April 16, 2020

Via Electronic Mail

Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

Re: April 9, 2020 Term Sheets for the Main Street New Loan Facility ("MSNLF") and Main Street Expanded Loan Facility ("MSELF")

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to provide its more detailed comments on the April 9, 2020 term sheets for the MSNLF and MSELF. This letter supplements the list of key comments provided to the Federal Reserve on April 13, 2020. As we noted in our list of key comments, we believe the MSNLF and MSELF have the potential to provide significant and rapid relief to a large number of small- and medium-sized enterprises and their employees, thus furthering the policy expressed by Congress in the CARES Act to provide broad support to the economy.

The issues raised in our list of key comments were those that we believe must be resolved in order for the MSNLF and MSELF to be successful, with many of the comments in that list directed at ensuring that the MSNLF and MSELF can be made available to a broad range of eligible borrowers as quickly and as seamlessly as possible. The purpose of this letter is to provide a set of more detailed comments covering both suggestions for further optimizing the facilities and specific points in the April 9 term sheets that need to be clarified in order to ensure the facilities can open quickly and operate efficiently. Clarification is also important to allow borrowers and lenders to be sure that they are abiding by the requirements of the program – e.g., with respect to eligibility and maximum loan amount.

As you can see from the issues discussed below, there are numerous operational issues that must be considered if the program is to achieve its goals. In order to avoid frustration and disappointment for borrowers, it will be essential for participating lenders to be given time to prepare their systems and processes before the program goes live. Accordingly, we recommend that the final terms of the program be published not less than one week prior to the date on which the Federal Reserve and the Treasury Department direct borrowers to begin applying. Given that further operational and other questions are certain to arise as the program progresses, we recommend that the Federal Reserve establish an expedited process for soliciting and issuing future FAQs.

Finally, we would like to reiterate the importance of there being transparency from the start of the program that underwriting by participating lenders is an important component of the program's design with the intent of limiting

1 The BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

taxpayer losses, and that, as a result, not all borrowers that meet the criteria for participation in the program will receive loans under the program or receive loans for the maximum allowable amount.

With this background in mind, we have set forth below our more detailed comments on the MSNLF and MSELF term sheets of April 9, 2020, which have been grouped into the following categories: (i) definitional clarifications; (ii) loan priority and collateral issues; (iii) participation agreement and associated operational issues; (iv) processes and procedures with regard to defaulted loans; (v) operational and administrative issues; (vi) fees; and (vii) regulatory issues.

I. Definitional Clarifications

A. Eligible Borrower Requirements

- As noted in our list of key comments, one of our members' primary concerns is to ensure that appropriate government support is available during the COVID-19 crisis to as wide a range of eligible borrowers as possible. One aspect of this concern is minimizing the risk of there being gaps between the already established programs (e.g., the SBA's Paycheck Protection Program and the Federal Reserve's Primary Market Corporate Credit Facility) for supporting businesses impacted by COVID-19 and the newly established MSNLF and MSELF. While the goal of minimizing overlap between the programs is understandable, small overlaps between them may be preferable to exclusions that leave deserving businesses without support.
  - As context for how the existing MSNLF and MSELF thresholds might operate in practice, it should be noted that, based on public data, there are nearly 200 medium-sized non-investment grade borrowers that do not qualify for access to the Primary Market Corporate Credit Facility or other Federal Reserve programs and that do not currently meet the 10,000 employees/$2.5 billion revenue criteria contained in the term sheets. Relatedly, of the approximately 1,600 non-investment grade U.S. businesses that may meet the MSELF criteria, nearly 30% have public bonds and loans of greater than $1 billion,[2] indicating that the $150 million cap is potentially too restrictive. Similarly, the $25 million cap for the MSNLF may prevent a number of businesses from getting the help that they need.
    - There are a number of ways in which the MSNLF and MSELF could be adjusted to help minimize gaps between these and other programs. For example, the employee or revenue threshold requirements could be raised or the minimum and maximum loan sizes could be altered. In addition, the Federal Reserve could institute an exceptions policy, whether on an individual loan basis or for broader categories of loans, that would allow access to the MSNLF or MSELF to borrowers that do not necessarily meet the strict program criteria but would otherwise benefit from the program.
- The term sheets define "Eligible Borrowers" as "businesses" with (i) 10,000 or fewer employees or (ii) up to $2.5 billion in 2019 annual revenues.
  - *Recommendation*: Confirm that, notwithstanding the reference to "businesses," non-profits such as hospitals and similar entities, as well as businesses owned or controlled by Native American Tribes, can also qualify as Eligible Borrowers (subject to satisfaction of any other relevant requirements in the final program documentation). Many such entities are struggling with the COVID-19 crisis and could benefit from the program.

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2 Source: FactSet, Bloomberg; illustrative analysis on the public U.S. high-yield bond and loan market, excludes Airlines & related industries.

- *Recommendation*: In order to ensure that the program is able to benefit as many borrowers as possible, confirm that the employee and revenue requirements are alternatives (such that a business with fewer than 10,000 employees but more than $2.5 billion in 2019 annual revenues would be an Eligible Borrower, as would a business with more than 10,000 employees but less than $2.5 billion in 2019 annual revenues).

- *Clarification*: Define how borrowers are to calculate their employee numbers. In particular, specify whether part-time or seasonal employees should be included (one alternative would be for borrowers to use a full-time-equivalent metric) and the dates or periods as of or for which the test should be determined.

    - The requirement could be tested as of a recent date prior to the establishment of the program or on the basis of the average number of employees over a specified period ending prior to its establishment.

- *Clarification*: Clarify whether the reference to "2019 annual revenues" may include fiscal year revenues (for borrowers that do not use the calendar year) and confirm that the revenue figure need not be audited or otherwise subject to auditor review.

➢ Further, as noted in our list of key comments, the EBITDA-based leverage metrics, the prohibition on distributions and other requirements contained in the term sheets could exclude deserving enterprises from participation.

- This concern applies, in particular, to enterprises that did not have positive income in 2019 (e.g., growth companies and startups) as well as non-profits. For example, many early-stage growth companies and startups that did not have positive income / earnings in 2019 will not be able to access the program given the EBITDA and leverage requirements. This is particularly unfortunate given that many of these businesses also are unable to receive funding under the Paycheck Protection Program due to the number of employees they have or because of the SBA's affiliation rules. Many of these businesses have promising growth prospects and help create jobs in the United States.

- In addition, S-corporations and other pass-through entities that are frequently used in middle market financings (e.g., in REIT structures and family-owned manufacturing businesses) are often required to make non-discretionary distributions, such as to satisfy tax liabilities, and so may not be able to make the necessary undertakings with respect to distribution restrictions.

- We assume that relevant exceptions will be provided to permit such enterprises to participate in the program.

    - *Recommendation*: In the case of companies for which an EBITDA or leverage test is inappropriate and that typically use other leverage and cash flow models, such as growth companies, non-profits and real estate companies, we recommend Eligible Lenders be permitted to use their existing credit underwriting standards, which may rely on another metric in common use. For example:

        - For growth companies, we would suggest Eligible Lenders be permitted to apply a requirement to have grown top line revenue by more than 20% for at least two years in a row. Using this metric would ensure that failing companies would not otherwise be permitted to receive funding under these programs.

- For non-profits such as hospitals, hospital systems, retirement communities, skilled nursing facilities, universities, colleges and other cultural institutions (e.g., religious organizations and museums), we would suggest Eligible Lenders be permitted to use a metric that uses a combination of net operating income (before debt service) and non-operating income, which would allow non-profits to include portfolio draws.

- For real estate companies, we would suggest Eligible Lenders be permitted to use a loan-to-value ratio of the type common in the sector.

➢ The "Eligible Borrower" definition also requires "significant operations" and a "majority of…employees" to be based in the United States.

- *Clarification*: Clarify the "significant operations" and "majority of…employees" requirements. For example, metrics based on a percentage of a borrower's total revenues for a certain period or total assets as of a certain date could be used for the "significant operations" test, while the majority of…employees" test could be satisfied if either a simple majority of employees (i.e., more than 50%) or a plurality of employees (i.e., a greater percentage of employees than any other jurisdiction) are employed in the United States.

  - To the extent income statement or balance sheet metrics are used, please clarify whether these should be calculated in accordance with applicable accounting standards or otherwise. Guidance on the geographical assignment of revenues (e.g., by location of customer, point of receipt of payment, point of shipment, etc.) and on whether intangible assets should be included would also be appreciated.

➢ Finally, as noted above, it must be made clear to Eligible Borrowers that this is a loan program and not a grant program, with the loans provided under the program expected to be repaid as a matter of Federal law. As a result, Eligible Lenders are expected to apply underwriting standards and assess credit risk such that not every enterprise that otherwise meets the Eligible Borrower definition or the other program criteria will get access to program loans or receive the maximum allowable amount of program loans. Public education by the Department of the Treasury and the Federal Reserve on this point is essential.

B. Eligible Lender Requirements

➢ The list of "Eligible Lenders" includes U.S. insured depository institutions, U.S. bank holding companies and U.S. savings and loan holding companies.

- *Recommendation*: Expand the definition of Eligible Lenders to include U.S. branches of foreign banks and to clarify that affiliates and subsidiaries of U.S. bank holding companies and U.S. insured depository institutions are Eligible Lenders. Doing so would allow participation by numerous deserving and eligible borrowers that would otherwise be excluded.

- *Recommendation*: Specify that the MSELF is available as long as an Eligible Lender provides the MSELF tranche, regardless of the nature of the financing being upsized. Also, clarify that the MSELF does not have to involve "reopening" an existing tranche of a term loan, but can be provided as an additional tranche under an existing facility.

  - Under the term sheets, MSELF loans are required to be structured as an increase to a term loan provided by an Eligible Lender. This requirement would exclude many otherwise eligible borrowers that do not currently have term loans in their capital structure (e.g., companies with just a revolving facility). It would also exclude borrowers whose existing lenders are direct lender debt funds, foreign banks and other non-bank institutions, or whose financing has been syndicated to non-bank "TLB" lenders. As noted in our list of key comments, non-traditional lenders are a critical source of capital to small- and medium-sized enterprises, and many potential borrowers have already contacted our members to express alarm about their potential exclusion.

C. Eligible Loans

- *Clarification*: If the loan size fits within the MSNLF parameters and the Eligible Lender has an existing secured loan with the borrower, can the Eligible Lender elect to use the MSNLF or will it be required to use the MSELF?

- *Clarification*: Should guidance as to reporting/risk ratings/impairments be followed for underwriting decisions under the program? Many relevant credits may have already been assigned to workout/problem asset groups, where underwriting new credit commitments would be denied under existing credit rules.

D. "Debt" Components

- For purposes of determining the maximum amount of financing available to an Eligible Borrower under the program, the term sheets use the concept of "outstanding and committed but undrawn debt." In addition, the MSELF includes the concept of "outstanding and committed but undrawn *bank* debt." While perhaps inadvertent, this distinction could unfortunately restrict access by otherwise qualified borrowers.

  - *Clarification*: Is "debt" intended to be calculated on a consolidated basis or on a standalone basis for the relevant Eligible Borrower?

  - *Recommendation*: Permit both bank and non-bank debt to be taken into account when determining loan sizing for Eligible Borrowers. As noted in our list of key comments, permitting only debt provided by regulated institutions to be taken into account could be prohibitive for borrowers with alternative capital structures (e.g., capital markets debt or "TLB" facilities).

  - *Recommendation*: "Debt" should exclude on-balance-sheet leases and other items typically excluded from debt calculations in commercial bank loans (e.g., trade payables, mortgages or deeds of trust issued by an SPV that holds real estate), and "debt" should be calculated net of cash, as is customary in commercial bank loans.

  - *Recommendation*: Provide Eligible Lenders with discretion to exclude from the "debt" calculation other items not typically included when testing leverage for purposes of extending credit to the relevant Eligible Borrower, including debt that is junior to the MSNLF or MSELF loan being extended. Doing so would expand the reach of the program and enable a great many more Eligible Borrowers to benefit. In the case of the MSELF, the definition of "debt" in the Eligible Borrower's existing documentation could be used for efficiency.

  - We noted in our list of key comments that it would be preferable to exclude undrawn commitments from leverage calculations for purposes of debt sizing. However, to the extent they remain included:

    - *Clarification*: Would the concept take into consideration the fact that certain facilities may be committed but not practically accessible by the borrower as a result of covenant restrictions or borrowing base tests?

- *Recommendation*: Apply an "available" commitment concept to take into account the fact that committed capacity may not be currently accessible.

- *Clarification*: Clarify that the concept of "existing outstanding and committed but undrawn debt" is intended to contemplate both drawn debt and undrawn debt (i.e., "outstanding" refers to drawn debt rather than being a further description of the undrawn commitments).

E. Attestation Requirements

- We noted in our list of key comments the need for lenders to be able to rely on borrower attestations without further verification and monitoring if delays are to be avoided. Lenders will need clarity that their responsibility in this regard will be limited and that they will not be held liable or subject to put-back risk in the event of a false statement by a borrower.

  - *Recommendation*: Borrower attestations should be made once at origination and not be subject to ongoing monitoring or verification.

- *Clarification*: There are also terms that will need to be clarified before borrowers can be comfortable providing their attestations.

  - First, what would constitute "reasonable efforts" on the part of the borrower to maintain payroll and retain employees?

  - Second, how will the compensation, stock repurchase and capital distribution restrictions be applied in the context of the program?

    - *Recommendation*: As noted above, we assume there will be exceptions to permit a subsidiary borrower to upstream cash to its parent holding company in the United States in order to meet that entity's tax obligations or other mandatory distribution obligations, and we would support exceptions of this type in order to maximize the potential reach of the program.

  - Third, what is the remedy if an Eligible Borrower breaches an attestation? Will there be a cure period?

- In addition, we are concerned that the Eligible Lender attestation regarding the proceeds of program loans not be used to repay or refinance pre-existing loans or lines of credit made by the Eligible Lender to the Eligible Borrower would be difficult for Eligible Lenders to provide as they are not in a position to know what funds a borrower is using for a repayment and so may discourage participation.

  - *Recommendation*: Remove the Eligible Lender attestation and rely on the use of proceeds covenant already contemplated by the term sheets.

II. Loan Priority and Collateral Issues

A. Ranking of Eligible Loans and Payment of Other Indebtedness

- As noted in our list of key comments, it is of primary importance that program loans be provided in a manner that works within the framework of borrowers' existing debt arrangements.

  - The term sheets contemplate that loans under the MSNLF would be provided on an unsecured basis.

  - *Recommendation*: Permit MSNLF loans to be provided as subordinated to other non-affiliate indebtedness if required by an Eligible Borrower's existing debt arrangements. Doing so would alleviate (although not eliminate) many consent and waiver requirements that might otherwise exist under an Eligible Borrower's existing debt documentation.

  - *Recommendation*: Similarly, permit MSNLF loans to be provided on a secured basis if there is collateral available to support such a loan. Eligible Lenders may be more willing to provide program loans if their 5% hold will be secured.

  - *Recommendation*: Confirm that "unsecured" refers only to collateral security and would not preclude an Eligible Loan from benefiting from guarantees; but, at the same time guarantees should not be required.

- The term sheets prohibit the proceeds of loans under the MSNLF and MSELF from being used to (i) repay or refinance pre-existing loans or lines of credit made by the Eligible Lender to the Eligible Borrower or (ii) repay other loan balances.

  - *Recommendation*: Confirm that these prohibitions are intended to prevent prepayments of indebtedness and do not extend to the use of such proceeds to pay principal and interest that is due and payable in accordance with the existing terms of such obligations. The ability to service existing debt will be important to ensuring that Eligible Borrowers are not subject to default risk while navigating through the COVID-19 crisis and use of program funds for this purpose should be viewed favorably.

  - *Recommendation*: Define "debt" to include only borrowed money and not other items that may constitute "debt" in a broader sense, such as on-balance-sheet leases.

  - *Recommendation*: Permit Eligible Borrowers to use program loans to repay existing indebtedness, particularly any "rescue" financing incurred after mid-March 2020. This permission could also be extended to permit the use of program loans to repay other existing indebtedness coming due within 24 months.

    - Facilitating refinancings will be an important way to ensure Eligible Borrowers maintain liquidity through the COVID-19 crisis. Moreover, given the absence of available government support, many Eligible Borrowers may have been forced in recent weeks to obtain emergency funding that may be on onerous terms. Permitting Eligible Borrowers to use program loans to refinance such funding would alleviate pressure on those Eligible Borrowers and provide them more breathing room to ride out the crisis.

    - Permitting the repayment of existing debt with program loans is also another way to alleviate the risk of program loans being restricted by existing debt documentation and so the need for waivers and consents. Loan documentation frequently permits the incurrence of debt if used to refinance existing debt.

- The term sheets also require Eligible Borrowers to refrain from repaying other debt of equal or lower priority, with the exception of mandatory principal payments, unless the Eligible Borrower has first repaid the Eligible Loan in full.

  - *Recommendation*: Confirm that Eligible Borrowers are also able to (i) pay interest that is due and payable and (ii) repay principal at maturity, including principal of an upsized Eligible Loan that comes due prior to the maturity of the upsized tranche.

- *Recommendation*: Confirm that these restrictions would not prohibit Eligible Borrowers from replenishing existing lines of credit or other revolving loans, or from complying with mandatory cash sweeps in accordance with the terms of existing instruments, but rather would be limited to permanent commitment reductions in respect of such facilities. Repaying revolving balances to reduce financing costs is an important part of the liquidity management of many small- and medium-sized enterprises.

- *Recommendation*: Clarify that debt that ranks equally in right of payment but senior in right of collateral (for example because it is secured when the Eligible Loan is unsecured) would not be caught by this prohibition.

B. Prohibition on Cancelling or Reducing Existing Lines of Credit

➢ Please confirm that this requirement is not intended to prohibit:

- The Eligible Lender cancelling or reducing existing lines of credit as a result of the occurrence of a default or event of default;
- The reduction or termination of uncommitted lines of credit;
- The expiration of existing lines of credit in accordance with their terms;
- 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 and similar structures;
- Eligible Borrowers from repaying amounts outstanding under existing lines of credit in the ordinary course of business (so long as the corresponding commitments are not reduced);
- Mandatory prepayments or commitment reductions in accordance with the terms of the existing lines of credit; or
- Eligible Borrowers from refinancing an existing line of credit with a comparable (cheaper) line.

C. Derivative Agreements

➢ Please confirm that none of the prohibitions contained in the term sheets is intended to prevent Eligible Lenders from:

- Taking action with respect to derivatives tied to existing facilities, Eligible Loans, or to upsized tranches of Eligible Loans (e.g., close-outs, realization of any collateral or other actions with respect to workouts); or
- Entering into new swaps tied to Eligible Loans and sharing on a pari passu basis in any available Eligible Borrower collateral with existing secured lenders or Eligible Lenders providing program loans.

D. Collateral

➢ Another way in which the program requirements set forth in the term sheets could cut across existing debt arrangements is the requirement that the upsized tranche of Eligible Loans under the MSELF be secured on a pari passu basis with the underlying Eligible Loan. This requirement could significantly reduce the utility of the facility by disincentivizing existing creditors from providing necessary consents.

- *Recommendation*: Permit MSELF loans to be provided with a priority that is junior to the existing Eligible Loan.
    - Permitting such ranking would help to incentivize participants in the existing Eligible Loan to consent to the upsize available under the MSELF, as they may otherwise be reluctant to dilute their collateral positions by sharing their collateral with the MSELF lenders given that such dilution would increase the likelihood of a collateral deficiency upon any default.
    - In addition, having the MSELF loans be accorded secured creditor status (even one that is subordinate to other secured creditors as suggested above) implies priority of payment over all existing unsecured creditors. This could make any unsecured creditors with consent rights unwilling to provide those consents, thereby inhibiting an Eligible Borrower's ability to consummate the transaction without defaulting under such existing unsecured debt.
- *Recommendation*: Clarify whether there will be any restrictions on the type of collateral that is acceptable under the program.

III. Participation Agreement and Associated Operational Issues

A. Nature of Participation

➢ As noted in our list of key comments, Eligible Lenders will need a clear Participation Agreement.

- *Recommendation*: Adopt a standard form Participation Agreement to be used for all program loans. The Participation Agreement should be structured to ensure that:
    - The 95% participation by the SPV will be a true loan participation with "true sale" accounting treatment, rather than some other technical form of funding and risk sharing (such as a non-recourse loan from the SPV to the Eligible Lender to fund the new loans or upsized tranches).
    - Consent and approval rights, if any, are available to the SPV both before and after default, taking into account the need for flexibility and efficiency in light of the myriad waiver and amendment requests that lenders receive from borrowers in the ordinary course of loan administration.
    - Any required representations and warranties are clear.
    - There is clarity around the SPV's ability to sell its 95% participation.
        - *Recommendation*: There should be no lender repurchase obligations after the SPV has purchased its participation in a new or upsized loan.

B. Participation Operational Queries

➢ There are operational issues to be clarified in respect of the participations:

- Will the SPV fund participations individually or in bulk at some frequency?
- How fast will funding occur? Is funding the same day as close feasible? Will the program have any pre-fund diligence requirements?
- Will banks be permitted to syndicate, sell or pool their 5% holds?

- *Recommendation*: Permit Eligible Lenders originating a program loan to sell or otherwise syndicate the retained 5% to other Eligible Lenders. Permitting such activities would make participation in the program more attractive to potential Eligible Lenders and so increase the capacity of the program to assist Eligible Borrowers by providing for a path to liquidity for the originating Eligible Lender.

- *Recommendation*: Adopt clear procedures permitting groups of Eligible Lenders to provide program loans together, including on a club or syndicated basis, so that Eligible Borrowers are not required to obtain program loans simply from one Eligible Lender. Many Eligible Borrowers will have relationships with multiple Eligible Lenders, each of which may wish to support the Eligible Borrower through the COVID-19 crisis and providing for clear procedures permitting them to do so would further optimize availability of the program facilities.

- Can the 5% holds be pledged either to the Federal Reserve or the Federal Home Loan Banks? Are there any other requirements/limitations around Eligible Lenders' 5% hold positions (e.g., can Eligible Lenders purchase CDS and/or macro hedges)?

- In the case of program loans that use an administrative agent, will each Eligible Lender be expected to take its pro rata share of the 5% hold back, or will the administrative agent take the full piece and hold it on behalf of the other Eligible Lenders? If the former, do all participating Eligible Lenders need to agree?

IV. Processes and Procedures with Regard to Defaulted Loans

➢ The need to have clarity regarding the relative rights and obligations of Eligible Lenders and the SPV under the Participation Agreement is particularly acute in the context of Eligible Loans that enter default. In particular, consideration will need to be given to the following issues:

- Will an Eligible Borrower be permitted to participate in the program if it is already in default under other indebtedness or if it is in or emerging from bankruptcy?

  - *Recommendation*: Do not automatically exclude Eligible Borrowers that are otherwise in default or emerging from bankruptcy, but rather permit Eligible Lenders to take this factor into account in their underwriting processes. Many borrowers currently affected by the COVID-19 crisis face operational covenant defaults; such defaults may be addressed by an amendment or waiver in connection with a concurrent financing (whether pursuant to the CARES Act or via the capital markets).

- How would cross defaults work? Would a default on other debt necessarily result in a cross default on the Eligible Loan participated to the SPV or would this be for the Eligible Lender and Eligible Borrower to negotiate?

  - *Recommendation*: Permit the Eligible Lender and Eligible Borrower to set the terms of the relevant loan, including any cross-default provision, so long as it otherwise complies with the program criteria.

- How much control would the SPV have over problem loans, workouts and collection activities? Who would take the lead in enforcing remedies upon default, given the SPV's 95% participation? Does there need to be a mechanism to get waivers/consents to cure defaults under program loans from the SPV or will it delegate this process to the Eligible Lenders?

   - *Recommendation*: To streamline loan administration and avoid delay, delegate workout activity to the Eligible Lenders holding the 5% retained interest, while putting in place procedures to protect the SPV's 95% interest and mitigating any conflict of interest that may arise as a result of those Eligible Lenders having other, more senior, debt in the relevant borrower's capital structure.

- Would the SPV be willing to subordinate its 95% participation interest recovery to the 5% interest of the Eligible Lender?

- Would the $75 billion of equity provided by the U.S. Department of the Treasury be in the first loss position for loans under the program? Would this first loss position apply only to the 95% participations or also the Eligible Lenders' 5%?

- *Clarification*: Confirm that if the Federal Reserve receives funds from an Eligible Borrower's estate for expenses under 507(a)(2) of the Bankruptcy Code, it will distribute to the Eligible Lender the percentage representing the Eligible Lender's interest in the Eligible Loan (5%) to ensure that risk sharing with the originating lender remains on a pari passu basis at all times.

V. Operational and Administrative Issues

A. Operational

➢ We have specific operational queries on which we would like clarification:

- What reporting with respect to originations and declines, if any, will be required of Eligible Lenders by the SPV, and what level of ongoing periodic reporting will be required?

- What are the loan servicing standards and the monthly settlement processes?

- *Recommendation*: Consistent with the Paycheck Protection Program, Eligible Lenders should be exempt from beneficial ownership requirements for the MSNLF and MSELF to the extent loans thereunder are extended to existing customers, as this will help to expedite the disbursement of funds under the program.

   - *Recommendation*: In addition, provide that Eligible Lenders will not be subject to enforcement actions related to a violation of, or unsafe and unsound practice related to, the Bank Secrecy Act for failing to detect and report suspicious activity with regard to any attestations or representations made by fund recipients in connection with this program so long as they make good faith efforts to comply with financial crime expectations, including monitoring and reporting on suspicious activity based on available customer information.

B. Administration

➢ We also have specific recommendations and queries regarding the administration of the program:

- *Recommendation*: For ease of administration, there should be a single point of contact to which a loan package can be submitted for confirmation of acceptance or rejection by the SPV.

- Will loans available under this program be on a first-come-first-served basis?

   - *Recommendation*: Ensure there is a system to communicate the remaining availability under the program to Eligible Lenders in real time. This communication will be vital in order to be able to set customer expectations and avoid Eligible Borrower disappointment, as it can take time to process an application once it has been entered into the system.

C. Standardized Documentation

- It will be important for Eligible Lenders to have confidence when they originate or upsize a program loan that such loan will be accepted by the SPV as an Eligible Loan. In particular, they will need to be sure that the SPV will accept the documentation pursuant to which the relevant loan has been extended.

  - *Recommendation*: For new loans under the MSNLF, the Federal Reserve should adopt a standard form of note or loan agreement, as this will ensure consistency in approach and make administering the program easier, as well as reduce friction, speed up the time to market and facilitate back-end securitizations by the SPV. As Eligible Loans under the MSNLF will be unsecured, there is likely to be less need for intercreditor arrangements, although consideration will need to be given to that issue.

  - *Recommendation*: For upsized loans under the MSELF, permit the upsize to be documented under the Eligible Borrower's existing documentation (for example through a short-form amendment), as this would avoid the need to spend time and effort attempting to fit a standardized document onto an existing documentation structure, which may come with a need for intercreditor arrangements and other related matters.

    - It would, however, be important for the Federal Reserve to provide a "template" of the language for the key terms that would need to be included in the loan amendment and then agree that the SPV will purchase any amendment that contained those key terms, even if it also contains additional terms.

VI. Fees

- We have the following recommendations:

  - *Recommendation*: Confirm that the 100 basis point facility fee is payable only in the case of the MSNLF and that it is payable only at the time the participation in the relevant Eligible Loan is purchased by the SPV. In addition, confirm that the facility fee may be net funded using the cash flows from the 95% participation purchase.

  - *Recommendation*: Confirm that Eligible Lenders have discretion over whether and when to charge Eligible Borrowers the 100 basis point origination/upsizing fee.

  - *Recommendation*: Confirm that the 25 basis point servicing fee paid by the SPV is paid annually in advance and is not intended to cover workouts in addition to ordinary course servicing, as workouts require special additional attention.

VII. Regulatory Issues

A. Balance Sheet

- *Recommendation*: For the duration of the program, Eligible Lenders should retain their respective category with respect to regulatory tailoring given that asset sizes of banks will increase dramatically as a result of this and other Federal Reserve programs aimed at supporting the market during this time.

B. Regulatory Guidance

- *Clarification*: As noted in the list of key comments, Eligible Lenders will need confirmation that only the 5% retained economic interest is to be included when they calculate risk-based capital and leverage ratios.

- *Clarification*: We would also like to clarify whether program loans will be considered reportable under the Shared National Credit Program and confirm their interaction with the Interagency Leveraged Lending Guidance (as noted in our list of key comments, we assume that these will not be enforced as binding rules with respect to Eligible Loans).

- *Clarification*: We would like to clarify whether the making of program loans would constitute a "MIRE" event for flood insurance purposes, as triggering a MIRE event can be time consuming and expensive and result in significant delay if real property is included in the collateral pool.

- Please confirm that Eligible Lenders will be permitted to use standard risk rating models and scorecards, including adversely classified ratings, when evaluating program loans and that Eligible Lenders will be permitted to exercise judgment in accordance with internal policies to potentially override a rating (provided that Eligible Borrower criteria is otherwise met).

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We would like to reiterate that the BPI appreciates this opportunity to comment on the term sheets. If you have any questions or would like to discuss any of the comments, please contact Lauren Anderson, Senior Vice President and Associate General Counsel at (202) 737-3536 (lauren.anderson@bpi.com).

Respectfully submitted,

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