Proskauer

Main Street Lending Program under the CARES Act

April 13, 2020

On April 9, 2020, the Federal Reserve announced additional programs under the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") to provide up to $2.3 trillion in loans and other investments to support the U.S. economy. These actions include:

- Supplying liquidity to financial institutions participating in the Small Business Administration's Paycheck Protection Program (the "PPP") (for more information on the PPP, see here);
- Expanding the size and scope of the Primary Market Corporate Credit Facility (the "PMCCF"), the Secondary Market Corporate Credit Facility, and Term Asset-Backed Securities Loan Facility, which will support up to $850 billion in credit to companies rated investment-grade as of March 22, 2020, the secondary market for investment-grade corporate debt, and holders of AAA-rated asset-backed securities, respectively;
- Announcing a $500 billion Municipal Liquidity Facility for states and municipalities; and
- Establishing a new $600 billion Main Street Lending Program, aimed to ensure credit flows to small and mid-sized businesses that were in good standing before the COVID-19 pandemic (the "Main Street Lending Program").

The announcement of the various programs was accompanied by the publication of short term sheets describing each program. This article focuses on the Main Street Lending Program, as described in the program term sheets that were published by the Federal Reserve on April 9. The Department of the Treasury will use funding from the $454 billion appropriated under Title IV, Section 4003(b)(4) of the CARES Act to provide $75 billion in equity to the program utilizing a special purpose vehicle (the "SPV") operated by the Federal Reserve. The Main Street Lending Program will leverage this $75 billion from Treasury up to eight times, for up to $600 billion in loans for eligible borrowers.

Eligibility

To be eligible for the Main Street Lending Program, a borrower must be a business with up to 10,000 employees or up to $2.5 billion in 2019 annual revenues. Borrowers must be 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. Section 4003(b)(4) of the CARES Act and the Main Street Lending Program term sheets published by the Federal Reserve do not impose any affiliation rules in determining eligibility.

Borrowers utilizing the PMCCF are not eligible to borrow under the Main Street Lending Program. Borrowers utilizing the PPP may use the Main Street Lending Program, if they meet the eligibility requirements for both. An eligible borrower may elect to borrow new loans under the Main Street New Loan Facility ("MSNLF"), or upsize an existing eligible term loan facility under the Main Street Expanded Loan Facility ("MSELF"). A borrower cannot utilize both the MSNLF and MSELF programs.

Eligible lenders under the Main Street Lending Program are limited to U.S. depository institutions, U.S. bank holding companies, and U.S. savings and loan holding companies.

Attestations and Other Requirements

A borrower must attest, among other things, that it requires financing due to the COVID-19 pandemic, and that it will use reasonable efforts to apply the proceeds of the loan to maintain its payroll and retain its employees during the term of the loan. There is no specific guidance on the meaning of "require financing" or what constitutes "reasonable efforts" to retain the workforce. However, the calculation of the leverage test referred to below includes undrawn commitments, which implies that access to additional financing sources alone would not preclude an applicant from making the attestation. In contrast, the requirement to use "reasonable efforts" to maintain payroll is a looser standard than under the PPP, which measures full-time equivalent employees and reduces loan forgiveness if there is a reduction in workforce or salary during applicable time periods (though it is notable that loans under the Main Street Lending Program are not forgivable).

A borrower must refrain from using the proceeds of a program loan to repay other loan balances. A borrower also must commit to refrain from repaying other debt of equal or lower priority, except for mandatory principal payments, until its loan under the Main Street Lending Program has been repaid in full.

A lender must attest that loan proceeds will not be used to repay or refinance pre-existing loans made by the lender to the borrower. A lender also must attest that it will not cancel or reduce any existing lines of credit outstanding to the borrower.

Loan Features – Main Street New Loan Facility (MSNLF)

Under the MSNLF, eligible loans must be unsecured term loans originated on or after April 8, 2020, with the following features:

- four-year maturity;
- amortization of principal and interest deferred for one year;
- adjustable rate of SOFR (Secured Overnight Financing Rate) plus 250-400 basis points;
- minimum loan size of $1 million;
- maximum loan size of the lesser of (i) $25 million or (ii) an amount that, when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed four times the borrower's 2019 earnings before interest, taxes, depreciation and amortization ("EBITDA"); and
- prepayment permitted without penalty.

Loan Features – Main Street Expanded Loan Facility (MSELF)

Under the MSELF, an eligible upsized term loan will have most of the same features of an eligible loan under the MSNLF, with the following differences:

- the original facility must have been made by an eligible lender to an eligible borrower on or before April 8, 2020;
- any collateral securing the existing eligible term loan, whether under the original terms of the eligible term loan or at the time of upsize, will secure the MSELF upsized tranche on a pro rata basis; and
- the maximum loan size is the least of (1) $150 million, (2) 30% of the borrower's existing outstanding and committed but undrawn bank debt, or (3) an amount that, when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed six times the borrower's 2019 EBITDA.

For both the MSNLF and MSELF, the leverage test uses simply EBITDA rather than adjusted EBITDA, and does not appear to include adjustments or “addbacks” that are often included in leveraged credit facilities. The leverage calculation includes undrawn commitments as debt, and does not appear to have a cash netting feature. For existing loans under the MSELF, borrowers that use adjusted EBITDA may need to recalculate EBITDA without any addbacks to determine the cap on maximum loan size.

Participation

The SPV will purchase a 95% participation in the par value of an eligible MSNLF loan, and a 95% participation in the par value of an eligible upsized tranche under the MSELF, both on a recourse basis, and the lender will retain a 5% participation. The lender will receive a 100 basis point fee from the borrower on the principal amount of the loan or the upsized tranche, as applicable, and a 25 basis point fee from the SPV on the principal amount of its participation in the loan or upsized tranche, as applicable. Under the MSNLF, the eligible lender will pay the SPV a facility fee of 100 basis points of the principal amount of the loan participation purchased by the SPV, which the lender may require the borrower to pay. Under both the MSNLF and the MSELF, the lender and the SPV will share the risk of the loan on a *pari passu* basis. Other terms of the SPV participations have not been specified. The SPV will cease purchasing participations under both the MSNLF and the MSELF on September 30, 2020.

Restrictions

The restrictions under Section 4003(c)(3)(A)(ii) of the CARES Act will apply to the Main Street Lending Program:

- Borrower will be prohibited from engaging in stock buybacks of nationally listed shares of the borrower or any of its parent entities, unless contractually obligated prior to enactment of the CARES Act, or from paying dividends or making other capital distributions with respect to common stock, until one year after the loan is no longer outstanding.
- Borrower also will be prohibited from increasing the compensation of any employee whose compensation exceeded $425,000 in 2019 or from offering the employee significant severance or termination benefits until one year after the loan is no longer outstanding.
- Borrower’s officers and employees whose total compensation exceeded $3 million in 2019 cannot receive compensation greater than $3 million, plus 50% of the

amount over $3 million that the individual received in 2019 until one year after the loan is no longer outstanding.

It is unclear how these compensation provisions will apply to newly hired employees who had no 2019 compensation from the applicable borrower.

The restrictions under Section 4003(c)(3)(D)(i) of the CARES Act for the as yet unannounced Mid-Sized Business Program, including requirements to retain 90% of the workforce, not to outsource or offshore jobs, and to maintain labor neutrality, would not apply to the Main Street Lending Program, unless the Federal Reserve issues additional rules or guidance. For more information on the Mid-Sized Business Program, see here. The Main Street Lending Programs will be subject to applicable requirements under the Federal Reserve Act, including policies and procedures regarding taxpayer protection and borrower solvency.

What's Next?

The Federal Reserve is using its emergency powers and moving quickly to provide aid to small and medium-sized business under the CARES Act. As a result, the terms of the Main Street Lending Program are not as detailed as they might be under less exigent circumstances. As of the date of this client alert, the Main Street Lending Program is not yet active, and the MSNLF and MSELF term sheets posted by the Federal Reserve on April 9 contemplate that the Federal Reserve and the Secretary of the Treasury may make adjustments to program terms. The Federal Reserve is accepting comments to the Main Street Lending Program through April 16, 2020. We expect to see more guidance in the coming days and will continue to monitor additional rules and regulations as they become available.

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Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, related regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

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