CURTIS INSIGHT

CLIENT ALERT MAY 5, 2020

U.S. Insight: Main Street Lending Program offers additional financial support to small and mid-sized business affected by COVID-19 (Coronavirus)

On April 9, 2020, the United States Department of the Treasury (the "Treasury") and the Federal Reserve Board of Governors (the "Federal Reserve") announced several initiatives to provide funding to assist employers of all sizes and bolster the ability of state and local governments to deliver critical services during the coronavirus pandemic.[1] One of these initiatives is the Main Street Lending Program (the "MSLP"), which implements certain provisions of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") that authorize the establishment of an emergency loan program and new loan facilities for small and mid-sized businesses.

Companies that borrow from the Small Business Administration's (the "SBA") Paycheck Protection Program (the "PPP") may also participate in the MSLP. On April 30, 2020, the Federal Reserve announced additional MSLP guidance regarding the available relief, requirements, and conditions, which are further detailed below.

The Main Street Lending Program

Authorized under section 13(3) of the Federal Reserve Act, the Treasury will make a $75 billion equity investment in a special purpose vehicle ("SPV") established by the Federal Reserve Bank of Boston (the "Reserve Bank") out of the $454 billion appropriated by the CARES Act to support Federal Reserve lending programs. The Reserve Bank will then lend to the SPV on a recourse basis. Eligible lenders originating MSLP loans will retain a percentage of the principal amount and sell the remaining participation to the SPV, which will purchase up to $600 billion of eligible loans.

The SPV established by the Reserve Bank will support three separate lending facilities: (i) the Main Street New Loan Facility (the "MSNLF"), (ii) the Main Street Priority Loan Facility (the "MSPLF"), and (iii) the Main Street Expanded Loan Facility (the "MSELF").

Main Street New Loan Facility

The MSNLF enhances financial support by extending credit to small and mid-sized businesses that were in sound financial standing before the coronavirus pandemic. Eligible lenders will originate new MSNLF loans and service low-interest terms for eligible borrowers on or after April 24, 2020. The SPV will purchase a 95% participation in the MSNLF loan at par value, and the eligible lender will retain the remaining 5%.

[1] For purposes of this client alert, "coronavirus pandemic" shall reference and mean the COVID-19 crisis.

The SPV and eligible lender will share risk on a *pari passu* basis. Any existing loan that the eligible borrower had outstanding with the eligible lender as of December 31, 2019 must have had an internal risk rating, based on the eligible lender's risk rating system, that was equivalent to a "pass" in the Federal Financial Institutions Examination Council's (the "FFIEC") supervisory rating system as of that date.

Main Street Priority Loan Facility

The MSPLF delivers liquidity, in the form of new term loans, to high-leverage borrowers in order to help credit flow to small and mid-sized businesses that were in sound financial standing before the coronavirus pandemic. The SPV will purchase an 85% participation in the MSPLF loan at par value, and the eligible lender will retain the remaining 15%. The SPV and eligible lender will share risk on a *pari passu* basis. Any existing loan that the eligible borrower had outstanding with the eligible lender as of December 31, 2019 must have had an internal risk rating, based on the eligible lender's risk rating system, that was equivalent to a "pass" in the FFIEC supervisory rating system as of that date. The eligible borrower may, at the time of the MSPLF loan origination, refinance existing debt to a lender that is not the eligible lender.

Main Street Expanded Loan Facility

The MSELF increases the extension of credit for a previously existing term loan that the eligible lender originated with the eligible borrower on or before April 24, 2020, which results in an upsized tranche of such loan. The SPV will purchase a 95% participation in the upsized tranche of the MSELF loan; *provided* that such tranche is upsized on or after April 24, 2020 and has a remaining maturity of at least 18 months (taking into account any adjustments made to the maturity of the loan after April 24, 2020, including at the time of upsizing). The SPV and eligible lender will share risk in the upsized tranche on a *pari passu* basis. The eligible lender must retain its 5% portion of the upsized tranche and its interest in the underlying eligible loan until (a) the upsized tranche matures, (b) the underlying eligible loan matures, or (c) the SPV sells all of its 95% participation, whichever comes first. Any collateral securing the loan, whether pledged under the original terms of the loan or at the time of upsizing, will secure the upsized tranche on a *pro rata* basis. The pre-existing term loan must have had an internal risk rating, based on the eligible lender's risk rating system, that was equivalent to a "pass" in the FFIEC's supervisory rating system as of December 31, 2019.

Main Street Lending Program Requirements

For purposes of the MSLP, eligibility and other requirements listed in the Federal Reserve Act remain applicable. The following details the eligibility, loan terms, and other requirements under existing guidelines for the MSNLF, MSPLF, and MSELF.

Eligible Borrowers

The borrower eligibility criteria are the same across all three MSLP facilities. Eligible borrowers include any "business" that (a) has not more than 15,000 employees *or* $5 billion in annual revenues for 2019 (regardless of the total number of employees), *and* (b) meets all of the following conditions:

Such business:

(i) was established prior to March 13, 2020;

(ii) is not an "Ineligible Business";[2]

(iii) is a business 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;

(iv) has not otherwise received adequate economic relief in the form of loans or loan guarantees under the Coronavirus Economic Stabilization Act of 2020 (Subtitle A of Title IV of the CARES Act);

(v) is not a participant in more than one MSLP lending facility or the Primary Market Corporate Credit Facility (which is a separate initiative by the Federal Reserve and the Treasury); and

(vi) must be able to make all of the certifications and covenants required, as further discussed below.

The most recent Frequently Asked Questions page published by the Federal Reserve defines "business" as a legally formed entity that is organized for profit as a partnership, limited liability company, corporation, association, trust, cooperative, joint venture with no more than 49 percent participation by foreign business entities, or tribal business concern. The Federal Reserve retains the discretion to consider and include other forms of organizations as a "business" eligible for the MSLP facilities.

As far as nonprofits are concerned, the Federal Reserve recognizes the critical role that nonprofit organizations play throughout the economy and is evaluating a separate approach to meet their unique needs.

Number of Employees

To determine the number of employees a business has, applicants should carefully follow the SBA's guidelines set forth in 13 CFR 121.106. For purposes of the MSLP, the number of employees of a business is generally the average number of all full-time, part-time, seasonal, or otherwise employed persons, excluding volunteers and independent

[2] "Ineligible Businesses" are listed in 13 CFR 120.110(b)-(j) and (m)-(s), as modified and clarified by the SBA's regulations implementing the PPP on or before April 24, 2020.

contractors, but including the employees of its affiliates (domestic and foreign), for each pay period over the 12 months prior to the eligible loan origination or tranche upsizing.

Affiliates

Businesses will be considered together with its domestic and foreign affiliates for purposes of determining eligibility for the MSLP. Applicants should carefully follow the SBA's affiliation rules set forth in 13 CFR 121.301(f).

Annual Revenues for 2019

To determine the business's annual revenues for 2019, the business must aggregate its revenues with those of its affiliates. The business may use its and its affiliates' (a) 2019 Generally Accepted Accounting Principles-based audited financial statements *or* (b) annual receipts, as such term is used by the SBA in 13 CFR 121.104, for the fiscal year 2019 as reported to the Internal Revenue Service. Applicants that do not yet have audited financial statements or annual receipts for 2019 should use their most recent audited financial statements or annual receipts.

Eligible Lenders

Eligible lenders currently include U.S. federally-insured depository institutions (including banks, savings associations, and credit unions), U.S. branches or agencies of foreign banks, U.S. bank holding companies, U.S. savings and loan holding companies, U.S. intermediate holding companies of foreign banking organizations, and any U.S. subsidiaries of the foregoing.

Loan Amount

Eligible loans originating after April 24, 2020 will be secured or unsecured term loans and will not be eligible for loan forgiveness, unlike loans made under the PPP.

Main Street New Loan Facility

Under the MSNLF, an eligible loan must not, at the time of origination or at any time during the term of the eligible loan, be contractually subordinated in terms of priority to any of the eligible borrower's other loans or debt instruments.

The minimum loan available to an eligible borrower is $500,000, while the maximum loan available is *the lesser of*:

(i) $25 million; and

(ii) an amount that, when added to the eligible borrower's existing outstanding and undrawn available debt, does not exceed four (4) times the eligible borrower's adjusted EBITDA for 2019.

Main Street Priority Loan Facility

Under the MSPLF, an eligible loan must, at the time of origination and at all times the eligible loan is outstanding, be senior to or *pari passu* with, in terms of priority and security, the eligible borrower's other loans or debt instruments (other than mortgage debt).

The minimum loan available to an eligible borrower is $500,000, while the maximum loan available is *the lesser of*:

(i) $25 million; and

(ii) an amount that, when added to the eligible borrower's existing outstanding and undrawn available debt, does not exceed six (6) times the eligible borrower's adjusted EBITDA for 2019.

Main Street Expanded Loan Facility

Under the MSELF, the upsized tranche of the loan must, at the time of upsizing and at all times the upsized tranche is outstanding, be senior to or *pari passu* with, in terms of priority and security, the eligible borrower's other loans or debt instruments (other than mortgage debt).

The minimum loan available to an eligible borrower is $10 million, while the maximum loan available *is the lesser of*:

(i) $200 million;

(ii) 35% of the eligible borrower's existing outstanding and undrawn available debt that is *pari passu* in priority with the eligible loan and equivalent in secured status (*i.e.* secured or unsecured); and

(iii) an amount that, when added to the eligible borrower's existing outstanding and undrawn available debt, does not exceed six (6) times the eligible borrower's adjusted EBITDA for 2019.

Certification Requirements

Eligible borrowers that participate in the MSLP must certify to the following certifications, covenants, and commitments:

- *Employee retention*. The eligible borrower will make commercially reasonable efforts, in light of its capacities, the economic environment, its available resources, and the business need for labor, to maintain its payroll and retain its employees for the term of the eligible loan.

- *Restrictions on dividends and stock repurchases*. The eligible borrower will follow stock repurchase and capital distribution restrictions that apply to direct loan programs under section 4003(c)(3)(A)(ii) of the CARES Act,[3] except that an eligible borrower that is an S corporation or other tax pass-through entity may make distributions to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings.

- *Compliance with CARES Act compensation restrictions*. The eligible borrower will comply with the executive compensation limitations detailed in section 4004 of the CARES Act.[4]

- *Bankruptcy*. The eligible borrower must have a reasonable basis to believe that, as of the origination date of the eligible loan and after giving effect to such loan, it has the ability to meet its financial obligations for at least the next ninety (90) days and does not expect to file for bankruptcy during that time period.

- *United States company*. The eligible borrower is domiciled in the United States with significant operations and a majority of its employees based in the United States.

Additionally, eligible borrowers and eligible lenders must both certify as follows:

- *Debt repayment*. The eligible borrower will refrain from repaying the principal balance of, or paying any interest on, any other debt, with the exception of mandatory debt or interest payments, unless it has first repaid the eligible loan or upsized tranche, as applicable, in full. The eligible lender will not request that the eligible borrower repay the principal balance of, or pay any interest on, debt extended by the eligible lender to the eligible borrower, with the exception of mandatory debt or interest payments or in the case of default and acceleration, until the eligible loan or upsized tranche is repaid in full.

- *Lines of credit*. The eligible borrower will not seek to cancel or reduce any of its committed lines of credit with the eligible lender or any other lender. The eligible

[3] For the term of the loan and one year after the loan is repaid, the borrower will not (i) pay dividends or make other capital distributions on its common stock or (ii) repurchase an equity security, of itself or its parent company, listed on a national securities exchange while the loan is outstanding, except to the extent required under a pre-existing contractual obligation that existed on March 27, 2020.

[4] For the term of the loan and one year after the loan is repaid, no employee that earned over $425,000 in 2019 may receive (i) an increase in annual compensation for any such 12-month period or (ii) severance payments in excess of two times the 2019 total compensation. Employees with compensation over $3 million in 2019 are limited to total annual compensation of $3 million plus 50% of the amount by which the employees' total compensation in 2019 exceeded $3 million.

lender will not cancel or reduce any existing committed lines of credit to the eligible borrower, except in the event of default.

- *Covered entity*. Each of the eligible borrower and eligible lender is eligible to participate in the MSLP.[5]

- *Calculation of EBITDA*. For MSNLF and MSPLF loans, the eligible lender must certify that the methodology used to calculate the eligible borrower's adjusted EBITDA for 2019 is the methodology it previously used for adjusting EBITDA when extending credit to the eligible borrower or other similarly situated borrowers on or before April 24, 2020. For MSELF loans, the eligible lender must certify that such methodology used is the methodology it previously used for adjusting EBITDA when originating or amending the underlying loan on or before April 24, 2020.

Eligible lenders are expected to conduct an assessment, using their own underwriting standards, and evaluate each potential borrower's financial condition at the time of the application. Additionally, eligible lenders are expected to collect the required certifications and covenants of each eligible borrower at the time of loan origination. Eligible lenders may rely on the eligible borrower's certifications and covenants, as well as any subsequent self-reporting by the eligible borrower, in determining whether an eligible borrower is approved for the MSLP. In light of these circumstances and considerations, businesses that otherwise meet the borrower eligibility requirements may not be approved for an eligible loan or may not receive the maximum loan amount available.

Public Information Disclosure

The Federal Reserve announced on April 23, 2020 that it will publicly disclose information on a monthly basis about certain of its lending programs that are using CARES Act funding. Accordingly, the Federal Reserve retains the right to disclose the (i) names of borrowers in each facility, (ii) amounts borrowed and interest rate charged, and (iii) overall costs, revenues, and fees for each facility.

Other MSLP Loan Terms

The Treasury and Federal Reserve may make adjustments to the terms and conditions of the MSLP loan terms and any changes will be implemented accordingly.

Maturity. The maximum loan term is four (4) years.

---

[5] The disqualification and conflict of interest provisions for covered entities under the CARES Act is applicable with respect to the MSLP. No individual that is the U.S. President, U.S. Vice-President, head of an executive department, or a member of Congress, or any such individual's spouse, child, son-in-law, or daughter-in-law, can hold more than 20% control by vote or value in the borrower or lender.

Interest. An adjustable rate of LIBOR (1 or 3 month), plus 300 basis points.

Prepayment. There shall be no prepayment penalty for any eligible loan.

Payment Deferment. Principal and interest payments may be deferred for one (1) year, and unpaid interest will be capitalized.

Principal Amortization. No principal is paid in the first year, and the principal will be amortized over the remaining term of the loan. For MSNLF loans, the principal will be amortized with one-third due at the end of the second year, one-third due at the end of the third year, and one-third due at maturity at the end of the fourth year. For MSPLF and MSELF loans, the principal will be amortized with 15% due at the end of the second year, 15% due at the end of the third year, and remaining balloon payment of 70% due at maturity at the end of the fourth year.

Security, Etc. Eligible loans will be secured or unsecured term loans at the discretion of the eligible lender. An MSELF loan must be secured if the underlying loan is secured, and any collateral securing the borrower's underlying loan must secure the upsized tranche on a *pro rata* basis. Eligible lenders may require eligible borrowers to pledge new or additional collateral when upsizing existing loans under the MSELF as a condition of approval.

Transaction Fee. Eligible lenders must pay the SPV a transaction fee based on the principal amount of the eligible loan or upsized tranche at the time of upsizing. The transaction fee is equal to 100 basis points for MSNLF and MSPLF loans and 75 basis points for MSELF loans, and eligible lenders may require eligible borrowers to pay this transaction fee.

Origination Fee and Servicing. Eligible borrowers will pay eligible lenders an origination fee based on the principal amount of the eligible loan or upsized tranche at the time of upsizing. The origination fee is equal to 100 basis points for MSNLF and MSPLF loans and 75 basis points for MSELF loans. The SPV will pay the eligible lender, *per annum* for loan servicing, 25 basis points of the principal amount of its participation in the eligible loan or upsized tranche.

Termination. The SPV will cease purchasing eligible loan participations on September 30, 2020, unless the Federal Reserve and Treasury extend the facility. The Reserve Bank will continue to fund the SPV after such date until the SPV's underlying assets mature or are sold.

Primary And Secondary Market Corporate Credit Facility

Another initiative of the Federal Reserve and the Treasury is the Primary Market Corporate Credit Facility (the "PMCCF") and the Secondary Market Corporate Credit Facility (the "SMCCF"), each of which provides direct liquidity for corporate debt issued by eligible issuers. The Federal Reserve Bank of New York (the "NY Reserve Bank") will lend to a special purpose vehicle (the "NY Reserve Bank SPV") on a recourse basis. The NY Reserve Bank will be secured by all the assets of the NY Reserve Bank SPV. The Treasury will make a $75 billion equity investment in the NY Reserve Bank SPV to support both the PMCCF and the SMCCF. The initial allocation of such equity will be $50 billion towards the PMCCF and $25 billion towards the SMCCF, with the combined size of both facilities up to $750 billion.

The PMCCF may purchase eligible corporate bonds as the sole investor in a bond issuance, portions of syndicated loans, and bonds of eligible issuers at issuance. The SMCCF may purchase eligible individual corporate bonds and eligible U.S.-listed exchange traded funds. Both PMCCF and SMCCF loans are not eligible for loan forgiveness.

Term Asset-Backed Securities Loan Facility

Another facility being established by the Federal Reserve pursuant to section 13(3) of the Federal Reserve Act is the Term Asset-Backed Securities Loan Facility (the "TALF"), which targets capital markets to facilitate the issuance of asset-backed securities during the coronavirus pandemic. The NY Reserve Bank will lend to a special purpose vehicle (the "TALF SPV") on a recourse basis, and the Treasury will make a $10 billion equity investment in the TALF SPV.

The TALF SPV supports the flow of credit to consumers and businesses by lending on a non-recourse basis to U.S. companies secured by certain AAA-rated asset-backed securities, which are backed by recently originated student loans, auto loans, credit card receivables, and certain other loans guaranteed by the SBA. The TALF SPV initially will make up to $100 billion of loans available.

Conclusion

As of the date of this publication, the aforementioned Federal Reserve lending programs are not yet operational. Further details regarding how to obtain and submit applications have not yet been released. Because there is a need for banks to understand and develop their own internal systems before implementing an entirely new government-funded lending program, it is expected that these lending programs may have irregular and inconsistent results. While the programs are being finalized, applicants should contact their respective lenders to request more information and facilitate the application process.

For more on the CARES Act and other details, please see the April 7, 2020, Curtis client alert "U.S. Insight: CARES Act Provisions for Small Businesses and Individuals".

About Curtis

Curtis, Mallet-Prevost, Colt & Mosle LLP is a leading international law firm. Headquartered in New York, Curtis has 16 offices in the United States, Latin America, Europe, the Middle East and Asia. Curtis represents a wide range of clients, including multinational corporations and financial institutions, governments and state-owned companies, money managers, sovereign wealth funds, family-owned businesses, individuals and entrepreneurs.

For more information about Curtis, please visit www.curtis.com.

Attorney advertising. The material contained in this Client Alert is only a general review of the subjects covered and does not constitute legal advice. No legal or business decision should be based on its contents.

Please feel free to contact any of the persons listed below if you have any questions on this important development:

Valarie A. Hing
Partner
vhing@curtis.com
New York: +1 212 696 6943

Shaun Reader
Partner
sreader@curtis.com
New York: +1 212 696 6062

Douglas Ian Glazer
Partner
dglazer@curtis.com
New York: +1 212 696 6011

Anthony Delury
Associate
adelury@curtis.com
New York: +1 212 696 8859