

Modest Use of Main Street Lending Program Reported as Federal Reserve Continues to Fine Tune Its Features

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A Congressional Panel overseeing the Main Street Lending Program (the “Program”) has indicated that its utilization to date dwarfs the lending capacity of the Program. As of mid-August, eligible lenders participating in the Program had issued \$496.8 million in loans, backed by \$472 million in Federal Reserve loan purchases. This level of utilization reflected only 0.07% of lending capacity for the \$600 billion Federal COVID related loan assistance program. A subsequent update provided by the Fed’s Board of Governors on September 7, 2020 indicated \$1.07 billion in loans made by the Federal Reserve to the MSLP Special Purpose Vehicle to permit loan purchases, illustrating a marked increase in activity from mid-August but still not an overall robust utilization of the Program, which was launched on July 6, 2020.

These findings were released by the Congressional Oversight Commission, the Congressional panel overseeing the Program, in a report dated August 21, 2020. The report observed, “[t]he Main Street Lending Program has seen modest initial activity thus far.” In explaining the less than robust use of the Program, the panel wrote, “Some of the Main Street Lending Program’s modest activity may be because some businesses accessed the Small Business Administration’s (SBA) Paycheck Protection Program (PPP), while others are able to rely on existing credit lines or other sources of liquidity.”

Other possible reasons for the lackluster utilization posited by the Commission included that many lenders registered with the Program have not widely publicized their involvement, that some business are unfamiliar with the Program despite publicity in the press and by the Federal Reserve in touting it, and that the complex eligibility rules may prevent certain borrowers who may want to participate from doing so.

Notwithstanding the low utilization numbers, the Federal Reserve has continued to fine tune rules regarding the Program, most recently by releasing revisions to its Frequently Asked Questions for For-Profit Businesses (“FAQs”) on September 18, 2020. These revisions largely related to three aspects of the facilities available to For-Profit Businesses under the Program. They (1) emphasized that lender underwriting should look back to the borrower’s pre-pandemic condition and forward to the borrower’s post-pandemic prospects and clarified supervisory expectations for lenders originating Main Street loans; (2) provided guidance on completing and submitting Main Street legal documents, and providing data to the Federal Reserve for multi-borrower loans; and (3) clarified the application of the direct loan restrictions on loans between Main Street borrowers and their owners, employees, and officers.

Underwriting Clarifications

The FAQs now clearly state that in connection with the underwriting of Main Street Loans, at the time of the potential borrower’s application, each lender is expected to assess each borrower’s pre-pandemic financial condition and post-pandemic prospects, while also taking into account the payment deferral features in Main Street loans. (FAQ F.3 and I.2). These assessments must comprise an essential aspect of the underwriting process.

Regarding temporary pandemic-related conditions that might make a borrower a greater risk, the FAQs state, “[The Federal] Supervisors will not criticize Eligible Lenders for originating Main Street loans in accordance with the Program’s requirements, including cases when such loans are considered non-pass at the time of origination,

provided these weaknesses stem from the pandemic and are expected to be temporary or if such loans are part of a bank's prudent risk mitigation strategy for an existing borrower." (FAQ K.4).

Multi-Borrower Loans

The new FAQs indicate that multi-borrower Main Street loans will be permitted on and after September 21, 2020. (FAQ L. 12). In connection with multi-borrower loans, each co-borrower must complete and deliver a separate full set of borrower covenants and certifications in the forms required by the Program, even if the principal executive officer and principal financial officer is the same for each of the co-borrowers. Notwithstanding the requirement of separate reporting, co-borrowers may supply aggregated financial information and an aggregated EBITDA calculation where permitted by the lender, and for the Main Street Priority Loan Facility (MSPLF) the co-borrowers may elect to submit aggregated lien and collateral valuation reporting where permitted by the Lender. (FAQ H. 24).

While the covenants and certifications for the Program will be deemed to refer to the co-borrowers collectively where the term "Borrower" is used, the following exceptions will apply: (1) each co-borrower must be a "business" that was established prior to March 13, 2020; (2) each co-borrower must submit its own separate covenants and certifications; and (3) each co-borrower must submit its own financial information and lien and collateral valuation, except, with respect to this clause (3), to the extent otherwise permitted by the Lender as provided in FAQ H. 24. (FAQ H. 25).

Loans Between Main Street Borrowers and their Owners, Employees and Officers

The FAQs also clarify the proper treatment of loans made to owners, employees and officers of a Main Street borrower. After September 18, 2020, a loan made by a borrower to an individual who is an owner of such borrower after a Main Street Loan has been originated will be presumed to be a capital distribution by such borrower. The exceptions to this rule would be if the loan is (i) "bona fide" and (ii) either repaid according to its terms, or the lender (in this case the borrower) exercises its rights as a creditor upon default. (FAQs H.20 and H.21).

A loan made to an owner, employee or officer by a Main Street borrower will be considered "bona fide" if (i) it is evidenced by a written instrument with a stated interest rate and a stated maturity date; (ii) it has terms that are at least as favorable to such borrower as market terms for similar loans at the time of origination; (iii) the lender (in this case the borrower) has a reasonable expectation of repayment, including that payments on the loan are not deferred; (iv) the debt is enforceable under state law; and (v) the lender (in this case the borrower) has remedies upon default (e.g., a security interest or position with respect to other creditors). (FAQs H. 20 and H. 21).

Clarifications in the FAQs also provide that a borrower is required to consider the purpose and economic result, and all other relevant factors, in determining whether any loan from such borrower to an owner, employee or officer constitutes compensation to such person for purposes of the relevant Program rules regarding employee compensation. (FAQ H. 22).

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 alerts summarizing the Main Street Lending Program for For-Profit and Non-Profit Organizations dated [August 7, 2020](#) and [July 31, 2020](#), respectively, along with the following resources:

Main Street Lending Resources from the Federal Reserve.

1. General Resources.
 - a. [FAQ Document for Non-Profit Organizations](#) (updated September 18, 2020)
 - b. [FAQ Document For-Profit Businesses](#) (updated September 18, 2020)
 - c. [Loan Document Checklist](#)
 - d. [Instructions for Lender Required Documentation](#) (updated September 18, 2020)
2. Main Street New Loan Facility Guidance.
 - a. [MSNLF Term Sheet](#) (updated July 28, 2020)
 - b. [MSNLF Lender Certifications and Covenants](#) (updated June 11, 2020)
 - c. [MSNLF Borrower Certifications and Covenants](#) (updated June 11, 2020)
3. Main Street Priority Loan Facility Resources.
 - a. [MSPLF Term Sheet](#) (updated July 28, 2020)
 - b. [MSPLF Lender Certifications and Covenants](#) (updated June 11, 2020)
 - c. [MSPLF Borrower Certifications and Covenants](#) (updated June 11, 2020)
4. Main Street Expanded Loan Facility Resources.
 - a. [MSELF Term Sheet](#) (updated July 28, 2020)
 - b. [MSELF Lender Certifications and Covenants](#) (updated June 11, 2020)
 - c. [MSELF Borrower Certifications and Covenants](#) (updated June 11, 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 (updated July 31, 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 (updated July 31, 2020).
 - i. [Standard Terms and Conditions applicable to Loan Participation Agreement](#), applies to all Main Street loan participations (updated July 31, 2020).
 - b. [Servicing Agreement](#), to be submitted by participating lenders at the time a loan participation is sold to the Main Street SPV (updated July 31, 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 (updated July 31, 2020).¹
- 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 (updated July 31, 2020).
 - i. [Standard Terms and Conditions applicable to Co-Lender Agreement](#), applicable to Co-Lender Agreement (updated July 31, 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 June 8, 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.

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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¹ 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.