Proskauer

Where is Main Street?

The Federal Reserve Provides Guidance on the Main Street Lending Program

Coronavirus Resource Center

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, related rules and regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

DISCLAIMER: This publication will be updated regularly to reflect any further changes in the key terms of the Main Street Lending Program resulting from any new legislation, rules, and guidance issued by the Federal government. While we have addressed the principal criteria of the program and will endeavor to add updates, it is not possible to cover all of the rules and guidance published by the Federal Reserve and Treasury. THIS PUBLICATION IS INTENDED TO BE A HELPFUL RESOURCE, BUT SHOULD NOT BE VIEWED AS LEGAL ADVICE FOR ANY SPECIFIC SITUATION.

CARES Act Team

Co-chairs

Jeffrey A. Horwitz
Partner
+1.212.969.3229
jhorwitz@proskauer.com

Andrew Bettwy
Partner
+1.212.969.3180
abettwy@proskauer.com

Yuval Tal
Partner
+1.212.969.3018
ytal@proskauer.com

Karen J. Garnett
Partner
+1.202.416.6850
kgarnett@proskauer.com

Ekaterina (Kate) Napalkova
Partner
+1.310.284.4505
enapalkova@proskauer.com

Susan R. Goldfarb
Special Finance Counsel
+1.310.284.4549
sgoldfarb@proskauer.com

Steven B. Leiser-Mitchell
Associate
+1.212.969.3621
sleiser-mitchell@proskauer.com

David F. McClellan
Associate
+1.212.969.3868
dmcclellan@proskauer.com

Lauren Richburg
Associate
+1.212.969.3123
lrichburg@proskauer.com

Updated as of June 14, 2020

UPDATE: Where is Main Street?—Fed Provides Guidance on the Main Street Lending Program

On June 11, 2020, the Federal Reserve Bank of Boston (the "Boston Fed") released updated information for potential lenders and borrowers in anticipation of the launch of the Main Street Lending Program (the "Program"), including updated borrower certifications and covenants ("Borrower Certifications"), updated lender certifications and covenants ("Lender Certifications"), an updated form loan participation agreement, and other legal documents related to the Program. On June 8, the Boston Fed released updated Frequently Asked Questions (the "FAQs") (see here) and updated Program term sheets (the "Term Sheets", see here, here and here).

As noted in our prior alerts (see here, and in numerous updates to this alert), the Department of the Treasury will use funding from the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") to make a $75 billion equity investment in the Program through MS Facilities LLC (the "SPV"), a special purpose vehicle operated by the Boston Fed. The Program will leverage this investment from Treasury up to eight times, for up to $600 billion in term loans for eligible borrowers. This client alert describes the main terms, issues and open questions under the Program Term Sheets, the FAQs, and other documentation for each of the three separate loan facilities under the Program: the Main Street New Loan Facility ("New Loan Facility"), the Main Street Priority Lending Facility ("Priority Loan Facility"), and upsizes of a pre-existing qualifying loan under the Main Street Expanded Loan Facility ("Expanded Loan Facility"). We will continue to update this alert periodically for material changes and developments under the Program.

Who is an Eligible Lender?

The definition of "Eligible Lender" includes lenders that are U.S. federally insured depository institutions (including banks, savings associations, and credit unions), U.S. bank holding companies, U.S. savings and loan holding companies, U.S. branches or agencies of foreign banks, and U.S. intermediate holding companies of foreign banking institutions. The FAQs state that nonbank financial institutions are not considered Eligible Lenders for purposes of the Program at this time. However, the Federal Reserve indicated it is considering expanding the list of Eligible Lenders in the future.

Who is an Eligible Borrower?

What types of entities are eligible?

An Eligible Borrower under the Program must be a business. For purposes of the Program, "Business" is defined as an entity organized **for profit** as a partnership, a limited liability company, a corporation, an association, a trust, a cooperative, a joint venture with no more than 49 percent participation by foreign business entities, or a tribal business concern.

At this time, non-profit organizations are not eligible borrowers, primarily because the main metric for measuring loan eligibility is adjusted 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA") and non-profit organizations generally do not have EBITDA. Fed guidance issued on June 8 indicated that the Federal Reserve is working to soon establish one or

more loan options that are suitable for non-profit organizations. Further, the Term Sheets and FAQs state that other forms of organizations may be included as eligible Businesses at the discretion of the Federal Reserve.

The FAQs limit foreign ownership of joint ventures to 49%, but do not define what constitutes a joint venture and do not impose any such limitation on other types of businesses. Under Small Business Administration ("SBA") rules (13 CFR 121.103(h)—which is not one of the SBA rules cited in the FAQs), a "joint venture" is defined as an association with limited purpose, engaging in no more than three business ventures over a two-year period. It is not clear whether the FAQs' reference to joint ventures is intended to follow the SBA definition, or why the Program would exclude majority foreign-owned limited purpose entities but not exclude more permanent structures that are majority-owned, or wholly owned, by non-U.S. persons.

The FAQs clarify the status of foreign-owned U.S. businesses under the Program by stating that an Eligible Borrower may be a subsidiary of a foreign company if it is created or organized in the U.S. and has (on a consolidated basis) significant operations in and a majority of its employees based in the U.S. An Eligible Borrower that is a subsidiary of a foreign company must use the proceeds of the Program loans only for the benefit of the Eligible Borrower, its consolidated U.S. subsidiaries, and other affiliates of the Eligible Borrower that are U.S. businesses. The proceeds of the Program loans may not be used for the benefit of an Eligible Borrower's foreign parents, affiliates or subsidiaries.

Which Businesses are Eligible Borrowers?

In addition to satisfying the definition of "Business," an Eligible Borrower is one that:

- was established prior to March 13, 2020;
- is not an "Ineligible Business;"
- meets at least one of the following two conditions: (i) has 15,000 employees or fewer, or (ii) had 2019 annual revenues of $5 billion or less;
- is created or organized in the U.S. or under the laws of the U.S. with significant operations in and a majority of its employees based in the U.S.;

  UPDATE: The updated Borrower Certifications include a clarifying change to emphasize that, for purposes of determining whether an Eligible Borrower has a majority of its employees in the United States, the same SBA guidelines apply as are used for determining the number of employees for size eligibility (see below under *"How are employees counted when determining eligibility?"*), except that unlike the size test, which includes all affiliates, the calculation for purposes of determining employees in the U.S. should only include **the borrower and its subsidiaries**, and not its parent companies or sister affiliates.

  The FAQs clarify the determination of "significant operations in the U.S." The Eligible Borrower's operations should be evaluated on a consolidated basis together with its subsidiaries, but not its parent companies or affiliates. Non-exhaustive

examples of "significant operations in the U.S." include an Eligible Borrower that has, on a consolidated basis, greater than 50% of its assets located in the U.S., or annual net income, operating revenues or consolidated operating expenses (excluding interest expense and other expenses associated with debt service) generated in the U.S.

- does not also participate in another Main Street Lending Program or the Primary Market Corporate Credit Facility (for a summary of this facility, see our client alert here); and

  An affiliated group of companies can participate in only one type of Program facility, and cannot participate in both the Program and the PMCCF. If an affiliate of a Business has previously participated in or has a pending application to participate in a Program facility, the Business would only be able to participate by using the same Program facility as its affiliate. The affiliated group's total participation cannot exceed the maximum loan size on a consolidated basis, which means that an affiliate group is limited by its individual leverage, the leverage of the consolidated group, and the size of any loan extended to other affiliates in the group.

  The FAQs clarify that if an Eligible Borrower is the only Business in its affiliated group that has sought funding through any of the Program loan facilities, its affiliated group's debt and EBITDA are not relevant to determining whether that Business can qualify, except to the extent that the Borrower's subsidiaries are consolidated into its financial statements. If the Eligible Borrower has an affiliate that has *previously* borrowed or has an application pending to borrow from one of the Program facilities, then the *entire* affiliated group's debt and EBITDA are relevant to determining the Eligible Borrower's maximum loan size.

- has not received specific support pursuant to Section 4003(b)(1)-(3) of Subtitle A of Title IV of the CARES Act (i.e., any Title IV programs for air carriers and related businesses, cargo air carriers, and businesses critical to maintaining national security).

"Ineligible Business" has the same meaning as under the SBA regulations and guidelines implementing the Paycheck Protection Program under the CARES Act ("PPP") on or before April 24, 2020. Key ineligible industries include businesses primarily engaged in lending or investment and passive investment in real estate. The Term Sheets and FAQs indicate the Federal Reserve may further modify the application of these restrictions. (For the SBA regulations on ineligible businesses cited in the FAQs, see here, and the interim final PPP rules here, here and here. For up to date information about the PPP, see our latest client alert here.)

To expand borrower eligibility, the Term Sheets were revised on April 30 to increase the maximum number of employees from 10,000 to 15,000 employees, and to increase maximum 2019 annual revenues from $2.5 billion to $5 billion. However, inclusion of the affiliation rules discussed below in determining the number of employees and annual revenues will limit the number of Businesses

eligible under the Program, particularly in the case of private equity funds and their portfolio companies.

The FAQs confirmed that private equity funds are not eligible to borrow under the Program, because they are "primarily engaged in investment or speculation," which is a category of ineligibility under SBA regulations. Portfolio companies of a private equity fund, however, are potentially eligible, subject to the SBA affiliation test described below.

The FAQs clarify that a Business can be an Eligible Borrower regardless of whether it receives a PPP loan or an Economic Injury Disaster Loan as long as it meets the Eligible Borrower criteria. However, the portion of any outstanding PPP loan that has not yet been forgiven is counted as outstanding debt for the purposes of the Main Street maximum loan size test.

How are employees counted when determining eligibility?

The FAQs clarify how a Business should count its employees, again borrowing from the regulations issued by the SBA and provisions of the PPP (see here as cited in the FAQs). Businesses should count all full-time, part-time, seasonal, or otherwise employed persons as employees, but exclude volunteers and independent contractors. Further, businesses are required to count their own employees and persons employed by their ***affiliates***. Under the applicable SBA rule (13 CFR 121.301(f), as in effect on January 1, 2019) (see here as cited in the FAQs), entities are considered affiliates when one controls or has the power to control the other or such entities are under common control. Control is broadly defined to encompass affirmative and negative control rights, as well as equity-based and contractual control rights, including affiliation based on a management agreement. In order to determine the applicable number of employees, businesses should use the average of the total number of persons employed by the Eligible Borrower and its affiliates for each pay period over the 12 months prior to the origination or upsizing of the loan.

How are 2019 annual revenues calculated when determining eligibility?

Businesses must aggregate their revenues with those of their ***affiliates***. Businesses may use either of the following methods to calculate 2019 annual revenues for purposes of determining eligibility: (1) its (and its affiliates') annual "revenue" per its 2019 U.S. GAAP audited financial statements; or (2) its (and its affiliates') annual "receipts" for fiscal year 2019, as reported to the Internal Revenue Service. For purposes of the Program, the term "receipts" has the same meaning as in the SBA regulations under 13 CFR 121.104(a) (see here as cited in the FAQs). If a potential Eligible Borrower does not have audited financial statements or annual receipts for 2019, it can use its most recent audited financial statements or annual receipts.

Terms of Eligible Loans

All Eligible Loans under the Program will have the following terms:

- 5 year maturity;
- principal payments will be deferred for two years;

- interest payments will be deferred for one year (unpaid interest will be capitalized);
- adjustable rate of LIBOR (1 or 3 months) plus 300 basis points; and
- prepayments permitted without penalty.

Applicable Interest Rate. In response to potential loan participants' comments, the Federal Reserve determined that requiring lenders to issue loans based on SOFR (Secured Overnight Financing Rate) at this time would divert resources from challenges related to the pandemic. Therefore LIBOR, the primary reference rate historically used for business loans, will be the applicable rate. Because LIBOR may not be published after the end of 2021, the FAQs encourage Eligible Lenders and Eligible Borrowers to include reference rate fallback language in Program loan documentation consistent with the recommendations of the Alternative Reference Rates Committee, should LIBOR become unavailable during the term of the loan.

No interest payments are required during the first year and unpaid interest will be capitalized. Beyond the first year, payment-in-kind ("PIK") interest is not permitted under any of the loan facilities. All accrued but uncapitalized PIK interest on the purchase amount of the loan that is participated to the SPV is for the account of the SPV, regardless of when such interest accrued.

Pricing grids with fluctuating interest rate based on performance metrics are not permitted – interest on all Program loans will be LIBOR (1 or 3 months) plus 300 basis points. There is no language expressly permitting a LIBOR floor. The Eligible Lender may charge default interest.

Eligible Loans are subject to the prohibition on loan forgiveness in Section 4003(d)(3) of the CARES Act. In the event of restructuring or workouts, the SPV may agree to reductions in interest (including capitalized interest), extended amortization schedules and maturities, and higher priority "priming" loans.

Facility Specific Terms. The following chart summarizes the terms applicable to the New Loan Facility, the Priority Loan Facility, and the Expanded Loan Facility.

Loan Terms	**New Loan Facility** (originated post April 24, 2020)	**Priority Loan Facility** (originated post April 24, 2020)	**Expanded Loan Facility** (term loan upsize to an existing term loan or revolving credit facility originated on or before April 24, 2020, with remaining maturity of at least 18 months)
Minimum Loan Size	$250,000	$250,000	$10,000,000 The Federal Reserve is considering reducing the minimum loan size of

			the Expanded Loan Facility.
Maximum Loan Size	Lesser of $35M or the amount, when added to existing outstanding and undrawn available debt, not exceeding **4x** 2019 adjusted EBITDA	Lesser of $50M or the amount, when added to existing outstanding and undrawn available debt, not exceeding **6x** 2019 adjusted EBITDA	Add–on term loan capped at the lesser of (i) $300M or (iii) the amount, when added to existing outstanding and undrawn available debt, not exceeding **6x** 2019 adjusted EBITDA
Lender Risk Retention	5%	5%	5%
Amortization of Principal (year one and two payment deferred for all)	Years 3-5: 15%, 15%, 70%, respectively	Years 3-5: 15%, 15%, 70%, respectively	Years 3-5: 15%, 15%, 70%, respectively
Transaction Fee (paid to SPV by Eligible Lender or Eligible Borrower)	1% of principal amount	1% of principal amount	0.75% of principal amount
Loan Origination Fee (paid by Eligible Borrower to Eligible Lender)	1% of principal amount	1% of principal amount	0.75% of principal amount
Servicing Fee (paid by SPV to Eligible Lender)	0.25% of the principal amount per annum	0.25% of the principal amount per annum	0.25% of the principal amount per annum

The guidance acknowledges that Eligible Borrowers and Eligible Lenders may need to amend the underlying credit agreement to comply with the requirements in the Expanded Loan Facility term sheet.

The Eligible Lender must complete, sign, and submit the Servicing Agreement (see here) at the time a loan participation is sold to the SPV. The Eligible Lender cannot charge servicing fees.

Eligible Lenders are not permitted to charge additional fees other than as set forth in the Term Sheets, with two exceptions. Eligible Lenders may charge de minimis amounts for customary fees (including appraisal fees and legal expenses). The guidance does not define "de minimis." They may also charge customary consent fees if such fees are necessary to amend existing loan documentation in the context of upsizing a loan in connection with the Expanded Loan Facility.

How is 2019 Adjusted EBITDA Calculated?

For the New Loan Facility and Priority Loan Facility, an Eligible Lender must use a methodology it previously used for adjusting EBITDA when extending credit to the Eligible Borrower or to similarly situated borrowers on or before April 24, 2020. The fact that Eligible Lenders are required to use a methodology they previously used for adjusting EBITDA when extending credit to "similarly situated borrowers" suggests that the Federal Reserve is relying on Eligible Lenders to engage in sound banking and underwriting practices. However, this guidance is likely to result in various different methodologies used by Eligible Lenders in determining adjusted EBITDA under the New Loan Facility and Priority Loan Facility.

For Eligible Loans under the Expanded Loan Facility, the methodology used by the Eligible Lender to calculate adjusted 2019 EBITDA must be the methodology it previously used for adjusting EBITDA when originating or amending the underlying term loan or revolving credit facility on or before April 24, 2020. The FAQs do not indicate what methodology should be used if the underlying term loan or revolving credit facility did not include the concept of EBITDA on or before April 24, 2020. It is possible that such loan or credit facility would not be eligible for the Expanded Loan Facility, on the grounds that EBITDA is the key underwriting metric for determining eligibility under the Program. It is conceivable that the "similarly situated borrower" methodology applicable to the other Program facilities could be applied to an Expanded Loan Facility in that situation, but the Federal Reserve guidance does not state this, and the applicable Lender Certification, discussed below, does not provide for such an alternative methodology.

"Similarly situated borrowers" are borrowers in similar industries with comparable risk and size characteristics. If an Eligible Lender has used multiple EBITDA adjustment methods with respect to the Eligible Borrower or similarly situated borrowers, the Eligible Lender should choose the most conservative method it has employed (although "conservative" is not defined), and it must select a single method used in the recent past and before April 24, 2020. Eligible Lenders cannot "cherry pick" or apply adjustments at different points in time or for a range of purposes. Eligible Lenders should document their process for identifying "similarly situated borrowers" and the rationale for the selection of an adjusted EBITDA methodology. The FAQs state that EBITDA leverage requirements should be viewed as minimum requirements for the Program, and emphasize that Eligible Lenders should conduct their own assessment of a borrower's financial condition at the time of the loan application. The FAQs were revised to clarify that the Eligible Borrowers are the ones "using" the methodology, which highlights that the Eligible Borrowers are ultimately responsible for the calculation.

It is unclear how EBITDA should be calculated if an Eligible Borrower does not have 2019 EBITDA figures, or was created during 2019 or after. The Federal Reserve may consider alternatives to EBITDA to address these issues.

Alternatives to EBITDA?

As indicated above, EBITDA is the key underwriting metric required for determining Eligible Loans under the Program. In the FAQs, the Federal Reserve acknowledged that the credit risk of asset-based borrowers, as a matter of practice, is generally not evaluated on the basis of EBITDA and stated that the Federal Reserve and the Treasury Department will be evaluating the feasibility of adjusting the loan eligibility metrics of the Program for such borrowers.

How is "existing outstanding and undrawn available debt" calculated?

"Existing outstanding and undrawn available debt" includes all amounts borrowed under any loan facility, including unsecured or secured loans from any bank, non-bank financial institution, or private lender, as well as any publicly issued bonds or private placement facilities. It also includes all unused commitments under any loan facility, excluding (1) any undrawn commitment that serves as a backup line for commercial paper issuance, (2) any undrawn commitment that is used to finance receivables (including seasonal financing of inventory), (3) any undrawn commitment that cannot be drawn without additional collateral, and (4) any undrawn commitment that is no longer available due to a change in circumstance. Existing outstanding and undrawn available debt should be calculated as of the date of the loan application.

Calculating the Leverage Ratio. While the Fed guidance gives the Eligible Lender some leeway to determine EBITDA based on the methodology used in the underlying term loan or revolving credit facility, or the methodology used by the Eligible Lender with similarly situated borrowers, as applicable, it does not provide for such flexibility in respect of other components of the leverage test beyond the definition of EBITDA. For example, the leverage ratio calculation described in the Term Sheets and the FAQs does not include a cash netting feature, a relatively common feature in leveraged loan facilities that reduces the amount of debt in the leverage test by the amount of the borrower's unrestricted cash. It is unclear whether such a feature would be permitted in a Program loan, even if the underlying facility has such a feature or if the Eligible Lender typically uses such a feature with similarly situated borrowers.

Collateral Requirements. The loans under all facilities can be secured or unsecured, assuming in the case of the Priority Loan Facility and Expanded Loan Facility that the other applicable priority requirements are met.

Collateral under the Expanded Loan Facility. An upsized tranche under the Expanded Loan Facility must be secured if the underlying term loan or revolving credit facility is secured. The upsized loan will be secured on a *pari passu* basis with the underlying term loan or credit facility, such that the Eligible Lender and the existing facility lenders will share equally in any collateral available to support the loan relative to their proportional interests (including the Expanded Loan Facility upsized tranche). Eligible Lenders can require Eligible Borrowers to pledge additional collateral to secure an Expanded Loan Facility upsized tranche as a condition of approval. It remains unclear exactly how the *pari passu* security requirement is to be implemented under an Expanded Loan Facility. Presumably an intercreditor agreement will be required between the secured parties under the existing loan or credit facility and the Eligible Lender on behalf of itself and the SPV.

The FAQs changed "pro rata basis" to "*pari passu* basis" for shared collateral under the Expanded Loan Facility. This has not been updated in the Term Sheets.

Guarantees. Although the Term Sheets and FAQs do not indicate that the loans under the Program must be guaranteed, if an existing loan to be upsized under the Expanded Loan Facility is guaranteed, it seems likely the upsized tranche would be guaranteed as well.

The Eligible Borrower is only required to designate guarantors ("Selected Subsidiaries") if it is a holding company. Each Selected Subsidiary must be eligible to become a borrower under the applicable Program criteria, and the aggregate adjusted 2019 EBITDA of the Selected Subsidiaries must be used to calculate maximum loan size under the Program. The Selected Subsidiaries will be jointly and severally liable. If the loan is secured, then the Selected Subsidiaries' guarantees must also be secured. It appears Eligible Borrowers have discretion to select subsidiaries for participation in the Program, though this will likely also be part of the Eligible Lender's underwriting criteria.

Priority of Eligible Loans Under the New Loan Facility. Under the New Loan Facility, Eligible Loans must not be contractually subordinated in terms of priority to any of the Eligible Borrower's other debt for borrowed money and all obligations evidenced by bonds, debentures, notes, loan agreements or other similar instruments, and all guarantees of the foregoing (collectively, "Loans or Debt Instruments") at origination and throughout the term of the Eligible Loan. As explained in the FAQs, this means that the Eligible Loan may not be junior in priority in bankruptcy to the Eligible Borrower's other unsecured Loans or Debt Instruments. This provision does not prevent:

- the issuance of a New Loan Facility loan that is secured (including in a second lien or other capacity), whether or not the Eligible Borrower has an outstanding secured loan of any lien priority;
- the issuance of a New Loan Facility loan that is unsecured, regardless of the secured or unsecured status of the Eligible Borrower's existing indebtedness; or
- the Eligible Borrower from taking on new secured or unsecured debt after receiving a New Loan Facility loan, provided the new debt would not have higher contractual priority in bankruptcy than the New Loan Facility loan.

Priority of Eligible Loans Under the Priority Loan Facility and Expanded Loan Facility.

Under the Priority Loan Facility and the Expanded Loan Facility, at the time of origination or upsizing, as applicable, and at all times the Eligible Loan is outstanding, the Eligible Loan must be senior to or *pari passu* with, in terms of priority and security, the Eligible Borrower's other Loans or Debt Instruments, other than (i) debt secured by real property at the time of origination and (ii) limited recourse equipment financings, including equipment capital or finance leasing and purchase money equipment loans, secured only by the acquired equipment (collectively, "Mortgage Debt").

UPDATE: It is unclear whether Mortgage Debt would include a loan secured by "all assets" (including real property), or if the definition is intended to apply only to debt that is secured

exclusively or primarily by real property. However, the Borrower Certifications for the Expanded Loan Facility state that, for the avoidance of doubt, if any of the other term loan tranche(s) of the underlying credit facility constitute Mortgage Debt, the upsized tranche must also be secured by all of the collateral securing such Mortgage Debt on a *pari passu* basis. The continued emphasis on sharing collateral could make it difficult for Eligible Borrowers to entice Eligible Lenders to provide an upsized tranche, or to obtain the necessary consents and intercreditor agreements from existing lenders, and may result in the Eligible Borrower being required to pledge additional assets as collateral.

The lien priority requirement could be difficult to achieve under certain financing structures involving multiple liens. For example, in a typical "split-lien" term loan and revolving credit facility arrangement, the revolver has a first lien on current assets (primarily receivables and inventory) and a second lien on other collateral, and the term loan has the converse lien priority on collateral. Because each component of the split-lien structure has some extent of junior lien status with respect to the other, neither component would seem to qualify on its own for the add-on tranche under the Expanded Loan Facility. One potential workaround could be for both the revolver and term loan lenders to permit the add-on tranche to have a first priority lien on all collateral, though this would effectively give the add-on tranche more than the *pari passu* treatment required under the Expanded Loan Facility term sheet.

The FAQs appear to address the split-lien issue noted above by clarifying that if the underlying credit facility includes revolving and term tranches, the shared collateral need only be shared on a *pari passu* basis with the term loan tranche. Although split-lien transactions are often documented with the revolver and term loan under separate agreements, rather than as separate "tranches" under the same agreement, in substance the new guidance seems to provide a solution for split-lien structures.

For the Priority Loan Facility, the FAQs also introduce the concept of a Collateral Coverage Ratio, which is defined as (a) the aggregate value of any relevant collateral security, including the pro rata value of any shared collateral, divided by (b) the outstanding aggregate principal amount of the relevant debt. If a Priority Loan Facility is secured, it must maintain a Collateral Coverage Ratio of either 200% or an amount not less than the aggregate Collateral Coverage Ratio for all of the Eligible Borrower's other secured Loans or Debt Instruments (other than Mortgage Debt). If the Priority Loan Facility is secured by the same collateral as any of the Eligible Borrower's other Loans or Debt Instruments (other than Mortgage Debt), the lien securing the Priority Loan Facility must remain senior to or *pari passu* with, in terms of priority and security, the liens of the other creditors on the shared collateral. Liens on shared collateral do not have to cover all assets.

The Priority Loan Facilities and Expanded Loan Facilities can only be unsecured if the Eligible Borrower does not have, as of the date of origination, any secured Loans or Debt Instruments (other than Mortgage Debt). Unsecured loans must not be contractually subordinated in terms of priority to any of the Eligible Borrower's other unsecured Loans or Debt Instruments.

In order to comply with the priority and security requirement and ensure the Priority Loan Facilities and Expanded Loan Facilities do not become contractually subordinated, the loan documentation must contain a lien covenant or negative pledge. Appendix B of the FAQs contains a model lien covenant. For the Expanded Loan Facility, any lien covenant that was negotiated in

good faith prior to April 24, 2020, as part of the underlying credit documentation, is sufficient to satisfy this requirement.

Multi-Lender and Syndicated Loan Facilities under the Expanded Loan Facility. If the term loan or revolving credit facility underlying an upsized tranche under the Expanded Loan Facility has multiple lenders, the Eligible Lender must be one of the lenders that holds an interest in the underlying loan or credit facility at the date of upsizing. Only the Eligible Lender for the upsized loan is required to meet the Eligible Lender criteria. Other members of the multi-lender facility are not required to be Eligible Lenders. Notably, the Federal Reserve guidance does not require a minimum amount of investment in the underlying loan or credit facility by the Eligible Lender, nor does it require that the investment in the underlying loan or credit facility be made at par value.

More than one lender under an existing multi-lender facility may choose to upsize an existing facility under the Expanded Loan Facility. Such Expanded Loan Facility upsized tranches should be separately submitted to the SPV for the sale of a participation interest. However, the Eligible Borrower's aggregate borrowing is constrained by the Eligible Loan Facility maximum loan size tests and, therefore, the Eligible Borrower's aggregate borrowing cannot exceed $300 million or an amount that, when added to the Eligible Borrower's existing outstanding and undrawn available debt, exceeds six times the Eligible Borrower's adjusted 2019 EBITDA. Additionally, the FAQs note that even in a multi-lender facility, the Eligible Lender must retain 5% of the upsized tranche until either the upsized tranche matures or neither the SPV nor a Government Assignee holds an interest in the loan in any capacity.

Although the term sheet for the Expanded Loan Facility continues to state that an Eligible Loan must be "made" by an Eligible Lender, the Term Sheets and the FAQs' guidance regarding multi-lender facilities seem to indicate that an underlying loan or credit facility with only ineligible lenders could achieve Eligible Loan status by bringing in an Eligible Lender to hold an interest in the underlying loan or credit facility and originate the upsized tranche under the Expanded Loan Facility. However, the updated FAQs include an additional temporal restriction that could hinder or eliminate such a structure – the FAQs now specify that the Eligible Lender must have purchased an interest in the underlying loan **as of April 24, 2020**, and <u>if</u> the Eligible Lender purchased the interest as of **December 31, 2019**, it must have assigned to the underlying loan an internal risk rating (based on the Eligible Lender's risk rating system) that was equivalent to a "pass" in the Federal Financial Institutions Examination Council's supervisory rating system **as of that date**. If the Eligible Lender purchased the interest **after December 31, 2019**, the Eligible Lender should use the internal risk rating given to that loan at the time of purchase to determine whether the loan is eligible for upsizing.

Considerations for Eligible Borrowers under Existing Debt Documentation. Eligible Borrowers will need to review their existing debt documents and other material agreements carefully to determine whether they will require the consent of counterparties to incur an upsized tranche under the Expanded Loan Facility, or to separately incur a new loan under the New Loan Facility or Priority Loan Facility. Existing debt documentation will likely contain restrictions on the incurrence or repayment of additional debt, or other covenants or requirements that either implicitly or explicitly contravene the specific provisions of the Program facility loan. If the Program facility is secured, additional modifications to existing debt documents or intercreditor agreements may be required to allow for the applicable lien priority of the Program facility loan.

The FAQs confirm that if an Eligible Borrower has an existing debt arrangement that requires prepayment of more than a de minimis amount upon the incurrence of new debt, this requirement must be waived or reduced to a de minimis amount by the relevant creditor, except in the case of the Priority Loan Facility which permits the refinancing of debt of other lenders at the time of origination of the Priority Loan Facility.

Prepayments against Principal Amount Due and Future Amortization Payments. Prepayment of principal is permitted without penalty and will reduce future payments in the manner specified in the underlying loan documents.

While Eligible Lenders have flexibility in specifying these terms, they should make efforts to align their approach with the expected amortization schedule specified for each loan type. For example, applying prepayments to the next scheduled principal payment due would maintain the alignment of later payments with the amortization schedule and allow for the intended deferment of some portion of payments to later years.

Loan Classification. All Eligible Borrowers must have been in sound financial condition prior to the onset of the COVID-19 pandemic. As noted above, in order for an Eligible Borrower to receive a loan under the Program, any existing loan it had outstanding with the Eligible Lender as of December 31, 2019, must have had an internal risk rating that was equivalent to a "pass" as of that date.

If an existing loan was originated or purchased by an Eligible Lender after December 31, 2019, the Eligible Lender should use the internal risk rating given to that loan at origination or purchase (as applicable) to determine whether the loan satisfies the "pass" criterion for upsizing.

Lender Certifications and Covenants

The Boston Fed posted required certifications and covenants of Eligible Lenders under the New Loan Facility (see here), Expanded Loan Facility (see here) and Priority Loan Facility (see here). In addition to other certifications required by applicable statutes and regulations, the following certifications and covenants will be required from Eligible Lenders:

- Eligible Lenders must certify that the loan terms comply with the Term Sheets, as applicable, and that the loan documentation permits voluntary prepayments without penalty, triggers mandatory prepayments upon any material misstatement related to the Eligible Borrower's eligibility certifications, and contains cross acceleration provisions and financial reporting covenants. Eligible Lenders under the Priority Loan Facility and Expanded Loan Facility must certify that the priority and security requirements are met, and that the documentation contains a lien covenant or a negative pledge covenant.

- The Eligible Lender must commit that it will not request that the Eligible Borrower repay debt extended by the Eligible Lender to the Eligible Borrower, or pay interest on such outstanding obligations, until the Eligible Loan is repaid in full, unless the debt or interest payment is mandatory and due, or in the case of default and acceleration.

- The Eligible Lender must commit that it will not cancel or reduce any existing committed lines of credit to the Eligible Borrower, except upon an event of default.

- For Eligible Loans under the New Loan Facility and Priority Loan Facility, the Eligible Lender must certify that the methodology used for calculating the Eligible Borrower's adjusted 2019 EBITDA for the leverage requirement is the methodology it has previously used for adjusting EBITDA when extending credit to the Eligible Borrower or similarly situated borrowers on or before April 24, 2020. For upsized loans under the Expanded Loan Facility, the Eligible Lender must certify that the methodology used for calculating the Eligible Borrower's adjusted 2019 EBITDA for the leverage requirement is the methodology it previously used when originating or amending the Eligible Loan on or before April 24, 2020.

- The Eligible Lender must certify that it is eligible to participate in the Program, including in light of the conflicts of interest prohibition in section 4019(b) of the CARES Act, which excludes the President, the Vice President, the head of an Executive Department, or members of Congress and certain of their respective family members from eligibility under Title IV programs (the "Conflicts of Interest Provision").

- Eligible Lenders must certify that the participation sold to the SPV will be a 95% participation and that it will retain its ownership share until the loan matures or if the SPV (or a Governmental Assignee) no longer holds an interest in the loan.

Cancelation or Reduction of Committed Lines of Credit. The requirement that an Eligible Lender not cancel or reduce an existing committed line of credit does not prohibit the reduction or termination of uncommitted lines of credit, the expiration of existing lines of credit in accordance with their terms, or the reduction of availability under existing lines of credit in accordance with their terms due to changes in borrowing bases or reserves in asset-based or similar structures.

An Eligible Lender will not need to re-verify beneficial ownership information it has previously collected for existing customers, and do not need to collect and verify beneficial ownership information for new customers, unless otherwise indicated by the Eligible Lender's risk-based approach to Bank Secrecy Act compliance.

Borrower Certifications and Covenants

The Boston Fed posted required Borrower Certification forms for the New Loan Facility (see here), Expanded Loan Facility (see here) and Priority Loan Facility (see here). The Eligible Lender will be an express beneficiary of these certifications and covenants. In addition to other certifications required by applicable statutes and regulations, the following certifications and covenants will be required from both the principal executive officer and principal financial officer (or individuals performing similar functions) of the Eligible Borrowers:

- The Eligible Borrower must commit to refrain from repaying the principal balance of, or paying any interest on, any debt until the Eligible Loan (or upsized tranche of an Eligible Loan) is repaid in full, unless the debt or interest payment is

mandatory and due. For loans made under the Priority Loan Facility, the Eligible Borrower may, at the time of origination of the Eligible Loan, refinance existing debt owed by the Eligible Borrower to a lender that is not the Eligible Lender.

The Borrower Certifications for the Priority Loan Facility and the Expanded Loan Facility indicate the prohibition on early repayment of other debt applies only to other debt for borrowed money of the Eligible Borrower. The prohibition thus does not apply to other forms of indebtedness that do not constitute borrowed money, and it does not appear to apply to debt of Selected Subsidiaries. Notably, the New Loan Facility does not have this qualification limiting the prohibition to debt for borrowed money. It is unclear if this was an oversight, or if the restriction on early repayment of other debt is intended to be more expansive (and therefore more restrictive) under the New Loan Facility.

The FAQs clarify that mandatory prepayment clauses that are triggered automatically are acceptable even though they do not have scheduled due dates, unless the mandatory prepayment requirement is triggered by the incurrence of other debt and requires more than a de minimis repayment.

- The Eligible Borrower must commit that it will not seek to cancel or reduce any of its committed lines of credit with the Eligible Lender or any other lender.

- The Eligible Borrower must certify that it is not insolvent, i.e. that it has a reasonable basis to believe that, as of the date of origination or upsizing of the Eligible Loan and after giving effect to such loan or upsizing, it has the ability to meet its financial obligations for at least the next 90 days and does not expect to file for bankruptcy during that time period. Notably, the revised Term Sheets removed a requirement in the initial drafts for an Eligible Borrower to attest that it "requires financing due to the exigent circumstances" presented by the COVID-19 pandemic.

  The Borrower Certifications clarify that an Eligible Borrower will not be deemed insolvent if it is behind on its debts because of reduced business activity resulting from government shutdowns or similar orders or recommendations by governmental authorities related to the pandemic.

- The Eligible Borrower must commit that it will follow compensation, stock repurchase, and capital distribution restrictions that apply to direct loan programs under section 4003(c)(3)(A)(ii) of the CARES Act, except that an S corporation or other tax pass-through entity that is an Eligible Borrower may make distributions to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings.

- The Eligible Borrower must certify that it is eligible to participate in the Program, including in light of the Conflicts of Interest Provision. The Borrower Certifications define a "controlling interest" as owning, controlling, or holding less than 20%, by vote or value, of the outstanding amount of any class of equity interest in a

company. An “equity interest” includes warrants and options even if they have not been exercised or are “out of the money.” Eligible Borrowers should check the beneficial owners owning more than 5% against the list of government officials (see here) covered by the Conflict of Interest Provision.

- The Eligible Borrower must certify that it is a Business established after March 13, 2020, and that, after reasonable, good faith diligence, it has no reason to believe it is an Ineligible Business. If a representative of the Eligible Borrower has reason to believe the Eligible Borrower might be an Ineligible Business, the Eligible Borrower is expected to conduct further inquiry into SBA’s interpretations of such categories, including in the interim final rules. Because the “further inquiry” is not limited to the interim final rules, this could potentially require a deep dive into SBA’s interpretations of ineligibility criteria.

- The Eligible Borrower must certify that it is unable to secure “adequate credit accommodations” from other sources.

  The FAQs confirm that being unable to secure adequate credit accommodations need not mean that a borrower cannot obtain other credit. Rather, a borrower can make this certification because the amount, price or terms of other credit available are inadequate. Eligible Borrowers are not required to demonstrate that they have sought other sources of credit or document terms that were unacceptable to them.

- The Eligible Borrower must certify that (i) it has provided the Eligible Lender with a calculation of its 2019 adjusted EBITDA (and, if relevant, the Eligible Borrower’s affiliates and subsidiaries) reflecting only those adjustments permitted pursuant to the methodology that the Borrower agreed upon with the Eligible Lender, and (ii) those calculations fairly present the financial condition of such entities for the time period covered thereby in accordance with U.S. GAAP (if applicable) consistently applied and (iii) such adjusted EBITDA calculations are true and correct in all material respects.

- If the Eligible Borrower is a subsidiary of a foreign company, it must certify that it will use the proceeds of the loan (or upsized tranche) only for the benefit of the Eligible Borrower, its consolidated U.S. subsidiaries, and other affiliates of the Eligible Borrower that are U.S. businesses. Notably, this certification on its face would not seem to apply to a “joint venture” with no more than 49 percent participation by foreign business entities.

- For the Priority Loan Facility and Expanded Loan Facility, the Eligible Borrower must certify that the priority and security requirements are met.

- The Eligible Borrower must include an indemnification by the Eligible Borrower of the beneficiaries (the SPV, Boston Fed, and Treasury Secretary) of such certifications and covenants for any liability, claim, cost, loss, judgment, damage or expense that a beneficiary incurs or suffers as a result of or arising out of a material breach of any of the Eligible Borrower’s certifications or covenants. This

does not include the standard carve out for gross negligence or willful misconduct by the beneficiaries, and also does not include limits on attorneys' fees.

- The Eligible Borrower must promptly notify the Eligible Lender if it is aware of any material misrepresentation with respect to any certification and of any material breach of a covenant (which could trigger a mandatory prepayment). Eligible Borrowers should have contemporaneous documentation that support the factual basis for its certifications.

Preparation of Financial Records.

The FAQs explain how Eligible Borrowers are expected to submit statements to their Eligible Lenders. Eligible Borrowers that are subject to U.S. GAAP reporting requirements or that already prepare their financials in accordance with U.S. GAAP must submit U.S. GAAP-compliant financial records in connection with this certification. Eligible Borrowers that do not have to comply with U.S. GAAP and that do not typically prepare their financials in accordance with U.S. GAAP are not required to submit U.S. GAAP compliant financials.

Eligible Borrowers that typically prepare audited financial statements must submit audited financial statements. Otherwise Eligible Borrowers should submit reviewed financial statements or financial statements prepared for the purpose of filing taxes. If an Eligible Borrower does not yet have audited or reviewed financial statements for 2019, the Eligible Borrower should use its most recent audited or reviewed financial statements.

Eligible Borrowers that typically prepare financial statements that consolidate the Eligible Borrower with its subsidiaries (but not parent companies or sister affiliates) must submit such consolidated financial statements. If an Eligible Borrower does not typically prepare consolidated financial statements, it is not required to do so, unless so required by the Eligible Lender.

Repayment of Existing Debt. The covenant restricting an Eligible Borrower from repaying existing debt does not prohibit an Eligible Borrower from undertaking any of the following actions during the term of the Eligible Loan:

- repaying a line of credit (including a credit card) in accordance with the Eligible Borrower's normal course of business usage for such line of credit;

- taking on and paying additional debt obligations required in the normal course of business and on standard terms, including inventory and equipment financing, provided that such debt is secured by newly acquired property (e.g., inventory or equipment), and, apart from such security, is of equal or lower priority than the Eligible Loan; or

- refinancing maturing debt.

Ability to Meet Financial Obligations. An Eligible Borrower is required to certify that "it has the ability to meet its financial obligations for at least the next 90 days and does not expect to file for bankruptcy during that time period," because Eligible Borrowers cannot be "insolvent" pursuant to the Program's authorization under Federal Reserve Act Section 13(3). The solvency certification

requirement places Eligible Borrowers that are distressed in a difficult position. Accurately estimating forward-looking 90-day projections in the midst of the COVID-19 pandemic will be inherently challenging. Paradoxically, the Program would not exist but for the uncertainty, liquidity constraints, and massive disruption caused by the COVID-19 pandemic. (See below for a further discussion of Federal Reserve Act requirements.)

Elimination of Attestation of Need; Revision of Requirement to Retain Employees. The revised Term Sheets eliminated the requirement under the initial April 9 draft term sheets that an Eligible Borrower certify that it "requires financing" due to the exigent circumstances of the COVID-19 pandemic and that, "using the proceeds of the Eligible Loan, it will make reasonable efforts" to retain employees. Instead, the Term Sheets do not require any certification that financing is required, and require only that each Eligible Borrower that participates in the Program make "commercially reasonable efforts" to maintain its payroll and retain its employees during the term the Eligible Loan is outstanding. As explained in the FAQs, this means that an Eligible Borrower should undertake "good-faith efforts" to maintain payroll and retain employees, in light of its capacities, the economic environment, its available resources, and the business need for labor. Eligible Borrowers that have already laid off or furloughed workers as a result of the disruptions from COVID-19 are eligible to apply for a loan under the Program.

Compliance with compensation, stock repurchase, and capital distribution restrictions that apply to direct loan programs under section 4003(c)(3)(A)(ii) of the CARES Act.

The following restrictions apply to an Eligible Borrower until 12 months after the loan is no longer outstanding. Notably, the Borrower Certification does not provide for a potentially shorter restriction period in the event the SPV sells its participation prior to the repayment of the Program loan.

Compensation Restrictions. An officer or employee whose "total compensation" exceeded $425,000 but was less than or equal to $3 million in calendar year 2019 or, for those officers and employees whose employment started during 2019 or later or whose total compensation first exceeds $425,000 (or $3 million) during a 12-month period ending after 2019, during a "subsequent reference period" (the "Comparison Period"), may not receive:

- total compensation in a consecutive 12 month period that exceeds Comparison Period total compensation; or
- severance or other termination benefits that exceed two times Comparison Period total compensation.

Generally, the above restrictions do not apply to employees whose compensation is determined through an existing collective bargaining agreement entered into before March 1, 2020.

An officer or employee whose total compensation exceeded $3 million in the Comparison Period, may not receive:

- total compensation in a consecutive 12 month period that exceeds $3 million plus 50% of the excess over $3 million of calendar year 2019 total compensation; or

- except for employees whose compensation is determined through an existing collective bargaining agreement entered into before March 1, 2020, severance or other termination benefits that exceed two times Comparison Period total compensation.

"Officer or employee" includes all individuals receiving compensation for services from the Eligible Borrower (i) for whom the Eligible Borrower would be responsible for reporting and withholding federal income taxes (notably, this applies regardless of whether the compensation is actually subject to federal income tax withholding and whether or not tax is withheld); or (ii) who is a partner in a partnership, a member of an LLC, or a similar structure. "Officer or employee" does not include independent directors or independent contractors.

"Subsequent Reference Period", for those officers or employees whose employment started during 2019 or later or whose total compensation first exceeds $425,000 (or $3 million) during a 12-month period ending after 2019, is the 12-month period starting from the end of the month in which the officer or employee started employment and the end of the month in which the officer or employee's total compensation first exceeded $425,000 (or $3 million), respectively. The indemnification provisions (described above) could be the "teeth" to enforce the compensation limitations that extend beyond the life of the facility.

"Total compensation" includes all salary, bonuses, awards of stock, and other financial benefits provided to the officer or employee by the Eligible Borrower. Many questions remain as to exactly how total compensation should be calculated, including how "awards of stock" are valued, what are "other financial benefits" and how they are valued, and whether payments under defined benefit and actuarial pension plans or non-qualified deferred compensation plans count towards "total compensation."

Stock Repurchases. Eligible Borrowers will be prohibited from engaging in buybacks of any nationally listed equity securities of the Eligible Borrower or any of its parent entities, unless contractually obligated prior to enactment of the CARES Act.

Capital Distributions. In response to the comments the Federal Reserve received surrounding the restrictions on the payment of dividends, an S corporation or other tax pass-through entity that is an Eligible Borrower may make distributions to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings. These restrictions will not apply if both the equity interest in an Eligible Borrower and the obligation to pay dividends or distributions existed as of March 27, 2020. It is not clear whether distributions from Regulated Investment Companies (RICs) and Real Estate Investment Trusts (REITs) to their equity owners would be permitted even though they are modified corporations treated as pass-through entities. Further guidance from the Federal Reserve on this issue is warranted.

The Borrower Certifications include certain clarifications on stock repurchases and capital distributions:

- The Borrower Certifications specify that preferred stock, or other equity interests that provide for mandatory or preferential payment of dividends or other distributions, are subject to the CARES Act restrictions on distributions.

- The certifications indicate that dividends and other capital distributions do not include repurchases or redemptions. Of course, regardless of this distinction under the CARES Act, it is possible that the Eligible Lender's customary documentation would treat repurchases or redemptions as a "restricted payment" subject to the same restrictions as dividends and other capital distributions.

- The exception for tax distributions in the Borrower Certifications is limited to "owners' tax obligations," so the uncertainty around treatment of RICs and REITs remains.

Eligible Lender's Role in Verifying an Eligible Borrower's Certifications and Covenants. As explained in the FAQs, the Eligible Lender is required to collect the required certifications and covenants from each Eligible Borrower at the time of origination or upsizing. The Eligible Lender may rely on the Eligible Borrower's certifications and covenants, as well as any subsequent self-reporting by the Eligible Borrower. The Eligible Lender is not expected to independently verify the Eligible Borrower's certifications or actively monitor ongoing compliance with covenants required for Eligible Borrowers under the Term Sheets. If the Eligible Lender becomes aware that the Eligible Borrower made a material misstatement or otherwise breached a covenant during the term of an Eligible Loan, the Eligible Lender should notify the Boston Fed.

Eligible Lenders may rely on the Borrower Certifications, except that Eligible Lenders must (1) perform due inquiry by taking steps to verify documentation received from the Eligible Borrower with respect to the formation of the Eligible Borrower consistent with the Lender's ordinary underwriting policies and procedures, and (2) for the Priority Loan Facility and the Expanded Loan Facility, perform due inquiry by completing customary due diligence, such as conducting lien searches, with respect to the assets of the Eligible Borrower (and Selected Subsidiaries, if any) consistent with the Lender's ordinary course lending to similarly situated borrowers, to confirm that no other debt is secured unless it is *pari passu* with the Program. An Eligible Lender is not required to monitor ongoing compliance with the Borrower Certifications, but it is expected to promptly notify the SPV and the Boston Fed if it becomes aware of a material breach as a result of Eligible Borrower's self-reporting.

Eligible Lender Underwriting Standards. Eligible Lenders have discretion in deciding whether to make a loan to a potential borrower and will apply their own underwriting standards in evaluating the financial condition and creditworthiness of a potential borrower. As noted in the FAQs, Eligible Lenders should view the eligibility criteria in the Term Sheets as the minimum requirements for the Program. Eligible Lenders are expected to conduct an assessment of each potential borrower's financial condition at the time of the potential borrower's application. An Eligible Lender may require additional information and documentation in making this evaluation and will ultimately determine whether an Eligible Borrower is approved for a loan in light of these considerations. Businesses that otherwise meet the Eligible Borrower requirements may not be approved for a loan or receive the maximum allowable amount.

Federal Reserve Act Requirements

The Main Street Lending Program was authorized by the Federal Reserve under Section 13(3) of the Federal Reserve Act, which requires certain conditions to justify the establishment of an emergency lending program. (See here and here.)

Insolvency. Under Federal Reserve Act Section 13(3) and related regulations under 12 CFR 201.4(d)(5), the Program may not involve the extension of credit to a person that is insolvent or to a person that is borrowing for the purpose of on-lending the proceeds to a person that is insolvent. Under the regulations, a person is "insolvent" if it is subject to a bankruptcy proceeding or other similar insolvency proceeding or is generally not paying undisputed debts as they come due during the 90-day period preceding participation in the authorized Program. As noted above, the Borrower Certifications include a certification by the Eligible Borrower to satisfy this requirement.

Indorsement or Other Security. Under Federal Reserve Act Section 13(3) and the related regulation under 12 CFR 201.4(d)(6), the Program must be "indorsed or otherwise secured" to the satisfaction of the Federal Reserve. Because the Program loans can be unsecured, presumably the Federal Reserve has determined that the $75 billion Treasury backstop using CARES Act funding constitutes adequate security to meet this requirement.

Premium / Penalty Interest Rate. Regulations under 12 CFR 201.4(d)(7) require that the interest rate charged on emergency credit under the Program must be at a level that is a premium to the market rate in normal circumstances, affords liquidity in unusual and exigent circumstances, encourages repayment, and discourages use of the Program as unusual and exigent circumstances normalize. These regulations require the Federal Reserve to take into account various factors in establishing the "penalty rate," including the condition of the affected markets and the financial system generally, the historical rate of interest for loans of comparable terms and maturity during normal times, the purpose of the program or facility, the risk of repayment, the collateral supporting the credit, the duration, terms and amount of the credit, and other factors relevant to ensuring taxpayers are appropriately compensated for the risks associated with the emergency credit. The interest rate of LIBOR (1 or 3 month) plus 300 basis points chosen by the Federal Reserve arguably does not establish a premium over the market rate for similar loans originated prior to the onset of the COVID-19 pandemic, depending on the type of facility involved. Further, it is surprising that the same interest rate will be applicable to all Eligible Loans regardless of whether the Eligible Loan is secured or unsecured, whether the Eligible Borrower is more or less leveraged, or, for loans under the Expanded Loan Facility, what the interest rate is on the underlying credit facility. It appears the Federal Reserve has determined that the Program interest rate represents an appropriate premium based on its analysis of the affected markets and the financial system generally, and based on the terms of the Program facility loans.

Unavailability of Adequate Credit Accommodation. Regulations under 12 CFR 201.4(d)(8) require the Federal Reserve to obtain evidence that Program participants are unable to secure adequate credit accommodations from other banking institutions, which evidence can be based on participant certification. As noted above, the Borrower Certifications include a certification by the Eligible Borrower to satisfy this requirement.

Equal Opportunity and Diversity. Federal regulations such as 12 CFR 201.4(d)(12) require that participation in any authorized program or facility will not be limited or conditioned on the basis of any legally prohibited basis, such as the race, religion, color, gender, national origin, age or

disability of the borrower, and that the selection of any "third-party vendor used in the design, marketing or implementation of any program or facility, to the extent possible and consistent with law, shall involve a process designed to support equal opportunity and diversity." The Term Sheets and FAQs do not include any provisions to support this requirement. Perhaps this requirement will be addressed in subsequent releases from the Federal Reserve and Treasury Department.

Loan Participations

The SPV will purchase at par a 95% participation in an Eligible Loan or upsized tranche (provided that it is upsized on or after April 24, 2020) of an Eligible Loan. The SPV and the Eligible Lender will share risk in the Eligible Loan on a *pari passu* basis. For Eligible Loans under the New Loan Facility and Priority Loan Facility, the Eligible Lender must retain its 5% interest until the loan matures or the SPV sells all of its participation, whichever comes first.

For Eligible Loans under the Expanded Loan Facility, the Eligible Lender must retain its 5% portion of the upsized tranche of the Eligible Loan until the upsized tranche of the Eligible Loan matures or the SPV sells all of its 95% participation, whichever comes first. In addition, the Eligible Lender must also retain its interest in the underlying Eligible Loan until the underlying Eligible Loan matures, the upsized tranche of the Eligible Loan matures, or the SPV sells all of its 95% participation, whichever comes first.

The sale of a participation in all circumstances will be structured as a "true sale" and must be completed expeditiously after the Eligible Loan's origination or upsizing, as applicable.

The Boston Fed posted a form of Loan Participation Agreement, which comes in two parts: the transaction specific terms (see here) and the standard terms and conditions (see here), which are based on the LSTA's standard terms and conditions. The SPV has certain rights under the Participation Agreement that are different than under a typical participation. The SPV does have special elevation and voting rights. The SPV is permitted to sell its participation (without elevation) with the consent of the Eligible Lender. The SPV is permitted to elevate its participation into an assignment only with the consent of the Eligible Borrower, the Eligible Lender, and other necessary parties. However, the SPV may sell, transfer or elevate its participation without consent of the Eligible Lender or the Eligible Borrower upon the following triggers: Eligible Borrower's failure to make payment when due, insolvency of Eligible Borrower or Eligible Lender, if required by statute or court, or if refraining to take the action would violate the forgiveness restrictions. The SPV can sell to the Federal Reserve or Department of the Treasury without consent, so long as the sale is not made to effect a securitization.

The SPV will retain voting rights for certain core changes to the loan documents, including customary lender "sacred rights" such as an extension of the maturity date, reduction in principal or interest, and delay or postponement of payment dates. The SPV will also have voting rights over matters such as waivers of conditions precedent, and amendments, modifications or waivers to the Borrower Certifications, periodic financial reporting requirements, subordination matters, and cross acceleration and default provisions related to other debt owed to an Eligible Lender. The SPV will exercise its voting rights by making commercially reasonable decisions to protect taxpayers from losses on the loans, and will not be influenced by non-economic factors.

In distressed situations, the SPV may elevate its participation, as described above, but the guidance indicates the SPV does not intend to use this right as a matter of course. The Federal Reserve expects that Eligible Lenders would follow market-standard workout processes, as if such Eligible Lender owned the entirety of the loan.

The form of Loan Participation Agreement includes a waiver by the SPV disclaiming its right to assert special administrative priority under Section 507(a)(2) of the Bankruptcy Code, which gives express priority to loans made pursuant to Section 13(3) of the Federal Reserve Act. The Federal Reserve believes that waiving the ability to assert special administrative priority against Eligible Borrowers in bankruptcy proceedings will enhance the efficacy of the Program and provide certainty to Eligible Lenders and Borrowers without compromising taxpayer protection.

The FAQs clarify that the Federal Reserve has designed the Program legal forms and agreements to facilitate a determination that the participation interests purchased by the SPV are "true participations". As such, the participation interests have characteristics of true participations under the Bankruptcy Code:

- the Participation Agreement explicitly reflects the intention of the parties to effect a true sale;
- the Eligible Lender does not guarantee repayment of the participation interest or the loan or upsized tranche underlying the participation interest, nor is there any other recourse inconsistent with a sale of the participation interest;
- the Participation Agreement provides for a pure pass-through to the SPV of amounts paid by the Eligible Borrower under any of the Program loan or upsized tranche facilities, excluding the Eligible Lender's retained beneficial interest. The proceeds will not be commingled with the Eligible Lender's funds for any significant period of time;
- any distributions received in respect of the participation interest will be held by the Eligible Lender for the account and sole benefit of the SPV and will be delivered to the SPV promptly;
- the Eligible Lender will provide Enhanced Reporting Services (as defined in the Servicing Agreement) to the SPV with respect to the participation interest. Enhanced Reporting Services will include, among other things, financial information, calculations and other information with respect to the Borrower in a form or through a reporting method specified by the SPV. As compensation for the Enhanced Reporting Services, the SPV will pay the Eligible Lender a servicing fee in the amount of 0.25% per annum of the total principal amount of the participation interest. The Federal Reserve believes the terms of the Servicing Agreement are commercially reasonable and comparable to terms generally accepted by third parties for providing Enhanced Reporting Services;
- Eligible Borrowers must consent to the Eligible Lender's sale of the participation interest in the New Loan Facility, Priority Loan Facility or Expanded Loan Facility, as applicable, to the Main Street SPV;

- the Eligible Lender has agreed to act on behalf of the SPV with respect to the SPV's participation interest in the New Loan Facility, Priority Loan Facility and Expanded Loan Facility. The Eligible Lender will not be held to the standard of care of a fiduciary, but will exercise the same duty of care with respect to the administration and enforcement of the participation interest as it would exercise if it held the participation interest solely for its own account;

- the Participation Agreement provides elevation rights for the SPV, which establish circumstances under which the SPV can request the Eligible Lender to use best efforts or commercially reasonable efforts, as applicable, to effectuate a full assignment of the legal title of the Program loan or upsized tranche underlying the participation agreement.

The FAQs clarify that the sale of a participation interest to the SPV is structured to be a true sale under the Bankruptcy Code, and the Program transaction terms are consistent with a true sale. This is evidenced by express language throughout the Participation Agreement indicating, among other things, that (i) the intent of the parties is to sell an undivided participation of the Program loan or upsized tranche to the SPV, (ii) the economic substance of the transfer of the participation interest from the Eligible Lender to the SPV under the Participation Agreement is a sale, (iii) the rewards and risks of ownership of the participation interest are irrevocably transferred and cannot be put-back, voided or rescinded, (iv) any change in the value of the participation interest will not be for the benefit or loss of the Eligible Lender, (v) the Eligible Lender will receive the entire consideration for the participation interest representing at least the fair market value for the participation interest on the applicable closing date and there will be not be any post-closing adjustment of the purchase price nor does the Eligible Lender have any right or obligation to transfer additional property to the SPV, and (vi) the Participation Agreement makes explicit the parties' intention for the Eligible Lender to relinquish the benefits and risks associated with ownership of the participation interest.

The FAQs state that subsequent to the sale of participation interests by Eligible Lenders to the SPV, there will be no right to put the participation interest back to the Eligible Lender, nor will the Eligible Lender or its affiliates have any right or obligation to purchase, repurchase, acquire or reacquire participation interests from the SPV.

Additionally, the Federal Reserve has structured the transfer of interests in financial assets so that they will qualify for a "safe harbor" in relation to Federal Deposit Insurance Corporation ("FDIC") resolution proceedings and National Credit Union Administration ("NCUA") resolution proceedings. The Program is structured with the intent that the participations purchased by the SPV should qualify as "participations" within the meaning of 12 CFR 360.6(a)(7), as they are sales of an undivided interest in a Program loan or upsized tranche, without recourse to the Eligible Lender. Staff of the FDIC and NCUA were consulted in preparing the FAQs.

The Main Street Instructions include an Assignment Executed in Blank (see here), and a Co-Lender Agreement in Blank (see here and here).

According to the FAQs, the SPV will collect information on certifications, covenants, the lender, loan terms, loan performance, the borrower, borrower fundamentals, collateral, and other characteristics. The information will be used to verify that the lender, loan, and borrower meet

eligibility requirements and to support ongoing accounting and credit risk monitoring needs with respect to the purchased loan participations.

Eligible Lenders and Eligible Borrowers must acknowledge that the Boston Fed, the Department of the Treasury, the Board of Governors of the Federal Reserve System, and any Governmental Assignee will make public and nonpublic disclosures with respect to the Program, which can include the identities of the parties, amounts borrowed, interest rates charged, overall costs, revenues and other fees and potentially other material terms of the loans. The Program certifications require files to be maintained for a period of 10 years following the termination of all facilities under the Program.

The SPV will cease purchasing participations in Eligible Loans on September 30, 2020 and the Program will terminate, unless extended by the Federal Reserve and Treasury Department.

Unanswered Questions

Although the Term Sheets and FAQs addressed many issues raised by potential participants in the Program, the revised guidance left certain questions unanswered, and raised some new ones.

Use of proceeds. The initial draft term sheets required that the Eligible Borrower use reasonable efforts to maintain payroll and retain employees "using the proceeds of the" Program loan. The revised Term Sheets do not include this use of proceeds language. Will there be restrictions on the use of proceeds, beyond the various restrictions on repayment of other debt and other restricted payments? Will the Eligible Borrower be permitted to use the proceeds for mandatory or other permitted debt payments, capital expenditures, permitted acquisitions, or other unrestricted payments?

Documentation. Will there be standard documentation for loans under the New Loan Facility and Priority Loan Facility? For upsized loans under the Expanded Loan Facility, will all terms applicable to existing loans apply to the upsized tranche, apart from the specific terms for the Expanded Loan Facility? Due to the requirements for lender verification, including verification of EBITDA methodology, the process of implementing Program loans will require detailed documentation and could be time intensive.

The updated guidance indicates that each Eligible Lender should use its own loan documentation, which should be substantially similar across all borrowers, with necessary adjustments to reflect the requirements of the Program. The appendices of the FAQs contain a checklist of items that must be reflected in the loan documentation, certain model covenants, and a list of financial information that Eligible Lenders must require Eligible Borrowers to provide on an ongoing basis. Electronic signatures are expressly permitted.

Revolving Credit Facility Considerations.

- Would the voluntary prepayment and reborrowing under a revolving credit facility qualify as "repaying a line of credit (including a credit card) in accordance with the Eligible Borrower's normal course of business usage for such line of credit?"

The FAQs clarified that an Eligible Borrower may repay a line of credit in accordance with its normal course of business, and the FAQs deleted the requirement for prepayments to be "regularly scheduled and periodic." It remains unclear if revolving credit facilities are necessarily viewed as "lines of credit" for this purpose.

- In calculating "existing outstanding and undrawn available debt," is undrawn availability under an asset-based revolving credit facility included? Or is it (potentially) excluded as an "undrawn commitment that is used to finance receivables (including seasonal financing of inventory)?"

Intercreditor Terms. In the case of a secured Program facility, what will the intercreditor terms look like, especially in terms of the exercise of remedies and bankruptcy matters?

Why Differing Governing Law and Jurisdiction? The Borrower Certifications and Lender Certifications are governed by New York law, but the respective parties agree to non-exclusive jurisdiction in Boston, Massachusetts courts. Presumably the choice of Massachusetts jurisdiction relates to the administration of the Program by the Boston Fed, but having different states for governing law and jurisdiction is notable, particularly as the other sample ancillary loan documents provided by the Fed reflected both New York law and jurisdiction.

When Will the Program Begin? In its June 8 press release, the Federal Reserve indicated that it expects the Main Street Program to be open for lender registration soon and to be actively buying loans shortly afterwards.

The FAQs and additional guidance released on May 27 did not provide information on timing for the launch of the Program, but did clarify that when effective, Eligible Lenders will not be required to commit and pre-fund loans under the Program before the SPV has committed to purchase its participation in a Program loan. Once effective, Eligible Lenders can either extend a loan and then seek to sell a participation to the SPV, or they can sign a commitment letter with an Eligible Borrower, with the SPV's participation as a condition to funding.

Loans Issued in Reliance on the April 30 Term Sheets. What will happen to participations in loans or upsized tranches agreed upon prior to the most up to date information released by the Boston Fed?

The FAQs released on June 8 clarified that any loans that were issued in reliance of the April 30 term sheets will be accepted for purchase by the Main Street SPV during the first 14 days of the relevant Program facility's operations, provided that the required documentation is complete and consistent with Program requirements under the April 30 term sheets and the loan was funded prior to **June 10, 2020**. Any such loans may be amended or refinanced in accordance with the June 8 terms, provided that Eligible Lenders and Eligible Borrowers execute the legal forms and agreements, as published on the Federal Reserve's website that are aligned with the June 8 terms.

There will undoubtedly be more questions and uncertainties to address as potential participants consider their eligibility and their options under the Main Street Lending Program. We will

continue to monitor the Federal Reserve and Treasury Department announcements for additional information and guidance.

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Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, related regulation and any subsequent legislation to provide our clients guidance in real time. Please visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

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