Proskauer

Where is Main Street?

The Federal Reserve Provides Guidance on the Main Street Lending Program

Coronavirus Resource Center

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

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

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Updated as of February 19, 2021

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

Fed Releases Updated Frequently Asked Questions for Business and Nonprofit Facilities

UPDATE: The Main Street Lending Program (the "Program") terminated on January 8, 2021. On February 1, 2021, the Federal Reserve Bank of Boston (the "Boston Fed") released post-termination Frequently Asked Questions for the Program ("Post-Termination FAQs", see here). The updates (1) make clear that borrowers can take on and pay, if mandatory and due, debt incurred as a result of participation in the Economic Injury Disaster Loan program or the Paycheck Protection Program ("PPP"), (2) allow borrowers to refinance existing non-Program debt under specific circumstances and (3) provide additional information on the process for loan amendments and waivers. For archived For-Profit FAQs ("FAQs"), see here, and archived Nonprofit FAQs ("Nonprofit FAQs"), see here.

As noted in our prior alerts (see here, and in numerous updates to this alert), the Department of the Treasury previously committed to using funding from the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") to make a $75 billion equity investment in the Program through MS Facilities LLC (the "SPV"), a special purpose vehicle operated by the Boston Fed. The Program was designed to leverage this investment from Treasury up to eight times, for up to $600 billion in term loans for eligible borrowers.

UPDATE: According to the Boston Fed, at the closing of the Program, the total outstanding amount of loans from the Boston Fed to the SPV for settled transactions under the Program stood at approximately $16.6 billion to over 1,800 companies in 49 states and two U.S. territories.

This client alert describes the main terms, issues and open questions under the Term Sheets, the FAQs, the Nonprofit FAQs, and other documentation for each of the five separate loan facilities under the Program. A complete description of the Nonprofit Facilities follows the description of the Business Facilities.

Program Documentation

The Boston Fed has released and updated multiple documents for potential lenders and borrowers under the Program, including:

- term sheets for the Main Street New Loan Facility ("New Loan Facility", see here), the Main Street Priority Lending Facility ("Priority Loan Facility", see here), and the Main Street Expanded Loan Facility ("Expanded Loan Facility", see here) (respectively, the "Business Facilities" and the "Business Term Sheets")

- term sheets for the Main Street Nonprofit Organization New Loan Facility ("Nonprofit New Loan Facility," see here) and the Main Street Nonprofit Organization Expanded Loan Facility ("Nonprofit Expanded Loan Facility", see here) (respectively, the "Nonprofit Facilities" and the "Nonprofit Term Sheets", collectively with the Business Term Sheets, the "Term Sheets")

- multiple iterations of the FAQs and Nonprofit FAQs described above
- borrower certifications and covenants ("Borrower Certifications")lender certifications and covenants ("Lender Certifications"), loan participation agreement forms, instructions for lender required documentation and other legal documents related to the Program.

The Boston Fed has also published a state-by-state listing of Eligible Lenders that elected to be listed as participating in the Program that are currently accepting applications from new business customers (see here).

Program Terms and Descriptions

Who is an Eligible Lender under the Business Facilities?

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

Who is an Eligible Borrower under the Business Facilities?

What types of entities are eligible?

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

The FAQs explain that in order for a tribal business to be eligible for the Program, a tribal business concern must be either (i) wholly owned by one or more Indian tribal governments, or by a corporation that is wholly owned by one or more Indian tribal governments, or (ii) owned in part by one or more Indian tribal governments, or by a corporation that is wholly owned by one or more Indian tribal governments, if all other owners are either U.S. citizens or Businesses.

The FAQs further state that a tribal business concern must be a separate and distinct legal entity organized or chartered by the tribe, Federal or state authorities. The Federal Reserve clarified that a tribal economic enterprise that does not have a separate legal personality from its related tribal government may still be eligible under the Program, so long as (1) the finances of the tribal economic enterprise are distinguishable from the related tribal government, (2) the tribal economic enterprise and Eligible Lender use financial records of the tribal economic enterprise, (3) recourse is available to the assets of the tribal economic enterprise and (4) the tribal economic enterprise meets the other eligibility criteria. Eligible Lenders must determine, based upon their own due diligence and advice from experienced in-house or outside counsel, that the tribal business either

does not have or has effectively waived sovereign immunity such that U.S. federal courts, in addition to any state court as may be agreed, may be among courts of competent jurisdiction for matters resulting from the Program. Such waiver must extend to the Borrower Certifications, Assignment-in-Blank and Co-Lender Agreement, as each is applicable.

The Indian Gaming Regulatory Act ("IGRA"). The FAQs state that the Federal Reserve does not have the authority to interpret the IGRA. The General Counsel of the National Indian Gaming Commission ("NIGC") has provided the Federal Reserve with a letter opining that Program requirements would not cause a loan facility to be a management contract requiring the NIGC's approval, and that Program requirements themselves would not cause a loan facility to violate IGRA's sole proprietary interest requirement. Additional questions should be referred to the NIGC General Counsel.

Nonprofit organizations are not eligible borrowers under the Business Facilities, primarily because the main metric for measuring loan eligibility is adjusted 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA") and nonprofit organizations generally do not have EBITDA. However, the Federal Reserve has established two separate loan options for nonprofit organizations, discussed below. Further, the Term Sheets and FAQs state that other forms of organizations may be included as eligible Businesses at the discretion of the Federal Reserve.

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

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

Which Businesses are Eligible Borrowers?

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

- was established prior to March 13, 2020;
- is not an "Ineligible Business;"

- meets at least one of the following two conditions: (i) has 15,000 employees or fewer, or (ii) had 2019 annual revenues of $5 billion or less;

- is created or organized in the U.S. or under the laws of the U.S. with significant operations in and a majority of its employees based in the U.S.;

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

  The FAQs clarify the determination of "significant operations in the U.S." The Eligible Borrower's operations should be evaluated on a consolidated basis together with its subsidiaries, but not its parent companies or affiliates. Non-exhaustive examples of "significant operations in the U.S." include an Eligible Borrower that has, on a consolidated basis, greater than 50% of its assets located in the U.S., or annual net income, operating revenues or consolidated operating expenses (excluding interest expense and other expenses associated with debt service) generated in the U.S.

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

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

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

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

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

The FAQs added that as of July 15, 2020, the Federal Reserve has incorporated the SBA's Interim Final Rules published in the Federal Register on June 18, 2020 and June 26, 2020, which amended the SBA's earlier Interim Final Rule published in the Federal Registrar on April 15, 2020, to make the eligibility rules more permissive for certain applicants with criminal histories. (For the SBA's Interim Final Rules, see here and here.)

To expand borrower eligibility, the Business Term Sheets were revised on April 30 to increase the maximum number of employees from 10,000 to 15,000 employees, and to increase maximum 2019 annual revenues from $2.5 billion to $5 billion. However, inclusion of the affiliation rules discussed below in determining the number of employees and annual revenues will limit the number of Businesses eligible under the Program, particularly in the case of private equity funds and their portfolio companies.

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

The FAQs note that the terms of the Program do not impose any special compliance procedures on Eligible Lenders to verify that a Borrower is not an Ineligible Business. Eligible Lenders that are subject to regulations designed to prevent improper insider lending should maintain compliance with those pre-existing rules and regulations without exception or modification for the Program.

The FAQs added an eligibility "safe harbor" from the insider lending rules and regulations for borrowers that are owned 5% or less by an Eligible Lender. A borrower shall not be deemed ineligible based solely on ownership by the Eligible Lender and its corporate affiliates of equity interests in the borrower that do not in the aggregate exceed 5% of the borrower's total outstanding equity interests. For example, a publicly traded borrower would not be deemed an Ineligible Business where a broker-dealer affiliate of an Eligible Lender holds shares of the borrower, acquired for market-making purposes, in an amount that, taken together with all other equity interests owned by the Eligible Lender and its corporate affiliates, totals less than 5% of the borrower's outstanding equity interests. The FAQs make it clear that this exception only

applies to the Program and does not apply to the PPP or 7(a) lending programs administered by the SBA.

It is unclear exactly who would be considered a "corporate" affiliate as the term is not defined and the FAQs do not provide any additional guidance. The use of the term "corporate" affiliate would suggest that the safe harbor exception does not apply to individual shareholders.

The FAQs state that a Business can be an Eligible Borrower regardless of whether it receives a PPP loan or an Economic Injury Disaster Loan as long as it meets the Eligible Borrower criteria.

The FAQs clarify that when calculating "existing and undrawn available debt" for purposes of determining the maximum allowable loan amount under the Program, an Eligible Borrower that, together with its affiliates (as defined for purposes of the PPP), received PPP loans with original principal amounts totaling $2 million or more, may not exclude any of the outstanding portion of such loans from "existing outstanding and undrawn available debt," except to the extent that the SBA has actually determined that such loans are eligible for forgiveness.

Eligible Lenders and Borrowers may exclude PPP debt provided that the Eligible Borrower, together with its affiliates (as defined for purposes of the PPP), received PPP loans with original principal amounts totaling less than $2 million. Under such circumstances, the following may be excluded from the "existing and undrawn available debt" calculation:

- If the Eligible Borrower has applied for forgiveness of its PPP loan, the "Forgiveness Amount" as reported by the Eligible Borrower on Line 11 of the SBA's Form 3508 (see here), Line 8 of Form 3508EZ (see here) or on Form 3508S (see here), as applicable, may be excluded, except to the extent the Eligible Borrower's PPP lender or SBA has determined that such amount is ineligible for forgiveness.

- If the Eligible Borrower has not yet applied for forgiveness of its PPP loan, the amount of its PPP loan that its principal executive officer has a reasonable, good-faith basis to believe will be forgiven in accordance with applicable PPP requirements, after review of the SBA's Form 3508, Form 3508EZ or Form 3508S, as applicable, including the relevant instructions, may be excluded.

Each Eligible Borrower seeking to exclude some or all of its PPP debt from the calculation of "existing outstanding and undrawn available debt" as provided by this FAQ must, during the Main Street loan underwriting process, provide its Eligible Lender with either:

- A copy of the PPP loan forgiveness application (SBA Form 3508, 3508EZ or 3508S) the Eligible Borrower has already completed and submitted to its PPP lender or lender servicing its PPP loan (which may be the same Eligible Lender); or

- A completed and signed version of the Exclusion of PPP Loan from Main Street "Outstanding Debt" form (see here).

If the PPP lender or SBA has determined that all or part of an Eligible Borrower's PPP loan is not forgivable prior to the submission of a Program loan to the Main Street Portal, the portion of the

PPP loan that the PPP lender or SBA has determined is not forgivable must be included in the "existing outstanding and undrawn available debt" calculation. Eligible Lenders and Eligible Borrowers may exclude 100% of the amount of any PPP loan that SBA has determined is eligible for forgiveness.

The framework for excluding an Eligible Borrower's PPP loan from the Program "existing outstanding and undrawn available debt" calculation reflects the intention of the Federal Reserve and the Treasury Department to support lending to PPP borrowers that are otherwise eligible to borrow under the Program, but may not receive the SBA's PPP loan forgiveness decisions by the time of their Program loans. It does not reflect any forecast or assessment of the actual expected amount of PPP loan forgiveness for any PPP borrowers.

The FAQs also make clear that sole proprietorships that are not otherwise established under law as a "Business" as defined above are not Eligible Borrowers.

How are employees counted when determining eligibility?

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

How are 2019 annual revenues calculated when determining eligibility?

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

Terms of Eligible Loans under the Business Facilities

All Eligible Loans under the Program (including as proposed under the Nonprofit Term Sheets) will have the following terms:

- 5 year maturity;

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

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

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

The FAQs explain that after the first year of the loan, Eligible Lenders may require the payment of interest at the frequency they would ordinarily require payment with respect to loans made to similarly situated borrowers (e.g., quarterly or annually). The FAQs indicate that the Federal Reserve does not expect that the frequency would ever be more than monthly.

Pricing grids with fluctuating interest rates based on performance metrics are not permitted – interest on all Program loans will be LIBOR (1 or 3 months) plus 300 basis points. The Eligible Lender may charge default interest.

The FAQs clearly state that LIBOR floors are not permissible. This would appear to apply to "zero floor" LIBOR provisions as well, which could be problematic for banks that have made it a policy in recent years to require that the applicable reference rate cannot be less than zero.

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

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

Loan Terms	New Loan Facility (originated post April 24, 2020)	Priority Loan Facility (originated post April 24, 2020)	Expanded Loan Facility (term loan upsize to an existing term loan or revolving credit facility originated on or before April 24, 2020, with remaining maturity of at least 18 months)
Minimum Loan Size	$100,000	$100,000	$10,000,000 The Federal Reserve is considering reducing the minimum loan size of the Expanded Loan Facility.
Maximum Loan Size	Lesser of $35M or the amount, when added to existing outstanding and undrawn available debt, not exceeding **4x** 2019 adjusted EBITDA	Lesser of $50M or the amount, when added to existing outstanding and undrawn available debt, not exceeding **6x** 2019 adjusted EBITDA	Add–on term loan capped at the lesser of (i) $300M or (iii) the amount, when added to existing outstanding and undrawn available debt, not exceeding **6x** 2019 adjusted EBITDA
Lender Risk Retention	5%	5%	5%
Amortization of Principal (year one and two payment deferred for all)	Years 3-5: 15%, 15%, 70%, respectively	Years 3-5: 15%, 15%, 70%, respectively	Years 3-5: 15%, 15%, 70%, respectively
Transaction Fee (paid to SPV by Eligible Lender or Eligible Borrower)	1% of principal amount of $250,000 or greater No transaction fee if principal amount is less than $250,000	1% of principal amount of $250,000 or greater No transaction fee if principal amount is less than $250,000	0.75% of principal amount

Loan Terms	New Loan Facility (originated post April 24, 2020)	Priority Loan Facility (originated post April 24, 2020)	Expanded Loan Facility (term loan upsize to an existing term loan or revolving credit facility originated on or before April 24, 2020, with remaining maturity of at least 18 months)
Loan Origination Fee (paid by Eligible Borrower to Eligible Lender)	1% of principal amount of $250,000 or greater 2% of principal amount if less than $250,000	1% of principal amount of $250,000 or greater 2% of principal amount if less than $250,000	0.75% of principal amount
Loan Servicing Fee (paid by SPV to Eligible Lender)	0.25% of principal amount of $250,000 or greater 0.5% of principal amount if less than $250,000	0.25% of principal amount of $250,000 or greater 0.5% of principal amount if less than $250,000	0.25% of the principal amount per annum

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

The term sheets of the New Loan Facility and Priority Loan Facility state that if the initial principal amount of the Eligible Loan is $250,000 or greater, an Eligible Lender will pay the SPV a transaction fee of 100 basis points of the principal amount of the Eligible Loan at the time of origination. The Eligible Lender may require the Eligible Borrower to pay this fee. No transaction fee will be imposed if the initial principal amount of the Eligible Loan is less than $250,000.

When deferred interest has been capitalized and added to the principal amount and purchase amount, the transaction fee will be based on the principal amount including such capitalized interest. The FAQs indicate that the Federal Reserve does not expect that interest would be capitalized more than monthly, and thus capitalized interest should only affect the calculation of the transaction fee where loans were extended at least one month prior to July 6, 2020. The applicability of this provision is unclear, given there have been no public announcements of Program loans closing prior to that date.

According to the term sheets of the New Loan Facility and Priority Loan Facility, if the initial principal amount of the Eligible Loan is $250,000 or greater, an Eligible Borrower will pay an Eligible Lender an origination fee of up to 100 basis points of the principal amount of the Eligible Loan at the time of origination. If the initial principal amount of the Eligible Loan is less than $250,000, an Eligible Borrower will pay an Eligible Lender an origination fee of up to 200 basis points of the principal amount of the Eligible Loan at the time of origination.

The term sheets of the New Loan Facility and Priority Loan Facility state that if the initial principal amount of the Eligible Loan is $250,000 or greater, the SPV will pay an Eligible Lender 25 basis points of the principal amount of its participation in the Eligible Loan per annum for loan servicing. If the initial principal amount of the Eligible Loan is less than $250,000, the SPV will pay an Eligible Lender 50 basis points of the principal amount of its participation in the Eligible Loan per annum for loan servicing. Eligible Lenders should consult the Servicing Agreement (see here) for more information.

The FAQs note that the SPV will not accept more than one loan made to a single Eligible Borrower by the same Eligible Lender with an initial principal amount of less than $250,000 within 60 days. This restriction is intended to prevent Eligible Lenders from originating multiple loans with an initial principal amount of less than $250,000 to the same Eligible Borrower in order to benefit from the fee structure.

The FAQs state that Eligible Lenders may include permissible fees in the principal amount of the Program loan, provided that the total Program loan amount, including such fees, does not exceed the maximum loan size permitted for the Eligible Borrower under the relevant Program facility.

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

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

The FAQs and Nonprofit FAQs state that customary consent fees may also be charged if the Eligible Borrower’s other loans or debt instruments need to be amended in order to facilitate the origination of a new New Loan Facility or Priority Loan Facility loan.

How is 2019 Adjusted EBITDA Calculated?

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

various different methodologies used by Eligible Lenders in determining adjusted EBITDA under the New Loan Facility and Priority Loan Facility.

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

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

The FAQs clarify that in order for an Eligible Borrower to receive a Program loan, it must have a financial record upon which calculation of an adjusted 2019 EBITDA can be based. If an otherwise Eligible Borrower was established before March 13, 2020, but does not have a financial history sufficient to establish that it was in sound financial condition before the onset of the pandemic, it will not qualify for a Program loan. If an Eligible Borrower has no financial record of its own, but has clear predecessors or subsidiaries that can be referenced to calculate its adjusted 2019 EBITDA, the Eligible Borrower can use the financial records of such predecessors or subsidiaries.

Alternatives to EBITDA?

As indicated above, EBITDA is the key underwriting metric required for determining Eligible Loans under the Business Facilities.

The FAQs state that the Federal Reserve and the Treasury Department have considered expanding the Program to include lending based on collateral values and have determined that conditions do not warrant such changes at this time. They will continue to monitor credit conditions and will adjust the Program as appropriate.

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

"Existing outstanding and undrawn available debt" includes all amounts borrowed under any loan facility, including unsecured or secured loans from any bank, non-bank financial institution, or private lender, as well as any publicly issued bonds or private placement facilities.

The FAQs state that the position of the "existing outstanding and undrawn available debt" in the borrower's capital structure is not relevant to the calculation. For example, subordinated debt and debt with deferred principal and interest payments should be included in the definition of debt and, therefore, are included in the calculation.

"Existing outstanding and undrawn available debt" also includes all unused commitments under any loan facility, excluding (1) any undrawn commitment that serves as a backup line for commercial paper issuance, (2) any undrawn commitment that is used to finance receivables (including seasonal financing of inventory), (3) any undrawn commitment that cannot be drawn without additional collateral, and (4) any undrawn commitment that is no longer available due to a change in circumstance. Existing outstanding and undrawn available debt should be calculated as of the date of the loan application.

The FAQs and Nonprofit FAQs state that if an undrawn facility is used to finance seasonal inventory as well as inventory that is not considered seasonal, then the Eligible Lender should include only the amount of undrawn debt that could be advanced on the Eligible Borrower's non-seasonal inventory as of the date of the loan application.

The FAQs clarify that if an Eligible Borrower is using a Priority Loan Facility to refinance debt it owes to a different lender, that debt will not be counted in its calculation of existing outstanding and undrawn available debt. To the extent that such outstanding debt is only being partially refinanced by the Program loan, only the portion that is being refinanced may be excluded from the "existing outstanding and undrawn available debt" calculation.

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

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

The FAQs clarify that collateral may be required for Priority Loan Facility loans, Expanded Loan Facility upsized tranches and Nonprofit Expanded Loan Facility upsized tranches due to the Eligible Borrower's other loans and debt instruments.

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

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

UPDATE: Eligible Lenders and Eligible Borrowers may not reduce or restructure the underlying term loan or revolving credit facility prior to the origination of the Expanded Loan Facility or Nonprofit Expanded Loan Facility in order to evade the *pari passu* requirement.

Cash Collateral, Compensating Balances, Cash Reserve Accounts and Cash Escrow Accounts. The FAQs provide that Eligible Borrowers and Eligible Lenders can agree to include provisions requiring that an Eligible Borrower maintain cash balances that are restricted to serving as collateral for the Eligible Loan or for paying principal or interest on the Eligible Loan when such payments are mandatory and due. Such cash collateral, compensating balance, cash reserve account, and escrow account provisions can be included at origination or during the term of the Eligible Loan if such terms are a normal component of the Eligible Lender's underwriting practices for similarly situated borrowers and do not exceed 15% of the outstanding balance of the Eligible Loan. In addition, such balances should not be used to prepay principal or interest of the Eligible Loan, except at the option of the Eligible Borrower. Because the Federal Reserve and Treasury Department do not encourage the practice of requiring Eligible Borrowers to maintain cash collateral or compensating balances, Eligible Lenders should minimize these requirements and align their approach with the expected interest payments and amortization schedule specified for Eligible Loans.

Delayed Draw Balances. The FAQs provide that Eligible Borrowers and Eligible Lenders can agree to place a portion of the proceeds of an Eligible Loan in an account held at the Eligible Lender and delay Eligible Borrower's ability to draw on such proceeds until certain conditions related to Eligible Borrower's operations are satisfied. Such conditions may include a requirement that Eligible Borrower (i) provide documentation or other evidence that loan proceeds are being withdrawn to fund pre-agreed activities or purchases by the Eligible Borrower, or (ii) pledge additional collateral to secure the Eligible Loan that was not available at the time of origination. Any restrictions must be substantially similar to conditions placed on similarly situated borrowers by Eligible Lender in the ordinary course of its underwriting procedures. The conditions must be

included in the loan agreement at origination and must be fully transparent to the Eligible Borrower. In addition, Eligible Lenders may not use such loan features for the purpose of ensuring funds are available for mandatory and due payments on ***other*** debt owed by the Eligible Borrower, except in the case of a permitted refinancing of existing debt under the Priority Loan Facility. The 15% limit on cash collateral and compensating balances described above would not apply to such delayed draw features.

Although the FAQs refer to this feature as a "delayed draw," it differs from a typical delayed draw term loan structure in that the Eligible Loan is fully funded at closing. In a typical delayed draw term loan structure, a portion of the term loans would remain unfunded at closing, with the lender committing to lend the unfunded portion of the commitments on request following the closing, subject to the satisfaction of customary conditions. The borrower may be required to pay an undrawn commitment fee to the lender, but would not be required to pay interest on the undrawn portion unless and until the delayed draw loans were actually funded. In the "delayed draw" mechanism described in the FAQs, the Eligible Loan would be fully funded at closing, and the Eligible Borrower would be required to pay interest on the entire amount of the Eligible Loan, including the portion that is held back by the Eligible Lender subject to delayed application.

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

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

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

- the issuance of a New Loan Facility loan that is secured (including in a second lien or other capacity), whether or not the Eligible Borrower has an outstanding secured loan of any lien priority;
- the issuance of a New Loan Facility loan that is unsecured, regardless of the secured or unsecured status of the Eligible Borrower's existing indebtedness; or

- the Eligible Borrower from taking on new secured or unsecured debt after receiving a New Loan Facility loan, provided the new debt would not have higher contractual priority in bankruptcy than the New Loan Facility loan.

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

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

The FAQs revised the definition of Mortgage Debt to clarify that Mortgage Debt only includes debt that is secured *solely* by real property. Loans secured by "all assets" (including real property) would thus not constitute Mortgage Debt. The FAQs indicate that this clarification is intended to be incorporated into the definition of Mortgage Debt under the Borrower Certifications and Lender Certifications for the Priority Loan Facility and the Expanded Loan Facility. The FAQs indicate, in a footnote, that any loans or upsized tranches under the Priority Loan Facility or Expanded Loan Facility funded or submitted to the Main Street Portal in good faith on or before July 17, 2020 that do not reflect this clarification are not adversely affected by the clarification. The Borrower Certifications for the Expanded Loan Facility state that, for the avoidance of doubt, if any of the other term loan tranche(s) of the underlying credit facility constitute Mortgage Debt, the upsized tranche must also be secured by all of the collateral securing such Mortgage Debt on a *pari passu* basis. The continued emphasis on sharing collateral could make it difficult for Eligible Borrowers to entice Eligible Lenders to provide an upsized tranche, or to obtain the necessary consents and intercreditor agreements from existing lenders, and may result in the Eligible Borrower being required to pledge additional assets as collateral.

The lien priority requirement could be difficult to achieve under certain financing structures involving multiple liens. For example, in a typical "split-lien" term loan and revolving credit facility arrangement, the revolver has a first lien on current assets (primarily receivables and inventory) and a second lien on other collateral, and the term loan has the converse lien priority on collateral. Because each component of the split-lien structure has junior lien status to some extent with respect to the other component, neither component would seem to qualify on its own for the add-on tranche under the Expanded Loan Facility.

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

UPDATE: Eligible Lenders and Eligible Borrowers may not create a new term loan tranche in what was solely a revolving credit facility in order to evade the requirement that the collateral be shared on a *pari passu* basis.

For the Priority Loan Facility, the FAQs also introduce the concept of a Collateral Coverage Ratio, which is defined as (a) the aggregate value of any relevant collateral security, including the pro rata value of any shared collateral, divided by (b) the outstanding aggregate principal amount of the relevant debt. If a Priority Loan Facility is secured, it must maintain a Collateral Coverage Ratio of either 200% or an amount not less than the aggregate Collateral Coverage Ratio for all of the Eligible Borrower's other secured Loans or Debt Instruments (other than Mortgage Debt). If the Priority Loan Facility is secured by the same collateral as any of the Eligible Borrower's other Loans or Debt Instruments (other than Mortgage Debt), the lien securing the Priority Loan Facility must remain senior to or *pari passu* with, in terms of priority and security, the liens of the other creditors on the shared collateral. Liens on shared collateral do not have to cover all assets. For the avoidance of doubt, if an Eligible Borrower has no other secured debt (other than Mortgage Debt), the Collateral Coverage Ratio and *pari passu* requirements do not apply to the collateral that secures the Priority Loan Facility.

The FAQs clarify that Eligible Lenders may not require Eligible Borrowers to provide collateral or guarantees solely with respect to the Eligible Lender's 5% retained portion of a Program loan. Any collateral pledged or guarantees made in connection with a Program loan must apply to the entire Program loan or tranche, resulting in Eligible Lenders and the SPV sharing any losses on a *pari passu* basis.

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

In order to comply with the priority and security requirement and ensure the Priority Loan Facilities and Expanded Loan Facilities do not become contractually subordinated, the loan documentation must contain a lien covenant or negative pledge. Appendix B of the FAQs contains a model lien covenant. For the Expanded Loan Facility, any lien covenant that was negotiated in good faith prior to April 24, 2020, as part of the underlying credit documentation, is sufficient to satisfy this requirement.

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

More than one lender under an existing multi-lender facility may choose to upsize an existing facility under the Expanded Loan Facility. Such Expanded Loan Facility upsized tranches should

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

Although the term sheet for the Expanded Loan Facility continues to state that an Eligible Loan must be "made" by an Eligible Lender, the Business Term Sheets and the FAQs' guidance regarding multi-lender facilities seem to indicate that an underlying loan or credit facility with only ineligible lenders could achieve Eligible Loan status by bringing in an Eligible Lender to hold an interest in the underlying loan or credit facility and originate the upsized tranche under the Expanded Loan Facility.

The FAQs removed a prior requirement that the Eligible Lender must have purchased an interest in the underlying loan as of April 24, 2020, and clarified that the position that an Eligible Lender relies upon to upsize a loan in connection with the Expanded Loan Facility may have been purchased from an Eligible Lender or a non-eligible lender. This clears the path to eligibility for an underlying loan or credit facility that previously included only ineligible lenders (e.g., a facility with only non-bank lenders) by adding an Eligible Lender to the lender group, presumably at any point up to the closing of the Program facility. However, the FAQs indicate that the underlying loan or credit facility must have achieved an internal risk rating, either at the time of origination or purchase. If the Eligible Lender purchased the interest as of **December 31, 2019**, it must have assigned to the underlying loan an internal risk rating (based on the Eligible Lender's risk rating system) that was equivalent to a "pass" in the Federal Financial Institutions Examination Council's supervisory rating system **as of that date**. If the Eligible Lender purchased the interest **after December 31, 2019**, the Eligible Lender should use the internal risk rating given to that loan at the time of purchase to determine whether the loan is eligible for upsizing.

The FAQs state that federal supervisors will not criticize Eligible Lenders for originating Program loans in accordance with the Program's requirements, including cases when such loans are considered "non-pass" at the time of origination, provided these weaknesses stem from the pandemic and are expected to be temporary or if such loans are part of a bank's prudent risk mitigation strategy for an existing borrower.

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

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

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

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

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

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

Lender Certifications and Covenants under the Business Facilities

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

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

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

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

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

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

    - The FAQs specify that the Eligible Lender must meet a reasonable diligence standard in making the conflicts of interest certification by considering its actual knowledge, determining whether beneficial owners of any 5% or greater equity interest are Covered Individuals and, if necessary, asking beneficial owners to confirm whether they are Covered Individuals.

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

    - The FAQs note that an Eligible Lender that is a depository institution may pledge its 5% of a Program loan as collateral, provided that the loan meets the collateral eligibility requirements of its local Federal Reserve Bank.

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

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

Borrower Certifications and Covenants under the Business Facilities

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

- The Eligible Borrower must commit to refrain from repaying the principal balance of, or paying any interest on, any debt until the Eligible Loan (or upsized tranche of an Eligible Loan) is repaid in full, unless the debt or interest payment is mandatory and due. For loans made under the Priority Loan Facility, the Eligible Borrower may, at the time of origination of the Eligible Loan, refinance existing debt owed by the Eligible Borrower to a lender that is not the Eligible Lender.

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

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

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

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

  The Borrower Certifications clarify that an Eligible Borrower will not be deemed insolvent if it is behind on its debts because of reduced business activity resulting

from government shutdowns or similar orders or recommendations by governmental authorities related to the pandemic.

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

    - As noted in more detail below, the FAQs indicate that the Secretary has granted a waiver of the dividend prohibition under the CARES Act to permit tribal businesses to make distributions to their tribal government owners.

- The Eligible Borrower must certify that it is eligible to participate in the Program, including in light of the Conflicts of Interest Provision. The Borrower Certifications define a "controlling interest" as owning, controlling, or holding not less than 20%, by vote or value, of the outstanding amount of any class of equity interest in a company. An "equity interest" includes warrants and options even if they have not been exercised or are "out of the money." Eligible Borrowers should check the beneficial owners owning more than 5% against the list of government officials (see here) covered by the Conflict of Interest Provision.

    - The FAQs make clear that an Eligible Borrower must meet the same reasonable diligence standard in making the conflicts of interest certification as an Eligible Lender by considering its actual knowledge, determining whether beneficial owners of any 5% or greater equity interest are Covered Individuals and, if necessary, asking beneficial owners to confirm whether they are Covered Individuals.

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

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

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

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

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

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

- The Eligible Borrower must include an indemnification by the Eligible Borrower of the beneficiaries (the SPV, Boston Fed, and Treasury Secretary) of such certifications and covenants for any liability, claim, cost, loss, judgment, damage or expense that a beneficiary incurs or suffers as a result of or arising out of a material breach of any of the Eligible Borrower's certifications or covenants. This does not include the standard carve out for gross negligence or willful misconduct by the beneficiaries, and also does not include limits on attorneys' fees.

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

How to Read the Term "Borrower" for Multi-borrower Loans.

The FAQs state that each co-borrower in a multi-borrower loan must deliver to the Eligible Lender a set of Borrower Certifications for the appropriate Program facility, which must be completed and signed by such co-borrower's principal executive officer and principal financial officer. If, for example, there are three co-borrowers, each with the same principal executive officer and principal financial officer, three sets of Borrower Certifications must be executed by the same officers in respect of the three different co-borrowers. Each set of certifications should accurately identify the relevant co-borrower in the "Name of the Borrower" field. References to "Borrower" throughout the Business Facility Borrower Certifications mean *only* the co-borrower identified in the "Name of the Borrower" field in the document, except that:

i. Co-borrowers may elect to supply aggregated financial information and an aggregated EBITDA calculation in relation to section 4.A of the Business Facility Borrower Certifications, where permitted by the Eligible Lender. If an Eligible

Lender permits co-borrowers to submit aggregated financial information and EBITDA calculations, the Eligible Lender should instruct the co-borrowers to use the Eligible Lender's typical practices to aggregate such information in a manner that accounts for transactions between the co-borrowers and accurately reflects the financial position of the co-borrowers and their ability to repay the loan (e.g., in a manner that avoids double counting of revenues, assets, or liabilities). Each co-borrower should reference section 4.A of the Business Facility Borrower Certifications, as well as question H.10 of the FAQs, to determine if they are able to submit consolidated financial statements, which may then be aggregated with other co-borrowers, if relevant and permitted by the Eligible Lender.

ii. For the Priority Loan Facility, co-borrowers may elect to submit aggregated Lien and Collateral Valuation Reporting in relation to section 4.C of the Priority Loan Facility Borrower Certifications, where permitted by the Eligible Lender.

UPDATE: In the case of the Expanded Loan Facility or the Nonprofit Expanded Loan Facility, all co-borrowers must be borrowers on the underlying credit facility being upsized.

Preparation of Financial Records.

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

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

The FAQs clarify that if an Eligible Borrower's fiscal year 2019 does not coincide with calendar year 2019, it may use its 2019 fiscal year, unless otherwise required by the Eligible Lender.

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

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

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

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

- refinancing debt that is maturing no later than 90 days from the date of such refinancing; or

- **UPDATE:** refinancing debt that existed at the time the Eligible Loan was originated, regardless of maturity date, so long as the following conditions are met: (1) the replacement debt is the same principal amount as the refinanced debt, (2) the replacement debt is of the same priority and secured by the same collateral as the existing debt and (3) the repayment schedule of the replacement debt does not exceed or accelerate the repayment schedule of the existing debt. Although this language reflects a fairly customary refinancing debt provision, it is unclear whether the Boston Fed intended for this new guidance, issued in Post-Termination FAQs several weeks after the closing of the Program, to supersede the terms of the definitive loan documentation (including, in many cases, intercreditor documentation) entered into by the various parties prior to the closing of the Program.

The FAQs make clear that even if an Eligible Borrower's outstanding debt is maturing within 90 days of origination, Program facility proceeds cannot be used to refinance such debt at origination, except in the case of a qualifying Priority Loan Facility where the existing borrower debt is owed to a different, unaffiliated lender.

The FAQs further state that Eligible Borrowers and Eligible Lenders are expected to act in good faith regarding debt that is maturing within 90 days of origination and are discouraged from originating Program loans for the purpose of funding debt payments that are, or are presently expected to become, mandatory by operation of a debt covenant or mandatory prepayment provision.

Ability to Meet Financial Obligations. An Eligible Borrower is required to certify that "it has the ability to meet its financial obligations for at least the next 90 days and does not expect to file for bankruptcy during that time period," because Eligible Borrowers cannot be "insolvent" pursuant to the Program's authorization under Federal Reserve Act Section 13(3). The solvency certification requirement places Eligible Borrowers that are distressed in a difficult position. Accurately estimating forward-looking 90-day projections in the midst of the COVID-19 pandemic will be inherently challenging. Paradoxically, the Program would not exist but for the uncertainty, liquidity constraints, and massive disruption caused by the COVID-19 pandemic. (See below for a further discussion of Federal Reserve Act requirements.)

Elimination of Attestation of Need; Revision of Requirement to Retain Employees. The revised Business Term Sheets eliminated the requirement under the initial April 9 draft term sheets that an Eligible Borrower certify that it "requires financing" due to the exigent circumstances of the COVID-19 pandemic and that, "using the proceeds of the Eligible Loan, it

will make reasonable efforts" to retain employees. Instead, the Business Term Sheets do not require any certification that financing is required, and require only that each Eligible Borrower that participates in the Program make "commercially reasonable efforts" to maintain its payroll and retain its employees during the term the Eligible Loan is outstanding. As explained in the FAQs, this means that an Eligible Borrower should undertake "good-faith efforts" to maintain payroll and retain employees, in light of its capacities, the economic environment, its available resources, and the business need for labor. Eligible Borrowers that have already laid off or furloughed workers as a result of the disruptions from COVID-19 are eligible to apply for a loan under the Program.

Hedging Interest Rate and Credit Risk.

The FAQs clarify that both Eligible Lenders and Eligible Borrowers are permitted to hedge interest rate risk associated with Program loans. Eligible Lenders are also permitted to hedge credit risk associated with a Program borrower's industry, but they may not engage in borrower name specific hedging of a Program loan.

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

All Eligible Borrowers must comply with the compensation, stock repurchase, and capital distribution restrictions that apply to direct loan programs under section 4003(c)(3)(A)(ii) of the CARES Act (described below). The following restrictions apply to an Eligible Borrower until 12 months after the loan is no longer outstanding. Notably, the Borrower Certification does not provide for a potentially shorter restriction period in the event the SPV sells its participation prior to the repayment of the Program loan.

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

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

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

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

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

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

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

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

Calculation of "total compensation" for purposes of complying with limits on compensation under the direct loan restrictions.

Severance and Termination Benefits not Included in Total Compensation. According to the FAQs, total compensation includes salary, bonuses, awards of stock and other financial benefits provided by the Eligible Borrower and its affiliates to an officer or employee of the Eligible Borrower, but does not include the value of severance pay or other benefits paid in connection with a termination of employment. The FAQs include a flowchart (see here) to illustrate the calculation methodology described below.

Calculating Total Compensation - Public Companies. Eligible Borrowers that are required to disclose information in accordance with the Securities and Exchange Commission's Regulation S-K ("Public Companies"), or that are consolidated subsidiaries of a Public Company, must calculate total compensation according to the methodology set out in item 402(c) of Regulation S-K (the "SCT Approach"). In other words, the FAQs make clear that Public Companies must calculate total compensation in the same manner as they calculate "total compensation" for purposes of the named executive officer compensation disclosure in the Summary Compensation Table.

Calculating Total Compensation - Non-Public Companies. Eligible Borrowers that are not Public Companies may choose to calculate compensation in a manner consistent with the federal tax rules (the "Tax Approach"), rather than the SCT Approach, if:

(a) the Eligible Borrower had gross revenues for its financial year ending in 2019 of less than or equal to $10,000,000 (a "Small Eligible Borrower"); or

(b) the Eligible Borrower had gross revenues for its financial year ending in 2019 of greater than $10,000,000, they may calculate compensation in a manner consistent with the federal tax rules for each officer or employee who does not, during any 12-month period beginning January 2019 and until 12 months after the date on which the Program loan is no longer outstanding, have total compensation that exceeds $425,000, out of which the fair value of deferred compensation (including stock-based deferred compensation) granted to such officer or employee exceeds 30 percent, calculated in accordance with U.S. GAAP ("Significant Deferred Compensation Recipients").

Eligible Borrowers that are not Public Companies and cannot, or choose not to, calculate total compensation under the Tax Approach must calculate total compensation under the SCT Approach.

Generally, an Eligible Borrower that is not a Public Company must choose which approach to use (*i.e.*, Tax Approach or SCT Approach) and apply it until 12 months after the date on which the Program loan is no longer outstanding, unless one of the following circumstances applies:

(1) An officer or employee who was not previously a Significant Deferred Compensation Recipient becomes a Significant Deferred Compensation Recipient. The Eligible Borrower must calculate total compensation under the SCT Approach for the officer or employee, and must begin doing so immediately upon such employee or officer becoming a Significant Deferred Compensation Recipient, and continue doing so until 12 months after the date on which the Program loan is no longer outstanding. The Eligible Borrower must include total compensation for the new Significant Deferred Compensation Recipient calculated under the SCT Approach and must also include in the individual's total compensation any deferred compensation that was granted but not paid in the preceding 90-day period. However, this rule does not apply to an Eligible Borrower that is a Small Eligible Borrower at the time of loan disbursement and that chooses to calculate total compensation under the Tax Approach.

(2) An Eligible Borrower becomes a Public Company. The Eligible Borrower must calculate total compensation under the SCT Approach, and must begin doing so immediately upon becoming a Public Company. The Eligible Borrower must include total compensation calculated under the SCT Approach and must also include in total compensation any deferred compensation that was granted but not paid in the 90-day period ending when the Eligible Borrower became a Public Company.

Guidance on Applying the Tax Approach for Calculating Total Compensation. Eligible Borrowers that choose to calculate total compensation under the Tax Approach must use the timing and valuation methodology, including the valuation of fringe benefits and bonuses, that apply for purposes of determining when amounts are treated as wages under Internal Revenue Code ("IRC") section 3401(a) for income tax withholding, or net earnings from self-employment under IRC section 1402(a). Additionally, total compensation as calculated under the Tax Approach includes elements of compensation paid to an officer or employee who is (a) an individual for whom the Eligible Borrower would be responsible for reporting compensation on Form W-2, and includes commissions, education assistance, total benefits or wages that are paid in kind (*e.g.*, meals or lodging) if they would be treated as taxable compensation subject to federal income tax withholding under section 3401(a) applicable to U.S. citizen employees, regardless of whether

the compensation paid to the individual is actually subject to federal income tax withholding, and whether or not tax is actually withheld, or (b) an individual who is a partner in a partnership or a member of a limited liability company or other similar structure, and includes "net earnings from self-employment" and "guaranteed payments for services" that are subject to self-employment tax under IRC section 1401(a) as payments in connection with the performance of services.

Stock Repurchases. Until the date twelve months after the Program loan is no longer outstanding, Eligible Borrowers will be prohibited from engaging in buybacks of any nationally listed equity securities of the Eligible Borrower or any of its parent entities, unless contractually obligated prior to enactment of the CARES Act.

Capital Distributions. Until the date twelve months after the Program loan is no longer outstanding, Eligible Borrowers will be prohibited from paying dividends or making other capital contributions in respect of equity interests. These restrictions will not apply if both the equity interest in an Eligible Borrower and the obligation to pay dividends or distributions existed as of March 27, 2020. In response to the comments the Federal Reserve received surrounding the restrictions on the payment of dividends, the Fed clarified that an S corporation or other tax pass-through entity that is an Eligible Borrower may make distributions to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings. It is not clear whether distributions from Regulated Investment Companies (RICs) and Real Estate Investment Trusts (REITs) to their equity owners would be permitted even though they are modified corporations treated as pass-through entities. Further guidance from the Federal Reserve on this issue is warranted.

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

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

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

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

The FAQs provide guidance on applying compensation and capital distribution restrictions to Eligible Borrowers that are organized as partnerships, limited liability companies, S corporations, or similar tax pass-through entities in cases where an employee subject to the compensation restrictions is also a shareholder, partner or member of the Eligible Borrower. The Eligible Borrower must distinguish between compensation of the employee or officer and dividends and distributions paid to the owners (including such employee or officer).

Corporations. Stock-based compensation is included in total compensation and would not be considered a capital distribution, but dividend payments made on such stock would be prohibited under the restrictions on capital distributions (except in the case of dividend distributions made to the owner of an S corporation that are reasonably required to cover its owners' tax obligations in respect of the Eligible Borrower's earnings).

Partnerships and Limited Liability Companies. Eligible Borrowers may receive awards in the form of a capital or profits interest. These capital or profits interests would be included in connection with calculating total compensation and would not be considered a capital distribution, but the Eligible Borrower would be prohibited from making a distribution with respect to such interest (except to the extent reasonably required to cover its owners' tax obligations in respect of the Eligible Borrower's earnings).

Employee Stock Ownership Plans ("ESOPs"). In cases where common stock of the Eligible Borrower is held by an ESOP, the restrictions on the repurchase or redemption of equity securities do not apply if (1) such equity security is not listed on a national exchange or (2) the repurchase or redemption arises from contractual obligations that were in effect as of March 27, 2020. Although this FAQ is written in the context of ESOPs, it speaks to a potentially larger exception to the prohibition on equity repurchases: while Eligible Borrowers cannot use Program loans to repurchase equity, Eligible Borrowers that are non-public companies are not restricted under the Program's terms from repurchasing equity using other funds. Of course, Eligible Lenders may impose further restrictions on equity repurchases using their customary underwriting standards.

The restrictions on dividends and other capital distributions apply to a corporation that maintains an ESOP that holds shares of the company stock. The restrictions on dividends and other capital distributions do not apply (1) to repurchases or redemptions described above or (2) contractual obligations to pay dividends or distributions that were in effect as of March 27, 2020.

Restrictions on Dividend and Capital Contributions for Tribal Businesses.

The FAQs explain that because dividends and other capital distributions paid by tribal businesses provide a vital source of revenue for tribal governments and thereby support the self-sufficiency of the tribe and the provision of social services, the Secretary has granted a waiver from the dividend prohibition in 4003(c)(3)(A)(ii)(II) to permit tribal businesses to pay dividends or make equivalent capital distributions to their tribal government owners.

A tribal business with ownership interests that are held by individuals or investors other than the tribal government may pay dividends or equivalent capital distributions to its tribal government owner(s), but remain subject to the prohibition on payment of dividends and other capital distributions with respect to ownership interests held by individuals or investors other than a tribal government. However, a tribal business that is organized as an S corporation or other tax pass-through entity is permitted to make distributions to the extent reasonably required to cover the owners' tax obligations in respect of the entity's earnings.

Transfers from tribal economic enterprises that do not have a distinct legal personality related to the tribal government are not considered dividends and are permitted, subject to the terms of the loan agreement.

Restrictions on Dividend and Capital Contributions for Affiliate Borrowers and Successors.

If two affiliates borrow from the Program, each will be subject to the restrictions on compensation, capital distribution, and stock repurchases described above. Some of the restrictions will impact affiliates that are not borrowers (for example, the compensation calculations include financial benefits received by officers and employees from an Eligible Borrower and its affiliates).

If an Eligible Borrower is acquired or merged into another business, the acquiring or resulting entity is expected to assume all rights and obligations of the Eligible Borrower under the Program.

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

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

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

The FAQs note that personal guarantees are not required under Program terms. However, an Eligible Lender may require a guarantee as part of its own underwriting process. As with collateral providing security to a Program loan, guarantees must extend to the entire loan such that the Eligible Lender and SPV share losses on a *pari passu* basis.

Use of Proceeds. The initial draft of the Business Term Sheets required that the Eligible Borrower use reasonable efforts to maintain payroll and retain employees "using the proceeds of" the Program loan. The revised Business Term Sheets and Nonprofit Term Sheets do not include this use of proceeds language. However, the FAQs state that the Program is intended to help eligible companies "maintain their operations and payroll until conditions normalize." Although the FAQs stop short of requiring that proceeds be used for these purposes, the FAQs emphasize that there will be restrictions on the use of proceeds of any Program loan, and repeat that the proceeds of Loans may not be used for the benefit of an Eligible Borrower's foreign parents, affiliates, or subsidiaries, or to refinance or accelerate payment of existing debt, except (i) at the time of origination of a loan under the Priority Loan Facility if the debt was owed to a different, unaffiliated lender, or (ii) under the limited exception for mandatory and due debt and interest payments after the origination of the Program loan.

Additionally, the FAQs reiterate that Eligible Borrowers may not use any funds, including the proceeds from a Program loan, during the term of the loan (and in some cases for 12 months after the Program loan is repaid) to pay dividends, distribute capital, repurchase equity, or pay compensation over specified thresholds, subject to limited exceptions for payment of taxes and in the case of tribal businesses; and may not use Program loan funds to repay other debt ahead of schedule.

Nonprofit Facilities

As described above, the Boston Fed released Nonprofit Term Sheets, which are similar to the Business Term Sheets. Like the Business Term Sheets, the Nonprofit Term Sheets are the minimum requirements and the Boston Fed will rely on Eligible Lenders to undertake normal underwriting procedures for the Nonprofit Facilities.

On September 4, 2020, the Boston Fed announced that the Nonprofit Facilities are operational. The Boston Fed released Nonprofit FAQs, which are substantially similar to the FAQs for the Business Facilities where applicable. The key differences relate to determining borrower eligibility and financial calculations (each described in more detail below). The following is a description of the requirements described in the Nonprofit Term Sheets and the Nonprofit FAQs.

Who is an Eligible Lender under the Nonprofit Facilities?

Eligible Lenders under the Nonprofit Facilities are the same lenders as under the Business Facilities.

Who is an Eligible Nonprofit Borrower?

An Eligible Nonprofit Borrower must be a "Nonprofit Organization." For purposes of the Nonprofit Facilities, a nonprofit organization is a tax-exempt nonprofit organization described in section

501(c)(3) of the IRC or a tax-exempt veterans' organization described in section 501(c)(19) of the IRC.

Public hospitals and public colleges and universities may not be recognized as tax-exempt organizations under section 501(c)(3) of the IRC, however these organizations may be considered eligible Nonprofit Organizations. The organization must reasonably determine, in a written record maintained by the organization, that it is an organization described in section 501(c)(3) of the IRC.

Other forms of organization may be considered for inclusion as an Eligible Nonprofit Borrower at the discretion of the Federal Reserve.

Eligible Nonprofit Borrowers that received a PPP loan or an Economic Injury Disaster Loan are eligible to apply for a loan under the Nonprofit Facility.

In addition to satisfying the definition of Nonprofit Organization, an Eligible Nonprofit Borrower is one that:

- has been in continuous operation since January 1, 2015;
    - "Continuous operation" means the organization, or a predecessor organization, was established on or before January 1, 2015, and has been engaged in activities justifying its tax-exempt status since that date.
- is not an Ineligible Business;
    - Government-owned entities are considered Ineligible Businesses. However, a hospital that is otherwise an eligible Nonprofit Organization is not rendered ineligible due to ownership by a state or local government if the hospital receives less than 50% of its funding through state or government sources (excluding Medicaid).
- meets at least one of the following two conditions: (i) has 15,000 employees or fewer, or (ii) had 2019 annual revenues of $5 billion or less;
    - To determine how many employees a Nonprofit Organization has, the SBA affiliation test described above will apply.
    - To determine its 2019 annual revenue, a Nonprofit Organization must aggregate its revenues with those of its affiliates; the SBA affiliation test described above will apply. A Nonprofit Organization may use (1) its (and its affiliates') annual "revenue" per its 2019 U.S. GAAP audited financial statements; or (2) its (and its affiliates') annual receipts for the fiscal year 2019, as reported to the Internal Revenue Service. If a Nonprofit Organization does not have audited financial statements or annual receipts for 2019, it can use its most recent audited financial statements or annual receipts.

The Nonprofit FAQs clarify that if a potential borrower's GAAP-compliant financial statements do not include a line item for "revenue", but instead include a similar line item (such as "revenue and other forms of support"), the potential borrower may elect to use such similar line item to calculate its revenues to determine its eligibility and maximum loan size.

The Nonprofit FAQs provide that for the avoidance of doubt, the calculation of 2019 annual revenues includes all revenues, including restricted revenues and non-cash revenues. This method of calculating 2019 revenues should also be used for the purposes of calculating the Nonprofit Organization's "average 2019 quarterly revenue" when determining the maximum loan size under the Nonprofit New Loan Facility or Nonprofit Expanded Loan Facility.

- has at least 10 employees;
    - A Nonprofit Organization should use the framework set out in SBA's regulation in 13 CFR 121.106 to calculate the number of employees. This includes part time, full time and seasonal employees, but not volunteers, independent contractors or student workers participating in a Federal Work Study Program.
- has an endowment of less than $3 billion;
    - The size of the endowment should be calculated as of the date of origination of the loan. There is no minimum endowment.
- has total non-donation revenues equal to or greater than 60% of expenses for the period from 2017 through 2019;
- has a ratio of adjusted 2019 earnings before interest, depreciation, and amortization ("EBIDA") to unrestricted 2019 operating revenue, greater than or equal to 2%;

  The Nonprofit FAQs clarify that the foregoing requirement should be viewed as a minimum requirement.
- has a ratio (expressed as a number of days) of (i) liquid assets at the time of the loan (or the origination of an upsized tranche for a Nonprofit Expanded Loan Facility loan) to (ii) average daily expense over the previous year, equal to or greater than 60 days;
- at the time of loan origination (or the origination of an upsized tranche for a Nonprofit Expanded Loan Facility loan), has a ratio of (i) unrestricted cash and investments to (ii) existing outstanding and undrawn available debt, plus the amount of any loan under the Nonprofit Program Facility, plus the amount of any Centers for Medicare & Medicaid Services Accelerated and Advance Payments

(emergency payments made to health care providers and suppliers due to the COVID-19 pandemic), that is greater than 55%;

    - The Nonprofit FAQs clarify that when calculating "existing and undrawn available debt" for purposes of the above requirement, the rules and process that govern the calculation are substantially similar to those governing the Business Facilities.

- is created or organized in the U.S. or under the laws of the U.S. with significant operations in and a majority of its employees based in the U.S.;

- does not also participate in any other Main Street Lending Program, the Primary Market Corporate Credit Facility, or the Municipal Liquidity Facility; and

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

How are "Donations" Calculated? For purposes of determining the percentage of donations attributable to 2019 revenue, "donations" include proceeds from fundraising events, federated campaigns, gifts, and funds from similar sources.

The Nonprofit Term Sheets clarify that for purposes of determining the percentage of donations attributable to 2019 revenue, "donations" also include donor-advised funds but exclude (i) government grants, (ii) revenues from a supporting organization, (iii) grants from private foundations that are disbursed over the course of more than one calendar year, and (iv) any contributions of property other than money, stocks, bonds, and other securities (noncash contributions), provided that such noncash contribution is not sold by the organization in a transaction unrelated to the organization's tax-exempt purpose; and "expenses" equal total expenses minus depreciation, depletion and amortization.

How are "Non-Donation Revenues" and "Expenses" Calculated? For purposes of the foregoing eligibility criteria, "non-donation revenues" are defined as all of the revenue items described on Part VIII of the IRS Form 990, except revenue from (i) fundraising events, (ii) federated campaigns, (iii) membership dues, (iv) any contributions from donor advised funds described in line 1d of Part VIII, and (v) all other contributions, gifts, grants, and similar amounts in line 1f of Part VIII (with exceptions for grants from private foundations that are disbursed over the course of more than one calendar year and any "specified property" contributed other than money, stocks, bonds and other securities, provided such property is not sold by the Nonprofit Organization in a transaction unrelated to its tax-exempt purposes).

"Expenses" equal total expenses minus depreciation, depletion, and amortization. "Total expenses" equal total expenses as defined in IRS Form 990 Part IX Line 25 minus depreciation, depletion and amortization as defined in IRS Form 990 Part IX Line 22.

The Nonprofit FAQs clarify that if a Nonprofit Organization has not yet filed, or is not required to file, IRS Form 990 reflecting its 2019 financial information, it may calculate 2019 "total expenses" either (i) using 2019 audited financial statements that are in accordance with U.S. GAAP or (ii) as described immediately above in accordance with the instructions to the Form 990.

For purposes of the ratio of liquid assets to average daily expenses, a Nonprofit Organization should calculate average daily expenses as its total expenses for 2019, as described above, divided by 365.

If a Nonprofit Organization does not have audited financial statements or tax returns that include information on non-donation revenues and tax returns for the fiscal year 2019, it can calculate its compliance using information from 2017 and 2018.

How is Adjusted 2019 EBIDA Calculated? An Eligible Lender must use the methodology it has previously used for adjusting EBIDA when extending credit to the Eligible Nonprofit Borrower or similarly situated borrowers on or before June 15, 2020.

The Eligible Lender should calculate operating revenue as unrestricted operating revenue, excluding funds committed to be spent on capital, and including a proxy for endowment income in place of unrestricted investment gains or losses. The methodology used by the Eligible Lender to calculate the proxy for endowment income must be the methodology it has used for similarly situated borrowers on or before June 15, 2020.

How is Unrestricted 2019 Operating Revenue Calculated? An Eligible Lender should calculate operating revenue as unrestricted operating revenue, excluding funds committed to be spent on capital, and including a proxy for endowment income in place of unrestricted investment gains or losses. The methodology used by the Eligible Lender to calculate the proxy for endowment income must be the methodology it has used for the Eligible Nonprofit Borrower or similarly situated borrowers on or before June 15, 2020.

How are "Liquid Assets" Calculated? "Liquid Assets" are unrestricted cash and investments that can be accessed and monetized within 30 days.

According to the Nonprofit Term Sheets, an organization may include in "Liquid Assets" the amount of cash receipts it reasonably estimates to receive within 60 days related to the provision of services, facilities, or products, or any other program service that exceed its reasonably estimated cash outflows payable within the same 60-day period.

Use of Proceeds. In addition to the restrictions on use of proceeds described above, the Nonprofit FAQs state that an Eligible Nonprofit Borrower must use proceeds of the loan in furtherance of the Eligible Nonprofit Borrower's tax-exempt purpose as conducted by the Eligible Nonprofit Borrower, its consolidated U.S. subsidiaries and other affiliates of the Eligible Nonprofit Borrower that are U.S. businesses.

Terms of Eligible Loans under the Nonprofit Facilities

As noted above, ***all*** Eligible Loans under the Program will have the following terms:

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

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

Loan Terms	Nonprofit New Loan Facility (originated post June 15, 2020)	Nonprofit Expanded Loan Facility (term loan upsize to an existing term loan or revolving credit facility originated on or before June 15, 2020, with remaining maturity of at least 18 months)
Minimum Loan Size	$100,000	$10,000,000
Maximum Loan Size	Lesser of (i) $35M or (ii) Eligible Nonprofit Borrower's average 2019 quarterly revenue	Add–on term loan capped at the lesser of (i) $300M or (ii) Eligible Nonprofit Borrower's average 2019 quarterly revenue
Lender Risk Retention	5%	5%
Amortization of Principal (year one and two payment deferred for all)	Years 3-5: 15%, 15%, 70%, respectively	Years 3-5: 15%, 15%, 70%, respectively
Transaction Fee (paid to SPV by Eligible Lender or Eligible Borrower)	1% of principal amount of $250,000 or greater No transaction fee if principal amount is less than $250,000	0.75% of principal amount
Loan Origination Fee (paid by Eligible	1% of principal amount of $250,000 or greater	0.75% of principal amount

Borrower to Eligible Lender)	2% of principal amount if less than $250,000	
Loan Servicing Fee (paid by SPV to Eligible Lender)	0.25% of principal amount of $250,000 or greater 0.5% of principal amount if less than $250,000	0.25% of the principal amount per annum

The term sheet of the Nonprofit New Loan Facility states that if the initial principal amount of the Eligible Loan is $250,000 or greater, an Eligible Lender will pay the SPV a transaction fee of 100 basis points of the principal amount of the Eligible Loan at the time of origination. The Eligible Lender may require the Eligible Borrower to pay this fee. No transaction fee will be imposed if the initial principal amount of the Eligible Loan is less than $250,000.

If the initial principal amount of the Eligible Loan is $250,000 or greater, an Eligible Borrower will pay an Eligible Lender an origination fee of up to 100 basis points of the principal amount of the Eligible Loan at the time of origination. If the initial principal amount of the Eligible Loan is less than $250,000, an Eligible Borrower will pay an Eligible Lender an origination fee of up to 200 basis points of the principal amount of the Eligible Loan at the time of origination.

If the initial principal amount of the Eligible Loan is $250,000 or greater, the SPV will pay an Eligible Lender 25 basis points of the principal amount of its participation in the Eligible Loan per annum for loan servicing. If the initial principal amount of the Eligible Loan is less than $250,000, the SPV will pay an Eligible Lender 50 basis points of the principal amount of its participation in the Eligible Loan per annum for loan servicing.

Priority of Eligible Loans Under the Nonprofit New Loan Facility. Under the Nonprofit New Loan Facility (similar to the requirement under the New Loan Facility), Eligible Loans must not be contractually subordinated in terms of priority to any of the Eligible Nonprofit Borrower's other loans or debt instruments at origination and throughout the term of the Eligible Loan.

Priority of Eligible Loans Under the Nonprofit Expanded Loan Facility.

Under the Nonprofit Expanded Loan Facility, at the time of upsizing, and at all times the Eligible Loan is outstanding, the Eligible Loan must be senior to or *pari passu* with, in terms of priority and security, the Eligible Nonprofit Borrower's other loans or debt instruments, other than mortgage debt. If the term "mortgage debt" is defined the same as for the Expanded Loan Facility, then it will include (i) debt secured by real property at the time of origination and (ii) limited recourse equipment financings, including equipment capital or finance leasing and purchase money equipment loans, secured only by the acquired equipment. We assume the analysis discussed above under the heading "*Priority of Eligible Loans under the New Loan Facility and Expanded Loan Facility*" will be equally applicable to Eligible Loans under the Nonprofit Expanded Loan Facility.

The Nonprofit FAQs clarify that collateral may be required for Nonprofit Expanded Loan Facility upsized tranches due to the Eligible Borrower's other loans or debt instruments.

Cash Collateral, Compensating Balances, Cash Reserve Accounts and Cash Escrow Accounts. The Nonprofit FAQs provide that Eligible Nonprofit Borrowers and Eligible Lenders can agree to include provisions requiring that an Eligible Nonprofit Borrower maintain cash balances that are restricted to serving as collateral for the Eligible Loan or for paying principal or interest on the Eligible Loan when such payments are mandatory and due. Such cash collateral, compensating balance, cash reserve account, and escrow account provisions can be included at origination or during the term of the Eligible Loan if such terms are a normal component of the Eligible Lender's underwriting practices for similarly situated borrowers and do not exceed 15% of the outstanding balance of the Eligible Loan. In addition, such balances should not be used to prepay principal or interest of the Eligible Loan, except at the option of the Eligible Nonprofit Borrower. Because the Federal Reserve and Treasury Department do not encourage the practice of requiring Eligible Nonprofit Borrowers to maintain cash collateral or compensating balances, Eligible Lenders should minimize these requirements and align their approach with the expected interest payments and amortization schedule specified for Eligible Loans.

Delayed Draw Balances. The Nonprofit FAQs provide that Eligible Nonprofit Borrowers and Eligible Lenders can agree to place a portion of the proceeds of an Eligible Loan in an account held at the Eligible Lender and delay Eligible Nonprofit Borrower's ability to draw on such proceeds until certain conditions related to Eligible Nonprofit Borrower's operations are satisfied. Such conditions may include a requirement that Eligible Nonprofit Borrower (i) provide documentation or other evidence that the loan proceeds are being withdrawn to fund pre-agreed activities or purchases by the Eligible Nonprofit Borrower, or (ii) pledge additional collateral to secure the Eligible Loan that was not available at the time of origination. Any restrictions must be substantially similar to conditions placed on similarly situated borrowers by Eligible Lender in the ordinary course of its underwriting procedures. The conditions must be included in the loan agreement at origination and must be fully transparent to the Eligible Nonprofit Borrower. In addition, Eligible Lenders may not use such loan features for the purpose of ensuring funds are available for mandatory and due payments on ***other*** debt owed by the Eligible Nonprofit Borrower. The 15% limit on cash collateral and compensating balances described above would not apply to such delayed draw features.

Although the Nonprofit FAQs refer to this feature as a "delayed draw," it differs from a typical delayed draw term loan structure in that the Eligible Loan is fully funded at closing. In a typical delayed draw term loan structure, a portion of the term loans would remain unfunded at closing, with the lender committing to lend the unfunded portion of the commitments on request following the closing, subject to the satisfaction of customary conditions. The borrower may be required to pay an undrawn commitment fee to the lender, but would not be required to pay interest on the undrawn portion unless and until the delayed draw loans were actually funded. In the "delayed draw" mechanism described in the Nonprofit FAQs, the Eligible Loan would be fully funded at closing, and the Eligible Nonprofit Borrower would be required to pay interest on the entire amount of the Eligible Loan, including the portion that is held back by the Eligible Lender subject to delayed application.

Lender and Borrower Certifications and Covenants under the Nonprofit Facilities

On July 31, the Boston Fed posted required certifications and covenants of Eligible Lenders under the Nonprofit Expanded Loan Facility (see here) and the Nonprofit New Loan Facility (see here), as well as certifications and covenants of Eligible Nonprofit Borrowers under the Nonprofit Expanded Loan Facility (see here) and the Nonprofit New Loan Facility (see here).

The Eligible Lender and Eligible Nonprofit Borrower certifications and covenants under the Nonprofit Facilities are substantially the same as the Eligible Lender and Eligible Borrower certifications and covenants under the Business Facilities. The differences relate to certifications regarding eligibility criteria and the financial calculations, as described above.

The Nonprofit FAQs added guidance on how Eligible Nonprofit Borrowers should calculate "total compensation" for purposes of complying with limits on compensation under the direct loan restrictions under section 4003(c)(3)(A)(ii) of the CARES Act. The guidance is similar to that for the Business Facilities with certain differences given that an Eligible Nonprofit Borrower would never be a public company.

Calculation of "total compensation" for purposes of complying with limits on compensation under the direct loan restrictions.

Severance and Termination Benefits not Included in Total Compensation. Pursuant to the Nonprofit FAQs, total compensation is defined as salary, bonuses, awards of stock and other financial benefits provided by the Eligible Nonprofit Borrower and its affiliates to an officer or employee of the Eligible Nonprofit Borrower, but does not include the value of severance pay or other benefits paid in connection with a termination of employment. The Nonprofit FAQs include a flowchart (see here) to illustrate the calculation methodology described below.

Calculating Total Compensation. Eligible Nonprofit Borrowers may choose to calculate total compensation in a manner consistent with the federal tax rules (the "Nonprofit Tax Approach") if:

(a) the Eligible Nonprofit Borrower had gross revenues for its financial year ending in 2019 of less than or equal to $10,000,000 (a "Small Eligible Nonprofit Borrower"); or

(b) the Eligible Nonprofit Borrower had gross revenues for its financial year ending in 2019 of greater than $10,000,000, and for each officer or employee who ***does not***, during any 12-month period beginning January 2019 and until 12 months after the date on which the Program loan is no longer outstanding, have total compensation that exceeds $425,000, out of which the fair value of deferred compensation (including stock-based deferred compensation) granted to such officer or employee exceeds 30 percent, calculated in accordance with U.S. GAAP ("Significant Nonprofit Deferred Compensation Recipients"), such Eligible Nonprofit Borrower chooses the Nonprofit Tax Approach.

Eligible Nonprofit Borrowers that have officers and employees that are Significant Nonprofit Deferred Compensation Recipients ***must*** calculate total compensation with respect to such officers and employees according to the methodology set out in item 402(c) of Securities and Exchange Commission's Regulation S-K (the "Nonprofit SCT Approach"). In addition, Eligible Nonprofit Borrowers that choose not to calculate total compensation under the Nonprofit Tax Approach must calculate total compensation under the Nonprofit SCT Approach.

Generally, an Eligible Nonprofit Borrower must choose which approach to use (*i.e.*, Nonprofit Tax Approach or Nonprofit SCT Approach) and apply it until 12 months after the date on which the Program loan is no longer outstanding. However, if an officer or employee who was not previously a Significant Nonprofit Deferred Compensation Recipient becomes a Significant Nonprofit Deferred Compensation Recipient, the Eligible Nonprofit Borrower must calculate total compensation under the Nonprofit SCT Approach for such officer or employee, and must begin doing so immediately upon such employee or officer becoming a Significant Nonprofit Deferred Compensation Recipient, and continue doing so until 12 months after the date on which the Program loan is no longer outstanding. The Eligible Nonprofit Borrower must include in such individual's total compensation any deferred compensation that was granted but not paid in the preceding 90-day period. However, this rule does not apply to an Eligible Borrower that is a Small Eligible Nonprofit Borrower at the time of loan disbursement and that chooses to calculate total compensation under the Nonprofit Tax Approach.

Guidance on Applying the Nonprofit Tax Approach for Calculating Total Compensation. Eligible Nonprofit Borrowers that choose to calculate total compensation under the Nonprofit Tax Approach must use the timing and valuation methodology, including the valuation of fringe benefits and bonuses, that apply for purposes of determining when amounts are treated as wages under IRC section 3401(a) for income tax withholding. Additionally, total compensation as calculated under the Nonprofit Tax Approach includes commissions, education assistance, total benefits or wages that are paid in kind (*e.g.*, meals or lodging) if they would be treated as taxable compensation subject to federal income tax withholding under section 3401(a) applicable to U.S. citizen employees, regardless of whether the compensation paid to the individual is actually subject to federal income tax withholding, and whether or not tax is actually withheld.

No Attestation of Need or Requirement to Retain Employees. The Nonprofit Term Sheets (like the Business Term Sheets) do not require any certification that financing is required, and require only that each Eligible Nonprofit Borrower that participates in the Program make "reasonable efforts" to maintain its payroll and retain its employees during the term the Eligible Loan or upsized tranche of the Eligible Loan is outstanding.

Federal Reserve Act Requirements

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

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

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

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

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

Equal Opportunity and Diversity. Federal regulations such as 12 CFR 201.4(d)(12) require that participation in any authorized program or facility will not be limited or conditioned on the basis of any legally prohibited basis, such as the race, religion, color, gender, national origin, age or disability of the borrower, and that the selection of any "third-party vendor used in the design, marketing or implementation of any program or facility, to the extent possible and consistent with law, shall involve a process designed to support equal opportunity and diversity." The Term Sheets and FAQs do not include any provisions to support this requirement. Perhaps this requirement will be addressed in subsequent releases from the Federal Reserve and Treasury Department.

Loan Participations

The SPV will purchase at par a 95% participation in (i) an Eligible Loan or upsized tranche (provided that it is upsized on or after April 24, 2020) of an Eligible Loan, and (ii) an Eligible

Nonprofit Loan or upsized tranche (provided that it is upsized on or after June 15, 2020) of an Eligible Nonprofit Loan. The SPV and the Eligible Lender will share risk in the Eligible Loan or Eligible Nonprofit Loan, as applicable, on a *pari passu* basis. For Eligible Loans under the New Loan Facility, the Nonprofit New Loan Facility, and the Priority Loan Facility, the Eligible Lender must retain its 5% interest until the loan matures or the SPV sells all of its participation, whichever comes first.

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

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

As discussed in the FAQs and Nonprofit FAQs, the Federal Reserve expects that the transfer of a participation interest in an Eligible Loan or Eligible Nonprofit Loan made in accordance with the Program requirements would qualify for sale accounting under the Financial Accounting Standards Board's ("FASB") ASC 860. ASC 860 describes strict criteria for determining the accounting treatment of loans that are "sold."

The American Bankers Association ("ABA") submitted a letter to the Securities and Exchange Commission ("SEC") requesting the staff's views on whether Eligible Loans and Eligible Nonprofit Loans meet the legal isolation condition under ASC 860. On September 11, 2020, the staff responded, stating that it does not object to the conclusion that Eligible Loans and Eligible Nonprofit Loans meet the legal isolation criteria under ASC 860 for sale treatment when a bank sells a 95% participation interest to the SPV under the Program. (The ABA's request did not address other criteria for sales accounting under ASC 860, and Eligible Lenders must individually evaluate the other criteria.) Eligible Loans and Eligible Nonprofit Loans that qualify as a sale under ASC 860 will not have to stay on the Eligible Lenders' balance sheet and will not be counted towards Eligible Lenders' regulatory capital requirements. This favorable treatment should address uncertainties about the accounting treatment of participations and reduce the regulatory, legal, and administrative burdens on Eligible Lenders, including the need for a true sale opinion from legal counsel to prove to their auditors that they have satisfied the legal criteria for sale accounting treatment.

The following discussion regarding the Loan Participation Agreement and loan participation in general applies to both the Business Facilities and the Nonprofit Facilities.

The Boston Fed posted a form of Loan Participation Agreement, which comes in two parts: the transaction specific terms (see here) and the standard terms and conditions (see here), which are based on the LSTA's standard terms and conditions. The SPV has certain rights under the Participation Agreement that are different than under a typical participation. The SPV does have special elevation and voting rights. The SPV is permitted to sell its participation (without elevation) with the consent of the Eligible Lender. The SPV is permitted to elevate its participation into an

assignment only with the consent of the Eligible Borrower, the Eligible Lender, and other necessary parties. However, the SPV may sell, transfer or elevate its participation without consent of the Eligible Lender or the Eligible Borrower upon the following triggers: Eligible Borrower's failure to make payment when due, insolvency of Eligible Borrower or Eligible Lender, if required by statute or court, or if refraining to take the action would violate the forgiveness restrictions. The SPV can sell to the Federal Reserve or Department of the Treasury without consent, so long as the sale is not made to effect a securitization.

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

UPDATE: The FAQs provide guidance as to how an Eligible Lender should go about obtaining instructions from the SPV in relation to core changes to loan documents that impact core rights. The Eligible Lender should complete an Eligible Lender Request for Loan Modification or Waiver Form (see here). The SPV will review and revert back to the Eligible Lender in a timely manner. In the case of uncertainty as to whether a modification to the loan documents requires the consent of the SPV, an Eligible Lender can submit the form, and the SPV can be expected to revert within three business days with a determination, unless further time is required for consideration. The FAQs note this approval process may be subject to further changes.

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

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

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

- the Participation Agreement explicitly reflects the intention of the parties to effect a true sale;

- the Eligible Lender does not guarantee repayment of the participation interest or the loan or upsized tranche underlying the participation interest, nor is there any other recourse inconsistent with a sale of the participation interest;

- the Participation Agreement provides for a pure pass-through to the SPV of amounts paid by the Eligible Borrower under any of the Program loan or upsized tranche facilities, excluding the Eligible Lender's retained beneficial interest. The proceeds will not be commingled with the Eligible Lender's funds for any significant period of time;

- any distributions received in respect of the participation interest will be held by the Eligible Lender for the account and sole benefit of the SPV and will be delivered to the SPV promptly;

- the Eligible Lender will provide Enhanced Reporting Services (as defined in the Servicing Agreement) to the SPV with respect to the participation interest. Enhanced Reporting Services will include, among other things, financial information, calculations and other information with respect to the Eligible Borrower in a form or through a reporting method specified by the SPV. As compensation for the Enhanced Reporting Services, the SPV will pay the Eligible Lender a servicing fee in the amount of 0.25% per annum of the total principal amount of the participation interest. The Federal Reserve believes the terms of the Servicing Agreement are commercially reasonable and comparable to terms generally accepted by third parties for providing Enhanced Reporting Services;

- Eligible Borrowers must consent to the Eligible Lender's sale of the participation interest in the New Loan Facility, Priority Loan Facility or Expanded Loan Facility, as applicable, to the Main Street SPV;

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

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

The FAQs clarify that the sale of a participation interest to the SPV is structured to be a true sale under the Bankruptcy Code, and the Program transaction terms are consistent with a true sale. This is evidenced by express language throughout the Participation Agreement indicating, among other things, that (i) the intent of the parties is to sell an undivided participation of the Program loan or upsized tranche to the SPV, (ii) the economic substance of the transfer of the participation interest from the Eligible Lender to the SPV under the Participation Agreement is a sale, (iii) the rewards and risks of ownership of the participation interest are irrevocably transferred and cannot be put-back, voided or rescinded, (iv) any change in the value of the participation interest will not

be for the benefit or loss of the Eligible Lender, (v) the Eligible Lender will receive the entire consideration for the participation interest representing at least the fair market value for the participation interest on the applicable closing date and there will be not be any post-closing adjustment of the purchase price nor does the Eligible Lender have any right or obligation to transfer additional property to the SPV, and (vi) the Participation Agreement makes explicit the parties' intention for the Eligible Lender to relinquish the benefits and risks associated with ownership of the participation interest.

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

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

The FAQs clarify that, for purposes of the Office of the Comptroller of the Currency (the "OCC"), for Eligible Lenders that are national banks, federal savings associations and state savings associations, the full amount of any Program loan will be treated as a loan by the Eligible Lender to the relevant Eligible Borrower and would count towards the Eligible Lender's lending limit only until such time as the SPV has purchased the participation (i.e., once the Eligible Lender has received full payment by the SPV for that participation) at which point the portion of the loan that has been sold as a participation to the SPV would no longer be treated as a loan for purposes of the OCC's lending limit regulations.

For Eligible Lenders that are federally insured credit unions, the "member business loan" limit set forth in 12 U.S.C. 1757a(a) applies to all member business loans, irrespective of any advance commitment to purchase a participation interest. However, when a participation interest is purchased and transferred to the SPV, that portion of the loan will no longer count towards the aggregate limit. Similarly, the NCUA's limit on commercial loans applies to all commercial loans, irrespective of any advance commitment to purchase a participation interest, but once sold, the participation will not count towards the limit.

The Main Street Program Instructions include an Assignment Executed in Blank (see here), and a Co-Lender Agreement in Blank (see here and here), which documents are executed only in connection with bilateral loans between an Eligible Borrower and single Eligible Lender. These documents will only be utilized if the SPV elevates its participation to an assignment of the Eligible Loan. For multi-lender and syndicated loan facilities, the form of assignment for such facility is used and also is executed in blank and submitted to the SPV with all other loan documents in connection with the participation. A co-lender agreement is not required for multi-lender and syndicated loan facilities because the loan documents will already include for agency, assignment, voting, sharing, and other typical multi lender provisions.

According to the FAQs, the SPV will collect information on certifications, covenants, the lender, loan terms, loan performance, the borrower, borrower fundamentals, collateral, and other characteristics. The information will be used to verify that the lender, loan, and borrower meet eligibility requirements and to support ongoing accounting and credit risk monitoring needs with respect to the purchased loan participations.

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

Lender Registration and Loan Funding

Lender registration under the Program opened on June 15. Lenders must submit the required information in proper form to the Federal Reserve, and once approved, can begin underwriting, negotiating loan documentation, and making loans under the Program. The initial process of lender registration has extended and may continue to further extend the time it will take for Eligible Lenders to access Program funds.

On July 6 the Federal Reserve announced the Program had become fully operational for those Eligible Lenders that have completed the registration process.

The FAQs clarify that Eligible Lenders will not be required to commit and pre-fund loans under the Program before the SPV has committed to purchase its participation in a Program loan. Eligible Lenders can either extend a loan and then seek to sell a participation to the SPV, or they can sign a commitment letter with an Eligible Borrower, with the SPV's participation as a condition to funding.

The FAQs also clarify that if an Eligible Lender extends a Program loan but makes the funding of such loan contingent on a binding commitment from the SPV that it will purchase a participation in the loan, the SPV will review the Eligible Lender's required documentation and, if complete and consistent with Program requirements, will provide the Eligible Lender with a Commitment Letter (link here) that will indicate that (i) the Eligible Lender is required to fund the loan within three business days of the date of the Commitment Letter and (ii) the Eligible Lender must then provide notice to the SPV of the date the funding occurred ("Funding Notice") by entering the date in the appropriate field in the Main Street Portal (see here). The SPV will generally be able to advance funds to purchase the participation within one business day of receiving the Funding Notice, if the Funding Notice is received before 7 p.m. Eastern time. If the Funding Notice is submitted by the Eligible Lender on or after 7 p.m. Eastern time, the notice will be treated as if it were received the next business day.

If an Eligible Lender uses the foregoing "condition to funding" model, the credit agreement and other loan documents will need to be completed and executed prior to submission to the Main Street Portal. When structuring the loan documentation, the Eligible Lender should select a

maturity date, payment schedule and interest rate based on the date of signing of the credit agreement. Eligible Lenders should measure interest deferral and set interest capitalization based on the signing date, but the loan should not accrue interest until the funding date.

Financial Information

The FAQs and Nonprofit FAQs clarify what financial information an Eligible Borrower or Eligible Nonprofit Borrower, as applicable, is required to submit to an Eligible Lender at the time of origination of a Program loan as well as what information an Eligible Lender is required to submit to the Main Street Portal with other loan participation documents.

2019 Financial Information. As required under section 4.A of the Borrower Certifications and Covenants, the Eligible Borrower must submit its 2019 financial records to its Eligible Lender. The Eligible Lender must (a) input the Eligible Borrower's 2019 revenues, 2019 adjusted EBITDA, and the Eligible Borrower's total assets, current assets and current liabilities as of December 31, 2019 into the Main Street Portal's data fields, and (b) upload all other required 2019 financial data (in the format in which the Eligible Borrower delivered it to the Eligible Lender) to the Main Street Portal.

For Eligible Nonprofit Borrowers, they must submit their 2019 financial records and financial records related to the borrower eligibility criteria to the Eligible Lender. The Eligible Lender must (a) input the Eligible Nonprofit Borrower's (1) 2019 revenues; (2) adjusted 2019 EBIDA; (3) unrestricted 2019 operating revenue; (4) liquid assets at the time of origination of the Eligible Loan or upsized tranche for a loan under the Nonprofit Expanded Loan Facility; (5) average daily expenses over the previous year; (6) unrestricted cash and investments; (7) existing outstanding and undrawn available debt; (8) amount of any loan under the Nonprofit Facility; (9) outstanding amount of any CMS Accelerated and Advance Payments received by the Eligible Nonprofit Borrower; and (10) the Eligible Nonprofit Borrower's total assets, current assets, and current liabilities as of December 31, 2019, and (b) upload all other required 2019 financial data (in the format in which the Eligible Nonprofit Borrower delivered it to the Eligible Lender) to the Main Street Portal.

Most Recent Quarter Available at Time of Origination. The Eligible Borrower or Eligible Nonprofit Borrower, as applicable, must also submit financial data consisting of all of the data fields required in Table II of Appendix C to the FAQs (see here) or Table II of Appendix C to the Nonprofit FAQs (see here) for the most recent quarter available at the time of origination of the Program loan. The Eligible Lender must input all of the data fields set out in Table II of Appendix C to the FAQs or Nonprofit FAQs, as applicable, into the Main Street Portal.

The FAQs and Nonprofit FAQs highlight that for loans made to multiple borrowers, the Eligible Lender must enter aggregated financial information, reflecting all co-borrowers collectively. Eligible Lenders may elect to require reporting from the co-borrowers on an aggregated basis, or may aggregate such information after requiring individual co-borrower financial statements. If an Eligible Lender permits co-borrowers to submit aggregated financial statements, the Eligible Lender should instruct the co-borrowers to use the Eligible Lender's typical practices to aggregate such information in a manner that accounts for transactions between co-borrowers and accurately reflects the financial position of the co-borrowers and their ability to repay the loan (e.g., in a manner that avoids double counting of revenues, assets, or liabilities).

Under the Business Facilities, for Program loans submitted to the Main Street Portal before September 4, 2020, the data must be submitted either (a) at the time the other required documentation to sell a loan participation is submitted or (b) at a later date, not to exceed (i) 60 days after the submission of the documentation required to sell a participation in the loan or (ii) 15 business days after communication from the SPV indicating an alternative process to submit the data is available, whichever is later.

Under the Business Facilities, for Program loans submitted to the Main Street Portal on or after September 4, 2020, the data must be submitted at the time the other required documentation to sell a loan participation is submitted. The FAQs state that the change in the requirement for when such data must be submitted as of September 4, 2020, is to ensure that the Federal Reserve has the information it requires to monitor its portfolio from the time of funding a participation, and in light of the fact that bulk-upload functionality is now available in the Main Street Portal to ease data-entry burden. The change does not indicate a change in policy regarding how Program loans submitted to the Main Street Portal will be assessed prior to purchase of a loan participation.

Under the Nonprofit Facilities, effective August 24, 2020, the data must be submitted to the Main Street Portal at the time the other required documentation to sell a loan participation is submitted. The Nonprofit FAQs state that the change in the requirement for submission of data made on or after August 24, 2020, is to ensure that the Federal Reserve has the information it requires to monitor its portfolio from the time of funding a participation.

Any additional financial information collected by Eligible Lenders as required under their underwriting practices should be uploaded to the Main Street Portal (in the format in which the Eligible Borrower delivered it to the Eligible Lender) when the other required documentation to sell a loan participation is submitted. An expansive table documenting the specific Borrower identifications, select borrower characteristics, loan characteristics and legal agreements and certifications can be found under section L.9. of the FAQs and Nonprofit FAQs. The Main Street Legal Forms and Agreements can be found on the FRB Boston's website (see here).

Other Information

Via the FAQs and Nonprofit FAQs, the Federal Reserve has provided additional information to aid Eligible Lenders, Eligible Borrowers, and Eligible Nonprofit Borrowers in their participation in the Program.

The Federal Reserve recommends that, in addition to the FAQs, the Nonprofit FAQs, and the Program's legal forms and agreements, potential borrowers and lenders consult the recorded Program webinars. The webinars have been recorded and are posted on the Federal Reserve's website (see here), along with downloadable versions of the presentations, which are available after signing into a recorded webinar.

Template Documents.

The Federal Reserve has also provided instruction for completing Program legal forms and agreements (see here). The Federal Reserve has provided example templates of the Program documentation that must be uploaded into the Main Street Portal. These templates have been

filled to show how they would be completed for a New Loan Facility loan made by a single lender to a single borrower (Hypo123 Company, Inc.):

- Example Assignment Executed-in-Blank for Hypo123 Company, Inc. (see here)
- Example Co-Lender Agreement Transaction-Specific Terms for Hypo123 Company, Inc. (see here)
- Example Borrower Certifications and Covenants for Hypo123 Company, Inc. (see here)
- Example of fields that are auto-populated into the Loan Participation Agreement, Servicing Agreement, and Lender Transaction Specific Certifications and Covenants via the Main Street Portal for Hypo123 Company, Inc. (see here)

In the Nonprofit FAQs, the Federal Reserve has provided example templates that have been filled to show how they would be completed for a Nonprofit Loan Facility loan made by a single lender to five co-borrowers:

- Example Assignment Executed-in-Blank for a Nonprofit Loan Facility loan to five co-borrowers.
- Example Co-Lender Agreement Transaction-Specific Terms for a Nonprofit Loan Facility loan to five co-borrowers.
- Example Borrower Certifications and Covenants for a Nonprofit Loan Facility loan to five co-borrowers.
- Example of fields that are auto-populated into the Loan Participation Agreement, Servicing Agreement, and Lender Transaction Specific Certifications and Covenants via the Main Street Portal for a Nonprofit Loan Facility loan to five co-borrowers.

The Program legal forms and agreements can be found here.

The FAQs explain that in the Business Facilities Lender Transaction Specific Certifications and Covenants, the "Name of the Borrower" will be populated by the portal to include the name of *each and every* co-borrower identified in the Main Street Portal. References to the "Borrower" throughout the document will be understood to mean "collectively, the co-borrowers named in the Lender Transaction Specific Certifications and Covenants," with the following exceptions:

i. Section 1.A – Due Inquiry with Respect to Formation: Each co-borrower must be a "Business" that was established prior to March 13, 2020. Therefore, the Eligible Lender must receive documentation from each co-borrower evidencing that co-borrower's legal formation certified by the appropriate governmental authority, and take those steps to verify such formation as are required under the Eligible Lender's ordinary underwriting policies and procedures.

ii. Section 1.B – Delivery of Borrower Certifications: Each co-borrower must submit its own Borrower Certifications. References to the Borrower Certifications

throughout the Lender Transaction Specific Certifications and Covenants should be read to include each co-borrower's Borrower Certifications.

iii. Sections 2.H, 2.I, and 2.J – EBITDA Requirements: Each co-borrower must submit financial information and a calculated 2019 adjusted EBITDA for such co-borrower, except that co-borrowers may elect to aggregate their financials and 2019 adjusted EBITDA, if permitted by the Eligible Lender.

While co-borrowers may individually submit financial information and EBITDA calculations, the maximum loan size must be determined in reference to the adjusted 2019 EBITDA and existing outstanding and undrawn available debt of "the Borrower" (i.e., collectively, all of the co-borrowers). The Eligible Lender should use (or should require the co-borrowers to use, as applicable) its typical practices in order to aggregate financial information in a manner that accounts for transactions between the co-borrowers and accurately reflects the financial position of the co-borrowers and their ability to repay the loan (e.g., in a manner that avoids double counting of revenues, assets, or liabilities).

Therefore, to calculate maximum loan size, the aggregate adjusted 2019 EBITDA and aggregate existing and outstanding and undrawn available debt of "the Borrower" should be used for section 2.H of the Business Facility Lender Transaction Specific Certifications and Covenants; the aggregate adjusted 2019 EBITDA and aggregate existing outstanding and undrawn available debt of "the Borrower" and its affiliates should be used for section 2.I of the Business Facility Lender Transaction Specific Certifications and Covenants; and if, on an aggregated basis, all or substantially all of the assets of the Borrower comprise equity interests in other entities, then the Borrower must identify Selected Subsidiaries and the maximum loan size would be constrained by such Selected Subsidiaries' aggregate adjusted 2019 EBITDA and aggregate existing outstanding and undrawn available debt.

iv. Section 3.B of the Priority Loan Facility Lender Transaction-Specific Certifications: Each Priority Loan Facility co-borrower must submit its own Lien and Collateral Value Reporting, except that the co-borrowers may elect to aggregate such reporting if permitted by the Eligible Lender. For the avoidance of doubt, a notice or report made to an Eligible Lender by any co-borrower is a notice or report made by "the Borrower." Further, requirements referencing the other loans, obligations, or "Loans or Debt Instruments" of "the Borrower" include the other loans, obligations, or Loans or Debt Instruments, of all co-borrowers in any capacity, and not solely the other loans, obligations, or Loans or Debt Instruments, jointly shared by the co-borrowers. Finally, acceleration of a loan made to any of the co-borrowers should trigger the cross-acceleration clause required under section 2.N of the Lender Transaction Specific Certifications and Covenants.

Unanswered Questions

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

Documentation. The FAQs and Nonprofit FAQs clarify that an Eligible Borrower or an Eligible Nonprofit Borrower, as applicable, may submit applications for Program loans to more than one Eligible Lender. However, the Eligible Borrower or Eligible Nonprofit Borrower, as applicable, should notify each Eligible Lender of other pending applications.

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

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

Revolving Credit Facility Considerations.

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

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

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

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

Why Differing Governing Law and Jurisdiction? The Borrower Certifications and Lender Certifications are governed by New York law, but the respective parties agree to non-exclusive

jurisdiction in Boston, Massachusetts courts. Presumably the choice of Massachusetts jurisdiction relates to the administration of the Program by the Boston Fed, but having different states for governing law and jurisdiction is notable, particularly as the other sample ancillary loan documents provided by the Fed reflected both New York law and jurisdiction.

The FAQs and Nonprofit FAQs make clear that Program loan documents must be governed by the laws of any of the several states, the District of Columbia, or any of the territories of the United States.

Further Guidance. While the Federal Reserve and Treasury Department will continue to provide answers to questions of broad applicability, they are unable to provide guidance with respect to an individual business's financial, credit, or legal analysis or decisions. The Federal Reserve recommends that Eligible Borrowers and Eligible Nonprofit Borrowers work with Eligible Lenders and legal counsel to make informed, reasonable, good-faith applications of the Program's terms and conditions to their individual facts and circumstances.

There will undoubtedly be more questions and uncertainties to address as potential participants consider their eligibility and their options under the Main Street Lending Program. We will continue to monitor the Federal Reserve and Treasury Department announcements for additional information and guidance.

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

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