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## Governor Cuomo Introduces Proposed New York Legislation on LIBOR Replacement

On Tuesday January 19, 2021, New York Governor Andrew Cuomo proposed New York-specific legislation aimed at minimizing the legal uncertainty and potential adverse economic impact associated with the transition away from LIBOR due to its expected cessation.<sup>1</sup> Governor Cuomo's proposal is part of a broader bill addressing the transportation, economic development and environmental conservation budget for New York State for the 2021-2022 fiscal year.<sup>2</sup> The proposed LIBOR legislation largely mirrors the legislative bill proposed by the Alternative Reference Rate Committee ("ARRC").<sup>3</sup>

If enacted, the proposed legislation would provide for a statutory replacement benchmark rate for contracts that use LIBOR as a benchmark and either (i) contain no fallback provisions, or (ii) contain fallback provisions that result in a benchmark replacement that is based in any way on LIBOR.<sup>4</sup> As such, the proposal would convert the interest rate in such LIBOR-linked contracts to a new replacement benchmark selected or recommended by the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of New York or the ARRC following the occurrence of a LIBOR discontinuance event, which is defined as a public statement by or on behalf of administrators or regulators of LIBOR either announcing that they have ceased or will cease to provide LIBOR permanently or indicating that LIBOR is no longer representative.<sup>5</sup> The proposed legislation reaffirms the selection of a replacement rate to include the ARRC and Federal Reserve Bank of New York-endorsed Secured Overnight Financing Rate ("SOFR").<sup>6</sup> The legislation also

<sup>1</sup> See *Discontinuance of LIBOR*, FY 2022 New York State Executive Budget, Transportation, Economic Development and Environmental Conservation Article VII Legislation, at pp. 233–242, available [here](#) (last visited January 24, 2021) (hereinafter "LIBOR Proposed Legislation").

<sup>2</sup> *Id.*; New York State Senator Kevin Thomas previously introduced the similar but unrelated Senate Bill S9070 on October 28, 2020, which remains pending in the New York State Senate Rules Committee. See *An Act to Amend the Uniform Commercial Code, in Relation to the Effort of a LIBOR Discontinuance Event on Contracts, Securities and Other Agreements*, Senate Bill S9070, New York Leg., available [here](#) (last visited January 25, 2021).

<sup>3</sup> *Proposed Legislative Solution to Minimize Legal Uncertainty and Adverse Economic Impact Associated with LIBOR Transition*, ARRC, Mar. 6, 2020, available [here](#) (last visited January 24, 2021). The ARRC is a group of private-market participants convened by the U.S. Federal Reserve Bank and the Federal Reserve Bank of New York to help ensure a successful transition from USD LIBOR.

<sup>4</sup> See *LIBOR Proposed Legislation*, *supra* note 1, at p. 237.

<sup>5</sup> *Id.* at 233–234.

<sup>6</sup> SOFR is the Federal Reserve Bank of New York-endorsed benchmark rate that best represents for USD LIBOR derivative and other financial contract instruments.

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provides that the discontinuance of LIBOR and the automatic statutory transition to a replacement rate neither impairs or affects the rights of a party to receive payment under such contracts, nor allows a party to discharge their performance obligations or to declare a breach of contract. Further, the proposal establishes a safe harbor from litigation for claims arising out of or related to the use of the recommended benchmark replacement pursuant to the bill.

While the proposed legislation would address financial instruments that are not modified to address LIBOR's cessation, many industry groups have developed and are beginning to implement robust fallback provisions to prepare for this eventuality. For example, on January 25, 2021, the IBOR Fallbacks Supplement to the 2006 ISDA Definitions (the "Supplement"), published by the International Swaps and Derivatives Association, Inc. ("ISDA"), became effective. The Supplement will be the default convention governing all new rates derivatives entered into after January 25, 2021, and will incorporate in these transactions robust fallback mechanics regarding IBOR cessation, including fallback triggers and replacement rates. The Supplement and the ISDA 2020 IBOR Fallbacks Protocol, which allows market participants to incorporate fallback provisions into legacy rates derivatives, are discussed in more detail in our previous client memorandum.<sup>7</sup>

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The proposed New York legislation marks notable progress at the state level to address and minimize the legal and economic impact associated with the upcoming discontinuance of LIBOR. The LIBOR legislation emphasizes the importance of market participants—particularly those who have entered into or plan to enter into contracts under the law of New York State—to adequately prepare for LIBOR transition.<sup>8</sup> This legislative proposal may help facilitate a broader transition away from LIBOR, given the large number of financial contracts governed by New York law. Additionally, if it passes in the New York State Legislature, as the first bill at the state level addressing such concerns, this legislation may become a template for other states in dealing with the LIBOR transition and replacement rates.

*Update:* On April 6, 2021, Governor Cuomo signed a version of the statute into law that had been passed by the New York State Legislature on March 24, 2021. The bill is nearly identical to the initial proposed

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<sup>7</sup> See Paul, Weiss October 27, 2020 Client Memorandum, *LIBOR Cessation: ISDA Launches IBOR Fallbacks Supplement and ISDA 2020 IBOR Fallbacks Protocol*, available [here](#) (last visited January 25, 2021).

<sup>8</sup> As with the ARRC's proposed legislative bill, this proposed legislation may face certain challenges on the basis that it potentially conflicts with federal law, such as Section 316(b) of the Trust Indenture Act of 1939, and the U.S. Constitution, specifically Article I, Section 10, Clause 1 (Contracts Clause).

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legislation, with two definitional changes that appear to address the recent announcements by the U.K. Financial Conduct Authority regarding staged LIBOR cessation.<sup>9</sup>

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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<sup>9</sup> See Paul, Weiss March 5, 2021 Client Memorandum, *LIBOR Cessation: FCA Announcement on the End of LIBOR Triggers ISDA's Spread Adjustment Fixing Date*, available [here](#) (last visited March 26, 2021).