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US branches of non-US banks: Access to US COVID-19 facilities and programs

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Authors: [Duane Wall](#), [Glen R. Cuccinello](#), [Max Bonici](#), [John Wagner](#), [Roseann Cook](#)

As during the 2008 global financial crisis, the US financial regulators and Congress are taking emergency action to ensure the availability of liquidity and credit to the US financial system in response to the COVID-19 pandemic. US branches and agencies of non-US banks (US Branches) are in many regards treated as US financial institutions for the purpose of these actions. US Branches may be positioned to realize benefits through participation in US COVID-19 programs and facilities but also will need to carefully navigate the COVID-19 related compliance requirements of the quickly changing US financial regulatory landscape.

This alert provides an overview of how the rapidly evolving US COVID-19 regulatory response applies to US Branches in respect of the availability of emergency funding and liquidity and compliance with new and changing regulatory measures. The alert discusses the following in turn:

- [Emergency lending facilities](#), outlining the availability of emergency funding sources for or through US Branches to support US businesses, US households and markets,
- [Emergency investment programs](#), outlining programs in which US Branches may be eligible to participate as lenders or liquidity providers to US businesses, and
- [Emergency regulatory compliance measures](#), outlining the new compliance requirements and expectations resulting from key measures implemented by US federal and state authorities to facilitate the flow of funding and liquidity and otherwise provide relief to US households, US businesses and the US economy.

Our team will provide periodic updates and insights as the COVID-19 pandemic and the US response continues to develop. Please refer to our [COVID-19 Regulatory and Legislative Dashboard](#) to help track the fast-changing regulatory actions, facilities, programs and laws.

Emergency liquidity facilities

US Branches are eligible to participate in various facilities established by the Federal Reserve in its capacity as the US central bank—and in its unofficial capacity of “lender of last resort” for the US financial system—in response to the COVID-19 pandemic. The Federal Reserve has borrowed from its playbook from the 2008 global financial crisis in establishing emergency programs to address the economic impact of the COVID-19 pandemic on the US financial system. These measures stem from the Federal Reserve’s emergency powers under section 13(3) of the Federal Reserve Act. While the Federal Reserve’s emergency lending powers were curtailed by

Congress following the 2008 global financial crisis, the Federal Reserve, with the approval of the US Treasury Secretary, can establish a lending program or facility with broad-based eligibility so long as the program/facility is not for the purpose of assisting a single or specific company to avoid bankruptcy and does not benefit any failing financial company. The lending program or facility must also provide for collateralization requirements that are sufficient to protect taxpayers from losses.

As during the 2008 global financial crisis, US Branches, like US banks, are generally eligible to participate in several of the Federal Reserve's COVID-19 response programs, which we summarize below. In many cases, banks in the United States, including US Branches, serve as the intermediaries between the Federal Reserve and the parties or markets that the facilities are intended to benefit—e.g., money market mutual funds. Please refer to [Appendix A](#) for a summary chart.

Discount window access

- To ensure continued credit to US households and businesses, the Federal Reserve on March 16, 2020 increased the funding available to banks through access to its discount window primary credit lending facilities.
- US Branches are eligible to borrow funds through the discount window of their applicable Federal Reserve Bank.
- The Federal Reserve's changes included:
 - Lowering the primary credit rate from 1.75% to 0.25%; and
 - Expanding permitted borrowing from overnight to up to 90 days.
- As with overnight borrowing, the expanded primary credit facilities are subject to the pledge of adequate collateral and require the US Branch to be in sound condition.
- The Federal Reserve has delayed the implementation of changes to the methods to determine a non-US banking organization's maximum daylight overdraft capacity and is retaining the Strength of Support Assessment (or SOSA) ranking as the appropriate measure through October 1, 2020.

Primary Dealer Credit Facility (PDCF)

- The PDCF is a loan facility akin to discount window borrowing that has been established to provide primary dealers in US Government securities with funding to ensure smooth market functioning and facilitate the availability of credit to businesses and households as well as to expand the ability of primary dealers to gain access to term funding. The PDCF will be administered by the Federal Reserve Bank of New York (New York Fed), which conducts open-market operations on behalf of the Federal Reserve System.
- A US Branch may participate if it is one of the US primary dealers, i.e., the 24 banks and securities broker-dealers that serve as counterparties of the New York Fed in its open market operations.
- Lending under the PDCF does not have any specific limit, provided sufficient margin-adjusted eligible collateral is pledged and assigned.
- During the 2008 financial crisis, the PDCF was established to address the lack of liquidity in the repo markets. Over \$8.9 trillion was made available to primary dealers.

Term Asset-Backed Securities Loan Facility (TALF)

- The TALF is a credit facility intended to help meet the credit needs of consumers and small businesses by facilitating the issuance of asset-backed securities (ABS) and improving the market conditions for ABS more generally. The TALF is intended to serve as a funding backstop to facilitate the issuance of eligible ABS. The New York Fed has committed to lend to a SPV on a recourse basis, and the SPV will make

loans available to companies in the United States that own eligible ABS and maintain an account relationship with a primary dealer.

- The TALF SPV initially will make up to \$100 billion of loans available through an initial \$10 billion equity investment in the SPV by US Treasury from its Exchange Stabilization Fund.
- Eligible collateral includes US dollar denominated cash (i.e., not synthetic) ABS meeting specified rating requirements that are issued on or after March 23, 2020 and for which the underlying credit exposures were originated by a US company.
- US Branches that own eligible collateral and maintain an account relationship with a primary dealer are eligible to borrow under the TALF.
- During the 2008 financial crisis, the New York Fed loaned up to \$200 billion on a nonrecourse basis through the TALF. In addition, TALF agents, most of which were also primary dealers, acted as agents for all TALF loans, responsible, among other functions, for crediting or debiting borrowers' accounts for loan proceeds, for making interest and loan repayments, and for delivering and receiving collateral.

Money Market Mutual Fund Liquidity Facility (MMLF)

- The MMLF allows eligible entities to borrow from the MMLF through the Federal Reserve Bank of Boston upon the pledge of eligible (high-quality) assets purchased from money market mutual funds, including those purchased from single state and other tax-exempt municipal money market mutual funds. The MMLF is intended to assist money market funds in meeting demands for redemptions by households and other investors, enhancing overall market functioning and credit provision to the broader economy.
- Eligible borrowers under the MMLF are depository institutions, their holding companies and certain other financial institutions in the United States. US Branches are eligible borrowers.
- During the 2008 financial crisis, the MMLF's predecessor, the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, made \$215 million in funding to eligible entities secured by asset-backed commercial paper purchased from money market mutual funds.

Commercial Paper Funding Facility (CPFF)

- The CPFF is a liquidity facility intended to ensure the smooth functioning of the US commercial paper markets, which directly finance a wide range of economic activity, supplying credit and funding for auto loans and mortgages as well as liquidity to meet the operational needs of a range of companies. The CPFF provides a backstop for US commercial paper issuers through the purchase of rated US unsecured and asset-backed commercial paper. The CPFF facility will fund an SPV that will purchase, through the New York Fed's primary dealers, eligible 3-month US dollar-denominated commercial paper from US commercial paper issuers.
- Eligible entities are US commercial paper issuers, including US issuers that have a non-US parent, that had dollar-denominated commercial paper outstanding on any day between March 16, 2019 and March 16, 2020. The maximum amount of a single issuer's commercial paper the SPV may own at any time is the greatest amount of US dollar-denominated commercial paper the issuer had outstanding on any day during that period. US Branches are eligible issuers.
- During the 2008 financial crisis, the CPFF was funded by approximately \$740 billion in funding from the Federal Reserve that was used to purchase over 1,100 issues of eligible commercial paper from US issuers, including the US subsidiaries and US branches of non-US banks.

In addition, the Federal Reserve has stood up other facilities that generally do not apply to US Branches: for central banks and other non-US monetary authorities, the FIMA Repo Facility; and for certain US companies headquartered in the US and with material operations in the United States, the Primary Market Corporate Credit Facility and the Secondary Market Corporate Credit Facility.

Emergency investment programs

The US Congress recently passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which authorizes specific investment programs, including \$349 billion for US small businesses, and provides \$454 billion in appropriations to be invested in facilities created to provide loans to medium-sized business, municipalities, states and others. The CARES Act anticipates that such \$454 billion in funding will be provided under the direction of the US Treasury Secretary through programs established by the Federal Reserve, including those outlined above. The Federal Reserve is expected to leverage that \$454 billion appropriation by a factor of up to 10-to-1 to pump up to \$4.5 trillion into the US economy. Banks are the critical infrastructure to move these unprecedented sums to the distressed US private sector and other beneficiaries of the facilities. US Branches with a track record of making business loans in the US may generally participate (or are expected to be able to participate) in the following investment programs:

Paycheck Protection Program (PPP)

The CARES Act offers financial assistance via the new PPP, which is being implemented under the Small Business Act as part of its Section 7(a) loan program, the primary lending program of the Small Business Administration (SBA). The PPP provides for loans of up to \$10 million to companies that meet certain size requirements based on their number of employees. PPP loans can be used for a variety of purposes, and may be forgivable to the extent used for certain payroll, mortgage, rent and utility payments.

PPP loans will be 100% guaranteed by the SBA, and the full principal amount of the loans may qualify for loan forgiveness.

In addition to all existing Section 7(a) lenders, which are automatically approved to make PPP loans, the following institutions may be eligible to make PPP loans:

1. federally insured depository institutions and federally insured credit unions;
2. certain Farm Credit System institutions; and
3. certain depository or non-depository financing providers with a history of business lending that meet the requirements discussed below.

US Branches are most likely to qualify as PPP lenders under the third prong of eligibility, based on a plain reading of the SBA's interim final rule and subject to further clarification from either the SBA or US Treasury. US Branches may be eligible lenders provided they (1) are not in a troubled condition or subject to an enforcement action by its primary federal regulator for unsafe and unsound practices, and (2) meet the following criteria for depository or non-depository financing providers:

- originate, maintain, and service business loans or other commercial financial receivables and participation interests;
- have a formalized compliance program;
- apply the requirements under the Bank Secrecy Act as a federally regulated financial institution;
- have been operating since at least February 15, 2019; and

\$250 billion
additional under
consideration

\$349 billion
PPP appropriation

\$4.54
trillion

(Fed can lend up
to 10X the below
appropriation)

\$454 billion
US mid-size
businesses & others
appropriation

**Direct appropriations v. Fed facilities' 10-to-1
loans-to-equity
leverage**

-
- have originated, maintained, and serviced more than \$50 million in business loans or other commercial financial receivables during a consecutive 12 month period in the past 36 months.

Although US Branches, in some contexts, may be deemed to be, or be functionally treated as federally insured depository institutions, neither the interim final rule nor guidance clearly indicates that US Branches would qualify as such for purposes of the PPP. To originate PPP loans, eligible lenders must submit, among other items, the CARES Act Section 1102 Lender Agreement (SBA Form 3506). SBA Form 3506 currently requires the prospective lender to attest that it is either a federally insured depository institution, a federal insured credit union, or a qualifying Farm Credit System institution.

We generally understand that the US Treasury staff is aware of these ambiguities and we expect the SBA or US Treasury will clarify the application process and forms for other depository financing providers or non-depository financing providers in the near term, and may also issue additional guidance that may address the eligibility of US Branches.

Mid-Sized Business Program

- The CARES Act also requires the US Treasury Secretary to endeavor to implement a program that provides financing to banks and other lenders to make direct loans to eligible businesses with between 500 and 10,000 employees.
- The CARES Act does not impose any deadlines on the US Treasury or the Federal Reserve to provide guidance on any such mid-sized business program. However, there is a likelihood that, consistent with the PPP, US Branches with a track record of originating, maintaining, and servicing business loans or other commercial financial receivables will be eligible to lend under the program.

Emergency regulatory compliance and other measures

Federal regulatory actions

Large swaths of recent federal bank regulatory lending guidance and other measures related to the COVID-19 pandemic apply to US Branches in their capacity as lenders to corporate customers. The federal bank regulators are actively encouraging institutions to lend to US businesses and have repeatedly stated that supervisors will not penalize institutions that lend prudently through the facilities and programs set up in response to the pandemic.

Interim final rules recently adopted by the federal bank regulators have relaxed various capital and related requirements that generally concern domestic US banks to allow these entities to more easily participate in the COVID-19 facilities or programs, or more generally weather certain effects from the pandemic ([please refer to our last alert](#)). Nevertheless, other pronouncements more directly related to US Branches include:

- **Essential workers.** The Federal Reserve has issued guidance stating that, consistent with guidance issued by the Cybersecurity and Infrastructure Security Agency (CISA), supervised financial institutions, including US Branches, should provide employees and contractors with a letter from the institution's leadership explaining that the identified worker carrying the letter is an essential critical infrastructure worker who needs to be allowed access to their place of work. The institution should also consider attaching the CISA guidance to its letter, which may assist an employee or contractor to travel inside restricted areas in order to support critical infrastructure.
- **Federal Reserve supervision.** The Federal Reserve will focus on monitoring and outreach to help financial institutions of all sizes and will temporarily reduce its examination activities (though smaller banks will benefit the most from this relief). The Federal Reserve will also grant additional time for resolving non-critical existing supervisory findings so institutions can focus on the heightened risks associated with the current economic environment.
- **Effective/implementation dates.** The Federal Reserve has extended the implementation of policy changes to procedures governing the provision of intraday credit to US Branches to October 1, 2020. In

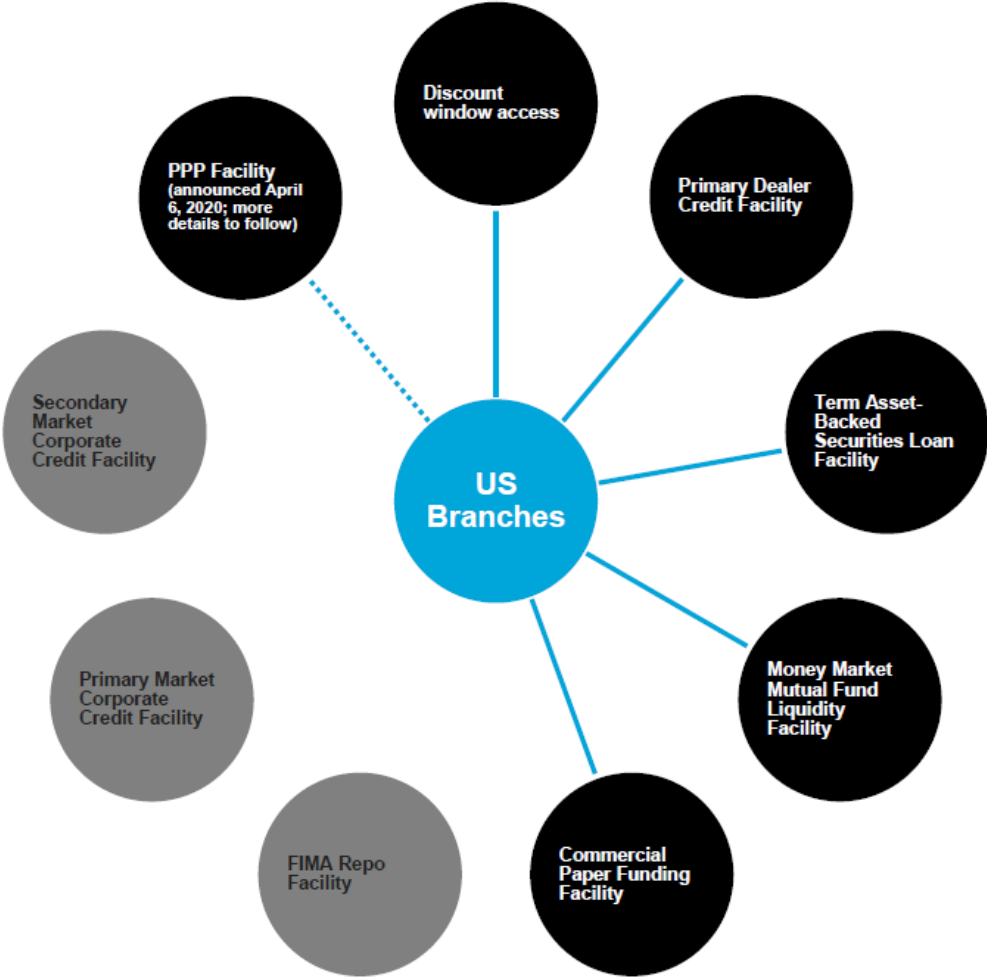
addition, the effective dates for certain final rules have also been extended. Notably, the Federal Reserve's rule on its controlling influence framework has been delayed until September 30, 2020 ([please refer to our control alert for more information](#)).

US state/local

- **New York.** The majority of state-licensed US Branches are licensed under New York law and subject to the supervision of the NY Department of Financial Services (NYDFS). On March 21, 2020, the Governor of New York issued executive order 202.9 that temporarily amends Section 39 of the New York Banking Law to provide that any bank subject to NYDFS jurisdiction that does not grant a 90-day forbearance to any person or business that has a financial hardship due to the COVID-19 pandemic is deemed to have engaged in an unsafe and unsound business practice. Neither the Governor's Office nor the NYDFS has issued an official clarification to this broad order that on its face would appear to implicate commercial lenders, including NY-licensed US Branches (note, but not federally licensed US Branches). However, the NYDFS has issued implementing regulations that suggest that this order, in practice, should only apply to requests for consumer mortgage forbearances, which would exclude the commercial lending operations of US Branches. Nevertheless, the amendments made by the executive order to Section 39 of the NY Banking Law, unless formally clarified or modified, will remain in effect until the order expires, which is currently scheduled to occur on April 20, 2020 (subject to possible extension).
- **Other states.** Many other states and local governments have imposed stay-at-home (or shelter-in-place) orders. However, as noted above, under federal guidelines, employees and service providers of financial institutions, including US Branches, are deemed to be critical sector workers and may generally report to work. Financial institutions may, however, have various public health obligations concerning their workplaces under state or local law.

Find out more about the business response to the Coronavirus outbreak: [Coronavirus: Managing business impact and legal risks](#)

Appendix A: US facilities and investment programs applicable to US Branches



AMERICAS

New York

Ian Cuillerier

Partner, New York
T +1 212 819 8713
E icuillerier@whitecase.com

Glen Cuccinello

Counsel, New York
T +1 212 819 8239
E gcuccinello@whitecase.com

Edward So

Partner, New York
T +1 212 819 7006
E edward.so@whitecase.com

Duane Wall

Partner of Counsel, New York
T +1 212 819 8453
E dwall@whitecase.com

Francis Zou

Partner, New York
T +1 212 819 8733
E francis.zou@whitecase.com

Washington, DC

Era Anagnosti

Partner, Washington, DC
T +1 202 637 6274
E era.anagnosti@whitecase.com

Steve Chabinsky

Retired Partner of Counsel,
Washington, DC
T +1 202 626 3587
E steven.chabinsky@whitecase.com

Nicole Erb

Partner, Washington, DC
T +1 202 626 3694
E nicole.erb@whitecase.com

Shamita Etienne-Cummings

Partner, Washington, DC
T +1 202 626 3695
E shamita.etienne@whitecase.com

Jeremy Kuester

Counsel, Washington, DC
T +1 202 637 6284
E jeremy.kuester@whitecase.com

Prat Vallabhaneni

Partner, Washington, DC
T +1 202 626 3596
E prat.vallabhaneni@whitecase.com

EMEA

Berlin

Henning Berger

Partner, Berlin
T +49 30 880911 540
E henning.berger@whitecase.com

Dubai

Adrianus Schoorl

Local Partner, Dubai
T +971 4 381 6273
E adrianus.schoorl@whitecase.com

Frankfurt

Dennis Heuer

Partner, Frankfurt
T +49 69 29994 1576
E dennis.heuer@whitecase.com

Matthias Kasch

Partner, Frankfurt
T +49 69 29994 1219
E matthias.kasch@whitecase.com

Carsten Loesing

Local Partner, Hamburg
T +49 40 35005 265
E carsten.loesing@whitecase.com

Helsinki

Tanja Törnkvist

Partner, Helsinki
T +358 9 228 64 351
E tanja.tornkvist@whitecase.com

Istanbul

Asli Basgoz

Partner, Istanbul
T +90 212 354 2013
E asli.basgoz@whitecase.com

London

Jonathan Rogers

Partner, London
T +44 20 7532 2163
E jonathan.rogers@whitecase.com

Patrick Sarch

Partner, London
T +44 20 7532 2286
E patrick.sarch@whitecase.com

Julia Smithers Excell

Partner, London
T +44 20 7532 2229
E julia.smithers.excell@whitecase.com

Ingrid York

Partner, London
T +44 20 7532 1441
E ingrid.york@whitecase.com

Madrid

Yoko Takagi

Partner, Madrid
T +34 91 7876 320
E yoko.takagi@whitecase.com

Milan

Iacopo Canino

Partner, Milan
T +39 0200688 340
E iacopo.canino@whitecase.com

Paris

Grégoire Karila

Partner, Paris
T +33 1 55 04 58 40
E gregoire.karila@whitecase.com

Thomas Le Vert

Partner, Paris
T +33 1 55 04 15 67
E thomas.levert@whitecase.com

Jean-Pierre Picca

Partner, Paris
T +33 1 55 04 58 30
E jeanpierre.picca@whitecase.com

Emilie Rogey

Partner, Paris
T +33 1 55 04 16 22
E emilie.rogey@whitecase.com

Stockholm

Martin Järvengren

Partner, Stockholm
T +46 8 506 32 371
E martin.jarvengren@whitecase.com

Warsaw

Tomasz Ostrowski

Partner, Warsaw
T +48 22 50 50 123
E tostrowski@whitecase.com

Marcin Studniarek

Partner, Warsaw
T +48 22 50 50 132
E marcin.studniarek@whitecase.com

ASIA-PACIFIC

Tokyo

Nels Hansen

Partner, Tokyo
T +81 3 6384 3240
E nels.hansen@whitecase.com

White & Case LLP
1221 Avenue of the Americas
New York, New York 10020-1095
United States

White & Case LLP
701 Thirteenth Street, NW
Washington, District of Columbia 20005-3807
United States

T +1 212 819 8200

T +1 202 626 3600

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