

New York Adopts LIBOR Legislation

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On April 6, 2021, New York Governor Andrew Cuomo signed into law Senate Bill 297B/Assembly Bill 164B (the “New York LIBOR Legislation”), the long anticipated New York State legislation addressing the cessation of U.S. Dollar (“USD”) LIBOR.^[1] The New York LIBOR Legislation generally tracks the legislation proposed by the Alternative Reference Rates Committee (“ARRC”).^[2] It provides a statutory remedy for so-called “tough legacy contracts,” *i.e.*, contracts that reference USD LIBOR as a benchmark interest rate but do not include effective fallback provisions in the event USD LIBOR is no longer published or is no longer representative, and that will remain in existence beyond June 30, 2023 in the case of the overnight, 1 month, 3 month, 6 month and 12 month tenors, or beyond December 31, 2021 in the case of the 1 week and 2 month tenors.^[3]

Under the new law, if a contract governed by New York law (1) references USD LIBOR as a benchmark interest rate and (2) does not contain benchmark fallback provisions, or contains benchmark fallback provisions that would cause the benchmark rate to fall back to a rate that would continue to be based on USD LIBOR, then on the date USD LIBOR permanently ceases to be published, or is announced to no longer be representative, USD LIBOR will be deemed by operation of law to be replaced by the “recommended benchmark replacement.” The New York LIBOR Legislation provides that the “recommended benchmark replacement” shall be based on the Secured Overnight Financing Rate (“SOFR”) and shall have been selected or recommended by the Federal Reserve Board, the Federal Reserve Bank of New York or the ARRC for the applicable type of contract, security or instrument. The recommended benchmark replacement will include any applicable spread adjustment^[4] and any conforming changes selected or recommended by the Federal Reserve Board, the Federal Reserve Bank of New York or the ARRC.

The New York LIBOR Legislation also establishes a safe harbor from liability for the selection and use of a recommended benchmark replacement and further provides that a party to a contract shall be prohibited from declaring a breach or refusing to perform as a result of another party’s selection or use of a recommended benchmark replacement.

It should be noted that the New York LIBOR Legislation does not affect contracts governed by jurisdictions other than New York, and that the parties to a contract governed by New York law remain free to agree to a fallback rate that is not based on USD LIBOR or SOFR; the new law does not override a fallback to a non-USD LIBOR based rate (e.g., the Prime rate) agreed to by the parties to a contract. Although this legislation provides crucial safeguards, it should not be viewed as a substitute for amending legacy USD LIBOR contracts where possible. Rather, it should be viewed as a backstop in the event that counterparties are unwilling or unable to agree to adequate fallback language prior to the cessation date or date of non-representativeness.

The ARRC, the Federal Reserve Board and several industry associations and groups have expressed their strong support for the new law.^[5]

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[1] See <https://www.nysenate.gov/legislation/bills/2021/S297>.

[2] See

<https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/libor-legislation-with-technical-amendments>.

[3] We note that certain contracts, such as derivatives entered into under International Swaps and Derivatives Association (ISDA) standard documentation, provide for linear interpolation of the 1 week and 2 month USD LIBOR tenors until USD LIBOR ceases to exist for all tenors on June 30, 2023. The New York LIBOR Legislation provides that if the first fallback in a contract is linear interpolation, then, for the 1 week or 2 month tenor USD LIBOR contracts, the parties to the contract would continue to use linear interpolation for the period between December 31, 2021 and June 30, 2023. See the definition of “LIBOR Discontinuance Event” and “LIBOR Replacement Date” in the New York LIBOR Legislation.

[4] Note that the ICE Benchmark Administration Limited and the UK Financial Conduct Authority formally announced LIBOR cessation and non-representative dates for USD LIBOR on March 5, 2021. These announcements fixed the spread adjustment contemplated under certain industry-standard documents. See Gibson Dunn’s Client Alert: The End Is Near: LIBOR Cessation Dates Formally Announced, available at <https://www.gibsondunn.com/the-end-is-near-libor-cessation-dates-formally-announced/>.

[5] See “ARRC Welcomes Passage of LIBOR Legislation by the New York State Legislature,” ARRC (March 24, 2021, available at <https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/20210324-arrc-press-release-passage-of-libor-legislation>); see also, Randall Quarles, Keynote Address at the “The SOFR Symposium: The Final Year,” an event hosted by the Alternative Reference Rates Committee, New York, New York (March 22, 2021), available at <https://www.federalreserve.gov/newsevents/speech/quarles20210322a.htm>.

Gibson Dunn’s lawyers are available to answer questions about the LIBOR transition in general and these developments in particular. Please contact any member of the Gibson Dunn team, the Gibson Dunn lawyer with whom you usually work in the firm’s Capital Markets, Derivatives, Financial Institutions, Global Finance or Tax practice groups, or the following authors of this client alert:

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