FEDERAL RESERVE'S MAIN STREET LENDING PROGRAM: UPDATED INFORMATION RE: LOW-INTEREST LOANS AVAILABLE TO MID-SIZED AND SMALL BUSINESSES

In a previous article on April 13, 2020, we discussed federal disaster relief programs available only for small businesses. As part of the article, we touched on the Federal Reserve's plans to launch the Main Street Lending Program (the "MSL Program"), a program that would provide direct low-interest loans to businesses, including mid-sized businesses, distinct from the loans offered to small businesses under the Paycheck Protection Program. Since the article, the Federal Reserve has released additional guidance regarding the MSL Program. Most recently, on June 8, 2020, the Federal Reserve released in-depth FAQs regarding the MSL Program. As of the date of this article, the Federal Reserve has opened up lender registration for the MSL Program.

The purpose of this article to update the information we previously provided and include additional details regarding the MSL Program.

Q: What kinds of loans will be included in the MSL Program?

A: The MSL Program will consist of three (3) loan facilities (the terms of which are discussed in more detail below):

- The Main Street New Loan Facility (the "MSNLF") – includes new loans originated on or after April 24, 2020.
- The Main Street Priority Loan Facility (the "MSPLF") – includes new loans originated on or after April 24, 2020, senior to or pari passu with, in terms of priority and security, the business' other loans, other than mortgage debt.
- The Main Street Expanded Loan Facility (the "MSELF") – includes upsized tranches to increase the size of loans or revolving credit facilities originated before April 24, 2020.

The Federal Reserve has released term sheets, as of June 8, 2020, for each of the MSNLF, the MSPLF, and the MSELF.

Q: Who is eligible to receive loans under the MSL Program?

A: To be eligible to receive a loan under the MSL Program, the business must:

- Be established prior to March 13, 2020.

- Have no more than 15,000 employees or no more than $5 billion in 2019 annual revenues.
- Be 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.
- Must not have participated and is not participating in another loan facility under the MSL Program or the Primary Market Corporate Credit Facility.
- Not have received support under Sections 4003(b)(1)-(3) the CARES Act (i.e., support for (i) passenger air carriers and related businesses, (ii) cargo air carries, or (iii) businesses critical to national security).
- Not be a non-profit organization.
    - Note: On June 15, 2020, the Federal Reserve issued draft term sheets for loan facilities for non-profit organizations – Nonprofit Organization New Loan Facility and the Nonprofit Organization Expanded Loan Facility.

Q: What loans are eligible for the MSL Program?

A: To be eligible under the MSL Program, the loan must meet the following criteria:

- Five-year maturity.
- Principal payments deferred for two (2) years and interest payments deferred for one (1) year (unpaid interest will be capitalized).
- Principal amortization of 15% at the end of the third year, 15% at the end of the fourth year, and a balloon payment of 70% at maturity at the end of the fifth year.
- Interest rate equal to LIBOR + 3%.
- Maximum loan size:
    - For the MSNLF – the lesser of (i) $35 million or (ii) an amount that, when added to the business' existing outstanding and undrawn available debt, does not exceed four (4) times the business' 2019 EBITDA (earnings before interest, taxes, depreciation, and amortization).

- For the MSPLF – the lesser of (i) $50 million or (ii) an amount that, when added to the business' existing outstanding and undrawn available debt, does not exceed six (6) times the business' 2019 EBITDA (earnings before interest, taxes, depreciation, and amortization).
- For the MSELF – the lesser of (i) $300 million or (iii) an amount that, when added to the business' existing outstanding and undrawn available debt, does not exceed six (6) times the business' 2019 EBITDA.

- Minimum loan size:
  - For the MSNLF – $250,000
  - For the MSPLF – $250,000
  - For the MSELF – $10 million
- Prepayment of the loan permitted without penalty.

Q: What certifications must be made by the business regarding the loan under the MSL Program?

A: The business will be required to make the following certifications:

- The business has not participated and is not participating in another loan facility under the MSL Program or the Primary Market Corporate Credit Facility, and if any of its affiliates are participating, the business will notify the lender.
- The business is not insolvent.
- The business is unable to secure adequate credit accommodations from other banking institutions (discussed in more detail below).
- The business will commit to refrain from repaying other debt, with the exception of mandatory and owed principal or interest payments, unless the business has first repaid the loan under the MSL Program in full.
- The business will not seek to cancel or reduce any of its outstanding lines of credit with the lender or any other lender, unless the business has first repaid the loan under MSL Program in full.

- The business, after giving effect to the loan under MSL Program, has the ability to meet its financial obligations for at least the next 90 days and does not expect to file for bankruptcy during that time period.
- The business will not make dividends or distributions with respect to the business' common stock or buy back the company's listed securities until 12 months after the loan is repaid (except pursuant to a previously existing contractual obligation).
    - Note: the dividend and distribution restriction does not apply to S corporations or other tax pass-through entities with regards to making distributions to its owners' to cover their tax obligations in respect of the business' earnings.
- The business will restrict compensation:
    - For officers and employees whose total compensation exceeded $425,000 (but was less than $3 million) in 2019 or, if applicable, a subsequent reference period, the business may not, beginning the year of the loan and continuing for the one-year period following the satisfaction of the loan, pay such officer or employee during any 12 consecutive month period more compensation than that officer or employee received in 2019 or the subsequent reference period or pay severance/other benefits upon termination of employment with the business that exceed twice the maximum total compensation in 2019 or the subsequent reference period.
    - For officers and employees whose total compensation exceeded $3 million in 2019 or the subsequent reference period, the business may not, beginning the year of any loan and continuing for the one-year period following the satisfaction of the loan, pay such officer or employee during any consecutive 12 month period more than $3 million plus 50% of the amount over $3 million received by the officer in 2019 or the subsequent reference period or pay severance pay/other benefits upon termination of employment with the borrower that exceed twice the maximum total compensation in 2019 or the subsequent reference period.
    - Note: These restrictions do not apply for an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020.

Other Features of the MSL Program

Q: Will a loan under the MSL Program be eligible for forgiveness or reduction, similar to a loan under the Paycheck Protection Program ("PPP")?

A: No, unlike loans under the PPP, the CARES Act prohibits the reduction or forgiveness of the principal amount of any loan made to an eligible business pursuant to a program or facility established by the Federal Reserve.

Q: May a business that received a PPP loan or Economic Injury Disaster Loan ("EIDL") participate in the MSL Program?

A: Yes, the MSL Program is designed to also accommodate a business who received a PPP loan or EIDL but now requires additional financial support.

Q: Will a loan under the MSL Program be subject to the SBA affiliation rules, similar to a loan under the PPP?

A: Yes, businesses eligible for loans under the MSL Program will be subject to the SBA's existing affiliation rules. The SBA's existing rules provides that affiliation occurs when one entity controls or has the power to control another entity, or when a third party controls both entities. Control does not have to be exercised; merely the power to control will suffice for purposes of determining affiliation.

The recent SBA guidance clarifies that affiliation will exist under any of the following circumstances:

- **Ownership**: When an entity owns or has the power to control more than 50% of the other entity's voting interests. A minority shareholder may also be in control if it has the power to prevent a quorum or block action by the board of directors or shareholders.
- **Stock options, convertible securities, and agreements to merge:** When stock options, convertible securities, and agreements to merge (including agreements in principle) affect one entity's control over another entity.

- **Management**: When a CEO or president of one entity also controls the management of another entity; when a single individual that controls the board of directors or management of one entity also controls the board of directors or management of another entity; or when an entity controls the management of another entity through a management agreement.
- **Identity of interest**: When close relatives have identical or almost identical business or economic interests.

Q: Are private equity funds and/or portfolio companies of private equity funds eligible for the MSL Program?

A: Private equity funds are not eligible for the MSL Program as the SBA regulations classify a private equity fund as an ineligible business. However, a portfolio company of a private equity fund may be eligible for the MSL Program, assuming, it otherwise meets the eligibility requirements. The affiliation rules discussed above may cause a portfolio company to fail to meet the eligibility requirements when that portfolio company's revenue and employees is aggregated with the revenue and employees of its affiliates.

Q: What constitutes "commercially reasonable efforts" to maintain payroll and retain employees?

A: The term sheets under the MSL Program state that businesses receiving a loan under the MSL Program should make commercially reasonable efforts to retain employees during the term of the MSNLF loan, MSPLF loan, or MSELF upsized tranche. Specifically, a business should undertake good-faith efforts to maintain payroll and retain employees, in light of its capacities, the economic environment, its available resources, and the business need for labor.

Q: How must a business demonstrate that it is "unable to secure adequate credit accommodations from other banking institutions"?

A: Being unable to secure adequate credit accommodations does not mean that no credit from other sources is available to the business. Rather, the business may certify that it is unable to secure "adequate credit accommodations" because the amount, price, or terms of credit available from other sources are inadequate for the business' needs during the current unusual and exigent circumstances. Businesses are not required to demonstrate that applications for credit had been denied by other lenders or otherwise document that the amount, price, or terms of credit available elsewhere are inadequate.

If you have any questions concerning this alert, please contact:

J. Daniel Boysen
Attorney
Email
214.922.4193

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