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ARRC-proposed New York LIBOR Legislation: The Trustees' Perspective

By Robert Coughlin

We have received a number of questions from our Corporate Trust clients about the New York State legislation proposed by the Alternative Reference Rates Committee (ARRC) addressing LIBOR transition for existing contracts and how it would affect trustees, if adopted. Here's the skinny.

In a nutshell, trustees would benefit from the adoption of this legislation, which is designed to minimize or eliminate certain legal uncertainties and possible adverse consequences associated with LIBOR transition. But don't count on it happening!

Arguably the biggest challenges associated with LIBOR transition will be faced by transactions that contain (i) LIBOR fallback terms limited to some form of "polling" procedure (e.g., telephone calls to some number of London reference banks to request quotes, and failing receipt of some minimal number of quotes from which an average can be taken, doing the same with some number of New York banks) and/or a "last LIBOR" provision (e.g., terms fixing the index rate at whatever rate applied on the last date LIBOR was available), or (ii) no LIBOR fallback terms at all.

The prevalent view in the market is that "polling" procedures will be unsuccessful; there is growing consternation over the prospect of "last LIBOR" terms causing variable rates to become fixed; and any transaction completely lacking any LIBOR fallback faces an obvious dilemma come the end of December 2021. These challenges are exacerbated by the requirement in most transaction documents (other than those containing some version of the ARRC-recommended amendment terms) that any change to the interest rate requires the consent of each holder affected. As a result, an amendment to adopt a replacement rate might be an option for some transactions but it is unlikely to be viable for most, absent some incentive that brings all parties to the table.

The New York legislation proposed by ARRC, were it to be adopted, would specifically address these issues and avoid resorting to judicial remedy or litigation. For example, the legislation would:

- *Nullify "polling" provisions* and *override "last LIBOR"* terms, where they would take effect in the absence of some other effective fallback; and
- Where a transaction has *no LIBOR fallback*, automatically apply the ARRC-recommended

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SOFR rate and ARRC-recommended spread adjustment as the fallback to LIBOR.

The proposed legislation would also provide relief to trustees in another situation, namely one in which transaction documents call upon the trustee to determine, or participate in the determination of, a replacement rate. The legislation provides that:

- Any transaction party having responsibility for determining or selecting a replacement for LIBOR (a "Determining Party") will have the benefit of a *safe harbor* from liability or litigation if it elects to adopt the ARRC-recommended benchmark replacement within a designated period of time; and
- Provides that the ARRC-recommended benchmark replacement will, *as a matter of law*, constitute a "commercially reasonable substitute for and a commercially substantially equivalent to" LIBOR, and a "reasonable, comparable or analogous term for" LIBOR, and its use will constitute "substantial performance" by any person of "any right or obligation under or in respect of" the relevant transaction concerning LIBOR.

At the same time, the proposed legislation would *not* affect or override any transaction that otherwise has effective fallback terms (other than "polling" or "last LIBOR" or other formulation that depends on LIBOR). For example, one having a fallback to a prime rate or federal funds rate would not be affected. And, the legislation does not preclude a Determining Party from selecting a replacement rate other than the ARRC-recommended benchmark replacement (e.g., SOFR), or bar the adoption of any cap, floor, modifier, or spread adjustment; it simply would not provide a safe harbor if those are chosen.

On the other hand, if for any reason parties to a given transaction do not want the mandatory aspects of the legislation to apply (such as, for example, those who may be agreeable to the application of "last LIBOR" terms in their deal documents), the legislation allows parties to opt-out of its mandatory terms (by written agreement of all requisite parties that, retrospectively or prospectively, the applicable contract, security, or instrument shall not be subject to the legislation). And, as noted above, there is nothing in the legislation that would preclude transaction parties from otherwise entering into an amendment in accordance with the terms of their documents to address LIBOR transition, as long as the amendment does not adopt fallback based in any way on LIBOR.

However, the bad news is, don't count on it. The legislation has not been introduced and the 2020 New York legislative session has ended. The earliest it could be introduced would be January 2021. Whether that happens and, if so, what its chances for adoption might be, remains to be seen.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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