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:

Section 1. The uniform commercial code is amended by adding a new 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.

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

(a) "LIBOR" shall mean, for purposes of the application of this article to any particular contract, security or instrument, U.S. dollar LIBOR (formerly known as the London interbank offered rate) as administered by ICE Benchmark Administration Limited (or any successor thereof).

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

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

(2) a public statement or publication of information by the regulatory supervisor for the administrator of LIBOR, the United States Federal Reserve System, an insolvency official with jurisdiction over the administrator 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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administrator for LIBOR or a court or an entity with similar insolvency or resolution authority over the administrator for LIBOR, which states that the administrator of LIBOR has ceased or will cease to provide LIBOR permanently or indefinitely, provided that, at the time of the statement or publication, there is no successor administrator that will continue to provide LIBOR; or

(3) with respect to any particular type of contract, security or instrument designated by the relevant recommending body, a public statement or publication of information by the regulatory supervisor for the administrator of LIBOR announcing that LIBOR is no longer representative.

(c) "LIBOR replacement date" shall mean:

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

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

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

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

(f) "Benchmark replacement" shall mean a benchmark, or an interest rate or rates (which may or may not be based in whole or in part on a prior setting of LIBOR), to replace or substitute for LIBOR or any interest rate based on LIBOR following the occurrence of a LIBOR discontinuance event under or in respect of a contract, security or instrument.

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

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

(i) "Benchmark replacement conforming changes" shall mean, with respect to any contract, security or instrument, any changes, alterations 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

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

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

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

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

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

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

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

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

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

(d) The use of a recommended benchmark replacement or the implementation or performance of benchmark replacement conforming changes as provided in this article shall be deemed to (1) not be an amendment or modification of any contract, security or instrument and (2) not impair or have a material or adverse effect on any person's rights or obligations under or in respect of any contract, security or instrument.

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

mended replacement benchmark, (2) any spread adjustment, or method for calculating or determining a spread adjustment, that is not a recommended spread adjustment or (3) any changes, alterations or modifications to or in respect of a contract, security or instrument that are not benchmark replacement conforming changes.

§ 12-104. Severability.

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

§ 2. This act shall take effect immediately.