COVID-19: CLBILS & CCFF
UK FUNDING SCHEMES UPDATE

Date: 27 May 2020

Introduction

On 26 May 2020, the British Business Bank (**BBB**) issued details of revisions to the existing Coronavirus Large Business Interruption Loan Scheme (**CLBILS**) aimed at providing COVID-19 financial support to UK mid-cap and larger enterprises with a turnover of over £45 million, which will see the maximum amount that businesses can borrow under the scheme increase from £50 million to £200 million. However, that comes with some new requirements for borrowers and group companies.

The Bank of England has also recently updated its guidance on the Covid Corporate Financing Facility (**CCFF**) aimed at providing COVID-19 financial support to investment grade rated businesses, which also includes some new requirements.

In this update, we provide details of the key changes to the CLBILS scheme, the new requirements under the CCFF scheme and signposts to the updated information and FAQs from the BBB and Bank of England.

If you have any questions or queries arising from this update, please feel free to contact us. We are here to help you.

Part One: Key changes to the CLBILS scheme

1. Borrowing limit

The borrowing limit under the CLBILS scheme has been increased from £50 million to £200 million. That is subject to a cap of:

(i) double the annual wage bill in respect of the United Kingdom business of the borrower (including social charges and the cost of personnel working on the undertaking's site, but formally in the payroll of subcontractors) for 2019;

(ii) 25% of the total turnover of the borrower's UK business in 2019; or

(iii) with appropriate justification and based on the borrower's self-certification of its liquidity needs, an amount to cover the liquidity needs of the UK business for the 12 months following the granting of the relevant facility.

This replaces previous maximum limits of up to £25 million (for businesses with group turnover of up to £250m) and £50 million (for businesses with turnover in excess of £250 million). We understand that access to facilities of over £50 million will be in the form of term loan and/or revolving credit facilities.

The minimum facility size under the CLBILS scheme is £50,000.

2. New borrower side restrictions

- ***Facilities of up to £50 million – restrictions***

  For facilities of up to £50 million, dividend payments may continue, but they cannot be increased whilst amounts under a CLBILS facility remain outstanding (the duration of a CLBILS facility being a maximum of three years).

- ***Facilities over £50 million – restrictions***

  For facilities of over £50 million, there are restrictions on:

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- dividend payments, charges, fees and distributions in relation to a company's share capital; and
- senior management payments.

These restrictions are summarised below.

3. Details of the restrictions relating to dividends etc. and senior management payments for facilities over £50 million

Restrictions relating to dividends and shares	Until the CLBILS facility has been repaid in full, the borrower will have to agree that it and each member of its group will not: (i) declare, make or pay any dividend, charge, fee or other distribution (or interest on any unpaid dividend, charge, fee or other distribution) (whether in cash or in kind) on or in respect of its share capital (or any class of its share capital) or, in the case of a partnership, any equivalent payment to its partners; (ii) repay or distribute any dividend or share premium reserve; (iii) pay or allow any member of its group to pay any management, advisory or other fee to or to the order of any of the shareholders (or if the borrower or such member of its group is a partnership, partners) of the borrower or such member of its group; or (iv) redeem, repurchase, defease, retire or repay any of its share capital or resolve to do so.
Exceptions to the restrictions relating to dividends and shares	The restrictions above will not apply to any payment: (i) falling within the above which is paid intra-group, by one member of the borrower's group to another member of the borrower's group (but excluding any payment to any 'partner enterprise' or 'linked enterprise' of the borrower that is a private equity or venture capital entity); (ii) that is a de minimis share buyback from an employee (other than to a member of senior management) upon such employee retiring or ceasing to be employed by the group; or (iii) of any dividend or distribution declared prior to the entry by the borrower into the facility. Note, it is not totally clear what the meanings of 'partner enterprise' and 'linked enterprise' are in this context, albeit these may have the same meanings as "linked" business' and "partner" business referred to in the BBB's FAQs on turnover: https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/clbils/faqs-for-businesses/

Restrictions on senior management pay	Until the facility has been repaid in full, borrowers and members of their group cannot pay any cash bonuses to senior management, or award any pay rises to senior management except where such pay rise: (i) was agreed in writing before the facility was taken out or is in keeping with similar payments made in the preceding 12 months; and (ii) does not have a material negative impact on the borrower's ability to repay the facility. Note that this restriction appears to be a blanket ban on senior management cash bonuses, subject to the exceptions below.
Exceptions to restrictions on senior management pay	The restriction does not need to apply to pay awards or cash bonuses to be paid to new senior management members joining the group after the date of the facility, but must apply to any subsequent cash bonuses or pay rises awarded to such persons after they have joined the group.
Who is classed as being 'senior management'?	Note that the definition of 'senior management' is wide and in some circumstances catches employees. The full list is: ○ board members; ○ persons classed as directors or senior managers of the company under section 414C of the Companies Act 2006[1]; ○ those captured by the SMR under Part V of the Financial Services and Markets Act 2000[2]; and ○ employees below board level for whom the levels of remuneration or the risks associated with the activities involved are material to the relevant group member's overall performance.

We anticipate that the terms of these restrictions will be included in facility documentation, which should be checked carefully to ensure that they are not wider than these restrictions.

4. Are there any other changes to the eligibility criteria for businesses to be able to use CLBILS?

The basic eligibility criteria does not appear to have changed since the launch of the CLBILS scheme. To be eligible for a facility under CLBILS, a business must:

- be UK based in its business activity, with turnover of more than £45 million per year;
- confirm that it has been impacted by the Coronavirus; and

[1] See subsection 9 of section 414 C: https://www.legislation.gov.uk/ukpga/2006/46/section/414C

[2] https://www.legislation.gov.uk/ukpga/2000/8/part/V

- have a borrowing proposal which, were it not for the current pandemic, would be considered viable by the lender, and for which the lender believes the provision of finance will enable the business to trade out of any short-to-medium term difficulty.

There are some notable restrictions to eligibility as follow.

Restrictions on eligibility criteria

To apply for a CLBILS facility, a business must not have utilised any funding under the Bank of England's CCFF scheme for investment grade rated companies, the smaller Coronavirus Business Interruption Loan Scheme (**CBILS**), or the Bounce Back Loan Scheme (details of which can be found here: https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/bounce-back-loans/).

Businesses from all sectors can apply, except for credit institutions (falling within the remit of the Bank Recovery and Resolution Directive), building societies, insurers and reinsurers (but not insurance brokers), public-sector bodies and state-funded primary and secondary schools. However, certain state aid rules also apply and lenders will have to assess whether a business is an 'undertaking in difficulty' as part of any funding application. This includes a business that as at 31 December 2019:

- had accumulated losses greater than half of their subscribed share capital (for limited liability companies) or capital (for unlimited liability companies);
- had entered into collective insolvency proceedings or fulfilled the criteria to be put into collective insolvency proceedings;
- had previously received rescue aid that was yet to be reimbursed or (in the case of a guarantee, terminated);
- had received restructuring aid and were still under a restructuring plan; or
- had (where that business is not an SME) fallen below solvency ratios (see further below) for the previous two years.

A CLBILS facility applicant only needs to fulfil one of these criteria to be a business in difficulty. The BBB says that in practice, this may mean that certain fast growth businesses may ineligible for the CLBILS scheme (unless the business is less than three years old). For more information on this and other eligibility FAQs, please refer to this BBB FAQs page:

https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/clbils/faqs-for-businesses/

If you have any questions on eligibility outside of these FAQs, it may be worth checking with your preferred CLBILS accredited funder in the first instance, as discretion to run the CLBILS scheme is delegated to accredited lenders by the BBB.

Note that businesses are still free to enter into loan agreements outside of CLBILS. For example, where there is no economic benefit to the borrower of taking out a CLBILS facility over normal commercial lending.

5. What is the position for companies backed by private equity or venture capital firms?

A company with a private equity or venture capital backer will be treated as a separate company for the purposes of assessing turnover**.**

So, if the individual company's turnover is up to £45 million, it should be eligible to apply for the smaller CBILS scheme (providing facilities of up to £5 million) subject to any other CBILS eligibility criteria. More details on the CBILS scheme can be found here:

https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-scheme-cbils-2/

However, if the individual company has a turnover of over £45 million it should be eligible to apply for a facility under the CLBILS scheme, subject to the CLBILS eligibility criteria.

For these purposes, the BBB says that a private equity or venture capital firm is an entity, including an early-stage or venture capital investor, whose primary business strategy consists in the raising of funds from private and institutional investors. The purpose of raising funds should be to make medium to long term equity investments in businesses that are not, or will not after such investment be, publicly quoted. Firms should also provide active management, commercial acumen and guidance in order to build and develop such businesses, alongside such investments.

Note that where a company is not private equity or venture capital backed, turnover and therefore, eligibility for the CLBILS scheme, is tested in a different way as set out in detail in the section headed 'What is "turnover" for the purpose of checking eligibility for CLBILS?' in the BBB's FAQs:

https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/clbils/faqs-for-businesses/

6. What if I have other facilities – has the BBB said anything on how will priority/subordination work across CLBILS and other existing facilities?

A summary of the position is below:

Can facilities under CLBILS be subordinated to other facilities?	○ The BBB says that lending under CLBILS will not be subordinated to any other senior obligations (including secured and/or super-senior obligations, if any) of the borrower, subject to carve-outs for asset finance and invoice finance. As such, existing lenders will need to be willing to accept a temporary dilution to their own seniority. ○ Except in respect of a residential development facilities, CLBILS facilities must at all times during its life, rank on at least a pari passu basis with the most senior obligations (including secured and/or super-senior obligations, if any) of the borrower. This includes from all collateral taken by any lender from the borrower, unless the borrower is a financing vehicle, whereby this will include any collateral from any member of its group. ○ For facilities used to fund the creation of residential property situated in the United Kingdom, the facility must benefit at all times during its life on at least a pari passu basis with the most senior obligations (including secured and/or super-senior obligations, if any) in respect of the development, from all collateral forming part of the relevant development and from all further collateral that the lender would take in accordance with its policies.
What are the carve-outs?	The BBB says there are certain carve-outs from the above requirements, including collateral: ○ with an aggregate value not greater than 10% of the value (determined by the lender in accordance with its lending policies) of all relevant collateral; and

	○ relating to asset and invoice finance facilities entered into in the ordinary course of business, where the proceeds of such collateral would not be available to facilities other than such asset or invoice finance facility and where the lending policies and procedures would not require it to take security over such collateral.

The BBB has said that lenders and borrowers must not conspire to circumvent the spirit of the above by seeking to structure around these requirements or act out of context of their normal business practices, so we expect that lenders will maintain strict criteria to meet the BBB's ranking requirements.

In any event, businesses may wish to consider discussing subordination and security requirements at the outset with their preferred CLBILS accredited lender, particularly if seeking one of the carve-outs from these requirements.

7. Given the increased possibility of lending of up to £200 million under CLBILS, how will that work alongside any syndicated lending?

CLBILS facilities may be provided by a syndicate of both CLBILS accredited and non-CLBILS accredited lenders. However, in those circumstances, none of the lending commitment of non-CLBILS accredited lenders will be backed by the 80% UK Government guarantee scheme for CLBILS lenders and so in practice, this may inhibit non-CLBILS accredited lenders from fully participating in syndicated CLBILS facilities, although that remains to be seen.

There are also strict rules around what lenders can do in a syndicated scenario. For example, a lender may not enter into any arrangement to share or pass on, directly or indirectly, amounts received by it under CLBILS guarantees to any other syndicate member.

8. Are all existing CLBILS accredited lenders offering facilities of up to £200 million?

No. Only specially accredited CLBILS lenders are providing the larger facilities. The full list is available on this BBB web page:

https://www.british-business-bank.co.uk/ourpartners/coronavirus-business-interruption-loan-schemes/clbils/current-accredited-lenders-and-partners-2/

9. When is the CLBILS scheme now open until?

The CLBILS scheme is currently open for new facilities until 20 October 2020 (although the UK Government has the right to extend it until the end of 2020).

Part Two: New requirements under the CCFF scheme

HM Treasury has recently announced that companies participating in the CCFF scheme may be required to commit to certain restraints on capital distributions and senior pay. A letter of commitment will be required to be delivered to HM Treasury and the Bank of England where:

- an increase in an issuer's CCFF limit over and above that suggested by the issuer's investment rating, is requested and approved; and/or
- a CCFF facility is entered which involves commercial paper maturing on or after 19 May 2021.

We understand that the letter of commitment will need to include the following statements on capital distributions and management pay:

- ***Capital distributions:***

  A confirmation that:

  - all distributions to shareholders (including dividends and buybacks on ordinary shares) will be suspended from when the company enters into any CCFF transaction involving commercial paper facilities maturing on or after 19 May 2021; and
  - the suspension will remain in place whilst the commercial paper is outstanding.

  It is also expected that details will need to be provided by the business in question, on how this requirement will be met.

- ***Restrictions on management pay:***

  A confirmation that:

  - the company/its board agrees to pay restraint for company management (no pay rises or cash bonuses to senior management, including the company's board and company management); and
  - the company will commit to no pay rises or cash bonuses to senior management, including the board and company management,

    which will apply from when the company enters into any CCFF facility maturing on or after 19 May 2021 and will remain in place whilst the facility is outstanding.

  As with the capital distribution restrictions, details will be required on how the business intends to meet the requirement, including details on how the company is exercising, or committing to exercise, senior pay restraint.

If in HM Treasury's view, the proposals provided by the business in question are not sufficient, it reserves the right to request amended proposals. Additionally, companies using the CCFF facility should note that if HM Treasury becomes aware of any breaches of the confirmations provided, it may publish the letter.

Full details of the CCFF facility can be found on the Bank of England's website below and a copy of the template letter of restrictions can be found in the answer to question A7 (*Are there any conditions on capital distributions and on senior pay placed on CCFF eligible issuers*):

https://www.bankofengland.co.uk/markets/covid-corporate-financing-facility

The Bank of England has also announced that businesses who have drawn facilities under the CCFF scheme, are now able to repay their drawings early if they choose to do so.

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COVID-19 Hub

For more information and COVID-19 related resources, please visit our dedicated COVID-19 hub:

https://gowlingwlg.com/en/topics/covid-19/overview/

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