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# Congress passes LIBOR legislation

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In a welcome development for so-called “tough legacy” contracts, Congress has passed legislation with the goal of establishing a clear and uniform nationwide process for replacing LIBOR in existing contracts the terms of which do not provide for the use of a clearly defined or practicable replacement benchmark rate.

Last week, Congress passed legislation that includes the Adjustable Interest Rate (LIBOR) Act. This legislation, which has been signed by the president, represents a welcome development for so-called “tough legacy” contracts, which are existing LIBOR contracts that are particularly difficult to amend. The key purpose of the legislation is to establish a clear and uniform process, on a nationwide basis, for replacing LIBOR in existing contracts the terms of which do not provide for the use of a clearly defined or practicable replacement benchmark rate, without affecting the ability of parties to use any appropriate benchmark rate in new contracts. While some states have already adopted, and others have been considering, LIBOR legislation, the federal legislation expressly supersedes any provision of any state or local law, statute, rule, regulation or standard. There are obvious benefits to having a single approach for the entire country.

The legislation is highly technical, but, at a high level, it applies to certain contracts, securities, instruments, obligations and assets that use any of the overnight or 1-, 3-, 6- or 12-month tenors of U.S. dollar LIBOR as a benchmark. As a general matter, the key provisions of the legislation are similar to those of New York’s LIBOR legislation, effectively bucketing contracts into three categories (after giving any effect to provisions in the legislation that generally disregard references in fallback provisions to a benchmark replacement that is based in any way on any LIBOR value or requires a poll):

- Contracts that contain no fallback provisions or contain fallback provisions that identify neither a specific benchmark replacement nor a “determining person” (i.e., any person with the authority, right or obligation to determine a benchmark replacement). These contracts will effectively be automatically changed on the LIBOR replacement date (expected to be the first London banking day after June 30, 2023) to use the “Board-selected benchmark replacement” (i.e., a benchmark replacement identified by the Board of Governors of the Federal Reserve System (the “Federal Reserve Board”) that is based on SOFR, including any tenor spread adjustment).
- Contracts that contain fallback provisions that identify a benchmark replacement that is not based in any way on any LIBOR value (including the prime rate or the effective Federal funds rate). The legislation will not alter these contracts.
- Contracts that identify a determining person. The determining person will have the authority to select the Board-selected benchmark replacement as the benchmark replacement. Importantly, the selection or use of a Board-selected benchmark replacement as a benchmark replacement (and any “benchmark replacement conforming changes” (as defined in the legislation)) would enliven safe harbor provisions that, among other things, generally provide that such selection or use will not discharge or excuse performance under, give any person the right to unilaterally terminate or suspend performance under, or constitute a breach, of the contract. The legislation will not alter any contract as to which a determining person does not elect to use a Board-selected benchmark replacement.

In addition, the legislation will not alter or impair any written agreement specifying that a contract shall not be subject to the legislation.

The key differences between the federal legislation and the New York legislation include the following:

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- The person responsible for certain key determinations under the federal legislation (including the identification of the Board-selected benchmark replacement) is the Federal Reserve Board. Under the New York legislation, the term “relevant recommending body” means the Federal Reserve Board, the Federal Reserve Bank of New York or the Alternative Reference Rates Committee.
- Under the federal legislation, the term “Board-selected benchmark replacement” includes any “tenor spread adjustment,” which is in turn defined to mean a figure specified in the legislation for each relevant LIBOR tenor. These figures are the same as the spread adjustments that will be added to the adjusted risk-free rates in the fallback methodology for certain LIBOR-based derivatives that use ISDA documentation. The equivalent term in the New York legislation, “recommended spread adjustment,” does not specify any figures.
- The federal legislation expressly provides that, if a determining person does not select a benchmark replacement by the earlier of the LIBOR replacement date and the latest date for selecting a benchmark replacement according to the terms of the contract, the Board-selected benchmark replacement, on and after the LIBOR replacement date, shall be the benchmark replacement for the contract.
- Under the federal legislation, the term “LIBOR” specifically excludes the 1-week and 2-month tenors of U.S. dollar LIBOR. These tenors are no longer published.

Importantly, the federal legislation also amends Section 316(b) of the Trust Indenture Act of 1939 to provide that the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security shall not be deemed to be impaired or affected by any change occurring by the application of the legislation to any indenture security.

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