

New York State LIBOR Transition Bill Signed into Law

April 28, 2021

On April 6, 2021, New York Governor Andrew Cuomo signed into law Senate Bill S297B/Assembly Bill 164B (the “New York Legislation”), which paves the way for a smoother transition from US Dollar LIBOR and, in particular, addresses certain “tough legacy contracts”¹ where replacement of LIBOR is not feasible due to certain legal or logistical issues. The New York Legislation is the first federal or state bill in this country signed into law that directly addresses the upcoming cessation of LIBOR.

Background

The ICE Benchmark Administration (“IBA”), the administrator of LIBOR, released a feedback statement on March 5, 2021, explaining that the IBA would cease publication of LIBOR (i) after December 31, 2021, for one week and two month USD LIBOR, and (ii) after June 30, 2023, for all other USD LIBOR tenors (overnight, one month, three month, six month and twelve month).

Concurrently with the IBA feedback statement, the UK Financial Conduct Authority, the regulatory supervisor of the IBA, released a statement that it does not intend “to use [its] proposed powers to compel [the] IBA to continue to publish any” of the LIBOR tenors; however, it will consult on requiring the IBA to continue to publish certain tenors going forward on a “synthetic” basis.

Application of the New York Legislation

The New York Legislation, which was promoted by the Alternative Reference Rates Committee (ARRC), applies to “any contract, security or instrument” that (i) is governed by New York law, (ii) uses LIBOR as a benchmark rate, and (iii) contains no fallback provisions or has fallback provisions that prescribe the use of LIBOR (including by way of a poll, survey, or inquiry for interbank lending rates).

Key Provisions of the New York Legislation. The New York Legislation does the following:

1. Establishes the Secured Overnight Financing Rate (SOFR)² as the benchmark replacement to replace USD LIBOR in applicable contracts “by operation of law” and provides for a spread adjustment and other conforming changes recommended by the Federal Reserve Board, the Federal Reserve Bank of New York or the ARRC, or any successor thereto.
2. Provides that the recommended benchmark replacement shall constitute a commercially reasonable substitute for and a commercially substantial equivalent to LIBOR.
3. Prohibits a party from refusing to perform its contractual obligations or declaring a breach of contract as a result of the discontinuance of USD LIBOR or the use of the recommended benchmark replacement.

4. Provides a safe harbor from liability in connection with 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 the New York Legislation.
5. It will not affect contracts and agreements that fall back to replacement rates like prime rate, federal funds rate or another non-LIBOR index.
6. It should be noted that the New York Legislation would not affect most syndicated and bilateral loan agreements that already contain existing fallback and replacement provisions, or that will be separately amended to include such provisions.

Potential Issues

Various commentators have noted that there could be constitutional and other legal challenges to the New York Legislation. Among other things, the statute may face litigation under the U.S. Constitution (including under the Contracts Clause) and under the New York State Constitution (under its so-called Nondelegation Doctrine and other clauses). These are complicated issues, but we note that in a recent report, a committee of the New York City Bar Association found that these types of constitutional challenges are not likely to succeed.

In addition, an argument could be made that under certain circumstances, the New York Legislation may conflict with the federal Trust Indenture Act of 1939 (the "TIA") and, if so, would be preempted by the TIA. Holders of bonds and notes subject to the TIA may claim that the changes in their interest rates that would be implemented by the New York Legislation are required to be approved by the unanimous consent of such holders under the TIA. This has led to additional calls for a federal statute to implement provisions similar to those in the New York Legislation, which could avoid this preemption issue.

¹ In March 2021, the ARRC published a report that "[a]n estimated \$1.9 trillion in exposures will remain in bonds and securitizations, many of which may have no effective means to transition away from LIBOR upon its cessation".

² The legislation only refers to SOFR as the replacement benchmark; however, much attention has been paid recently (including in an advisory published by the Loan Syndication and Trading Association) to other credit-sensitive rates such as IHS Markit Credit Rate (provided by IHS Markit), Bank Yield Index (provided by ICE Benchmark Administration), AMERIBOR (provided by American Financial Exchange, LLC) and BSBY (provided by the Bloomberg Short-Term Bank Yield Index).