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FEDERAL RESERVE ANNOUNCES REVISIONS TO AND EXPANSION OF THE MAIN STREET LENDING PROGRAMS

To Our Clients and Friends:

On April 9, 2020, we published an alert on the Board of Governors of the Federal Reserve System's ("Federal Reserve") announcement that it was creating two loan facilities, the Main Street New Loan Facility ("MSNLF") and the Main Street Expanded Loan Facility ("MSELF"), pursuant to the *Coronavirus Aid, Relief, and Economic Security Act* ("*CARES Act*").

Yesterday, the Federal Reserve announced key changes to those Facilities, including the creation of a third program, the Main Street Priority Loan Facility ("MSPLF," together with the MSNLF and MSELF, the "Main Street Lending Programs"), which is meant to extend assistance to more highly leveraged companies and those with lower earnings in 2019.

Key takeaways from the Federal Reserve's announcement include:

- ***Creating a New Facility for More Leveraged Borrowers***: The MSPLF is a new lending facility with less restrictive leverage requirements than the MSNLF, requiring the maximum loan size to be the lesser of $25 million or six times adjusted 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA"); as compared to the MSNLF, which establishes a maximum of four times adjusted 2019 EBITDA.
- ***Increasing Scope of Eligible Borrowers***: The revised terms sheets for the Main Street Lending Programs modify certain borrower eligibility tests to make more borrowers eligible. They raise the maximum employee cap from 10,000 to 15,000 and the maximum annual revenue cap from $2.5 billion to $5.0 billion.
- ***Clarification on Eligible Borrowers***: Under the additional guidance on eligible borrowers, it appears that U.S. subsidiaries of foreign businesses or U.S. businesses owned by non-U.S. persons can participate in the Main Street Lending Programs.
- ***SBA Affiliation Rules***: When determining the number of employees for purposes of the Main Street Lending Programs, the SBA Affiliation Rules apply. These rules are discussed in prior alerts available here and here.
- ***Decreasing Minimum Loan Size***: Under the MSNLF, minimum loan size has been reduced from $1 million to $500,000. Similarly, the newly created MSPLF will require only a minimum of $500,000 to be borrowed.
- ***Increasing Maximum Loan Size in MSELF***: The minimum borrowable amount required under the MSELF has been increased to $10 million from $1 million. The maximum amount borrowable under the MSELF has been increased to the lesser of (a) $200 million *that is pari passu in priority and equivalent in security with the MSELF loan* (increased from

$150 million), (b) 35% of outstanding and undrawn available debt (increased from 30% and adding the priority and security requirements), or (c) six times 2019 adjusted EBITDA (unchanged from previous guidance).

- ***No "Specific Support"***: Similar to other Federal Reserve programs, all three Main Street Lending Programs now require that the borrower "has not received specific support pursuant to the [*CARES* Act]." Accompanying guidance clarified that "specific support" does not include participation in the Paycheck Protection Program, but it does include support pursuant to Section 4003(b)(1)-(3) of the *CARES Act*, which provides funding to specific industries—namely, passenger and cargo air carriers and businesses critical to national security.
- ***Prior Existence***: Eligible borrowers must have existed prior to March 13, 2020, and not be "ineligible business[es]."[1]

The following requirements, although substantively unchanged from April 9 guidance, will apply to all three Main Street Lending Programs:

- ***Only One Program May Be Selected***: As required under previous guidance, borrowers may only participate in one Main Street Lending Program **or** the Primary Market Corporate Credit Facility ("PMCCF"). Borrowers may not participate in both a Main Street Lending Program and the PMCCF.
- ***Compensation, Dividend, and Buy-Back Restrictions Apply***: Compensation, stock repurchase, and capital distribution restrictions under Section 4003(c)(3)(A)(ii) of the *CARES Act* continue to apply.
- ***No Forgiveness***: Loans remain unforgivable.
- ***Program Size***: The overall aggregate size of the Main Street Lending Programs remains unchanged at $600 billion.
- ***Application Process***: There will be an application process run by lenders. The guidance instructs potential borrowers to contact lenders to see if the lender plans to participate in the Main Street Lending Programs and to request additional information. The official launch date of the Main Street Lending Programs, however, has not yet been announced.

The chart below details changes to key terms under the MSNLF and MSELF, as well as the features of the MSPLF.

Main Street Lending Programs					
	MSNLF		**MSELF**		**MSPLF**
Version	*Old Terms (April 9)*[2]	New Terms (April 30)[3]	*Old Terms (April 9)*[4]	New Terms (April 30)[5]	New Program (April 30)[6]
Revenue Cap	*$2.5 billion*	Either $5 billion or	*$2.5 billion*	Either $5 billion or	Either $5 billion or

Employee Cap	*10,000*	15,000 employees[7]	*10,000*	15,000 employees[8]	15,000 employees
Term	*4 years*	4 years	*4 years*	4 years	4 years
Minimum Loan Size	*$1,000,000*	$500,000	*$1,000,000*	$10,000,000	$500,000
Maximum Loan Size	*Lesser of $25M or 4x 2019 adjusted EBITDA*	Lesser of $25M or 4x 2019 adjusted EBITDA	*Lesser of $150M, 30% of outstanding and undrawn available debt, or 6x 2019 adjusted EBITDA*	Lesser of $200M, 35% of outstanding and undrawn available debt that is pari passu with other debt and equivalent in secured status, or 6x 2019 adjusted EBITDA	Lesser of $25M or 6x 2019 adjusted EBITDA
Risk Retention	*5%*	5%	*5%*	5%	15%
Payment (year one deferred for all)	*Post-Year 1 unspecified*	Years 2-4: 33.33% each year	*Post-Year 1 unspecified*	Years 2-4: 15%, 15%, 70%	Years 2-4: 15%, 15%, 70%
Rate	*Secured Overnight Financing Rate ("SOFR") + 250–400 basis points*	LIBOR + 3%	*Secured Overnight Financing Rate ("SOFR") + 250–400 basis points*	LIBOR + 3	LIBOR + 3%

<u>Main Street Priority Loan Facility</u>

The new MSPLF is similar in concept and terms to the MSNLF and MSELF. As noted above, it is an additional avenue of relief for certain higher-leveraged borrowers. Differences from the MSNLF include:

- **Lender Participation**: Under the MSNLF and MSELF, the Special Purchase Vehicle ("SPV"), which the Federal Reserve and Treasury will capitalize, will purchase 95% of the interest in MSNLF and MSELF loans. Under the MSPLF, however, the SPV will purchase only 85%, and require lenders to retain the remaining 15%;
- **Loan Size Calculation**: The maximum loan size under the MSPLF is capped at the lesser of $25 million and six times adjusted 2019 EBITDA (as compared to the lesser of $25 million or four times adjusted 2019 EBITDA under the MSNLF);
- **Loan Amortization**: Rather than the standard one-third amortization rate for years two through four under the MSNLF, loans under the MSPLF will be amortized at 15% for years two and three, with a final balloon payment of 70% due in year four;
- **Loan Subordination**: MSPLF loans must be senior to or pari passu, both in terms of priority and security, with the other debt instruments of the borrower (excluding mortgage debt). This is the same for an upsized tranche under the MSELF. MSNLF loans, however, must only be senior to or pari passu in terms of priority (but not security) with the other debt instruments of the borrower (inclusive of mortgage debt);
- **Loan Refinancing**: MSPLF loans allow for the borrower to refinance its existing debt at the time of origination of the MSPLF loan, provided that the MSPLF lender is not also the holder of the refinanced debt. Such refinancing is not permitted under the MSNLF.

<u>Main Street New Loan Facility</u>

The key changes to the MSNLF are as follows:

- **Minimum Loan Size Decrease**: Minimum loan size changed from $1 million to $500,000;
- **Additional Guidance on Eligible Businesses**: The guidance clarifies that an eligible business is any of the following: an entity that is 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 (with limited exceptions) a tribal business concern as defined in 15 U.S.C 657a(b)(2)(C);
- **Ineligible Businesses**: A number of businesses are ineligible to participate, including (but not limited to) non-profit businesses, and financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (but pawn shops, although engaged in lending, may qualify in some circumstances);
- **Eligible Lenders**: The additional guidance provides that eligible lenders include a "U.S. branch or agency of a foreign bank," a "U.S. intermediate holding company of a foreign banking organization," or a "U.S. subsidiary of" any entity that otherwise meets the definition of eligible lender; currently, nonbank financial institutions are not considered eligible lenders;
- **Financial Condition Assessment**: Lenders are now expected to conduct an assessment of each potential borrower's financial condition at the time of the potential borrower's application;
- **Solvency Certification**: A borrower must certify that it has a reasonable basis to believe that, as of the date of origination of the 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;

- **Adjusted EBITDA Certification**: Lenders must certify that the methodology used to generate a borrower's 2019 adjusted EBITDA is the same as previously used;
- **LIBOR Pricing:** Pricing for the loans will be based on LIBOR, not SOFR as originally proposed. Guidance explains that this change is intended to facilitate timely originations as lenders continue to prepare to transition from LIBOR to alternative reference rates"; and
- **Retained Interest**: Lenders must retain their 5% portion of the loan until it matures or the SPV sells all of its 95% participation, whichever comes first.

Main Street Expanded Loan Facility

Largely the same new features apply to the MSELF as apply to the MSNLF, including: (i) additional guidance on eligible and ineligible business; (ii) more targeted guidance on eligible lenders; (iii) the financial condition assessment; (iv) additional solvency certifications; (v) the adjusted EBITDA certification; and (vi) LIBOR pricing.

The April 30 guidance also includes some new features unique to the MSELF:

- **Requirements on Loan Being Upsized**: The upsized tranche must be senior to or pari passu with, in terms of priority and security, the borrower's other loans or debt instruments, other than mortgage debt;
- **Additional Loan Requirements**: The upsized tranche must:
  - Be a term loan originated on or before April 24, 2020, and that has a remaining maturity of at least 18 months (taking into account any adjustments made to the maturity of the loan after April 24, 2020, including at the time of upsizing); and
  - Have principal amortization of 15% at the end of the second year, 15% at the end of the third year, and balloon payment of 70% at maturity at the end of the fourth year;
- **Eligible Lender Requirements**: The lender must be one of the lenders that holds an interest in the underlying loan at the date of upsizing. Additionally, the lender must:
  - Retain its 5% portion of the upsized tranche of the loan until the upsized tranche of the loan matures or the SPV sells all of its 95% participation, whichever comes first; and
  - Retain its interest ***in the underlying loan*** until the underlying eligible loan matures, the upsized tranche of the eligible loan matures, or the SPV sells all of its 95% participation, whichever comes first.

Conclusion

Despite some broadening at the margins, the Federal Reserve's actions do not transform the fundamental nature of the Main Street Lending Programs. The requirements of a financial assessment of the borrower, and solvency and adjusted EBITDA certifications, will focus the Programs on firms that have not incurred very significant amounts of leverage. Borrowers will also be required to comply with the *CARES Act* restrictions on stock repurchases and dividends, and the statute's executive compensation limitations. We will continue to monitor developments with respect to these Programs, including when additional guidance on the application process for the Main Street Lending Programs is released.

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[1] For more information regarding the PPP and "ineligible business" standard, please see 13 CFR 120.110(b)-(j) and (m)-(s) and our discussion of the implementing regulations of the PPP, available at https://www.gibsondunn.com/analysis-of-small-business-administration-memorandum-on-affiliation-rules-and-faqs-on-paycheck-protection-program/.

[2] MSNLF (April 9): https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a7.pdf

[3] MSNLF (April 30): https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200430a1.pdf

[4] MSELF (April 9): https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a4.pdf

[5] MSELF (April 30): https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200430a3.pdf

[6] MSPLF (April 30): https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200430a2.pdf

[7] Borrower only needs to satisfy the revenue or employee test, but not both as previously required under April 9 guidance.

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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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