

May 29, 2020

To: Alternative Reference Rates Committee

**From: Shelly Repp
Counsel
National Council of Higher Education Resources**

Re: Comments on the ARRC Consultation on LIBOR Fallback Contract Language for New Variable Rate Private Student Loans

Set forth below are the comments of the National Council of Higher Education Resources (NCHER) on the ARRC Consultation on LIBOR Fallback Contract Language for New Variable Rate Private Student Loans that was circulated for comment on March 27, 2020 (the “Consultation” and such fallback language, the “Contract Language”).

NCHER is a national, nonprofit trade association representing state, nonprofit, and private higher education finance organizations that provide loan assistance to students and parents to pay for the costs of postsecondary education. Our membership includes lenders that originate private education loans, including private education loans that refinance federal education and pre-existing private education loans. NCHER members assist students and their families succeed in postsecondary education as part of their public service missions.

The Consultation is patterned after the previous ARRC recommendations for new closed-end, residential adjustable rate mortgages (ARMs). Thus, the Consultation is largely not plowing new ground. By and large, our comments are addressed to the recommended Contract Language. At the outset however, we need to point out that the essential ingredient is the selection of the replacement index, including the margin. Since the ARRC has not yet proposed a spread adjusted average of the Secured Overnight Financing Rate (“SOFR”) or a forward-looking term SOFR, we cannot at this time venture an opinion on the desirability of the first step in the “waterfall” under which the Replacement Index is that selected or recommended for use in consumer products by the Federal Reserve, the Federal Reserve Bank of New York, or a committee convened by them. Also, as a general comment, we think it should be made clear in the introductory discussion that the Overview and Contract Language are intended to set forth recommended mechanics for switching away from LIBOR and do not establish legal standards.

Our detailed comments on the Contract Language are set forth below for your consideration.

- Footnote 9 indicates that the contract language can be used for loans that do not reference LIBOR, thus expanding the scope of the Consultation. In our view, it is inappropriate for the ARRC to recommend fallback contract language for variable rate student loans that are not indexed to LIBOR.

- Section 4.(A).
 - This Section contains business terms that are beyond the scope of the Consultation and are best left to the lender.
 - In any case, we suggest “first” day be placed in brackets. Lenders should be free to change interest rates on the day of their choosing.
 - We also suggest “each month” be placed in brackets. The language of Section 4.(A) assumes the relevant interest rate changes on a monthly basis. While the interest rate charged on many variable rate student loans changes on a monthly basis, others change less frequently (e.g., quarterly).
- Section 4.(B) implies that the interest rate will change on the Disbursement Date as well as on each Change Date. Please clarify why the interest rate set forth in Section 2 would not be the applicable interest rate applied on the Disbursement Date. Is it expected that the promissory note and/or loan agreement may be signed so far in advance of disbursement that the Current Index used to determine the interest rate set forth in Section 2 may have changed? In any case, the reason for the possible discrepancy should be explained to the borrower.
- Section 4.(C).
 - As a general note, we believe the calculation of the new interest rate is a business term that is beyond the scope of the Consultation and appropriately should be left to the lender. In any case, we suggest that many of the terms in this section should be in brackets. For example, additional rounding conventions beyond that provided (i.e., to the nearest one-eighth of one percent) should be recognized, including the ability to extend the relevant decimal points
 - We do not believe that a lender should be required to re-amortize loan payments following each change in the interest rate. We believe this places an unnecessary burden on lenders and servicers and will be confusing to borrowers.
 - There should be a clear understanding of when the SOFR spread adjustment will be set in cases where a Replacement Event occurs. Will this be a one-time event, or could it change over the course of the (lengthy) life of a student loan?
- Section 4.(D). This section should be struck. While it may be customary in the case of ARMs, where the interest rate generally only changes annually, to limit the amount of any increase or decrease in the interest rate on a change date, it is not customary in the case of student loans, where the interest rate generally changes more frequently (monthly in many cases).
- Section 4.(G). Has consideration been given to allowing a lender to replace LIBOR prior to the technical occurrence of a Replacement Event? It is possible that certain lenders, seeing the trends and writing on the wall, might want to change the interest computation earlier in anticipation of a Replacement Event occurring.
- Section 4.(G)(1). It should be made clear that the recommended Replacement Index is spread adjusted to make it comparable to the original Index. Also, while we recognize that the ARRC is committed to SOFR as the recommended Replacement Index, we wonder whether student loan

lenders should be steered in this direction. In particular, has the state of the current financial markets raised any concerns for the ARRC with respect to its decision to promote SOFR as the Replacement Index?

- Section 4.(G)(2). It seems to us that the standard set forth in this section for selecting a replacement Index and replacement Margin when the Federal Reserve or another regulatory or guiding body has not recommended a replacement Index and replacement Margin could encourage unnecessary litigation. An alternative might be to say that, in these circumstances, the lender will undertake a reasonable, good faith effort to select a comparable Replacement Index and Replacement Margin.
- We encourage the ARRC to consumer test the contract language to ensure that it is understandable to student loan borrowers (i.e., is it written in plain English (or Spanish)).

We would be happy to elaborate on any of these points. Do not hesitate to contact me (srepp@ncher.us; 202-494-0948).