

# 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.

##### 12-102. Effect of LIBOR discontinuance.

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

##### 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-

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

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

15 (k) "Relevant recommending body" shall mean the Federal Reserve Board,  
16 the Federal Reserve Bank of New York, or the Alternative Reference Rates  
17 Committee, or any successor to any of them.  
18 Section 12-102. Effect of LIBOR discontinuance.

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

23 (2) contains fallback provisions that provide for a benchmark replace-  
24 ment that is based in any way on any LIBOR value.

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

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

39 (1) the time, if any, specified in such contract, security or instru-  
40 ment for making such selection; or

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

46 (d) The provisions of this article shall not alter or impair (1) any  
47 written agreement by all requisite parties that provides, retrospective-  
48 ly or prospectively, that a contract, security or instrument shall not  
49 be subject to this article (without necessarily referring specifically  
50 to this article); (2) any contract, security or instrument that contains  
51 fallback provisions that, after the application of subsection (a) of  
52 this section, would result in a benchmark replacement that is not based  
53 on LIBOR (including, but not limited to, the prime rate or the federal  
54 fund rate); (3) any contract, security or instrument subject to  
55 subsection (c) of this section as to which a determining person does not  
56 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 ended 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.