

CARES ACT UPDATE: FEDERAL RESERVE RELEASES FIRST GUIDANCE ON MAIN STREET LENDING PROGRAM

Hodgson Russ Banking & Finance Alert
April 10, 2020

This is an update to our March 30, 2020 alert summarizing the distressed industry relief outlined in the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”).

As discussed in our prior alert, the CARES Act directed the Federal Reserve and Department of the Treasury to develop a program designed to stimulate direct lending to mid-sized businesses. On April 9, the Federal Reserve issued its first guidance on the program, now known as the Main Street Lending Program (“MSLP”, or the “Program”).

As with other CARES Act programs, we expect further guidance as the Program is implemented. It is important to consult your professional advisors before applying to any CARES Act assistance program for up-to-date information on eligibility and terms.

Loans under the Program will be made directly by financial institutions to eligible borrowers, which may then sell 95% of the loans to the Federal Reserve. They may be either new loans under the Main Street New Loan Facility, or increased borrowing under an existing facility through the Main Street Expanded Loan Facility. The amount set aside for the program is up to \$600 billion.

What Companies are Eligible?

The Program purports to improve support to small and mid-sized businesses that were in good financial standing before the crisis. While the CARES Act stated that mid-sized business programs would target companies that did not otherwise receive assistance under the CARES Act, the Federal Reserve clarified that businesses receiving loans under the Paycheck Protection Program may also seek loans under MSLP.

Eligible borrowers must:

- Have up to 10,000 employees or up to \$2.5 billion in 2019 annual revenue;
- Be a business that is created or organized in the United States or under the laws of the United States; and

Attorneys

Jessica Chue
Krystal Daniels
Christofer Fattey
Amy Fitch
Andrea Gervais
Valerie Stevens
Brianna Szopinski
James Thoman
Sujata Yalamanchili

Practices & Industries

Banking & Finance
Corporate & Business
Financial Services

CARES ACT UPDATE: FEDERAL RESERVE RELEASES FIRST GUIDANCE ON MAIN STREET LENDING PROGRAM

- Have significant operations in and a majority of its employees based in the United States.

A borrower may participate in only one of the new loan or expanded loan facilities, not both. The borrower may also not participate in the Program if it has participated in the Primary Market Corporate Credit Facility established by the Federal Reserve in March.

Key insight: Significant questions remain on eligibility. For example, the CARES Act indicated that a minimum of 500 employees would be required for this program, but no employee minimum is given, and the position that a PPP-borrower may also apply under MSLP indicates no minimum may apply. Further, the guidance implies that a U.S.-based but foreign-owned operation may qualify, but no final confirmation has been provided. Finally, the method of determining headcount and/or revenues of affiliated entities has not been established, but we presume some aggregation will be required. We are continuing to monitor the Federal Reserve and Treasury for updates on these points.

Which Loans Qualify?

Under each of the new loan and expanded loan portions of the Program, loans will be made by an eligible financial institution, and must have the following features (or, in the case of an expanded loan, the upsized tranche must have these features):

- 4 year maturity;
- Amortization of principal and interest deferred for one year;
- Adjustable interest rate of the Secured Overnight Financing Rate plus 2.5 – 4%;
- Minimum loan size of \$1 million; and
- No early prepayment penalty

Unlike the Paycheck Protection Program, loans under the Program are not forgivable.

Other terms are slightly different between the new loan and expanded loan parts of the Program. In addition to the listed loan requirements:

New Loans. Newly originated loans are eligible for the Program if they are originated on or after April 8, 2020, are unsecured term loans, and have a maximum loan size equal to 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 4x borrower's 2019 EBITDA.

Expanded Loans. To be eligible for expansion, existing loans must have been originated before April 8, 2020, may be secured or unsecured (but if secured, the collateral must secure the loan participation in the upsized tranche on a pro rata basis), and may have a maximum loan size equal to the lesser of (i) \$150 million, (ii) 30% of the borrower's existing outstanding and committed but undrawn bank debt, or (iii) an amount that, when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed 6x borrower's 2019 EBITDA.

CARES ACT UPDATE: FEDERAL RESERVE RELEASES FIRST GUIDANCE ON MAIN STREET LENDING PROGRAM

What Restrictions and Attestations are Required?

The CARES Act listed a significant number of restrictions on borrowers under the Program. Several of these have been included in the attestations the Program will require of eligible borrowers and lenders, including attestations that:

- Borrower will comply with the executive compensation, stock repurchase, and capital distribution restrictions applicable to Treasury's direct loan programs;
 - The equity-based restrictions prevent any stock or other equity repurchase, as well as dividends or distributions, during the term of the loan and for a period of 12 months after it is repaid;
 - Under the executive compensation restrictions, employees earning more than \$425,000 per year will not be eligible for any increase in compensation in excess of 2019 levels, and those employees earning more than \$3,000,000 per year will see a reduction in compensation based on the formula described in the CARES Act, in each case while the loan remains outstanding and for a period of 12 months after.
- Borrower will not use the proceeds of a Program loan to repay other loan balances, and will not repay debt of equal or lower priority (except mandatory principal payments) until the Program loan has been repaid in full;
- Lender will not use the proceeds of the loan to repay or refinance pre-existing loans or lines of credit made by the lender to the borrower;
- Neither borrower or lender will cancel or reduce, nor seek to cancel or reduce, any existing lines of credit;
- Borrower meets the EBITDA leverage condition;
- Borrower requires financing due to the exigent circumstances created by the COVID-19 pandemic and that, using the loan proceeds, it will make reasonable efforts to maintain its payroll and retain its employees during the term of the loan.

Key insight: The attestations do not fully capture requirements for this program mandated by the CARES Act, including the restoration and retention of 90% of workforce at full compensation and benefits, restrictions on offshoring of jobs and abrogation of existing collective bargaining agreements during the loan term and for a period of 2 years after, as well as required neutrality in the response to any union organizing effort. As we pointed out in our prior alert, we believe that certain union-related restrictions described in the CARES Act may be contrary to applicable law and the U.S. Constitution. It is unclear whether the Program loans will include these requirements as well.

Hodgson Russ will continue to monitor this relief and will publish updates as we receive more information from the federal government and financial institutions implementing these programs. Please contact Christofer C. Fattley (716.848.1757) or Valerie E. Stevens (646.218.7614) for any questions you may have.

Please check our Coronavirus Resource Center and CARES Act page to view many other alerts our attorneys in various practice areas have published on topics related to the pandemic.

If you received this alert from a third party or from visiting our website, and would like to be added to any of our mailing lists, please visit us at: <https://forms.hodgsonruss.net/sign-up-for-email-and-other-communications..html>