



May 8, 2020

*Via Electronic Mail*

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

Re: April 30, 2020 Term Sheets and FAQ for the Main Street Lending Program<sup>1</sup>

Ladies and Gentlemen:

The Bank Policy Institute<sup>2</sup> appreciates the opportunity to comment further on the April 30, 2020 term sheets and related FAQ for the MSLP. This letter supplements our letter of May 5, 2020, which discussed five priority issues, and sets forth our more detailed comments and requests for clarification in respect of the updated term sheets and the FAQ.

As we noted in our prior letter, we believe the updated term sheets and FAQ represent a significant advance towards an effective program that can provide the relief needed by small- and medium-sized enterprises, and we hope that with the further revisions contemplated by this letter, the MSLP can be swiftly operationalized.

As the key terms of the program approach finalization, we wish to stress once more how critical it will be to provide potential participants with sufficient time to review and comment on the legal documentation relating to the program and to ensure that staff, systems and procedures are prepared before any MSLP loans are made. The experience of Eligible Borrowers and so the success of the MSLP will depend on the program operating effectively and efficiently from the very start. It is therefore vital that the program documentation be compatible with Eligible Lenders' systems and for those systems to have sufficient processing capacity and the controls necessary to satisfy the program's requirements.

Providing participants with sufficient time for preparation will be all the more important in light of the reduced minimum loan sizes contemplated by the updated term sheets. For many Eligible Lenders, the program will straddle both the small business lending and middle market lending divisions as a result of the reduction, requiring more systems to be operated and more personnel to be trained. Similarly, the importation into the MSLP of certain SBA standards, such as those relating to Ineligible Businesses, will require time for Eligible Lenders' middle market staff to become familiar with these standards in order to ensure compliance with the program criteria. We previously recommended a period of at least a week between the finalization of the program documentation and the program

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<sup>1</sup> For purposes of this letter, the Main Street Lending Program ("MSLP") includes each of the Main Street New Loan Facility ("MSNLF"), the Main Street Expanded Loan Facility ("MSELF") and the Main Street Priority Loan Facility ("MSPLF"). Capitalized terms used and not otherwise defined herein have the meaning set forth in the term sheets for the MSNLF, the MSELF and the MSPLF dated April 30, 2020.

<sup>2</sup> 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.

“going live,” and we continue to believe that one week is the absolute minimum amount of time required for successful implementation.

With that background in mind, we have set forth below our further comments grouped into the following categories: (i) definitional clarifications; (ii) loan terms and features; (iii) documentation and operational issues, (iv) regulatory matters and other restrictions, and (v) certifications.

## I. Definitional Clarifications

### A. Borrower Eligibility

- The term sheets require that Eligible Borrowers be “Businesses.” Businesses are defined in the term sheets and FAQ E.2 as legally formed entities that, if organized as a joint venture, have “no more than 49 percent participation by foreign business entities.”
  - *Recommendation.* Confirm that the limitation in the case of joint ventures would not prevent any other type of business entity contemplated by the term sheets and the FAQ (e.g., a partnership, limited liability company, corporation, etc.) from constituting a “Business” regardless of its level of foreign ownership. Doing so would make clear that U.S. subsidiaries of foreign parents, many of which employ a significant U.S. workforce, are entitled to participate in the MSLP so long as they satisfy the other relevant criteria. We note that a similar confirmation has been provided in the context of the PMCCF and SMCCF.
- The term sheets require that Eligible Borrowers have “significant operations” and a “majority of...employees” based in the United States.
  - *Recommendation.* Clarify how the “significant operations” and “majority of...employees” standards will be determined in the context of the MSLP. We note the clarifications provided in respect of these matters under the PMCCF and SMCCF and believe something similar would be helpful here.
  - *Clarification:* Confirm that for purposes of determining whether a majority of employees is based in the United States, U.S. companies with foreign ownership need refer only to their own employees and those of any subsidiaries, and not to the employees of their foreign owners.
- A Business may not be an Eligible Borrower if it is a type of business listed in 13 CFR 120.110(b)-(j) and (m)-(s). The provision contained in 13 CFR 120.110(g) would appear on its face to render businesses deriving more than one-third of gross annual revenue from legal gambling activities ineligible for the MSLP.
  - *Clarification.* Consistent with the most recent SBA guidance on the PPP contained in 85 FR 23450, 23451 Part III.2.d (April 28, 2020), please confirm that (i) 13 CFR 120.110(g) is not applicable to the MSLP and (ii) a Business that is otherwise eligible under the MSLP is not rendered ineligible due to its receipt of legal gaming receipts.
- Similarly, 13 CFR 120.110(o) would render ineligible any business “in which an [Eligible Lender] or any of its Associates owns an equity interest,” with no floor on the amount of the equity interest.<sup>3</sup> In other words, if an Eligible Lender or any of its Associates holds even a *de minimis* equity interest in a potential borrower, that potential borrower would be ineligible for the MSLP. In the context of the

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<sup>3</sup> The definition of an “Associate,” in relevant part and as modified by the PPP’s implementing regulations, includes (i) any officer, inside director or key employee of an Eligible Lender; and (ii) any entity in which one or more of these individuals, or a Close Relative of one of these individuals, owns more than 20% of the equity. A “Close Relative” is a spouse; a parent; or a child or sibling, or the spouse of any such person.

MSLP, there are many valid reasons why an Eligible Lender may own an equity interest in an Eligible Borrower without raising the concerns typically associated with lending to insiders, and requiring disqualification would prevent otherwise eligible entities from participating in the program. In addition, given the breadth of the definition of “Associate” and “Close Relative,” the potentially disqualifying equity holders in a Business will be extremely difficult to identify and track, particularly in the case of Businesses that are public companies. The definition of “Close Relative” is broader than those under applicable banking regulations, such as Regulation O, and tracking siblings, in-laws and adult children will be difficult both for Eligible Lenders and for Eligible Borrowers. As a result, many Businesses may be unable to certify this criterion of their eligibility. Although some Eligible Lenders may have borrower screening procedures in place for compliance with other requirements (e.g., Regulation O or other SBA loan programs designed for small businesses), the application of these similar-but-not-identical screening procedures to the MSLP exposes Eligible Lenders to significant compliance and legal risk and undercuts the principle that Eligible Lenders may rely on an Eligible Borrower’s certifications.

- *Recommendation.* Given the fact that the purpose of the provision is to mitigate conflicts of interest, we recommend revising the definition of “Ineligible Business” such that: (i) an Eligible Borrower is permitted to certify its eligibility on the basis of its knowledge and belief upon reasonable inquiry, both as to the general certification that it is not an “Ineligible Business” and specifically that it is not a business contemplated by 13 CFR 120.110(o); (ii) an Eligible Borrower will not be disqualified due to the acquisition of an equity interest in that Eligible Borrower by an Eligible Lender or an Associate of an Eligible Lender; and (iii) the scope of an Eligible Lender’s “Associates” for MSLP purposes is limited to match the scope of “insiders” as defined in Regulation O.
- FAQ E.5 provides that a Business’s affiliates for purposes of the employee and revenue eligibility criteria are to be determined using the affiliation test set forth in 13 CFR 121.301(f).
- *Recommendation:* As a general principle, the Federal Reserve should announce that any regulation imported from the SBA includes the variants for the PPP included in interim final rules and guidance except to the extent specifically so stated in writing by the Federal Reserve in an FAQ. We note that the Federal Reserve has already made it clear that the SBA regulations and guidance for Ineligible Businesses also import the PPP interim final rules and guidance while it has not done so with respect to the affiliation rules.
- *Clarification.* We would appreciate clarification of the following questions with respect to specific industries:
- Will any industries be excluded from the affiliation requirements of the MSLP?
  - Are the asset-based borrowers referred to in FAQ E.7 intended to be ineligible for the MSLP or could they participate if they are able to satisfy the EBITDA-based requirements of the program?
  - Are real estate industry borrowers permitted to access the MSLP and are there any particular requirements with respect to real estate industry lending and leverage? Eligible Lenders frequently apply particular non-EBITDA-based leverage metrics in the context of real estate loans, such as loan-to-value measures.
  - Per 13 CFR 120.110(c), “Ineligible Businesses” include passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds, except for “eligible passive companies” that satisfy statutory conditions in 13 CFR 120.111. Would traditional apartment properties leased to residential tenants and other commercial real estate properties leased to office / retail / industrial tenants be considered to be “Ineligible Businesses”?

## B. Definition of Debt

- Maximum loan size under the term sheets is determined by reference to the Eligible Borrower's "outstanding and undrawn available debt." FAQ G.2 clarifies this requirement by specifying that certain types of unused debt commitments will not count as available debt for purposes of the MSLP.
- *Clarification.* Please confirm the following do not constitute "debt" for purposes of the loan sizing requirements of the MSLP:
  - Uncommitted lines of credit, including "accordion" facilities (i.e., uncommitted expansion options that are included in the same credit agreement as a committed facility);
  - PPP exposure (whether or not forgiven);
  - Unconditionally cancelable unused portions of extensions of credit (e.g., on credit cards or other credit lines);
  - Products that establish a relationship between a lender and borrower under which the lender is willing to extend credit to a borrower on specific terms, but where each transaction is subject to an independent credit decision and there is no ongoing legal obligation to extend further credit;
  - Non-recourse debt of special purpose subsidiaries (not debt of parent / borrower);
  - Debt incurred in connection with cash management or other corporate treasury and depository services, including overnight or short-term lines for such purposes, ACH processing, cash pooling arrangements and similar programs; and
  - Exposure under commercial card programs (PCards). PCards are hybrid products designed for cash management, but do include revolving lines, with card charges incurred and payable with each billing statement. However, they do not have specific expiration dates and can be cancelled on short notice. Most credit agreements treat PCards and cash / treasury management services as payables and they do not count against other permitted debt or in calculating financial covenants.
- *Clarification.* Please clarify the following:
  - Are the references in FAQ G.2 to "any undrawn commitment that cannot be drawn without additional collateral" and "any undrawn commitment that is no longer available due to a change in circumstance" intended to exclude all undrawn working capital revolver availability or only in the case of facilities under which availability is determined by reference to a borrowing base (or a leverage test)? Would a delayed draw term loan subject to a leverage test be excluded if the borrower's current leverage profile would not allow them access to the loan?
  - Similarly, is the reference in FAQ G.2 to "any undrawn commitment that is used to finance receivables (including seasonal financing of inventory)" intended to exclude the undrawn portion of all asset-based revolvers that may be secured by accounts receivable, including those that are secured by other assets (frequently a borrower's primary revolving credit facility will be secured by receivables, inventory and other assets), or only of A/R securitization facilities and other financings specifically relating to receivables?
  - Are other securitizations intended to be excluded from "debt" for loan sizing purposes?

- In light of the reference in FAQ G.2 to “seasonal financing of inventory,” if a seasonal facility is about to be drawn should it still be excluded, and to the extent borrowings have already been increased because of seasonal fluctuations, should funded debt be adjusted?
  - Do issued but unfunded letters of credit fall under “existing outstanding undrawn available debt”? Do standalone committed letter of credit facilities count as “undrawn available debt”?
  - Will leverage calculations be on a net or gross basis?
- FAQ G.2 also provides that existing outstanding and undrawn available debt should be calculated as of the date of the loan application.
- *Recommendation.* Permit the amount of outstanding and undrawn available debt to be calculated as of a recent balance sheet date. Determining the amount of debt “as of the date of the loan application” will be challenging for many Eligible Borrowers, particularly if certain working capital debt is excluded, as they may not have the appropriate systems in place to obtain this information on a daily basis. It will also be difficult for Eligible Lenders to verify a particular day’s debt balance, particularly if there is a significant amount of outstanding or committed debt from a person other than the relevant Eligible Lender.

### C. 2019 Adjusted EBITDA

- *Clarification.* We note that the references to calculating 2019 adjusted EBITDA in the term sheets and FAQ G.1 do not make clear whether the applicable measurement period is the 2019 calendar year or a relevant borrower’s 2019 fiscal year. Please provide further clarification on this point.
- *Clarification.* Confirm that EBITDA (and debt) of an Eligible Borrower for purposes of loan sizing is to be determined on a consolidated basis for the relevant Eligible Borrower (i.e., taking into account the Eligible Borrower and its consolidated subsidiaries but not any parent or sister companies) without regard to whether a consolidated subsidiary of the Eligible Borrower will be a guarantor of the loan.

## II. Loan Terms and Features

### A. MSNLF

- Under the MSNLF term sheet, Eligible Loans under the MSNLF may be either secured or unsecured and must not be contractually subordinated to an Eligible Borrower’s other debt, but do not otherwise have to share in any credit support provided in respect of an Eligible Borrower’s existing debt.
- *Clarification.* Please confirm that, regardless of whether any other debt of the Eligible Borrower benefits from credit support, whether in the form of collateral or personal, cross-corporate or other guarantees, an MSNLF loan may be provided on a fully unsecured basis with no such security or guarantees so long as it is not contractually subordinated in right of payment to that other debt.
  - Note that many bank standard form loan documents contain “dragnet” clauses that cause existing guarantees, security agreements, mortgages, deeds of trust (etc.) to secure and support all future debt owing from the borrower to the lender. These clauses would have to be specifically waived in the MSNLF loan documents or lenders would need permission to amend all existing loan documents to clarify these clauses do not apply to the MSNLF loans.

### B. MSELF

- *Clarification.* Please confirm that an Eligible Lender that participates in a revolving credit facility serving as the Eligible Loan for purposes of the MSELF may originate an MSELF loan to upsize the Eligible

Borrower's existing term loan even if the Eligible Lender does not participate in that term loan. Many borrowers will have a revolving credit facility provided by traditional bank lenders and a term loan B tranche provided by alternative non-bank institutional lenders, so this clarification would confirm that the program is open to those borrowers.

- *Clarification.* Does the upsized tranche have to be provided by a single Eligible Lender in all cases or may multiple Eligible Lenders provide the upsized tranche if they all participate in the underlying Eligible Loan?
- *Clarification.* If an Eligible Lender is not an existing lender to an Eligible Borrower that has a syndicated facility outstanding, is the Eligible Lender permitted to provide an MSELF tranche if it acquires an interest in the syndicated facility in the secondary market?
- *Clarification.* Please confirm that upsized tranches are not to be considered increases of the underlying Eligible Loan and so treated as part of the same unit of account for purposes of derecognition. If they are not treated separately for such purposes, the SPV's 95% participation in the upsized tranche would result in the application of failed sale accounting and the whole upsized tranche would continue to be recognized on the balance sheet of the relevant Eligible Lender.
- A number of Eligible Borrowers may have existing loan facilities that benefit from separate collateral pools, such as a revolving credit facility secured by inventory and accounts receivable and a term loan secured by other assets.
  - *Recommendation.* The MSELF requirement that the MSELF loan be secured equally with the Eligible Borrower's existing debt should be satisfied if it is secured by one of these collateral pools and should not be required to be secured by both (or other assets). Revising the requirement as suggested would expand the reach of the program by minimizing the number of existing lenders from whom an Eligible Borrower would need to seek consent to obtain an MSELF loan.
  - *Clarification.* Please confirm that in the context of dual-collateral structures, the reference to "equivalent in secured status" in the 35% test for loan sizing is intended to refer only to that portion of an Eligible Borrower's existing debt that will share the same collateral pool as the MSELF loan rather than other secured debt that is secured by other assets (i.e., only the term loan or the revolving credit facility in this example and not both).

### C. Seniority of MSPLF and MSELF Loans

- The term sheets provide that MSPLF and MSELF loans must be term loans that are senior to or pari passu with the Eligible Borrower's other debt obligations (other than mortgage debt). Is this expected to override the existing security arrangements in the Eligible Borrower's current capital structure that are subject to an asset-specific security interest?
  - *Clarification.* Confirm and clarify that "senior or pari passu with" should be interpreted on a customary basis for senior secured term loans in structures that sit alongside asset-specific secured financings of the type described above. In particular:
    - an MSLP loan may be junior to the lien on current collateral (inventory, receivables) securing asset-based lending and receivables facilities in accordance with customary "crossing-lien" structures, so long as it is pari passu with existing term loans (including a first lien position on non-current assets securing such existing term loans);
    - an MSLP loan would not need to be secured by assets securing purchase money, project financing or similar indebtedness that is secured only by the specific equipment or other

project assets purchased, constructed or developed with the proceeds of such indebtedness (and the proceeds thereof);

- an MSLP loan would not need to be secured by cash collateral, deposit or securities accounts or similar collateral securing secured swaps (or other derivatives), cash management arrangements (including card programs, ACH, cash pooling or similar arrangements) and/or bilateral letter of credit facilities (or any similar arrangements) secured by such cash or other collateral; and
- an MSLP loan would not need to be secured by specific assets subject to receivables securitizations or similar structures.

#### D. Minimum Loan Size

- While recognizing the benefits of permitting smaller loan sizes under the MSLP, we believe this creates certain operational challenges that need to be considered.
  - Many Eligible Lenders approve, underwrite and administer small business loans (\$500,000 to \$1,000,000) in a manner that is very different from “middle market” loans (\$1,000,000 and above), for both lender efficiency and customer satisfaction reasons. For example, small business loans are often underwritten using a credit scoring process that does not use EBITDA as a decision factor, but rather applies decision factors such as a business risk score from a third-party provider, revenue size and some element of debt service coverage.
  - As a result, the lower minimum loan amounts will require Eligible Lenders to set up two parallel structures for providing MSLP loans or else treat small business loans as if they were middle market loans.
  - The former would be costly and take longer to implement, potentially resulting in delays to the MSLP, and will result in inconsistencies between the quality of the two classes of loans, while the latter would, in practice, likely result in a much higher denial rate for loans under \$1,000,000 because many of the borrowers will not be able to supply the needed underwriting materials, such as audited or CPA reviewed financial statements and similar financial records that larger business have as a matter of course. Moreover, applying an EBITDA-based leverage metric to determine program eligibility for smaller loans would require a manual process or time to establish an automated process, which could result in delays.

#### E. Amendments

- *Clarification.* Are there any restrictions on amendments to an Eligible Borrower’s existing credit facilities made prior to or simultaneously with the origination of an MSLP loan?

#### F. Capitalization of Interest in Year 1

- The term sheets provide that “unpaid interest will be capitalized.”
  - *Clarification.* Should the term sheet refer to interest “accruing” as opposed to being “capitalized”? If interest is to be capitalized, will it be added to principal at the end of each interest period during the first year of MSLP loans such that it compounds upon itself? If so, the principal amount will increase on different dates depending on whether 1-month or 3-month LIBOR is used. If 1-month LIBOR is chosen, an Eligible Borrower will pay less in interest, but the principal will have been compounded 12 times that first year.

- *Clarification.* Will the SPV anticipate the original loan funding amount to include this capitalized interest for the full year or does the SPV intend to make multiple purchases during the first year to maintain its 95% or 85% funding percentage? It is our view that any payment in kind would automatically be apportioned pro-rata under the participation and would not require an “additional purchase.”
- Any broader guidance that relates to the mechanics of the interest and principal deferral would also be appreciated as this would be helpful as banks work through their internal systems, billing practices, etc.

## G. Amortization

- We note that the term sheets require material mandatory amortization commencing at the end of the second year of MSLP loans. Credit facilities customarily restrict the ability of a borrower to incur indebtedness with a shorter maturity or weighted average life to maturity than such credit facility, so Eligible Borrowers with existing credit facilities may be prevented from participating in the MSLP by these or similar restrictions in their existing credit facilities, particularly in the case of the MSELF where the MSLP loan will be a new amortizing tranche of an existing facility (though we note that many borrowers may structure MSPLF loans as new tranches of existing facilities as well).
- *Recommendation.* Confirm that for Eligible Borrowers with existing credit facilities containing weighted average life to maturity restrictions, amortization will only be required to the extent not in violation of such restrictions.
- We also wanted to note the different amortization schedules contemplated for the MSNLF as compared to the MSPLF and MSELF, and that we believe the faster amortization in the MSNLF may discourage Eligible Borrowers from using it.

## H. Interest Mechanics

- *Recommendation.* Confirm that Eligible Lenders are permitted to charge customary default interest in excess of the interest rate set by the term sheets if an Eligible Borrower is in default.
- *Clarification.* Is an Eligible Lender restricted from setting monthly or quarterly interest payments after the first year, or will interest be required to be payable annually along with amortization payments?
- *Recommendation.* Consistent with market practice, permit index floors with regard to all MSLP facilities (which, to accommodate a lender's operational capabilities, may be expressed as a floor on the all-in rate of interest on the loan, e.g., if the loan rate is LIBOR + 3.00%, a rate floor of LIBOR + 4.00% may be used in lieu of a LIBOR floor of 1.00%).

## I. Non-LIBOR Option for Smaller Loans

- *Recommendation.* Provide for the use of Prime or a fixed rate option for smaller loans. Given the reduction in minimum loan size to \$500,000, it may well be the case that more small businesses apply for MSLP loans. These businesses are typically more familiar with Prime or fixed rates given their level of sophistication and the more labor-intensive nature of resetting LIBOR at the end of each contract. The different interest rate expectations of these borrowers is an example of the different market practices between small business lending and middle market lending referred to above.

## J. Fees and Expenses

- *Clarification.* Will Eligible Lenders and Eligible Borrowers have the freedom to negotiate amendment fees if an amendment to an MSLP loan is required? The term sheet currently addresses only the up-front fees payable at origination.
- *Recommendation.* Make clear that, consistent with market practice, Eligible Lenders may seek reimbursement from Eligible Borrowers for any fees and costs, including legal fees and costs, incurred on the part of an Eligible Lender in relation to the origination and administration of the MSLP loans.
- *Clarification.* Make clear that origination and transaction fees may be paid from proceeds at closing or directly collected from Borrower from other proceeds.
- *Clarification.* Are servicing fees paid annually in arrears?
- *Clarification.* Is an Eligible Lender permitted to charge fees other than those set forth in the term sheets?

### III. Documentation and Operational Issues

#### A. Loan Documentation and Applications

- We note the recent statement on the Federal Reserve's website noting that Eligible Lenders should provide their own form of loan documents when originating MSLP loans and that those loan documents must reflect the terms of the MSLP.
  - *Recommendation.* So long as loan documentation reflects the terms of the MSLP, Eligible Borrowers and Eligible Lenders should be free to set whatever other terms they consider necessary, and to amend those terms without requiring the involvement of the SPV (so long as those amendments do not relate to the particular matters reserved to the SPV under the participation agreement).
    - In particular, Eligible Lenders and Eligible Borrowers should be free to choose whether to include detailed covenants in loan documentation or simply use MFN clauses or cross-default provisions to ensure that MSLP loans are no less favorable than other debt incurred by the relevant Eligible Borrower.
- We also note that the Federal Reserve will publicly issue a form of loan participation agreement, form borrower and lender certifications and other form agreements necessary for the MSLP. As noted in our prior letters, many loan administration terms, reporting requirements and loan voting and control requirements (both before and after a default) will need to be clarified and resolved as part of the participation agreement before the MSLP can be implemented. Providing potential participants with the opportunity to review the form documentation before it is made effective will assist in resolving these issues as efficiently as possible.
  - *Recommendation.* Permit Eligible Lenders to modify the formatting of all documentation to allow more automation (i.e., pre-fill of forms) to speed processing of loans once approved and documentation phase is started. For example, does the Federal Reserve intend to produce a Microsoft Word-type document that must be updated for each MSLP loan and/or something that can be uploaded in to an Eligible Lender's existing loan documentation system (e.g., Laser Pro, Medici) which would make pre-filling a possibility. Similarly, given current COVID-19 conditions and the need to conduct lending activity remotely, electronic signature should be permitted for execution of all loan documentation and the Federal Reserve should confirm that Eligible Lenders can participate loans signed electronically and whether such loans need to be eVaulted.

- *Clarification.* Will a true sale opinion be provided or required in connection with each participation?
- In the context of the participation agreement, we would also note that including an “elevation” provision permitting the elevation of the SPV’s participation to an assignment would create significant added complexity to the loan documentation and could potentially prevent the effective operation of the program, particularly in the context of the MSNLF and MSPLF, due to the need to account for the possibility of multiple lenders of record. Virtually all small business borrowers and a very large portion of middle market borrowers use only bilateral loan facilities (i.e., one lender per loan facility) and are not familiar with the issues and complexities that can arise under multi-lender facilities. The need for borrower education around the mechanics, operational requirements, terms and nuances of syndicated loan facilities would be extensive and it would be challenging for borrowers to work syndicate lending practices into their internal financial reporting and capital management activities. Moreover, if the purpose of elevation is to facilitate capital markets transactions, other monetizations or management of the SPV’s holdings of participations, the better approach may be for the SPV (or securitization trust or other assignee or transferee) to instead take a formal assignment of a full 100% of the loans to be included in the relevant pools (and terminate the relevant participation agreements accordingly), as this will allow for the efficient bundling of loans with a single servicer.
- FAQ F.1 indicates that Eligible Borrowers will be required to submit loan applications.
  - *Clarification.* Some banks typically move from borrower discussion to term sheet presentation for consideration, rather than a formal application process. Is the expectation that an application is required and, if so, are the borrower certifications to be completed along with or incorporated into the formal application? If an application is required, please confirm that each Eligible Lender can develop its own application form to ensure it works with its processes and systems.
- As noted above, it will be critical for Eligible Lenders to have a set period of time to review and comment on the form of and substance of the participation agreement, the borrower and lender certifications and the other form agreements necessary for the MSLP so as to be able to ensure the forms will work in the context of the operational realities of the program and appropriately protect Eligible Lenders from undue risk.

## **B. Timing of SPV Participations**

- We note that the term sheet provides for the SPV’s participation to occur “expeditiously” following loan funding to Eligible Borrowers.
  - *Recommendation.* The SPV’s participation should close contemporaneously with the funding of the underlying loan.
  - If the participation cannot be contemporaneous with the funding of the underlying loan, there must be a mechanism to ensure that the Eligible Lender is protected against the risk of the SPV failing to purchase its participation after the Eligible Lender has committed to fund. Without such a mechanism, many Eligible Lenders may be discouraged from participating in the MSLP.
  - *Clarification.* Will the SPV buy a participation if the loan was already in process but not completed by the September deadline?

## **C. Disclosure**

- *Clarification.* Dodd-Frank added detailed disclosure requirements for both bank borrowing at the discount window and emergency facilities under Section 13(3) of the Federal Reserve Act. The Federal

Reserve Act, as amended by Dodd-Frank, requires disclosure of specific information at a precise point in time. 12 U.S.C. § 248(s). The Chair has the authority to shorten the time for public release of the required information, provided that the Chair “determines that such disclosure would be in the public interest and would not harm the effectiveness of the relevant credit facility or the purpose or conduct of covered transactions.” 12 U.S.C. § 248 (s)(3). These statutory requirements were formulated for Dodd-Frank after Federal Reserve staff took an informal poll of banks using the discount window, and others participating in Federal Reserve facilities. We are not aware of any reason why a period shorter than 1-year would be advisable now, especially when emergency conditions are still in full effect and there is heightened sensitivity to credit condition.

A Federal Reserve press release on April 23, 2020 states that the Federal Reserve will be releasing to the public on a monthly basis borrower identities and loan terms for credit facilities that use CARES Act funding. The FAQs released on April 30, by contrast, reference the provisions of Dodd-Frank, including the 1-year disclosure rule for Section 13(3) programs. Please clarify which disclosure rule will apply. If disclosure is to be monthly, please clarify whether the Chair has made the required findings for a shortened period.

- *Clarification.* Confirm that loan documentation and financial information provided to the SPV or the Federal Reserve will remain confidential. Many Eligible Borrowers may be discouraged from participation if detailed information about their business is to be made public when it otherwise would not, and we believe disclosure should be limited to the information required by statute to avoid discouraging participation. Note also that consideration will need to be given to applicable privacy laws to the extent personal identifying information is expected to be included in any disclosures.
- *Recommendation.* With respect to intended disclosures that could require bank input/reporting, please provide detailed fields, required information and mechanism for standardized data aggregation so that Eligible Lenders know what information will be collected with respect to MSLP loans.

#### IV. Regulatory Matters and Other Restrictions

##### A. Leveraged Lending Guidelines

- *Clarification.* Are MSLP loans excluded from the Leveraged Lending guidelines? If they are not totally excluded, please confirm that only the Eligible Lender's hold is included. Will a bank's total credit commitments or only the MSLP loan hold be required to be classified in the event that the MSLP loan or upsized tranche results in an increase in leverage levels above those required to classify a loan as leveraged?

##### B. Dividends / Distributions Restrictions

- We note the exception from the dividend and distribution restrictions permitting tax pass-through entities to make distributions necessary for their owners to meet current tax obligations.
  - *Clarification.* Are dividends / distributions also permissible to maintain tax status, as well as to pay tax obligations? For example, would a REIT be permitted to pay dividends that are required to maintain its REIT status?
- Is the prohibition on dividends and distributions intended to capture intercompany dividends (below the Eligible Borrower) or dividends by other affiliates of the Eligible Borrower (e.g., a parent company)?
  - *Recommendation.* Confirm that the dividend and distribution and related restrictions apply only to the Eligible Borrower and not to its parent company or other affiliates.

- Is the prohibition on dividends and distributions intended to preclude a sale of an Eligible Borrower, or do those restrictions terminate in the case of a sale of an Eligible Borrower (or all or substantially all of its assets)?
  - *Recommendation.* Confirm that the restrictions are not applicable and cease to apply in connection with a sale or other change of control of the applicable Eligible Borrower.
- *Clarification.* Confirm Eligible Lenders will not be responsible for verifying, monitoring or reporting compliance with dividend, distribution and compensation restrictions, including those that survive after the repayment in full of the loan.

### C. Derivatives

- *Recommendation.* Confirm that payments under, entering into, cancelling and otherwise modifying, settling, resolving or working with interest rate swaps and hedging products are not prohibited or inhibited, in any manner, by any of the terms of the MSLP.

### D. Banks' Internal Restrictions / Risk Appetite

- *Clarification.* Please provide guidance on whether individual Eligible Lenders would be criticized if they apply their own specific minimum loan amounts (e.g., providing MSLP loans only in amounts in excess of \$2 million) or deal only with existing customers.

### E. Pass Ratings

- The term sheets provide that, in the case of the MSELF, the underlying Eligible Loan must have had a "pass" rating at December 31, 2019 and, in the case of the MSNLF and MSPLF, any non-program loans made by the Eligible Lender to the Eligible Borrower as of December 31, 2019 must have had a "pass" rating.
  - *Clarification.* If an Eligible Lender did not provide funding to an Eligible Borrower as of December 31, 2019, but other lenders did and the loans provided by those lenders were "non-pass," is the new Eligible Lender permitted to make an MSLP loan? How would the Eligible Lender determine whether the Eligible Borrower's existing loans were "pass" or "non-pass"?
  - *Clarification.* How are Eligible Lenders expected to communicate with Eligible Borrowers regarding "pass" ratings of existing debt? Banks generally are not permitted to share internal rating information and the inclusion of the "pass" rating criterion in the term sheets may result in Eligible Borrowers inquiring as to whether their "non-pass" status was the reason for denial of an MSLP loan. This inquiry could expose an Eligible Lender to the risk of being caught between its regulatory obligations of confidentiality with respect to confidential supervisory information and their obligation to explain a loan denial. In addition, Eligible Borrowers may be subject to disclosure requirements, particularly if they are public companies, if they are informed about the internal risk rating attributed to their loans by their bank.
  - *Confirmation.* Please confirm that the SPV will not be able to challenge the internal risk rating as of December 31, 2019. If a default arises, the SPV should not be able to claim a breach of representation on borrower eligibility, based on any subsequent review or otherwise, that the borrower was not a pass credit even though the internal rating was a pass.

### F. Reporting Requirements

- We note that FAQ H.6 contemplates that an Eligible Lender will be expected to report to the Federal Reserve if it becomes aware that an Eligible Borrower has made a material misstatement or otherwise breaches a covenant during the term of an MSPLF loan.
  - *Recommendation.* Define expectations and provide guidance for the reporting mechanism for material misstatements or covenant breaches by an Eligible Borrower.
  - *Clarification:* How is this requirement intended to be aligned with SAR requirements? If a material misstatement or breach of covenant is considered suspicious activity and a SAR is filed, it would be subject to substantial secrecy obligations that could conflict with a reporting obligation.

## G. Other Regulatory Matters

- We would appreciate any additional guidance that can be provided regarding potential relief from other regulatory requirements in connection with the MSLP, including with respect to the matters mentioned in Section VII of our letter of April 16, 2020, such as those relating to flood insurance. As we have noted previously, there are certain requirements that may result in a delay to the ability of Eligible Borrowers to access MSLP loans if left unmodified. For example, we would recommend that the MSLP receive the same relief with respect to KYC requirements as has been provided for the PPP and that existing legal entity customers be exempted from beneficial ownership requirements for purposes of the MSLP by finding that the provision of a loan or extension of an existing loan or line of credit under the facility is not a “new account” for the purposes of the CDD rule.

## V. Certifications

### A. Borrower Certifications

- As we have noted previously, in addition to the matters contemplated by the term sheets, it will be important for borrowers to understand that there may be other certifications that borrowers will need to provide, including those relating to the requirements applicable generally to lending programs provided under Section 13(3) of the Federal Reserve Act and its implementing regulations, such as the requirement that participants in those programs be unable to secure adequate credit accommodations from other banking institutions.
  - *Recommendation.* Confirm that Eligible Lenders may rely upon an Eligible Borrower’s certifications with respect to these matters, just as is contemplated in the term sheets and FAQ for the certifications expressly set forth in the term sheets.
  - *Recommendation.* Each participation agreement to be entered into between the SPV and an Eligible Lender should include an express agreement by the SPV that (A) the Eligible Lender is (i) not responsible for the borrower’s certifications, covenants or representations; (ii) entitled to rely on those certifications, covenants and representations for all purposes without further verification; and (iii) not required to verify or monitor the borrower’s ongoing compliance; and (B) there is no recourse to, or other liability for, the Eligible Lender if a borrower certification, covenant or representation turns out to be false. This will ensure that Eligible Lenders have the necessary clarity that they will not be held responsible for borrower misstatements or covenant breaches.
  - *Recommendation.* With respect to the requirement that participants in Section 13(3) lending programs be unable to secure adequate credit accommodations, clarify that an Eligible Borrower need only certify that it requires financing due to the exigent circumstances presented by the COVID-19 pandemic and that in making that certification, an Eligible Borrower may rely upon its determination that credit is not available at prices or on conditions that are consistent with the purposes of the MSLP or with normal market conditions and may make the certification even if it is

concurrently considering or pursuing multiple options for liquidity, including outside of the MSLP, if it determines that the conditions of the MSLP are commercially more suitable to it than those that are being offered by the private sector at the time of the certification or commercially suitable to it alongside additional liquidity options that may be available in the private sector.

- We note the guidance provided to Eligible Borrowers in FAQ G.8 regarding measures that would constitute “commercially reasonable efforts” to maintain payroll and retain employees.
  - *Recommendation.* Given this is likely to be an area of significant focus for Eligible Borrowers and may make them hesitate to use the MSLP, we would recommend providing additional guidance on this standard..
- FAQ H.3 clarifies that the restriction on Eligible Borrowers repaying debt is not intended to preclude the Eligible Borrower from “refinancing maturing debt,” but does not make clear whether Eligible Borrowers are expected to wait until the final maturity date of a debt instrument to conduct that refinancing or may refinance prior to final maturity. Waiting until final maturity presents substantial payment default risk for Eligible Borrowers, for instance because market conditions may not be conducive to the execution of a refinancing transaction at the time of final maturity. In addition, unrefinanced debt that matures within a year often precludes a borrower from obtaining a clean audit opinion without a “going concern” or like qualification or exception, and such an audit opinion is a customary requirement in many credit facilities (with failure to obtain such an audit opinion presenting the risk of an early event of default and acceleration right for other creditors).
  - *Recommendation.* Confirm that the “refinancing maturing debt” exception permits refinancings within the 18 months prior to the final maturity of a debt instrument to allow Eligible Borrowers (and their financing sources) to manage the company’s capital structure prior to a scheduled maturity date.

## B. Lender Certifications

- Eligible Lenders are required to certify that they are eligible to participate in the MSLP, including in light of the conflicts of interest prohibition in section 4019(b) of the CARES Act.
  - *Recommendation.* Given that Eligible Lender certifications will be provided by the Eligible Lender’s senior management, clarify that such certifications may be submitted once on behalf of an institution in respect of all MSLP loans.
- Lenders are required to commit not to cancel or reduce existing committed lines of credit to the Eligible Borrower, except in the case of default. We welcome the clarification provided by FAQ H.5 on this matter.
  - *Recommendation.* Confirm that exposure under PCards (as described above) can be reduced or cancelled without violating this requirement given that it is not generally treated as debt.
  - *Recommendation.* Confirm that not funding a requested draw on a line of credit as a result of the relevant conditions to funding not being satisfied would not constitute a cancellation or reduction if an existing committed line of credit.
  - *Clarification.* Confirm that lenders can still exercise remedies upon a default by an Eligible Borrower.

\* \* \* \* \*

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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