Financial Institutions Regulation Group

Client Alert

"Exile on Main St.":[1] The Federal Reserve Substantially Expands the Main Street Lending Program

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On April 30, 2020, the Board of Governors of the Federal Reserve System (the "Federal Reserve") issued a press release announcing substantially expanded terms for the two facilities that it had previously announced under the Main Street Lending Program ("MSLP"), as well as terms for an additional facility under the MSLP umbrella.[2] For a description of the previous terms of the MSLP facilities, please see our prior client alerts The Federal Reserve Issues the Main Street New Loan Facility and the Main Street Expanded Loan Facility and A Review of the Municipal Liquidity Facility.

The new MSLP now consists of three separate lending programs: (i) the Main Street New Loan Facility ("MSNLF"), (ii) a newly announced Main Street Priority Loan Facility ("MSPLF"), and (iii) the Main Street Expanded Loan Facility ("MSELF"). The MSLP introduces significant changes to the prior term sheets for the MSNLF and MSELF.

Below we outline and explain some of these changes.

- The pool of Eligible Borrowers is expanded to entities with 15,000 employees or fewer or with 2019 annual revenues of $5 billion or less.[3]
  - Unlike the prior term sheets, the new term sheets provide that employee and revenue counts must be calculated by reference to the Small Business Administration's ("SBA") affiliation rules under 13 C.F.R. 121.301(f) (1/1/2019 ed.). The new term sheets also exclude any "Ineligible Business," as defined under the SBA regulations at 13 C.F.R. 120.110(b)-(j) and (m)-(s).
  - The prior terms sheets were limited to entities with 10,000 employees or fewer and had 2019 annual revenues of $2.5 billion or less.
  - Not-for-profits, which do not measure EBITDA, may be eligible to participate in the future.
- The minimum loan size of the MSNLF and the MSPLF is now set at $500,000.
  - This will allow for a broader class of smaller borrowers to participate.

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[1] *Exile on Main St.*, the Rolling Stones (Rolling Stones Records), May 12, 1972.

[2] *See* https://www.federalreserve.gov/newsevents/pressreleases/monetary20200430a.htm.

[3] As is the case under the prior term sheets, Eligible Borrowers must 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. The definition of Eligible Borrower is shared across the three MSLP facilities.

- The minimum loan size of the MSELF remains at $10 million.

- Use of proceeds
  - The MSLF and the MSELF each restrict each Eligible Borrower from using the proceeds of a MSLP loan to repay existing debt except for debt or interest payments that are mandatory and due.
  - The MSPLF, however, permits at the time the Eligible Loan is made the Eligible Borrower to finance existing debt owed to a lender other than an Eligible Lender.
    - This provision should allow portfolio companies of private equity sponsors to use the MSPLF to repay debt.
- Inclusion of Foreign Banks as Eligible Lenders
  - Each facility now includes as Eligible Lenders[4] branches and agencies of foreign banks, as well as foreign bank intermediate holding companies.
- Leverage
  - The new MSPLF allows for a size of an Eligible Loan that will not exceed six times the Eligible Borrower's adjusted 2019 EBIDTA, subject to a higher retention requirement imposed upon the Eligible Lender, as discussed below. The MSNLF restricts loans to a four times EBIDTA.
- Retention of by Eligible Lender of loan interest
  - The MSNLF and the MSELF each require an Eligible Lender to retain a five percent participation in each Eligible Loan.
  - The MSPLF requires an Eligible Lender to retain a 15 percent participation in each Eligible Loan.
    - This expanded retention requirement is intended to help the SPV hedge against the increased risk of the more highly-leveraged participations acquired by the SPV under the MSPLF.
  - Each Eligible Lender must retain the participation until it matures or the SPV sells all of its participation, and the sale of the participation to the SPV will be structured as a true sale.
    - There is no restriction on the Eligible Lender hedging the risk of the participation retained.
- LIBOR for SOFR
  - The Federal Reserve responded to industry requests to replace SOFR with LIBOR for the MSLP. While SOFR will be introduced by the end of 2021, use of it in these facilities would have delayed introduction of the facilities.
- Other government support
  - The MSLP makes clear that an Eligible Borrower must choose between one of the three MSLP facilities or the Primary Market Corporate Credit Facility, and that companies that received or will receive direct support pursuant to section 4003(b)(1)-(3) of the CARES Act are ineligible under the MSLP.
    - However, an Eligible Borrower may choose one of the above and also take part in the SBA PPP program to the extent eligible.

[4] The definition of Eligible Lenders is shared across the three MSLP facilities, and is now defined to include a U.S. federally insured depository institution, a U.S. branch or agency of a foreign bank, a U.S. bank holding company, a U.S. savings and loan holding company, a U.S. intermediate holding company of a foreign banking organization, or a U.S. subsidiary of any of the foregoing.

- EBITDA
  - The MSLP now requires that the methodology used by an Eligible Lender to review whether a borrower is an Eligible Borrower must be the same methodology used for calculating EBITDA when extending credit to the borrower (or similarly situated borrowers) prior to April 24, 2020.
    - Each Eligible Lender will be required to certify the above EBITDA methodology qualifies.
  - EBITDA is the key underwriting metric required for the MSNLF, MSPLF, and MSELF. The Federal Reserve notes that the credit risk of asset-based borrowers, as a matter of practice, is generally not evaluated on the basis of EBITDA. The Federal Reserve and the Treasury Department will be evaluating the feasibility of adjusting the loan eligibility metrics of the MSLP for such borrowers.
- Not insolvent covenant under the MSLP
  - Each Eligible Borrower must certify that, after given effect to the Eligible Loan, it has a reasonable basis to believe that it can meet its financial obligations over the following 90 days, and that it does not expect to file for bankruptcy during that period.
- Employee retention
  - Each Eligible Borrower must make "commercially reasonable efforts" to "maintain its payroll and retain its employees" while an Eligible Loan is outstanding.
  - The Federal Reserve released a Q&A[5] with the new terms sheets in which it is made clear that Eligible Borrowers must make "good faith" efforts to do the above, "in light of its capacities, the economic environment, its available resources, and the business need for labor." Borrowers that have already furloughed or laid off workers *can* be Eligible Borrowers.
- MSELF definition of Eligible Lender
  - The MSELF now confirms that only the new loan must be from an Eligible Lender; the existing tranches may contain other, non-Eligible Lenders.
- The Federal Reserve Bank of Boston will administer the MSLP, and all three MSLP facilities will share a common SPV. Further details on how entities should apply and when purchases will be made should be forthcoming over the next few weeks.

[5] The Q&A is available at https://www.federalreserve.gov/monetarypolicy/files/main-street-lending-faqs.pdf.

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