Proposed Legislative Solution to Minimize Legal Uncertainty and Adverse Economic Impact Associated with LIBOR Transition

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Executive Summary

The U.S. dollar LIBOR interest rate index is used in approximately $200 trillion of financial products worldwide. For a number of reasons, including concerns about whether LIBOR adequately represents actual market rates, LIBOR's regulator has announced that it is likely to be discontinued after the end of 2021. However, many existing contracts lack any provisions that deal with the end of LIBOR or have provisions that would cause significant economic impacts that the parties may not have anticipated. Amending the terms of many of those contracts will not be possible. As a result, when LIBOR is discontinued, consumers, businesses, lenders, and investors in New York and throughout the country will be faced with legal uncertainty and adverse economic impacts on hundreds of thousands of affected financial contracts, including mortgages, student loans, credit cards, business loans, business contracts, and securities. Many of the financial products and agreements that reference LIBOR are governed by New York law, and the legal uncertainty and adverse economic impact may result in disputes that will burden New York's judicial resources. Legislative action in New York is urgently needed in order to establish a clear path that would reduce these negative consequences and mitigate potential risks to economic stability in advance of LIBOR cessation.

This document sets forth a conceptual description of a legislative proposal aimed at addressing LIBOR cessation in financial instruments and contracts in general, provides several case studies that illustrate how the proposed legislation would interact with certain specific products and includes draft legislative text that could be considered by the New York State legislature in implementing the proposal.

I. LIBOR: Background and Replacement

LIBOR is intended to reflect the average rate at which large banks can borrow from other large banks and professional investors for various terms (e.g. 1 month, 3 months) without posting collateral. However, changes to bank capital rules and funding practices following the financial crisis led to a significant reduction in the amount of this type of unsecured borrowing. Due to such changes, LIBOR became a less robust benchmark, one based in large part on estimates provided by contributing panel banks rather than actual transactions. The regulator that oversees LIBOR (the U.K.'s Financial Conduct Authority) has taken notice and announced that it will not compel the panel banks to continue to contribute to publication of LIBOR after the end of 2021. As a result, financial markets are faced with a situation where numerous products reference LIBOR but LIBOR is likely to cease, requiring alternative solutions.

Because LIBOR is deeply embedded in the financial system, across the globe, working groups comprised of financial system regulators and market participants have identified alternative rates to replace LIBOR. In the U.S., the Federal Reserve convened the Alternative Reference Rates Committee (ARRC) to develop recommendations to facilitate the transition away from U.S. dollar LIBOR. The ARRC is comprised of a diverse set of private-sector entities and an array of official-sector ex-officio members including the Federal Reserve, the Treasury Department, the Consumer Finance Protection Bureau, the Commodity Futures Trading Commission and the Securities and Exchange Commission.

Guided by the objective of developing a robust and transaction-based rate, the ARRC recommended a rate to replace LIBOR called the Secured Overnight Financing Rate (SOFR), which the Federal Reserve Bank of New York began publishing in 2018. SOFR is a broad measure of the cost of borrowing cash overnight collateralized by U.S. Treasury securities in repurchase agreement (repo) markets, which are broad and deep. The ARRC also published a transition plan to promote the use of SOFR on a voluntary basis and continues to work on recommendations to support transitioning financial markets to SOFR.

II. Impact on Transactions

Many types of financial contracts do not include provisions (known as "fallback language") that adequately address a permanent end to LIBOR, while others have ambiguous language. Almost all would, upon a permanent end to LIBOR, dramatically change the economics of hundreds of thousands of contracts and create complex problems for parties or courts to sort out.

To mitigate the risk of economic disruption, the ARRC conducted five market-wide consultations and then published recommendations for fallback language that contemplates a permanent end to LIBOR and transition to SOFR. The ARRC's recommended fallback language sets forth a waterfall that includes a replacement rate calculation based on a SOFR-based rate plus a spread adjustment to make the successor rate as close as possible to what the parties originally intended (recognizing that LIBOR and SOFR are fundamentally different rates). This language can be included in new transactions and some market participants are trying to include it in existing transactions through an amendment process. However, such amendments will not be possible for some products and will be challenging for other products given the scale of the problem and the short period of time before LIBOR is expected to be discontinued.

III. Impact on New York

New York has long encouraged clarity and stability in commercial transactions and, for that reason, is widely preferred as the law that governs commercial transactions and securities, including commercial and business loans, floating rate notes and securitizations. In light of the anticipated cessation of LIBOR, businesses in New York, as well as New York State and its political subdivisions and local governments with LIBOR exposure (*i.e.* floating rate bonds) will, in a LIBOR cessation, be faced with legal uncertainty and economic impact on hundreds of thousands of affected financial contracts. Consumers in New York will also be affected by the discontinuance of LIBOR, which is referenced in adjustable rate mortgages, student loans, credit cards and other consumer products. In addition, investors in New York, including mutual funds and public pension funds holding LIBOR-based investments, will be adversely affected by the impact on the market value of their investments caused by this legal uncertainty. Without clarification by the proposed legislation, disputes arising out of these transactions will burden New York's courts.

IV. Overview of Proposed Legislation

The proposed statute is designed to minimize costly and disruptive litigation by providing legal certainty for the issues that are likely to arise under New York law. Notably, the proposed statute would: (1) prohibit a party from refusing to perform its contractual obligations or declaring a breach of contract as a result of the discontinuance of LIBOR or the use of the statute's recommended benchmark replacement; (2) definitively establish that the recommended benchmark replacement is a commercially reasonable substitute for and a commercially substantial equivalent to LIBOR; and (3) provide a safe harbor from litigation for the use of the recommended benchmark replacement. The proposed legislation would achieve these goals by requiring the use of the recommended benchmark replacement where the contract language is silent or the fallback provisions prescribe the use of LIBOR. Where the fallback provisions are discretionary, the proposed legislation's safe harbor is intended to encourage the selection of the recommended benchmark replacement. The proposed legislation, however, would not impact legacy contracts that have fallback provisions to a non-LIBOR replacement rate (such as the prime rate). The proposed statute is based, in part, on New York legislation enacted in 1998 in anticipation of the discontinuance of sovereign currencies that were being replaced by the euro.

The following table provides a description of key components of the proposed statute and its effects on contractual provisions:

Key Components	Proposed Legislation Structure
"Mandatory" v. "Permissive" Application of the Statute	• **Mandatory**: If the legacy contract is *silent* as to fallbacks. • **Mandatory**: If the legacy language falls back to a *Libor-based rate* (such as last-quoted Libor). • **Permissive**: If the legacy language gives a party the right to exercise *discretion or judgment* regarding the fallback, that party can decide whether to avail itself of the statutory safe-harbor.
Degree of Override of Legacy Contract Fallback Provisions	• **Override**: Where the legacy language falls back to a *Libor-based rate* (such as last quoted Libor). • **Override**: If the legacy language includes a fallback to *polling for Libor or other interbank funding rate*, the statute would mandate that the polling not occur. • **No Override**: Where the legacy language is *silent* as to fallbacks or gives a party the right to exercise *judgment or discretion* regarding the fallback. *In these instances, there is nothing to override and the statute would apply the recommended benchmark replacement.* • **No Override**: The statute would not override legacy language that falls back to an express *non-Libor based rate* (such as Prime).
Mutual "Opt-Out"	• Parties would be permitted to mutually opt-out of the application of the statute, in writing, at any time *before or after* the occurrence of the Trigger Event.
Trigger Events	• The statute would become applicable or available (as described in "Mandatory" v. "Permissive" above) upon the occurrence of statutory trigger events.
Scope	• **No Exclusions**: No product would be categorically excluded from the statute. Parties can opt-out as described above.
Conforming Changes	• The statute would be drafted to provide safe-harbor protection for parties who add conforming changes to their documents to accommodate administrative/operational adjustments for the statutory endorsed benchmark rate.

Because in many cases fallback language in existing contracts is inadequate or inconsistent with the economics of the transactions that would be affected, legislative action this year would provide critical stability by establishing the means to help maintain consistency and financial stability for consumers, businesses, lenders, and investors, as illustrated by the case study examples set out below.

V. Case Studies

A: Case Study: Floating Rate Notes

The floating rate note market provides variable rate financing to a wide range of private sector businesses as well as government related entities. It has been estimated that LIBOR serves as the primary reference rate for approximately $1.8 trillion of floating rate notes.

Many such floating rate notes issued by U.S. institutions are governed by New York law. Some floating rate notes referencing LIBOR typically provide that if LIBOR is not available for an interest determination date, the rate will be determined by asking for quotes for LIBOR from banks, and, if these are not available, the fallback rate would be the last available LIBOR. If there is a permanent cessation of LIBOR, that last available LIBOR would, in effect, become a fixed interest rate, inconsistent with the fundamental purpose and intent of a floating rate note.

This type of fallback language addresses the temporary unavailability of LIBOR, not permanent unavailability. The reference bank poll is highly likely to fail if LIBOR has been discontinued. The banks that would be polled are the same banks that would submit quotations to formulate LIBOR. So the process would be circular – LIBOR is unavailable, and the banks that would have provided input into its determination are to be polled. However, when LIBOR is discontinued there is a significant risk that reference banks would not be willing to quote for such a poll; there would be no established process through which reference banks could respond to such post-cessation LIBOR polls; no such post-cessation polling has been tested on a wide scale; it would be difficult for banks to engage in this process given the sheer volume of contracts that would utilize it; and any new process for polling would not be compliant with what are now globally-recognized standards for financial benchmark rate-setting.

The net effect of this type of fallback language will be that instruments that were intended to be floating rate become fixed rate – a clear change from what was intended by the parties. However, it is difficult to argue that the calculation agent or the trustee should be permitted to ignore the fallback language and adopt some other approach, such as selecting a replacement floating rate.

The unexpected change from floating to fixed-rate for thousands of floating rate notes could have dramatic and destabilizing effects for the financial system. There will be winners and losers as the values associated with such transactions change from what was expected and intended. The disruption, risk and inadvertent outcomes will be felt by issuers and investors in such securities, including retail investors and pension plans, who contracted for a floating rate and would instead receive a fixed rate. Some investors, including money market funds, may be prohibited from investing in fixed-rate long-term instruments. Those investors would be forced to sell their notes, resulting in losses to investors and declines in the market value of the notes.

Although the notes could theoretically be amended to resolve this problem, they typically require consent from each holder to change the interest rate. So while it may be possible to obtain consent in isolated cases, it is unlikely to be workable for many securities with a large number of holders, especially if held by retail investors. The administrative burden and potentially high costs of reaching these investors will be significant, particularly when unanimous consent of security holders would be required. So even though an amendment is possible, the most likely outcome is that upon the discontinuance of LIBOR, there will be a significant volume of outstanding notes that move to a fixed rate because of inadequate fallback language that does not provide for LIBOR to be replaced with a variable rate. Litigation can also be expected with respect to the enforceability of the fallback language, for example, as not reflective of the parties' intent. It is also foreseeable that some market participants may buy notes that have inadequate fallback language with the intention of withholding consent or litigating.

The proposed New York legislation would nullify the fallback polling mechanism included in the current fallback language in most securities, as well as the ultimate fallback to a fixed rate based on the last published LIBOR index. The proposed legislation would instead uniformly implement a fallback to the statute's recommended benchmark replacement for securities. This outcome would avoid the use of a rate (last quoted LIBOR) that is no longer representative of a market rate, reduce uncertainty about the replacement rate, and minimize market disruption, potential disputes and the costs and burdens of litigation on New York courts, residents and commercial participants.

B. Case Study: Securitizations

The securitization market provides financing to a wide range of consumer and corporate borrowers including college students, automobile owners, users of credit cards, homeowners, commercial real estate owners, and businesses. The ARRC has estimated that $1.8 trillion of securitizations are currently linked to LIBOR.

Securitization documents exhibit many of the same variants of unworkable or non-existent fallback language as is found in other asset classes such as floating rate notes but those issues are compounded exponentially by the fact that every securitization has at least two independent rates (the rate paid on the securities themselves and the rate payable on the underlying assets), and often a third (a swap, to smooth cash flows). These are distinct contracts (or sets of contracts) which will transition away from LIBOR (if at all) using potentially different methodologies at potentially different times absent a legislative solution. Consequent cash flow mismatches (especially unexpected and undesired mismatches) give rise to what is known as "basis risk." Left unaddressed by legislation, this "basis risk" and the actions that lead to it are likely to lead to a flood of litigation between and among the parties to the securitizations and investors, as well as uncertainty for consumers and substantial disruption to the liquidity of such instruments.

Securitizations are intricately structured using these multiple instruments so as to transform the cash flows derived from the underlying assets into suitable instruments for capital markets investors and rely on the absence of unexpected basis risk. Nationally recognized credit rating organizations generally utilize "stress case" assumptions to evaluate basis risk when granting ratings to each bond in the securitization's capital structure.

If unanticipated basis risk were introduced into the securitization, investors could face losses, in the form of interest shortfalls, slower principal repayment, reduced excess spread and/or ratings downgrades, all of which potentially contribute to a significant loss of value and liquidity. The result could be credit rating downgrades that could set off a series of decisions by market participants that could have adverse consequences for financial institutions and cause extreme volatility that would impact the broader financial markets, funds and instruments in which retail investors and pension funds invest.

In the absence of a legislative solution, most LIBOR-indexed securitization bonds would (assuming compliance with the various reference bank polling provisions and other conditions precedent) ultimately revert to a fixed rate ("last LIBOR") upon LIBOR cessation, similar to floating rate notes. Changing the language in many securities would have to be approved by a noteholder vote and many require unanimous consent. As with floating rate notes, securing unanimous consent, or even locating the full set of noteholders, would likely be quite difficult. Many securitizations involve different tranches, making the problem or amendments even more complicated.

In addition to the issues identified in the floating rate notes context, a fallback to last LIBOR for securitization bonds will not be the case with many of the other instruments implicated in a securitization, which can and typically do contain securities (including other securitized products), consumer ARMs, derivatives, and bilateral business loans that transition away from LIBOR as set out herein. For example, if, following LIBOR cessation, securitization bond coupons set at a 5% "fixed rate/last LIBOR" while underlying assets continue to "float" according to an alternate index that sets initially at 2%, the transaction would suffer a 3% unanticipated interest shortfall for the relevant accrual period. This scenario would lead to substantial market losses and disruption that would negatively affect all market participants, including businesses that use securitizations to provide funding for their operations and the consumers that they employ.

The proposed legislation would serve to minimize this potential unanticipated basis risk by ensuring that the securitization bonds reverted to the recommended benchmark replacement rather than a fixed/last LIBOR rate, thereby more closely matching the alternate index on the underlying assets or loans. Addressing this basis risk is critical in avoiding a potentially significant liquidity event and market disruption and to ensure that consumers and corporations can continue to access capital provided by the securitization sector as a reliable and critical source of financing.

C. Case Study: Consumer Adjustable Rate Mortgages (ARMs)

The consumer adjustable rate mortgages market is a fundamentally important market that underpins the ability of consumers to achieve home ownership. It is estimated that LIBOR serves as the primary or secondary reference rate for approximately $1.2 trillion of adjustable-rate U.S. residential mortgages.

Current contract language in such consumer mortgages generally allows noteholders to replace the index if LIBOR is no longer available. There is no defined standard, so when choosing the replacement index, lenders are typically obligated to consider "comparable information." However, there is a significant degree of discretion and no industry standard. As a result, even when acting in good faith, different lenders could determine different replacement indices. An outcome whereby borrowers receive different replacement rates could be perceived as being unfair or result in disparate economic outcomes for home owners. In any event, disputes can be expected to arise with respect to whether or not the selected replacement index satisfied the applicable contractual or legal standards and, if not, what replacement index should have been used instead.

The ARRC developed recommended fallback language for ARMs and conducted a market consultation to refine it in response to the feedback received from market participants. The drafting and consultation involved a wide variety of stakeholders including lenders, servicers, investors, regulators and consumer groups to ensure its recommended fallbacks would comply with all applicable consumer protection laws and regulations. Similar to the other ARRC-recommended fallback language, the recommended fallback language for ARMs includes details regarding the replacement benchmark, the spread adjustment to the replacement benchmark, timing and other mechanics.

To ensure an orderly, fair and transparent outcome for ARMs as well as other consumer products with loans indexed to LIBOR, the proposed New York State legislation would provide that lenders responsible for selecting the replacement index could be protected from litigation by opting into the statute and thus implementing the recommended benchmark replacement. This type of relief would increase consistency and strive to treat all consumers equally, an important objective.

D. Case Study: Derivatives

It is estimated that LIBOR serves as the primary reference rate for approximately $190 trillion of derivatives. While they sound exotic, many types of customers, including corporations, use derivatives to manage interest rate risk associated with a variety of businesses. For example, a manufacturing company might hedge the interest rate risk associated with a long-term variable rate loan by purchasing an interest rate swap to make its interest payments fixed.

Derivatives are widely used by financial institutions to hedge risks assumed in providing these swaps to commercial users, and for this reason, if a LIBOR termination disrupts these contracts, it would have a ripple effect throughout the financial system. Many derivative contracts are governed by New York law.

The International Swaps & Derivatives Association (ISDA), a trade group focused on derivatives, publishes the LIBOR definition used in most derivative contracts. This definition provides that if LIBOR is unavailable, the calculation agent has the contractual obligation to determine the rate by polling reference banks (first in London, then in New York). As discussed above, reference banks may not respond to a poll given potential liability and other concerns. The reference bank poll to recreate LIBOR after it no longer exists is therefore highly likely to fail.

Assuming the reference bank polls fail, the fallback language does not provide any clear answer as to what to do. Market participants would likely pursue a number of different paths and use different fallback rates. These would inevitably differ across transactions, potentially causing mismatches and market disruption on a large scale. Alternatively, many parties would likely choose to litigate the outcome or otherwise ask the courts for direction.

In response to this issue, ISDA is developing a protocol that would amend the derivatives entered into bilaterally between protocol adherents, in order to provide for a more robust U.S. dollar LIBOR fallback provision with definitive trigger events and a published adjusted SOFR fallback rate. The new ISDA LIBOR fallback language was selected based on multiple rounds of broad market consultations.

However, ISDA cannot impose amendments on financial market participants; their protocols require both parties to the derivatives contract to adhere to the protocol in order for these derivatives to be effectively amended. Many institutional financial entities are likely to adhere to the ISDA protocol because their offsetting derivatives go through clearinghouses (which have announced they will unilaterally implement the same ISDA fallbacks). Banks are, therefore, motivated to ensure that the fallbacks in both cleared and uncleared swaps are aligned.

Commercial end users are generally exempt from clearing requirements and adherence to a protocol may present operational challenges and potentially legal expense for some. This means they may be in the ambiguous position discussed above, while the rest of the market moves to the ISDA fallback.

The proposed New York legislation would remedy these anticipated and severe market disruptions by nullifying the polling mechanism included in the existing fallback language in most derivatives contracts. Instead of the fallback polling process that did not anticipate these issues, the proposed legislation would implement the recommended benchmark replacement, which is consistent with the adjusted rate proposed in the ISDA protocol. Transactions in the affected markets would then be consistent. The proposed legislation would benefit commercial end users (i.e., those that have operational and other hurdles to adhering to protocols) by reducing the uncertainty embedded in their derivatives contracts. It would increase consistency across derivatives markets about the value of derivatives linked to U.S. dollar LIBOR, align with the floating rate note and securitization markets that use derivatives to hedge cash exposures, and mitigate economic risks and the potential for disputes that could disrupt the efficient operation of these vital markets at the time of a LIBOR discontinuance.

E. Case Study: Business Loans

The business loan market, which can include both bilateral and syndicated loans, provides financing to nonfinancial businesses that may be used to grow their business and/or to manage the risk associated with exposures to other products. As noted below, the proposed legislation would have little impact on business loans and would not alter existing fallback language that converts to a non-LIBOR rate.

The contract language in business loan documents may include instructions to seek quotes from one reference bank or a set of reference banks in the event that LIBOR is not published, but if an offered rate is not obtained, then the language generally provides that the rate paid on these loans would convert to an alternative base rate – either the prime rate or a rate which is typically close to the prime rate. More recent loans, particularly in the syndicated loan space, provide a mechanism for the parties to select and implement a replacement benchmark, however, if the relevant consents are not achieved, then these loans would convert to an alternative base rate.

The proposed legislation would leave an ultimate fallback to a non-LIBOR replacement rate (such as the prime rate) unaffected. This framework was intentional in light of disparate views in financial markets today regarding the replacement interest rate for business loans. Since business loan contracts can be amended (and generally are amended quite frequently), the most appropriate economic path forward is for lenders and borrowers to modify loans well in advance of a LIBOR discontinuation to include interest rates and pricing acceptable to the parties.

The proposed New York State legislation would, however, serve to reduce uncertainty by nullifying any reference to bank polls and overriding silent or ambiguous fallback provisions.

F. Case Study: Procurement Agreements

In addition to the $200 trillion of financial transactions referencing LIBOR, there is an as yet unmeasured amount of contracts for the exchange of goods and services in the real economy that also reference LIBOR. Based on the relative size of the overall economy compared to the financial markets, it is likely that the outstanding amounts of commercial supply agreements, contracts for purchases of major capital equipment, real estate, and business assets generally, are significantly more than the $200 trillion cited for financial markets.

Consider the purchase of a major piece of equipment where the construction process from order to delivery will take many months. For example, state-of-the-art machines for paper production cost several hundred million dollars and can take over two years to construct. The paper company and the paper machine supplier enter into a multi-year purchase agreement that calls for periodic payments to be advanced by the customer upon the machine manufacturer's completion of designated milestones. If, however, the production of the paper machine falls behind schedule and a milestone is missed, the contract will call for a reduction in the purchase price based on a calculation using LIBOR. Most of these types of agreements outstanding today were negotiated without any thought of what rates would apply if LIBOR were no longer quoted and are without fallback provisions. As is most often the case, if customer and supplier are in different jurisdictions, they would likely choose New York law for the settlement of disputes.

In today's competitive marketplace, many U.S.-based multinational corporations enter into worldwide supply contracts in which they agree to buy all their needs for a particular commodity, or other input to their production process, if the supplier will give a volume discount for the quantity purchased. In many of these agreements, the discount is negotiated to be paid up front in anticipation of annual targeted purchases. If, however, the target is missed, the typical contract will call for a payment back to the supplier with the formula including LIBOR for the calculation. Particularly for cross-border supply agreements, the parties choose New York as the governing law and venue for dispute resolution.

If LIBOR ceases to be quoted, the parties to most supply agreements will have to negotiate a mutually acceptable resolution. During this negotiation, a supplier may suspend deliveries and a customer might withhold payments causing a major disruption in the economy. The parties whose contracts specify New York law for the settlement of disputes could very likely tie up the state's courts with a logjam of cases. Often in the case of long-term supply agreements, prices will have moved since inception and one of the parties will have an incentive to hold out for a price or quantity adjustment, making resort to the courts more likely by the advantaged party seeking to preserve its contractual benefit. The proposed legislation will bring in the recommended fallback rates to substitute for LIBOR and, we hope, resolve the dispute without resort to the courts.

G. Case Study: Municipal Bond Markets

Governments, governmental institutions and not for profits access funding through municipal bond markets for projects that serve a civic purpose. Municipal bonds provide much needed public funding for projects like roads, bridges, sewer systems, hospitals, airports, affordable housing, schools and other public facilities. The different types of governmental entities and institutions that issue these bonds include states, towns, cities, counties, school districts, hospitals, transportation authorities, universities and colleges, housing projects, road and highway authorities, water districts, and power districts. In fact, the first municipal bond was issued by the City of New York in 1812 to finance a canal. Since then, the municipal bond markets have grown to $3.8 trillion in outstanding debt issued by over 50,000 individual entities. There are an estimated $44 billion in LIBOR-linked municipal floating rate notes outstanding and an unmeasured number of LIBOR-linked loans and swaps. Many of these contracts are long-dated and mature well after the end of 2021. Similar to the previous case studies described above, many of the LIBOR-linked municipal contracts have language that may not be sufficient upon a LIBOR discontinuation. Municipal bonds are payable from taxes, user fees, and other public funds. The proposed New York State legislation would protect taxpayers and municipalities from rate uncertainty and litigation at the time of a LIBOR discontinuance.

Appendix: Draft Legislative Proposal Text, Subject to Revision by the ARRC

§[100]____ **Effect of LIBOR Discontinuance Event On Agreements**

1. On the LIBOR Replacement Date, the Recommended Benchmark Replacement shall, by operation of law, be the Benchmark Replacement for any contract, security or instrument that:

   a. uses LIBOR as a Benchmark and contains no Fallback Provisions or;

   b. contains Fallback Provisions that provide for a Benchmark Replacement that is based in any way on any LIBOR value.

2. Following the occurrence of a LIBOR Discontinuance Event, any Fallback Provisions that provide for a Benchmark Replacement based on or otherwise involving a poll, survey or inquiries for quotes or information concerning interbank lending rates or any interest rate based on LIBOR shall be disregarded as if not included in such contract, security or instrument and shall be deemed null and void and without any force or effect.

3. Following the occurrence of a LIBOR Discontinuance Event, any Determining Person shall be permitted, but shall not be required, to select a Recommended Benchmark Replacement as the Benchmark Replacement under or in respect of any contract, security or instrument, provided that such contract, security or instrument is not subject to § 100 (1) and provided further that the selection of such Benchmark Replacement shall be irrevocable and shall be made no later than

   a. the time, if any, specified in such contract, security or instrument for making such selection; and

b. if no such time is specified in the contract, security or instrument, the first date that is at least [60] days following the LIBOR Replacement Date on which any valuation, payment or other measurement under or in respect of such contract, security or instrument is required to be calculated or determined by reference to a Benchmark Replacement.

4. The provisions of this title shall not alter or impair (a) any written agreement by all requisite parties that, retrospectively or prospectively, a contract, security or instrument shall not be subject to this title (without necessarily referring specifically to this title); (b) any contract, security or instrument that contains Fallback Provisions that, after the application of §100 (1), would result in a Benchmark Replacement that is not based on LIBOR (including, but not limited to, the prime rate or the federal funds rate); (c) any contract, security or instrument subject to §100 (3) as to which a Determining Person does not elect to use a Recommended Benchmark Replacement or that permits a Determining Person to use a Recommended Benchmark Replacement prior to the occurrence of a LIBOR Discontinuance Event; or (d) the application to a Recommended Benchmark Replacement of any cap, floor, modifier or spread adjustment to which LIBOR had been subject pursuant to the terms of a contract, security or instrument. For purposes of the foregoing, "requisite parties" means all parties required to amend the terms and provisions of a contract, security or instrument that would otherwise be altered or impaired by this title.

5. Notwithstanding the uniform commercial code or any other law of this state, this title shall apply to all contracts, securities and instruments (including contracts, with

respect to commercial transactions) and shall not be deemed to be displaced by any other law of this state.

§ [200]____ **Continuity Of Contract And Safe Harbor**

1. The use of a Recommended Benchmark Replacement as a Benchmark Replacement under or in respect of a contract, security or instrument shall constitute:

   a. a commercially reasonable substitute for and a commercially substantial equivalent to LIBOR;

   b. a reasonable, comparable or analogous term for LIBOR under or in respect of such contract, security or instrument; and

   c. substantial performance by any person of any right or obligation under or in respect of a contract, security or instrument relating to or based on LIBOR.

2. None of (a) a LIBOR Discontinuance Event or a LIBOR Replacement Date, (b) the use of a Recommended Benchmark Replacement as a Benchmark Replacement or (c) the implementation or performance of Benchmark Replacement Conforming Changes shall have the effect of (i) discharging or excusing performance under any contract, security or instrument for any reason, claim or defense (including, but not limited to, any force majeure or other provision in any contract, security or instrument); (ii) giving any person the right to unilaterally terminate or suspend performance under any contract, security or instrument; (iii) constituting a breach of a contract, security or instrument; or (iv) voiding or nullifying any contract, security or instrument.

3. If a Recommended Benchmark Replacement is used as a Benchmark Replacement or a Determining Person implements Benchmark Replacement Conforming

Changes under or in respect of a contract, security or instrument in accordance with this title, no person shall have any liability for damages to any person or be subject to any claim or request for equitable relief arising out of or related to the use of a Recommended Benchmark Replacement or the implementation or performance of Benchmark Replacement Conforming Changes, and the use of such Recommended Benchmark Replacement or the implementation or performance of Benchmark Replacement Conforming Changes shall not give rise to any claim or cause of action by any person in law or in equity.

4. The use of a Recommended Benchmark Replacement or the implementation or performance of Benchmark Replacement Conforming Changes as provided in this title shall be deemed to (a) not be an amendment or modification of any contract, security or instrument and (b) not impair or have a material or adverse effect on any person's rights or obligations under or in respect of any contract, security or instrument.

5. Except in the case of a contract, security or instrument covered by §100 (1) or (2), the provisions of this title shall not be interpreted as creating any negative inference or negative presumption regarding the validity or enforceability of (a) any Benchmark Replacement that is not a Recommended Replacement Benchmark, (b) any spread adjustment, or method for calculating or determining a spread adjustment, that is not a Recommended Spread Adjustment or (c) any changes, alterations or modifications to or in respect of a contract, security or instrument that are not Benchmark Replacement Conforming Changes.

§[300]____ **Definitions**

As used in this title the following terms shall have the following meanings:

1. "LIBOR" shall mean, for purposes of the application of this title to any particular contract, security or instrument, U.S. dollar LIBOR (formerly known as the London interbank offered rate) as administered by ICE Benchmark Administration Limited (or any successor thereof).

2. "LIBOR Discontinuance Event" shall mean the earliest to occur of any of the following:

   a. a public statement or publication of information by or on behalf of the administrator of LIBOR announcing that such administrator has ceased or will cease to provide LIBOR, permanently or indefinitely, provided that, at the time of the statement or publication, there is no successor administrator that will continue to provide LIBOR;

   b. a public statement or publication of information by the regulatory supervisor for the administrator of LIBOR, the United States Federal Reserve System, an insolvency official with jurisdiction over the administrator for LIBOR, a resolution authority with jurisdiction over the administrator for LIBOR or a court or an entity with similar insolvency or resolution authority over the administrator for LIBOR, which states that the administrator of LIBOR has ceased or will cease to provide LIBOR permanently or indefinitely, <u>provided</u> that, at the time of the statement or publication, there is no successor administrator that will continue to provide LIBOR; or

c. with respect to any particular type of contract, security or instrument designated by the Relevant Recommending Body, a public statement or publication of information by the regulatory supervisor for the administrator of LIBOR announcing that LIBOR is no longer representative.

3. "LIBOR Replacement Date" shall mean

a. in the case of a LIBOR Discontinuance Event described in subclause (a) or (b) of § 300 (2), the later of (i) the date of the public statement or publication of information referenced therein and (ii) the date on which the administrator of LIBOR permanently or indefinitely ceases to provide LIBOR; and

b. in the case of a LIBOR Discontinuance Event described in subclause (c) of § 300 (2), the date of the public statement or publication of information referenced therein;

provided that, if the date on which the Benchmark Replacement would become effective under the Fallback Provisions of a contract, security or instrument is later than the date determined according to the foregoing provisions, such later date shall be the LIBOR Replacement Date for such contract, security or instrument.

4. "Fallback Provisions" shall mean terms in a contract, security or instrument that set forth a methodology or procedure for determining a Benchmark Replacement, including any terms relating to the date on which the Benchmark Replacement becomes

effective, without regard to whether a Benchmark Replacement can be determined in accordance with such methodology or procedure.

5. "Benchmark" shall mean an index of interest rates that is used, in whole or in part, as the basis of or as a reference for calculating or determining any valuation, payment or other measurement under or in respect of a contract, security or instrument.

6. "Benchmark Replacement" shall mean a Benchmark, or an interest rate or rates (which may or may not be based in whole or in part on a prior setting of LIBOR), to replace or substitute for LIBOR or any interest rate based on LIBOR following the occurrence of a LIBOR Discontinuance Event under or in respect of a contract, security or instrument.

7. "Recommended Benchmark Replacement" shall mean a Benchmark Replacement, which shall include any Recommended Spread Adjustment and any Benchmark Replacement Conforming Changes, that shall have been selected or recommended by a Relevant Recommending Body.

8. "Recommended Spread Adjustment" shall mean a spread adjustment, or method for calculating or determining such spread adjustment, (which may be a positive or negative value or zero) that shall have been selected or recommended by a Relevant Recommending Body to be applied to a Recommended Benchmark Replacement for a particular type of contract, security or instrument and for a particular term to account for the effects of the transition or change from LIBOR to a Recommended Benchmark Replacement.

9. "Benchmark Replacement Conforming Changes" shall mean, with respect to any contract, security or instrument, any changes, alterations or modifications that are

associated with and reasonably necessary to the use, adoption or implementation of a Recommended Benchmark Replacement and that (a) have been selected or recommended by a Relevant Recommending Body to reflect the use, adoption or implementation of a Recommended Benchmark Replacement under or in respect of such contract, security or instrument or (b) would not, in the reasonable judgment of the Determining Person, result in a disposition of such contract, security or instrument for U.S. federal income tax purposes.

10. "Determining Person" shall mean, with respect to any contract, security or instrument, any person specified as a "Determining Person" or, if none is specified, any person with the authority, right or obligation to (a) determine the Benchmark Replacement, (b) notify other persons of the occurrence of a LIBOR Discontinuance Event, a LIBOR Replacement Date or a Benchmark Replacement or (c) calculate a payment based on a Benchmark.

11. "Relevant Recommending Body" shall mean the Federal Reserve Board, the Federal Reserve Bank of New York, or the Alternative Reference Rates Committee or any successor to any of them.

§ [400]____ **Severability. [Add severability provision.]**