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New York Legislation Addressing LIBOR Cessation

Issuers Should Review Structured Instruments to Identify Any Mismatch in Payments Arising from Differing State Laws

On April 6, 2021, the State of New York adopted long-anticipated legislation addressing the cessation of U.S. Dollar LIBOR ("LIBOR"). The legislation provides a statutory approach to so-called "tough legacy" contracts (contracts that (1) reference LIBOR as a benchmark interest rate but do not include effective fallback provisions in the event LIBOR is no longer published or is no longer representative, and that (2), in the case of overnight, 1-month, 3-month, 6-month and 12-month LIBOR, will remain in existence beyond June 30, 2023, or, in the case of the 1-week and 2-month LIBOR, will remain in existence beyond December 31, 2021).

Under this legislation, if a contract governed by New York law (1) references LIBOR as a benchmark interest rate and (2) does not contain benchmark fallback provisions, or contains benchmark fallback provisions that would cause the benchmark rate to fall back to a rate that would continue to be based on LIBOR, then on the date LIBOR permanently ceases to be published (or is announced to no longer be representative), LIBOR will be deemed by operation of law to be replaced by the "recommended benchmark replacement"—an interest rate that will be based on the Secured Overnight Financing Rate and selected or recommended by the Federal Reserve Board, the Federal Reserve Bank of New York or the Alternative Reference Rates Committee for the applicable type of contract.

In the context of structured securities and hybrid capital instruments, situations may exist where one instrument in the structure is governed by New York law but another instrument is governed by the law of another jurisdiction. One example is trust preferred securities in which a debt instrument is issued to a trust, which in turn issues trust certificates to investors. These trust certificates are issued pursuant to a trust

agreement governed by the law of the jurisdiction of the trust, frequently Delaware, whereas the debt instrument is frequently governed by New York law.

One effect of the statutory change in New York law could be to create a mismatch (once the relevant trigger date under the New York law has arrived) in rates payable under securities, guaranties or other instruments in these structures. Therefore, we recommend that issuers review transactions to determine whether such a mismatch would exist under current law and what, if any, actions should be taken, such as seeking amendments or waivers, dissolution of the trust and distribution of the underlying debt securities, or making disclosures to investors. Issuers should also monitor any further developments, such as legislation by other relevant states or the Federal government, that could potentially address a mismatch.

Many of these securities were issued years before the problems with LIBOR were ever contemplated. They nonetheless frequently contain provisions intended to prevent mismatches in rates to be paid. A careful review is warranted to determine whether such mechanisms are present and effective.

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