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Amended and Restated Limited Liability Company Agreement of MS Facilities LLC

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AMENDED AND RESTATED LIMITED LIABILITY COMPANY AGREEMENT
OF
MS FACILITIES LLC

This Amended and Restated Limited Liability Company Agreement (this “Agreement”) of MS Facilities LLC (the “Company”) is entered into as of May 29, 2020 by and between the Federal Reserve Bank of Boston (“FRBB”), as managing member (in such capacity, the “Managing Member”), and the United States Department of the Treasury (“UST”), as a member (the “Preferred Equity Member”; the Preferred Equity Member and the Managing Member together, the “Members”, and each, a “Member”).

WHEREAS, the Company was formed on May 18, 2020, by FRBB as the sole member, and is currently governed by the Limited Liability Company Agreement of the Company, dated as of May 18, 2020 (the “Initial Agreement”); and

WHEREAS, FRBB desires to amend and restate the Initial Agreement in its entirety and wishes to admit UST as a member of the Company, and UST wishes to be admitted, on the terms set forth in this Agreement; and

WHEREAS, the Company desires to enter into a Credit Agreement (as defined below) with FRBB as Lender, and certain other Operative Documents (as defined in the Credit Agreement); and

WHEREAS, changes to the term sheet governing the Main Street New Loan Facility, Main Street Expanded Loan Facility, or Main Street Priority Loan Facility, including an extension of the termination date of any of them, would require approval of the Secretary of the Treasury and the Board of Governors of the Federal Reserve System.

The Initial Agreement is hereby amended and restated in its entirety as set forth herein, and the Members, by execution of this Agreement, pursuant to and in accordance with the Delaware Limited Liability Company Act (6 Del. C. § 18-101 et seq.), as amended from time to time (the “Act”), hereby agree as follows:

1. Name. The name of the Company is MS Facilities LLC.
2. Definitions.

(a) In addition to the terms otherwise defined herein, the following terms are used herein as defined below:

“All Other Accounts” means the Clearing Account, the Expense Reserve Account (as defined in the Custodian Agreement) and sub-accounts thereof, and any other accounts of the Company other than the Preferred Equity Account.

“Credit Agreement” means the Credit Agreement, dated as of May 29, 2020, (as amended, modified or otherwise supplemented from time to time) between the Company and FRBB.

“Exchange Stabilization Fund” means the fund established under Section 5302(a)(1) of Title 31, United States Code. “Membership Interest” means the Managing Member Interest and the Preferred Equity Member Interest.

(b) Capitalized terms not otherwise defined herein shall have the meanings set forth therefore in Section 18-101 of the Act.

(c) Capitalized terms not otherwise defined herein or in Section 18-101 of the Act shall have the meanings set forth in the Credit Agreement.

3. Purpose. The Company has been organized as a limited liability company pursuant to the Act. The Act shall govern the rights and liabilities of the parties hereto except as otherwise expressly stated. The sole purposes to be conducted or promoted by the Company are as follows:

(a) to enter into all Operative Documents to which the Company is to be a party and to perform its obligations thereunder;

(b) to acquire, hold, manage, encumber and dispose of assets as contemplated by the Operative Documents and any proceeds thereof (the “Assets”) and to finance the same;

(c) to enter into and to perform its obligations under such other agreements as may be contemplated by the Operative Documents or as may be necessary or useful in connection with its acquisition, ownership, management, and disposition of the Assets;

(d) to perform any other obligations required of it under or to take any other action contemplated by the Operative Documents; and

(e) to engage in any lawful act or activity and to exercise any powers permitted to limited liability companies organized under the laws of the State of Delaware that are related or incidental to or necessary, convenient or advisable for the accomplishment of the purposes set forth in clauses (a) through (d) of this Section 3.

4. Registered Office. The registered office of the Company in the State of Delaware is located at c/o The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801. The name and address of the registered agent of the Company for service of process on the Company in the State of Delaware is The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801. The Managing Member may from time to time change the registered agent or registered office by an amendment to the Certificate of Formation of the Company.

5. Members. The Managing Member and the Preferred Equity Member are the sole members of the Company. The Managing Member hereby represents and warrants that it is, and the Preferred Equity Member represents that it may be treated as, (1) a “qualified institutional buyer” (as defined under Rule 144A under the Securities Act) and (2) a “qualified purchaser” for purposes of Section 3(c)(7) of the United States Investment Company Act of 1940, as amended; and each of the Managing Member and the Preferred Equity Member hereby separately represents and warrants as to itself that it is acquiring its interest in the Company for its own account. Upon the making by the Company to the Preferred Equity Member of the distributions contemplated by Section 13(a) below, the Preferred Equity Member shall automatically cease to be a member of the Company and the Preferred Equity Member Interest shall automatically be cancelled, without any further act of any Person. Notwithstanding any provision of the Act to the contrary, the distributions under Section 13(a) of this Agreement shall be the only consideration to which the Preferred Equity Member shall be entitled in exchange therefor.

6. Limited Liability. Except as required by the Act, the debts, obligations and liabilities of the Company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the Company, and the Members shall not be obligated personally for any such debt, obligation or liability of the Company solely by reason of being a member of the Company.

7. Term. The term of the Company commenced on the date of filing of the Certificate of Formation of the Company in accordance with the Act and shall continue until the Company is dissolved and its affairs are wound up in accordance with Section 19 of this Agreement.

8. Management of the Company; Initial Authorizations.

(a) The Managing Member shall have the exclusive right to manage the business of the Company, and shall have all powers and rights necessary, appropriate or advisable to effectuate and carry out the purposes and business of the Company and, in general, all powers permitted to be exercised by a manager and member under the Act. The Managing Member may appoint, employ or otherwise contract with any persons or entities for the transaction of the business of the Company or the performance of services for or on behalf of the Company, and the Managing Member may delegate to any such person or entity such authority to act on behalf of the Company, including without limitation by executing any power of attorney, as the Managing Member may from time to time deem appropriate.

(b) No Member other than the Managing Member, in its status as such, shall have the right to take part in the management or control of the business of the Company or to act for or bind the Company or otherwise to transact any business on behalf of the Company.

(c) The Managing Member is hereby authorized to do and perform, or cause to be done and performed, all such acts, deeds and things and to make,

execute and deliver, or cause to be made, executed and delivered, all such agreements, undertakings, documents, instruments or certificates in the name and on behalf of the Company or otherwise as it may deem necessary or appropriate in furtherance of the ordinary course of business of the Company. Notwithstanding any other provision of this Agreement, the Managing Member is authorized to execute and deliver any document on behalf of the Company without any vote or consent of any other person.

(d) _____, as an “authorized person” of the Company within the meaning of the Act, has executed, delivered and filed the Certificate of Formation of the Company with the Secretary of State of the State of Delaware, such execution, delivery and filing being hereby ratified and approved in all respects. Upon the filing of the Certificate of Formation of the Company with the Secretary of State of the State of Delaware, his powers as an “authorized person” of the Company ceased. The Managing Member is hereby designated as an authorized person, within the meaning of the Act, to execute, deliver and file any amendments and/or restatements of the certificate of formation of the Company and any other certificates (and any amendments and/or restatements thereof) necessary for the Company to qualify to do business in a jurisdiction in which the Company may wish to conduct business.

(e) Without any further action or authorization by any Member or any other Person (and without limiting the authority of the Managing Member), the Company is hereby authorized to negotiate, enter into, execute, amend, deliver and perform under, and the Managing Member, any representative of the Managing Member or any Officer on behalf of the Company is hereby authorized to negotiate, enter into, execute, amend and deliver on behalf of and in the name of the Company: (i) each of the documents comprising the Operative Documents to which the Company is to be a party, (ii) such other documents as may be contemplated by the Operative Documents or as may be necessary or useful in connection with its ownership and management of the Assets, and (iii) all documents, agreements, certificates, powers of attorney or financing statements contemplated thereby or related thereto, all without any further act, vote or approval of any other Person notwithstanding any other provision of this Agreement, but subject to Section 20 hereof if applicable. For the avoidance of doubt, the execution, delivery and performance by the Company of any Operative Documents prior to the date hereof are hereby authorized, ratified, confirmed and approved in all respects.

(f) The Managing Member may, from time to time as it deems advisable, select natural persons who are employees or agents of the Company and designate them as officers of the Company (the “Officers”) and assign titles (including, without limitation, President, Vice President, Secretary, and Treasurer) to any such person. Unless the Managing Member decides otherwise, if the title is one commonly used for officers of a business corporation formed under the Delaware General Corporation Law, the assignment of such title shall

constitute the delegation to such person of the authorities and duties that are normally associated with that office. Any delegation pursuant to this Section 8(f) may be revoked at any time by the Managing Member. An Officer may be removed with or without cause by the Managing Member.

(g) The Managing Member shall comply with Section 2.8 of the Credit Agreement, shall take all actions reasonably available to it to ensure compliance with Section 2.8 of the Credit Agreement by all other parties, and will promptly inform the Preferred Equity Member upon learning of any breach thereof.

9. Exculpation and Indemnification; Duties.

(a) To the fullest extent permitted by the laws of the State of Delaware, no Member, Officer, employee, representative, agent or other person authorized to act for the Company, including, but not limited to, the person whose name and signature is affixed hereto and to the Certificate of Formation of the Company, nor any employee, representative, agent or affiliate of any Member, together with their heirs, executors, personal representatives, successors, assigns or administrators (collectively, the “Covered Persons”), shall be liable to the Company, any Member or any other Person bound by this Agreement for any loss, damage or claim incurred by reason of any act or omission performed or omitted by such Covered Person on behalf of the Company unless such act or omission constituted a bad faith violation of the implied contractual covenant of good faith and fair dealing.

(b) Each Person who was or is a party or is threatened to be made a party to, or is involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that such Person is or was a Covered Person shall be indemnified and held harmless by the Company to the fullest extent permitted by the laws of the State of Delaware, unless such Person acted in a manner that constituted a bad faith violation of the implied contractual covenant of good faith and fair dealing. To the fullest extent permitted by the laws of the State of Delaware, expenses (including legal fees) incurred by a Covered Person defending any claim, demand, action, suit or proceeding shall, from time to time, be advanced by the Company prior to the final disposition of such claim, demand, action, suit or proceeding upon receipt by the Company of an undertaking by or on behalf of the Covered Person to repay such amount if it shall be determined that such Covered Person is not entitled to be indemnified as authorized in this Section 9. Any advancement or indemnity under this Section 9 shall be provided out of and to the extent of Company assets only, and no Member shall have personal liability on account thereof.

(c) To the fullest extent permitted by the laws of the State of Delaware and notwithstanding any other provision of this Agreement or any duty otherwise existing at law or in equity, no Covered Person shall have any fiduciary duty to the Company, any Member or any other Person bound by this Agreement;

provided that the foregoing shall not eliminate the implied contractual covenant of good faith and fair dealing.

10. Membership Interests. The Company shall have two classes of limited liability company interests, which shall be designated “Managing Member Interest” and “Preferred Equity Member Interest” respectively. The Managing Member Interest shall have the rights and powers of the Managing Member specified herein and the rights to distributions set forth in Section 13 below and any distribution upon dissolution of the Company as described in Section 19. The Preferred Equity Member Interest shall have the rights to distributions set forth in Section 13 below. The Preferred Equity Member Interest shall have no voting, consent, approval, management or control rights whatsoever under this Agreement or the Act, except to the extent expressly provided in Section 20.

11. Assignments.

(a) The Preferred Equity Member shall not assign or otherwise transfer its rights or obligations with respect to the Preferred Equity Member Interest (or any portion thereof) unless the Managing Member consents to such assignment or transfer.

(b) The Managing Member shall not assign or otherwise transfer its rights or obligations with respect to its Managing Member Interest (or any portion thereof) unless the Preferred Equity Member consents to such assignment or transfer.

(c) Upon the assignment by any Member of its entire Membership Interest in the Company in accordance with the terms of this Agreement, such Member shall have no further rights under this Agreement.

12. Capital Contributions. The Managing Member hereby continues as, and the Preferred Equity Member is hereby admitted as, a member of the Company upon its execution and delivery of this Agreement. The Managing Member is deemed to have contributed \$10.00 in cash, and no other property, to the capital of the Company. The Managing Member is not required to make any additional contribution to the capital of the Company. However, the Managing Member may, at any time and in its sole discretion, make additional contributions to the capital of the Company. The Preferred Equity Member shall (1) within one Business Day of the date of this Agreement, contribute \$37.5 billion (Thirty-Seven Billion Five Hundred Million Dollars) in cash from the Exchange Stabilization Fund, and no other property, to the capital of the Company (the date of such contribution, the “First Tranche Date”) and (2) on the Second Tranche Date, contribute an additional \$37.5 billion (Thirty-Seven Billion Five Hundred Million Dollars) in cash from the Exchange Stabilization Fund, and no other property, to the capital of the Company.

For purposes of the foregoing the “Second Tranche Date” means the earlier of:

(a) the second Business Day after the Managing Member has notified the Preferred Equity Member that, on any date, the balance standing in the Preferred Equity Account minus Total Equity Usage was less than or equal to \$12.5 billion (Twelve Billion Five Hundred Million Dollars); or

(b) such date as may be agreed between the Managing Member and the Preferred Equity Member.

“Total Equity Usage” on any date means 75/600 times the cumulative principal amount of all Participations purchased by the Company on or prior to such date.

The Managing Member shall provide written confirmation to the Preferred Equity Member upon receiving confirmation that the \$37.5 billion has been deposited in the Preferred Equity Account on each of the First Tranche Date and the Second Tranche Date; and following receipt of the \$37.5 billion on the Second Tranche Date, Schedule A shall be updated accordingly. Amounts in the Preferred Equity Account shall be invested as mutually agreed upon by the Managing Member and the Preferred Equity Member and consented to by the FRBB, as Lender, including as provided for in any Investment Memorandum of Understanding among the Company, UST and the FRBB, and the proceeds of all investments of funds in the Preferred Equity Account shall be deposited in the Preferred Equity Account. The Preferred Equity Member is not required to make any additional contribution to the capital of the Company after the Second Tranche Date. However, the Preferred Equity Member may, subject to the consent and agreement of the Managing Member in its sole discretion, make additional contributions to the capital of the Company.

13. Distributions to Members. On the date (as determined by the Managing Member) when the Credit Agreement has been finally terminated and repaid and any and all security interests of the Lender over the Preferred Equity Account and All Other Accounts have been released and all other obligations of the Company due or to become due thereafter have been paid or provided for, the Managing Member, after consulting with the Preferred Equity Member, may or may cause the Company, with respect to each Asset that is not cash (“Non-Cash Asset”) that is standing in the Preferred Equity Account and All Other Accounts, to, at the election of the Managing Member, either (1) in the event the Preferred Equity Member does not consent to a transfer in kind pursuant to clause (2), liquidate such Non-Cash Asset to cash, including where necessary to provide for the cash distribution to the Managing Member in respect of clause (b) below, or (2) with the consent of the Preferred Equity Member, transfer in kind such Non-Cash Asset to the Preferred Equity Member or any designee thereof (the total value of such Non-Cash Assets transferred in kind from All Other Accounts under this clause (2) the “Other Accounts In-Kind Value”). In the event of an in-kind transfer of a Non-Cash Asset pursuant to clause (2), the Preferred Equity Member shall cooperate with the Managing Member to promptly effectuate such transfer. Immediately following all such liquidations and transfers under this paragraph:

(a) the Preferred Equity Member shall be entitled to a distribution from the Company equal to (i) the cash balance of the Preferred Equity Account *plus* (ii) the balance of any unreimbursed drawings from the Preferred Equity Account made in accordance with Section 2.8 of the Credit Agreement (the “Unreimbursed Balance”, and the cash balance of All Other Accounts minus the Unreimbursed Balance, the “Available Balance of All Other Accounts”) *plus* (iii) 90% of the sum of the Available Balance of All Other Accounts plus the Other Accounts In-Kind Value, *minus* (iv) the Other Accounts In-Kind Value, with such distribution to be transferred to the account or accounts directed by the Preferred

Equity Member in accordance with written instructions to be provided by the Preferred Equity Member; provided that in no event shall the amount of the distribution to which the Preferred Equity Member is entitled under this clause (a) exceed the cash balance of the Preferred Equity Account *plus* the cash balance of All Other Accounts;

(b) the Managing Member shall be entitled to a cash distribution from the Company equal to the greater of (i) 10% of the sum of the Available Balance of All Other Accounts and the Other Accounts In-Kind Value and (ii) zero; and

(c) the Company shall be deemed to immediately make, to the maximum extent permissible by applicable law (including Section 18-607 of the Act), such distribution to be payable to each such Member.

The Managing Member shall give the Preferred Equity Member at least ten days' prior written notice of the distribution to be made under this Section 13, together with an accounting of how the amounts proposed to be distributed as described above have been calculated.

14. No Interim Distributions. Other than as specified in Section 13, no Member shall be entitled to distributions from the Assets in respect of their Member Interests, it being understood that payments of fees, reimbursement of expenses, repayment of principal and interest under the Credit Agreement and other payments to FRBB contemplated by the Operative Documents will not be deemed distributions in respect of its Membership Interest.

15. Limitation on Distributions. Notwithstanding anything to the contrary contained in this Agreement, the Company, and the Managing Member on behalf of the Company, shall not be required to make a distribution to any Member on account of its interest in the Company if such distribution would violate the Act or other applicable law.

16. Return of Capital. Other than as specified in Section 13 or Section 19, no Member has the right to receive any distributions which include a return of all or any part of such Member's capital contribution.

17. Books and Records; Tax Treatment. (a) The Managing Member shall keep or cause to be kept complete and accurate books of account and records with respect to the Company's business, and shall cause the Company's annual financial statements for each fiscal year to be audited by an independent public accounting firm of nationally recognized standing selected by the Managing Member. The Company's books of account shall be kept using the method of accounting determined by the Managing Member.

(b) The Members intend that the relationship formed under this Agreement is a joint mechanism to provide access to liquidity for Eligible MSELF Lenders, Eligible MSNLF Lenders and Eligible MSPLF Lenders as defined in the Credit Agreement) as authorized under Section 13(3) of the Federal Reserve Act, with an investment by UST authorized by the Coronavirus Aid, Relief, and Economic Security (CARES) Act and does not constitute a venture entered into for profit by the Members; the Members will treat the Company accordingly for U.S. tax purposes. The Members agree to cooperate to take such actions as may be necessary or desirable

to effect this intent for tax purposes, including, if applicable, making an election out of the provisions of Subchapter K under section 761(a) of the Internal Revenue Code (including on a protective basis).

(c) The Managing Member shall develop, in consultation with the Preferred Equity Member, an internal control program designed to ensure effective and efficient operations, reliable reporting, and compliance with applicable laws and regulations, and shall implement such program and thereafter at least annually review such program for effectiveness. Subject, as appropriate, to confidentiality restrictions, the Managing Member agrees to provide the Preferred Equity Member reporting and documentation as mutually agreed to by the Managing Member and the Preferred Equity Member, which at a minimum will include all information necessary for the Preferred Equity Member to comply with its statutory reporting obligations, regulations and guidelines implementing statutory reporting obligations applicable to the Preferred Equity Member, and Generally Accepted Accounting Principles.

18. Separateness. The Managing Member shall cause the Company to do or cause to be done all things necessary to preserve and keep in full force and effect its existence, rights (charter and statutory) and franchises until all of obligations of the Company under the Operative Documents have been performed in full.

19. Dissolution. The Company shall be dissolved, and its affairs shall be wound up upon the first to occur of the following: (i) upon the determination by the Managing Member to dissolve the Company following the date on which the distributions contemplated by Section 13 have been completed, (ii) the termination of the legal existence of the last remaining member of the Company or the occurrence of any other event which terminates the continued membership of the last remaining member of the Company in the Company unless the Company is continued without dissolution in a manner permitted by this Agreement or the Act or (iii) the entry of a decree of judicial dissolution of the Company under Section 18-802 of the Act. Following satisfaction of the liabilities of the Company (whether by payment or the making of reasonable provision for the payment thereof) pursuant to Section 18-804(a)(1) of the Act, any remaining assets of the Company shall be distributed as follows: (1) if the distributions to the Members pursuant to Section 13 have not been made in full, to the Members pursuant to and in accordance with Section 13 and, thereafter, to the Managing Member; or (2) if the distributions to the Members pursuant to Section 13 of this Agreement have been made in full, to the Managing Member. For the avoidance of doubt, the Managing Member shall be the sole Member entitled to any distribution of assets upon dissolution as described in Section 18-804(a)(3) of the Act.

20. Amendments. This Agreement may be amended by a writing signed on behalf of the Managing Member, in the Managing Member's sole discretion; provided that (a) no amendment of this Agreement that has not been consented to in writing by the Preferred Equity Member shall become effective unless the Managing Member has given the Preferred Equity Member at least three Business Days' prior written notice of its intent to effect such amendment, and (b) no amendment of this Agreement may amend, modify or supplement any rights or obligations of the Preferred Equity Member under this Agreement without the written consent of the Preferred Equity Member. Any amendment to the Credit Agreement that has the effect of amending any term of this Agreement, including without limitation any amendment of the Credit

Agreement that modifies any defined term incorporated into this Agreement and any amendment to the Credit Agreement that would have the effect of amending, modifying or supplementing any rights or obligations of the Preferred Equity Member under this Agreement, shall be deemed an amendment of this Agreement under the preceding sentence. For the avoidance of doubt, any amendment to Section 2.8 of the Credit Agreement shall be deemed to be an amendment to this Agreement that would amend the rights of the Preferred Equity Member.

21. Counterparts. This Agreement may be executed in any number of counterparts with the same effect as if all parties hereto had signed the same document. All counterparts shall be construed together and shall constitute one instrument.

22. Entire Agreement. This Agreement constitutes the entire agreement of the Members with respect to the subject matter hereof.

23. Severability. Each provision of this Agreement shall be considered severable, and if for any reason any provision or provisions herein are determined to be invalid, unenforceable or illegal under any existing or future law, such invalidity, unenforceability or illegality shall not impair the operation of or affect those portions of this Agreement that are valid, enforceable and legal.

24. Governing Law. This Agreement shall be governed by, and construed under, the laws of the State of Delaware, without regard to its conflict of law rules.

25. Notices. All notices, requests, consents and demands to or upon the respective parties hereto to be effective shall be in writing (including by electronic mail transmission), and, unless otherwise expressly provided herein, must be delivered by messenger, overnight courier service or electronic mail, and shall be deemed to have been duly given or made when delivered, or in the case of notice by electronic mail transmission, when acknowledged by the receiving party or otherwise verified by the sending party (whichever occurs first), addressed as follows or to such other address as may be hereafter notified by the respective parties hereto:

Managing Member:

Federal Reserve Bank of Boston
600 Atlantic Avenue
Boston, MA 02210
Attention:
Telephone:
Email:
and

Vice President

Federal Reserve Bank of Boston
600 Atlantic Avenue
Boston, MA 02210
Attention:
Telephone:
Email:

General Counsel

Preferred Equity Member: United States Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, D.C. 20220
Attention: Principal Deputy Assistant Secretary,
Financial Markets
Telephone:
Email address:

and

United States Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, D.C. 20220
Attention: Principal Deputy Assistant Secretary,
International Monetary Policy
Telephone:
Email address:

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IN WITNESS WHEREOF, the undersigned have duly executed this Agreement as of the day and year first above written.

MANAGING MEMBER:

FEDERAL RESERVE BANK OF BOSTON

By:

Name:

Title:

[Signature Page to the Amended and Restated LLC Agreement]

CLEARED FOR RELEASE

IN WITNESS WHEREOF, the undersigned have duly executed this Agreement
as of the day and year first above written.

PREFERRED EQUITY MEMBER:

UNITED STATES DEPARTMENT OF THE

By:

NAME:

Title:

SCHEDULE A

Names and Capital Contribution of Members

Name	Capital Contribution
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Managing Member

Federal Reserve Bank of Boston	\$10.00
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Preferred Equity Member

United States Department of the Treasury	\$37,500,000,000.00
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