

MEMORANDUM

December 17, 2020

To: House Select Subcommittee on the Coronavirus Crisis
Attention: Carlos Uriarte

From: Jay B. Sykes, Legislative Attorney, jsykes@crs.loc.gov, 7-1064

Subject: **Section 4029 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act and the Extension of the Federal Reserve’s Emergency-Lending Programs**

Summary

Section 4003(b)(4) of the Coronavirus Aid, Relief, and Economic Security (CARES) Act authorizes the Treasury Secretary to invest up to \$454 billion in emergency-lending programs established by the Federal Reserve (the Fed).¹ To date, the Treasury Secretary has committed \$195 billion to such programs, and appears to have transferred \$114 billion of that amount as of December 9, 2020.² In establishing these programs, the Fed lends to special-purpose vehicles (SPVs), while the Treasury Department uses CARES Act funds to make equity investments in the SPVs.³ In turn, the SPVs purchase certain types of assets or lend to specified categories of borrowers.⁴ According to the term sheets for the CARES Act-funded

¹ Pub. L. No. 116-136 § 4003(b)(4) (2020).

² See Letter from Steven T. Mnuchin, Sec. of the Treasury, to Jerome H. Powell, Chair of the Bd. of Gov. of the Fed. Res. Sys. (Nov. 19, 2020), <https://home.treasury.gov/system/files/136/letter11192020.pdf>; *Federal Reserve Statistical Release, Factors Affecting Reserve Balances*, BD. OF GOV. OF THE FED. RES. SYS. (Dec. 10, 2020), <https://www.federalreserve.gov/releases/h41/current/>.

³ See Amended and Restated Limited Liability Company Agreement of MS Facilities LLC, FED. RES. BANK OF BOSTON (May 29, 2020) [hereinafter “Main Street LLC Agreement”]; Amended and Restated Limited Liability Company Agreement of Municipal Liquidity Facility LLC, FED. RES. BANK OF N.Y. (May 1, 2020), <https://www.newyorkfed.org/medialibrary/media/markets/mlf/mlf-limited-liability-company-agreement> [hereinafter “MLF LLC Agreement”]; Amended and Restated Limited Liability Company Agreement of Corporate Credit Facilities LLC, FED. RES. BANK OF N.Y. (Apr. 13, 2020), https://www.newyorkfed.org/medialibrary/media/markets/SMCCF_Limited_Liability_Company_Agreement.pdf [hereinafter “Corporate Credit LLC Agreement”]; Amended and Restated Limited Liability Company Agreement of TALF II LLC, FED. RES. BANK OF N.Y. (Apr. 13, 2020), https://www.newyorkfed.org/medialibrary/media/markets/talldocs/TALF_Limited_Liability_Company_Agreement.pdf [hereinafter “TALF LLC Agreement”].

⁴ See, e.g., Municipal Liquidity Facility Term Sheet, BD. OF GOV. OF THE FED. RES. SYS. (updated Aug. 11, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200811a1.pdf> [hereinafter “MLF Term Sheet”]; Primary Market Corporate Credit Facility Term Sheet, BD. OF GOV. OF THE FED. RES. SYS. (updated June 29, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200629a1.pdf> [hereinafter “PMCCF Term Sheet”]; Term Sheet, Main Street New Loan Facility, BD. OF GOV. OF THE FED. RES. SYS. (June 8, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200608a1.pdf> [hereinafter “MSNLF Term Sheet”].

programs, the SPVs will stop lending and purchasing assets on December 31, 2020, unless the Fed and the Treasury Department agree to extend the programs.⁵

The deadline in the term sheets applies to lending and asset purchases *by the SPVs*. By contrast, Section 4029 of the CARES Act also establishes December 31, 2020 as the expiration date of the “authority provided under” Title IV Subtitle A of the CARES Act for the Treasury Secretary to invest *new* funds in the SPVs.⁶

You have asked us to respond to two questions:

- “[D]oes the Treasury Secretary have the authority to extend the CARES Act supported Federal Reserve lending facilities consistent with Sec[ti]on 4029?”; and
- “[I]f the Treasury Secretary agreed to extend the CARES Act supported Fed lending facilities, would the Fed be able to continue making loans under these programs consistent with Sec[ti]on 4029?”⁷

While litigants before a court could raise unanticipated or novel arguments not addressed here, a court presented with these questions would likely conclude that the answer to both questions is “yes.”⁸

With respect to the first question, Section 4029 by its plain terms sets only the date upon which the Treasury Secretary’s authority “to make *new* loans, loan guarantees, or other investments” under Title IV Subtitle A of the CARES Act “shall terminate.”⁹ As pertinent here, the authority granted the Treasury Secretary under Title IV Subtitle A is the authority to invest CARES Act funds in the Fed’s SPVs.¹⁰ Accordingly, Section 4029 does not appear to impose any limitations on the Treasury Secretary’s discretion to agree to extend the SPVs in which the Treasury Secretary already has invested CARES Act funds.

Turning to the second question, as noted, Section 4029(a) by its terms sets only the termination date for the Treasury Secretary’s authority to make “new” investments of CARES Act funds in the SPVs.¹¹ It does not appear to impose any limitations on *the SPVs’* use of funds that the Treasury Secretary already has invested in those programs before December 31, 2020. In other words, Section 4029’s December 31 deadline applies only to exercises of “authority provided under” Title IV Subtitle A of the CARES Act.¹² Title IV Subtitle A provides authority to *the Treasury Secretary*, but not to *the Fed or its SPVs*.¹³ And when the Fed’s SPVs purchase assets or extend credit, the Treasury Secretary does not play a role in those

⁵ See *Federal Reserve Board Announces an Extension Through December 31 of its Lending Facilities That Were Scheduled to Expire On or Around September 30*, BD. OF GOV. OF THE FED. RES. SYS. (July 28, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200728a.htm> [hereinafter “Lending Facilities Extension Announcement”].

⁶ See Pub. L. No. 116-136 § 4029(a) (2020).

⁷ Email from Carlos Uriarte to CRS (Dec. 11, 2020, 5:17 PM) (on file with author).

⁸ Because Article III of the Constitution limits the jurisdiction of federal courts to cases in which litigants assert “concrete and particularized” injuries, it is unlikely that any court would reach the merits of these questions. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Nonetheless, the principles of statutory interpretation employed by courts are applicable to resolving any legal question.

⁹ Pub. L. No. 116-136 § 4029(a) (emphasis added).

¹⁰ See *id.* § 4002(9) (2020) (defining “Secretary” as “the Secretary of the Treasury, or the designee of the Secretary of the Treasury”); *id.* § 4003(a) (providing that “the Secretary is authorized to make loans, loan guarantees, and other investments in support of eligible businesses, States, and municipalities that do not, in the aggregate, exceed \$500,000,000,000”); *id.* § 4003(b) (specifying the recipients to which “[l]oans, loan guarantees, and other investments made pursuant to [Section 4003(a)] shall be made available”); see generally *id.* tit. IV subtitle A.

¹¹ *Id.* § 4029(a).

¹² *Id.*

¹³ See *id.* tit. IV subtitle A.

transactions. Therefore, when the Fed’s SPVs purchase assets or extend credit, they are not exercising “authority provided under” Title IV Subtitle A for purposes of Section 4029’s December 31 deadline. Thus, if the Treasury Secretary agreed to extend the SPVs beyond December 31, 2020—which possibility the SPV term sheets contemplate—the SPVs would appear to have authority to continue making loans consistent with Section 4029, using funds the Treasury Department invested prior to December 31.

Background

Statutory Background

Section 13(3) of the Federal Reserve Act empowers the Fed to lend to non-banks in “unusual and exigent circumstances,” with the Treasury Secretary’s approval.¹⁴ During the early weeks of the COVID-19 pandemic, the Fed invoked this authority to establish several emergency-lending programs backstopping key financial markets. In establishing some of these programs, the Fed lent to SPVs, which are in turn purchasing certain types of assets or extending credit to specified categories of borrowers.¹⁵ To absorb any losses on these transactions, the Treasury Department made equity investments in several of the SPVs using money from its Exchange Stabilization Fund.¹⁶

The CARES Act provided “the Secretary”—defined as “the Secretary of the Treasury or the designee of the Secretary of the Treasury”¹⁷—with \$500 billion for additional economic relief.¹⁸ Section 4003(b) of the Act authorizes the Treasury Secretary to use up to \$25 billion of this total on loans and loan guarantees for passenger airlines; up to \$4 billion on loans and loan guarantees for cargo airlines; and up to \$17 billion on loans and loan guarantees for “businesses critical to national security.”¹⁹ Section 4003(b) also authorizes the Treasury Secretary to use up to \$454 billion—plus any remaining funds from the other categories—to “make loans and loan guarantees to, and other investments in” Fed emergency-lending programs.²⁰ While Section 4003 imposes several restrictions on the types of Fed programs in which the Treasury Secretary can invest the relevant funds,²¹ it does not by its terms grant any authorities to the Fed.

Section 4029 of the CARES Act establishes a deadline on which the Treasury Secretary’s Section 4003 authorities expire. Section 4029(a) indicates that “the authority provided under [Title IV Subtitle A of the CARES Act] to make *new* loans, loan guarantees, or other investments shall terminate” on December 31, 2020.²² Title IV Subtitle A authorizes only *the Treasury Secretary* to invest the relevant funds.²³

¹⁴ 12 U.S.C. § 343(3).

¹⁵ See, e.g., Commercial Paper Funding Facility: Program Terms and Conditions, BD. OF GOV. OF THE FED. RES. SYS. (updated Nov. 30, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201130a1.pdf>.

¹⁶ *Id.* at 1.

¹⁷ Pub. L. No. 116-136 § 4002(9) (2020).

¹⁸ *Id.* § 4003(a); see also *id.* § 4027(a).

¹⁹ *Id.* § 4003(b)(1)-(3).

²⁰ *Id.* § 4003(b)(4).

²¹ *Id.* § 4003(c)(3)(A)(ii), (c)(3)(C).

²² *Id.* § 4029(a) (emphasis added).

²³ See *id.* § 4002(9) (defining “Secretary” as “the Secretary of the Treasury, or the designee of the Secretary of the Treasury”); *id.* § 4003(a) (providing that “the Secretary is authorized to make loans, loan guarantees, and other investments in support of eligible businesses, States, and municipalities that do not, in the aggregate, exceed \$500,000,000,000”); *id.* § 4003(b) (specifying the recipients to which “[l]oans, loan guarantees, and other investments made pursuant to [Section 4003(a)] shall be made available”); see generally *id.* tit. IV subtitle A.

Federal Reserve CARES Act Programs

The Treasury Secretary has used CARES Act funds to invest in several Fed emergency-lending programs. Specifically, the Treasury Secretary has used CARES Act money to purchase preferred equity in the following Fed facilities:

- **The Primary Market Corporate Credit Facility (PMCCF).** Under the PMCCF, the Federal Reserve Bank of New York (New York Fed) has lent to an SPV, which in turn purchases qualifying corporate bonds and syndicated loans in the primary market.²⁴
- **The Secondary Market Corporate Credit Facility (SMCCF).** Under the SMCCF, the same SPV utilized by the PMCCF purchases eligible corporate bonds, bond exchange-traded funds, and bond portfolios in the secondary market.²⁵
- **The Municipal Liquidity Facility (MLF).** Under the MLF, the New York Fed has lent to an SPV, which in turn purchases eligible notes from qualifying states, cities, and counties.²⁶
- **The Main Street Lending Program (MSLP).** Under the MSLP, the Federal Reserve Bank of Boston has lent to an SPV, which in turn purchases 95-percent participations in eligible loans that financial institutions make to qualifying small and medium-sized businesses and nonprofits.²⁷
- **The Term Asset-Backed Securities Loan Facility (TALF).** Under the TALF, the New York Fed has lent to an SPV, which in turn makes collateralized loans to holders of certain asset-backed securities.²⁸

Under the term sheets for these programs, the SPVs will stop lending and purchasing assets on December 31, 2020, unless the Fed and the Treasury Secretary agree to extend the programs.²⁹

The SPVs utilized by the Fed's emergency-lending programs are limited liability companies (LLCs) organized under Delaware law.³⁰ Under the LLC Agreements between the relevant Federal Reserve Banks and the Treasury Department, the Federal Reserve Banks have the exclusive right to manage the LLCs.³¹ The Treasury Department has no right "to take part in the management or control of the business" of the LLCs, to "act for or bind" the LLCs, or "otherwise to transact any business on behalf of" the LLCs.³² The

²⁴ PMCCF Term Sheet, *supra* note 4.

²⁵ Secondary Market Corporate Credit Facility Term Sheet, BD. OF GOV. OF THE FED. RES. SYS. (updated July 28, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200728a1.pdf>.

²⁶ MLF Term Sheet, *supra* note 4.

²⁷ MSNLF Term Sheet, *supra* note 4; Main Street Priority Loan Facility Term Sheet, BD. OF GOV. OF THE FED. RES. SYS. (updated Oct. 30, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201030a2.pdf>; Main Street Expanded Loan Facility Term Sheet, BD. OF GOV. OF THE FED. RES. SYS. (updated Oct. 30, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201030a3.pdf>; Nonprofit Organization New Loan Facility Term Sheet, BD. OF GOV. OF THE FED. RES. SYS. (updated Oct. 30, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201030a4.pdf>; Nonprofit Organization Expanded Loan Facility Term Sheet, BD. OF GOV. OF THE FED. RES. SYS. (updated Oct. 30, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201030a5.pdf>.

²⁸ Term Asset-Backed Securities Loan Facility Term Sheet, BD. OF GOV. OF THE FED. RES. SYS. (updated July 28, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200728a6.pdf>.

²⁹ See Lending Facilities Extension Announcement, *supra* note 5.

³⁰ Main Street LLC Agreement, *supra* note 3, at 1-2; Corporate Credit LLC Agreement, *supra* note 3, at 1-2; MLF LLC Agreement, *supra* note 3, at 1-2; TALF LLC Agreement, *supra* note 3, at 1-2.

³¹ Main Street LLC Agreement, *supra* note 3, ¶ 8(a); Corporate Credit LLC Agreement, *supra* note 3, ¶ 8(a); MLF LLC Agreement, *supra* note 3, ¶ 8(a); TALF LLC Agreement, *supra* note 3, ¶ 8(a).

³² Main Street LLC Agreement, *supra* note 3, ¶ 8(b); Corporate Credit LLC Agreement, *supra* note 3, ¶ 8(b); MLF LLC Agreement, *supra* note 3, ¶ 8(b); TALF LLC Agreement, *supra* note 3, ¶ 8(b).

LLC Agreements further provide that the Treasury Department “shall have no voting, consent, approval, management or control rights whatsoever,” except for certain limited rights to review and approve amendments to the LLC Agreements.³³ Accordingly, while the Treasury Secretary has provided capital to the Fed’s emergency-lending programs—subject to the terms and conditions in the LLC Agreements—the Treasury Secretary does not appear to play any role in the management of those programs.

Analysis

Does The Treasury Secretary Have The Authority To Extend The CARES Act-Supported Federal Reserve Lending Facilities Consistent With Section 4029?

As noted, the term sheets for the CARES Act-funded SPVs provide that the SPVs will stop lending and purchasing assets on December 31, 2020.³⁴ However, the term sheets also provide that the Fed and the Treasury Secretary may extend the SPVs’ lending and asset purchases beyond December 31, 2020.³⁵ This is consistent with the statutory and regulatory scheme governing Fed emergency lending, under which such programs must end within one year, unless the Fed determines that “unusual and exigent circumstances” still exist and the Treasury Secretary agrees to continue the programs.³⁶

You have asked whether the Treasury Secretary has the authority to extend the CARES Act-supported Fed lending facilities consistent with Section 4029 of the CARES Act. While litigants before a court could raise unanticipated or novel arguments not addressed here, a court presented with that question would likely conclude that the answer is “yes.”

A court would likely begin by determining the meaning of the pertinent provisions of Section 4029. The Supreme Court has explained that when “the meaning of [a] statute’s terms is plain,” the interpretive inquiry is “at an end.”³⁷

Section 4029(a) states that “the authority provided under [Title IV Subtitle A of the CARES Act] to make *new* loans, loan guarantees, or other investments shall terminate” on December 31, 2020.³⁸ Title IV Subtitle A authorizes “*the Secretary of the Treasury, or the designee of the Secretary of the Treasury*” to invest CARES Act funds in the Fed’s SPVs, but does not, by its terms, confer any authority on the SPVs.³⁹ Therefore, by its plain terms, Section 4029(a) appears to establish only the expiration date for the Treasury Secretary’s authority to make *new* investments of CARES Act funds in the SPVs. It does not appear to impose any limitations on the Secretary’s discretion to extend the operation of SPVs in which the Secretary has invested CARES Act funds *before* December 31, 2020. Accordingly, a court would

³³ Main Street LLC Agreement, *supra* note 3, ¶¶ 10, 20; Corporate Credit LLC Agreement, *supra* note 3, ¶¶ 10, 20; MLF LLC Agreement, *supra* note 3, ¶¶ 10, 20; TALF LLC Agreement, *supra* note 3, ¶¶ 10, 20.

³⁴ See Lending Facilities Extension Announcement, *supra* note 5.

³⁵ See *id.*

³⁶ See 12 U.S.C. § 343(3)(B)(i) (requiring the Fed to establish procedures to ensure its emergency-lending programs are “terminated in a timely and orderly fashion”); 12 C.F.R. § 201.4(d)(9)(iv) (requiring the Fed to re-evaluate the need for emergency-lending programs every six months); *id.* § 201.4(d)(9)(i)-(ii) (providing that the Fed’s Section 13(3) programs will end within one year, unless the Fed determines that “unusual and exigent circumstances” still exist and the Treasury Secretary agrees to continue the programs).

³⁷ *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1749 (2020); see also *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

³⁸ Pub. L. No. 116-136 § 4029(a) (2020) (emphasis added).

³⁹ *Id.* § 4002(9) (defining “Secretary”) (emphasis added); see also *id.* § 4003(a) (providing that “the Secretary is authorized to make loans, loan guarantees, and other investments in support of eligible businesses, States, and municipalities that do not, in the aggregate, exceed \$500,000,000,000”); *id.* § 4003(b) (specifying the recipients to which “[l]oans, loan guarantees, and other investments made pursuant to [Section 4003(a)] shall be made available”); see generally *id.* tit. IV subtitle A.

likely conclude that Section 4029 does not prohibit the Treasury Secretary from extending the CARES Act-funded Fed facilities beyond December 31.

If The Treasury Secretary Agreed To Extend The CARES Act-Supported Fed Lending Facilities, Would The Fed Be Able To Continue Making Loans Under These Programs Consistent With Section 4029?

You also asked whether the Fed’s CARES Act-supported programs could continue lending and purchasing assets consistent with Section 4029 if the Treasury Secretary agreed to extend these programs.

As explained, Section 4029(a) by its terms sets only the termination date for the Treasury Secretary’s authority to make “new” investments of CARES Act funds in the SPVs. It does not appear to impose any limitations on the SPVs’ use of funds that the Treasury Secretary has already invested in those programs before December 31, 2020. That is because Section 4029’s December 31 deadline applies to exercises of “authority provided under” Title IV Subtitle A of the CARES Act.⁴⁰ Title IV Subtitle A provides authority to *the Treasury Secretary*, but not to *the Fed or its SPVs*. For example, Section 4003(a) authorizes “the Secretary [of the Treasury]” to “make loans, loan guarantees, and other investments in support of” specified entities.⁴¹ Likewise, Section 4003(b)(4) authorizes the Treasury Secretary to “make loans and loan guarantees to, and other investments in” Fed emergency-lending programs.⁴² But nothing in these provisions—or the remainder of Title IV Subtitle A—confers any authority on the Fed or its SPVs.⁴³ The Fed’s authority to establish and manage emergency-lending programs is instead based on Section 13(3) of the Federal Reserve Act—not the CARES Act.⁴⁴ And when the Fed’s SPVs purchase assets or extend credit, the Treasury Secretary does not play any role in those transactions.⁴⁵ Therefore, when the Fed’s SPVs purchase assets or extend credit, they are not exercising “authority provided under” Title IV Subtitle A for purposes of Section 4029’s December 31 deadline.⁴⁶

⁴⁰ *Id.* § 4029(a).

⁴¹ *Id.* § 4003(a).

⁴² *Id.* § 4003(b)(4).

⁴³ See *id.* tit. IV subtitle A; see also Peter Conti-Brown, *What’s Next for the Treasury-Fed COVID-19 Lending Facilities?*, BROOKINGS INST. (Nov. 24, 2020), <https://www.brookings.edu/blog/up-front/2020/11/24/whats-next-for-the-treasury-fed-covid-19-lending-facilities/> (explaining that the “authority provided” by Title IV Subtitle A is “for the Treasury, not the Fed”).

⁴⁴ 12 U.S.C. § 343(3); see also *Treasury and Federal Reserve Board Announce New and Expanded Lending Programs to Provide Up to \$2.3 Trillion in Financing*, DEP’T OF THE TREASURY (Apr. 9, 2020), <https://home.treasury.gov/news/press-releases/sm968> (explaining that the Treasury Secretary approved the establishment of the MSLP and MLF “[p]ursuant to section 13(3) of the Federal Reserve Act”); *Main Street Lending Program, Frequently Asked Questions*, FED. RES. BANK OF BOSTON (Nov. 25, 2020) (explaining that the MSLP lending facilities were authorized under Section 13(3) of the Federal Reserve Act); *Primary Market Corporate Credit Facility*, FED. RES. BANK OF N.Y., <https://www.newyorkfed.org/markets/primary-market-corporate-credit-facility> (explaining that “[t]he PMCCF was established by the Federal Reserve under the authority of Section 13(3) of the Federal Reserve Act, with the approval of the Treasury Secretary”); MLF Term Sheet, *supra* note 4, at 1 (explaining that the MLF “has been authorized under Section 13(3) of the Federal Reserve Act”); Conti-Brown, *supra* note 43 (explaining that the Fed’s authority to create emergency-lending programs “comes from the Federal Reserve Act, not from the CARES Act”).

⁴⁵ See Main Street LLC Agreement, *supra* note 3, ¶ 8(a) (giving the relevant Federal Reserve Bank the exclusive right to manage the SPV); Corporate Credit LLC Agreement, *supra* note 3, ¶ 8(a) (same); MLF LLC Agreement, *supra* note 3, ¶ 8(a) (same); TALF LLC Agreement, *supra* note 3, ¶ 8(a) (same).

⁴⁶ This understanding of Section 4029 derives further support from the CARES Act’s post-enactment legislative history. In September 2020, Senate Majority Leader Mitch McConnell introduced S. 4775—a package of additional economic relief to supplement the CARES Act. See S. 4775, 116th Cong. (2020). Section 1003 of S. 4775 would amend Section 4029 of the CARES Act to prohibit the Fed’s CARES Act-funded lending programs from making any new loans or asset purchases after January 4, 2021. *Id.* § 1003. Such a provision would seem to be unnecessary if Section 4029 *already* prohibited such loans and asset purchases after December 31, 2020.

Accordingly, it appears likely that a court would determine that Section 4029 does not prohibit the Fed’s emergency-lending programs from using funds invested prior to December 31, 2020 to continue lending and purchasing assets after that date, if the Treasury Secretary agreed to extend those programs.

Section 4027(c)(1) of the CARES Act—which limits the uses of “any remaining funds made available under section 4003(b)” after December 31, 2020—does not appear to warrant a different conclusion.⁴⁷

Section 4027(c)(1) provides: “On or after January 1, 2021, any remaining funds made available under section 4003(b) may be used only for” (1) modifications, restructurings, or amendments of outstanding loans, loan guarantees, and investments; (2) exercising any options, warrants, or investments made before January 1, 2021; or (3) paying certain costs and administrative expenses.⁴⁸ The phrase “remaining funds made available” in Section 4027(c) is most naturally read to refer to funds made available to *the Treasury Secretary*—not funds that the Treasury Secretary *has already invested in Fed programs*. Section 4003(b) of the CARES Act repeatedly describes the funds appropriated to the Treasury Secretary as funds that are made “available” to him, but does not use similar language to refer to the Treasury Secretary’s “investments” in Fed programs.⁴⁹ Instead, Section 4003(b) appears to distinguish between funds made “available” to the Treasury Secretary and funds that the Treasury Secretary “uses” to make loans and investments. For example, Section 4003(b)(4) provides that “[n]ot more than the sum of \$454 [billion] and any amounts *available* under paragraphs (1), (2), and (3) that are not *used* as provided under those paragraphs shall *be available* to make loans and loan guarantees to, and other investments in, programs or facilities established by the” Fed.⁵⁰ Because courts generally give terms a consistent meaning throughout a statute, a court would likely conclude that the phrase “remaining funds made available” refers to funds that the Treasury Secretary has not already “used” for “investments” in Fed programs.⁵¹ As a result, Section 4027(c)(1) does not appear to support an argument that Section 4029 applies to lending by the Fed’s SPVs.

In sum, using customary rules of statutory construction, a court would likely answer both of your questions in the affirmative.

⁴⁷ Pub. L. No. 116-136 § 4027(c)(1) (2020); *but see* Letter from Sen. Mike Crapo et al. to Steven T. Mnuchin, Sec. of the Treasury, and Jerome H. Powell, Chair of the Bd. of Gov. of the Fed. Res. Sys. at 2 (Nov. 25, 2020) (on file with author).

⁴⁸ Pub. L. No. 116-136 § 4027(c)(1).

⁴⁹ *Id.* § 4003(b)(1)-(4).

⁵⁰ *Id.* § 4003(b)(4) (emphasis added).

⁵¹ *See, e.g.,* Shirk v. United States *ex rel.* Dep’t of Interior, 773 F.3d 999, 1004 (9th Cir. 2014) (“A basic principle of interpretation is that courts ought to interpret similar language in the same way, unless context indicates that they should do otherwise.”); Flowers v. S. Reg’l Physician Servs. Inc., 247 F.3d 229, 233 n.4 (5th Cir. 2001) (“[A]s a matter of statutory interpretation, in determining the meaning of a particular statutory provision, it is helpful to consider the interpretation of other statutory provisions that employ the same or similar language.”).