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Federal Reserve's Main Street Lending Program offers Liquidity to Small and Medium-Sized Businesses

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The Board of Governors of the Federal Reserve System (the Fed) recently released terms for its Main Street Lending Program (MSLP), a program authorized under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and intended to facilitate lending by Eligible Lenders to small and medium-sized businesses, including small businesses which have received or will receive Paycheck Protection Program loans.

The MSLP terms differ significantly from proposed terms circulated by the Fed for comment in April, and they include significant expansions in the scope of the program and eligibility of borrowers.

The MSLP will consist of three different programs:

- The Main Street New Loan Facility (New Loan Facility);
- The Main Street Priority Loan Facility (Priority Loan Facility), for borrowers with higher leverage; and
- The Main Street Expanded Loan Facility (Expanded Loan Facility), which will permit a borrower's existing term loan or revolving credit facility to be "upsized" or increased (such upsized portion is referred to as the "upsized tranche").

Who will be making and funding MSLP loans to businesses?

Loans will be made by the following (Eligible Lenders): U.S. federally-insured banks, savings associations and credit unions; U.S. branches and 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 U.S. subsidiaries of any of the foregoing.

A special-purpose entity (SPE) funded by the Federal Reserve Bank of Boston will purchase participation interests of 95% of the face amount of New Loan Facility loans, 95% of the upsized tranche of Expanded Loan Facility Loan and 85% of the face amount of Priority Loan Facility loans. The remainder of the loans will be retained for the account of the lender.

When will MSLP loans be made?

As of this writing, MSLP loans are not yet being made, though banking industry sources expect that applications will be available and accepted

and loans will be funded shortly.

The SPE will cease purchasing participation interests in MSLP loans on September 30, 2020, so all MSLP loans must be made and funded by that date.

What kinds of businesses are eligible to borrow MSLP loans?

At least at the outset, the Fed is limiting MSLP loans to for-profit business entities, including corporations, limited liability companies, partnerships, associations, trusts, cooperatives, joint venture with no more than 49% participation by foreign business entities, and tribal business concerns. In the future, the Fed may, in its discretion, consider non-profit and other entities.

In order to be eligible for a MSLP loan, a business entity must:

- have been established before March 13, 2020;
- either (i) have 15,000 or fewer employees or (ii) had 2019 annual revenues of \$5 billion or less (the Fed has adopted the Small Business Administration's affiliation rules for MSLP loan eligibility determinations, so employees or revenues of entities that control, are controlled by or are under common control with the business will be included in this calculation);
- be created or organized in the United States or under U.S. law and have significant operations in, and a majority of its employees based in, the U.S.;
- not participate in on of the other MSLP programs or the Fed's Primary Market Corporate Credit Facility;
- not have received specific support (other than Paycheck Protection Loans) pursuant to the Coronavirus Economic Stabilization Act of 2020, a subtitle of the CARES Act (including airline carriers, air cargo carriers, certain businesses supporting operations of airline and air cargo carriers, and businesses deemed critical to maintaining national security);
- not be in a category of "ineligible businesses" (discussed in detail below);
- have been in sound financial condition prior to the onset of the COVID-19 pandemic;
- have had an internal risk rating assigned by its lender to any existing loan outstanding as of December 31, 2019, equivalent to a "pass" in the Federal Financial Institutions Examination Council's (FFIEC) supervisory rating system.

At the current time, businesses with negative EBITDA in 2019 would be ineligible, although the Fed is considering modifying this restriction for borrowers with asset-based credit facilities.

To be eligible for "upsizing" under the Expanded Loan Facility, the existing term loan or revolving credit facility must have been originated on or before April 24, 2020, and must have a remaining maturity of at least 18 months

(including after giving effect to any extension of the maturity date at the time of upsizing).

How are the MSLP loans structured?

Maximum Loan Amount:

- A New Loan Facility loan is limited to the lesser of (i) \$25 million and (ii) an amount that, when added to the borrower's existing outstanding and undrawn available debt, does not exceed four (4) times the borrower's adjusted EBITDA for 2019.
- A Priority Loan Facility loan is limited to the lesser of (i) \$25 million and (ii) an amount that, when added to the borrower's existing outstanding and undrawn available debt, does not exceed six (6) times the borrower's adjusted EBITDA for 2019.
- An Expanded Loan Facility loan is limited to the lesser of (i) \$200 million, (ii) 35% of the borrower's existing and undrawn available debt that is *pari passu* in priority with the Expanded Loan Facility loan and equivalent in secured status (i.e., secured or unsecured), or (iii) an amount that, when added to the borrower's existing and undrawn available debt, does not exceed six (6) times the borrower's adjusted EBITDA for 2019.

Minimum Loan Amount:

- The minimum amount of a New Loan Facility loan or a Priority Loan Facility loan is \$500,000.
- The minimum amount of an Expanded Loan Facility loan is \$10 million.

Interest Rate:

- All MSLP loans accrue interest at an adjustable rate equal to the sum of one-month or three-month LIBOR plus 300 basis points. There is no difference in pricing based on the credit risk.
- Interest payments are deferred for the first year after funding. Accrued interest will be capitalized at that point.

Fees:

- At the lender's discretion, an origination fee of up to 100 basis points of the principal amount of a New Loan Facility loan or a Priority Facility loan may be charged by the lender and is payable at the time of origination.
- At the lender's discretion, a fee of 75 basis points of the principal amount of an Expanded Loan Facility loan's upsized tranche is payable at the time of upsizing. In addition, at the lender's discretion, the lender may require the borrower to pass along the 75 basis points fee on the amount of the upsized tranche payable by the lender to the SPE at the time of upsizing.

Principal Repayments:

- A New Loan Facility loan requires principal amortization of one-

third at the end of the second year, one-third at the end of the third year, and one-third at the end of the fourth year.

- A Priority Loan Facility loan or an Expanded Loan Facility loan requires principal amortization of 15% at the end of the second year, 15% at the end of the third year, and 70% at the end of the fourth year.
- Prepayment of any MSLP loan is permitted at any time without penalty.
- The loans' maturity dates are four (4) years after funding.
- Unlike the Small Business Administration's Paycheck Protection Program loans, MSLP loans are with full recourse to the borrower and collateral (if any) and are not forgivable.

Collateral Security:

- MSLP loans may be secured or unsecured, at the discretion of the lender.

Subordination:

- A New Loan Facility loan must not at any time be contractually subordinated in priority (i.e., junior in priority in a borrower bankruptcy to other unsecured loans or debt) to any other loan or debt. However, a New Loan Facility loan can be a second lien loan, unsecured when the borrower has secured debt, or outstanding even while other secured or unsecured debt is incurred (so long as the new debt would not have higher contractual priority in bankruptcy).
- A Priority Loan Facility loan and the upsized tranche portion of an Expanded Loan Facility loan must at all times be senior to or *pari passu* with, in terms of priority and security, the borrower's other loans or debt, other than mortgage debt.

What certifications and covenants will my business be required to make?

- The borrower must commit to refrain from making any optional payments or prepayments of the principal or interest on any other debt until the New Loan Facility loan or Priority Loan Facility loan, or the upsized tranche of the Expanded Loan Facility loan, is repaid in full. However, at the time of origination of a Priority Loan Facility Loan, a borrower may refinance existing debt owed to a lender who is not the MSLP lender.
- The borrower must commit that it will not seek to cancel or reduce any of its committed lines of credit with any lender.
- The borrower must certify that it has a reasonable basis to believe that, as of the date of origination of the MSLP loan and after giving effect to it, 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.
- The borrower must certify that it is eligible to participate in the

MSLP.

- The borrower must commit to the following while the MSLP loan is outstanding and for twelve (12) months thereafter:
 - It will not repurchase an equity security that is listed on a national securities exchange of the business or any parent company of the business, except to the extent required under a contractual obligation that was in effect as of March 27, 2020.
 - It will not pay dividends (except distributions of a S-corporation or other tax pass-through entity that are reasonably required to cover its owners' tax obligations in respect of the business's earnings) or make other capital contributions with respect to the common stock of the business.
 - No officer or employee of the business whose total compensation exceeded \$425,000 in calendar year 2019 (other than an employee whose compensation is determined through an existing collective bargaining agreement entered into before March 1, 2020) will receive from the business (A) total compensation which exceeds, during any 12 consecutive month period, the total compensation received by such officer or employee from the business in 2019, or (B) severance pay or other benefits upon termination of employment with the business which exceeds twice the maximum total compensation received by the officer or employee from the business in 2019.
 - No officer or employee of the business whose total compensation exceeded \$3 million in calendar year 2019 may receive during any 12 consecutive month period total compensation in excess of the sum of (A) \$3 million plus (B) 50% of the excess over \$3 million of the total compensation received by such officer or employee from the business in calendar year 2019.

Other covenants and certifications may be required by the lender.

What categories of businesses are ineligible to receive MSLP loans?

The following are not eligible to receive MSLP loans:

- financial businesses primarily engaged in the business of lending (such as banks, finance companies and factors);
- most passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or used with loan proceeds;
- life insurance companies;
- businesses located in a foreign country;
- pyramid sale distribution plans;
- businesses engaged in any illegal activity;

- private clubs and businesses which limit the number of memberships for reasons other than capacity;
- government-owned entities (except businesses owned or controlled by a Native American tribe);
- loan packagers earning more than one-third of their gross annual revenue from packaging SBA loans;
- businesses with an officer, director, key employee or holder of more than 20% of the stock or debt of the business if any such person is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude;
- businesses in which the lender, or any of the lender's officers, directors, key employees or holders of more than 20% of its stock or debt, owns an equity interest;
- businesses which (1) present live performances of a prurient sexual nature, or (2) derive directly or indirectly more than *de minimis* gross revenue through the sale of products or services, or the presentation of any depictions or displays of a prurient sexual nature;
- businesses which have, or which are owned or controlled by a business which has, previously defaulted on a federal government loan or federal government-assisted financing which resulted in the government or any agency or department suffering a loss;
- businesses primarily engaged in political or lobbying activities;
- speculative businesses; or
- businesses in which the President, the Vice President, the head of an executive branch department, or a member of Congress, or the spouse, child, son-in-law or daughter-in-law of any such person, directly or indirectly owns, controls or holds more than 20% (by vote or value) of the outstanding amount of any class of equity interest in the business.

How can my business apply for a MSLP loan?

A business must submit to an Eligible Lender an application and any other documentation required by the Eligible Lender. Please contact an Eligible Lender to obtain information on whether it plans to participate in the MSLP, to request application materials and instructions, and to determine when it will commence accepting applications and funding loans.

A lender will conduct an assessment of each potential borrower's financial condition at the time of application.

We encourage you to visit Holland & Hart's Coronavirus Resource Site, a consolidated informational resource offering practical guidelines and proactive solutions to help companies protect their business interests and their workforce. The dynamic Resource Site is regularly refreshed with new topics and updates as the COVID-19 outbreak and the legal and regulatory responses continue to evolve. Sign up to receive updates and for

upcoming webinars.
