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Treasury and Fed Release High-Level Terms of Main Street and Paycheck Protection Lending Facilities

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Today, the Board of Governors of the Federal Reserve System ("Federal Reserve") announced that, as part of the "programs or facilities" the *Coronavirus Aid, Relief, and Economic Security Act* ("*CARES Act*") directs the Federal Reserve to establish to provide "liquidity to the financial system that supports lending to eligible businesses, States, or municipalities," it would establish two new facilities to promote lending to businesses with up to 10,000 employees or up to $2.5 billion in 2019 annual revenue. The Federal Reserve also announced a lending facility for depository institutions that originate loans under the *CARES Act*'s Paycheck Protection Program ("PPP"). This alert discusses these three facilities.

In addition, the Federal Reserve announced four other lending facilities today: the Term Asset-Backed Securities Loan Facility; the Primary Market Corporate Credit Facility; the Secondary Market Corporate Credit Facility; and the Municipal Liquidity Facility.

Main Street Loan Facilities

The Federal Reserve announced two programs to promote lending to small and mid-sized businesses. The first, the Main Street New Loan Facility ("MSNLF"), applies to new loans. The second, the Main Street Expanded Loan Facility ("MSELF"), applies to upsized tranches on top of existing loans. Pursuant to both, the Department of the Treasury ("Treasury") will make a $75 billion equity investment in a special purpose vehicle ("SPV") on a recourse basis. The SPV, in turn, will purchase 95% participations in either: (1) a new loan, under the MSNLF, or (2) the increased amount of an existing loan, under MSELF. Lenders will retain the remaining 5%.

Eligible Lenders

U.S. insured depository institutions, U.S. bank holding companies, and U.S. savings and loan holding companies are eligible lenders under MSNLF and MSELF.

Eligible Borrowers

To receive funds under MSNF or MSELF, a business must:

- Have either (i) up to 10,000 employees or (ii) $2.5 billion in 2019 annual revenue; and
- Be created or organized in the United States or under the laws of the United States with significant operations in and a majority of its employees based in the United States.

Eligible Loans

A loan is eligible for the MSNLF if it meets six requirements:

1. 4 year maturity;
2. Amortization of principal and interest deferred for one year;
3. Adjustable rate of Secured Overnight Financing Rate ("SOFR") + 250–400 basis points;
4. Minimum loan size of $1 million;
5. Maximum loan size that is the lesser of (i) $25 million or (ii) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed four times the Eligible Borrower's 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA"); and
6. Prepayment permitted without penalty.

Largely the same requirements determine whether an existing loan can be upsized through the MSELF. The requirements apply to the upsized tranche of the loan. The only difference is the maximum loan size, which is the lesser of:

- $150 million; or
- 30% of the Eligible Borrower's existing outstanding and committed but undrawn bank debt; or
- An amount that, when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed six times the borrower's 2019 earnings before EBITDA.

Loan Participation

Under the MSNLF, the SPV will purchase a 95% participation in the loan at par value; the lender will retain 5% of the loan.

Under the MSELF, the SPV will purchase a 95% participation in the upsized tranche of the loan—i.e., the increased amount of the loan—so long as the loan is upsized on or after April 8, 2020 at par value.   Any collateral securing the loan, whether such collateral was pledged under the loan's original terms or at the time of upsizing, will secure the loan participation on a pro rata basis.

In both situations, the SPV and the lender will share risk in the upsized tranche on a *pari passu* basis.

Loan Requirements

In addition to certifications required by applicable statutes and regulations, a lender of a loan purchased by the MSNLF or MSELF must make the following attestations:

- The proceeds of the loan or upsized tranche of the loan will not be used to repay or refinance pre-existing loans or lines of credit made by the lender to the borrower; for the MSELF, this also applies to the pre-existing portion of the loan; and,
- It will not cancel or reduce any existing lines of credit outstanding to the borrower.

A borrower of loans purchased under both programs must make the following attestations:

- It will refrain from (i) using the proceeds of the loan or upsized tranche of the loan to repay other loan balances, and (ii) from repaying other debt of equal or lower priority, with the exception of mandatory principal payments, unless the borrower has first repaid the loan in full;

- It will not seek to cancel or reduce any of its outstanding lines of credit with that lender or any other lender;
- It requires financing due to the exigent circumstances presented by the COVID-19 pandemic, and that, using the proceeds of the loan or upsized tranche of the loan, it will make reasonable efforts to maintain its payroll and retain its employees during the term of the loan or upsized tranche of the loan;
- It will follow compensation, stock repurchase, and capital distribution restrictions that apply to direct loan programs under Section 4003(c)(3)(A)(iii) of the *CARES Act*—specifically, that, from the date the loan agreement is executed until one year after the loan is no longer outstanding, borrowers cannot:
    - Engage in stock buybacks, unless contractually obligated, or pay dividends;
    - Increase the compensation of any employee whose compensation exceeded $425,000 in 2019 or offer them severance or termination benefits that exceed twice their 2019 compensation; and
    - Provide employees whose total compensation exceeded $3 million in 2019 compensation greater than $3 million, plus 50 percent of the amount over $3 million that the individual received in 2019.

A key difference between borrowers of loans under the MSNLF and borrowers of increased loan amounts under the MSELF is the leverage conditions. Under the MSNLF, the loan amount, when added to the borrower's existing outstanding and committed but undrawn debt, cannot exceed four times the borrower's EBITDA. In contrast, under the MSELF, the loan amount, when added to the borrower's existing outstanding and committed but undrawn debt, cannot exceed six times borrower's EBITDA.

Restrictions On Receiving Other *CARES Act* Relief

A borrower can participate in either the MSNLF or the MSELF—but not both. And businesses that receive loans (or increase loans) under either program cannot participate in the Primary Market Corporate Credit Facility ("PMCCF").

Note that guidance released today for the PMCCF and Secondary Market Corporate Credit Facility impose as a condition that "[t]he issuer has not received specific support pursuant to the CARES Act or any subsequent federal legislation," but does not expand on what constitutes "specific support" and whether the MSNLF or MSELF qualifies.[1]

Finally, the Federal Reserve expressly stated that businesses that have received loans under the *CARES Act*'s PPP loan program can also participate in the MSNLF or the MSELF.

Fees and Servicing

For loans purchased by the MSNLF, the 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 lender can require the borrower to pay this fee. Borrowers must also pay the lender an origination fee of 100 basis points of the principal amount of the loan.

For upsized tranches of loans purchased by the MSELF, the borrower will pay the lender a fee of 100 basis points of the principal amount of the upsized tranche of loan at the time of upsizing

For loans under both programs, the SPV will pay the lender 25 basis points of the principal amount of its participation in the loan per annum for loan servicing.

Facility Termination

The SPV will terminate on September 30, 2020, unless the Federal Reserve and Treasury extend the Facilities.

Paycheck Protection Program Lending Facility

The Federal Reserve also created the Paycheck Protection Program Liquidity Facility ("PPPLF"). The PPPLF is intended to facilitate lending by eligible borrowers to small businesses under the *CARES Act*'s PPP loan program.

To this end, the PPPLF will extend credit to eligible financial institutions that originate PPP loans, taking the loans as collateral at face value.

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[1] Under the *CARES Act*, "eligible business" is a "United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act." It is possible that, if a business receives a loan under the MSNLF or the MSELF, Treasury will conclude the business has "received adequate economic relief" and can no longer participate in programs established with *CARES Act* funds. But further guidance is needed on what constitutes "adequate" economic relief. In addition, because the *CARES Act* focuses on whether eligible businesses "received" relief, the *Act* appears to allow eligible businesses to apply for loans or loan guarantees under multiple provisions of the *Act* so long as they have not yet "received adequate economic relief."

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors:

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