitutes a brief transition period.

2. *Comparison of existing account to factors used for similar new accounts.* Under § 1026.59(a), if a card issuer evaluates an existing account using the same factors that it considers in determining the rates applicable to similar new accounts, the review of factors need not result in existing accounts being subject to exactly the same rates and rate structure as a card issuer imposes on similar new accounts. For example, a card issuer may offer variable rates on similar new accounts that are computed by adding a margin that depends on various factors to the value of a SOFR index. The account that the card issuer is required to review pursuant to § 1026.59(a) may have variable rates that were determined by adding a different margin,

depending on different factors, to a published prime index. In performing the review required by § 1026.59(a), the card issuer may review the factors it uses to determine the rates applicable to similar new accounts. If a rate reduction is required, however, the card issuer need not base the variable rate for the existing account on the SOFR index but may continue to use the published prime index. Section 1026.59(a) requires, however, that the rate on the existing account after the reduction, as determined by adding the published prime index and margin, be comparable to the rate, as determined by adding the margin and the SOFR index, charged on a new account for which the factors are comparable.

3. *Similar new credit card accounts.* A card issuer complying with § 1026.59(d)(1)(ii) is required to consider the factors that the card issuer currently considers when determining the annual percentage rates applicable to similar new credit card accounts under an open-end (not home-secured) consumer credit plan. For example, a card issuer may review different factors in determining the annual percentage rate that applies to credit card plans for which the consumer pays an annual fee and receives rewards points than it reviews in determining the rates for credit card plans with no annual fee and no rewards points. Similarly, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards than it reviews in determining the rates applicable to credit cards that can be used at a wider variety of merchants. In addition, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards usable only at Merchant A than it may review for private label credit cards usable only at Merchant B. However, § 1026.59(d)(1)(ii) requires a card issuer to review the factors it considers when determining the rates for new credit card accounts with similar features that are offered for similar purposes.

4. *No similar new credit card accounts.* In some circumstances, a card issuer that complies with § 1026.59(a) by reviewing the factors that it currently considers in determining the annual percentage rates applicable to similar new accounts may not be able to identify a class of new accounts that are similar to the existing accounts on which a rate increase has been imposed. For example, consumers may have existing credit card accounts under an open-end (not home-secured) consumer credit plan but the card issuer may no longer offer a product to new consumers with similar characteristics, such as the availability of rewards, size of credit line, or other features. Similarly, some consumers' accounts may have been closed and therefore cannot be used for new transactions, while all new accounts can be used for new transactions. In those circumstances, § 1026.59 requires that the card issuer nonetheless perform a review of the rate increase on the existing customers' accounts. A card issuer does not comply with § 1026.59 by maintaining an increased rate without performing such an evaluation. In such circumstances, § 1026.59(d)(1)(ii) requires that the card issuer compare the existing accounts to the most closely comparable new accounts that it offers.

5. *Consideration of consumer's conduct on existing account.* A card issuer that complies with § 1026.59(a) by reviewing the factors that it currently considers in determining the annual percentage rates applicable to similar new accounts may consider the consumer's payment or other account behavior on the existing account only to the same extent and in the same manner that the issuer considers such information when one of its current cardholders applies for a new account with the card issuer. For example, a card issuer might obtain consumer reports for all of its applicants. The consumer reports contain certain information regarding the applicant's past performance on existing credit card accounts. However, the card issuer may have additional information about an existing cardholder's payment history or account usage that does not

appear in the consumer report and that, accordingly, it would not generally have for all new applicants. For example, a consumer may have made a payment that is five days late on his or her account with the card issuer, but this information does not appear on the consumer report. The card issuer may consider this additional information in performing its review under § 1026.59(a), but only to the extent and in the manner that it considers such information if a current cardholder applies for a new account with the issuer.

6. *Multiple rate increases between January 1, 2009 and February 21, 2010*. i. *General*. Section 1026.59(d)(2) applies if an issuer increased the rate applicable to a credit card account under an open-end (not home- secured) consumer credit plan between January 1, 2009 and February 21, 2010, and the increase was not based solely upon factors specific to the consumer. In some cases, a credit card account may have been subject to multiple rate increases during the period from January 1, 2009 to February 21, 2010. Some such rate increases may have been based solely upon factors specific to the consumer, while others may have been based on factors not specific to the consumer, such as the issuer's cost of funds or market conditions. In such circumstances, when conducting the first two reviews required under § 1026.59, the card issuer may separately review: (i) Rate increases imposed based on factors not specific to the consumer, using the factors described in § 1026.59(d)(1)(ii) (as required by § 1026.59(d)(2)); and (ii) rate increases imposed based on consumer-specific factors, using the factors described in § 1026.59(d)(1)(i). If the review of factors described in § 1026.59(d)(1)(i) indicates that it is appropriate to continue to apply a penalty or other increased rate to the account as a result of the consumer's payment history or other factors specific to the consumer, § 1026.59 permits the card issuer to continue to impose the penalty or other increased rate, even if the review of the factors described in § 1026.59(d)(1)(ii) would otherwise require a rate decrease.

i. Example. Assume a credit card account was subject to a rate of 15% on all transactions as of January 1, 2009. On May 1, 2009, the issuer increased the rate on existing balances and new transactions to 18%, based upon market conditions or other factors not specific to the consumer or the consumer's account. Subsequently, on September 1, 2009, based on a payment that was received five days after the due date, the issuer increased the applicable rate on existing balances and new transactions from 18% to a penalty rate of 25%. When conducting the first review required under § 1026.59, the card issuer reviews the rate increase from 15% to 18% using the factors described in § 1026.59(d)(1)(ii) (as required by § 1026.59(d)(2)), and separately but concurrently reviews the rate increase from 18% to 25% using the factors described in paragraph § 1026.59(d)(1)(i). The review of the rate increase from 15% to 18% based upon the factors described in § 1026.59(d)(1)(ii) indicates that a similarly situated new consumer would receive a rate of 17%. The review of the rate increase from 18% to 25% based upon the factors described in § 1026.59(d)(1)(i) indicates that it is appropriate to continue to apply the 25% penalty rate based upon the consumer's late payment. Section 1026.59 permits the rate on the account to remain at 25%.

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59(f) Termination of Obligation to Review Factors

1. *Revocation of temporary rates.* i. *In general.* If an annual percentage rate is increased due to revocation of a temporary rate, § 1026.59(a) requires that the card issuer periodically review the increased rate. In contrast, if the rate increase results from the expiration of a temporary rate previously disclosed in accordance with § 1026.9(c)(2)(v)(B), the review requirements in § 1026.59(a) do not apply. If a temporary rate is revoked such that the requirements of § 1026.59(a) apply, § 1026.59(f) permits an issuer to terminate the review of the

rate increase if and when the applicable rate is the same as the rate that would have applied if the increase had not occurred.

ii. *Examples.* Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. The card issuer offers the consumer a 10% rate on purchases made between February 1, 2012 and August 1, 2013 and discloses pursuant to § 1026.9(c)(2)(v)(B) that on August 1, 2013 the rate on purchases will revert to the original 15% rate. The consumer makes a payment that is five days late in July 2012.

A. Upon providing 45 days' advance notice and to the extent permitted under § 1026.55, the card issuer increases the rate applicable to new purchases to 15%, effective on September 1, 2012. The card issuer must review that rate increase under § 1026.59(a) at least once each six months during the period from September 1, 2012 to August 1, 2013, unless and until the card issuer reduces the rate to 10%. The card issuer performs reviews of the rate increase on January 1, 2013 and July 1, 2013. Based on those reviews, the rate applicable to purchases remains at 15%. Beginning on August 1, 2013, the card issuer is not required to continue periodically reviewing the rate increase, because if the temporary rate had expired in accordance with its previously disclosed terms, the 15% rate would have applied to purchase balances as of August 1, 2013 even if the rate increase had not occurred on September 1, 2012.

B. Same facts as above except that the review conducted on July 1, 2013 indicates that a reduction to the original temporary rate of 10% is appropriate. Section 1026.59(a)(2)(i) requires that the rate be reduced no later than 45 days after completion of the review, or no later than August 15, 2013. Because the temporary rate would have expired prior to the date on which the rate decrease is required to take effect, the card issuer may, at its option, reduce the rate to 10%

for any portion of the period from July 1, 2013, to August 1, 2013, or may continue to impose the 15% rate for that entire period. The card issuer is not required to conduct further reviews of the 15% rate on purchases.

C. Same facts as above except that on September 1, 2012 the card issuer increases the rate applicable to new purchases to the penalty rate on the consumer's account, which is 25%. The card issuer conducts reviews of the increased rate in accordance with § 1026.59 on January 1, 2013 and July 1, 2013. Based on those reviews, the rate applicable to purchases remains at 25%. The card issuer's obligation to review the rate increase continues to apply after August 1, 2013, because the 25% penalty rate exceeds the 15% rate that would have applied if the temporary rate expired in accordance with its previously disclosed terms. The card issuer's obligation to review the rate terminates if and when the annual percentage rate applicable to purchases is reduced to the 15% rate.

2. *Example—relationship to § 1026.59(a).* Assume that on January 1, 2011, a consumer opens a new credit card account under an open-end (not home-secured) consumer credit plan. The annual percentage rate applicable to purchases is 15%. Upon providing 45 days' advance notice and to the extent permitted under § 1026.55, the card issuer increases the rate applicable to new purchases to 18%, effective on September 1, 2012. The card issuer conducts reviews of the increased rate in accordance with § 1026.59 on January 1, 2013 and July 1, 2013, based on the factors described in § 1026.59(d)(1)(ii). Based on the January 1, 2013 review, the rate applicable to purchases remains at 18%. In the review conducted on July 1, 2013, the card issuer determines that, based on the relevant factors, the rate it would offer on a comparable new account would be 14%. Consistent with § 1026.59(f), § 1026.59(a) requires that the card issuer

reduce the rate on the existing account to the 15% rate that was in effect prior to the September 1, 2012 rate increase.

3. *Transition from LIBOR*. i. *General*. Effective March 15, 2021, in the case where the rate applicable immediately prior to the increase was a variable rate with a formula based on a LIBOR index, a card issuer may terminate the obligation to review if the card issuer reduces the annual percentage rate to a rate determined by a replacement formula that is derived from a replacement index value on December 31, 2020, plus replacement margin that is equal to the annual percentage rate of the LIBOR index value on December 31, 2020, plus the margin used to calculate the rate immediately prior to the increase (previous formula).

ii. *Examples*. A. Assume that on March 15, 2021, the previous formula is a LIBOR index plus a margin of 10% equal to a 12% annual percentage rate. In this case, the LIBOR index value is 2%. The card issuer selects a prime index as the replacement index. The replacement formula used to derive the rate at which the card issuer may terminate its obligation to review factors must be set at a replacement index plus replacement margin that equals 12%. If the prime index is 4% on December 31, 2020, the replacement margin must be 8% in the replacement formula. The replacement formula for purposes of determining when the card issuer can terminate the obligation to review factors is the prime index plus 8%.

B. Assume that on March 15, 2021, the account was not subject to § 1026.59 and the annual percentage rate was a LIBOR index plus a margin of 10% equal to 12%. On April 1, 2021, the card issuer raises the annual percentage rate to a LIBOR index plus a margin of 12% equal to 14%. On May 1, 2021, the card issuer transitions the account from a LIBOR index in accordance with § 1026.55(b)(7)(i) or (b)(7)(ii). The card issuer selects a prime index as the replacement index with a value on December 31, 2020, of 4%. The replacement formula used to derive the rate at which the card issuer may terminate its obligation to review factors must be set at the value of a replacement index on December 31, 2020, plus replacement margin that equals 12%. In this example, the replacement formula is the prime index plus 8%.

4. *Selecting a replacement index.* In selecting a replacement index for purposes of § 1026.59(f)(3), the card issuer must meet the conditions for selecting a replacement index that are described in § 1026.55(b)(7)(ii) and comment 55(b)(7)(ii)-1. For example, a card issuer may select a replacement index that is not newly established for purposes of § 1026.59(f)(3), so long as the replacement index has historical fluctuations that are substantially similar to those of the LIBOR index used in the previous formula, considering the historical fluctuations up through December 31, 2020, or up through the date indicated in a Bureau determination that the replacement index and the LIBOR index have historical fluctuations that are substantially similar, whichever is earlier. 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. The Bureau also has determined that effective [applicable date] the spread-adjusted indices based on SOFR recommended by the Alternative Reference Rates Committee to replace the 1-month, 3-month, 6-month, and 1-year U.S. Dollar LIBOR indices have historical fluctuations that are substantially similar to those of the 1-month, 3-month, 6-month, and 1-year U.S. Dollar LIBOR indices respectively. See comment 55(b)(7)(ii)-1. Also, for purposes of § 1026.59(f)(3), a card issuer may select a replacement index that is newly established as described in § 1026.55(b)(7)(ii).

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59(h) Exceptions

1. *Transition from LIBOR.* The exception to the requirements of this section does not

apply to rate increases already subject to § 1026.59 prior to the transition from the use of a LIBOR index as the index in setting a variable rate to the use of a different index in setting a variable rate where the change from the use of a LIBOR index to a different index occurred in accordance with § 1026.55(b)(7)(i) or (b)(7)(ii).

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/s/ Laura Galban

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