The Main Street Business Lending Program – Frequently Asked Questions

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On April 30, 2020, the Department of the Treasury and the Federal Reserve Board released a set of "Frequently Asked Questions" (FAQs) relating to the Main Street Business Lending Program (Main Street Program), which was created to further support the flow of credit to small and medium-sized businesses impacted by the coronavirus pandemic (COVID-19).

The Main Street Program was initially announced on April 9, 2020; our previously-published alert outlines the basic terms of the Main Street Program. The subsequent release of the FAQs aims to answer some of the most frequently asked questions and clarify or expand certain basic terms of the Main Street Program. In addition to many points of clarification, the FAQs reference the following notable additions or changes to the Main Street Program:

1. creation of the Main Street Priority Loan Facility, which requires lender risk retention of 15% (higher than the 5% lender risk retention requirement under the other Main Street loan programs;
2. expands the eligibility threshold for Eligible Borrowers to allow up to 15,000 employees and $5 billion in revenue (increased from the previous limitation of 10,000 employees and $2.5 billion in revenue);
3. LIBOR replaces SOFR as the reference rate in all Main Street Program loans;
4. lowers the minimum loan size for certain Main Street Program loans from $1 million to $500,000; and
5. introduces the concept of an "ineligible business."

The information provided below is intended to offer a curated synopsis of the FAQs, focusing on those points of clarification that we believe may be particularly beneficial to our lender and borrower clients.

We anticipate that lenders will commence accepting applications for the Main Street Program in the first week of May.

SECTION 1: PURPOSE AND DESIGN

What are the differences between the Main Street New Loan Facility (MSNLF), the Main Street Priority Loan Facility (MSPLF), and the Main Street Expanded Loan Facility (MSELF)?

The FAQs provide additional clarity regarding the MSNLF and MSELF (including a reduction of the minimum loan amount from $1,000,000 to $500,000) and also introduce MSPLF as a new facility under the Main Street Program. Each available facility under the Main Street Program is briefly outlined below, along with links to their respective "term sheets," which were all updated as of April 30, 2020.

- MSNLF: Under this facility, Eligible Lenders extend new loans to Eligible Borrowers ranging in size from $500,000 to $25 million. The maximum size of a loan made in connection with the MSNLF cannot, when added to the Eligible Borrower's existing outstanding and undrawn available debt, exceed four times the Eligible Borrower's adjusted 2019 earnings before interest, taxes, depreciation, and amortization (EBITDA). The loans must not be, at the time of origination or at any time during the term of the Eligible Loan, contractually subordinated in terms of priority to any of the Eligible Borrower's other loans or debt instruments. The complete MSNLF term sheet is available here.

- MSPLF: Under this facility, Eligible Lenders extend new loans to Eligible Borrowers ranging in size from $500,000 to $25 million. The maximum size of a loan made in connection with the MSPLF cannot, when added to the Eligible Borrower's existing outstanding and undrawn available debt, exceed six times the Eligible Borrower's adjusted 2019 EBITDA. At the time of origination and at all times thereafter, the Eligible Loan must be senior to or pari passu with, in terms of priority and security, the Eligible Borrower's other loans or debt instruments, other than mortgage debt. Eligible Borrowers may, at the time of origination of the Eligible Loan, refinance existing debt owed by the Eligible Borrower to a lender that is not the Eligible Lender. The complete MSPLF term sheet is available here. It is important to note that MSPLF allows for refinances and lenders retain a 15% interest under MSPLF loans instead of a 5% interest under both MSNLF and MSELF loans.
- MSELF: Under this facility, Eligible Lenders increase or "upsize" an Eligible Borrower's existing term loan or revolving credit facility. The upsized tranche is a four-year term loan ranging in size from $10 million to $200 million. The maximum size of a loan made in connection with the MSELF cannot exceed (i) 35% of the Eligible Borrower's existing outstanding and undrawn available debt that is pari passu in priority with the Eligible Loan and equivalent in secured status (i.e., secured or unsecured); or (ii) when added to the Eligible Borrower's existing outstanding and undrawn available debt, six times the Eligible Borrower's adjusted 2019 EBITDA. At the time of upsizing and at all times thereafter, the upsized tranche must be senior to or pari passu with, in terms of priority and security, the Eligible Borrower's other loans or debt instruments, other than mortgage debt. The complete MSELF term sheet is available here.

Are loans that are originated or upsized in connection with the Main Street Program forgivable?

No. All loans under the Main Street Program are full-recourse and not forgivable.

SECTION 2: BORROWER ELIGIBILITY

Which entities are "eligible" to borrow under the Main Street Program?

The following Businesses (defined below) are Eligible Borrowers. These requirements are the same for all three loan facilities.

- The Business must have been established prior to March 13, 2020. The Business must have been formed prior to March 13, 2020, under the laws of the United States, one of the several states, the District of Columbia, any of the territories and possessions of the United States, or an Indian Tribal government.
- The Business must not be an "Ineligible Business." Ineligible Businesses include Businesses that are not eligible for Paycheck Protection Program (PPP) loans.
- The Business must meet at least one of the following two conditions: (i) the Business has 15,000 employees or fewer, or (ii) the Business has 2019 annual revenues of $5 billion or less. **Businesses must meet at least one of these conditions, but are not required to meet both**. To determine how many employees a Business has or a Business's 2019 revenues, the employees and revenues of the Business must be aggregated with the employees and revenues of its affiliated[1] entities. This represents an increase from 10,000 employees or fewer to 15,000 employees or fewer and an increase in revenues from $2.5 million to $5 million.
- The Business must be a U.S. Business. As required by the Coronavirus Aid, Relief and Economic Security Act (CARES Act), Eligible Borrowers must be Businesses that were created or organized in the United States or under the laws of the United States with significant operations in and a majority of their employees based in the United States.

- Loan Participation. An Eligible Borrower may only participate in one of the Main Street facilities: the MSNLF, the MSPLF, or the MSELF. In addition, a Business is not an Eligible Borrower if it participates in the Primary Market Corporate Debt Facility (PMCCF).
- The Business must not have received specific support pursuant to the Coronavirus Economic Stabilization Act of 2020 (Subtitle A of Title IV of the CARES Act). A Business is not eligible if it has received support pursuant to section 4003(b)(1)-(3) of the CARES Act.[2]
- The Business must be able to make all of the certifications and covenants required under the Main Street Program. These certifications and covenants are discussed in Section 4 below.

A Business that has received PPP loans, or that has affiliates that have received PPP loans, is permitted to borrower under the Main Street Program, provided that the borrower meets all other eligibility criteria (including the financial condition of the borrower as determined by the lender).

How is a "Business" defined?

Businesses must be legally formed entities that are organized for profit as a partnership; a limited liability company; a corporation; an association; a trust; a cooperative; a joint venture with no more than 49 percent participation by foreign business entities; or a tribal business concern.

Other forms of organization may be considered for inclusion as an Eligible Borrower under the Main Street Program at the discretion of the Federal Reserve.

How should a Business count employees for purposes of determining eligibility under the Main Street Program?

To be an Eligible Borrower, a Business must meet at least one of the following two conditions: (i) the Business has 15,000 employees or fewer, or (ii) the Business has 2019 annual revenues of $5 billion or less.

To determine how many employees a Business has, it should follow the framework set out in the Small Business Administration's (SBA) regulations that have been used to determine PPP eligibility[3]. In that regard, the Business should count as employees all full-time, part-time, seasonal or otherwise employed persons, excluding volunteers and independent contractors. Businesses should count their own employees and those employed by their affiliates. Additionally, Businesses should use the average of the total number of persons employed by the Eligible Borrower and its affiliates for each pay period over the 12 months prior to the origination or upsizing of the specific Main Street Program loan.

How should a Business calculate 2019 revenues for purposes of determining eligibility under the Main Street Program?

To determine its 2019 annual revenues, Businesses must aggregate their revenues with those of their affiliates (applying the articulated PPP affiliation principles). Businesses may use either of the following methods to calculate 2019 annual revenues for purposes of determining eligibility:

1. a Business may use its (and its affiliates') annual "revenue" per its 2019 Generally Accepted Accounting Principles (GAAP) based audited financial statements; or
2. a Business may use its (and its affiliates') annual receipts for its fiscal year 2019, as reported to the Internal Revenue Service. For purposes of the Program, the term "receipts" has the same meaning used by the SBA.

If a potential borrower (or its affiliate) does not yet have audited financial statements or annual receipts for 2019, the borrower (or its affiliate) should use its most recent audited financial statements or annual receipts.

Are non-profit organizations eligible to borrower under the Main Street Program?

No, primarily because the Main Street Program uses EBITDA as the key underwriting metric for eligibility.

However, recognizing that non-profits otherwise meeting eligibility criteria may be in need of liquidity to get them through the pandemic, the Federal Reserve and the Treasury Department will be evaluating the feasibility of adjusting the borrower eligibility criteria and loan eligibility metrics of the specific Main Street Program for such organizations.

SECTION 3: TERMS AND CONDITIONS

How will adjusted 2019 EBITDA be calculated?

For the MSNLF and MSPLF programs, the methodology used by the Eligible Lender to calculate adjusted 2019 EBITDA for an Eligible Borrower must be a methodology it previously used for adjusting EBITDA when extending credit to the Eligible Borrower or to similarly situated borrowers on or before April 24, 2020.

For the MSELF programs, the methodology used by the Eligible Lender to calculate adjusted 2019 EBITDA for an Eligible Borrower must be the methodology it previously used for adjusting EBITDA when originating or amending the underlying loan on or before April 24, 2020.

This was an important clarification for private equity portfolio companies and other borrowers, since negotiated or customary adjustments more accurately reflect how cash flow loans are typically underwritten (and generally can provide for more availability).

How will "existing outstanding and undrawn available debt" be calculated?

"Existing outstanding and undrawn available debt" includes all amounts borrowed under any loan facility by the Eligible Borrower, including unsecured or secured loans from any bank, non-bank financial institution, or private lender, as well as any publicly issued bonds or private placement facilities. It also includes all unused commitments under any loan facility of an Eligible Borrower, excluding (i) any undrawn commitment that serves as a backup line for commercial paper issuance, (ii) any undrawn commitment that is used to finance receivables (including seasonal financing of inventory), (iii) any undrawn commitment that cannot be drawn without additional collateral, and (iv) any undrawn commitment that is no longer available due to change in circumstance. Existing outstanding and undrawn available debt will be calculated as of the date of the loan application.

What constitutes "commercially reasonable efforts" to maintain payroll and retain employees?

An Eligible Borrower should undertake good-faith efforts to maintain payroll and retain employees, in light of its capacities, the economic environment, its available resources, and the business's need for labor. Borrowers that have already laid-off or furloughed workers as a result of the disruptions from COVID-19 are eligible to apply for Main Street Program loans. Unlike the PPP, which is forgivable and used that feature to incentivize payroll retention, the Main Street Program will look for a good faith effort for payroll retention and it appears that borrowers may be further scrutinized for rational and necessary business decisions.

SECTION 4: CERTIFICATIONS AND COVENANTS

What restrictions are placed on the Eligible Borrower's ability to repay existing debt?

The restrictions on the Eligible Borrower's ability to repay existing debt vary across the Main Street Program:

- MSNLF and MSELF. The Eligible Borrower must commit to refrain from repaying the principal balance of, or paying any interest on, any debt until the MSNLF Loan or the MSELF upsized tranche is repaid in full, unless the debt or interest payment is mandatory and due. The Eligible Borrower must also commit that it will not seek to cancel or reduce any of its committed lines of credit with the Eligible Lender or any other lender.
- MSPLF. The Eligible Borrower must commit to refrain from repaying the principal balance of, or paying any interest on, any debt until the MSPLF Loan is repaid in full, unless the debt or interest payment is mandatory and due; however, the Eligible Borrower may, at the time of origination of the MSPLF Loan, refinance existing debt owed by the Eligible Borrower to a lender that is not the Eligible Lender. The Eligible Borrower must also commit that it will not seek to cancel or reduce any of its committed lines of credit with the Eligible Lender or any other lender.

The covenants above would not prohibit an Eligible Borrower from undertaking any of the following actions during the term of the MSNLF Loan, MSPLF Loan or MSELF upsized tranche:

1. repaying a line of credit (including a credit card) in accordance with the Eligible Borrower's normal course of business usage for such line of credit;
2. taking on and paying additional debt obligations required in the normal course of business and on standard terms, including inventory and equipment financing, provided that such debt is secured by newly acquired property (e.g. inventory or equipment), and, apart from such security, is of equal or lower priority than the MSNLF Loan, the MSPLF Loan, or the MSELF upsized tranche; or
3. refinancing maturing debt.

Is an Eligible Lender permitted to accept partial repayment of an Eligible Borrower's existing line of credit with the Eligible Lender?

The Eligible Lender would not be prevented from accepting regularly scheduled, periodic repayments on a line of credit from an Eligible Borrower in accordance with the Eligible Borrower's normal course of business usage for such line of credit.

What restrictions are placed on an Eligible Lender's ability to cancel or reduce any existing committed lines of credit outstanding?

An Eligible Lender must commit that it will not cancel or reduce any existing committed lines of credit outstanding to the Eligible Borrower, except in an event of default. This requirement does not prohibit the reduction or termination of uncommitted lines of credit, the expiration of existing lines of credit in accordance with their terms, or the reduction of availability under existing lines of credit in accordance with their terms due to changes in borrowing bases or reserves in asset-based or similar structures.

What is the Eligible Lender's role in verifying certifications and covenants?

An Eligible Lender is required to collect the required certifications and covenants from each Eligible Borrower at the time of origination or upsizing. Eligible Lenders may rely on an Eligible Borrower's certifications and covenants, as well as any subsequent self-reporting by the Eligible Borrower. The Eligible Lender is not expected to independently verify the Eligible Borrower's certifications or actively monitor ongoing compliance with covenants required for Eligible Borrowers under the Main Street term sheets. If an Eligible Lender becomes aware that an Eligible Borrower made a material misstatement or otherwise breached a covenant during the term of an MSNLF Loan, MSPLF Loan, or MSELF Upsized Tranche, the Eligible Lender should notify the Federal Reserve Bank Boston.

While there are still several questions that need to be answered as the Main Street Program commences, the FAQs provide significant and helpful guidance to lenders and borrowers alike. We will continue to update clients and friends on such further guidance under the Main Street Program as it becomes available.

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As we continue to monitor COVID-19, White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.

[1] An "affiliate" is defined in accordance with the affiliation test set forth in 13 CFR 121.301(f). To determine affiliation, the rules applicable to the SBA's 7(a) loan program are to be utilized (as adjusted for the above noted employee size and revenue limits.

[2] 4003(b)(1)-(3): (i) $25 billion for passenger air carriers, eligible businesses that are certified under part 145, of title 14, Code of Federal Regulations, and approved to perform inspection, repair, replace, or overhaul services, and ticket agents (Section 4003(b)(1)); (ii) $4 billion for cargo air carriers (Section 4003(b)(2)); and (iii) $17 billion for businesses critical to maintaining national security (Section 4003(b)(3)).

[3] The applicable regulation, 13 CFR 121.106, is available here.