

STATE OF NEW YORK

297

2021-2022 Regular Sessions

IN SENATE

(Prefiled)

January 6, 2021

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

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;

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

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(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 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

1 the transition or change from LIBOR to a recommended benchmark replace-
2 ment.

3 (i) "Benchmark replacement conforming changes" shall mean, with
4 respect to any contract, security or instrument, any changes, alter-
5 ations or modifications that are associated with and reasonably neces-
6 sary to the use, adoption or implementation of a recommended benchmark
7 replacement and that (1) have been selected or recommended by a relevant
8 recommending body to reflect the use, adoption or implementation of a
9 recommended benchmark replacement under or in respect of such contract,
10 security or instrument or (2) would not, in the reasonable judgment of
11 the determining person, result in a disposition of such contract, secu-
12 rity or instrument for U.S. federal income tax purposes.

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

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

23 Section 12-102. Effect of LIBOR discontinuance.

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

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

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

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

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

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

51 (d) The provisions of this article shall not alter or impair (1) any
52 written agreement by all requisite parties that provides, retrospective-
53 ly or prospectively, that a contract, security or instrument shall not
54 be subject to this article (without necessarily referring specifically
55 to this article); (2) any contract, security or instrument that contains
56 fallback provisions that, after the application of subsection (a) of

1 this section, would result in a benchmark replacement that is not based
2 on LIBOR (including, but not limited to, the prime rate or the federal
3 funds rate); (3) any contract, security or instrument subject to
4 subsection (c) of this section as to which a determining person does not
5 elect to use a recommended benchmark replacement or that permits a
6 determining person to use a recommended benchmark replacement prior to
7 the occurrence of a LIBOR discontinuance event; or (4) the application
8 to a recommended benchmark replacement of any cap, floor, modifier or
9 spread adjustment to which LIBOR had been subject pursuant to the terms
10 of a contract, security or instrument. For purposes of the foregoing,
11 "requisite parties" means all parties required to amend the terms and
12 provisions of a contract, security or instrument that would otherwise be
13 altered or impaired by this article.

14 (e) Notwithstanding this chapter or any other law of this state, this
15 article shall apply to all contracts, securities and instruments
16 (including contracts, with respect to commercial transactions) and shall
17 not be deemed to be displaced by any other law of this state.
18 Section 12-103. Continuity of contract and safe harbor.

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

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

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

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

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

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

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

1 (e) Except in the case of a contract, security or instrument covered
2 by subsections (a) or (b) of section 12-102 of this article, the
3 provisions of this article shall not be interpreted as creating any
4 negative inference or negative presumption regarding the validity or
5 enforceability of (1) any benchmark replacement that is not a recom-
6 mended replacement benchmark, (2) any spread adjustment, or method for
7 calculating or determining a spread adjustment, that is not a recom-
8 mended spread adjustment or (3) any changes, alterations or modifica-
9 tions to or in respect of a contract, security or instrument that are
10 not benchmark replacement conforming changes.

11 § 12-104. Severability.

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

19 § 2. This act shall take effect immediately.