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Covid-19 coronavirus - quick reference guide on US federal business stimulus programs

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The Covid-19 crisis continues to impact the global economy in unprecedented ways. Numerous clients, ranging from SMEs to large public companies, and from boutique investment firms to global financial institutions, have asked us to advise them regarding the US federal response to Covid-19, and more specifically the much-publicized and rapidly unfolding business stimulus programs. This Alert seeks to pull together a cohesive, high-level summary of these programs and to highlight some of the key issues every business or financial institution should consider as it evaluates participating in them.

Going forward, this Alert will be updated to reflect new business stimulus-related legislation as well as material updates to the regulations and guidance on the existing stimulus programs discussed herein. While we will strive to update this Alert as regularly as we can, it is not possible or practical to provide real-time updates on this quickly evolving set of laws, regulations, and guidance. Please reach out to us with any specific questions you may have.

We are providing this Alert as a helpful reference, but this should not be viewed as legal advice for any entity's or individual's specific situation. Given the rate at which new legislation, regulations, and guidance are being put forth, and the fact-specific and nuanced application of many of the legislative and regulatory requirements described below, we welcome the opportunity to discuss your individual concerns directly. Allen & Overy is one of a small number of truly global elite law firms, with 44 offices in 31 countries, and is uniquely positioned to provide tailored multi-jurisdictional advice across all Covid-19-related legal issues.

Executive Summary

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (the **CARES Act**), Phase 3 of the US federal response to the Covid-19 pandemic. The CARES Act (as expanded by the PPP-HCE Act (defined below)) is an approximately $2.7 trillion stimulus package allocated across a number of different programs with varying objectives, conditions and eligibility criteria. On April 9, 2020, the US Federal Reserve System (the **Federal Reserve**) announced a series of measures to deploy up to $2.3 trillion in loans to supplement the relief to the US economy provided under the CARES Act.[1] These programs will be implemented and administered primarily by the US Department of the Treasury (**Treasury**), the Small Business Administration (the **SBA**), and the Federal Reserve.

This Alert addresses several different categories of stimulus under the CARES Act, as well as certain initiatives taken by the Federal Reserve in response to COVID-19. Specifically, this Alert considers:

- (1) the SBA's Paycheck Protection Program (the **PPP** and each loan issued thereunder, a **PPP Loan**);
- (2) the SBA's Economic Injury Disaster Loan program (the **EID Program**, each loan issued thereunder, an **EID Loan**, and each advance on an EID Loan, an **EID Grant**);
- (3) CARES Act direct lending and liquidity programs (including the potentially-forthcoming mid-sized business lending program);
- (4) the Federal Reserve's Main Street Lending Program (the **Main Street Lending Program**, and each loan issued thereunder, a **Main Street Loan**); and
- (5) the Federal Reserve's Primary Corporate Credit Facility (the **PMCCF**).

In this Executive Summary, we highlight some high-level takeaways and recent developments in respect of each of these programs.

PPP Loans and EID Loans and Grants – Small Business Relief

- Title I of the CARES Act expands SBA relief options available to certain US businesses, including (i) authorizing PPP Loans as a new class of lending under Section 7(a) of the Small Business Act, and (ii) expanding the existing EID Program established under Section 7(b) of the Small Business Act. The CARES Act appropriated $376 billion to support SBA programs, of which, $349 billion was earmarked to guarantee PPP Loans, $10 billion was allocated for EID Grants, and $17 billion was set aside to cover six months of principal and interest payments on certain SBA-backed loans). On April 24, 2020, President Trump signed into law the "Paycheck Protection Program and Health Care Enhancement Act" (the **PPP-HCE Act**), the so called "Phase 3.5" of the US federal response. The PPP-HCE Act, among other things, (i) authorizes an additional $310 billion worth of PPP Loans (bringing the total amount of authorized PPP Loans to $659 billion), (ii) sets aside $60 billion of the aforementioned $310 billion for PPP Loans made by small and community-based lenders, (iii) appropriates an additional $50 billion for the EID Program and (iv) appropriates an additional $10 billion for EID Grants.
- The maximum amount of a PPP Loan is the lesser of (i) $10 million and (ii) 250% of the borrower's average monthly payroll costs (plus the outstanding amount of an EID Loan made between January 3, 2020 and April 3, 2020).

[1] Note: There is overlap in the amounts made available by the CARES Act and these Federal Reserve measures, as the Federal Reserve measures are funded, in part, by the CARES Act appropriations.

- EID Loan amounts are based on actual harm suffered, and are available up to a maximum amount of $2 million.

- As described in greater detail below, provided that the PPP Loan proceeds are used for permitted payroll costs and rent and/or mortgage expenses, the PPP Loans may be forgiven. EID Loans are not forgivable. In response to complaints about the impracticality of the original eight-week forgiveness period and the rigidity of the payroll and non-payroll use requirements, the Paycheck Protection Program Flexibility Act of 2020 (the **PPP Flexibility Act**) was enacted on June 5, 2020. Among other things, the PPP Flexibility Act (i) extends the period during which covered expenses are eligible for forgiveness from eight weeks from disbursement to 24 weeks from disbursement (or, if earlier, December 31, 2020), (ii) reduces the percentage of proceeds that must be used on payroll costs from 75% to 60%, and (iii) allows PPP Loan borrowers that receive forgiveness to defer Social Security payroll taxes on those forgiven PPP Loan proceeds used for payroll (where before borrowers eligible for forgiveness had to choose between forgiveness and tax deferral).[2]

- PPP Loan guidance is evolving at a rapid pace. To-date, the SBA has promulgated 22 Interim Final Rules (each, an **IFR**) relating to the PPP: the IFR published April 2nd implements the PPP (**PPP IFR 1**), the IFR published April 3rd outlines affiliation rules relating to the PPP (**PPP IFR 2**), the IFR published April 14th focuses on self-employed individuals' eligibility for the PPP (**PPP IFR 3**), the IFR published on April 24th provides further clarity on certain eligibility questions and formalizes certification safe harbor (**PPP IFR 4**), the IFR published on April 27th describes alternative criterion for calculating PPP Loan amounts for seasonal employers (**PPP IFR 5**), the IFR published on April 28th clarifies disbursement mechanics (**PPP IFR 6**), the IFR published on April 30th covers non-bank and non-insured lender eligibility and limitations on "single corporate group" borrowings (**PPP IFR 7**), the IFR published on May 5th clarifies non-discrimination limitations and exemptions for the PPP as well as how PPP Loan borrowers should account for student workers (**PPP IFR 8**), the IFR published on May 8th extends the Necessity Certification safe harbor described below (**PPP IFR 9**), the IFR published on May 13th discusses PPP Loan increases for partnership and seasonal employer applicants that may be entitled to more than initial guidance indicated (**PPP IFR 10**), the IFR published on May 14th covers PPP eligibility for electric cooperatives (**PPP IFR 11**), the IFR published on May 18th confirms that non-US employees of borrowers (and their affiliates) must be counted for PPP eligibility purposes (**PPP IFR 12**), the IFR published on May 20th formally extends the Necessity Certification safe harbor to May 18th (**PPP IFR 13**), the first IFR published on May 22nd outlines the PPP Loan forgiveness process (**PPP IFR 14**), the second IFR published on May 22nd provides further clarity on SBA review of PPP Loans (**PPP IFR 15**),the IFR published on June 5th covers eligibility for certain telephone cooperatives (**PPP IFR 16**), the IFR published on June 11th amends PPP IFR 1 to reflect changes mandated by the PPP Flexibility Act (**PPP IFR 17**), the IFR published on June 12th further amends PPP IFR 1 by reducing the lookback period (from five years to one year) for non-fraudulent felonies committed by any individual owning at least 20% of the borrower (**PPP IFR 18**)[3], the IFR published on June 17 amends PPP IFRs 3 and 6 to reflect the changes to mandatory payroll costs and extended maturities mandated by the PPP Flexibility Act (**PPP IFR 19**), the IFR published on June 22 provides further revisions to loan forgiveness procedures in keeping with the PPP Flexibility Act (**PPP IFR 20**), the IFR published on June 24 extends PPP IFR 18 by making clear that borrowers will only be deemed ineligible on the basis of 20+% owners being indicted if the charge is a felony offense and on the basis of 20+% owners being on probation or parole if such probation or parole commenced during the periods set forth in PPP IFR 18 (**PPP IFR 21**) and the IFR published on June 25 clarifies payroll costs for certain fishing-related business (**PPP IFR**

[2] See H.R. 7010, Pub L 116-142 (June 5, 2020).

[3] Prior to PPP IFR 18, if an individual owning at least 20% of a prospective borrower had committed *any* felony within the five years preceding the application, then such borrower would be ineligible for a PPP Loan.

22). The SBA and the Treasury are also maintaining a set of PPP Loan Frequently Asked Questions (the **PPP FAQs**).

- Generally speaking (and subject, in each case, to the more detailed eligibility requirements set forth below), a business may be eligible for a PPP Loan and/or an EID Loan if it has no more than 500 employees (or the applicable SBA employee-based size standard, if higher). Many entities that would typically be barred from SBA loans based on annual receipts may be eligible to apply for relief so long as they do not exceed the applicable employee threshold.

  - Based on existing SBA affiliation rules and PPP IFRs 1 and 2, and subject to a few narrow exceptions (as described below), many venture capital- and private equity-backed portfolio companies will likely not qualify for the PPP Loans or the EID Loans because, together with their affiliates, such companies will employ over 500 employees.

  - In response to the well-publicized criticism by certain politicians, media outlets and members of the business community over some of the businesses that received PPP Loans,[4] the Treasury and the SBA have advised companies with alternative sources of liquidity against applying for PPP Loans, even if such companies otherwise satisfy the eligibility requirements under the CARES Act and the corresponding regulations. As described below, each PPP Loan applicant must certify in good faith that "[c]urrent economic uncertainty makes the [PPP Loan] necessary to support the [borrower's] ongoing operations" (the **Necessity Certification**). SBA guidance dated April 23, 2020 strongly suggests that "a public company with substantial market value and access to capital markets" cannot make this Necessity Certification in good faith and, consequently, could open itself up to treble damages under the False Claims Act (the **FCA**). In response to public criticism and the guidance on the Necessity Certification, many public company PPP Loan recipients have already returned (or plan to return) their PPP Loans, while several others have announced that they intend to retain the funds.[5]

  - Subsequent SBA guidance dated April 26, 2020 confirms that private equity-backed portfolio companies must "carefully review" this same Necessity Certification when applying for PPP Loans, strongly suggesting that portfolio companies receiving PPP Loans will be heavily scrutinized. **However**, in a May 13th update to the PPP FAQs, the SBA announced that "any borrower that, together with its affiliates [(but solely to the extent aggregation of affiliates is required by PPP IFR 2)], received PPP Loans with an original principal amount of less than $2 million will be deemed to have made the [Necessity Certification] in good faith."

- On April 16, 2020, the SBA announced that it was unable to accept new applications for PPP Loans and EID Loans (including EID Grants) due to exhaustion of the CARES Act appropriations for the programs.[6] While many experts expected the second tranche of PPP Loan funds appropriated by the PPP-HCE Act to be exhausted in a matter of days, the pace of PPP Loan approvals has slowed considerably (due in no small part to the web of ever-shifting PPP regulations). According to the SBA, between April 27 and May 1, 2020, approximately $176 billion of PPP Loans were approved,[7] and between May 1st and May 8th, that number had increased to approximately $189 billion[8]. Through June 6th (after giving effect to both PPP Loans approved

[4] See WSJ: Public Companies Have to Repay Small-Business Rescue Loans (April 23, 2020).
[5] See WSJ: At Least 13 Public Companies Give Back $170 Million in Small-Business Stimulus Money (April 25, 2020), and WSJ: Texas Hotelier to Keep Money from U.S. Coronavirus-Related Loan Program (April 25, 2020).
[6] As of 12 pm EDT on April 16, 2020, 1,661,367 PPP Loans had been approved, representing over $342 billion. See SBA: Paycheck Protection Program Report (April 16, 2020).
[7] See SBA: Paycheck Protection Program Report: Second Round (May 3, 2020).
[8] See SBA: Paycheck Protection Report: Second Round (May 10, 2020).

and cancelled as of that date), approximately $511 billion of PPP Loans had been approved across both phases of the PPP, and approximately $131 billion of PPP Loans remained available.[9] As of June 20th (after giving effect to approved and canceled PPP Loans), approximately $515 billion of PPP Loans had been approved and approximately $128 billion of PPP Loans remained available.[10]

- On June 19, 2020, the SBA and Treasury announced that the SBA would disclose (1) for PPP Loans in excess of $150,000 (which will cover about 75% of the money lent through the PPP), the business names, addresses, NAICS codes, zip codes, business type, demographic data, non-profit information, jobs supported, and loan amounts, and (2) for PPP Loans below that threshold, loan totals, aggregated by zip code, industry, business type, and demographic categories.[11]

- On April 9, 2020, the Federal Reserve announced the establishment of the Paycheck Protection Program Liquidity Facility (**PPPLF**) through which the Federal Reserve will provide term financing at a 0.35% interest rate to lenders eligible to originate PPP Loans (including depository and non-depository institutions) up to the principal amount of such loans, with those PPP Loans serving as collateral. While lenders may only participate to the extent eligible to originate PPP Loans, lenders may pledge PPP Loans purchased on the secondary market in addition to PPP Loans they originate. The program, which will provide additional liquidity to participating lenders, will be in effect until September 30, 2020.

CARES Act Direct Lending - Mid-Sized to Large Business Relief

- Title IV of the CARES Act, entitled the "Coronavirus Economic Stabilization Act" (**CESA**), provides sweeping authority for Treasury and the Federal Reserve to provide up to $500 billion of liquidity to assist U.S. businesses, states and municipalities that have been impacted by COVID-19. Although small businesses may benefit significantly from certain CESA programs, it is generally expected that Treasury and the Federal Reserve will target CESA programs towards mid-size to large businesses (as well as states and municipalities) in light of the separate $349 billion allocation to SBA programs described above.

- Of the total $500 billion authorized under CESA, $46 billion is earmarked for airlines and certain national security businesses. The remaining $454 billion (and any unused portion of the $46 billion designated for airlines and national security businesses), is designated for loans and other investments in programs or facilities established by the Federal Reserve to provide liquidity to other eligible businesses, states, and municipalities.

- Pursuant to CESA's provisions specifically for "Assistance for Mid-Sized Businesses," the Treasury Secretary must "seek to implement" a Federal Reserve program that uses an unspecified amount of the $454 billion to finance banks and other lenders that provide direct loans to businesses with between 500 and 10,000 employees.

- CESA establishes some overarching eligibility requirements and operational restrictions that will apply to this mid-sized business loan program when implemented, but neither the Treasury nor the Federal Reserve has provided guidance on the implementation of the mid-sized business loan program, the precise mechanics of such program (including any additional requirements and restrictions) or the viability of such funding for venture capital- and private equity-backed companies.

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[9] See SBA: Paycheck Protection Program Report: Second Round (June 7, 2020).
[10] See SBA: Paycheck Protection Program Report (June 20, 2020).
[11] See SBA and Treasury Announce Enhanced Transparency Regarding the Paycheck Protection Program (June 19, 2020).

- Unlike PPP Loans, no portion of the principal amount of any loan made under this mid-sized business loan program will be forgivable.

Federal Reserve's Main Street Lending Program – Small- to Mid-Sized Business Relief

- Perhaps the most widely-discussed of the Federal Reserve's programs announced on April 9, 2020, is the Treasury-backed Main Street Lending Program. As revised and supplemented by the Federal Reserve on June 8, 2020 the Main Street Lending Program will support small and medium-sized businesses with up to 15,000 employees or $5 billion in 2019 annual revenues, and will support up to $600 billion in Main Street Loans.

- The Main Street Lending Program is administered by the Federal Reserve Bank of Boston (**FRB Boston**), which will set up a special purpose vehicle (the **Fed SPV**) to purchase participations in Main Street Loans originated by eligible lenders. Lenders will retain a specified percentage of each Main Street Loan.

- As described in greater detail below, the Main Street Lending Program will operate through three separate facilities: (i) Main Street New Facility (**MSNLF**), (ii) the Main Street Priority Facility (**MSPLF**) and (iii) the Main Street Expanded Loan Facility (**MSELF**). The MSNLF and MSPLF will facilitate the origination of new loans, while the MSELF will facilitate the expansion of existing term loans or revolving credit facilities. All three facilities share the baseline criteria for eligible borrowers and eligible lenders, but differ in other respects (including specific eligibility criteria), as more fully described herein.

- The existing SBA affiliation rules applicable to the PPP also apply to the Main Street Lending Program (though neither the limited waivers of affiliation rules set forth in the CARES Act nor the PPP IFRs apply). To determine employee and revenues eligibility thresholds, a potential borrower under the Main Street Lending Program must aggregate its employees and revenues with those of its affiliates. This may have the practical effect of excluding certain businesses, including many private equity-owned portfolio companies, from participation in the Main Street Lending Program.

- Based on the current guidance from the Federal Reserve, borrowers under the Main Street Lending Program are subject to the same restrictions applicable to direct loans under CESA, in addition to certain other eligibility requirements and operating restrictions. Further, Main Street Loan size will be limited by EBITDA-based leverage caps (four times adjusted EBITDA for new loans under the MSNLF, and six times adjusted EBITDA for loans under each of the MSPLF and MSELF). These leverage caps may preclude many "eligible" borrowers from obtaining any funding under the Main Street Lending Program.

- Unlike PPP Loans, no portion of the principal amount of any Main Street Loan will be forgivable.

- The Main Street Lending Program opened for Lender Registration on June 15, 2020 and interested lenders can submit application information via the Lender portal.The Federal Reserve has not provided a an official launch date for purchasing loan participations but has released application materials, borrower and lender form certifications and covenants, and other form agreements, including documents related to lenders' sale of participations for the Fed SPV, which can be accessed on the website of the Federal Reserve Bank of Boston.

- The Federal Reserve is maintaining and periodically updating a set of Main Street Lending Program Frequently Asked Questions (the **MSLP FAQs**). The latest update of these FAQs was June 20, 2020.

Federal Reserve's PMCCF – Mid-Sized to Large Business Relief

- Also on April 9, 2020, the Federal Reserve announced an expansion of the size and scope of its PMCCF, which serves as a funding backstop for corporate debt issued by eligible issuers and was initially announced on March 23, 2020. Initially, this program was available only to high investment-grade issuers.

- The expansion will, among other accommodations, make corporate issuers of debt eligible if they had the lowest investment-grade rating from a nationally-recognized statistical rating agency (**NRSRO**) as of March 22, 2020, even if they have been downgraded to below investment grade subsequently. Accordingly, this program may be attractive to "fallen angels" and "cross-over credits."

- The Federal Reserve Bank of New York (**FRB New York**), which is administering the PMCCF, is maintaining and periodically updating a set of PMCCF Frequently Asked Questions (the **PMCCF FAQs**).

Looking Ahead: Next Steps in the US Federal COVID-19 Response

- Further CESA appropriations remain available for additional loan and loan guarantee programs, details of which are yet to be announced.

- Lawmakers have already begun discussions on the scope and quantum of Phase 4. On May 15, 2020, the House passed the first potential Phase 4 bill, the "Health and Economic Recovery Omnibus Emergency Solutions Act" (the **HEROES Act**), which would provide approximately $3 trillion of additional stimulus and, among other things, effect a number of substantial changes to the PPP (including in relation to PPP Loan covered period and maturity, permissible uses and forgiveness).[12] The bill is not expected to pass the Senate in its current form, and negotiations on Phase 4 will likely continue to drag on for weeks if not months. Note, however, that certain of the changes to the PPP contemplated by the HEROES Act have instead been addressed by the PPP Flexibility Act.

- **Note**: all of the relief programs described herein remain subject to further guidance, implementation and rule-making, as well as new legislation. We will continue to closely monitor developments across this slate of programs (and any additional programs), and will provide updated guidance as and when we can.

- **Note**: businesses should also take note of the employment and tax provisions of the CARES Act and the Families First Coronavirus Response Act (the **FFCRA**). We are available to discuss these provisions and their interplay with the funding programs described herein.

[12] See H.R. 6800 (HEROES Act) (May 12, 2020).

A closer look at the covid-19-related federal relief programs

1. Paycheck Protection Loan Program.

(a) **Qualifying Borrowers**. A business concern[13] will be eligible to apply for a PPP Loan if such entity (1) is not an "ineligible business," as described below, (2) is organized (i) for-profit and (ii) as any of the following: a sole proprietorship, partnership, limited liability company, corporation, association, trust, cooperative, or joint venture (with *no more* than 49% participation by foreign business entities), (3) has a place of business located in the US, (4) operates primarily within the US or makes a significant contribution to the US economy through payment of taxes or use of American products, materials or labor, (5) has no more than 500 employees (or the applicable SBA employee-based size standard, if higher),[14,15] and (6) was in operation and had either employees (for whom it paid wages and payroll taxes) or a paid independent contractor on February 15, 2020. The CARES Act includes a carveout (the **Hospitality Carveout**) for businesses assigned a North American Industry Classification System (**NAICS**) code beginning with 72 (each, a **Hospitality Entity**),[16] pursuant to which a Hospitality Entity with over 500 employees in the aggregate will nonetheless be eligible to apply for a PPP Loan so long as such entity has no more than 500 employees per physical location.

(i) **Ineligible Businesses**. A business that otherwise meets requirements (2)-(6) above will nonetheless be ineligible to receive a PPP Loan if it is primarily engaged in any of the businesses listed at 13 CFR 120.110(b)-(f), (h)-(j), (m)-(s). Notable "ineligible businesses" include: lending institutions (including banks, finance companies and factors), passive real estate investors, certain private clubs, businesses engaged in illegal activity, businesses primarily engaged in political or lobbying activities and speculative businesses. **Note**: PPP IFR 4 expressly provides that the SBA considers hedge funds and private equity "firms" to be engaged in "investment or speculation" and, consequently, ineligible for PPP Loans. As described below, private equity-backed portfolio companies may be eligible for PPP Loans.

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[13] **Note**: This Alert primarily focuses on "business concerns" as defined by the Small Business Association. However, PPP loans are also available for (i) sole proprietors, (ii) independent contractors, (iii) any of the following entities satisfying requirements (1), (4) and (5): tax-exempt non-profit described in IRC 501(c)(3), tax-exempt veterans organization described in IRC 501(c)(19) and Tribal business concern described in Section 31(b)(2)(C) of the Small Business Act, and (iv) any entity qualifying as a "small business concern" under Section 3 of the Small Business Act (including an entity that, together with its affiliates, (x) meets the applicable employee-based or revenue-based size standard for its industry or (y) as of March 27, 2020, had a maximum tangible net worth of no more than $15 million and, for the two fiscal years before the application, an average net income (after federal income taxes, but excluding carry-over losses) of no more than $5 million).

[14] **Note**: Previous guidance suggesting that employees were only counted to the extent their principal place of residence is in the US has been effectively overruled by PPP IFR 12. See Section 1(a)(iii) and 1(f)(i) of this Alert.

[15] **Note**: PPP IFR 1 provided that, in addition to meeting the 500-employee threshold, applicants needed to also qualify as a "small business concern" as defined in the Small Business Act, which would require consideration of the receipt-based size standards in the SBA Size Standard Table set forth at 13 CFR 121.201 and could render ineligible businesses with under 500 employees that exceed any such receipt-based standard. This guidance was wholly inconsistent with the CARES Act and, although it has not been rescinded, the subsequently-posted PPP IFRs and PPP FAQs make clear that PPP Loan eligibility does not require consideration of these receipt-based standards. Indeed, the PPP Loan application, itself, requires that borrowers certify as to meeting the applicable employee threshold (and does not mention any receipts-based standard).

[16] Industries with an NAICS code beginning with 72 include: Hotels and motels; Casino hotels; Bed-and-Breakfast Inns; All Other Traveller Accommodation; RV Parks and Campgrounds; Recreational and Vacation camps; Rooming and Boarding Houses, Dormitories, and Workers' Camps; Food Service Contractors; Caterers; Mobile Food Services; Drinking Places (Alcoholic Beverages); Full-Service Restaurants; Cafeterias, Grill Buffets, and Buffets; Snack and Non-Alcoholic Beverage Bars.

(ii) **Employee Calculation**. Businesses must count all individuals employed on a full-time, part-time, or other basis, (x) including student workers[17] as well as employees obtained from a temporary employee agency, professional employer organization, or leasing business, but (y) excluding volunteers and independent contractors.

The SBA has indicated that borrowers may use either of two alternatives to calculate how many employees they have for PPP Loan purposes: (a) the borrower's average number of employees over the previous 12 months or for calendar year 2019 (or, for seasonal businesses, the average number of employees for February 15, 2019 – March 1, 2019) or, if not in business between such dates, average employment for January 1, 2020 – February 29, 2020, or (b) the borrower's average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (or, if not in business for 12 months, the average number of employees for each of the pay periods that the borrower has been operational).

(iii) **Non-US Employees**. Previous guidance, specifically PPP IFRs 1 and 2 and Question 3 in the PPP FAQs, indicated that, for the purposes of determining its eligibility for a PPP Loan vis-à-vis the 500 employee-threshold, a borrower only needed to count those of its employees whose principal place of residence was in the US. **However**, this guidance has been officially overruled by PPP IFR 12, which unambiguously states the standard for all PPP Loan applicants is either (x) 500 employees or (y) if higher, the applicable SBA-based sized standard for the primary industry in which the borrower operates, in each case, regardless of where such employees' principal places of residence may be. **Note**: PPP IFR 12 does not address Hospitality Entities with over 500 employees in the aggregate, which may still seek eligibility under the Hospitality Carveout described above. PPP IFR 12 provides that the "principal place of residence" element is actually only relevant to a PPP Loan applicant's calculation of payroll costs in connection with determining the maximum PPP Loan size; see Section 1(b) below.

The rule does not expressly restrict foreign shareholder-owned businesses from eligibility under the PPP, but the updated guidance severely limits the viability of the PPP for multinational borrowers that must now count all employees, wherever employed. PPP IFR 12 also made clear that any use of PPP Loan proceeds on non-US employees or operations is strictly prohibited. **Note**: borrowers that previously relied on the "principal place of residence" language in qualifying for a PPP Loan may not be found to have falsely certified as to their eligibility or even forced to return their PPP Loan(s); see Section 1(f) below.

(iv) **Affiliation Rules**. PPP IFRs 1 and 2 provide that unless expressly exempted by the CARES Act (more on that below), applicants will be subject to the SBA's affiliation rules,[18] requiring aggregation of such applicant's employees with the employees of its affiliates. PPP IFR 12 clarified that the SBA will count the employees of all of such business's affiliates, foreign and domestic, and regardless of where such employees live.

[17] Pursuant to IFR 8, student workers should not be counted (i) by any borrower if the student worker is providing services pursuant to a Federal Work-Study Program or a substantially similar state or local program or (ii) by a borrower that is an institution of higher education (as defined at 34 CFR § 675.2).
[18] 13 CFR 121.301.

Affiliation for PPP Loan purposes will be determined by the ability to control (even if not exercised), where control can be found based on equity ownership (including (a) minority ownership where the minority owner can prevent a quorum or otherwise block board and/or shareholder action and (b) contingent ownership based on stock options, convertible securities and agreements to merge), common management (i.e., an officer or director holds controlling positions in two or more companies), or identity of interests based on close family relationships (specifically, spouse, parent, child, sibling or the spouse of any such person).

In short, under current SBA guidance, any portfolio company applicant controlled by a venture capital firm or private equity sponsor will likely be affiliated with (and will have its employees aggregated with the employees of) all other controlled portfolio companies of its ultimate controlling equityholder. Thus, subject to the limited CARES Act exceptions outlined below and further administrative guidance, most portfolio companies controlled by venture capital firms or private equity sponsors will not be eligible to participate in the PPP Loan program at this time.

(v) **Affiliation Exceptions**. The CARES Act waives the affiliation rules for the following types of borrowers: (i) Hospitality Entities with no more than 500 employees in the aggregate (the **Hospitality Exception**), (ii) any franchise assigned a franchise identifier code by the SBA, and (iii) any business concern receiving financial assistance from a company licensed under the Small Business Investment Act (such a company, an **SBIC**, and such exception, the **SBIC Exception**).

Hospitality Exception. The Hospitality Exception is in addition to the Hospitality Carveout (pursuant to which Hospitality Entities with over 500 employees are eligible for a *single* PPP Loan so long as such entity has no more than 500 employees per physical location). Subject to the "single corporate group" limitation described below, the combined effect of the Hospitality Carveout and the Hospitality Exception is that venture capital firms or private equity sponsors with multiple Hospitality Entity portfolio companies with under 500 employees per physical location may be able to seek separate PPP Loans for each such Hospitality Entity. Similarly, and again subject to the "single corporate group" limitation, to the extent that a hospitality group has established separate Hospitality Entities with fewer than 500 employees at each of its physical locations, each such Hospitality Entity may be eligible to apply for its own PPP Loan. This Hospitality Exception will not provide a similar benefit to any Hospitality Entity that directly owns and operates its different physical locations (though such an entity will still be eligible to apply for a single PPP Loan pursuant to the Hospitality Carveout). **Note**: a plain reading of the CARES Act and SBA guidance to-date suggests that any Hospitality Entity that does not qualify for the Hospitality Exception will have to apply the SBA affiliation rules to determine whether it *and* its affiliates have no more than 500 employees per physical location; **however**, the SBA has not clarified (1) the interplay of the Hospitality Carveout and the Hospitality Exception for private equity-backed Hospitality Entities with over 500 employees in the aggregate or (2) whether the inclusion of multiple affiliates that are not Hospitality Entities could result in the borrower, itself, ceasing to be a Hospitality Entity for PPP purposes (and, where it has over 500 employees in the aggregate, ceasing to be eligible for a PPP Loan). **Note also**: borrowers proceeding under the

Hospitality Exception must nonetheless consider the certifications and FCA concerns described below. Indeed, due to public criticism and possible FCA liability, many borrowers that relied on the Hospitality Carveout and/or the Hospitality Exception have subsequently returned the PPP Loan proceeds.

SBIC Exception. The SBIC Exception presents a gray area for prospective PPP Loan applicants (especially venture capital- and private equity-backed portfolio companies). Because SBIC financing eligibility[19] is subject to different affiliation rules than the PPP Loan program (which rules will not affiliate applicants with controlling shareholders that are venture capital operating companies, registered investment companies, or unregistered 3(c)(1) funds), the SBIC Exception may provide an alternative route to PPP Loan eligibility for venture capital- or private equity-backed portfolio companies otherwise disqualified from the PPP Loan program due to affiliation. Portfolio company applicants should first confirm whether any of their current lenders or investors are SBICs. Even if they are not already receiving SBIC funding, portfolio companies might look to take advantage of the SBIC Exception by securing new debt and/or equity financing from an SBIC,[20] and then applying for a PPP Loan (thereby avoiding application of the affiliation rule complications). **However**, based on current SBA guidance, (x) it is unclear whether businesses that are not currently funded by an SBIC can become eligible for PPP loans by simply securing new funding from an SBIC, and (y) even if a borrower could secure such eligibility, it may nonetheless be precluded from taking out a PPP Loan by the certifications and FCA concerns described below.

(vi) **Expanded Waivers Unlikely**. Since the enactment of the CARES Act, the SBA affiliation rules have received intense public scrutiny, with venture capital[21] and private equity[22] trade associations and multiple members of Congress[23] lobbying Treasury Secretary Mnuchin and SBA Administrator Carranza to relax affiliation rules for PPP Loan purposes. House Minority Leader McCarthy expressed confidence that venture-capital backed portfolio companies will ultimately be eligible for PPP Loans.[24] **However**, to date, the SBA has only relaxed affiliation rules for certain faith-based organization, and has strongly suggested that companies with sufficient alternative sources of liquidity (including public companies as well as private equity-backed portfolio companies) could face FCA liability for unnecessarily taking out a PPP Loan.

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[19] Generally, an entity is eligible for SBIC financing if it
(1) is organized for profit,
(2) has a place of business located in the US,
(3) operates primarily within the US or makes a significant contribution to the US economy through payment of taxes or use of American products, materials or labor,
(4) has at least 51% of its employees and assets located within the US,
(5) together with its affiliates (a) qualifies as small under the SBA Size Standard Table industry-specific threshold set forth at 13 CFR 121.201 or (b) has a combined tangible net worth not in excess of $19.5 million and an average net income (post-federal income tax (excluding carry-over losses) for the preceding two fiscal years not more than $6.5 million, and
(6) does not engage in any of the prohibited activities in 107.720 (i.e., re-lending, factoring, passive businesses, real estate businesses, farmland purchases, project financings, foreign investments, associated suppliers, financing licensees or businesses contrary to the public interest).

[20] According to the SBA, typical financing terms are as follows: (1) debt only: between $250,000 to $10 million, with interest rates between 9% and 16%, (2) equity only: between $100,000 and $5 million, and (3) mixed financings (debt and equity): between $250,000 and $10 million, with interest rates between 10% and 14%.

[21] See NVCA Letter to Mnuchin and Carranza (March 27, 2020).

[22] See SBIA Letter to Mnuchin and Carranza (April 2, 2020).

[23] See, e.g., Letter from Representatives Pelosi and Khanna to Mnuchin and Carranza (March 31, 2020), Letter from Representatives Gottheimer, Reed, Crow and Rodgers to Mnuchin and Carranza (March 31, 2020), and Letter from Representative Waters to Mnuchin and Carranza (April 1, 2020).

[24] See Axios, Kevin McCarthy: Startups Will Be Eligible for Coronavirus Stimulus Loans (April 2, 2020).

(vii) **Single Corporate Group Limitation**. PPP IFR 7 provides that, effective April 30, 2020, no "single corporate group" may receive more than $20 million of PPP Loans. Per the guidance, borrowers will be deemed to be part of the same "single corporate group" if majority owned, directly or indirectly, by a common parent. **Note**: this is a different standard than the affiliation rules described above (which relate to eligibility), and will apply even if a borrower qualifies for one or more of the affiliation waivers. On its face, this seemingly equity-based test is much narrower than the affiliation rules, though the guidance does not clarify whether (x) majority ownership gives present effect to options, convertible securities and agreements to merge or (as is the case for the affiliation test under the PPP) or (y) "majority owned" will be limited to equity ownership or will include one or more alternative bases (i.e., control).

The $20 million limitation applies to any PPP Loan that has not been fully disbursed as of April 30, 2020 (and for all PPP Loans thereafter), and requires any PPP Loan borrower with any pending or approved PPP Loan application(s) that, together with all of its other PPP Loan proceeds received and/or applied for, would exceed this threshold, to withdraw and (if already approved) cancel each PPP Loan application that, if disbursed, would exceed the threshold. PPP IFR 7 provides that failure to withdraw and/or cancel any such application would immediately render any use of such proceeds "unauthorized," making such loan unforgivable and potentially subjecting the borrower to FCA liability. **Note**: based on the guidance, if a borrower were to fail to withdraw and/or cancel its applications, it appears that only the approved loan in excess of the threshold (and not all previously disbursed loans) would be deemed unauthorized and unforgivable.

(b) **PPP Loan Size**. The maximum amount of any PPP Loan is the lesser of (x) $10 million and (y) the sum of (i) 250% of the borrower's average monthly payroll costs[25] (measured over the one-year period prior to the loan funding date or for calendar year 2019[26]) and (ii) the outstanding amount of any preexisting EID Loan made between January 31, 2020 and April 3, 2020 (net of any EID Grant).

(c) **Qualifying Uses/Loan Forgiveness**. PPP Loans are intended to cover the cost of maintaining payroll costs, rent and mortgage expenses for the period beginning on the PPP Loan funding date (or, at the borrower's election, the first day of the first payroll cycle after funding) and ending on the earlier of the 24-week anniversary of such date and December 31, 2020 (the **PPP Covered Period**), though borrowers that already received PPP Loans prior to the enactment of the PPP Flexibility Act may elect to use the original eight-week period. The sum of the following payments made with PPP Loan proceeds during the PPP Covered Period may be forgiven at the end of the PPP Covered Period: (i) payroll costs, (ii) interest payments on mortgage obligations existing prior to February 15, 2020 (but not on any prepayment or payment of principal), (iii) rent payments pursuant to leases in existence prior to February 15, 2020, and (iv) certain utility payments, including

[25] "Payroll costs" are defined as the sum of such borrower's salary, wage, commission and other compensation, payment of cash tip or equivalent, payment for vacation, parental, family, medical or sick leave, allowance for dismissal or separation, payment required for the provisions of group health care benefits, including insurance premiums, payment of any retirement benefit, or payment of state or local tax assessed on the compensation of employees. Payroll costs shall not include the prorated portion of any salary in excess of $100,000 per year paid to a given person (though it will include non-cash benefits, such as health care, retirement benefits, etc.), compensation of any employee whose principal place of residence is outside of the US, compensation to independent contractors or sole proprietors, certain payroll taxes (including FICA and income tax withholding), and certain payments for family and sick leave for which a tax credit is available under Section 7001 or Section 7003 of the FFCRA.

[26] Seasonal employers can use average monthly payroll for the 12-week period beginning (i) February 15, 2019 (or at the election of the borrower, March 1, 2019) and ending June 30, 2019 or (ii) May 1, 2019 and ending on September 15, 2019.

electricity, gas, water, transportation, and phone and internet access for service incurred in the ordinary course of business prior to February 15, 2020. **Note**, the PPP Flexibility Act requires that a borrower use no more than 40% of the PPP Loan proceeds on non-payroll costs in order to remain eligible for full forgiveness of its PPP Loan.[27] However, PPP IFR 17 also clarifies that this 60% payroll requirement is a proportional limitation on forgiveness amount (rather than a threshold for any loan forgiveness) such that a borrower that spends less than 60% on payroll costs may still be eligible for forgiveness, but the maximum amount of forgiveness will be reduced to an amount where the borrower's payroll cost spending represents 60% of such reduced amount. In other words, where a borrower takes out a $100,000 PPP Loan and spends $45,000 (or 45%) on payroll costs during the Covered Period, such borrower may still be eligible to receive forgiveness on up to $75,000 (as $45,000 is 60% of $75,000). Setting aside forgiveness, a borrower must spend 60% of its PPP Loan proceeds on payroll costs when all is said and done.

The amount otherwise forgiven will be reduced proportionally by any reduction in the number of employees retained by the borrower as compared to the prior year. There is a further dollar-for-dollar reduction in loan forgiveness equal to the reduction of salary/wages of any employee (making less than $100,000 per year) in excess of 25% of such employee's salary/wages for the most recent full quarter during which the employee was employed prior to the PPP Covered Period. A borrower, however, will not be penalized by these reductions for termination of an employee and/or reduction of an employee's salary (in excess of 25%) made between February 15, 2020 and April 26, 2020, as long as (1) each such employee is rehired and/or each salary is fully restored by December 31, 2020[28] or (2) the borrower can, in good faith, document either (x) an inability to rehire all such terminated employees *and* an inability to hire a similarly qualified employees for unfilled positions, in each case by December 31, 2020 or (y) an inability to return to its pre-February 15, 2020 level of business *due to* compliance with Covid-19-related sanitation, social distancing and/or employee/customer safety regulations implemented by the CDC Director, HHS Secretary, or OSHA Administrator between March 1, 2020 and December 31, 2020.[29] Further, if a borrower reduces the hours of a full-time employee (rather than terminating such employee), the borrower can avoid a reduction in its loan forgiveness amount if the borrower makes a good faith offer to restore the reduced hours at the same salary or wages and the same number of hours (as compared to such employee's last pay period prior to the reduction), the offer was rejected by the employee, and the borrower maintains documentation of the offer and the rejection. Forgiven amounts will not constitute cancellation of indebtedness income for US federal tax purposes.

(d) **PPP Loan Terms**. Based on the latest guidance received from the SBA, if and to the extent that a PPP Loan has a remaining balance after the forgiveness described above, it will have a maturity of either (x) if made prior to June 5, two years from loan origination (however, such borrowers and lenders may agree to extend the maturity date to five years) or (y) if made on or after June 5, five years from loan origination, and, in each case, an interest rate of 1.0% per annum. The PPP Loans are generally non-recourse to the borrower's owners and are not subject to the credit elsewhere,[30] personal guaranty, collateral, and guaranty or annual fee requirements typical of SBA Section 7(a) loans.

[27] Prior to the PPP Flexibility Act, SBA guidance required borrowers to allocate no more than 25% of PPP Loan proceeds to non-payroll costs.

[28] **Note**: Presumably, a borrower electing to use the original eight-week period cannot avail itself of this extended deadline (and would still have to rehire such workers and restore such salaries by June 30).

[29] PPP IFR 20 confirms that inability to return to pre-Covid-19 business levels includes both direct (i.e., CDC, HHS or OSHA) and indirect (i.e. state and municipal) government regulation.

[30] **Note**: As discussed in Section 1(f) of this Alert, however, the borrower must make the Necessity Certification, which requires consideration of, among other things, the availability of sufficient alternative sources of capital.

PPP Loan lenders must defer payments under the PPP Loan until at least (1) where the borrower applies for forgiveness within 10 months of the expiration of its PPP Covered Period, the date on which such forgiveness amount is remitted to the lender, or (2) where the borrower fails to apply for forgiveness by such deadline, the date that is no earlier than ten months following the expiration of its PPP Covered Period. There shall be no prepayment penalties. The SBA will guarantee 100% of PPP Loans.

(e) **Application Process**. The PPP Loans are administered through the SBA Section 7(a) Program, but applications should be made directly to participating lenders, not the SBA.

Loan applications went live on April 3, 2020, and (so long as there are sufficient appropriations) will be **available until June 30, 2020**. **Note**: although the PPP Flexibility Act extended the PPP Covered Period and the deadline for applying for forgiveness until December 31, 2020, it did **not** extend the application window for new PPP Loans beyond June 30, 2020. Given the amount of available PPP Loan funds and the slowed pace of new loan applications, it is possible that Congress extends the new loan application deadline.

PPP Loans continue to be processed on a **first-come, first-served basis**. In an effort to allocate PPP Loans to smaller borrowers, however, the PPP-HCE Act mandates that, of the $310 billion of additional PPP Loans authorized therein, (i) $30 billion be allocated to PPP Loans made by insured depository institutions and credit unions, in each case, with consolidated assets between $10 billion and $50 billion, and (ii) $30 billion be allocated to PPP Loans made by (1) insured depository institutions and credit unions, in each case, with consolidated assets of less than $10 billion, and (2) community financial institutions.

Eligible applicants must submit this PPP Loan Application and documentation necessary to establish eligibility (i.e., payroll processor records, payroll tax filings, bank records, and Form 1099-MISC as applicable) to a participating lender.

(f) **Certification and False Claim Act Considerations**. PPP Loan applicants will be required to make numerous certifications in connection with their application, including satisfying all of the eligibility requirements outlined above, the 25% non-payroll cost cap described above, and the Necessity Certification.

Any misrepresentation or inaccurate certification in a PPP Loan application could subject a PPP Loan applicant to liability under the FCA. Under the FCA, entities or individuals can be held liable for submitting (or causing the submission of) a false claim for payment to the government or for knowingly making or using (or causing to be made or used) a false record or statement in connection with such a claim for payment. Importantly, failure to comply with payment eligibility requirements under a government payment program (such as the PPP Loan program) can be a basis for FCA liability. Applicants found liable for violating the FCA could face treble damages, civil penalties, and prevailing whistleblower plaintiffs' attorneys' fees (note that claims under the FCA can be brought by the Department of Justice as well as whistleblowers). Accordingly, applicants should carefully consider their eligibility and ability to make *all* certifications in the PPP Loan application before submission.

(i) ***500 Employee Rule***. As described above, prior to the promulgation of PPP IFR 12, the SBA guidance on the 500-employee threshold was ambiguous, but seemed to suggest that so long as, between itself and its affiliates (foreign and domestic), a borrower had no more than 500 employees whose principal place of

residence was in the US, such borrower would satisfy the 500-employee threshold. While this interpretation has been overruled by PPP IFR 12, as we suggested in an earlier version of this Alert, borrowers likely had a good faith basis to argue that the prior guidance allowed them to exclude non-US employees from the eligibility calculation. Indeed in PPP IFR 12, the SBA concedes that there was "reasonable borrower confusion based on SBA guidance" concerning ex-US employees and eligibility, and states that it will not find any borrower with over 500 employees in the aggregate that applied for a PPP Loan prior to May 5, 2020[31] to (1) be ineligible for a PPP Loan on the basis of exceeding the 500-employee threshold or (2) to have made an inaccurate certification as to its eligibility, in each case, *so long as* such borrower had no more than 500 employees whose principal place of residence in the US. The updated guidance does not indicate whether such borrowers will need to submit any documents to secure this safe harbor or whether borrowers that applied for a PPP Loan on the basis of excluding non-US employees *after* May 5 will be automatically deemed ineligible or found to have made an inaccurate eligibility certification.

(ii) ***Necessity Certification***. On April 23, 2020, the SBA issued clarifying guidance on this subjective standard, stating that borrowers must "[take] into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental for the business." Effectively, this updated SBA guidance turns the Necessity Certification into a "credit elsewhere" like test for PPP loan applicants. The updated guidance applies to <u>all</u> borrowers with sufficient alternative sources of liquidity. The April 23rd update to the PPP FAQs stated that "a public company with substantial market value and access to capital markets" likely <u>cannot</u> certify, in good faith, that the PPP Loan is "necessary," effectively implying that a public company's Necessity Certification will be strictly scrutinized, while the April 28th update suggested that a private company with adequate sources of liquidity would likely not be able to make this Necessity Certification. PPP IFR 4 strongly suggested that a private equity-backed borrower's Necessity Certification would be subject to some form of heightened scrutiny.

Necessity Certification Safe Harbor. PPP IFR 4, as modified by PPP IFR 8, clarifies that any borrower that obtained a PPP Loan prior to April 24, 2020 that repays that loan in full by or before May 14, 2020 will be deemed to have made the Necessity Certification in good faith. <u>**Note**</u>: on May 13, 2020, the SBA indicated that this repayment safe harbor date will be extended again until May 18, 2020. Further, on May 13, 2020, the SBA announced in Answer 46 to PPP FAQs, that "any borrower that, together with its affiliates [(but solely to the extent aggregation of affiliates is required by PPP IFR 2)], received PPP Loans with an original principal amount of less than $2 million will be deemed to have made the [Necessity Certification] in good faith." Answer 46 also implies that, absent additional circumstances, such borrowers will likely <u>not</u> be subject to an SBA audit or enforcement action (see below). We expect that this safe harbor will be formalized in a new PPP IFR shortly. Subject to any changes in the language in the PPP IFR ultimately promulgated on this point, for companies taking less than

[31] <u>**Note**</u>: On May 5, 2020, the SBA issued a new FAQ that stated: for the purposes of the PPP's 500 or fewer employee size standard, an applicant must count all of its employees and the employees of its US and foreign affiliates." In PPP IFR 12, the SBA claims that this FAQ resolved all ambiguity on the 500-employee threshold and foreign affiliates, hence the reason for the May 5th cut-off of this particular safe harbor. While the lack of the "principal place of residence element" was certainly conspicuous in that FAQ update, we noted at the time that FAQs do not override the PPP IFRs and that the rules remained ambiguous on this point.

$2 million in PPP Loans, this safe harbor appears to trump the SBA's previous guidance on consideration of alternative sources of liquidity.[32]

(iii) ***SBA Audit***. In Answers 39 and 46 to the PPP FAQs, the SBA has maintained that borrowers taking in excess of $2 million in PPP Loans may still be able to satisfy the Necessity Certification. **However**, the SBA stated that "it will review all [PPP Loans] in excess of $2 million,[33] in addition to other [PPP Loans] as appropriate."[34] Based on a plain reading of the PPP FAQs, an audit would be required even if the borrower is only seeking partial forgiveness on such PPP Loan(s).

In Answer 46, the SBA clarified that (1) if it determines that a borrower (or group of affiliated borrowers) lacked an adequate basis for the Necessity Certification(s), the borrower(s) will have to repay the full outstanding PPP Loan balance and such balance will not be eligible for forgiveness, and (2) if the borrower(s) repay the PPP Loan(s), the SBA will **not** pursue administrative action against such borrower(s) on the Necessity Certification (or refer the action to other agencies). **Note**: this safe harbor is limited to the Necessity Certification and, even then, does not preclude whistleblowers from bringing actions under the False Claims Act (though the government would be unlikely to intervene in any such action).

Note: beyond the Necessity Certification, PPP IFR 15 makes clear that the SBA may, at any time, and in its sole discretion, review any PPP Loan (regardless of size) for borrower eligibility, loan amount and loan forgiveness. If the SBA determines that the borrower was not eligible for the PPP Loan at all or is not eligible for the initial proceeds or the claimed forgiveness amount, the SBA will direct the lender to deny the forgiveness application in whole or in part, as applicable. Borrowers may appeal SBA ineligibility decisions, though we are awaiting an additional PPP IFR on this appear procedure.

2. Economic Injury Disaster Loan Program

In lieu of (or in addition to) a PPP Loan, a portfolio company may be eligible to receive an EID Grant and an EID Loan.

(a) **Qualifying Borrowers**. Any business concern with not more than 500 employees located in a declared disaster area (which, as of March 13, 2020, includes all states, tribes, territories and the District of Columbia) is eligible to apply for an EID Loan and an EID Grant as an advance thereon. EID Loan applicants are subject to the same broad affiliation rules as are PPP Loan applicants.

Note: unlike the PPP Loan program, the CARES Act does not provide any waiver of the SBA affiliation rules. Thus, it is even less likely that a venture capital- or private equity-backed portfolio company will qualify for these EID Loans.

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[32] Indeed, the SBA stated in Answer 46 that the safe harbor is based on the notion that "borrowers with loans [below $2 million] are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger [PPP Loans]."

[33] Based on Answer 46, this $2 million threshold will likely be considered on an aggregate basis across all affiliated borrowers, and not on an individual PPP Loan basis.

[34] **Note**: Answer 39 indicated that audits would be triggered upon the lender's submission for loan forgiveness. Answer 46, however, flatly stated that PPP loans in excess of $2 million (and others as appropriate) will be subject to audit, suggesting that PPP Loans could be audited even if the borrower does not seek forgiveness. Further, as discussed below, PPP IFR makes clear that the SBA may review borrower eligibility, loan amount and loan forgiveness at any time and in its sole discretion.

(b) **Permitted Uses**. EID Loan proceeds are to be used by borrowers to cover payroll obligations and other working capital needs or normal business operating expenses. A notable usage permitted for EID Loans (but not for PPP Loans) is meeting the borrowers' increased costs due to supply chain interruption.

(c) **EID Loan Size; Terms**. Terms and conditions of EID Loans vary. EID Loan amounts are based on actual harm suffered, up to a maximum amount of $2 million. EID Loans can feature up to 30-year terms, and interest rates may not exceed 3.75% per annum for small businesses or 2.75% per annum fixed for nonprofit organizations. The CARES Act eliminated the need for personal guarantees for EID Loans up to $200,000, but for any loan in excess of that amount, each principal owning in excess of 20% of the borrower's equity must provide a personal guarantee. The CARES Act also waived the credit elsewhere requirement and the requirement that the borrower be in business for the one-year period before the applicable disaster (so long as the borrower was in business prior to January 31, 2020). Borrowers must provide collateral for all EID Loans over $25,000.

(d) **EID Grants**. Borrowers that self-certify as eligible can apply for an EID Grant (in an amount up to $10,000) as an advance on the EID Loan, to be provided within three days after receipt of such borrowers applications. These advances can be applied to any of the allowable purposes described above. If an applicant receives an EID Grant and is subsequently denied an EID Loan, such applicant need not repay the EID Grant.

(e) **Interplay with PPP Loans**. The CARES Act allows a borrower who already has applied, or is in the process of applying, for an EID Loan to apply for a PPP Loan if it will not duplicate the borrower's use of the EID Loan. Further, if a borrower received a EID Loan related to Covid-19 between January 31, 2020 and April 3, 2020, then the borrower may refinance that EID Loan into the PPP Loan for loan forgiveness purposes, it being understood that any portions of such EID Loan that do not meet the loan forgiveness requirements outlined above will remain a loan (but subject to the terms of the PPP Loan). **Note**: if the EID Loan was used to cover payroll costs, the PPP Loan must be used to refinance the EID Loan. If the borrower took out a PPP Loan and took advantage of an EID Grant, the amount of such EID Grant would be subtracted from the amount forgiven in respect of the PPP Loan.

(f) **Application, Timing**. As and when additional appropriations are made for the EID Program, interested companies can access the streamlined EID Loan for Covid-19 relief here. Expanded eligibility for these EID Loans will sunset after December 31, 2020.

Note: the EID Loan application will include its own certifications, and applicants thereunder should be mindful of the FCA-related concerns as described above in Section 1(f) of this Alert.

3. Coronavirus Economic Stabilization Act

CESA, as set out in Title IV of the CARES Act, appropriates an additional $500 billion in Covid-19-related economic relief. Of this $500 billion, $46 billion is earmarked for airlines national security businesses (collectively, the **CESA (b)(1)-(3) Facilities**).[35] The remaining $454 billion (plus any unused portion of the $46 billion designated for airlines and national security businesses) (collectively, the **CESA (b)(4) Appropriations**) must be invested in Federal Reserve emergency

[35] Specifically, $25 billion is designated for air carriers and businesses connected to the air transport industry (such as inspectors, ticket agents, and repair services); $4 billion is designated for cargo air carriers; and $17 billion is designated for businesses critical to national security.

facilities supporting US businesses, states, and municipalities (each, a **CESA (b)(4) Facility**, and any loan provided thereunder, a **CESA (b)(4) Loan**).

The CARES Act provides certain eligibility requirements and operational restrictions that must be incorporated in *all* CESA (b)(4) Facilities. However, as illustrated by the Main Street Lending Program (discussed below), each CESA (b)(4) Facility will likely establish additional eligibility requirements and/or operational restrictions, the details of which are subject to further guidance, implementation and rule-making.

(a) **Eligible Businesses**. A business concern is eligible to participate in a CESA (b)(4) Facility if it (i) is created and organized in the US or under the laws of the US, (ii) has significant operations in the US, (iii) has a majority of its employees located in the US and (iv) has not otherwise received adequate economic relief under the CARES Act.

The CARES Act does not exclude an otherwise eligible US business from participating in a CESA (b)(4) Facility if it is owned or operated by foreign entities or individuals. Thus, US-incorporated subsidiaries and portfolio companies may be eligible for a CESA (b)(4) Loan. Any such applicant should consider the extent to which it operates outside the US and/or relies on employees that are based outside the US.

(b) **Terms, Restrictions**. The CARES Act gives the Treasury Secretary broad discretion over the form and terms CESA (b)(4) Loans, but applicable requirements under Section 13(3) of the Federal Reserve Act related to collateralization, taxpayer protection and borrower solvency will still apply to *all* CESA (b)(4) Loans.

Unlike the PPP Loans, no portion of the principal amount of a CESA (b)(4) Loan, including any CESA Mid-Sized Loan, will be forgivable.

Further, the following restrictions will apply to every borrower that receives a direct CESA (b)(4) Loan (collectively, the **CESA (b)(4) Direct Loan Restrictions**):

- the borrower may not pay dividends or other capital distributions while the CESA (b)(4) Loan is outstanding and for 12 months thereafter;
- the borrower may not repurchase listed stock of the borrower or any parent company while a CESA (b)(4) Loan is outstanding and for 12 months thereafter (except under contractual obligations in effect on March 27, 2020); and
- the borrower must agree to the following employee compensation caps for a period ending 12 months after the CESA (b)(4) Loan is repaid (where compensation includes salary, stock and bonuses): (i) any officer or employee whose 2019 annual compensation exceeded $425,000 cannot receive compensation in excess of their 2019 compensation in any consecutive 12-month period or severance pay in excess or twice their 2019 compensation, and (ii) any officer or employee whose 2019 annual compensation exceeded $3 million cannot receive total compensation in excess of an amount equal to $3 million plus 50% of the excess over $3 million.

Note: On April 23, 2020, the Federal Reserve announced that it would be publishing, on a monthly basis, the following information on each of the CESA (b)(4) Facilities (including the Main Street Lending Program and the PMCCF): (1) names and details of participants, (2) amounts borrowed and interest charged thereon, and (3) overall costs, revenues, and fees charged. The Federal Reserve may publish additional details. Given the public

criticism following the initial disbursement of PPP Loans, any prospective CESA (b)(4) Loan borrower should consider the impact, if any, of such a loan being made public.

(c) **Mid-Sized Business Loan Program**. As part of the CESA (b)(4) Appropriations, the Treasury Secretary must "seek the implementation" of a CESA (b)(4) Facility that provides financing to bank and non-bank lenders that make direct loans to mid-sized businesses (including nonprofits) with between 500 and 10,000 employees (the **CESA Mid-Sized Loan Program** and any such loan thereunder, a **CESA Mid-Sized Loan**). The CARES Act requires that any CESA Mid-Sized Loan feature annualized interest rates no higher than 2% per annum, with no principal or interest due for the first six months. The CARES Act also requires that any CESA Mid-Sized Loan borrower make the following good faith certifications:

- the loan is necessary for ongoing operations of the borrower in light of uncertain economic conditions as of the application date;
- any proceeds will be used to retain at least 90% of the borrower's workforce until September 30, 2020;
- the borrower intends to restore not less than 90% of its workforce that existed on February 1, 2020, no later than four months after the declared public health emergency in respect of Covid-19 is terminated;
- the borrower is domiciled in the US, with significant operations and employees in the US;
- the borrower is not in bankruptcy;
- the borrower will not pay dividends with respect to common stock, or repurchase listed stock of the borrower or any parent company during the term of the loan (except under contractual obligations in effect on March 27, 2020);[36]
- the borrower will not outsource or offshore jobs for the term of the loan and two years after completing repayment;
- the borrower will not abrogate existing collective bargaining agreements during the term of the loan and two years after completing repayment; and
- the borrower will remain neutral in any union organizing effort for the term of the loan.

Note: CESA Mid-Sized Loan applicants should be mindful of the same FCA-related concerns as described above in Section 1(f) of this Alert.

The CARES Act does not affirmatively require the establishment of the CESA Mid-Sized Loan Program, and it is possible that the Federal Reserve relies solely on the Main Street Lending Program described below to provide relief to mid-sized businesses. If and to the extent the CESA Mid-Sized Loan Program is implemented, the Federal Reserve may establish further eligibility requirements and operating restrictions.

[36] **Note**: This certification does not align with the share buyback and dividend restrictions set forth in the CESA (b)(4) Direct Loan Restrictions, in that (1) it is limited to the term of the loan (as opposed to 12 months after the term) and (2) expands the contractual obligation exception to include share buybacks and dividends (as opposed to just share buybacks).

We will be closely monitoring developments related to CESA (b)(4) Appropriations, including the CESA Mid-Sized Loan Program, and will provide updated guidance when more information becomes available.

4. Main Street Lending Program

Among the measures announced by the Federal Reserve on April 9, 2020, the Federal Reserve announced the Main Street Lending Program, which leverages $75 billion of CESA (b)(4) Appropriations, and will provide up to $600 billion in Main Street Loans to eligible borrowers.[37] Note that the Main Street Lending Program is a CESA (b)(4) Facility, but is independent of the CESA Mid-Sized Loan Program.

Following a public comment period, during which the Federal Reserved received more than 2,200 comment letters from individuals, businesses, non-profits and various industry groups, on April 30, 2020, the Federal Reserve released revised term sheets for the MSNLF and the MSELF and introduced for the first time the MSPLF. The Federal Reserve made these changes with the goal of expanding the loan options available to businesses and expanding the number of businesses eligible to borrow under the Main Street Loan Program.[38] On June 8, 2020, the Federal Reserve further revised the terms sheet for the MSNLF, MSELF and MSPLF. These changes aim to allow more small and medium-sized businesses to be able to receive support.[39]

The Main Street Lending Program is comprised of three credit facilities (together, the **Main Street Facilities**): (1) the MSNLF and the (2) MSPLF, each of which will facilitate Main Street Loans originated after April 24, 2020; and (3) the MSELF, which will facilitate the upsizing of certain term loans or revolving credit facilities originated on or before April 24, 2020, where the upsized portion constitutes the Main Street Loan. As noted below, the Main Street Facilities will share an SPV and many of the same features. The MSELF is only available to borrowers that have existing facilities with banks, though the terms required by the MSELF may require amendments of such existing facilities before the MSELF may be implemented. The MSNLF and the MSPLF will likely be used by borrowers that either have no existing credit facilities or are unable to amend their existing credit facilities to properly participate in the MSELF.[40] A borrower that participates under one Main Street Facility may not also participate under another Main Street Facility, so it will be relevant when considering one's participation to determine the need for any amendments to existing facilities and the likelihood of obtaining such amendments.

The Federal Reserve has published a term sheet in relation to each of the Main Street Facilities also has also released application materials, form borrower and lender certifications and covenants and the form loan participation agreement relating to the sale of participations to the Fed SPV, among other documentation relating to the MSLP. These documents can be accessed on the website of the Federal Reserve Bank of Boston. On June 15, 2020, the Federal Reserve announced the launch of the Lender Registration portal where eligible lenders can register and submit required information. The Federal Reserve has not yet started purchasing participations or announced a date on which it will do so. As a result, be advised that the Main Street Lending Program is generally subject to further modifications and the release of additional guidance.

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[37] See Federal Reserve: $2.3 Trillion Loan Package (April 9, 2020). Other programs announced include: (1) an expansion of the size and scope of the PMCCF (discussed in Section 5 of this Alert) and the Secondary Market Corporate Credit Facilities (**SMCCF**) and the Term Asset-Backed Securities Loan Facility (**TALF**) to provide a combined $850 billion in credit (backed by $85 billion in Treasury credit protection, none of which appears to include CESA (b)(4) Appropriations) and (2) establishment of a $500 billion Municipal Liquidity Facility (backed by $35 billion in CESA (b)(4) Appropriations).

[38] See Federal Reserve Board announces it is expanding the scope and eligibility for the Main Street Lending Program (April 30, 2020).

[39] See Federal Reserve Board expands its Main Street Lending Program to allow more small and medium-sized business to be able to receive support (June 8, 2020).

[40] The MSLP FAQs note that if an eligible lender is making a Main Street Loan to a new customer, such lender should follow its normal policies and procedures for originating a loan to a new customer, including Know Your Customer procedures.

(a) **Program Mechanics; Participation Details**. Under the Main Street Facilities, the Federal Reserve will establish and commit to lend on a recourse basis to the Fed SPV. The Treasury will make a $75 billion equity investment (using CESA (b)(4) Appropriations) into the Fed SPV, which will be leveraged to purchase a specified participation in Main Street Loans, up to $600 billion, with each lender required to retain the remaining portion of each Main Street Loan. The sale of a participation of each Main Street Loan to the Fed SPV will be structured as a "true sale" and must be completed expeditiously after the origination of the eligible loan. Other than the Main Street Lending Program's size and time limitations, there is no limit on the amount of participations that the Fed SPV can purchase from a single eligible lender.

The details of the participations under each of the Main Street Facilities are outlined below and in each case, the Fed SPV and the eligible lender will share risk in the eligible loan on a *pari passu* basis.

MSNLF: The Fed SPV will purchase a 95% participation in each Main Street Loan and the lender will retain a 5% participation therein until such loan matures or until neither the Fed SPV nor a Governmental Assignee[41] holds an interest in such loan in any capacity, whichever comes first.

MSPLF: The Fed SPV will purchase a 95% participation in the Main Street Loan and the lender will retain 5% therein until such loan matures or until the time when neither the Fed SPV nor a Governmental Assignee holds an interest in such loan in any capacity, whichever comes first.[42]

MSELF: The Fed SPV will purchase a 95% participation in the Main Street Loan and the lender will retain a 5% participation therein until the Main Street Loan (being the upsized tranche) matures or until neither the Fed SPV or a Governmental Assignee holds an interest in such loan in any capacity, whichever comes first. The lender must also retain its interest in the underlying eligible loan until the first to occur of the following: (i) the maturity of the underlying eligible loan, (ii) the maturity of the upsized Main Street Loan, or (iii) the time when neither the Fed SPV nor a Governmental Assignee holds an interest in the Main Street Loan in any capacity.

Under the terms and conditions Loan Participation Agreement released by the Federal Reserve, the Fed SPV is generally permitted to sell its participation or to elevate its participation into an actual assignment only with the contemporaneous consent of the eligible lender, eligible borrower, or other necessary parties, as applicable. Under certain scenarios set out the terms of the Loan Participation Agreement, the Fed SPV may, sell, transfer or elevate into an assignment its participation without contemporaneous consent (e.g. to a Governmental Assignee, if the eligible borrower misses a due payment on its Main Street Loan (beyond any applicable grace period), or if the borrower or lender has become the subject of bankruptcy proceedings).

The MSLP FAQs address further details regarding the Fed SPV's participation in each Main Street Loan, including the role the Fed SPV will play in the event an eligible borrower enters distress, voting rights and decision making by the Fed SPV, and the waiver of the Fed SPV of any special administrative priority under the Bankruptcy Code for any claims against eligible borrowers in bankruptcy proceedings.

[41] As defined in the terms and conditions of the Loan Participation Agreement released by the Federal Reserve.
[42] This reflects a number of changes announced on June 8, 2020 regarding the MSPLF participation purchase percentages.

(b) **No Forgiveness**. Unlike PPP Loans, no portion of the principal amount of any Main Street Loan will be forgivable.

(c) **Eligible Lenders.** Main Street Loans may only be made by US federally-insured depository institutions (including a bank, savings association, or credit union), US branches or agencies of foreign banks, US bank holding companies, US savings and loan holding companies, US intermediate holding companies of foreign banking organizations, or any US subsidiary of any of the foregoing.[43] Non-bank direct lenders are not currently eligible to participate in this Main Street Lending Program, though the Federal Reserve has stated that it may hereafter expand the list of eligible lenders. The Fed's revised term sheets leave ambiguity regarding the eligibility of certain affiliates of non-U.S. financial institutions.

(d) **Eligible Upsized Tranches under the MSELF**. The MSELF allows an eligible borrower to upsize an eligible term loan or revolving credit facility that was originated by an eligible lender (or lenders) before April 24, 2020 and that has a remaining maturity of at least 18 months (taking into account any adjustments made to the maturity of the loan after April 24, 2020, including at the time of the upsizing).[44]

The MSELF term sheet clarifies that a multi-lender facility, in which non-eligible lenders participated, is eligible to be upsized under the MSELF, but that the eligible lender of the Main Street Loan must be one of the lenders that holds an interest in the underlying loan at the date of upsizing. Only the lender of the Main Street Loan – and not the other lenders in the original syndicate – is required to meet the eligible lender criteria under the MSELF. The eligible lender is not permitted to share its 5% retention of the Main Street Loan with other members of a multi-lender facility. Additionally, the eligible lender of the upsized Main Street Loan need not be the lender that originated the underlying loan, provided that the eligible lender had purchased the interest in the underlying loan as of December 31, 2019.

(e) **Eligible Borrowers**. Based on the term sheets for the Main Street Facilities, a borrower will be eligible for a Main Street Loan if it is a "Business"[45] that (1) is not an "Ineligible Business,"[46] (2) was established prior to March 13, 2020, (3) is created or organized in the US or under the laws of the US, (4) has significant operations in the US[47], (5) has a majority of its employees based in the US, (6) has no more than (x) 15,000 employees or (y) $5 billion in 2019 annual revenues, (7) has not participated in another Main Street Facility or in the PMCCF and (8) has not received specific support from any of the CESA (b)(1)-(3) Facilities. Borrowers must also be able to make certain certifications in

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[43] The Federal Reserve added U.S. branches of foreign banks and agencies of foreign banks to the scope of eligible lenders in its April 30, 2020 revisions to the Main Street Lending Program.

[44] The MSLP FAQs confirm that if an existing multi-lender credit facility does not have an "opening" or "accordion" clause, such facility can still be eligible for upsizing under the MSELF if the underlying credit agreement(s) are amended as needed to comply with the requirements set out in the MSELF term sheet.

[45] For purposes of the Main Street Lending Program, a "Business" is an entity that is 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% participation by foreign business entities; or a tribal business concern. The Main Street Facility term sheets indicate that the Federal Reserve may consider including other forms of organization as a Business under the Main Street Lending Program in its discretion.

[46] "Ineligible Businesses" are those listed in 13 CFR 120.110(b)-(j), (m)-(s) (as modified in connection with the PPP). See Section 1(a) of this Alert. The Federal Reserve has indicated that it may modify the list of "Ineligible Businesses." The MSLP FAQs confirm, that as is the case under the PPP, private equity funds are considered to be engaged in investment or speculation, and are therefore not eligible to borrow under the MSLP. Portfolio companies of private equity funds are eligible to participate in the MSLP, subject to the application of the affiliation rules and the other terms of the MSLP.

[47] The MSLP FAQs clarify that a Business has "significant operations in the US" if, on a consolidated basis with its subsidiaries (but not its parent or sister affiliates), greater than 50% of the Business's (i) assets are located in the US, (ii) annual net income is generated in the US, (iii) annual net operating revenues are generated in the US, or (iv) annual consolidated operating expenses (excluding interest expense and any other expenses associated with debt service) are generated in the US.

connection with a Main Street Loan (see below) in order to be eligible to apply for a Main Street Loan.

(i) **Affiliation**. The MSLP FAQs make it clear that the SBA's affiliation rules will apply to Main Street Loans, though neither the limited waivers of affiliation rules for PPP Loans set forth in the CARES Act (i.e., the Hospitality Exception) nor the PPP IFRs apply. Thus, a potential borrower must aggregate its employees and 2019 revenues with those of its affiliated entities when assessing eligibility under any of the Main Street Facilities. As described in Section 1(a)(iv) of this Alert, affiliation under the SBA rules is premised on the power to control another entity (even when not exercised). The MSLP FAQs state that an affiliated group of companies can participate in only one Main Street Facility or the PMCCF. If an affiliate of an eligible business has previously participated in or has a pending application to participate in a Main Street Facility, that eligible business can only participate in the MSLP by using the same Main Street Facility. In no event may an affiliated group's total participation in a single Main Street Facility exceed the maximum loan size that the affiliated group is eligible to receive on a consolidated basis.[48]

***Employee Calculation*.** When counting employees (and employees of affiliates), potential borrowers under the Main Street Loan Program should count as employees all full-time, part-time, seasonal, or otherwise employed persons (excluding volunteers and independent contractors) based on the average of the total number of persons employed by the borrower and its affiliates for each pay period over the 12 months prior to the origination or upsizing of the Main Street Loan. The SBA affiliation rules indicate that when determining the amount of a business's employees, the SBA counts the employees of all of such business's affiliates, both foreign and domestic, but the neither the MSLP FAQs nor the Main Street Facilities' term sheets address this point specifically.

2019 Revenue Calculation. To determine 2019 annual revenue (and 2019 revenue of affiliates), potential borrowers may use one of the following methods: (i) using annual revenue (and that of its affiliates) per its GAAP audited financial statements, or (ii) using its (and its affiliates) annual receipts for the fiscal year 2019, as reported to the Internal Revenue Service.[49]

Foreign Owners and Operators. Though not explicitly addressed in the term sheets, the MSLP FAQs confirm that a US-organized subsidiary of a foreign company is eligible to participate in the MSLP, provided that the borrower on a consolidated basis has significant operations in and a majority of its employees based in the US. An eligible borrower that is a subsidiary of a foreign company must use the proceeds of the Main Street Loan only for the benefit of itself, its consolidated US subsidiaries and other affiliates of the eligible borrower that are US businesses and may not use such proceeds for the benefit of its foreign parent(s), affiliates or subsidiaries. It should also be noted that if a prospective borrower is a joint venture, such joint venture is not an eligible borrower under the MSLP if it is more than 49% owned by foreign persons.

(ii) **Interplay with Other Relief Programs**. Main Street Loans are available to eligible borrowers in addition to PPP Loans (provided that any such borrower satisfies the eligibility requirements for each such loan). **Note**: neither the

[48] As a result of this, any eligible borrower's maximum Main Street Loan size is limited by its own leverage, the leverage level of the affiliated group on a consolidated basis, and the size of any Main Street Loan extended to other affiliates in the group.
[49] "Receipts" has the same meaning as used by the SBA.

Treasury nor the Federal Reserve has clarified (i) how a borrower that has received a PPP Loan can demonstrate the inadequacy of the economic relief provided by such PPP Loan (as required by CESA), or (ii) whether and to what extent a borrower's eligibility for a Main Street Loan impacts such borrower's ability to make the Necessity Certification (as discussed in Section 1(f) of this Alert). As noted above, a Main Street Loan borrower may not also participate in multiple Main Street Facilities or in the PMCCF. Per the MSLP FAQs, a single eligible borrower is permitted to receive more than one loan under a single Main Street Facility, provided that aggregate loans do not exceed $25 million under the MSNLF or MSPLF, or $200 million under the MSELF.

(f) **Main Street Loan Terms**.

(i) **Maturity; Deferral of Principal and Interest; Interest Rate**. All three Main Street Loans will feature five-year maturities, deferred principal payments for two years and deferred interest payment obligations for one year (with any unpaid interest being capitalized), adjustable interest rates equal to LIBOR (one- or three-month) plus 300 basis points[50], and will be prepayable without penalty.

The foregoing mandated maturity, interest rate and deferment may pose issues for an MSELF applicant seeking to upsize its existing facility. Where such facility matures after the five-year period, borrowers will need to assess whether a new loan with a shorter maturity or a shorter weighted average life to maturity will trip the facility's accordion (or incremental) provision or most favored nation provision. Similarly, borrowers should consider whether the interest rate will trigger the facility's most favored nation provision.

(ii) **Collateral**. Loans under the Main Street Lending Program may be secured or unsecured. An upsized tranche under the MSELF must be secured if the underlying loan is secured, with any collateral securing the underlying loan (at the time of upsizing or any later date) securing the MSELF upsized tranche participation on a *pari passu* basis.[51] It is possible that lenders will, as a condition of upsizing an existing loan into a Main Street Loan under MSELF, require additional collateral. Borrowers applying for the MSELF program will need to assess whether their existing facilities have available basket capacity for *pari passu* secured loans and whether any additional collateral will be required to be shared with existing lenders.

(iii) **Amortization Profile**. As stated above, no principal will be paid on a Main Street loan during the first 24 months of the loan term. Under each program, a loan will be amortized over the remaining three years of the loan, with 15% of the principal due at the end of each of years three and four, and a balloon payment of 70% due at maturity at the end of year five.

[50] Note that in the April 30, 2020 Main Street Lending Program Term Sheets, the applicable reference rate was changed from the Secured Overnight Financing Rate (SOFR) to LIBOR in response to public comments questioning the practicality of a quick transition to SOFR, a relatively new reference rate, amidst the Covid-19 pandemic. In light of the market transition away from LIBOR, the MSLP FAQs advise, consistent with the recommendations of the Alternative Reference Rates Committee, that lenders and borrowers should include fallback contract language in loan documentation should LIBOR become unavailable during the term of the Main Street Loan.
[51] The MSLP FAQs clarify that if the borrower defaults, the Fed SPV and lender(s) under the Main Street would share equally in the collateral relative to their proportional interests.

(iv) **Interaction with Borrower's Existing Debt**. The terms of each Main Street Facility differ as to how the Main Street Loan must rank vis-à-vis the borrower's existing outstanding indebtedness.

<u>MSNLF</u>: A MSNLF loan must not be, at the time of origination, or at any time during the term of the eligible loan, contractually subordinated in terms of priority to any of the borrower's other loans or debt instruments. This means that an MSNLF loan may not be junior in priority in bankruptcy to the borrower's other unsecured debt or loan instruments,[52] but the MSLP FAQs make it clear that the lender is permitted to issue a secured MSNLF loan (including a second lien or other capacity) or an unsecured loan (regardless of the term or secured/unsecured status of the borrower's existing indebtedness) and that the borrower is not prevented from taking on new secured or unsecured debt after receiving an MSNLF loan, provided the new debt would not have higher contractual priority in bankruptcy than the MSNLF loan. Borrowers with existing facilities will need to consider whether there is sufficient basket capacity for such MSNLF loans, as well as whether incurring such loans will impact leverage or other financial covenants.

<u>MSPLF</u>: At the time of origination and at all times thereafter, MSPLF loans must rank senior to or *pari passu* with, in terms of priority and security, the borrower's other loans or debt instruments, other than mortgage debt. Borrowers may, *at the time of origination* of the loan, refinance existing debt owed by the borrower to a lender that is not the Main Street Loan lender. The ability to refinance is an important consideration as in order for a MSPLF loan to rank senior to other loans, often the consent of all existing lenders under the potentially subordinated existing credit facility will be required. After origination and until the MSPLF loan is repaid in full, the eligible borrower must refrain from repaying the principal balance of, or any interest on, any debt other than the MSPLF, unless the debt or interest payment is mandatory or due. If secured, the MSPLF loan must have a Collateral Coverage Ratio at the time of its origination that is (i) at least 200% or (ii) not less than the aggregate Collateral Coverage Ratio for all of the Borrower's other secured Loans or Debt instruments (other than Mortgage Debt).[53]

<u>MSELF</u>: At the time of the eligible loan upsizing and at all times thereafter, the upsized tranche must be senior to or *pari passu* with, in terms of priority and security, the borrower's other loans or debt instruments, other than mortgage debt.

(v) **Fees**. Main Street Program lenders will pay a transaction fee to the Fed SPV of 100 basis points of the principal amount of the MSNLF or MSPLF loan or 75 basis points of the principal amount of the upsized MSELF tranche, which fee the lender may elect to pass on to their borrowers. In addition, lenders have discretion to charge an origination fee of up to 100 basis points of the principal amount of the MSNLF or MSPLF loan or up to 75 basis points of the principal amount of the upsized tranche under the MSELF. Eligible lenders are not permitted to charge eligible borrowers any additional fees (including servicing fees), except de minimus fees for services that are customary and necessary for such lender's underwriting of commercial and industrial loans to similar borrowers, such as appraisal and legal fees.

[52] 52 For the avoidance of doubt, prohibitions on contractual subordination with respect to Main Street loans do not prevent the incurrence of obligations that have mandatory priority under the Bankruptcy Code or other insolvency laws that apply to entities generally.

[53] The Collateral Coverage Ratio equals (i) the aggregate value of any relevant collateral security, including the *pro rata* value of any shared collateral, divided by (ii) the outstanding aggregate principal amount of the relevant debt.

The Fed SPV will pay each participating lender 25 basis points of the principal amount of its participation per annum for loan servicing.

(g) **Main Street Loan Size**. The minimum and maximum loan sizes vary across the three Main Street Loan Facilities, as follows:

MSNLF: A loan under the MSNLF may range in size from $250,000 to $35 million, but may not exceed the lesser of (i) $35 million or (ii) an amount that, when added to the borrower's existing outstanding and undrawn available debt, does not exceed ***four times*** the borrower's 2019 adjusted EBITDA.

MSPLF: A loan under the MSNLF may range in size from $250,000 to $50 million, but may not exceed the lesser of (i) $50 million or (ii) an amount that, when added to the borrower's existing outstanding and undrawn available debt,[54] does not exceed ***six times*** the borrower's 2019 adjusted EBITDA.

MSELF: A loan under the MSELF may range in size from $10,000,000 to $300 million, but may not exceed the lesser of (i) $300 million or (ii) an amount that, when added to the borrower's existing outstanding and undrawn available debt, does not exceed ***six times*** the borrower's 2019 adjusted EBITDA.

EBITDA Adjustments. The MSLP FAQs clarify that lenders, when originating or upsizing Main Street Loans, may use the adjusted 2019 EBITDA of the borrower. Under the MSNLF and the MSPLF, 2019 EBITDA must be adjusted pursuant to the methodology such lender required the eligible borrower to use when previously extending credit to the borrower or to a similarly situated[55] borrower before April 24, 2020[56]. Under the MSELF, the lender must adjust 2019 EBITDA pursuant to the methodology used by the eligible borrower when the underlying loan was originated or amended on or before April 24, 2020. Note, however, that the existing methodology can only be used for determining EBITDA and does not apply to all aspects of existing leverage definitions. For example, where an existing facility provides for cash netting when determining leverage, a cash netting construct is not available for determining leverage under the MSELF.

Certain industry-appropriate and non-cash adjustments to a borrower's EBITDA will better approximate a business's true cash flow and earnings capacity over time (as opposed to unadjusted EBITDA), and the Federal Reserve's expansion of EBITDA to include such adjustments is expected to broaden the scope of businesses eligible to participate in the Main Street Lending Program.[57] However, the borrowing caps under each of the Main Street Facilities imposed by the foregoing leverage tests impose meaningful limitations on participation in the Main Street Lending Program by private equity-backed portfolio

[54] The MSPLF FAQs note that if an Eligible Borrower is using an MSPLF Loan to refinance debt it owes to a different lender, that debt should not be counted in its calculation of "existing and undrawn available debt." To the extent that such outstanding debt is only being partially refinanced by the Main Street loan, only the portion that is being refinanced may be excluded from the "existing outstanding and undrawn available debt" calculation. The Eligible Borrower must ensure that all such excluded debt is fully refinanced by the Main Street loan expeditiously.

[55] Similarly situated borrowers are borrowers in similar industries with comparable risk and size characteristics.

[56] The MSLP FAQs note that, where an eligible lender has used a range of EBITDA adjustment methodologies in the past with respect to a single eligible borrower or a similarly-situated borrower, the lender should choose the most conservative method it has employed. In all cases, the eligible lender must select a single method used at a point in time in the recent past and before April 24, 2020 and may not "cherry pick" or apply adjustments used at different points in time. The eligible lender should be able to document the rationale for its chosen methodology.

[57] The MSLP FAQs note that the Federal Reserve recognizes that creditworthiness of asset-backed borrowers, as a matter of practice, is not evaluated on the basis of EBITDA, and that the Federal Reserve and the Treasury Department will be evaluating the feasibility of adjusting the Main Street Loan metrics for such borrowers.

companies, among other highly-levered businesses. Further, early-stage companies with negative earnings will be ineligible for Main Street Loans.

(h) **Required Lender Certifications and Covenants**. Pursuant to the Main Street Facilities' term sheets, each eligible lender will be required to certify to the following:

- the lender must commit that it will not request that the borrower repay debt extended by the lender to the borrower, or pay interest on such outstanding obligations, until the Main Street Loan is repaid in full, unless the debt or interest payment is mandatory and due[58], or in the case of default and acceleration;

- the lender must commit that it will not cancel or reduce any existing committed lines of credit to the borrower, except in an event of default;[59]

- the lender must certify that the methodology used for calculating the borrower's adjusted 2019 EBITDA for the leverage requirement is the methodology it has previously required the eligible lender to use for adjusting EBITDA when extending credit to the borrower or, in the case of the MSNLF or MSPLF, to similarly-situated borrowers on or before April 24, 2020, as applicable; and

- The lender must certify that it is eligible to participate in the relevant Main Street Facility, including in light of the conflicts of interest prohibition in section 4019(b) of the CARES Act.[60]

(i) **Required Borrower Certifications; Restrictions**. Pursuant to the Main Street Facilities' term sheets, every applicant for a Main Street Loan must certify to the following eligibility requirements and operational restrictions:

- the borrower will refrain from repaying the principal balance of, or paying any interest on, any debt until the Main Street Loan is repaid in full, unless the debt or interest payment is mandatory and due (however, in the case of the MSPLF, the borrower may, at time of the origination of the Main Street Loan, refinance existing debt owed by the borrower to a lender than is not the Main Street Loan lender);

- the borrower will not seek to cancel or reduce any of its committed lines of credit with any of its lenders (including the Main Street Loan lender);[61]

- the borrower has a reasonable basis to believe that, as of the date of the origination or upsizing of the Main Street Loan, as applicable, and after giving

[58] With respect to debt that predates the Main Street Loan, principal and interest payments are "mandatory and due": on the future date upon which they were scheduled to be paid as of April 24, 2020 or upon the occurrence of an event that automatically triggers mandatory prepayments under a debt agreement executed by the eligible borrower prior to April 24, 2020 (except that such prepayments can only be paid if they are de minimus or under the MSPLF at the time of origination of an MSPLF loan.

[59] The MSLP FAQs clarify that this requirement does not prohibit the reduction or termination or expiration of uncommitted lines of credit, 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.

[60] This section of the CARES Act explicitly bars from receipt of loans, loan guarantees, or other investments, any company in which the President, Vice President, an executive department head, member of Congress, or any of such individual's spouse, child, son-in-law, or daughter-in-law owns over 20 percent of the outstanding voting stock. In making the conflicts of interest certification, Eligible Borrowers and Eligible Lenders must employ the level of diligence required to make the certification in good faith. The Main Street Program FAQs state that "in all cases, an Eligible Lender or Eligible Borrower must consider its actual knowledge, determine whether beneficial owners of any 5% or greater equity interest are Covered Individuals and, if necessary, ask the beneficial owners to confirm whether they are Covered Individuals."

[61] The MSLP FAQs clarify that the borrower certifications do not prevent an eligible borrower from repaying a line of credit (such as a credit card) in the normal course of business, from taking on and paying additional debt obligations required in the normal course of business (such as for inventory or equipment financing, provided that such debt is secured by such property and is lower priority than the Main Street Loan), or from refinancing debt that is maturing no later than 90 days from the date of such refinancing.

effect to such loan, 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;[62]

- the borrower will abide by the CESA (b)(4) Direct Loan Restrictions (as set forth in Section 3(b) of this Alert);[63] and
- the borrower is eligible to participate in the Main Street Lending Program, including the borrower's satisfaction of the conflicts-of-interest requirements of section 4019 of the CARES Act.

In addition, the borrower should make "commercially reasonable efforts"[64] to maintain its payroll and retain its employees during the time the Main Street Loan is outstanding.

The Federal Reserve has indicated that the Main Street Lending Program is intended to support businesses that "were in sound financial condition before the onset of the Covid-19 pandemic." Neither the Main Street Facilities' term sheets, FAQs nor any Federal Reserve press releases provide any explicit standards to assess this qualification, and it is not clear whether the bankruptcy certification (listed above) is intended to address this "sound financial condition" in satisfaction of the terms of Federal Reserve Act (or if any further certifications or conditions will be required). The Main Street Facilities' term sheets do, however, provide the following condition to receiving a Main Street Loan: if a borrower had an existing loan with the eligible lender as of December 31, 2019, then such loan (or, in the case of the MSELF, the underlying loan being upsized) must have had, as of December 31, 2019, an internal risk rating equivalent to a "pass" in the Federal Financial Institutions Examinations Council's supervisory rating system.

In addition, as described below, lenders are expected to conduct an assessment of each potential borrower's financial condition at the time of the borrower's application to determine whether and to what extent the Main Street Loan is approved.

Note: In respect of the foregoing attestation requirements, Main Street Loan applicants should be mindful of the same FCA-related concerns as described above in Section 1(f) of this Alert.

(i) **Lender's Role in Verifying Borrower Certifications and Covenants.** As clarified in the MSLP FAQs, lenders are permitted to rely on a borrower's certifications and covenants, as well as any subsequent self-reporting by the borrower. A lender is required to collect the required certifications and covenants from each borrower at the time of origination or upsizing of the Main Street Loan, but such lender is not expected to independently verify the borrower's certifications or actively monitor ongoing compliance with covenants. Lenders should contact FRB Boston, as administrator of the Main Street Loan Program, if

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[62] Under Section 13(3) of the Federal Reserve Act, the Federal Reserve is prohibited from using its emergency lending authority to lend to insolvent borrowers. Federal Reserve regulations define an entity as insolvent if (x) it is in bankruptcy (or similar proceedings), (y) it is not paying its undisputed debts when due during the 90-day period preceding its participation in the emergency lending program, or (z) the Federal Reserve otherwise determines it to be insolvent (i.e., based on recent audited financial statements or other relevant documentation).

[63] Recall that the CESA Direct Loan Restrictions (x) on share repurchases apply only to publicly-traded securities and (y) on dividends and capital distributions apply only to the borrower's common stock. The MSLP FAQs clarify an exception for any eligible borrower that is an S-corporation or other tax pass-through entity to permit distributions to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings.

[64] The Main Street Lending Program FAQs clarify that "commercially reasonably efforts" mean that a 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. The MSLFP FAQs clarify that borrowers that have already laid-off or furloughed workers as a result of the disruptions from COVID-19 are eligible to apply for Main Street loans.

such lender becomes aware that a borrower has made a material misstatement or otherwise breached a covenant during the term of the Main Street Loan.

(j) **Loan Documentation; Additional Borrower Information; Loan Funding**.

Borrowers do not automatically qualify for a Main Street Loan upon meeting the minimum criteria for such eligibility set out in the Main Street Facility term sheets, and, upon qualifying, may not receive the maximum allowable amount described in the Main Street Facilities' term sheets. Lenders are expected to conduct an assessment of each potential borrower's financial condition at the time of the potential borrower's application, and will apply their own underwriting standards in evaluating the financial condition and creditworthiness of a potential borrower. A lender may require additional information and documentation beyond what is required by the Main Street Lending Program in making its evaluation, and will ultimately determine whether and to what extent the borrower is approved for a Main Street Loan.

The Federal Reserve is not providing form loan documentation for the MSLP and each participating lender is expected use its own loan documentation in relation to Main Street Loans. Any documentation used for a Main Street Loan should be substantially similar, including with respect to required covenants, to the loan documentation that such lender uses in the its ordinary course lending to a similarly situated borrower, with relevant adjustments only as appropriate to meet MSLP requirements. The Federal Reserve has released, among other materials, a checklist of provisions that are required to be reflected in MSLP loan documentation in order for the Fed SPV to purchase its participation interest, including model covenants for lender reference when drafting loan documentation in order to satisfy the items required in such checklist.[65] Such required covenants include, among other things:

- a mandatory prepayment of the Main Street Loan in connection with a material misstatement in borrower certifications or a material breach of covenants (as determined by the Fed's Board of Governors) relating to the CARES Act and the Federal Reserve Act, among other applicable regulations.
- a cross-acceleration triggered by an event of default under a Main Street Loan if a different loan extended to the eligible borrower by the eligible lender (or a commonly controlled affiliated of such lender) is accelerated.
- required delivery by eligible borrowers of quarterly and annual financial information and calculations, detailed in Appendix C of the MSLP FAQs.

Borrowers should review all existing debt and equity agreements and other commercial contracts to ensure that any debt incurrence under the Main Street Lending Program does not cause a default or a violation of any debt, lien or financial covenants under such contracts.

Once the MSLP is operational, eligible lender shave two options for funding loans under the MSLP. Eligible lenders may (i) to commit and pre-fund Main Street Loans and then seek to sell participation in such loans to the Fed SPV by submitting all required documentation within 14 days of the closing or (ii) extend a Main Street Loan to an eligible

[65] This information is contained in the appendices to the MSLP FAQs.

borrower but condition the funding of such a loan on a binding commitment from the Fed SPV that it will purchase a participation in the Main Street Loan.[66]

(k) **Timing.** On June 15, 2020, the Fed opened the Lender Registration portal. Eligible lenders will use the portal to register and submit required information. The Fed indicated that they will begin purchasing participations through the lender portal soon.[67]

The Main Street Lending Program will **cease participations on September 30, 2020** unless extended by the Treasury and Federal Reserve. The Federal Reserve will provide periodic reports on the size of the MSLP and its remaining capacity.

As noted in Section 3(b) of this Alert, the Federal Reserve will be regularly publishing information regarding the Main Street Lending Program, including information regarding participants, transaction amounts, costs, revenues and other fees.

5. Primary Market Corporate Credit Facility

On April 9, 2020, the Federal Reserve announced an expansion of the size and scope PMCCF, initially announced on March 23, 2020, which serves as a funding backstop for corporate debt issued by eligible issuers. An SPV financed by the Federal Reserve will make loans from the PMCCF to companies by (i) purchasing qualifying bonds as the sole investor in a bond issuance and (ii) purchasing portions of syndicated loans or bonds at issuance. The Department of the Treasury will make an equity investment of $50 billion in the SPV.[68]

Under the PMCCF, eligible issuers may seek to refinance outstanding debt from the period of three months ahead of its maturity, or issuers may issue additional debt, provided certain ratings conditions are met. Notably, the PMCCF, which was originally open only to high investment-grade companies, is now available to companies that had had the lowest investment-grade rating from an NRSRO as of March 22, 2020, even if they have been downgraded to below investment grade subsequently.[69] Eligible issuers under the PMCCF may elect to defer interest and principal payments during the first six months of the loan, extendable at the Federal Reserve's discretion, in order to have additional cash on hand that can be used to pay employees and suppliers in the near term.[70] Unless extended by the Federal Reserve and the Treasury Department, the PMCCF will cease purchasing eligible assets no later than September 30, 2020. Participants in the PMCCF may not also participate in the Main Street Lending Program or have received financial assistance under the CARES Act or other subsequent federal legislation.

(a) **Eligible Assets**. Eligible corporate bonds or eligible syndicated loans/bonds, as applicable, must, at the time of purchase by the PMCCF, (i) be issued by an eligible issuer, (ii) have a maturity of four years or less and (iii) be USD denominated. For

[66] Under the conditional funding model, Eligible Lenders will indicate upon submission of the required documentation that the loan has not yet been funded. Upon a determination that the submitted documentation is complete and consistent with program requirements, the Main Street SPV will provide the Eligible Lender with a Commitment Letter that the Eligible Lender will (i) fund the loan within three days of the Commitment Letter and (ii) provide notice to the Main Street SPV on the date of funding. The Main Street SPV will be able to advance funds to purchase the participation within one business day of receiving notice if the notice is received before 7 P.M. ET. If received after 7 P.M. ET, the notice will be treated as if received the next business day.

[67] See Federal Reserve's Main Street Lending Program opens for lender registration (June 15, 2020).

[68] The Treasury will also allocate $25 billion toward the Secondary Market Corporate Credit Facility, which will be used to purchase from eligible sellers in the secondary market corporate debt in the form of individual corporate bonds and eligible corporate bond portfolios in the form of exchange-traded funds.

[69] The PMCCF will leverage the Treasury equity at ten-to-one when acquiring corporate bonds or syndicated loans from issuers that are investment grade at the time of purchase. The PMCCF will leverage its equity at seven-to-one when acquiring any other type of eligible asset.

[70] A borrower that makes this election may not pay dividends or make stock buybacks during the period it is not paying interest.

syndicated loans and bonds, the PMCCF can purchase no more than 25% of any such issuance.

(b) **Eligible Issuers**. To qualify as an eligible issuer under the PMCCF, an issuer must:

(i) be a business created and organized in the US[71] and has significant operations and a majority of its employees located in the US;

(ii) be rated at least BBB-/Baa3 as of March 22, 2020 by a major nationally recognized statistical rating organization (**NRSRO**)[72] (issuers that were rated at least BBB-/Baa3 as of March 22, 2020, but are subsequently downgraded, must be rated at least BB-/Ba3 at the time the PMCCF makes a purchase; in every case, issuer ratings are subject to review by the Federal Reserve);

(iii) not be an insured depository institution or depository institution holding company (as such terms are defined in the Dodd-Frank Act);

(iv) must not have received specific support pursuant to the CARES Act or any subsequent federal legislation (which FRB New York has clarified to mean specific support received from any of the CESA (b)(1)-(3) Facilities, not the tax credits provided by the CARES Act); and

(v) must satisfy the conflicts-of-interest requirements of section 4019 of the CARES Act, discussed above.

Significant Operations. Where the issuer is a subsidiary whose sole purpose is to issue debt, the corporate affiliate receiving 95% or more of the syndicated loan or corporate bond purchases from such issuer (or, where no single affiliate will receive 95%, the affiliates receiving, in the aggregate, 95% of such proceeds) must have, on a consolidated basis with such affiliate's (or affiliates') subsidiaries, significant operations in and a majority of its (or their) employees based in the US. Where the issuer is not strictly a debt-issuing entity, it and its consolidated subsidiaries (but not its parent company or sister affiliates) must have significant operations in and a majority of its employees based in the US.

FRB New York does not provide a definition of "significant operations," but provides, as illustrative examples, that an issuer (or, where the issuer is strictly a debt issuing entity, the corporate beneficiaries of such issuer) will satisfy this test if over 50% of its consolidated assets, annual consolidated net income, annual consolidated net operating revenues, or annual consolidated operating expenses (excluding interest and other debt service expenses) are located or generated in the US.

Domestic Subsidiaries of Foreign Parent Companies. So long as it meets the eligibility criteria set forth above, an issuer that is a subsidiary of a foreign parent company may participate in the PMCCF so long as the proceeds from such participation are only used by the issuer, its consolidated US subsidiaries, and other US affiliates (and not by or for the benefit of any of its foreign affiliates).

[71] **Note**: A company may form a new entity to serve as issuer to the PMCCF, in which case the issuer can generally rely on the ratings history of any of its US affiliates guaranteeing the issuance.

[72] According to the latest guidance, the Federal Reserve will refer to published ratings maintained on an ongoing basis by a "Major NRSRO" which include: S&P Global Ratings, Moody's Investor Service Inc., and Fitch Ratings, Inc. To the extent the issuer has a qualifying rating from one of the foregoing agencies, Major NRSROs also include: DBRS, Inc., Kroll Bond Rating Agency, Inc. and A.M. Best Rating Services, Inc. (only with respect to insurance companies). **Note**: Issuers rated by multiple NRSROs must be rated at least BBB-/Baa3 by two or more NRSROs as of March 22, 2020 (one of which must be from Fitch Ratings, Inc., Moody's Investor Services, Inc. or S&P Global Ratings).

(c) **Limits per Issuer**. The maximum amount of outstanding bonds or loans of an eligible issuer that borrows from the PMCCF may not exceed 130% of the issuer's maximum outstanding bonds and loans on any day between March 22, 2019 and March 22, 2020, which limit is calculated at the consolidated top-tier parent level. Further, the PMCCF and SMCCF may not purchase, on a combined basis, more than $11.25 billion from any single issuer.

Per the latest guidance from FRB-NY, "outstanding bonds and loans" will (i) include current and non-current portions of corporate bonds and loans (including drawn portions of term loans, revolving facilities maturing in over a year, and bonds maturing in over a year, (ii) exclude any operating leases, non-recourse debt, commercial paper, and other short-term liabilities.

(d) **Pricing, Interest Rate**. Interest rates for corporate bonds under the PMCCF will be issuer specific and informed by market conditions, plus a 100 bps facility fee. With respect to syndicated loans and bonds, the PMCCF will receive the same pricing as other syndicate members, plus a 100 bps facility fee on the PMCCF' share of the syndication.

FRB New York has clarified that (i) where the PMCCF is the sole participant in an offering, it will only purchase fixed-rate bonds and (ii) with respect to syndicated debt, the PMCCF will generally purchase only fixed rate debt, but may participate in floating-rate debt so long as any such floating-rate debt priced off LIBOR includes adequate fallback language.

(e) **Certification**. Issuers will have to certify as to compliance with the PMCCF eligibility criteria. Further, pursuant to Section 13(3) of the Federal Reserve Act, the issuer will have to certify that (i) it is not insolvent, and (ii) it is unable to secure adequate credit accommodations from other banking institutions and the capital markets.[73] With regards to the adequate credit accommodations, FRB New York has confirmed that issuers may consider the current economic or market conditions (as compared to normal conditions), and that "a lack of adequate credit" does not mean "no credit," but may include credit available at prices or on conditions that (during normal conditions) would be off-market. FRB New York has indicated that it will provide further information on required certifications.

See Section 1(f) of this Alert for a discussion of certification-related liability.

(f) **Timing, Other Considerations**. According to the PMCCF FAQs, FRB New York expects the PMCCF to become operational in mid-May, but has not provided any further updates on timing.

As noted in Section 3(b) of this Alert, the Federal Reserve will be regularly publishing information regarding the PMCCF, including information regarding participants, transaction amounts, costs, revenues and other fees.

Further details for obtaining, completing and/or submitting applications for borrowing under the PMCCF have not been released. We will be closely monitoring further developments with the PMCCF for additional updates. Eligible issuers are encouraged to contact their existing lenders pending the release of further guidance.

[73] A borrower may make this certification if it is unable to secure "adequate credit accommodations" because the amount, price or terms of credit available from other sources are inadequate for such borrower's needs during the current unusual and exigent circumstances. Eligible borrowers are not required to demonstrate that other lenders have denied its applications for credit or otherwise document the inadequacy of other credit terms offered by other lenders.

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