

Main Street Loan Facility Program Under the CARES Act in Wake of COVID-19's Economic Consequences

April 14, 2020
(revised May 5, 2020)

On April 9, 2020, the Federal Reserve Board established the Main Street Lending Program as authorized under Section 13(3) of Federal Reserve Act, to enhance support for small and mid-sized businesses that were in good financial standing before the crisis and were unable to access the CARES Act U.S. Small Business Administration (SBA) Payroll Protection Program (“PPP”) (or that require additional financial support after receiving a PPP loan), by offering four-year loans to companies employing up to 15,000 employees or with revenues of less than \$5 billion. On that date, the U.S. Department of the Treasury and Federal Reserve Board announced that the Department of the Treasury will make a \$75 billion equity investment in a special-purpose vehicle (the “**Main Street SPV**”) to be established by the Federal Reserve Board out of the \$454 billion allocated by The Coronavirus Aid, Relief, and Economic Security Act (the “**CARES Act**”) for support of Federal Reserve Board credit facilities. This is one of several initiatives aimed at promoting maximum employment and stabilizing the U.S. economy during the COVID-19 pandemic. The Federal Reserve Bank of Boston will commit to lend to the Main Street SPV on a recourse basis, providing leverage that is expected to result in up to \$600 billion in new or expanded bank loans to eligible borrowers, using funds appropriated to the Exchange Stabilization Fund under CARES Act section 4027. The Main Street SPV will support three separate lending facilities:

- **MSNLF (New)**. The Main Street New Loan Facility (“**MSNLF**”), which will cover eligible secured or unsecured term loans ranging from \$500,000 to \$25 million (and not more than 4x adjusted earnings before interest, taxes, depreciation and amortization (“**EBITDA**”)), originated on or after April 24, 2020.
- **MSPLF (Priority)**. The Main Street Priority Loan Facility (“**MSPLF**”) which allows a borrower to refinance existing debt owed to a different lender at origination time, and covers eligible secured or unsecured loans ranging from \$500,000 to \$25 million (and not more than 6x adjusted EBITDA), originated prior to April 24, 2020 (with the lender keeping a 15% participation instead of 5%).

- **MSELF (Expanded)**. The Main Street Expanded Loan Facility (“**MSELF**”) which will provide availability for secured or unsecured loan tranches ranging from \$10 million to \$200 million (and not more than 6x adjusted EBITDA and meeting other conditions), upsized on or after April 24, 2020 at par value, as to eligible term loans or revolving credit facilities originated prior to April 24, 2020 and that have a remaining maturity of at least 18 months (taking into account any adjustments made to the loan maturity after April 24, 2020, including at upsizing time), with the upsized tranche being a term loan (and an upsized tranche must be secured if the underlying loan is secured).

A borrower may only participate in one of the Main Street facilities, but may receive more than one loan under a single Main Street facility, so long as the sum of MSNLF loans or MSPLF loans does not exceed \$25 million and the sum of MSELF upsized tranches does not exceed \$200 million.

The Main Street SPV will purchase at par value a 95% participation in the MSNLF and MSELF loans (and 85% participation in the MSPLF loans) in efforts to encourage lending under such facilities by eligible financial institutions, leaving banks with a 5% share (or a 15% share for the MSPLF loans)¹. Apart from the program’s size and time limitations, there is no limit on the amount of participations the Main Street SPV can purchase from a single eligible lender.

The Main Street facilities are separate from the SBA’s PPP and Economic Injury Disaster Loans (EIDL). The Main Street SPV and the lender will share risk in the loan or upsized tranche on a pari passu basis. The sale to the Main Street SPV of a loan or upsized tranche participation will be structured as a “true sale” and must be completed expeditiously after the loan origination or upsizing. In the case of an MSELF, the lender must be one of the lenders that holds an interest in the underlying loan at the upsizing date. Each of the Main Street facilities has various eligibility standards, and the three facilities are described further below.

I. Eligible Lenders

A lender eligible to extend Main Street facility loans includes a U.S. federally insured depository institution (including a bank, savings association and credit union), a U.S. branch or agency of a foreign bank, a U.S. bank holding company, a U.S. intermediate holding company of a foreign banking organization, a U.S. savings and loan holding company and a U.S. subsidiary of any of the foregoing. Non-bank financial institutions (e.g., PayPal) are not considered eligible lenders, but the Federal Reserve is considering options to expand the list in the future.

¹ A MSNLF or MSPLF lender must retain its 5% of the loan until it matures or the Main Street SPV sells all of its participation (whichever comes first); and a MSELF lender must retain its 5% of the upsized tranche until the underlying loan or upsized tranche matures or the Main Street SPV sells all of its participation (whichever comes first).

II. Eligible Borrowers

A “business”² that was established before March 13, 2020 with (a) up to 15,000 employees (without regard to revenues) OR (b) up to \$5 billion in 2019 annual revenues (without regard to numbers of employees)³, in each case that also satisfies the following requirements, is eligible to receive loans under one of the Main Street facilities:

- it was created or organized in the U.S. (or its territories or possessions, or be an Indian tribal government) or under U.S. laws with significant operations in (and a majority of its employees based in) the U.S.;
- it was in good financial standing pre-pandemic (i.e., not a debtor in bankruptcy proceedings);
- it has not received specific support in the form of loans or loan guarantees under the CARES Act (but the business (or its affiliates) can have procured a PPP loan); and
- is not an “Ineligible Business” (see Exhibit A for a description and list).

Annual revenues will be determined with reference to either generally accepted accounting principles (GAAP)-based audited financial statements or annual receipts as reported to the Internal Revenue Service (with “receipts” having the meaning used by the SBA in [13 CFR 121.104\(a\)](#)); and a business must aggregate its revenues with those of its affiliates. If a potential borrower (or its affiliate) does not yet have audited financial statements or annual receipts for 2019, the borrower (or such affiliate) should use its most recent audited financial statements or annual receipts.

An eligible borrower may only participate in one of the three Main Street facilities; and a borrower’s Main Street facility participation will preclude participation in the Federal Reserve Board’s Primary Market Corporate Credit Facility, established March 23, 2020 to support credit to large employers for new bonds and loan issuances.

Non-profit organizations also are not currently eligible under the Main Street lending since EBITDA is the key required underwriting metric and non-profit credit risk is generally not evaluated on the basis of EBITDA; but the Federal Reserve and Treasury Department will be evaluating the feasibility of adjusting the borrower eligibility criteria and loan eligibility metrics of the Main Street program for such organizations.

² A business is defined as a for-profit corporation, partnership, limited liability company, association, trust, cooperative, certain tribal business concerns, or joint venture with no more than 49% participation by foreign business entities. The Federal Reserve may consider other forms of organization for inclusion as a business under the facility.

³ To determine numbers of employees has, a business should follow the framework set out in the SBA regulation at 13 CFR 121.106, and count as employees all full-time, part-time, seasonal or otherwise employed persons (excluding volunteers and independent contractors). The business should use the average of the total number of persons employed by the borrower and affiliates for each pay period over the 12 months prior to the loan’s origination or upsizing. To determine employees or 2019 revenues, the business’s employees and revenues must be aggregated with those of its affiliated entities, in accordance with the affiliation test set forth in 13 CFR 121.301(f) (1/1/2019 ed.).

III. Loan Terms

Main Street facility loans to eligible borrowers will be subject to the following terms, as set forth in term sheets issued by the Federal Reserve Board on April 9, 2020 (and updated April 30, 2020) for the MSNLF and MSELF and a term sheet for the MSPLF issued by the Federal Reserve Board on April 30, 2020:

- Term, Interest, Payment and Prepayment; No Forgiveness. Minimum four-year maturity period, one-year deferral of principal and interest (with unpaid interest being capitalized); penalty-free prepayment; and an adjustable interest rate equal to LIBOR (1 or 3 month)⁴ plus 300 basis points, with the loans not being forgivable.
- Minimum Amount. Loans will have a minimum original principal loan amount equal to:
 - as to an MSNLF and MSPLF loan, \$500,000 minimum; and
 - as to an MSELF loan, a \$10 million minimum tranche.
- Maximum Amount. Loans will have a maximum original principal loan amount equal to:
 - as to an MSNLF or MSPLF, the lesser of (i) \$25 million and (ii) an amount that (when taken together with existing outstanding and committed but undrawn debt⁵) does not exceed 4x (MSNLF) or 6x (MSPLF) adjusted 2019 EBITDA; and
 - as to an MSELF, the lesser of (i) \$200 million, (ii) 35% of the borrower's existing outstanding and undrawn available debt that is pari passu in priority with the MSELF and equivalent in secured status (i.e., secured or unsecured) and (iii) an amount that (when added to existing outstanding and undrawn available debt) does not exceed 6x adjusted 2019 EBITDA.⁶
- Amortization. Amortization of principal (includes capitalized interest) will be:
 - as to an MSNLF loan, 1/3 principal amortization at the end of each of the second, third and fourth years; and
 - as to an MSPLF and MSELF loan, 15% at the end of each of the second and third years and a 70% balloon payment at the end of the fourth year.

⁴ The Federal Reserve changed to a LIBOR standard after receiving feedback that LIBOR remains the most common base rate used in business lending (even though firms cannot rely on LIBOR being published after 2021). The FAQs indicate that (consistent with the Alternative Reference Rates Committee recommendations) lenders and borrowers should include fallback contract language to be used if LIBOR becomes unavailable during the loan term.

⁵ The FAQs indicate that "existing outstanding and undrawn available debt" (calculated as of the application date) includes amounts borrowed under any loan facility, 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; and includes unused commitments under any loan facility, excluding any undrawn commitment that (1) serves as a backup line for commercial paper issuance, (2) is used to finance receivables (including seasonal financing of inventory), (3) cannot be drawn without additional collateral or (4) is no longer available due to change in circumstance.

⁶ The lender's methodology used to calculate adjusted 2019 EBITDA must be the methodology previously used for adjusting EBITDA when extending credit to the borrower or similarly situated borrowers on or before April 24, 2020.

- Priority.
 - Not Subordinated (MSNLF). An MSNLF loan may not be contractually subordinated in priority to any of the borrower's other loans or debt instruments, at origination or any time during the term (i.e., it may not be junior in priority in bankruptcy to the borrower's other unsecured loans or debt instruments)⁷; and
 - Senior or Pari Passu (MSPLF/MSELF). An MSPLF loan or MSELF tranche must be senior to or pari passu in priority and security with the borrower's other loans or debt instruments (other than mortgage debt) at loan or upsizing time and at all times the loan or tranche is outstanding.

- Collateral. Any collateral securing a MSELF loan (at upsizing time or any subsequent date) must secure the upsized tranche on a pro rata basis (and a lender may require a borrower to pledge additional collateral to secure the tranche as a condition of approval).

- Fees.
 - Origination and Servicing Fees. The borrower must pay:
 - if required by the lender, an origination fee of up to 100 basis points of the loan principal (for a MSNLF or MSPLF borrower) or up to 75 basis points on the upsized loan tranche (for an MSELF borrower); and
 - an annual loan servicing fee of 25 basis points of the MSNLF or MSPLF loan principal or MSELF's upsized tranche.

 - Transaction Fee. The lender must pay the Main Street SPV a transaction fee equal to 100 basis points of the MSNLF or MSPLF loan principal (or 75 basis points of the MSELF tranche amount) at origination or upsizing time (and may pass on this fee to the borrower).

- Risk Rating. If a MSNLF or MSPLF borrower had other loans outstanding with the lender as of December 31, 2019, the loan must have had an internal risk rating equivalent to a "pass" in the Federal Financial Institutions Examination Council's supervisory rating system as of December 31, 2019 (with such risk rating equivalent being required as to all MSELF loans).

Each participating borrower also should make commercially reasonable efforts to maintain its payroll and retain its employees during the time the MSNLF or MSPLF loan (or MSELF upsized tranche) is outstanding (i.e., it should undertake good-faith efforts to maintain payroll and retain employees, in

⁷ This does not prevent: (a) issuance of an MSNLF loan that is (1) a secured loan (including in a second lien or other capacity), whether or not the borrower has an outstanding secured loan of any lien position or maturity, or (2) an unsecured loan, regardless of the term or secured or unsecured status of the borrower's existing debt or (b) the borrower from taking on new secured or unsecured debt after receiving an MSNLF loan, so long as the new debt would not have higher contractual priority in bankruptcy than the MSNLF loan.

light of its capacities, the economic environment, its available resources, and the business need for labor). Borrowers that have already laid-off or furloughed workers as a result of the COVID-19 disruptions are eligible to apply for Main Street loans.

IV. **Borrower Certifications and Covenants**

Prior to receiving an eligible loan, a borrower must make certifications and covenants that it:

- **Repayment Priority.** Will refrain from repaying the principal balance or (or any interest on) any debt unless it has first repaid the loan (or upsized tranche) in full, unless the debt or interest payment is mandatory and due (but the lender may accept regularly scheduled, periodic repayments on a borrower's existing line of credit with the lender, in accordance with the borrower's normal course of business usage for such line of credit)⁸. In addition, will not (a) seek to cancel or reduce any of its committed lines of credit held with the relevant lender or any other lender or (b) repay other debt of equal or lower priority (with the exception of mandatory principal payments) unless it has first repaid in full the Main Street loan or upsized tranche.
- **Ability to Repay.** Has a reasonable basis to believe that, as of the date of loan origination or upsizing and after giving effect to such loan or upsizing, 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.
- **CARES Act Restrictions (Compensation, Stock Repurchase and Distributions).** Will follow compensation, stock repurchase and capital distribution restrictions that apply to direct loan programs under CARES Act Section 4003(c)(3)(A)(ii)⁹, so that it:
 - will not, for the loan term plus one year after repayment:
 - repurchase its equity security (if listed on a national securities exchange during the loan term) or purchase any parent company security (except as required under contractual obligations that existed as of March 27, 2020); or
 - pay common stock dividends or make other capital distributions as to its stock (except that an S corporation or other tax pass-through entity borrower may pay

⁸ The FAQs indicate that these covenants would not prohibit a borrower from undertaking any of the following actions during the loan or tranche term: (a) repaying a line of credit (including a credit card) in accordance with normal course of business usage for the line of credit; (b) taking on and paying additional debt obligations required in the normal course of business and on standard terms (including inventory and equipment financing) so long as 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 loan or upsized tranche; or (c) refinancing maturing debt.

⁹ CARES Act Section 4003(c)(3)(A)(ii)(I) relates to share repurchases, Section 4003(c)(3)(A)(ii)(II) relates to dividends and distributions, and Section 4003(c)(3)(A)(ii)(III) imposes compensation restrictions under Section 4004.

dividends and make other distributions to the extent reasonably required to cover its owners' tax obligations in respect of the borrower's earnings); and

- will comply with CARES Act Section 4004's executive compensation limitations, so that:
 - none of its officers or employees with total calendar 2019 compensation over \$425,000 (other than pursuant to a collective bargaining agreement entered into prior to March 1, 2020) may receive:
 - an increase in annual compensation during any 12-consecutive-month period above their calendar 2019 compensation; or
 - severance pay or other termination benefits in excess of two times their total calendar 2019 compensation; and
 - none of its officers or employees with total compensation in calendar 2019 over \$3 million may receive total compensation¹⁰ during any 12- consecutive-month period in excess of \$3 million plus 50% of the amount by which the calendar 2019 total compensation exceeded \$3 million.
- Eligibility. Is eligible to participate in the facility, including in light of the CARES Act Section 4019(b) conflicts of interest prohibition (which generally prohibits loan participation by certain members of the U.S. Presidential administration, Congress, their families and entities they control).

A borrower also may be required to comply with additional CARES Act restrictions (namely (a) remaining neutral in union-organizing efforts throughout the loan term and (b) not outsourcing or offshoring jobs (or abrogating existing collective bargaining agreements) during the loan term plus two years after repayment), although the April 30, 2020 term sheets and FAQs did not address whether the foregoing restrictions apply to the Main Street programs.

A lender (a) is expected to conduct an assessment of each potential borrower's financial condition at application time and (b) may rely on a borrower's certifications and covenants (as well as any subsequent borrower self-reporting). A lender is not expected to independently verify the borrower's certifications or actively monitor ongoing covenant compliance; but if a lender becomes aware that a borrower made a material misstatement or otherwise breached a loan covenant during the loan term, the lender should notify the Federal Reserve Bank of Boston.

¹⁰ Total compensation includes salary, bonuses, stock awards and other financial benefits.

V. Lender Certifications and Covenants

An eligible lender must make certifications and covenants to participate in a Main Street loan facility program, including that:

- it will not:
 - cancel or reduce any existing committed lines of credit to the borrower except in an event of default¹¹; and
 - request that the borrower repay debt extended by the lender to the borrower (or pay interest on such outstanding obligations) until the MSNLF/MSPLF loan or MSELF upsized tranche is repaid in full, unless the debt or interest payment is mandatory and due (or in the case of default and acceleration);
- the methodology used for calculating the borrower's adjusted 2019 EBITDA for the leverage requirement is the methodology it has previously used for adjusting EBITDA when extending credit to the borrower or similarly situated borrowers on or before April 24, 2020 (or in the case of a MSELF borrower, when originating or amending the loan on or before April 24, 2020); and
- it is eligible to participate in the Main Street facility, including in light of the CARES Act Section 4019(b) conflicts of interest prohibition (which generally prohibits loan participation by certain members of the U.S. Presidential administration, Congress, their families and entities they control).

VI. Application Mechanics, Guidance and Changes

To obtain a loan under the program, an eligible borrower must submit an application and any other documentation required by an eligible lender. An eligible borrower should contact an eligible lender for more information on whether the lender plans to participate, and to request more information on the application process.

The term sheets also indicate that the Board of Governors of the Federal Reserve System and Treasury Secretary may adjust the term sheets' terms and conditions by announcing the changes on the Board's website. The Board also intends to make available on its website further information regarding credit administration and loan servicing,

Updates regarding the program (including the official launch date and the time and date at which the Main Street SPV will begin purchasing loan participations) will be made available on the Board's Main Street website at: <https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm>.

¹¹ The FAQ's clarify that there is no prohibition on 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.

VII. Public Disclosure

The Federal Reserve indicated in late April 2020 that it plans to disclose monthly the names of borrowers and lenders, loan amounts and interest rates (and overall costs, revenues and other fees) from this loan facility program. It expects to report weekly as to program balance sheet items on its published H.4.1 statistical release titled "Factors Affecting Reserve Balances of Depository Institutions and Condition Statement of Federal Reserve Banks". In addition, it will disclose to Congress information pursuant to Section 13(3) of the Federal Reserve Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the Board's Regulation A. Under Federal Reserve Act section 11(s) section 11(s), the Federal Reserve also will disclose information concerning the facilities one year after the effective date of the Board's termination of the facilities' authorization (which disclosure will include names and identifying details of each facility participant, the amount borrowed, the interest rate or discount paid, and information concerning the types and amounts of collateral pledged or assets transferred in connection with participation).

VIII. Program Expires September 30, 2020

Main Street facility loans availability will end September 30, 2020, subject to any extension agreed upon by the Treasury Department and Federal Reserve Board. The Reserve Bank will continue to fund the Main Street SPV after September 30, 2020 until the Main Street SPV's underlying assets mature or are sold.

Because eligible loans may be fully subscribed prior to September 30, 2020, however, and in light of the April 2020 and May 2020 over-subscriptions to the CARES Act SBA loan programs, a small and medium-sized business that wishes to take advantage of a Main Street facility should discuss this program with its bank (and should consider reaching out to additional banks) and moving quickly to submit its loan application when available (expected imminently in May 2020).

Consult Your Advisor

If you think that your business might qualify for one of the Main Street loans described above, in light of the filing deadline and possible over-subscription (and the likelihood that loan processing may involve long lead times), we recommend starting the application process as soon as practicable.

Robinson Brog is working with its clients to address various coronavirus-related matters in the employment, benefits, litigation, bankruptcy, estate planning, tax and corporate/commercial arenas. For advice regarding the impact of the coronavirus pandemic on you, your business or your matter, please do not hesitate to reach out to your primary Robinson Brog contact. If you have any questions regarding this alert, please contact one of the authors below or the other attorneys on the COVID-19 coronavirus response team or the Robinson Brog attorney with whom you regularly work.

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Exhibit A
Ineligible Businesses

An “Ineligible Business” includes a business listed in 13 CFR 120.110(b)-(j)¹², (m)-(s), as modified and clarified by SBA regulations established by CARES Act Section 1102) on or before April 24, 2020), specifically:

- (b) Financial. A financial business primarily engaged in the business of lending, such as banks, finance companies and factors (pawn shops may qualify in some circumstances);
- (c) Developers/Landlords. A passive business owned by a developer and /or landlord that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under §120.111);
- (d) Life Insurance. A life insurance company;
- (e) Foreign. A business located in a foreign country (a business in the U.S. owned by aliens may qualify);
- (f) Pyramid. A pyramid sale distribution plan;
- (g) Gambling. A business deriving more than 1/3 of gross annual revenue from legal gambling activities;
- (h) Illegal Activities. A business engaged in any illegal activity;
- (i) Private Club. A private club or business that limits the number of memberships for reasons other than capacity;
- (j) Government. A government-owned entity (except for businesses owned or controlled by a Native American tribe);

- (m) Loan Packager. A loan packager earning more than 1/3 of its gross annual revenue from packaging SBA loans;
- (n) Criminal Past. A business with an “Associate” who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude;
- (o) Lender-Owned Business. A business in which the Lender or CDC, or any of its Associates owns an equity interest;
- (p) Sex-Trade. A business that (1) presents live performances of a prurient sexual nature; or (2) derives directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;
- (q) Prior Default. Unless waived by SBA for good cause, a business that previously defaulted on a Federal loan or Federally assisted financing, resulting in a federal agency sustaining a loss in any of its programs, and businesses owned or controlled by an applicant or any Associate that previously owned, operated, or controlled a business that defaulted

¹² This means that an item (k) business (principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting) is eligible.

on a Federal loan (or guaranteed a loan that defaulted) and caused a loss (with a compromise agreement being considered a loss);

- (r) Lobbying. A business primarily engaged in political or lobbying activities; and
- (s) Speculation. A speculative business (such as oil wildcatting).

An “Ineligible Business” also includes a business so designed by the PPP rules, including:

- Cannabis. A cannabis business and a business ancillary thereto;
- Gaming (Illegal and Some Legal). A business that received illegal gaming revenue; and some businesses that received legal gaming revenue, with exceptions¹³;
- Hedge Fund. A hedge fund;
- Private Equity. A private equity firm;
- Illegal Activities. A business engaged in any illegal activity under federal, state, or local law;
- Criminal Past. A business with a 20% or greater equity owner that has been convicted of a felony within the last 5 years;
- Prior Default. A business that has previously defaulted on an SBA or other federal loan in the past 7 years causing a loss to the government; or is presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; and
- Household Employer. A household employer (an individual that employs a household employee such as a nanny or housekeeper).

¹³ A business that is otherwise eligible is not rendered ineligible due to its receipt of legal gaming revenues if the existing standard in 13 CFR 120.110(g) is met or legal gaming revenue (net of payouts but not other expenses) did not exceed \$1 million in 2019 **AND** comprised less than 50% of the business's total 2019 revenue..