

The Federal Reserve Releases Additional Guidance, Terms, Conditions and Agreement Forms and Expands the Program to Allow for Broader Borrower Participation

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In preparation for the imminent launch of the Main Street Lending Program, the Federal Reserve (through the Federal Reserve Bank of Boston, which is implementing the program) issued updates on May 27, 2020 to the [Frequently Asked Questions document](#) (“**FAQ**”), originally published on April 30, 2020 and also provided additional guidance and form legal documents. Further revisions to the Main Street Lending Program, expanding it to allow more small and medium sized businesses to be able to receive support, were subsequently provided in a Press Release from the Federal Reserve Board dated June 8, 2020. The Main Street Lending Program is the small to mid-size business loan program established by the Federal Reserve and funded, in part, pursuant to the Coronavirus Aid, Relief, and Economic Security (“**CARES**”) Act signed by President Trump on March 27, 2020.

The Main Street Lending Program is comprised of three facilities that, in the aggregate, may originate up to \$600 billion in loans. The facilities include: (i) the Main Street New Loan Facility (“**MSNLF**”), pursuant to which borrowers may request new single-lender loans; (ii) the Main Street Priority Loan Facility (“**MSPLF**”), a loan program that permits borrowers to be more highly leveraged and requires lenders to retain a greater portion of the risk; and (iii) the Main Street Expanded Loan Facility (“**MSELF**”), which is intended to “upsized” existing term loans or revolving credit facilities and may apply to lenders’ interests in syndicated loan facilities. A special purpose vehicle (the “**Main Street SPV**”) established by the Federal Reserve with \$75 billion of committed capital has been created for the purpose of purchasing participation interests in a significant portion of each loan originated under the Main Street Lending Program. The key terms of the Main Street Lending facilities are summarized as follows:

	Main Street New Loan Facility (MSNLF)	Main Street Priority Loan Facility (MSPLF)	Main Street Expanded Loan Facility (MSELF)
Term	5 years	5 years	5 years
Minimum Loan Size	\$250,000	\$250,000	\$10 Million
Maximum Loan Size	Lesser of (i) \$35 MM or (ii) 4x 2019 adjusted EBITDA (taking into account existing undrawn debt)	Lesser of (i) \$50 MM or (ii) 6x 2019 adjusted EBITDA (taking into account existing undrawn debt)	Lesser of (i) \$300MM, (ii) 6x 2019 adjusted EBITDA (taking into account existing undrawn debt)
Eligible Lender Risk Retention	5%	5%	5%
Principal Repayment Schedule (years one and two deferred for all loans)	Years 3 and 4: 15% Year 5: 70%	Years 3 and 4: 15% Year 5: 70%	Years 3 and 4: 15% Year 5: 70%
Interest Repayment Schedule:	Deferred for 1 year	Deferred for 1 year	Deferred for 1 year

Interest Rate	LIBOR + 3%	LIBOR + 3%	LIBOR + 3%
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The latest FAQs and additional guidance released by the Federal Reserve include the following relevant information:

1. **Launch Date.** According to [recent statements](#) by Federal Reserve Chairman Jerome Powell, the Federal Reserve is “days away” from launching the Main Street Lending Program. The Main Street Lending Program will accept loans that were originated under the terms announced on May 27 if funded before June 10, 2020.
2. **Structure and Overview.** Contrary to some prior press reports, the Federal Reserve confirmed in its FAQ that the Main Street Lending Program would be effectuated only through eligible lenders, and no direct loans from the Federal Reserve will occur. The FAQ further confirms that unlike the Paycheck Protection Program (“**PPP**”), the Main Street Lending Program will not contain any form of loan forgiveness (other than reductions in interest, extensions of repayment schedules or similar relief in the event of a restructuring or workout scenario).
3. **Eligible Borrowers.** The FAQ provided additional guidance with respect to the types of borrowers that will be eligible to participate.
 - a. **Date of Creation.** The borrower must be a U.S. business that was formed prior to March 13, 2020.
 - b. **Size of Borrower.** The borrower must have 15,000 employees or fewer or have had 2019 annual revenues of \$5 billion or less.
 - c. **Traditional SBA Rules on Ineligible Businesses Apply.** Ineligible Businesses include those businesses listed in [13 CFR 120.110\(b\)-\(j\), \(m\)-\(s\)](#), as modified and clarified by recent SBA regulations promulgated through April 24, 2020.¹ FAQ E.11 further clarifies that such eligibility restrictions prohibit private equity funds from participating in the Main Street Lending Program (though portfolio companies of such funds may be eligible). Prospective borrowers are required to make a “reasonable, good faith effort” to determine if the business’s activities or ownership would cause it to be classified as an ineligible business.
 - d. **PPP Affiliation Rules Similarly Apply to Main Street Lending Program.** When determining whether a business fits under the 15,000 employee limit or 2019 annual revenue cap of \$5 billion for purposes of eligibility for the Main Street Lending Program, the affiliation rules set forth in [13 CFR 121.301\(f\)](#) and used in determining eligibility under PPP will similarly apply.²
 - e. **International Borrowers.** The CARES Act provided that 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 their employees based in the United States. Sections E.8 and E.9. of the FAQ clarify that borrowers “may be a subsidiary of a foreign company” so long as the borrower meets the aforementioned standard in the CARES Act and the borrower, on a consolidated basis with its

¹ See [85 Fed. Reg. 20811](#), [85 Fed. Reg. 21747](#), and [85 Fed. Reg. 23450](#). Note that Chapter 2, Section III of the [SBA’s Standard Operating Procedure 50 10 5\(k\)](#) contains additional guidance concerning the SBA’s eligibility rules.

² According to the Federal Reserve, “the SBA affiliation exceptions in [13 CFR 121.103\(b\)](#) apply to the Program” including the exception for businesses owned “in whole or substantial part” by a Small Business Investment Company (SBIC). (FAQ E.12, FN 3).

subsidiaries (but not its affiliates or parent companies), “has significant operations in and a majority of its employees based in the United States.”³

- f. Applicability of other CARES Act Requirements. Section A.8 of the FAQ clarifies that several of the provisions in the CARES Act that relate to loan programs for air carriers, businesses engaged in national security (among others) will apply to borrowers under the Main Street Lending Program, including with respect to conflicts of interest, dividends (excluding tax distributions for pass-through entities), stock buybacks, and employee compensation.
- g. Unavailability of Credit. Pursuant to 12 CFR 201.4(d)(8), the Borrower must certify that it is unable to secure adequate credit accommodations from other banking institutions. The Federal Reserve clarifies that this “does not mean that no credit from other sources is available to the borrower”, but rather, that the amount, price, or terms from any available credit sources would be “inadequate for the borrower’s needs during the current unusual and exigent circumstances.” Importantly, the FAQ also clarifies that borrowers are not required to demonstrate denials of credit by other lenders or otherwise document any inadequate loan offers (though such documentation is nevertheless advisable). (FAQ, H.9).
- h. Borrowers May Obtain PPP and Main Street Loans. Businesses receiving PPP loans are also eligible for Main Street Lending Program loans so long as they meet the applicable eligibility criteria. (FAQ E.1).
- i. Affiliated Businesses Can Only Participate in One Facility. According to Section E.10 of the FAQ, an affiliated group of companies can participate in only one Main Street facility and cannot participate in both a Main Street facility and the Primary Market Corporate Credit Facility.
- j. Eligible Lenders May Make MSNLF and MSPLF Loans to New Customers. So long as lenders follow normal policies and procedures, including “know your customer” requirements, they may offer MSNLF loans to new customers. (FAQs B.4, C.4).

4. Eligible Lenders.

- a. Each Lender to Develop Own Loan Documents. Each participating lender should use its own loan documentation to extend Main Street loans, which are required to be “substantially similar, including with respect to required covenants, to the loan documentation that the participating lender uses in its ordinary course lending to similarly situated borrowers”, making only such adjustments that are necessary to reflect the requirements of the Main Street Lending Program’s requirements. (FAQ I.4).
- b. Affiliated Lenders May Participate. According to FAQ I.3, multiple affiliated entities may register as participating lenders under the Main Street Lending Program.

5. Eligible Loan Amounts.

- a. Minimum Loan Sizes. If a borrower’s maximum loan size under a facility’s term sheet test is below the minimum loan size for the same facility (*i.e.*, \$250,000 for MSNLF and MSPLF loans and \$10 million for MSELF loans), borrowers may not participate in the Main Street Lending Program. (FAQ G.10).
- b. Loan Calculation Methodology. For lenders who wish to lend to existing customers, 2019 EBITDA should be calculated by using the methodology previously used between such parties. If the

³ The FAQ further cautions foreign-owned borrowers that “the proceeds of a Main Street loan may not be used for the benefit of a borrower’s foreign parents, affiliates or subsidiaries.” (FAQ E.9).

borrower is a new customer, participating lenders should use the methodology used for similarly situated borrowers on or before April 24, 2020 (or if multiple methods have been used, the most conservative one). (FAQ G.13).

6. Loan Priority and Security.

- a. MSNLF Loans. An MSNLF Loan, at the time of origination or at any time during its term, may not be contractually subordinated in terms of priority to the borrower's other loans or debt instruments (but, with respect to collateral, may be in a second lien position). (FAQ B.3).
- b. MSPLF Loans.
 - i. *Priority.* MSPLF loans may not be contractually subordinated to any of the borrower's other Loans or Debt Instruments. MSPLF loans must be senior to, or pari passu with, such Loans or Debt Instruments,⁴ other than debt secured by real property ("**Mortgage Debt**").
 - ii. *Security.* MSPLF loans must be secured if, at the time of origination, the borrower has any other secured Loans or Debt Instruments (other than Mortgage Debt). If secured, MSPLF Loans must have a Collateral Coverage Ratio⁵ of (i) at least 200% or (ii) not less than the aggregate Collateral Coverage Ratio for all of the borrower's other secured Loans or Debt Instruments (other than Mortgage Debt). Note that there is no requirement for lenders participating in the MSPLF loan program to share in all of the collateral that secures the borrower's other Loans or Debt Instruments. (FAQ C.6).
- c. MSELF Loans.
 - i. *Priority.* MSELF upsized tranches 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.
 - ii. *Security.* The MSELF Loan must be secured if, at the time of origination, the borrower has any other secured Loans or Debt Instruments (other than Mortgage Debt). The MSELF Loan must be secured by the collateral securing any other tranche of the underlying credit facility on a pari passu basis. Lenders and borrowers may add new collateral to secure the loan (including the MSELF Loan on a pari passu basis) at the time of upsizing. If the underlying credit facility includes both term loan tranche(s) and revolver tranche(s), the MSELF Upsized Tranche needs to share collateral on a pari passu basis with the term loan tranche(s) only. (FAQ D.12).

7. Use of Loan Amounts.

- a. Permitted Debt Repayments. While the Main Street Lending program's debt repayment covenants generally prohibit a borrower from repaying the principal balance of, or paying any interest on, any other debt until the loan under the Main Street Lending Program is repaid in full, borrowers may make principal or interest payments that are "mandatory and due." (FAQ H.3)
 - i. With respect to debt that predates a loan under the Main Street Lending program, principal and interest payments are considered "mandatory and due": (A) on the future

⁴ Under the FAQ, "**Loans or Debt Instruments**" means debt for borrowed money and all obligations evidenced by bonds, debentures, notes, loan agreements or other similar instruments, and all guarantees of the foregoing." (FAQ C.6).

⁵ The "**Collateral Coverage Ratio**" means (i) the aggregate value of any relevant collateral security, including the pro rata value of any shared collateral, divided by (ii) the outstanding aggregate principal amount of the relevant debt).

date upon which they were scheduled to be paid as of April 24, 2020, or (B) upon the occurrence of an event that automatically triggers mandatory prepayments under a contract existing prior to April 24, 2020. (FAQ H.7)⁶

- ii. For future debt incurred by the borrower in compliance with the terms and conditions of the loan, principal and interest payments are “mandatory and due” on their scheduled dates or upon a mandatory prepayment trigger (so long as the requirements regarding debt payment covenants, including with respect to lines of credit, are followed). (FAQ H.7).
- b. Refinancing Existing Loans under MSPLF. At the time of the origination of a MSPLF Loan, a borrower may use the proceeds of a MSPLF Loan to refinance existing loans with other lenders (other than the lender originating the MSPLF Loan). (FAQ C.4).

Given the fast pace of developments, businesses and lenders are encouraged to seek advice from qualified legal counsel before participating in the Main Street Lending program

For more information, please see [Haynes and Boone’s prior alert summarizing the Main Street Lending Program](#) (updated May 6, 2020), along with the following resources:

Main Street Lending Resources from the Federal Reserve.

1. General Resources.
 - a. [FAQ Document](#) (updated May 27, 2020)
 - b. [Loan Document Checklist](#) (see Exhibit A) (released May 27, 2020)
 - c. [Instructions for Lender Required Documentation](#) (released May 27, 2020)
2. Main Street New Loan Facility Guidance.
 - a. [MSNLF Term Sheet](#) (released April 30, 2020)
 - b. [MSNLF Lender Certifications and Covenants](#) (released May 27, 2020)
 - c. [MSNLF Borrower Certifications and Covenants](#) (released May 27, 2020)
3. Main Street Priority Loan Facility Resources.
 - a. [MSPLF Term Sheet](#) (released April 30, 2020)
 - b. [MSPLF Lender Certifications and Covenants](#) (released May 27, 2020)
 - c. [MSPLF Borrower Certifications and Covenants](#) (released May 27, 2020)
4. Main Street Expanded Loan Facility Resources.
 - a. [MSELF Term Sheet](#) (released April 30, 2020)
 - b. [MSELF Lender Certifications and Covenants](#) (released May 27, 2020)

⁶ Note that prepayments triggered by the incurrence of new debt can only be made if such prepayments are *de minimis*, or under the MSPLF at the time of origination of an MSPLF Loan, as discussed in 7.b below.

- c. [MSELF Borrower Certifications and Covenants](#) (released May 27, 2020)
- 5. Lender Documents.
 - a. [Lender Registration Certifications and Covenants](#), to be submitted by the lender at the time of its registration with the Main Street SPV (released May 27, 2020).
 - b. [Lender Wire Instructions](#), to be submitted by the lender in connection with providing the Main Street SPV with wire instructions for transfers of loan purchase amounts, servicing fees, and other payments related to MSNLF, MSPLF, or MSELF transactions (released May 27, 2020).
- 6. Loan Participation and Co-Lender Documents.
 - a. [Loan Participation Agreement – Transaction-Specific Terms](#), to be submitted by participating lenders in order to effect the sale of a loan participation to the Main Street SPV (released May 27, 2020).
 - i. [Standard Terms and Conditions applicable to Loan Participation Agreement](#), applies to all Main Street loan participations (released May 27, 2020).
 - b. [Servicing Agreement](#), to be submitted by participating lenders at the time a loan participation is sold to the Main Street SPV (released May 27, 2020).
 - c. [Form of Assignment-in-Blank](#), to be executed by both the participating lenders and borrowers, and intended to be used by the Main Street SPV to elevate its participation to co-lender status or to elevate and transfer its participation in limited circumstances (released May 27, 2020).⁷
 - d. [Co-Lender Agreement – Transaction-Specific Terms](#), to be submitted by borrowers and lenders, and intended to be used to set forth the intercreditor arrangements for the Main Street SPV and the participating lender (released May 27, 2020).
 - i. [Standard Terms and Conditions applicable to Co-Lender Agreement](#), applicable to Co-Lender Agreement (released May 27, 2020).

Prior Haynes and Boone Guidance on the SBA Paycheck Protection Program.

- 1. [Bridging the Gap - An Overview of SBA Loans under the Paycheck Protection Program](#) (updated May 7, 2020)
- 2. [Could Retention of PPP Loan Funds Create False Claims Act Liability?](#) (updated May 6, 2020)
- 3. [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#) (April 6, 2020)
- 4. [Relief for Employers and Workers under the CARES Act](#) (updated March 29, 2020)
- 5. [Full List of Haynes and Boone Alerts on PPP.](#)

Resources on the SBA EIDL Program.

⁷ Note that for existing multi-lender facilities in respect of which MSELF loans are to be made, the form assignment-in-blank that must be submitted to the Main Street SPV is not the form provided here. Such form would come from the documentation for the existing multi-lender facility.



1. [Looking for an Alternative to PPP? Taking a Second Look at the Economic Injury Disaster Loan Program](#) (Haynes and Boone Alert, May 1, 2020).
2. [SBA's COVID-19 Disaster Loan Program](#) (Haynes and Boone Alert, March 24, 2020)
3. [SBA EIDL Resource Page](#)

Additional Questions? Contact a member of the Haynes and Boone [Finance](#) or [Corporate](#) Practice Groups at Haynes and Boone, including the following individuals:

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