

Financial Services

Providing Strategic Legal Guidance to the Global Financial Services Industry

APRIL 24, 2020

For more information,
contact:

Michael Urschel
+1 212 556 2285
murschel@kslaw.com

Tony Mechcatie
+1 212 556 2104
amechcatie@kslaw.com

Adam Ghebrekristos
+1 404 572 2823
aghebrekristos@kslaw.com

Katie Weiss
+1 212 556 2323
kweiss@kslaw.com

King & Spalding

New York
1185 Avenue of the Americas
New York, New York 10036-4003
Tel: +1 212 556 2100

Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600

Suggested Modifications to the Primary Market Corporate Credit Facility and/or Main Street Lending Program for Certain Securitization Transactions

On April 9, 2020, the Federal Reserve announced initiatives to expand existing programs and create new programs to provide up to \$2.3 trillion in loans to provide liquidity to the national economy in response to the COVID-19 pandemic. The programs established by the Federal Reserve include the Main Street Lending Program¹ established to provide aid to small-to-medium sized businesses and the Primary Market Corporate Credit Facility² to provide aid to larger employers with access to the capital markets.

While these programs will provide much-needed liquidity to a broad array of U.S. companies, the programs are currently structured in a manner that excludes many other U.S. companies which rely on financing secured through securitizations. Companies utilizing financing secured through securitizations for the substantial part of their capital structure for an operating business—in particular, businesses using “whole business” securitizations (“WBS”) or other similar financings—are in stark contrast to more traditional securitizations which are structured to finance more traditional financial asset classes such as mortgages, student loans, auto loans and credit card receivables.

WBS and other “esoteric” securitizations often securitize the revenue-generating assets of main street, “real-economy” businesses such as franchised restaurants, franchised repair and maintenance and disaster recovery chains, franchised schools, spas, wireless and telecom operators and other “real economy” concepts. These businesses employ many thousands of Americans and are a valuable part of our economy. In 2019, WBS issuance alone was greater than \$9 billion.³ Such transactions involve the issuance of bonds backed by the right to receive long-term payments under valuable assets transferred to the securitization entities by the operating company, including franchise royalty payments, company-



operated revenues, leases, wireless telecom contracts and other similar assets. The parent companies typically continue to employ all (or a majority) of the employees working at the businesses that are securitized and provide important services to vast franchisee networks that themselves employ hundreds of thousands (if not millions) of Americans.

These companies and their securitization subsidiaries are thus far unable to access the liquidity afforded by the new Federal Reserve programs to bolster their liquidity in the wake of the COVID-19 crisis. With a few simple, targeted modifications to the Main Street Lending Program and/or the Primary Market Credit Facility, these U.S. companies which provide numerous services that Americans rely on every day would be able to secure additional liquidity through access to one or more of the programs.

PRIMARY MARKET CORPORATE CREDIT FACILITY

On March 23, 2020, the Federal Reserve established the Primary Market Corporate Credit Facility or “PMCCF”.⁴ The PMCCF will facilitate the purchase by a Federal Reserve-financed special purpose vehicle of qualifying bonds and the purchase of portions of qualifying syndicated loans or bonds issued by eligible issuers.⁵ Because most WBS and other esoteric securitizations are issued in note or bond form (as opposed to loans), the PMCCF is potentially the best fit for making Federal Reserve programs available for these issuers. In order to expand access to this program, we would recommend the following targeted modifications to the eligibility criteria for the program:

1. Expand the ratings criteria of the “Eligible Issuer” definition to alternately consider the rating of the qualifying debt rather than the rating of the issuer itself by permitting an investment grade security rating. The bonds issued in a WBS transaction are typically rated investment grade but the issuers themselves are not typically rated.
2. In addition to S&P Global Ratings, Moody’s Investor Service Inc. and Fitch Ratings, Inc., accept ratings issued by Kroll Bond Rating Agency as an additional nationally recognized statistical rating organization (NRSRO) approved by the U.S. Securities and Exchange Commission (SEC). Kroll Bond Rating Agency rated bonds for 9 out of the 13 WBS transactions in 2019.⁶
3. Lengthen the four-year maturity requirement or expand the definition to take into account expected maturities. The legal final maturity date in a WBS is typically 30 years, while expected or “anticipated” maturity dates are customarily set at 5, 7 or 10 years. We think it would be reasonable to apply the expected or “anticipated” maturity dates in this context as WBS are typically structured in a manner to expect the securitization to refinance the securitization notes by such dates.

MAIN STREET LENDING PROGRAM

If the PMCCF is not made available to issuers as noted above, the Main Street Lending Program could be another potential option for additional liquidity. Initially announced on April 9, 2020, the Main Street Lending Program created facilities providing for new term loans as well as upsized tranches of existing term loans, in each case restricted to “Eligible Borrowers and “Eligible Lenders”.⁷ In order to expand access to this program, we would recommend the following modifications to the eligibility criteria if PMCCF eligibility is not available:⁸

1. Expand the “Eligible Loan” definition to include loans other than term loans. WBS issuers typically have in place a “variable funding note purchase agreement”, which functions similarly to a revolving credit facility, but would not immediately be eligible for the upsized tranche facility today due to the fact that they are denominated as notes issued under an indenture.
2. Lengthen the four-year maturity requirement or expand the definition to take into account expected maturities. As noted in the above discussion of the PMCCF, the legal final maturity date in a WBS is typically 30 years, while expected or “anticipated” maturity dates are shorter customarily set at 5, 7 or 10 years.



3. Expand the “Eligible Lender” definition to include investment banks and other financial institutions which may provide non-traditional forms of financing such as WBS and other “esoteric” securitizations. In a WBS, certain investment banks and other entities often provide financing through variable funding note purchase agreements but would not currently be considered “Eligible Lenders” and would not be able to participate in this program.

It is our view that with the targeted changes above to permit funding to WBS and other similar financings, the PMCCF and/or the Main Street Lending Program could prove even more effective in achieving their intended goal of providing liquidity to the national economy in response to the COVID-19 pandemic.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,100 lawyers in 21 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.” View our [Privacy Notice](#).

ABU DHABI	BRUSSELS	DUBAI	HOUSTON	MOSCOW	RIYADH	SINGAPORE
ATLANTA	CHARLOTTE	FRANKFURT	LONDON	NEW YORK	SAN FRANCISCO	TOKYO
AUSTIN	CHICAGO	GENEVA	LOS ANGELES	PARIS	SILICON VALLEY	WASHINGTON, D.C.

¹ Main Street Lending Program, <https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm>.

² Primary Market Corporate Credit Facility, <https://www.federalreserve.gov/monetarypolicy/pmccf.htm>.

³ Finsight, U.S. ABS Esoteric: Whole Business, <https://finsight.com/sector/Esoteric/Whole%20Business?products=ABS®ions=USOA>.

⁴ *Id.* See also, Primary Market Corporate Credit Facility Term Sheet, <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a5.pdf>.

⁵ Eligible issuers include U.S. businesses rated at least BBB-/Baa3 as of March 22, 2020, by a major NRSRO, pursuant to the additional terms set forth in the term sheet issued on April 9, 2020. Eligible assets include corporate bonds issued by an eligible issuer with a maturity of 4 years or less. *Id.*

⁶ Finsight, U.S. ABS Esoteric: Whole Business, <https://finsight.com/sector/Esoteric/Whole%20Business?products=ABS®ions=USOA>.

⁷ Eligible Borrowers include U.S. businesses with no more than 10,000 employees and \$2.3 billion in revenue for 2019, and eligible lenders are U.S. insured depository institutions, U.S. bank holding companies, and U.S. savings and loan holding companies. Main Street New Loan Facility Term Sheet, <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a4.pdf> and Main Street Expanded Loan Facility Term Sheet, <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a7.pdf>.

⁸ Note that it is our understanding that a borrower/issuer would not likely be permitted to use both the PMCCF and the Main Street Lending Program.