Fed Chair and Treasury Secretary say emergency lending programs will launch in early June 2020. Four Federal Reserve (Fed) lending programs – established under the $2 trillion legislation enacted in late March 2020 to address the economic fallout of the coronavirus disease 2019 (COVID-19) pandemic – will begin issuing emergency loans in early June 2020, Fed Chairman Jerome Powell and Treasury Secretary Steven Mnuchin said in congressional testimony on May 19, 2020. Speaking at the first quarterly hearing by the Senate Banking Committee on the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Mnuchin said Treasury planned to use all $500 billion that Congress allocated for economic relief. The Secretary added that his department was “fully prepared to take losses in certain scenarios” on its emergency loans. Powell, who reiterated the early June 2020 timeline in a May 29, 2020 interview, told the committee of his intention to use the “full range of tools” to aid the economy. Most of the Fed’s new lending programs were announced in March 2020, and several have proven...
extremely complex to implement. The Fed has revised several of the programs based at least in part on stakeholder input. The four lending facilities expected to be in place by early June 2020 include:

- **Main Street Lending Program**, which will lend to midsize companies with fewer than 15,000 employees or less than $5 billion in annual revenue;
- **Primary Market Corporate Credit Facility**, which will purchase corporate bonds from investment-grade firms and those that fell into junk status after March 22, 2020;
- **Municipal Liquidity Facility**, which will buy debt from investment-grade state and local governments; and
- **Term Asset-Backed Securities Loan Facility**, which will buy credit-backed securities including auto loans, student loans, and small-business loans.

**Fed to disclose who’s borrowing under new lending programs.** The Fed announced on April 23, 2020 that it will report, on a monthly basis, “extensive and timely public information” about the liquidity and lending facilities using funding made available under the CARES Act, including:

- Names and details of participants in each facility;
- Amounts borrowed and interest rate charged; and
- Overall costs, revenues, and fees for each facility.

The new reporting will apply to all of the emergency programs authorized under Section 13(3) of the Federal Reserve Act to support the economy that incorporate equity investments provided from the Treasury Department via the CARES Act. The Fed Board will publish the reports on its website at least every 30 days and without redactions. The disclosures will not cover the Paycheck Protection Program (PPP), which is conducted by the Small Business Administration (SBA) and Treasury. Information about the Fed’s actions in response to the economic impact of COVID-19 pandemic can be found here.

- As part of its public information disclosures, the Fed is providing, on a monthly basis, reports to Congress that contain specific data for the various emergency lending programs intended to contain the economic fallout from the coronavirus pandemic. The programs covered under the reports, which thus far cover March, April and May of 2020, include:
  - Primary Dealer Credit Facility
  - Commercial Paper Funding Facility
  - Money Market Mutual Fund Liquidity Facility
  - Term Asset-Backed Securities Loan Facility
  - Primary Market Corporate Credit Facility
  - Municipal Liquidity Facility
  - Paycheck Protection Program Liquidity Facility
  - Main Street Expanded Loan Facility
  - Main Street New Loan Facility
  - Main Street Priority Loan Facility

**Fed expands scope and eligibility for Main Street Lending Program for small and mid-size businesses, releases loan participation forms.** The Fed has announced a revised Main Street Lending Program that will allow larger companies and businesses with more pre-existing debt access to loans intended to counter losses incurred from the COVID-19 pandemic. The Fed published the terms sheets for the updated Main Street New Loan Facility (New Loan) and Main Street Expanded Loan Facility (Expanded Loan), as well as for the new Main Street Priority Loan Facility (Priority Loan), along with a set of answers to Frequently Asked Questions (FAQs) on April 30, 2020. Changes from the original terms for the Main Street Lending Program, include:

- Companies with up to 15,000 employees, or up to $5 billion in annual revenue in 2019, will now be eligible to participate in the program – a change from the original terms, which restricted eligibility to companies with up to 10,000 employees and $2.5 billion in revenue.
- Creation of a third Priority Loan option with increased risk-sharing by lenders for borrowers with greater leverage – lenders would retain a 15 percent share on loans and a lower scale of pay-back – in addition to the previously announced New Loan and Expanded Loan facilities.
- The minimum loan size for New Loans or Priority Loans has been lowered to $500,000, down from $1 million, while the minimum for Expanded Loans has increased from $1 million to $10 million.
• The maximum size for the Expanded Loans will now be either the lesser of $200 million (increased from $150 million), 35 percent (increased from 30 percent) of the eligible borrower’s existing outstanding and undrawn available debt, or an amount that, when added to the eligible borrower’s debt does not exceed six times the borrower’s adjusted 2019 earnings before interest, taxes, depreciation, and amortization (EBITDA).
• Affiliation rules apply when determining eligibility, which aggregates the employees and 2019 revenues of the eligible borrower itself with those of its affiliated entities in accordance with the affiliation test set forth in 13 CFR 121.301(f) (generally, entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both).
• Companies that receive SBA PPP loans can borrow under this loan program.

The changes to the $600 billion Main Street Lending Program are discussed in greater detail in a May 5, 2020 DLA Piper Alert. The introduction of the program was the subject of an April 13, 2020 DLA Piper Alert. The Fed has published a set of Frequently Asked Questions (FAQs) on the Main Street Lending Program.

• The Federal Reserve Bank of Boston, which is administering the Main Street Lending Program, on May 27, 2020 released loan participation forms and additional information about the program.

**Fed updates TALF 2.0 term sheet, sets June 17, 2020 launch, announces monthly information disclosures and expands FAQs.** The Fed on May 12, 2020 announced additional information on borrower and collateral eligibility criteria, as well as some new operational details, for the Term Asset-Backed Securities Loan Facility (TALF). The updated term sheet for TALF does not change the basic structure and economic terms of the facility, which was announced on March 23, 2020 as part of an initiative to support the flow of credit to US consumers and businesses. To help ensure that consumers and businesses remain able to access credit at affordable terms, TALF initially will make up to $100 billion of loans available. The current TALF (dubbed TALF 2.0) is based on the original loan facility created during the 2008 financial crisis. It uses an equity investment from the Treasury in a Fed-sponsored special purpose vehicle (SPV), along with leverage from the Fed to make up to $100 billion of non-recourse three-year loans secured by eligible asset-backed securities (ABS). The TALF will serve as a funding backstop to facilitate the issuance of eligible ABS on or after March 23, 2020. The Federal Reserve Bank of New York (the New York Fed) will commit to lend to the SPV on a recourse basis.

• The New York Fed on May 20, 2020 announced that the first subscription date for TALF 2.0 loans will be June 17, 2020, and the first loan closing date will be June 25, 2020. The TALF window is currently scheduled to close on September 30, 2020. It is expected that there will be two loan subscription dates per month. TALF 2.0 loans will have a duration of three years, must be in a minimum amount of $5 million and will be requested and made via authorized TALF 2.0 agent banks. Loans under TALF 2.0 will be non-recourse to borrowers except for breaches of representations, warranties and covenants, as further specified in the Master Loan and Security Agreement (MLSA).
• The Fed also announced on May 12, 2020 the information it will publicly disclose for the TALF and the Paycheck Protection Program Liquidity Facility (PPPLF) on a monthly basis. The Fed Board will disclose the name of each participant in both facilities; the amounts borrowed, interest rate charged, and value of pledged collateral; and the overall costs, revenues, and fees for each facility. The disclosures are similar to those announced in April 2020 for Fed facilities that utilize CARES Act funds.
• The New York Fed also published an expanded set of Frequently Asked Questions (FAQs) on TALF 2.0.
• The changes to the TALF are discussed in greater detail in this May 22, 2020 DLA Piper Alert.

**Municipal Liquidity Facility: Fed announces pricing details, expansion of scope and duration, number and type of eligible entities.** Since its original rollout on April 9, 2020, the Municipal Loan Facility (MLF) has been updated three times. In its most recent updated term sheet, announced on June 3, 2020, the Federal Reserve expanded the range of cities that will be eligible to borrow money through the emergency program for state and local governments. Under the new terms, at least two cities or counties in every state will be eligible, regardless of population. Governors of each state will also be able to designate two issuers in their jurisdictions whose revenues are generally derived from operating government activities (such as public transit, airports, toll facilities, and utilities) to be eligible to directly use the facility. The changes follow concerns voiced by Senate Banking Committee Chair Mike Crapo (R-ID) that the Fed’s population thresholds would “impede access to smaller and rural communities.”

• The MLF continues to be directly open to US states and DC, cities with a population of at least 250,000
residents, counties with a population of at least 500,000 residents, and certain multistate entities. Established under Section 13(3) of the Federal Reserve Act, with approval of the Treasury Secretary, MLF will offer up to $500 billion in lending to states and municipalities to help manage cash flow stresses caused by the COVID-19 pandemic. The New York Fed will commit to lend to a SPV on a recourse basis. The SPV will purchase eligible notes directly from eligible issuers at the time of issuance and the New York Fed will be secured by all the assets of the SPV. Among other rating requirements, eligible issuers must have had an investment grade rating as of April 8, 2020, from at least two major nationally recognized statistical rating organizations. The termination date for the facility has been extended to December 31, 2020.

- The Fed previously published an updated term sheet and a pricing appendix on May 11, 2020, following an earlier update two weeks earlier, on April 27.
- The New York Fed has published updated FAQs.
- The emergency program became operational on May 26, 2020.

Fed expands access to small business lending facility and expands the collateral that can be pledged. The Fed has expanded access to its Paycheck Protection Program Liquidity Facility (PPPLF) to include additional lenders and expanded the collateral that can be pledged. The changes, outlined in a term sheet issued on April 30, 2020, are intended to facilitate lending to small businesses via the SBA PPP. All PPP lenders approved by the SBA, including non-depository institution lenders, are eligible to participate in the PPPLF under the revised terms. SBA-qualified PPP lenders include banks, credit unions, Community Development Financial Institutions, members of the Farm Credit System, small business lending companies licensed by the SBA, and some financial technology (fintech) firms. Eligible borrowers will be able to pledge whole PPP loans that they have purchased as collateral to the PPPLF. An institution that pledges a purchased PPP loan will need to provide the Reserve Bank with documentation from the SBA demonstrating that the pledging institution is the beneficiary of the SBA guarantee for the loan.

- In another PPP-related development, the Fed on April 20, 2020 published an interim final rule temporarily modifying the Fed’s insider lending restrictions to allow banks to make loans to small businesses owned by the bank’s directors and shareholders. Section 22(h) of the Federal Reserve Act and the Fed’s Regulation O limit the types and quantity of loans that bank directors, shareholders, officers, and businesses owned by these persons can receive from their related banks. The rule exempts PPP loans from the definition of “extension of credit” under the statute and corresponding regulations. The rule became effective on April 22, 2020 and will remain in place while the PPP is active. Public comment is due on or before June 8, 2020.

SBA limits PPP loans to $20 million, clarifies eligibility criteria and limits. The SBA has issued an interim final rule setting a loan limit of $20 million for a single corporate group under the PPP. The rule, published in the May 4, 2020 Federal Register, also clarifies PPP eligibility criteria for non-bank and non-insured depository institution lenders that meet certain thresholds in the amount of loans originated, maintained, and serviced during a 12-month period in the past 36 months. Thresholds are lower for community development financial institutions and majority minority-, women-, or veteran/military-owned lenders. Loan applicants must notify the PPP lenders if they have applied for or received PPP loans in excess of $20 million, and cancel any pending application or approved PPP loan above the limit. Failure to do so will be a use of PPP funds for unauthorized purposes, and the loan will not be forgiven. A lender may rely on an applicant’s representation concerning compliance with this limitation. Businesses are subject to this limitation even if they are eligible for the waiver-of-affiliation provision under the CARES Act or are otherwise not considered to be affiliates under SBAs affiliation rules. Following passage of the CARES Act, the SBA and the Treasury Department have issued a series of interim rules with additional guidance for implementing the program. The interim final rule is effective April 30, 2020, through March 31, 2021, although SBA will accept public comments through June 3, 2020 for consideration in developing the final rule.

CFPB issues compliance aid for small businesses applying for PPP loans. The Consumer Financial Protection Bureau (CFPB) on May 6, 2020 issued a set of FAQs intended to provide clarity for small businesses that have applied for a loan from their financial institution under the PPP. The three FAQs address the Equal Credit Opportunity Act (ECOA) and Regulation B provisions that require creditors to notify an applicant of action taken within 30 days after receiving a completed application concerning the creditor’s approval of, counteroffer to, or adverse action on the application. In its FAQs, the CFPB clarifies that a PPP application is only a “completed application” once the creditor has received a loan number from the SBA or a response about the availability of funds. This ensures that the time awaiting this information from the SBA does not count towards the 30-day notice
requirement, and that applications will therefore not “time out” during the process. The FAQs also make clear that if the creditor denies an application without ever sending the application to the SBA, the creditor must give notice of this adverse action within 30 days. It further clarifies that a creditor cannot deny a loan application based on incompleteness where the creditor has enough information for a credit decision but has yet to receive a loan number or response about the availability of funds from the SBA.

OCC urges electronic filing during the pandemic. The Office of the Comptroller of the Currency (OCC) has issued guidance strongly recommending the use of electronic methods for submitting licensing filings during the COVID-19 pandemic, warning that paper filings may result in processing delays. In a March 20, 2020 announcement, OCC provided links explaining its two methods for electronic filing: the Central Application Tracking System (CATS) and the agency's secure email system.

- In another housekeeping announcement, OCC on May 12, 2020 issued a bulletin relaxing requirements for in-person annual shareholder meetings in light of the COVID-19 pandemic, subject to applicable state corporate governance mandates.

CFPB expedites access to credit for consumers facing financial emergencies during the COVID-19 pandemic. The CFPB on April 29, 2020 issued an interpretive rule clarifying that consumers can exercise their rights to modify or waive certain required waiting periods under the Truth in Lending Act (TILA)-Real Estate Settlement Procedures Act (RESPA) Integrated Disclosure (TRID) Rule and Regulation Z Rescission Rules. In conjunction with the interpretive rule, the CFPB also issued FAQs addressing when creditors must provide appraisals or other written valuations to mortgage applicants in order to expedite access to credit for consumers affected by the COVID-19 pandemic. Under the interpretive rule, which became effective May 4, 2020, a consumer has a bona fide personal financial emergency that permits the modification and waiver under the TRID and Reg Z rules if the need to obtain funds during the pandemic either necessitates consummating the credit transaction before the end of the TRID waiting periods or must be met before the end of the Regulation Z Rescission Rules waiting period. The COVID-19 pandemic is considered a "changed circumstance" for purposes of certain TRID Rule provisions, which allows creditors to use revised estimates reflecting changes in settlement charges for purposes of determining good faith. The TRID Rule enacts certain disclosure requirements and waiting periods related to mortgage transactions. The Regulation Z Rescission Rules provide consumers with the right to rescind certain credit transactions secured by their principal dwelling and impose waiting periods.

In other recent developments ...

New leadership at the OCC. Joseph Otting stepped down from his post of Comptroller of the Currency effective May 29, 2020. Brian Brooks, First Deputy and Chief Operating Officer, has assumed the role of acting Comptroller of the Currency. During his two-and-a-half-year tenure at the helm of OCC, Otting has made reform of the Community Reinvestment Act (CRA) a top priority [see following item]. The agency has also sought to update capital and liquidity rules for banks, encouraged banks to offer consumers responsible short-term small-dollar credit as an alternative to predatory lenders, and bolstered anti-money laundering and Bank Secrecy Act provisions. As with all of the regulatory agencies, OCC has been involved in taking emergency measures to keep the banking system functioning during the COVID-19 pandemic. “It has been my distinct honor to serve the United States and this Administration as the 31st Comptroller of the Currency,” Otting said in a May 21, 2020 statement. “I am extremely proud of what the women and men of the agency have accomplished to promote economic opportunity, eliminate unnecessary regulatory burden, and operate the agency in a more effective and efficient manner.” Before taking the comptroller job, Otting served as president and CEO of OneWest Bank, NA, which was founded by Treasury Secretary Steven Mnuchin. Brooks previously served as vice chair and chief legal officer at OneWest. OCC is an independent bureau within the Treasury Department.

OCC finalizes CRA overhaul. In the final major action of the Joseph Otting era in the OCC, the agency on May 20, 2020 released a final rule intended to modernize the Community Reinvestment Act (CRA). The new regulations will take effect in October 2020 for banks and federal thrifts under OCC oversight, though compliance dates vary according to certain criteria and will be phased in over several years. The Federal Deposit Insurance Corporation (FDIC), which also has jurisdiction over CRA, has signed on to the OCC's proposal, although it did not participate in the rulemaking. But the third agency with authority over CRA enforcement, the Fed, has not signed on to the OCC's plan, creating the potential for different sets of rules for banks depending on which agency is their primary regulator – although Fed officials have expressed hope that the agencies will eventually wind up on the same page.
Accompanying the 372-page final rule is a 22-page list of qualifying activities. Among OCC’s key goals in developing the new rule are:

- Clarifying what qualifies for CRA consideration.
- Updating how banks define assessment areas by retaining immediate geographies around branches and establishing additional assessment areas for banks that do not rely on branch networks to serve their customers.
- Evaluating bank CRA performance more objectively through quantitative measures that assess the volume and value of activity.
- Making reporting more transparent and timelier.
- Providing greater support for small businesses, small and family-owned farms, and Indian Country.
- Thoroughly evaluating banks’ CRA performance in all their assessment areas, not just a limited evaluation in some of them.

OCC said it received more than 7,500 comments from stakeholders when the rule was first proposed in December 2019.

- Community groups file suit against the OCC. The National Community Reinvestment Coalition (NCRC), the California Reinvestment Coalition (CRC) and legal oversight group Democracy Forward announced on the day after the rule was released, that they intend to sue the OCC “for unlawfully gutting the [CRA].” In a May 21, 2020 statement, Jesse Van Tol, CEO of NCRC, said, “It’s an awkward, disjointed and rushed move by a single agency that couldn’t get agreement from the two other agencies that regulate banks. It’s an administrative fiasco. We’ll see you in court.”

OCC finalizes valid-when-made doctrine to resolve uncertainty over Madden decision. On his first day in office, acting Comptroller of the Currency, Brian Brooks, finalized a regulation to codify the valid-when-made principle, that when a bank sells, assigns or otherwise transfers a loan, the interest permissible before the transfer continues to be permissible after the transfer. The final rule – announced on May 29, 2020 and unchanged from OCC’s original proposal unveiled November 2019 – is intended to clarify and reaffirm a longstanding industry understanding that was thrown into question by the 2015 decision of the US Court of Appeals for the Second Circuit in the Madden v. Midland Funding, LLC, case. In that decision, the court ruled that federal law did not permit a non-bank third-party that purchased bank-issued credit card debt to collect on the debt because the interest rate was too high, violating New York’s usury law. The Madden decision was criticized by the financial industry, and the Obama Administration Solicitor General and the OCC at the time filed a brief with the US Supreme Court arguing that the decision was incorrectly decided. The Supreme Court declined to hear the case in 2016, and on remand in 2017, the Southern District Court for New York determined that New York law applied to the claims despite a Delaware choice-of-law provision in the original credit card agreement. OCC said it hoped that the newly finalized rule would provide “enhanced legal certainty” that would “facilitate responsible lending by banks, including in circumstances when access to credit is especially critical.”

- Consumer groups have expressed concern that the rule could encourage more predatory lending by allowing nonbanks to evade state interest rate caps. In the text of the rule, OCC acknowledges that it heard this criticism during the public comment period but disagrees with it, stating that “the agency has consistently opposed predatory lending, including through relationships between banks and third parties. Nothing in this rulemaking in any way alters the OCC’s strong position on this issue, nor does it rescind or amend any related OCC issuances.”
- The rule applies to all national banks and state and federal savings associations and will take effect 60 days after publication in the Federal Register.
- The FDIC proposed a similar rule in December 2019, which has not yet been finalized.

CFPB issues guidance on mortgage loan transfer process. The CFPB on April 24, 2020 issued a policy document outlining practices the bureau says will provide mortgage servicers clarity, facilitate compliance, and prevent harm to consumers during the transfer of residential mortgages. The Compliance Bulletin and Policy Guidance: Handling of Information and Documents During Mortgage Servicing Transfers includes examples of practices that achieve the objectives of the regulatory bureau’s requirements. The bulletin’s recommendations are non-binding and intended as suggestions to help ensure compliance with Regulation X and a seamless servicing transfer. Servicers may not need to implement all of the model policies and procedures in order to comply with
Regulation X and should tailor theirs to meet their specific needs. Regulation X, which implements the Real Estate Settlement Procedures Act (RESPA) of 1974, was amended by the CFPB in 2014 pursuant to Dodd-Frank. “Consumers should experience a seamless process when their mortgage servicer changes. The guidance we released today will facilitate a well-functioning mortgage servicer transfer process, providing a roadmap for servicers that will prevent consumer harm,” said CFPB Director Kathleen L. Kraninger. “The guidance provides insights the CFPB has gained through years of supervisory and enforcement work to oversee compliance with regulations updated after the financial crisis.”

If you have any questions regarding these new requirements and their implications, please contact any of the authors or your DLA Piper relationship attorney.

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

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