STATE OF NEW YORK

297--B

Cal. No. 523

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 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee, ordered to first report, amended on first report, ordered to a second report and ordered reprinted, retaining its place in the order of second report

AN ACT to amend the general obligations law, in relation to the discontinuance of the London interbank offered rate

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

Section 1. The general obligations law is amended by adding a new article 18-C to read as follows:

ARTICLE 18-C

LIBOR DISCONTINUANCE

Section 18-400. Definitions.

18-401. Effect of LIBOR discontinuance on agreements.

18-402. Continuity of contract and safe harbor.

18-403. Severability.

§ 18-400. Definitions. As used in this article the following terms shall have the following meanings:

1. "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 predecessor or successor thereof), or any tenor thereof, as applicable, that is used in making any calculation or determination thereunder.

2. "LIBOR discontinuance event" shall mean the earliest to occur of any of the following:

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

LBD03775-03-1

a. 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;

b. 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

c. a public statement or publication of information by the regulatory supervisor for the administrator of LIBOR announcing that LIBOR is no longer representative. For purposes of this subdivision two, a public statement or publication of information that affects one or more tenors of LIBOR shall not constitute a LIBOR discontinuance event with respect to any contract, security or instrument that (i) provides for only one tenor of LIBOR, if such contract, security or instrument requires interpolation and such tenor can be interpolated from LIBOR tenors that are not so affected, or (ii) permits a party to choose from more than one tenor of LIBOR and any of such tenors (A) is not so affected or (B) if such contract, security or instrument requires interpolation, can be interpolated from LIBOR tenors that are not so affected.

3. "LIBOR replacement date" shall mean:

a. in the case of a LIBOR discontinuance event described in paragraph a or b of subdivision two 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

b. in the case of a LIBOR discontinuance event described in paragraph c of subdivision two of this section, the date of the public statement or publication of information referenced therein. For purposes of this subdivision, a date that affects one or more tenors of LIBOR shall not constitute a LIBOR replacement date with respect to any contract, security or instrument that (i) provides for only one tenor of LIBOR, if such contract, security or instrument requires interpolation and such tenor can be interpolated from LIBOR tenors that are not so affected, or (ii) permits a party to choose from more than one tenor of LIBOR and any of such tenors (A) is not so affected or (B) if such contract, security or instrument requires interpolation, can be interpolated from LIBOR tenors that are not so affected.

4. "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.

5. "Benchmark" shall mean an index of interest rates or dividend 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.

6. "Benchmark replacement" shall mean a benchmark, or an interest rate or dividend rate (which may or may not be based in whole or in part on a prior setting of LIBOR), to replace LIBOR or any interest rate or dividend rate based on LIBOR, whether on a temporary, permanent or indefinite basis, under or in respect of a contract, security or instrument.

7. "Recommended benchmark replacement" shall mean, with respect to any particular type of contract, security or instrument, a benchmark replacement based on SOFR, 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 with respect to such type of contract, security or instrument.

8. "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 for 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.

9. "Benchmark replacement conforming changes" shall mean, with respect to any type of contract, security or instrument, any technical, administrative or operational changes, alterations or modifications that are associated with and reasonably necessary to the use, adoption, calculation or implementation of a recommended benchmark replacement and that:

a. have been selected or recommended by a relevant recommending body; and

b. if, in the reasonable judgment of the calculating person, the benchmark replacement conforming changes selected or recommended pursuant to paragraph a of this subdivision do not apply to such contract, security or instrument or are insufficient to permit administration and calculation of the recommended benchmark replacement, then benchmark replacement conforming changes shall include such other changes, alterations or modifications that, in the reasonable judgment of the calculating person:

(i) are necessary to permit administration and calculation of the recommended benchmark replacement under or in respect of such contract, security or instrument in a manner consistent with market practice for substantially similar contracts, securities or instruments and, to the extent practicable, the manner in which such contract, security or instrument was administered immediately prior to the LIBOR replacement date; and

(ii) would not result in a disposition of such contract, security or instrument for U.S. federal income tax purposes.

10. "Determining person" shall mean, with respect to any contract, security or instrument, in the following order of priority:

a. any person specified as a "determining person"; or

b. any person with the authority, right or obligation to:

(i) determine the benchmark replacement that will take effect on the LIBOR replacement date,

(ii) calculate or determine a valuation, payment or other measurement based on a benchmark, or

(iii) notify other persons of the occurrence of a LIBOR discontinuance event, a LIBOR replacement date or a benchmark replacement.

11. "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.

12. "SOFR" shall mean, with respect to any day, the secured overnight financing rate published for such day by the Federal Reserve Bank of New York, as the administrator of the benchmark (or a successor administrator), on the Federal Reserve Bank of New York's website.

13. "Calculating person" shall mean, with respect to any contract, security or instrument, any person (which may be the determining person) responsible for calculating or determining any valuation, payment or other measurement based on a benchmark.

14. "Contract, security, or instrument" shall include, without limitation, any contract, agreement, mortgage, deed of trust, lease, security (whether representing debt or equity, and including any interest in a corporation, a partnership or a limited liability company), instrument, or other obligation.

§ 18-401. Effect of LIBOR discontinuance on agreements. 1. 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 uses LIBOR as a benchmark and:

a. contains no fallback provisions; or

b. contains fallback provisions that result in a benchmark replacement, other than a recommended benchmark replacement, that is based in any way on any LIBOR value.

2. Following the occurrence of a LIBOR discontinuance event, any fallback provisions in a contract, security, or instrument 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 or dividend 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.

3. This subdivision shall apply to any contract, security, or instrument that uses LIBOR as a benchmark and contains fallback provisions that permit or require the selection of a benchmark replacement that is:

a. based in any way on any LIBOR value; or

b. the substantive equivalent of paragraph a, b or c of subdivision one of section 18-402 of this article.

A determining person shall have the authority under this article, but shall not be required, to select on or after the occurrence of a LIBOR discontinuance event the recommended benchmark replacement as the benchmark replacement. Such selection of the recommended benchmark replacement shall be:

(i) irrevocable;

(ii) made by the earlier of either the LIBOR replacement date, or the latest date for selecting a benchmark replacement according to such contract, security, or instrument; and

(iii) used in any determinations of the benchmark under or with respect to such contract, security or instrument occurring on and after the LIBOR replacement date.

4. If a recommended benchmark replacement becomes the benchmark replacement for any contract, security, or instrument pursuant to subdivision one or subdivision three of this section, then all benchmark replacement conforming changes that are applicable (in accordance with the definition of benchmark replacement conforming changes) to such recommended benchmark replacement shall become an integral part of such contract, security, or instrument by operation of law.

5. The provisions of this article shall not alter or impair:

a. any written agreement by all requisite parties that, retrospectively or prospectively, a contract, security, or instrument shall not be

subject to this article without necessarily referring specifically to this article. For purposes of this subdivision, "requisite parties" means all parties required to amend the terms and provisions of a contract, security, or instrument that would otherwise be altered or affected by this article;

b. any contract, security or instrument that contains fallback provisions that 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, except that such contract, security or instrument shall be subject to subdivision two of this section;

c. any contract, security, or instrument subject to subdivision three of this section as to which a determining person does not elect to use a recommended benchmark replacement pursuant to subdivision three of this section or as to which a determining person elects to use a recommended benchmark replacement prior to the occurrence of a LIBOR discontinuance event, except that such contract, security, or instrument shall be subject to subdivision two of this section; or

d. 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.

6. Notwithstanding the uniform commercial code or any other law of this state, this title 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.

§ 18-402. Continuity of contract and safe harbor. 1. The selection or use of a recommended benchmark replacement as a benchmark replacement under or in respect of a contract, security or instrument by operation of section 18-401 of this article shall constitute:

a. a commercially reasonable replacement for and a commercially substantial equivalent to LIBOR;

b. a reasonable, comparable or analogous term for LIBOR under or in respect of such contract, security or instrument;

c. a replacement that is based on a methodology or information that is similar or comparable to LIBOR; and

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

2. None of: a. a LIBOR discontinuance event or a LIBOR replacement date, b. the selection or use of a recommended benchmark replacement as a benchmark replacement; or c. the determination, implementation or performance of benchmark replacement conforming changes, in each case, by operation of section 18-401 of this article, shall:

(i) be deemed to impair or affect the right of any person to receive a payment, or affect the amount or timing of such payment, under any contract, security, or instrument; or

(ii) have the effect of (A) 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; (B) giving any person the right to unilaterally terminate or suspend performance under any contract, security or instrument; (C) constituting a breach of a contract, security or instrument; or (D) voiding or nullifying any contract, security or instrument.

3. 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 selection or use of a recommended benchmark replacement or the determination, implementation or performance of benchmark replacement conforming changes, in each case, by operation of section 18-401 of this article, and such selection or use of the recommended benchmark replacement or such determination 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.

4. The selection or use of a recommended benchmark replacement or the determination, implementation, or performance of benchmark replacement conforming changes, by operation of section 18-401 of this article, shall be deemed to:

a. not be an amendment or modification of any contract, security or instrument; and

b. not prejudice, impair or affect any person's rights, interests or obligations under or in respect of any contract, security or instrument.

5. Except as provided in either subdivision one or subdivision three of section 18-401 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:

a. any benchmark replacement that is not a recommended replacement benchmark;

b. any spread adjustment, or method for calculating or determining a spread adjustment, that is not a recommended spread adjustment; or

c. any changes, alterations or modifications to or in respect of a contract, security or instrument that are not benchmark replacement conforming changes.

§ 18-403. Severability. If any provision of this article or application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this article that can be given effect without the invalid provision or application, and to this end the provisions of this article shall be severable.

§ 2. This act shall take effect immediately.