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[NY LIBOR Transition Legislation: Can We Now Stop Talking About LIBOR Fallbacks and Amendments?]

On March 24, 2021, New York State's Senate and Assembly approved LIBOR transition legislation. New York Governor Andrew Cuomo's consent awaits and is expected as the governor indicated his support earlier this year.

The law will have limited impact on syndicated loan markets; the long-running discussion of LIBOR fallbacks and LIBOR transition amendments will continue. This is a positive step, however, for other debt markets where inclusion of LIBOR fallback language is not common.

The law closely tracks the text of legislation proposed by the Alternative Reference Rates Committee (ARRC), the committee established by the Federal Reserve Board and the New York Federal Reserve Bank to manage the transition from LIBOR. The law includes the following key provisions:

- It covers only contracts governed by New York State law. There are efforts to pass similar legislation at a federal level and in other states.
- It covers only LIBOR contracts that either (i) contain no methodology or procedure for determining the interest rate once LIBOR is not available (a fallback provision) or (ii) have a fallback provision using a different LIBOR-based rate as the fallback.
  Most sophisticated syndicated and bilateral loan agreements contain a fallback provision, even those agreements entered into prior to regular market use of the model ARRC fallback language. The ARRC "hardwired" or "amendment" fallback language provides for SOFR or a negotiated rate, respectively, to be used in the case of LIBOR termination. Pre-ARRC fallback language typically falls back to a prime interest rate.
  A significant number of other types of debt contracts, however, have no fallback language. This new law aims to provide a procedure for determining a fallback for this group of contracts. A recent Federal Reserve Bank "Progress Report" on the state of LIBOR transition estimates that $2 trillion of "tough legacy" LIBOR contracts exist without any fallback provisions. Many of these contracts exist in debt markets where amendments to debt contracts are difficult to obtain. These include certain types of securitizations, floating rate notes, mortgages, municipal bonds, and derivatives.

- It provides that the fallback for applicable contracts will be a SOFR-based interest rate similar to the approach of the ARRC hardwired fallback model language, and declares SOFR as a "commercially reasonable substitute for and a commercially substantial equivalent to LIBOR."
- It prohibits parties to applicable contracts from refusing to perform their obligations under the contracts as a result of application of the law, and provides a litigation safe harbor as a result of application of the law.
- It nullifies contractual fallback methodology relying on polls, surveys, and inquiries of dealers and lenders, more often found in certain derivatives and loan agreements. The law is not without potential controversy. Some commentators, including the New York City Bar Association (which supports the law), have noted that, in the case of contracts subject to the Federal Trust Indenture Act, application of the law may violate the Act. Other concerns with the law include possible

federal and New York State constitutional claims to its legality.

Morrison & Foerster LLP – Geoffrey R. Peck

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