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FEDERAL RESERVE AND TREASURY ANNOUNCE $600 BILLION MAIN STREET LENDING PROGRAM

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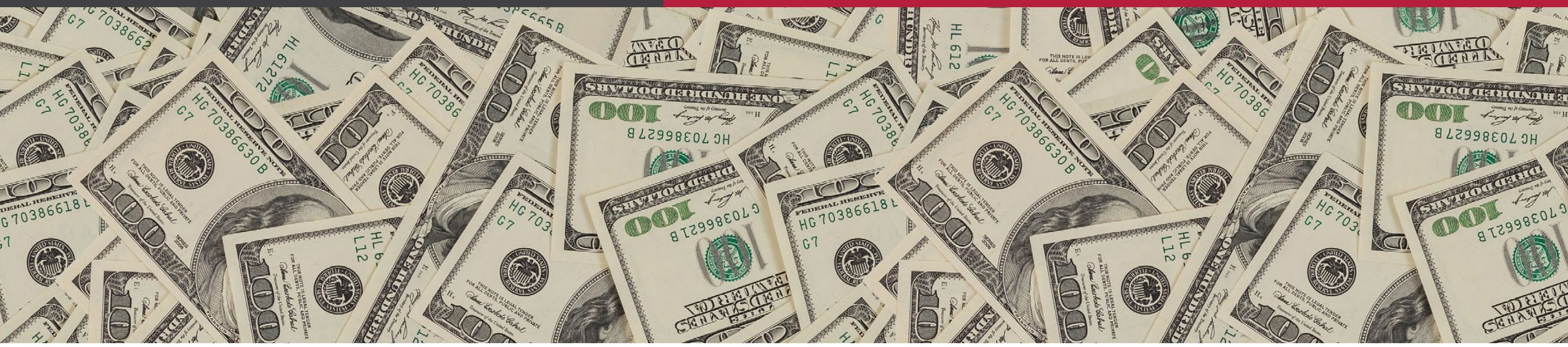
April 18, 2020



On April 9, 2020 the Federal Reserve, with the approval of the Department of the Treasury, announced the establishment of a Main Street Lending Program to support loans of up to $600 billion to small and mid-sized businesses affected by the COVID-19 pandemic. The lending facilities will be available to U.S. businesses (see further information on this below) that have up to 10,000 employees or 2019 annual revenues of up to $2.5 billion.

The Main Street Lending Program will operate through two new facilities: (i) the Main Street New Loan Facility (MSNLF), which will, through a special purpose vehicle (SPV), purchase participations in new, eligible loans originated by eligible lenders *on or after* April 8, 2020, and (ii) the Main Street Expanded Loan Facility (MSELF), which will, through a SPV, purchase participations in newly upsized tranches of term loans which were in existence *prior to April 8, 2020*. As detailed below, the primary differences between the MSELF and the MSNLF are their collateral requirements and the increased borrowing size for a loan expanded through the MSELF.

Eligible lenders are not accepting MSNLF and MSELF applications yet. However, the comment period for lenders, borrowers and other stakeholders ended April 16, so it is anticipated that implementing guidance will be issued in the coming days. This client alert discusses the key terms of the MSNLF and MSELF as set forth in the Coronavirus Aid, Relief and Economic Security (CARES) Act and the Federal Reserve's term sheets and press releases, including the certifications and restrictions required to be given by borrowers and lenders.

MSNLF OVERVIEW

What businesses are eligible for loans under the MSNLF?

An eligible borrower must have 10,000 or fewer employees or a maximum of $2.5 billion in 2019 annual revenues. Although the term sheets provided by the Federal Reserve suggest that there is no minimum employee size per borrower such as 500 or more employees, this has not been confirmed at the time of this release. An eligible borrower must be a U.S. business, which is defined as an entity created or organized in the U.S. or under U.S. law with significant operations in and a majority of its employees based in the U.S.

When can businesses apply? Is there a deadline?

The Federal Reserve has not announced a definitive timeline for implementation of the MSNLF. However, the comment period expired on April 16, so it is anticipated that implementation will occur quickly. The Federal Reserve's term sheet for the MSNLF states that the SPV will cease purchasing participations in eligible loans on September 30, 2020.

What are the MSNLF loan terms?

An eligible loan under the MSNLF is an unsecured term loan not requiring collateral, is required to be originated on or after April 8, 2020 and must meet the following criteria:

i. 4 year maturity;
ii. Amortization of principal and interest deferred for one year;

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iii. Adjustable rate of Secured Overnight Financing Rate (SOFR)[1] plus 250-400 basis points; and
iv. Prepayment permitted without penalty.

<u>What are the minimum and maximum amounts of the MSNLF loans?</u>

The minimum MSNLF loan size is $1 million, and the maximum loan size is capped at the lesser of: (i) $25 million or (ii) an amount that, when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed 4 times the borrower's 2019 EBIDTA. Of interest, the term sheets for the MSNLF and MSELF do not address whether a borrower's EBITDA may be determined based upon the borrower's existing credit facilities or whether non-GAAP add-backs to EBITDA will be permitted in certifying as to the maximum MSNLF loan amount.

<u>What restrictions will a MSNLF borrower face?</u>

In addition to any covenants imposed by the lender, borrowers under the MSNLF will be required to comply with the following restrictions:

i. Equity securities listed on a national securities exchange. For the term of the loan and 12 months after it is no longer outstanding, the borrower may not purchase an equity security that is listed on a national securities exchange of the borrower or any parent company of the borrower while the loan is outstanding, except to the extent required by a contractual obligation in effect prior to March 27, 2020.

ii. No Dividends. For the term of the loan and for 12 months after it is no longer outstanding, the borrower will not pay dividends or make other capital distributions with respect to its common stock. Although neither the Federal Reserve nor the Department of the Treasury have issued guidance on this subject, it is reasonable to expect that limited liability companies and limited partnerships would be similarly restricted from issuing distributions to their interest holders. Given that the owners of these interests are often taxed on taxable income attributable to their interests regardless of whether cash is actually distributed, this restriction could pose significant tax issues for the owners of potential borrowers.

iii. Employee Compensation Restrictions. Borrowers will be required to restrict total compensation for officers and employees who earned $425,000 or more during calendar year 2019, including salary, bonuses, stock awards and "other financial benefits." These restrictions go into effect when the loan agreement is executed, expire 1 year after it is no longer outstanding, and include the following:

a. For officers or employees who earned $425,000 or more during calendar year 2019, these persons may not receive compensation during any consecutive 12 month period which exceeds their total compensation for calendar year 2019. Similarly, these persons may not receive severance or termination benefits in excess of twice their total compensation for calendar year 2019.

b. For officers or employees who earned $3,000,000 or more during calendar year 2019, these persons may not receive compensation during any consecutive 12 month period in excess of (1) $3,000,000 <u>and</u> (2) 50 percent of any compensation received during calendar year 2019 in excess of $3,000,000.

<u>What certifications will a MSNLF borrower be required to make?</u>

In addition to certifications required by applicable law, a borrower will be required to make the following attestations:

i. Until the loan is repaid in full, the borrower commits to not use loan proceeds to (a) pay other loan balances or (b) repay other debt of equal or lower priority with the exception of mandatory principal payments;

ii. Borrower requires financing due to the exigent circumstances presented by the COVID-19 pandemic, and using the proceeds of the loan, borrower will make reasonable efforts to maintain its payroll and retain its employees during the term of the loan;

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[1] The SOFR is currently 0.01 percent, but was over 1.0 percent before March 15 and was over 1.5 percent on March 3.

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iii. Borrower will not seek to cancel or reduce existing lines of credit with any lender;

iv. Borrower meets the EBITDA leverage condition outlined above for eligible loans;

v. Borrower will comply with the compensation, stock repurchase, dividend and capital distribution restrictions outlined above; and

vi. Borrower is eligible to participate in the facility, including in light of the conflicts of interest prohibition in Section 4019(b) of the CARES Act, which prohibits high-level government officials (including members of Congress) from controlling or owning more than 20 percent of a potential borrower.

<u>What attestations will a lender be required to give?</u>

An eligible lender will be required to attest that (i) loan proceeds will not be used to repay or refinance pre-existing loans or facilities between the eligible lender and borrower; (ii) borrower is eligible to participate in the facility, including in light of the conflicts of interest prohibition in Section 4019(b) of the CARES Act and (iii) eligible lender will not cancel or reduce any existing lines of credit outstanding to the borrower.

<u>How does the loan origination and participation process work under the MSNLF?</u>

U.S. bank holding companies, U.S. savings and loan holding companies and U.S. insured depository institutions may originate eligible loans to eligible businesses, and the Federal Reserve Bank of Boston (Reserve Bank) will commit to lend on a recourse basis to a single common SPV which will in turn purchase 95 percent participations of these eligible loans. Eligible lenders would retain 5 percent of the eligible loans.

<u>What fees are applicable to the MSNLF?</u>

An eligible lender will pay the SPV a facility fee of 100 basis points of the principal amount of the loan participation purchased by the SPV. The eligible lender may pass this fee through to the borrower. The borrower will pay the eligible lender an origination fee of 100 basis points of the principal amount of the loan. The SPV will pay the eligible lender 25 basis points of the principal amount of its participation in the loan per annum for loan servicing.

<u>Can borrowers participate in other CARES Act loan programs as well as the MSNLF?</u>

Borrowers that participate in the MSNLF may not also participate in the MSELF or the Primary Market Corporate Credit Facility. However, the Federal Reserve's press release states that borrowers may participate in the Paycheck Protection Program as well as the MSNLF, but does not comment with respect to whether receiving an economic injury disaster loan affects eligibility for the MSNLF.

OVERVIEW OF MSELF

<u>What businesses are eligible for loans under the MSELF?</u>

Eligible borrower criteria are the same as the criteria under the MSNLF.

<u>When can businesses apply? Is there a deadline?</u>

The Federal Reserve has not announced a definitive timeline for implementation of the MSELF. However, the comment period expired on April 16, so it is anticipated that implementation will occur quickly. The Federal Reserve's term sheet for the MSELF state that the SPV will cease purchasing participations in eligible loans on September 30, 2020.

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What are the MSELF loan terms?

The MSELF loan terms are the same as outlined in number 3 above for MSNLF loans.

What are the minimum and maximum amounts of the MSELF loans?

Under the MSELF, the minimum loan size is $1 million, and the maximum loan size is the lesser of: (i) $150 million, (ii) 30% of the borrower's existing outstanding and committed but undrawn bank debt or (iii) an amount that, when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed 6 times the borrower's 2019 EBIDTA. As noted above with respect to the MSNLF, the Federal Reserve has not as of the date of this alert specified whether EBITDA may be determined based upon the borrower's existing credit facilities or whether non-GAAP add-backs to EBITDA will be permitted in certifying as to the maximum MSELF loan amount.

What restrictions will MSELF borrowers face?

The restrictions set forth in paragraph 5 above for MSNLF loans track the restrictions applicable to MSELF loans. However, unlike the MSNLF, loans under the MSELF are collateralized. Any collateral securing an eligible loan, whether pledged under the original terms of the eligible loan or at the time of upsizing under the MSELF, will secure the loan participation on a pro rata basis between the SPV and the eligible lender.

What certifications will MSELF borrowers be required to make?

The certifications that an eligible borrower will be required to make regarding the upsize tranche of an eligible loan generally track the certifications set forth above under paragraph 6 for MSNLF loans.

What attestations will a lender be required to give?

The certifications that an eligible lender will be required to make track the certifications set forth above under paragraph 7 for MSNLF loans.

How does the loan origination and participation process work under the MSELF?

U.S. bank holding companies, U.S. savings and loan holding companies and U.S. insured depository institutions may expand existing term loans which were originated prior to April 8, 2020 for eligible businesses. The expanded term loans must meet the MSELF's loan eligibility requirements. Under the MSELF, the Reserve Bank commits to lend on a recourse basis to a single common SPV, which will in turn purchase 95 percent participations of these eligible expanded loans. Eligible lenders would retain 5 percent of the eligible expanded loans.

What fees are applicable to the MSELF?

The MSELF includes a fee of 100 basis points, which the borrower will pay to the lender at the time of upsizing. The SPV will pay the eligible lender 25 basis points of the principal amount of its participation in the upsized tranche of the eligible loan per annum for loan servicing.

Can borrowers participate in other CARES Act loan programs as well as the MSELF?

Borrowers that participate in the MSELF may not also participate in the MSNLF or the Primary Market Corporate Credit Facility. However, the Federal Reserve's press release states that borrowers may participate in the Paycheck Protection Program as well as the MSELF, but does not comment with respect to whether receiving an economic injury disaster loan affects eligibility for the MSELF.

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THE "OTHER" LOAN PROGRAM FOR MID-SIZED BUSINESSES

Notably, the MSNLF and MSELF seem to be in addition to (and not a replacement for) the direct loan program for mid-sized businesses[2] contemplated in the CARES Act, which has not been implemented as of the date of this alert.

Please contact a member of Gray Reed's CARES Act task force if we may be of assistance to you.

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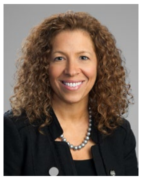

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[2] Eligible businesses must have between 500 and 10,000 employees, or less than $2.5 billion in annual revenue for 2019.