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FEDERAL RESERVE EXPANDS THE SCOPE OF ITS MAIN STREET LENDING PROGRAMS

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The Federal Reserve on April 30, 2020 announced changes to expand the loan and eligibility requirements under its $600 billion Main Street Lending Program (Program) to allow participation by larger businesses and those with higher debt levels. The changes were in response to more than 2,200 comment letters provided to the Federal Reserve during the public comment period and generally increase access to the Program by including borrowers who have 15,000 or fewer employees or 2019 annual revenues of $5 billion or less. The changes also allow borrowers under the newly-established Main Street Priority Loan Facility (MSPLF) and the existing Main Street Expanded Loan Facility (MSELF) to increase their debt to a maximum of 6 times adjusted earnings before interest, taxes, depreciation and amortization (EBITDA), subject to potential reduction as discussed below.

The Program consists of the following components which are detailed in Federal Reserve term sheets and a FAQ which are available here: (1) the newly established MSPLF, (2) the the Main Street New Loan Facility (MSNLF) and (3) the MSELF. The MSELF and MSNLF were originally announced by the Federal Reserve on April 9, and the Federal Reserve's April 30 term sheets amend those initial term sheets.

The Federal Reserve has not yet implemented the Program, so eligible lenders are not currently able to accept Program applications. Under the Program, the Federal Reserve Bank of Boston (Reserve Bank) will commit to lend to a single common special purpose vehicle (SPV) that will buy 85 percent participations in eligible loans originated by eligible lenders under the MSPLF and 95 percent participations in eligible loans originated by eligible lenders under the MSNLF and MSELF. Eligible lenders will retain the balance of the loans and thereby share in a portion of the lending risk.

MSNLF OVERVIEW

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

An eligible borrower must meet the following criteria to participate in the MSNLF:

i. Be an entity organized for profit as a partnership, limited liability company, corporation, association, cooperative, joint venture with no more than 49 percent participation by foreign business entities or a tribal business concern;
ii. Have been established prior to March 13, 2020;
iii. Have, together with its affiliates,[1] either: (i) 15,000 or fewer employees,[2] or (ii) a maximum of $5 billion in 2019 annual revenues;
iv. Not be an "Ineligible Business;"[3]
v. Be created or organized in the United States or under the laws of the United States with significant operations and a majority of its employees based in the United States;
vi. Not also participate in the MSPLF, MSELF or the Primary Market Corporate Credit Facility; and
vii. Not have received specific support pursuant to the Coronavirus Economic Stabilization Act of 2020 (Subtitle A of Title IV of the CARES Act).

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[1] The FAQ document published by the Federal Reserve (FAQ) states that, for purposes of size eligibility for a Program loan, borrowers must count their employees and revenues collectively with their "affiliates," using the Small Business Administration's affiliation rules set forth in 13 CFR 121.301(f).
[2] The FAQ clarifies that employee size eligibility for Program purposes will follow the Small Business Administration's approach under 13 CFR 121.106, which counts all full-time, part-time, seasonal or otherwise employed individuals as "employees" of the borrower. For accounting purposes, 13 CFR 121.106 requires the borrower to count the monthly average number of employees over the 12 month period prior to the date of the borrower's loan application.
[3] An "Ineligible Business" is a type of business listed in 13 CFR 120.110(b)-(j) and (m)-(s), as modified by regulations implementing the Paycheck Protection Program established by section 1102 of the CARES Act (PPP) on or before April 24, 2020. These include, for example, certain passive businesses owned by developers and landlords, pyramid sale distribution plans, life insurance companies, and inherently speculative businesses.

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When can businesses apply? Is there a deadline?

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

What are the MSNLF loan terms?

A MSNLF loan is a secured or unsecured term loan made by an eligible lender to an eligible borrower after April 24, 2020 that has the following terms:

i. 4 year maturity;
ii. Principal and interest payments deferred for one year (unpaid interest will be capitalized);
iii. Adjustable interest rate equal to LIBOR (1 or 3 month)[4] + 300 basis points;
iv. Principal amortization of 1/3 at the end of each of the second year, third year and fourth year;
v. Not, 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; and
vi. Permits prepayment without penalty.

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

The minimum MSNLF loan size is $500,000, 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 available debt, does not exceed 4 times the borrower's adjusted 2019 EBIDTA. Notably, the April 30 MSNLF term sheet provides that the methodology used by an eligible lender to calculate adjusted 2019 EBITDA must be the methodology the lender previously used for adjusting EBIDTA when extending credit to the eligible borrower or similarly situated borrowers on or before April 24, 2020.

What restrictions will a MSNLF borrower face?

In addition to other certifications required by law, 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, except that an S corporation or other tax pass-through entity may make distributions to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings.

iii. *Employee compensation restrictions.* Borrowers are 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, as described below. 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 million or more during calendar year 2019, these persons may not receive compensation during any consecutive 12-month period in excess of (1) $3 million <u>and</u> (2) 50 percent of any compensation received during calendar year 2019 in excess of $3 million.

[4] The FAQ recommends that the loan documentation include fallback contract language to be used if LIBOR becomes unavailable during the loan period.

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iv. *Loan Classification.* If the eligible borrower had other loans outstanding with the eligible lender as of December 31, 2019, such loans must have had an internal risk rating equivalent to a "pass" (the highest rating available) in the Federal Institutions Examination Council's supervisory rating system on that date.

What certifications will a MSNLF borrower be required to make?

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 must commit to refrain from repaying the principal balance of, or paying any interest on, any debt until the eligible loan is repaid in full, unless the debt or interest payment is mandatory and due;
ii. Borrower will not seek to cancel or reduce any of its committed lines of credit with any lender;
iii. Borrower must certify that it has a reasonable basis to believe that, as of the date of origination of the eligible loan and after giving effect to such loan, it has the ability to meet its financial obligations for at least the next 90 days and does not expect to file for bankruptcy during that time period;
iv. Borrower will comply with the compensation, stock repurchase, dividend and capital distribution restrictions outlined above;
v. 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; and
vi. Borrower will use commercially reasonable efforts to maintain its payroll and retain its employees during the time the eligible loan is outstanding.

Who is an eligible lender and what certifications and attestations will a lender be required to give?

An eligible lender is a U.S. federally insured depository institution, including a bank, savings association or credit union, a U.S. branch or agency of a foreign bank, a U.S. bank holding company, U.S. savings and loan holding company, U.S. intermediate holding company of a foreign banking organization or a U.S. subsidiary of any of the foregoing.

An eligible lender will be required to attest that (i) it will not request the borrower to repay debt extended by such lender to such borrower or pay interest thereon until the eligible loan is repaid in full unless the debt or interest payment is mandatory and due or in the case of default and acceleration, (ii) it will not cancel or reduce any existing committed lines of credit to such borrower except in an event of default, (iii) the methodology used to calculate adjusted 2019 EBITDA for the leverage requirement for an eligible loan is the methodology previously used for adjusting EBITDA when extending credit to such borrower or similarly situated borrowers on or before April 24, 2020 and (iv) it is eligible to participate in the facility, including in light of the conflicts of interest prohibition in Section 4019(b) of the CARES Act. Eligible lenders are expected to conduct an assessment of an eligible borrower's financial condition at the time of the loan application.

Who are eligible lenders, and how does the loan origination and participation process work under the MSNLF?

The Reserve Bank will commit to lend on a recourse basis to a single common SPV that will in turn purchase 95 percent participations of the MSNLF loans. Eligible lenders are required to retain the remaining 5 percent of the eligible loans until it matures or the SPV sells all of its participation in the loan, whichever occurs first.

What fees are applicable to the MSNLF?

An eligible lender will pay the SPV a transaction fee of 100 basis points of the principal amount of the loan at the time of its origination and 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.

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

Borrowers that participate in the MSNLF may not also participate in the MSPLF, MSELF or the Primary Market Corporate Credit Facility.

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However, the Federal Reserve's revised term sheet for the MSNLF 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.

MSPLF OVERVIEW

What businesses are eligible for loans under the MSPLF?

Eligible borrower criteria are the same as the criteria under the MSNLF, except that a borrower under an MSPLF may not also participate in the MSNLF.

When can businesses apply? Is there a deadline?

The timeline for the implementation of the MSPLF and deadline to apply are the same as outlined in paragraph 2 above for the MSNLF.

What are the MSPLF loan terms?

The MSPLF's loan terms are the same as outlined in paragraph 3 above for MSNLF loans, except as noted below:

i. An eligible loan will feature principal amortization of 15 percent at the end of the second year, 15 percent at the end of the third year, and a balloon payment of 70 percent at maturity at the end of the fourth year; and
ii. At the time of origination and at all times the eligible loan is outstanding, the eligible loan is senior to or pari passu with, in terms of priority and security, the borrower's other loans or instruments, other than mortgage debt.

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

The minimum MSPLF loan size is $500,000, 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 available debt, does not exceed 6 times the borrower's adjusted 2019 EBIDTA. The methodology used by an eligible lender to calculate adjusted 2019 EBITDA must be the methodology the lender previously used for adjusting EBIDTA when extending credit to the eligible borrower or similarly situated borrowers on or before April 24, 2020.

What restrictions will MSPLF borrowers face?

The restrictions set forth in paragraph 5 above for MSNLF loans track the restrictions applicable to MSPLF loans.

What certifications will MSPLF borrowers be required to make?

The certifications that an eligible borrower will be required to make regarding an eligible loan generally track the certifications set forth above under paragraph 6 for MSNLF loans. Notably, however, a MSPLF borrower may, at the time of MSPLF loan origination, refinance existing debt owed by the eligible borrower to a lender other than the eligible lender.

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.

Who is an eligible lender and how does the loan origination and participation process work under the MSPLF?

Eligible lenders are the same as set forth above in paragraph 7 under MSNLF loans. An eligible lender may originate eligible loans to eligible businesses, and the Reserve Bank will commit to lend on a recourse basis to a single common SPV that will in turn purchase 85 percent participations of these eligible loans. Eligible lenders are required to retain the remaining 15 percent of each eligible loan until it matures or the SPV sells all of its participation, whichever comes first.

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What fees are applicable to the MSPLF?

The fees for the MSPLF track the fees for the MSNLF, which are discussed under paragraph 9 above for the MSNLF.

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

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

MSELF OVERVIEW

What businesses are eligible for loans under the MSELF?

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

When can businesses apply? Is there a deadline?

The timeline for the implementation of the MSELF and deadline to apply are the same as outlined in paragraph 2 above for the MSNLF.

What are the MSELF loan terms?

The MSELF's loan terms are the same as outlined in number 3 above for MSNLF loans, except that an eligible loan must have originated on or before April 24, 2020 and have a remaining maturity of at least 18 months (taking into account adjustments made to the maturity of the loan after April 24, 2020, including as expanded through the MSELF), and the upsized tranche of the loan is a term loan with the following features:

i. The features set forth in paragraph 3 above under MSNLF loans;
ii. Principal amortization of 15 percent at the end of the second year, 15 percent at the end of the third year and a balloon payment of 70 percent at maturity at the end of the fourth year; and
iii. At the time of expansion and at all times while the eligible loan is outstanding, the eligible loan is senior to or pari passu with, in terms of priority and security, the borrower's other loans or instruments, other than mortgage debt.

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

Under the MSELF, the minimum loan size is $10 million, and the maximum loan size is the lesser of: (i) $200 million, (ii) 35 percent of the borrower's existing outstanding and committed but undrawn bank debt that is pari passu in priority with the eligible loan and equivalent in secured status 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 adjusted 2019 EBIDTA. The methodology used by an eligible lender to calculate adjusted 2019 EBITDA must be the methodology the lender previously used for adjusting EBIDTA when extending credit to the eligible borrower or similarly situated borrowers on or before April 24, 2020.

What restrictions will MSELF borrowers face?

The restrictions set forth in paragraph 5 above for MSNLF loans track the restrictions applicable to MSELF loans. In addition, 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.

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

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

<u>Who is an eligible lender and how does the loan expansion and participation process work under the MSELF?</u>

An eligible lender is the same as set forth in paragraph 7 above under MSNLF loans. An eligible lender may expand a tranche of eligible loans to eligible businesses, and the Reserve Bank will commit to lend on a recourse basis to a single common SPV that will in turn purchase 95 percent participations of the upsized tranche of the eligible loan. Eligible lenders must retain 5 percent of the upsized tranche of the eligible loan until it matures or the SPV sells all of its participation, whichever comes first. An eligible lender must also retain its interest in the underlying eligible loan until the underlying loan matures, the upsized tranche of the underlying loan matures or the SPV sells all of its participation in the upsized tranche, whichever comes first.

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

An eligible lender must pay the SPV a transaction fee of 75 basis points of the principal amount of the upsized tranche of the eligible loan at the time of upsizing, which the lender may pass the cost of through to the borrower. An eligible borrower must pay the lender an origination fee of up to 75 basis points on the principal amount of the upsized tranche of the eligible loan at the time of upsizing.

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

Borrowers that participate in the MSELF may not also participate in the MSNLF, MSPLF or the Primary Market Corporate Credit Facility. However, the Federal Reserve's revised term sheet for the MSELF 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.

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

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