

Major Updates to Main Street Lending Program

By **Lowell A. Citron** and **Bryan D. LaPlant**

Certain provisions of the coronavirus economic stimulus legislation are subject to the ongoing issuance of government regulations and other government action; thus, certain details regarding the legislation may be clarified, revised, or added.

The initial launch of the Federal Reserve Board's Main Street Lending Program on April 9 left many businesses and lenders scrambling to interpret minimalist guidance. However, the Federal Reserve Board's April 30 update on the Main Street programs put substantially more actionable information into the public domain. In its own words, the Federal Reserve Board revised guidance on the two previously announced programs—the Main Street New Loan Facility (the MSNLF) and the Main Street Expanded Loan Facility (the MSELF)—and announced a new, third program titled the Main Street Priority Loan Facility (the MSPLF and, collectively with the MSNLF and the MSELF, the Main Street Lending Program), to expand the scope and eligibility for the Main Street Lending Program. The Federal Reserve Board's April 30 press release, as well as links to "Frequently Asked Questions" and the latest term sheets for the loan facilities, can be found [here](#).

The updated guidance on the Main Street Lending Program shows clear engagement with feedback from lenders, borrowers, and advocacy organizations participating in the comment period for the Main Street Lending Program (see our prior Client Alert discussing public feedback to initial guidance on the MSNLF and the MSELF, "[The Issues With the Main Street Lending Program](#)"). Program updates provide big wins for borrowers and lenders in the form of, among other things, reducing limitations on borrowers repaying existing indebtedness, using "Adjusted EBITDA" in lieu of "EBITDA" to size loans, permitting tax distributions for pass-through entities, and permitting U.S. branches of foreign banks to participate as eligible lenders.

However, not all commenters will be satisfied by continuing reliance on an EBITDA-based metric, exclusion of nonbank private lenders, and lenders remaining largely without discretion to determine borrower eligibility and loan terms such as amortization and maturity.

Our prior Client Alert, "[Federal Reserve—Initial Launch, Main Street Loan Facilities](#)," provided a comprehensive overview of the initial term sheets for the MSELF and the MSNLF as of April 9, including as to eligibility of borrowers and lenders, loan sizing, required certifications by borrowers and lenders, and limitations on share repurchases, dividends, and executive compensation. The analysis in this Client Alert and article supplements our prior overview by identifying revisions to and new guidance on the MSELF and the MSNLF, as well as how the new MSPLF compares and differs but does not restate entirely provisions which remain unchanged and as covered in our prior Client Alert.

Although we do not yet know when credit will begin to flow under the facilities, this latest round of guidance from the Federal Reserve Board provides an opportunity for potential borrowers and lenders to more fully evaluate their eligibility and interest in the program. In light of the experiences of businesses attempting to access Paycheck Protection Program (PPP) loans—where leveraging existing lending relationships to speed the application process was essential to access the limited pool of capital—we urge interested businesses to approach existing lenders and/or other potential eligible lenders as soon as possible.

New Main Street Lending Program: Main Street Priority Loan Facility

The Federal Reserve Board's April 30 update on the Main Street Lending Program established an entirely new facility—the Main Street Priority

Loan Facility—with increased risk sharing by lenders and intended for borrowers with greater leverage. Just as with the MSELF and the MSNLF, the MSPLF is structured as a Federal Reserve loan to a special purpose vehicle (SPV), which SPV will purchase participations in eligible loans between eligible lenders and eligible borrowers.

The MSPLF is generally on the same terms as the MSNLF (as updated as of April 30, as described below), with the differences described below.

- *Participations*: SPV will purchase 85 percent participations in eligible loans under the MSPLF, with the eligible lender retaining 15 percent exposure to the loan (in contrast to 95 percent participations acquired by the respective SPVs for the MSELF and the MSNLF).
- *Loan Sizing*: Maximum loan size is the lesser of (i) \$25 million or (ii) an amount that, together with borrower's existing outstanding and undrawn available debt, does not exceed six times (6x) borrower's 2019 adjusted EBITDA.
- *Use of proceeds*: At origination, proceeds of the MSPLF loans may be used to refinance existing *indebtedness* of the borrower, so long as the existing indebtedness is with a different lender.
- *Amortization*: Principal amortization is 15 percent at the end of the second year, 15 percent at the end of the third year, and 70 percent at the end of fourth year (at maturity).
- *Security*: Facility loans must be senior to or *pari passu* with, in terms of priority and security, the borrower's other indebtedness (other than mortgage debt).

Updates Applicable to All Main Street Lending Program Facilities

In addition to establishing the MSPLF, the Federal Reserve Board provided on April 30 substantial updates, revisions, and new guidance applicable to all of the facilities under the Main Street Lending Program. The first category of changes detailed below includes efforts to expand the scope and eligibility for the Main Street Lending Program by providing clarity to, and in some cases loosening requirements on, participating lenders.

- *Eligible Lenders*: Under prior guidance, eligible lenders were limited to U.S.-insured depository institutions, U.S. bank holding companies, and U.S. savings and loan holding companies. Under updated guidance, eligible lenders now include, *in*

addition to the previously eligible lenders, U.S. branches or agencies of foreign banks, U.S. intermediate holding companies of foreign banking organizations, federally insured banks, savings associations and credit unions, and U.S. subsidiaries of any of the foregoing categories of eligible lenders. Nonbank financial institutions (e.g., credit funds, other private lenders) remain ineligible, although the Federal Reserve Board notes it is still considering options to further expand the list of eligible lenders.

- *Retained Loan Exposure*: Prior guidance left unanswered whether originating lenders must continue to hold their retained (i.e., non-participated) portion of loans to borrowers. All facilities under the Main Street Lending Program now require lenders to continue to hold their retained portion of the loan (and interest in existing indebtedness being upsized, in the case of the MSELF) until maturity or sale of the participation purchased by the applicable Federal Reserve Bank SPV.
- *Lender Covenants*: Latest guidance on the Main Street Lending Program clarifies previously overbroad limitations on the ability of lenders to call borrower defaults and receive mandatory payments of principal and interest under existing indebtedness. As updated, a lender must only agree to not: (1) request that the borrower repay other debt owing to it, or pay interest, until upsized tranche is repaid in full, **unless the debt or interest payment is mandatory and due**, or in the case of default and acceleration, and (2) cancel or reduce any existing committed lines of credit to borrower, **except in the event of default**
- *Lender Underwriting*: although facility term sheets now expressly state that lenders are "expected" to assess potential borrowers' financial condition at the time of their application, the right of lenders to rely on a borrower's certifications at origination has also been clearly established.

Updated guidance as of April 30 also provides significant additional detail on borrower eligibility requirements.

- *Borrower Business*: Updated guidance specifies that an eligible borrower:

(1) Must be a "Business," now defined expansively to include *for-profit* partnerships, LLCs, corporations, associations, trusts, cooperatives, tribal business concerns, and joint ventures with not more than 49 percent participation by foreign business entities. The Federal Reserve Board notes that nonprofits are

intended beneficiaries of Main Street Lending Program assistance but that it is evaluating a separate approach to meet their unique needs;

(2) Must have 15,000 employees or fewer or 2019 annual revenue of \$5 billion or less. When determining employee headcount and 2019 annual revenue, potential borrowers must include employees and revenue of its affiliates, determined under the Small Business Administration's affiliation rules (consistent with rules used to determine if a potential PPP loan borrower has 500 or less employees when aggregated with affiliates). Employee headcount should be determined as the average of the total number of persons—including all full-time, part-time, seasonal, or otherwise employed persons, but excluding volunteers and independent contractors—employed by borrower and its affiliates over the 12 months prior to origination. 2019 revenues may be determined for a borrower and its affiliates as either annual "revenue" per its 2019 GAAP-audited financial statements or as annual receipts for fiscal 2019 as reported to the Internal Revenue Service;

(3) Must not be an "Ineligible Business," defined as a business that would be ineligible for a PPP loan by virtue of its business activities (i.e., financial businesses, gambling businesses, life insurance companies, loan packagers, private clubs, among others, are ineligible businesses for PPP loan purposes); and

(4) Must not have received other specific CARES Act assistance, other than any PPP loan that is expressly permitted for otherwise eligible borrowers. As under prior guidance, a potential borrower may utilize only one of the facilities under the Main Street Lending Program.

- *Borrower Covenants:* Updated guidance reflects a significantly more permissive stance on borrowers repaying existing indebtedness and acknowledges the need for pass-through entities to make tax distributions. In lieu of the prior unqualified prohibition on using loan proceeds to repay existing indebtedness, borrower businesses must only commit: (1) to refrain from repaying the principal balance of, or paying any interest on, any debt until the facility loan is repaid, **unless the debt or interest payment is mandatory and due**, and (2) to not seek to cancel or reduce any of its committed lines of credit with any lender. The Federal Reserve Board has further

clarified that (i) repaying a line of credit in the normal course of business usage, (ii) incurring and repaying debt obligations required in the normal course of business on standard terms, including inventory and equipment financing (so long as security is only in the newly acquired inventory or equipment and is otherwise not superior in priority or security to the facility loan), and (iii) refinancing maturing debt are, in each case, not prohibited. In addition, the prior flat prohibition on common stock dividends for the term of the loan plus 12 months has been qualified to permit tax distributions for S corporations and other pass-through entities.

- *Borrower Certifications:* Under updated guidance, a participating borrower must additionally certify (in addition to various other certifications detailed in our prior Client Alert) that it has a reasonable basis to believe that, as of origination, it has the ability to meet its financial obligations for at least 90 days and does not expect to file for bankruptcy during that period. Practically speaking, a business that is insolvent or in bankruptcy proceedings may not be a borrower under any of the Main Street Lending Program facilities.
- *Employee Retention:* Under updated guidance, borrowers will be required to undertake "commercially reasonable efforts" during the term of the loan to maintain payroll and retain employees. Further color is provided that (1) a borrower should be undertaking good-faith efforts to maintain payroll and retain employees, in light of its capacities, the economic environment, its available resources, and the business need for labor and (2) a potential borrower will not be disqualified solely on the basis of having already laid-off or furloughed workers as a result of disruptions from COVID-19.

In addition to the updates regarding eligibility of borrowers and lenders and their respective obligations while participating in the Main Street Lending Program, additional terms for eligible loans have been provided.

- *Interest Rate:* Adjustable interest rate of 1 or 3 month LIBOR *plus* 300 basis points, in lieu of the prior formulation of SOFR *plus* 250-400 basis points.
- *Security:* Loans under the Main Street Lending Program facilities may be unsecured or secured. Loans under the MSELF and the MSPLF may be required to be secured to the extent borrower has other existing indebtedness that is secured, in which case loans under the MSLEF and the

MSPLF must be secured and pari passu with such other existing indebtedness (other than mortgage debt). Loans under the MSNLF may be unsecured so long as they are not contractually subordinated to other indebtedness of borrower.

- **Rating:** In the case of the MSELF, a borrower's existing indebtedness being upsized must have an internal risk rating equivalent to a "pass" in the Federal Financial Institutions Examination Council's supervisory rating system as of December 31, 2019. In the case of the MSNLF, any of a

borrower's debt outstanding with an eligible lender as of December 31, 2019, if any, must have an internal risk rating equivalent to a "pass" in the Federal Financial Institutions Examination Council's supervisory rating system as of such date.

In addition to the generally applicable updates, revisions, and new guidance for the Main Street Lending Program, the Federal Reserve Board—largely in response to commenter feedback—has revised various previously provided provisions of the MSELF and MSNLF, as follows:

Provision	MSNLF	MSELF
Minimum loan size	\$500,000 (down from \$1 million)	\$1 million
Maximum loan size¹	Lesser of (i) \$25 million or (ii) an amount that, together with borrower's existing outstanding and undrawn available debt, does not exceed four times (4x) borrower's 2019 adjusted EBITDA	Lesser of (i) \$200 million, (ii) 35% of borrower's existing outstanding and undrawn available debt that is pari passu and has equivalent security status to upsized tranche, or (iii) an amount that, together with borrower's existing outstanding and undrawn available debt, does not exceed six times (6x) borrower's 2019 adjusted EBITDA
Adjusted EBITDA	Lender must certify that borrower's adjusted EBITDA, as used to determine maximum loan size, has been calculated using the same methodology as lender previously used for adjusting EBITDA when extending credit to the borrower or similarly situated borrowers on or before April 24, 2020	ender must certify that borrower's adjusted EBITDA, as used to determine maximum loan size, has been calculated using the same methodology as lender previously used for adjusting EBITDA when originating or amending the borrower's existing indebtedness on or before April 24, 2020
Principal Amortization	One-third (1/3) at the end of second year, one-third (1/3) at the end of third year, and one-third (1/3) at the end of fourth year at maturity	Fifteen percent at the end of second year, 15 percent at the end of third year, and 70 percent at the end of fourth year at maturity
Loans Eligible for Upsize (MSELF)	n/a	Lenders may provide upsized tranche, which upsized tranche must be a term loan, as an upsized term loan or a revolving credit facility (previously, upsized was permitted solely on existing term loans), so long as the existing indebtedness being upsized has a remaining maturity of at least 18 months (including as a result of any amendment at the time of borrowing the upsized tranche)

Closing Thoughts

The Federal Reserve Board has said publicly that it is working to create the infrastructure necessary to operationalize the Main Street Lending Program. Although this latest guidance provides significantly more detail on what an operational Main Street Lending Program will look like, key details such as participation terms, credit administration, and loan servicing remain absent. This latest guidance is also likely to spark a new round of comments from lenders, businesses, and advocacy organizations looking to increase accessibility for their constituents. Further, the Federal Reserve Board has noted that it is continuing to consider how to extend credit to nonprofits, add additional categories of eligible lenders (e.g. private lenders), and provide non-EBITDA metrics as eligibility criteria for certain borrowers (e.g., nonprofits and asset-based borrowers).

While we expect that a fully operational Main Street Lending Program remains weeks away at a minimum, we continue to advise businesses that may be eligible and that may be able to abide facility limitations on repaying other indebtedness, dividends, share repurchases, and executive compensation, among others, to preserve their optionality and the ability to apply at the front of a potentially very long line by reaching out to potential lenders in the near term. We are continuing to monitor and review the latest information and steps taken to operationalize the Main Street Lending Program, and we stand ready to assist clients looking for additional guidance.

To see our other material related to the pandemic, please visit the [Coronavirus/COVID-19: Facts, Insights & Resources](#) page of our website by clicking [here](#).

¹ Determination of borrower's "existing outstanding and undrawn available debt" clarified as consisting of existing secured or unsecured loans, together with unused commitments but only to the extent unused commitments are practically available to be drawn at the time of loan application without the posting of additional collateral or other consents/amendments.

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

LOWELL A. CITRON

Partner

Chair, Debt Financing

T: 646.414.6819

lcitron@lowenstein.com

BRYAN D. LAPLANT

Counsel

T: 646.414.6884

blaplant@lowenstein.com

NEW YORK

PALO ALTO

NEW JERSEY

UTAH

WASHINGTON, D.C.

This Alert has been prepared by Lowenstein Sandler LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. Lowenstein Sandler assumes no responsibility to update the Alert based upon events subsequent to the date of its publication, such as new legislation, regulations and judicial decisions. You should consult with counsel to determine applicable legal requirements in a specific fact situation. Attorney Advertising.