

STATE OF NEW YORK

9070

IN SENATE

October 28, 2020

Introduced by Sen. THOMAS -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the uniform commercial code, in relation to the effect of a LIBOR discontinuance event on contracts, securities and other agreements

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The uniform commercial code is amended by adding a new
2 article 12 to read as follows:

ARTICLE 12

LIBOR DISCONTINUANCE

Section 12-101. Definitions.

6 12-102. Effect of LIBOR discontinuance.

7 12-103. Continuity of contract and safe harbor.

8 12-104. Severability.

Section 12-101. Definitions.

10 As used in this article the following terms shall have the following
11 meanings:

12 (a) "LIBOR" shall mean, for purposes of the application of this arti-
13 cle to any particular contract, security or instrument, U.S. dollar
14 LIBOR (formerly known as the London interbank offered rate) as adminis-
15 tered by ICE Benchmark Administration Limited (or any successor there-
16 of).

17 (b) "LIBOR discontinuance event" shall mean the earliest to occur of
18 any of the following:

19 (1) a public statement or publication of information by or on behalf
20 of the administrator of LIBOR announcing that such administrator has
21 ceased or will cease to provide LIBOR, permanently or indefinitely,
22 provided that, at the time of the statement or publication, there is no
23 successor administrator that will continue to provide LIBOR;

24 (2) a public statement or publication of information by the regulatory
25 supervisor for the administrator of LIBOR, the United States Federal
26 Reserve System, an insolvency official with jurisdiction over the admin-
27 istrator for LIBOR, a resolution authority with jurisdiction over the

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 administrator for LIBOR or a court or an entity with similar insolvency
2 or resolution authority over the administrator for LIBOR, which states
3 that the administrator of LIBOR has ceased or will cease to provide
4 LIBOR permanently or indefinitely, provided that, at the time of the
5 statement or publication, there is no successor administrator that will
6 continue to provide LIBOR; or

7 (3) with respect to any particular type of contract, security or
8 instrument designated by the relevant recommending body, a public state-
9 ment or publication of information by the regulatory supervisor for the
10 administrator of LIBOR announcing that LIBOR is no longer represen-
11 tative.

12 (c) "LIBOR replacement date" shall mean:

13 (1) in the case of a LIBOR discontinuance event described in paragraph
14 (1) or (2) of subsection (b) of this section, the later of (i) the date
15 of the public statement or publication of information referenced therein
16 and (ii) the date on which the administrator of LIBOR permanently or
17 indefinitely ceases to provide LIBOR; and

18 (2) in the case of a LIBOR discontinuance event described in paragraph
19 (3) of subsection (b) of this section, the date of the public statement
20 or publication of information referenced therein; provided that, if the
21 date on which the benchmark replacement would become effective under the
22 fallback provisions of a contract, security or instrument is later than
23 the date determined according to the foregoing provisions, such later
24 date shall be the LIBOR replacement date for such contract, security or
25 instrument.

26 (d) "Fallback provisions" shall mean terms in a contract, security or
27 instrument that set forth a methodology or procedure for determining a
28 benchmark replacement, including any terms relating to the date on which
29 the benchmark replacement becomes effective, without regard to whether a
30 benchmark replacement can be determined in accordance with such method-
31 ology or procedure.

32 (e) "Benchmark" shall mean an index of interest rates that is used, in
33 whole or in part, as the basis of or as a reference for calculating or
34 determining any valuation, payment or other measurement under or in
35 respect of a contract, security or instrument.

36 (f) "Benchmark replacement" shall mean a benchmark, or an interest
37 rate or rates (which may or may not be based in whole or in part on a
38 prior setting of LIBOR), to replace or substitute for LIBOR or any
39 interest rate based on LIBOR following the occurrence of a LIBOR discon-
40 tinuance event under or in respect of a contract, security or instru-
41 ment.

42 (g) "Recommended benchmark replacement" shall mean a benchmark
43 replacement, which shall include any recommended spread adjustment and
44 any benchmark replacement conforming changes, that shall have been
45 selected or recommended by a relevant recommending body.

46 (h) "Recommended spread adjustment" shall mean a spread adjustment, or
47 method for calculating or determining such spread adjustment, (which may
48 be a positive or negative value or zero) that shall have been selected
49 or recommended by a relevant recommending body to be applied to a recom-
50 ended benchmark replacement for a particular type of contract, security
51 or instrument and for a particular term to account for the effects of
52 the transition or change from LIBOR to a recommended benchmark replace-
53 ment.

54 (i) "Benchmark replacement conforming changes" shall mean, with
55 respect to any contract, security or instrument, any changes, alter-
56 ations or modifications that are associated with and reasonably neces-

sary to the use, adoption or implementation of a recommended benchmark replacement and that (1) have been selected or recommended by a relevant recommending body to reflect the use, adoption or implementation of a recommended benchmark replacement under or in respect of such contract, security or instrument or (2) would not, in the reasonable judgment of the determining person, result in a disposition of such contract, security or instrument for U.S. federal income tax purposes.

(j) "Determining person" shall mean, with respect to any contract, security or instrument, any person specified as a "determining person" or, if none is specified, any person with the authority, right or obligation to (1) determine the benchmark replacement, (2) notify other persons of the occurrence of a LIBOR discontinuance event, a LIBOR replacement date or a benchmark replacement or (3) calculate a payment based on a benchmark.

(k) "Relevant recommending body" shall mean the Federal Reserve Board, the Federal Reserve Bank of New York, or the Alternative Reference Rates Committee, or any successor to any of them.

Section 12-102. Effect of LIBOR discontinuance.

(a) On the LIBOR replacement date, the recommended benchmark replacement shall, by operation of law, be the benchmark replacement for any contract, security or instrument that: (1) uses LIBOR as a benchmark and contains no fallback provisions or;

(2) contains fallback provisions that provide for a benchmark replacement that is based in any way on any LIBOR value.

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

(c) Following the occurrence of a LIBOR discontinuance event, any determining person shall be permitted, but shall not be required, to select a recommended benchmark replacement as the benchmark replacement under or in respect of any contract, security or instrument, provided that such contract, security or instrument is not subject to this section and provided further that the selection of such benchmark replacement shall be irrevocable and shall be made no later than:

(1) the time, if any, specified in such contract, security or instrument for making such selection; or

(2) if no such time is specified in the contract, security or instrument, the first date that is at least 60 days following the LIBOR replacement date on which any valuation, payment or other measurement under or in respect of such contract, security or instrument is required to be calculated or determined by reference to a benchmark replacement.

(d) The provisions of this article shall not alter or impair (1) any written agreement by all requisite parties that provides, retrospectively or prospectively, that a contract, security or instrument shall not be subject to this article (without necessarily referring specifically to this article); (2) any contract, security or instrument that contains fallback provisions that, after the application of subsection (a) of this section, would result in a benchmark replacement that is not based on LIBOR (including, but not limited to, the prime rate or the federal funds rate); (3) any contract, security or instrument subject to subsection (c) of this section as to which a determining person does not elect to use a recommended benchmark replacement or that permits a

1 determining person to use a recommended benchmark replacement prior to
2 the occurrence of a LIBOR discontinuance event; or (4) the application
3 to a recommended benchmark replacement of any cap, floor, modifier or
4 spread adjustment to which LIBOR had been subject pursuant to the terms
5 of a contract, security or instrument. For purposes of the foregoing,
6 "requisite parties" means all parties required to amend the terms and
7 provisions of a contract, security or instrument that would otherwise be
8 altered or impaired by this article.

9 (e) Notwithstanding this chapter or any other law of this state, this
10 article shall apply to all contracts, securities and instruments
11 (including contracts, with respect to commercial transactions) and shall
12 not be deemed to be displaced by any other law of this state.

13 Section 12-103. Continuity of contract and safe harbor.

14 (a) The use of a recommended benchmark replacement as a benchmark
15 replacement under or in respect of a contract, security or instrument
16 shall constitute:

17 (1) a commercially reasonable substitute for and a commercially
18 substantial equivalent to LIBOR;

19 (2) a reasonable, comparable or analogous term for LIBOR under or in
20 respect of such contract, security or instrument; and

21 (3) substantial performance by any person of any right or obligation
22 under or in respect of a contract, security or instrument relating to or
23 based on LIBOR.

24 (b) None of (1) a LIBOR discontinuance event or a LIBOR replacement
25 date, (2) the use of a recommended benchmark replacement as a benchmark
26 replacement or (3) the implementation or performance of benchmark
27 replacement conforming changes shall have the effect of (i) discharging
28 or excusing performance under any contract, security or instrument for
29 any reason, claim or defense (including, but not limited to, any force
30 majeure or other provision in any contract, security or instrument);
31 (ii) giving any person the right to unilaterally terminate or suspend
32 performance under any contract, security or instrument; (iii) constitut-
33 ing a breach of a contract, security or instrument; or (iv) voiding or
34 nullifying any contract, security or instrument.

35 (c) If a recommended benchmark replacement is used as a benchmark
36 replacement or a determining person implements benchmark replacement
37 conforming changes under or in respect of a contract, security or
38 instrument in accordance with this title, no person shall have any
39 liability for damages to any person or be subject to any claim or
40 request for equitable relief arising out of or related to the use of a
41 recommended benchmark replacement or the implementation or performance
42 of benchmark replacement conforming changes, and the use of such recom-
43 mended benchmark replacement or the implementation or performance of
44 benchmark replacement conforming changes shall not give rise to any
45 claim or cause of action by any person in law or in equity.

46 (d) The use of a recommended benchmark replacement or the implementa-
47 tion or performance of benchmark replacement conforming changes as
48 provided in this article shall be deemed to (1) not be an amendment or
49 modification of any contract, security or instrument and (2) not impair
50 or have a material or adverse effect on any person's rights or obli-
51 gations under or in respect of any contract, security or instrument.

52 (e) Except in the case of a contract, security or instrument covered
53 by subsections (a) or (b) of section 12-102 of this article, the
54 provisions of this article shall not be interpreted as creating any
55 negative inference or negative presumption regarding the validity or
56 enforceability of (1) any benchmark replacement that is not a recom-

1 mended replacement benchmark, (2) any spread adjustment, or method for
2 calculating or determining a spread adjustment, that is not a recom-
3 mended spread adjustment or (3) any changes, alterations or modifica-
4 tions to or in respect of a contract, security or instrument that are
5 not benchmark replacement conforming changes.

6 § 12-104. Severability.

7 If any clause, sentence, paragraph, section or part of this article
8 shall be adjudged by any court of competent jurisdiction to be invalid
9 and after exhaustion of all further judicial review, the judgment shall
10 not affect, impair or invalidate the remainder thereof, but shall be
11 confined in its operation to the clause, sentence, paragraph, section or
12 part of this article directly involved in the controversy in which the
13 judgment shall have been rendered.

14 § 2. This act shall take effect immediately.