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2021 Bankruptcy Battleground West

Issues Relating to CARES Act Loans

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PPP and MSLP Overview

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Banking EvolvedSM

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Main Street Lending Program

Eligible Borrowers

Requirements for New Loans



Main Street New Loan

- Established prior to March 13, 2020
- Meets at least one of the following
 - 15,000 employees or fewer
 - 2019 revenue of \$5 billion or less
- Created or operating under the laws of the United States with majority of employees based in United States
- Does not participate in the other Main Street or Nonprofit Loan Facilities, nor the Primary Market Corporate Credit Facility
- Has not received specific support under Subtitle A of Title IV of the CARES Act

Nonprofit New Loan

- All of Main Street New Loan eligibility list **PLUS**
- Has been in continuous operation since January 1, 2015
 - Has ≥10 employees
 - Has an endowment <\$3 billion
 - Has total non-donation revenues ≥60% of expenses from 2017 to 2019
 - Has ratio of adjusted 2019 EBITDA to unrestricted 2019 operating revenue ≥2%
 - Has ratio of liquid assets at time of origination to average daily expenses ≥60 days
 - Has ratio of unrestricted cash and investments to existing outstanding and undrawn debt (plus the amount of any loan under the Facility, plus the amount of any CMS Accelerated and Advance Payments) that is >55%

Data provided by Board of Governors of the Federal Reserve System (www.federalreserve.gov)

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	Main Street Loan Facilities		
	New	Priority	Expanded
Origination	After April 24, 2020	After April 24, 2020	On or before April 24, 2020 and remaining maturity of 18+ months
Loan Term and Rate	5 years and adjustable rate of LIBOR (1-3 mo) + 300 points	5 years and adjustable rate of LIBOR (1-3 mo) + 300 points	5 years and adjustable rate of LIBOR (1-3 mo) + 300 points
Payment Deferral	Principal 2 years Interest 1 year	Principal 2 years Interest 1 year	Principal 2 years Interest 1 year
Principal Amortization	15% year 3 15% year 4 70% year 5	15% year 3 15% year 4 70% year 5	15% year 3 15% year 4 70% year 5
Participation Rate	95% Main Street SPV 5% Lender	95% Main Street SPV 5% Lender	95% Main Street SPV 5% Lender
Min. Loan Size	\$100,000	\$100,000	\$10,000,000
Max. Loan Size	Lesser of \$35 million or 4x adjusted 2019 EBITDA	Lesser of \$50 million or 6x adjusted 2019 EBITDA	Lesser of \$300 million or 6x adjusted 2019 EBITDA
Transaction Fee	If loan \$250k+, lender pays SPV 100 base points	If loan \$250k+, lender pays SPV 100 base points	Lender pays SPV 75 base points on upsized tranche
Loan Origination Fee	If loan \$250k+, borrower pays lender 100 base points	If loan \$250k+, borrower pays lender 100 base points	Borrower pays lender 75 base points on upsized tranche
Loan Servicing Fee	If loan \$250k+, SPV pays lender 25 base points per annum	If loan \$250k+, SPV pays lender 25 base points per annum	SPV pays lender 25 base points on upsized tranche per annum

Data provided by Board of Governors of the Federal Reserve System (www.federalreserve.gov)

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	Nonprofit Organization Loan Facilities	
	New	Expanded
Origination	After June 15, 2020	On or before June 15, 2020 and remaining maturity of 18+ months
Loan Term and Rate	5 years and adjustable rate of LIBOR (1-3 mo) + 300 points	5 years and adjustable rate of LIBOR (1-3 mo) + 300 points
Payment Deferral	Principal 2 years Interest 1 year	Principal 2 years Interest 1 year
Principal Amortization	15% year 3 15% year 4 70% year 5	15% year 3 15% year 4 70% year 5
Participation Rate	95% Main Street SPV 5% Lender	95% Main Street SPV 5% Lender
Min. Loan Size	\$100,000	\$10,000,000
Max. Loan Size	Lesser of \$35 million or average 2019 quarterly revenue	Lesser of \$300 million or average 2019 quarterly revenue
Transaction Fee	If loan \$250k+, lender pays SPV 100 base points	Lender pays SPV 75 base points on upsized tranche
Loan Origination Fee	If loan \$250k+, borrower pays lender 100 base points	Borrower pays lender 75 base points on upsized tranche
Loan Servicing Fee	If loan \$250k+, SPV pays lender 25 base points per annum	SPV pays lender 25 base points on upsized tranche per annum

Data provided by Board of Governors of the Federal Reserve System (www.federalreserve.gov)

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Main Street Lending Program

Big picture overview

axos[™]

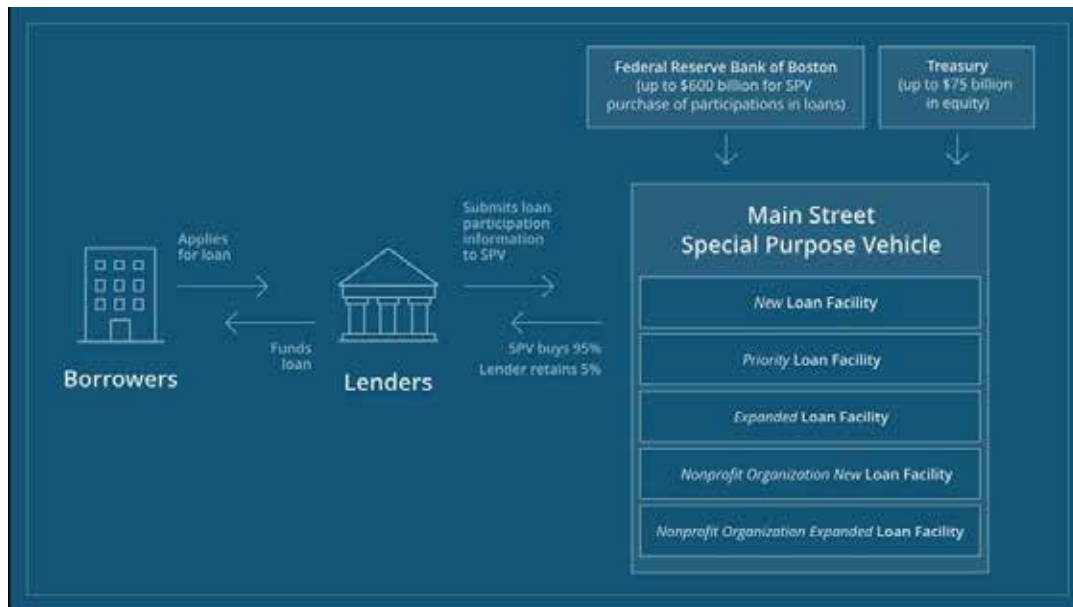


Diagram by Federal Reserve Bank of Boston (bostonfed.org/mslp)

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Main Street Lending Program



Federal Reserve supporting lending to small and medium-sized businesses and nonprofit organizations.

Purpose

To enable sound businesses and nonprofits to maintain operations and support economic recovery.

Five Facilities

> **Main Street** New Loan > **Main Street** Priority Loan > **Main Street** Expanded Loan > **Nonprofit** New Loan > **Nonprofit** Expanded Loan

As of January 31, 2021

Outstanding Advances \$46,520,183,981	Collateral Pledged \$46,520,183,981	Interest, Fees, Other \$155,930,752
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Data provided by Board of Governors of the Federal Reserve System (www.federalreserve.gov)

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Federal Reserve site



Loans have the same terms regardless of lender

✓ Federal Reserve site

> <https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm>

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Paycheck Protection Program

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Round 1 - First Draw PPP Loans

First loan to incent small businesses to keep workers on payroll

Who Qualifies	What It Covers	How To Apply
<ul style="list-style-type: none"> > Sole proprietors > Contractors > Self-employed > Any business, nonprofit, veteran organization, tribal business with: <ul style="list-style-type: none"> ▪ ≤500 employees, OR ▪ >500, but meets SBA industry size standard > Accommodations, food services, or news organizations with: <ul style="list-style-type: none"> ▪ >1 location, AND ▪ <500 employees per location 	<ul style="list-style-type: none"> > Payroll and benefit costs > Mortgage interest > Rent > Utilities > COVID-related costs to protect workers > Uninsured damage of looting/vandalism > Other specific supplier or operational expenses <div> <p>\$15 billion designated for borrowers in low- or moderate-income neighborhoods</p> <ul style="list-style-type: none"> ▪ ≤ 10 employees ▪ <\$250,000 loans </div>	<ul style="list-style-type: none"> > March 31, 2021 deadline > Apply through: <ul style="list-style-type: none"> ▪ SBA 7(a) lender ▪ Federal insured depository institution ▪ Federal insured credit union ▪ Farm Credit System or other eligible non-bank lenders > Lender Match – an SBA online tool to connect businesses with approved lenders > All First Draw PPP loans have the same terms, regardless of lender

Data provided by U.S. Small Business Administration (www.sba.gov)

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Round 2 - Second Draw PPP Loans



The second draw loan program contains stricter eligibility and lower loan limits

Who Qualifies	What Limits	How To Apply
<ul style="list-style-type: none"> > Previously received a loan and used the full amount only for authorized uses > ≤ 300 employees > Experienced 25%+ reduction in gross receipts between comparable quarters in 2019 and 2020 	<ul style="list-style-type: none"> > Maximum loan amount is 2.5x average monthly payroll costs up to \$2 million > For accommodation and food services - Maximum loan amount is 3.5x average monthly payroll costs up to \$2 million <div style="background-color: #e6f2ff; padding: 10px; margin-top: 10px;"> <p>\$25 billion designated for borrowers in low- or moderate-income neighborhoods</p> <ul style="list-style-type: none"> ▪ ≤ 10 employees ▪ <\$250,000 loans </div>	<ul style="list-style-type: none"> > March 31, 2021 deadline > Apply through: <ul style="list-style-type: none"> ▪ SBA 7(a) lender ▪ Federal insured depository institution ▪ Federal insured credit union ▪ Farm Credit System or other eligible non-bank lenders > Lender Match – an SBA online tool to connect businesses with approved lenders > All Second Draw PPP loans have the same terms, regardless of lender

Data provided by U.S. Small Business Administration (www.sba.gov)

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Loan Terms & Full Forgiveness



Loans have the same terms regardless of lender

- > Loan details
 - PPP loans have an interest rate of 1%
 - Loans prior to June 5th have a maturity of 2 years
 - Loans after June 5th have a maturity of 5 years
 - Loan payments will be deferred for those who apply for loan forgiveness until SBA remits to the lender
 - If they didn't apply for loan forgiveness, payments are deferred 10 months after the end of what would have been the covered period
 - No collateral or personal guarantees required
 - No fees charged from the government or lenders
- > Full Loan Forgiveness – Borrowers qualify if during the 8- to 24-week period following loan disbursement, all three criteria are met:
 - > Employee and compensation levels are maintained
 - > Loan is spent on payroll costs and other eligible expenses
 - > At least 60% of proceeds are spent on payroll costs

Data provided by U.S. Small Business Administration (www.sba.gov)

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Paycheck Protection Program

Keeping the workforce employed during the COVID-19 crisis.

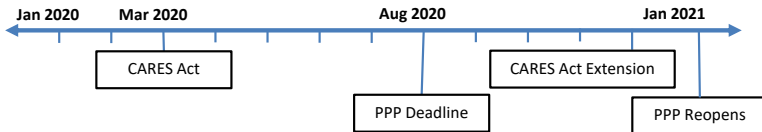
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 > **First Draw**
First Time
Participants

 > **Second Draw**
Previously
Received a Loan

 > **Loan Forgiveness**
60% Spent on
Payroll

Legislation



2020 and 2021 Approved Lending



Data provided by U.S. Small Business Administration (www.sba.gov)

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SBA Resources

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- ✓ PPP Loan Forgiveness
 - SBA site
<https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program/ppp-loan-forgiveness>
- ✓ First Draw PPP Loans
 - SBA site
<https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program/first-draw-ppp-loans>
- ✓ Second Draw PPP Loans
 - SBA site
<https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program/second-draw-ppp-loans>

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Additional Resources regarding Paycheck Protection Program



What Businesses and Lenders Need to Know About The CARES Act and the Paycheck Protection Program

April 22, 2020

Summary

The Coronavirus Aid, Relief, and Economic Security, or “CARES Act”—the third emergency bill that Congress has prepared in response to the Coronavirus (COVID-19) pandemic—was signed into law Friday, March 27, 2020. Bryan Cave Leighton Paisner lawyers have analyzed the law, including its provision for a Paycheck Protection Program (PPP), and have been advising clients on what impact it may have on their businesses and whether those businesses may be eligible for assistance.

The Coronavirus Aid, Relief, and Economic Security, or “CARES Act”—the third emergency bill that Congress has prepared in response to the Coronavirus (COVID-19) pandemic—was signed into law Friday, March 27, 2020. Bryan Cave Leighton Paisner lawyers have analyzed the law, including its provision for a Paycheck Protection Program (PPP), and have been advising clients on what impact it may have on their businesses and whether those businesses may be eligible for assistance.

The [U.S. Legislative Response to COVID-19](#) contained significant relief for small businesses, including \$349 billion in Small Business Administration (SBA) loan guaranties and subsidies and additional

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funding for SBA programs. Funding lapsed on April 16 when the original \$349 billion in appropriations was spoken for and the SBA put a halt to authorizing new loan applications. Congress is currently negotiating another coronavirus response bill in which more than \$300 billion will be added to the Paycheck Protection Program, and it is expected that small businesses will be able to submit applications again soon.

Highlights include:

- **Expansion of SBA's 7(a) Loan Program to Support New "Paycheck Protection Program" Loans.** The SBA's existing 7(a) program will see:
 - Increase in maximum loan amount to \$10 million.
 - Allowable uses expanded to include:
 - Payroll support (including salaries, benefits, and paid sick or medical leave);
 - Mortgage, rent and utility payments; and
 - Other debt obligations.
- **Loan Forgiveness.** Certain borrowers would be eligible for loan forgiveness equal to the amount incurred and spent during an eight-week period after the origination date of the loan on:
 - Payroll costs;
 - Interest payment on any mortgage in force before Feb. 15, 2020;
 - Rent on any lease in force before Feb. 15, 2020; and
 - Utilities for which service began before Feb. 15, 2020.

Borrowers must spend at least 75% of the loan on payroll costs. The amount forgiven would be reduced in proportion to any

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reduction in employees retained and to the reduction in pay of any employee beyond 25% of prior year compensation.

- **Subsidies for Certain Existing SBA 7(a) Loans.**
- **Special Terms.**
 - No personal or collateral guarantee will be required.
 - The eligible recipient does not have to certify that it is unable to obtain credit elsewhere.
 - Eligible borrowers must make a good faith certification that the loan is necessary due to the uncertainty of current economic conditions caused by COVID-19; that funds will be used for a permitted purpose; and that they are not receiving fund from another SBA program for the same uses.
 - Maximum term of loan is 2 years.
 - Interest rate cannot exceed 1%, but interest payments are deferred for six months.
 - No prepayment penalty.

Who Qualifies?

The CARES Act program covers business with 500 or fewer employees, unless the covered industry's SBA size standard allows more than 500 employees, which were operational on Feb. 15, 2020. The size standards are tested on an affiliate basis—combined with all businesses under common control (50% ownership or contractual control)—counting on an aggregate basis towards the size test, except for hospitality and restaurant businesses, franchises, and recipients of Small Business Investment Company (SBIC) investment. The program is available for employees whose principal place of residence is in the United States.

This means that the 500-employee threshold is measured for the certain excepted businesses in the hospitality and restaurant business, franchises, and recipients of SBIC loans on a location-by-location basis. For instance, a hotelier with more than 500 employees nationwide may seek loans for individual properties. Consultation with an attorney to determine how a loan request can be structured to ensure eligibility may be key.

Loan Forgiveness

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Following a detailed application, the loan will be eligible for forgiveness in an amount (not to exceed the principal amount of the loan) equal to the sum of payroll costs, rent and utilities expenses, and interest payments on mortgages so long as any such lease, mortgage, or utility was in service **prior to** February 15, 2020 and, in each case, paid during the eight-week period commencing on the date of disbursement of the loan. Rental payment under a lease in effect as of January 1, 2020, would be eligible for forgiveness while rental payment under a lease effective as of March 15, 2020, would not.

Payroll costs include salary, commissions, wages, and “similar compensation,” as well as health and retirement benefits and state and local taxes. Payroll costs do not include FICA or federal withholding from the period of Feb. 15 through June 30, and they do not include compensation for salary above \$100,000 (exact calculation of what amounts above \$100,000 will be allowed will be more clear once the SBA promulgates regulations, which are expected about a week after the law’s passage).

Loans will be made by lenders who are participants in the SBA’s Section 7(a) program and those lenders will also decide whether to accept a borrower’s application for forgiveness. Such decision must be made within 60 days of receipt of the application for forgiveness. Not later than 90 days after the loan forgiveness amount has been agreed by the lender, the SBA is authorized to reimburse the lender directly for the principal amount of any forgiven debt, plus interest accrued through the date of repayment.

The amount of any loan forgiveness will be reduced by any meaningful reductions in employee wages (in excess of 25% for any employee) or layoffs of employees during the covered period in accordance with the terms of the program. Borrowers that rehire workers previously laid off will not be penalized for having reduced payroll at the beginning of the period. The forgiven loan will not be considered taxable income.

Any loan amount not forgiven is carried forward as an ongoing loan with a maximum term of 2 years and a maximum interest rate of 1%.

Detailed accounting and complete and accurate recordkeeping will be vital to taking advantage of these provisions.

Maximum Amount of Loan

The maximum loan amount is the **lesser of** \$10 million or the product obtained by multiplying average total monthly payments for payroll costs during the 1-year period before the loan application by 2.5.

(Regulations have clarified that lenders can accept calculations based on the 2019 calendar year.) If average monthly payroll costs for the 12-month period were \$1.5 million (annual payroll costs of \$18 million), the maximum loan amount would be \$3,750,000. The loan can also include the outstanding amount of a loan made under the SBA's Economic Injury Disaster Loan Program between January 31, 2020, and the date on which such loan may be refinanced as part of this new program.

Allowance for New Lenders

The CARES Act allows the Department of Treasury to establish a process by which lending institutions that are not currently authorized to offer SBA loans will be able to participate during the declared national emergency.

Subsidy/Deferment for Existing Loans

The SBA will pay the principal, interest and any associated fees that are owed on certain existing 7(a) loans for a six-month period starting on the next payment due date. Loans already currently in deferment would include an additional six months of payment by the SBA beginning with the next payment. Loans made during this period until six months after the enactment of the legislation would also qualify for six months of deferral payment by the SBA. This does not apply for new "Paycheck Protection Program" loans made under the CARES Act.

Existing SBA Disaster Loan Program

In a [previous alert](#), we highlighted the SBA's disaster assistance loans that were made a part of Congress's second emergency bill, the Coronavirus Preparedness and Response Supplemental Appropriations Act signed into law on March 6, 2020. Under that law, the SBA expanded the ways in which businesses could apply for an Economic Injury Disaster Loan (EIDL).

Importantly, under the CARES Act, a borrower that receives a 7(a) loan for employee salaries, payroll support, mortgage payments and/or other debt obligations would not be able to receive an EIDL for the same purpose, or co-mingle funds from another loan for the same purpose.

The EIDL program does have the benefit of establishing an emergency grant to allow an eligible entity to request an advance on the EIDL of up to \$10,000. An applicant would not be required to repay such an advance payment, even if it is subsequently denied an EIDL.

The programs discussed above, and other assistance programs being established throughout this pandemic, will have varying benefits and eligibility requirements. A business should carefully assess

which of the new federal programs is most advantageous before applying and how best to plan for, apply to, and manage any loans received for the maximum benefit.

Other CARES Act Provisions Specific to Lenders

Bryan Cave Leighton Paisner's legislative affairs team has provided an overview of the CARES Act and other congressional emergency measures [here](#). A more in-depth look at CARES Act provisions relevant to lenders in general is available [here](#). The firm's continuing analysis of COVID-related legal issues is housed [here](#).

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Publications

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article

Navigating PPP Loan Forgiveness Risks: Part 1 — Borrowers

Law360

November 9, 2020

This is Part 1 of an article series. Part 2 is available [here](#).

Over the past several months, the U.S. Department of Justice has brought charges against more than 50 individuals over various Paycheck Protection Program fraud schemes. Likewise, the U.S. Small Business Administration has said repeatedly — and said so again at the beginning of October^[1] — that it plans to review all loans of more than \$2 million and that these reviews will focus on borrowers' good faith.

Against that backdrop, many borrowers are in the process of preparing, certifying and submitting their PPP loan forgiveness applications. To avoid costly investigations and allegations of misconduct, borrowers need to consider the statements they make to the SBA carefully as they calculate, document, certify and submit their applications.

In this two-part article, we discuss potential pitfalls and provide recommendations for avoiding potential criminal ramifications for borrowers, lenders and third parties as they navigate issues related to the forgiveness of PPP loans.

This first installment analyzes potential DOJ investigations and prosecutions related to forgiveness applications from the viewpoint of PPP borrowers, and the second installment will be from the perspective of lenders and third parties.

PPP Loans Facing Scrutiny

On Aug. 10, borrowers who received loans issued under the PPP were able to begin submitting applications to the SBA seeking full or partial forgiveness of those loans. Borrowers need to remain vigilant to protect against fraud and misuse of the funds.

In June, the U.S. Senate confirmed the appointment of an Office of the Special Inspector General for Pandemic Recovery, which has authority to conduct audits and investigations of PPP loans.^[2] Moreover, the DOJ and SBA have reportedly earmarked significant resources to investigate and bring criminal prosecutions for PPP loan fraud.

In particular, in March, Attorney General William Barr directed the 94 U.S. attorneys' offices around the country to prioritize the investigation and prosecution of coronavirus fraud schemes, and days later, Deputy Attorney General Jeffrey Rosen issued an

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internal memorandum directing each U.S. attorney's office to appoint a coronavirus fraud coordinator to serve as the legal counsel for the district on matters relating to the coronavirus.

As of September, federal prosecutors have brought criminal charges across the country against more than 50 people alleging more than \$175 million in PPP fraud schemes.[3]

Borrowers Must Remain Vigilant

In general, fraud is hard to prove: Prosecutors need to establish an ongoing scheme to defraud and need to show that a defendant exhibited a criminal intent to defraud. To be sure, statements by insiders at businesses, email chains and other records can help the government prove that a fraud was committed.

Nonetheless, when an executive whose company received PPP funds makes up the existence of employees working for the business,[4] or shows up to work driving a new sports car,[5] or is caught at strip clubs,[6] the criminal indictment virtually writes itself.

Frequently, though, borrowers who did not set out to commit a crime find themselves sitting across from FBI agents. Often, borrowers who ultimately commit fraud start with good intentions and clear business purposes.

Then, something happens.

The business or a key executive suddenly stumbles — a key business milestone is missed. Optimistic sales projections do not pan out, but operating expenses keep rising. Perhaps the funds are not used to buy sports cars or party at strip clubs, but they are used in ways not authorized by the PPP in an effort to cover up the problems and keep the business operating. Those cases are more difficult for the government to prove.

Borrowers need to be aware that the PPP loan forgiveness application was drafted in a way to simplify for the government the investigation and prosecution of the misuse of PPP funds.

The application contains a page of certifications that an executive or owner of the borrower — typically the business' CEO, chief financial officer or comptroller — must attest are all true before the government will forgive the loan. In one certification, the certifying individual is attesting that the information in the application, including the other certifications, is true and correct.

The individual also attests to knowing that making any false statement on the application form is a criminal offense punishable by a term in federal prison. Tie that certification together with the very first certification, which requires the borrower's representative to attest that the PPP funds distributed to the business were used in accordance with the requirements of the program.

The borrower's representative is certifying that the funds were used as required by the program, that this statement is true, and that the representative knows that if the funds were used for any other purpose than what was permitted under the program, he could be prosecuted for lying and, if convicted, sent to prison.

All that is left for the government to prove is that the funds were used in some unauthorized way — not even some overtly illegal way — and that the certifying representative knew or should have known that fact.

Even more, another certification asks the borrower's representative to acknowledge that if the funds were used for some unauthorized purpose, the government could pursue criminal fraud charges against the borrower.

Some anti-fraud statutes require the government to prove that the fraudster knew that his conduct was against the law or at least wrong. This element is called willfulness and typically is very difficult for the government to prove. By signing the second

certification, the borrower's representative is establishing the willfulness element for the government, making a criminal fraud prosecution that much easier.

Considerations for Borrowers to Avoid Serious Problems

With these points in mind, borrowers and their certifying representatives ought to consider the following when seeking forgiveness of PPP loans.

Think before you sign.

Above all else, borrower representatives need to understand how all of the borrowed PPP funds were used before submitting any application for forgiveness.

If the borrower used a portion of funds in some unauthorized way, that mistake often can be remedied. But knowing about the issue and then sweeping it under the rug by certifying a forgiveness application creates more problems — problems that are significantly more difficult to correct after the fact.

Go back to the original PPP loan application.

A lot has happened since the start of the PPP, and it may be that borrowers have forgotten some of the details they provided regarding PPP eligibility, such as business size and the necessity for the PPP loan. What was said initially cannot be changed, of course, but a review of the application may identify areas that may need explanation and context.

Do not rush.

Although loan forgiveness applications can be filed now, the deadline for filing an application is much longer. Loan forgiveness applications must be filed within 10 months of the end of the period covered by the loan. The exact deadline will vary from business to business based on factors, such as whether the business chose an eight-week or 24-week period.

Although some businesses may want to wrap things up and put the PPP behind them, there is no need to rush. The PPP and guidance about the PPP have evolved over time and will probably continue to do so. Waiting may allow a business to have more information about the loan forgiveness process.

Keep in close touch with your lender.

The PPP is new for everyone, and at the time of this article, many lenders are not even accepting loan forgiveness applications. Lenders still need to develop procedures for processing and evaluating loan forgiveness applications, and while all lenders will need to meet standards set by the SBA, different lenders likely will handle applications differently.

Make sure that you are meeting your lender's specific requirements; any deviation could lead to a suggestion of willful concealment or dishonesty on your part. On the other hand, carefully documenting communications with your lender and following their requirements can be a powerful defense in a government investigation.

Document everything and keep your documents together.

Government investigations are built through witness recollections and documents. Many times — fairly or not — the absence of documents supporting a witness's recollection will lead prosecutors to believe that the witness is lying or covering something up.

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You need to be able to document your positions and you do not want to be in a position of trying to collect and reassemble documents many months after an event.

Limit statements to law enforcement.

If a law enforcement agent approaches you — particularly if you are approached at 6 a.m. at your home — do not try to talk your way out of the situation. At that moment, the government agent probably knows more than you do about the matter and almost certainly knows more than you might think the agent knows.

You are never required to speak with a law enforcement officer in a setting like that, and you're entitled to have an attorney with you if you do choose to speak.

Consider corporate liability.

The PPP forgiveness application requires certifications by people, not businesses, and the government can prosecute those people for lying on the applications. But the government is not limited to prosecuting people. The government also can prosecute corporate entities and other business for the crimes of their officers, directors and employees, subject to certain prudential considerations.^[7]

Conclusion

As deadlines approach for borrowers to submit their PPP forgiveness applications, they should carefully consider potential issues before they sign their name to a certification or talk to law enforcement in order to avoid potentially triggering fraud investigations, or worse yet, criminal liability.

“Navigating PPP Loan Forgiveness Risks: Part 1 — Borrowers,” by Paul H. Tzur, William E. Lawler III, Martin Teckler, and Grant E. Buerstetta was published in [Law360](#) on November 9, 2020.

[1] Statement of William B. Shear, COVID-19 Loans Lack Controls and Are Susceptible to Fraud, Testimony Before the Subcommittee on Investigations, Oversight, and Regulations, Committee on Small Business, House of Representatives available at www.gao.gov/assets/710/709912.pdf (Oct. 1, 2020).

[2] Meet the Inspector General, Special Inspector General for Pandemic Recovery, available at www.sigpr.gov/about-sigpr/meet-inspector-general.

[3] Remarks by Acting Assistant Attorney General Brian Rabbitt, PPP Criminal Fraud Enforcement Action Press Conference, available at www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-rabbitt-delivers-remarks-ppp-criminal-fraud (Sept. 10, 2020).

[4] News Release, San Diego Woman Created Fake “Employees” to Swindle CARES Act Funds; Pleads Guilty to Federal Fraud Charges, available at www.justice.gov/usao-sdca/pr/san-diego-woman-created-fake-employees-swindle-cares-act-funds-pleads-guilty-federal (Sept. 2, 2020).

[5] News Release, Florida Man who Used COVID-Relief Funds to Purchase Lamborghini Sports Car Charged in Miami Federal Court, available at www.justice.gov/opa/pr/florida-man-who-used-covid-relief-funds-purchase-lamborghini-sports-car-charged-miami-federal (July 27, 2020).

[6] News Release, Texas Entrepreneur Charged with Spending COVID Relief Funds on Improper Expenses Including Lamborghini and Strip Club, available at www.justice.gov/opa/pr/texas-entrepreneur-charged-spending-covid-relief-funds-improper-expenses-including (Aug. 4, 2020).

[7] Principles of Federal Prosecution of Business Organizations, Justice Manual §9-28.000, available at www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

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article

Navigating PPP Loan Forgiveness Risks: Part 2 — Lenders

Law360

November 10, 2020

This is Part 2 of an article series. Part 1 is available [here](#).

As borrowers prepare, certify and submit hundreds of thousands of Paycheck Protection Program loan forgiveness applications, lenders and third parties need to be aware of and assess various risks they face in this process. The U.S. Department of Justice and U.S. Small Business Administration are reviewing and investigating all violations of the PPP, not just those caused by borrowers.

In this two-part article, we discuss potential pitfalls for PPP borrowers, lenders and third parties and provide recommendations for avoiding potentially serious legal jeopardy as their loan forgiveness applications face investigators' and prosecutors' scrutiny.

The [first installment](#) analyzed potential DOJ and SBA investigation angles on forgiveness applications from the perspective of borrowers, while this second installment takes the perspective of lenders and third parties.

As of September, federal prosecutors have brought criminal charges across the country against more than 50 people alleging more than \$175 million in PPP fraud schemes.[1]

But that is only part of the story.

With borrowers continuing to submit applications to SBA seeking full or partial forgiveness of their PPP loans, lenders and third parties need to be aware of a variety of risks surrounding misuse of loans and abuse of the process.

Over the past few weeks, lenders have self-reported PPP and disaster relief loan fraud among their own employees. Lenders and third parties need to ensure that they have robust controls in place; that they have adequate management and audit functions in place to review employee behavior; and that they are maintaining a strong tone at the top of compliance and adherence to regulations.

Lenders and Third Parties Must Identify Risks

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Lenders and third-party loan service providers are not immune to possible fraud by individuals or groups of employees within their organizations. The top 15 lenders of funds under the PPP issued more than \$156 billion in more than 1.6 million loans.

These numbers are staggering and have provided ample cover for enterprising employees to commit fraud.

For example, lender employees had opportunities during the PPP loan application period to create fictitious companies and corporate documents to support loan applications for those fake companies. And, now that we are at the forgiveness stage, little more is required of these fraud-committing employees to convert their loans to federal grants.

As another example, employees of lenders and third-party loan processors have had opportunities to scheme with otherwise legitimate borrowers to obtain larger loans than those the borrowers needed, or qualified for, to cover payroll, with portions of the overages being kicked back to the employees.

Here are several considerations for lenders looking to identify potential or suspected fraud.

Audit your employees.

Lender employees involved with underwriting and processing PPP loans are the ones who were closest to the process and most likely to have an opportunity to commit some type of fraud or other wrongdoing.

Consider sampling a set of loans and thoroughly auditing them. Review the borrowers and their businesses. Try to identify competitors and speak with them. Go to corporate offices or worksites, or at least do so virtually.

Investigate as needed.

If you identify an employee or group of employees who may have engaged in fraudulent behavior in issuing loans, consider conducting an internal investigation, either with in-house personnel or outside advisers.

To be sure, this sometimes can be a time-consuming and costly process, and internal investigations often create suspicions and uncertainty within an organization. But internal investigations are necessary to promote the tone of a business organization and to show how any problems are isolated to specific employees and not the result of a failure in the organization's overall culture.

Self-disclose.

How and under what circumstances to self-disclose wrongdoing by employees are always difficult questions to answer. Factors to consider include:

- The size of the issue, both in terms of dollars and number of employees involved;
- The duration of the issue; and
- The confidence that the conduct in fact was wrong or illegal.

The DOJ certainly encourages self-disclosure,[2] though, explaining that it:

- "[E]ncourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities"; and that
- "[P]rosecutors may consider a corporation's timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the corporation's compliance program and its management's commitment to the compliance program."

Refresh your compliance program.

Without a doubt, the PPP was unprecedented in scope and speed of execution. The administration encouraged lenders to get funds to the businesses that needed them quickly. Processing the more than 1.6 million loan applications under the PPP was not a scenario many (or any) compliance teams contemplated when developing their compliance programs.

Nevertheless, in light of this experience, compliance functions should consider designing new compliance protocols to use in the event that another macroeconomic event triggers a need to underwrite and process huge volumes of loan applications in a short period of time.

Conclusion

With lenders and third parties facing potential investigations or prosecutions over billions of dollars of PPP loans that were extended during the first few months of the COVID-19 pandemic, they must remain vigilant at identifying potential or suspected fraud.

“Navigating PPP Loan Forgiveness Risks: Part 2 — Lenders,” by Paul H. Tzur, William E. Lawler III, Martin Teckler, and Grant E. Buerstetta was published in [Law360](#) on November 10, 2020.

[1] Remarks by Acting Assistant Attorney General Brian Rabbitt, PPP Criminal Fraud Enforcement Action Press Conference, available at www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-rabbitt-delivers-remarks-ppp-criminal-fraud (Sept. 10, 2020).

[2] Principles of Federal Prosecution of Business Organizations, Justice Manual § 9-28.900, available at www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.900.

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Stimulus Bill Changes to All PPP Loans

January 4, 2021

Authored by: [Robert Klingler](#)

On December 27, 2020, President Trump signed the [2021 Consolidated Appropriations Act](#), which also contained the latest stimulus relief bill. Part of that bill was the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act, which made changes to all Paycheck Protection Program (PPP) loans, [re-opened the PPP program for new loans](#), and [allowed certain borrowers to obtain a second PPP loan](#).

This post specifically looks at the changes implemented by the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (the “Act”) that affects all PPP borrowers. The changes below are based on the text of the Act, and may be further modified or clarified by subsequent regulations or guidance.

Paycheck Protection Program

Tax Treatment. Most importantly, Section 276 of the Act reverses the prior Internal Revenue Service guidance and provides significant tax relief to all PPP borrowers. Not only does the Act confirm that any cancellation of debt income obtained from forgiveness of the PPP loan is tax exempt (as provided for in the CARES Act), but now any tax deductible expenses used to generate such forgiveness may still be taken to reduce taxable income.

Covered Period Flexibility. Section 306 of the Act provides PPP borrowers with the flexibility of setting the length of the “Covered Period” for purposes of PPP loan forgiveness and FTE representations at any length between 8 and 24 weeks. The Covered Period will begin on the date of the origination of the PPP loan, and end on the date selected by the borrower that occurs between 8 weeks and 24 weeks after origination.

EIDL Advance Does Not Affect Forgiveness. Section 333 of the Act repeals a prior CARES Act provision that said that any forgiveness would be reduced by the amount of the EIDL Advance. We understand that newly processed forgiveness remittances from the Small Business Administration (SBA) already reflect this change, but we are awaiting SBA guidance for how they will handle previous EIDL Advance-based forgiveness reductions.

Simplified Forgiveness. Section 307 of the Act requires that the SBA, by January 20, 2021, to provide a new simplified forgiveness process for PPP loans of not more than \$150,000. The new process is required to be a certification on no more than 1 page. The only items specified in the Act as to be included in this simplified form are the number of employees able to be retained, estimated amount spent on payroll costs, the total loan value, and an attestation of compliance with the requirements of the PPP loan program. No additional application or documentation is to be required. We are interested to see how the SBA and Treasury interpret the provision regarding attestation of compliance with the requirements of the PPP loan program, but regardless this new simplified forgiveness process should be a welcome relief to small PPP borrowers and the lenders that must process the applications. (As a reminder, [over 75% of the PPP loans](#) should qualify for this simplified forgiveness process.)

Expanded Permissible/Forgivable Uses of PPP Loan Proceeds. Section 304 of the Act adds four additional categories of expenses that are now eligible for forgiveness under PPP loans:

- Covered operations expenditures;
- Covered property damage costs;
- Covered supplier costs; and
- Covered worker protection expenditures.

We will provide more details following implementing regulations, but the Act provides basic details of these new expense categories. Covered operations expenditures are generally payments for business software or cloud services. Covered property damage costs are meant to cover any property damage from vandalism or looting related to public disturbances that occurred in 2020 and were not covered by insurance. Covered supplier costs will cover the cost of purchasing goods that are essential to operations and were made pursuant to a contract that was in effect prior to the Covered Period (unless for

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2021 BANKRUPTCY BATTLEGROUND WEST

perishable goods, in which case the contract can be entered into during the Covered Period). Covered worker protection expenditures should cover all operating and capital expenditures related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

Note: Payroll costs still must represent at least 60% of the total expenses for which forgiveness is sought.

Agent Fees. Section 341 of the Act clarifies that a PPP Lender is only responsible for paying the fees of an agent under the PPP for services which the lender has directly contracted with the agent. This should end, once and for all, the litigation brought by purported agents seeking fees under the provisions of the CARES Act.

Elected Federal Official Conflict of Interest. Any PPP borrower that is 20% or more owned by covered federal officials (generally the President, Vice President, cabinet member or member of Congress, and their respective spouses), must disclose the existence of their PPP loan by January 26, 2021.

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Stimulus Bill Changes to New PPP Loans

January 5, 2021

Authored by: [Robert Klingler](#)

On December 27, 2020, President Trump signed the [2021 Consolidated Appropriations Act](#), which also contained the latest stimulus relief bill. Part of that bill was the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act, which [made changes to all Paycheck Protection Program \(PPP\) loans](#), re-opened the PPP program for new loans, and [allowed certain borrowers to obtain a second PPP loan](#).

This post specifically looks at the changes implemented by the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (the “Act”) that affects new PPP borrowers. The [changes previously discussed that will affect all PPP borrowers will also affect new borrowers](#). The changes below only affect new PPP borrowers, and do not affect existing outstanding PPP loans. The changes below are based on the text of the Act, and may be further modified or clarified by subsequent regulations or guidance.

Paycheck Protection Program

Applications Re-Opened through March 31, 2021. The Act authorizes a renewed opportunity for eligible small businesses to apply for a PPP loan. The Act authorizes up to \$259 billion in new PPP loans, although some of that money could also be utilized for second draw PPP loans. The prior authorization for new PPP loans ended on August 8, 2020. The terms of these new (first) PPP loans remain essentially the same... up to \$10 million, based on monthly payroll costs, with a cap of \$20 million for any affiliated corporate group. Eligibility is also generally unchanged: less than 500 employees and ability to certify that due to economic uncertainty the PPP loan is necessary.

Public Companies Ineligible. If a company has securities listed on an exchange registered with the SEC, then it is ineligible for a covered loan on or after December 27, 2020.

Expanded Non-Profit Eligibility. Section 318 of the Act slightly expands eligibility for non-profit entities to include 501(c)(6) and “destination marketing organizations.”

Bankrupt Companies May Apply. Section 320 of the Act provides that small business in bankruptcy that otherwise satisfy the eligibility criteria may apply for a PPP loan.

Elected Federal Official Conflict of Interest. Any small business that is 20% or more owned by covered federal officials (generally the President, Vice President, cabinet member or member of Congress, and their respective spouses), is ineligible for a covered loan on or after December 27, 2020.

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Additional Resources regarding Main Street Lending Program



U.S. Economic Stimulus Under the Main Street Lending Program

April 15, 2020

Summary

On April 9, 2020, the Federal Reserve (the “Fed”) announced that it is taking additional action to provide up to \$2.3 trillion in loans to support the economy through various programs, including the Main Street Lending Program (“MSLP”). The Fed intends that the MSLP will ensure credit flow to small and mid-sized businesses by providing support to businesses that were in good financial standing prior to the COVID-19 crisis, on terms and conditions to be set by the Federal Reserve Board. Funds for MSLP were appropriated pursuant to Section 4027 of Title IV of the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), and the program is being established under Section 13(3) of the Federal Reserve Act (12 U.S.C. § 344).

The Main Street Lending Program is fully operational as of July 6, 2020. Some details in this post may have changed since publication. For more recent thought leadership on the program, please visit the posts published on [May 7, 2020](#), [June 2, 2020](#), and [June 17, 2020](#).

MSLP consists of two facilities:

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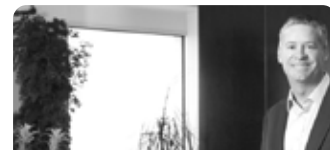


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- The Main Street New Loan Facility (“MSNLF”) for **unsecured** term loans originated on or after April 8, 2020; and
- The Main Street Expanded Loan Facility (“MSELF”) for upside tranches of **secured or unsecured** term loans originated before April 8, 2020 (provided the upside is on or after April 8, 2020).

As detailed below, the collateral packages and maximum loan sizes are the primary differences between the two facilities.

A Federal Reserve Bank will commit to lend funds (in an amount expected to result in up to \$600 billion in MSLP loan purchases) to a special purpose vehicle (“SPV”) that the Department of the Treasury (“Treasury”) will capitalize with a \$75 billion equity investment using its Exchange Stabilization Fund, made available under Section 4027 of the CARES Act (part of the \$454 billion previously authorized under the CARES Act). The SPV will use the proceeds of such loans and the Treasury’s equity investment to purchase up to a 95% participation in loans made by “Eligible Lenders” (defined below) to “Eligible Borrowers” (defined below). The SPV and the Eligible Lender will share risk on a *pari-passu* basis. The SPV will cease purchasing participations on September 30, 2020, unless the Fed and the Treasury extend the program.

Because comments are being accepted regarding MSLP until April 16, 2020, details of the program are still being finalized. The Term Sheets that the Fed published last week indicate the following:

An “**Eligible Lender**” is a U.S. insured depository institution, U.S. bank holding company, or a U.S. savings and loan holding company.

An “**Eligible Borrower**” is a business:

- with up to 10,000 employees or up to \$2.5 billion in 2019 annual revenues; and
- that is created or organized in the U.S. or under the laws of the U.S. with significant operations in and a majority of its employees based in the U.S.

Loan Terms and Requirements:

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- Loans provided under MSLP are not eligible for loan forgiveness.
- MSNLF loan size between \$1 million and \$25 million.
 - Maximum loan size is the lesser of (i) \$25 million or (ii) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed **four times** the Eligible Borrower's 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA"). Note that the Term Sheet does not reference the "add-backs" that are typical of EBITDA definitions in loan documents.
 - MSNLF loans are unsecured.
- MSELF loan size between \$1 million and \$150 million.
 - Maximum loan size is the lesser of (i) \$150 million, (ii) 30% of the Eligible Borrower's existing outstanding and committed but undrawn bank debt, or (iii) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed **six times** the Eligible Borrower's EBITDA.
 - Any collateral securing the existing loan will secure the upsized tranche on a pro rata basis.
- 4 year maturity.
- Principal and interest payments deferred for one year.
- Interest rate of Secured Overnight Financing Rate + 250-400 basis points.
- No prepayment penalty.
- Facility fee of 100 basis points for MSNLF loans (payable by the Eligible Lender to the SPV, although the Eligible Lender may require the Eligible Borrower to pay this fee).
- Origination fee of 100 basis points of the principal amount of a MSNLF loan or of the principal amount of the upsized tranche of an MSELF loan, payable by the Eligible Borrower to the Eligible Lender.
- The SPV will pay the Eligible Lender 25 basis points per annum for loan servicing
- The Eligible Borrower must attest that it requires financing due to exigent circumstances presented by the COVID-19 pandemic.
- The Eligible Borrower must attest that, using the proceeds of the MSLP loan, it will make reasonable efforts to maintain its payroll and retain its employees during the term of the loan.

- The loan proceeds cannot be used to repay or refinance existing loans (including, for MSELF loans, the pre-existing tranche of the loan that is being upsized).
- The Eligible Borrower cannot repay other debt of equal or lower priority (except mandatory principal payments) until the MSLP loan is repaid in full.
- The Eligible Lender cannot cancel or reduce any existing lines of credit, and the Eligible Borrower cannot seek cancellation or reduction of any outstanding lines of credit.
- The Eligible Borrower must follow compensation, stock repurchase, and capital distribution restrictions set forth in the CARES Act.
- The Eligible Borrower and the Eligible Lender must each certify eligibility to participate in MSLP, including that they do not have a conflict of interest prohibited by the CARES Act.
- Businesses can take advantage of loans made under MSLP in addition to the SBA Section 7(a) Paycheck Protection Program loans. Note, however, that Eligible Borrowers must elect among the MSNLF, MSELF, and the Primary Market Corporate Credit Facility, and may not participate in more than one of these programs.
- The Term Sheets imply that foreign ownership may not disqualify a borrower, but that a U.S. holding company with no operations may not be eligible for MSLP. We expect further guidance on the “up to” 10,000 employees rule—at present there is no guidance on the minimum number of employees.

Like with other programs implemented by the CARES Act, BCLP is tracking these developments closely, and will continue to publish additional guidance over the coming weeks. You can also view other thought leadership, guidance, and helpful information on BCLP’s dedicated [COVID-19 / Coronavirus resources page](#).

[1] See Federal Reserve, Term Sheet: Main Street New Loan Facility (April 9, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a7.pdf>; Federal Reserve, Term Sheet: Main Street Expanded Loan Facility (April 9, 2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a4.pdf> (collectively, the “Term Sheets”).

[2] A business that receives a loan or loan guarantee under Title IV of the CARES Act must agree that during the lifetime of such loan or guarantee, it will not pay total compensation (meaning salary,

bonuses, award of stock, and other financial benefits) that exceeds the following limits:

- The total compensation during any consecutive 12 months for any officer or employee who made over \$425,000 in 2019 may not exceed their 2019 total compensation, and severance or other benefits on termination of employment may not exceed twice their 2019 maximum total compensation.
- The total compensation during any consecutive 12 months for any officer or employee who made over \$3,000,000 in 2019 may not exceed the sum of \$3,000,000, and 50% of the compensation the officer or employee received over \$3,000,000 in 2019.

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Federal Reserve Board Expands Scope and Eligibility of Main Street Lending Program

May 7, 2020

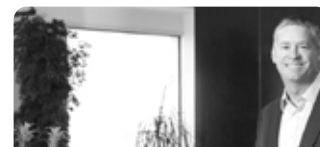
Summary

On April 30, 2020, the Federal Reserve (the “Fed”) released additional details about the Main Street Lending Program (“MSLP”), and announced that it is expanding the scope of and eligibility for the program. Initially, the MSLP consisted of two loan facilities: (1) the Main Street New Loan Facility (“MSNLF”) and (2) the Main Street Expanded Loan Facility (“MSELF”). In response to public comment, the Fed created a third loan option, the Main Street Priority Loan Facility (“MSPLF”), and released updated term sheets (the “Term Sheets”)^[1] and answers to frequently asked questions (the “FAQ”)^[2].

The Main Street Lending Program is fully operational as of July 6, 2020. Some details in this post may have changed since publication. For more recent thought leadership on the program, please visit the posts published on [June 2, 2020](#) and [June 17, 2020](#).

The Fed intends that the MSLP will ensure credit flow to small and mid-sized businesses that were in good financial standing prior to the COVID-19 crisis, on terms and conditions to be set by the Federal Reserve Board. Funds for MSLP were appropriated pursuant to Section 4027 of Title IV of the Coronavirus Aid, Relief,

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and Economic Security Act (the “**CARES Act**”), and the program is being established under Section 13(3) of the Federal Reserve Act (12 U.S.C. § 344).

The Department of the Treasury (“**Treasury**”) will use funds appropriated to the Exchange Stabilization Fund under Section 4027 of the CARES Act (part of the \$454 billion previously authorized under the CARES Act) to make a \$75 billion equity investment in a special purpose vehicle (“**SPV**”). The SPV will purchase participations in loans made pursuant to the program by “**Eligible Lenders**” (defined below) to “**Eligible Borrowers**” (defined below), in an amount of up to \$600 billion. The SPV and the Eligible Lender will share risk on a pari passu basis. The SPV will cease purchasing participations on September 30, 2020, unless the Fed and the Treasury extend the program, and the Federal Reserve Bank of Boston will administer and operate the SPV until its assets mature or are sold. Unlike Paycheck Protection Program (“**PPP**”) loans, MSLP loans are full-recourse and not forgivable.

The April 30 publications contain a few notable clarifications of and changes to the MSLP:

- Methodology to be used to calculate adjustments to an Eligible Borrower’s 2019 earnings before interest, taxes, depreciation, and amortization (“**EBITDA**”).
- The addition of a third category of loan facilities - MSPLF loans.
- Decreased minimum loan size for MSNLF loans, and increased minimum and maximum loan size for MSELF loans.
- Clarification that loans under each facility type may be secured or unsecured.
- Clarification regarding restrictions on paying other debt while the MSLP loan is outstanding.
- Increase in maximum size of eligible businesses (in both number of employees and annual revenues) and clarification regarding inclusion of affiliates in calculations.
- Removal of requirement that Eligible Borrowers have to self-certify as to exigent circumstances presented by COVID-19.

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The addition of MSPLF allows participation in the program by companies with higher debt burdens. Lenders participating in MSPLF loans will be required to retain a higher share of risk—15% rather than the 5% required under MSNLF and MSELF. Unlike MSNLF and MSELF, MSPLF can be used to refinance existing debt.

The updated Term Sheets indicate the following:

An “**Eligible Lender**” is a U.S. federally insured depository institution (including a bank, savings association, or credit union), a U.S. branch or agency of a foreign bank, a U.S. bank holding company, a U.S. savings and loan holding company, a U.S. intermediate holding company of a foreign banking organization, or a U.S. subsidiary of any of the foregoing.

An “**Eligible Borrower**” is a (for profit) Business^[3] that:

- was established prior to March 13, 2020;
- is not an Ineligible Business^[4];
- has 15,000 or fewer employees *or* had 2019 annual revenues of \$5 billion or less;
- is created or organized in the U.S. or under the laws of the U.S. with significant operations in and a majority of its employees based in the U.S.;
- has not received specific support pursuant to Section 4003(b)(1)-(3) of the CARES Act^[5];
- must elect among the MSNLF, MSPLF, MSELF and the Primary Market Corporate Credit Facility, and may not participate in more than one of these programs; and
- must be able to make all of the certifications and covenants required under the MSLP.

MSLP Facilities Terms and Requirements:

An “**Eligible Loan**” is a secured or unsecured term loan^[6] made an Eligible Lender to an Eligible Borrower, as outlined in the table linked below. The table below and the Term Sheets provide the *minimum* requirements for MSLP loans, and Eligible Lenders are expected to apply their own underwriting standards and conduct their own assessment of each application.

	MSNLF / “New” Loans	MSPLF / “Priority” Loans	MSELF / “Expanded” Loans
Term	4 years		
Origination	After April 24, 2020	After April 24, 2020	An upside tranche to an

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			existing loan that closed on or before April 24, 2020 (with a remaining maturity of at least 18 months)	
Minimum Loan Size	\$500,000	\$500,000	\$10,000,000	
Maximum Loan Size is the lesser of:	• \$25,000,000; and, when added to outstanding and undrawn available debt, ≤4.0x EBITDA ¹	• \$25,000,000; and • an amount that, when added to outstanding and undrawn available debt, ≤6.0x EBITDA	• \$200,000,000; • 35% of existing outstanding and undrawn available debt; and • an amount that, when added to outstanding and undrawn available debt, ≤6.0x EBITDA	
Payment	Year 1	All principal and interest payments deferred (unpaid interest will be capitalized)		
	Year 2	33.33%	15%	15%
	Year 3	33.33%	15%	15%
	Year 4	33.33%	70%	70%
Interest Rate	LIBOR (1 or 3 month) ² + 3%			
Priority	Cannot be contractually subordinated to other loans or debt instruments ³	Must be senior to or pari passu with other loans or debt instruments, other than mortgage debt		
Eligible Lender's Risk Retention	SPV and the Eligible Lender would share in any losses on a pari passu basis			
	5%	15%	5%	
Transaction Fee	An Eligible Lender will pay the SPV a transaction fee of: <ul style="list-style-type: none">• 100 basis points of the principal amount for MSNLF and MSPLF loans, or• 75 basis points on the principal amount of the upsized tranche for MSELF loans. The Eligible Lender may require the Eligible Borrower to pay this fee.			
Loan Origination/Upsizing and Servicing Fees	An Eligible Borrower will pay an Eligible Lender: <ul style="list-style-type: none">• an origination fee of up to 100 basis points of the principal amount for MSNLF and MSPLF loans, or• an origination fee of up to 75 basis points of the upsized tranche for MSELF loans. The SPV will pay an Eligible Lender 25 basis points of the principal amount of its participation per annum for loan servicing.			
Prepayment Penalty	None			
Loan Classification	Equivalent to a "pass" in the Federal Financial Institutions Examination Council's supervisory rating system			
Assessment of Financial Condition	Eligible Lenders are expected to conduct an assessment of each potential borrower's financial condition at the time of application			

2021 BANKRUPTCY BATTLEGROUND WEST

Financial Condition	Borrower's financial condition at the time of application:
Retaining Employees	Each Eligible Borrower should make commercially reasonable efforts to maintain its payroll and retain its employees while the loan is outstanding.
Required Lender Certifications and Covenants	The Eligible Lender must commit that it will not: (1) request that the Eligible Borrower make principal or interest payments (except mandatory principal or interest payments, or defaulted/accelerated debt), until the loan/upsized tranche is repaid in full; and (2) cancel or reduce any existing committed lines of credit to the Eligible Borrower, except in an event of default.
	For loans made under MSNLF and MSPLF, the methodology used to calculate adjusted 2019 EBITDA must be a methodology the Eligible Lender previously used for adjusting EBITDA when extending credit to the Eligible Borrower or similarly situated borrowers on or before April 24, 2020.
	For loans made under MSELF, the methodology used must be what was previously used for adjusting EBITDA when originating or amending the underlying loan on or before April 24, 2020.
	The Eligible Lender must certify that it is eligible to participate in the Facility, including in light of the conflicts of interest prohibition in section 4019(b) of the CARES Act.
Required Borrower Certifications and Covenants	The Eligible Borrower must commit to refrain from repaying the principal balance of, or paying any interest on, any debt until the loan/upsized tranche is repaid in full, unless the debt or interest payment is mandatory and due.
	In the case of MSPLF loans only, the Eligible Borrower may, at the time of origination of the loan, refinance existing debt owed to a different lender.
	The Eligible Borrower must commit that it will not seek to cancel or reduce any of its committed lines of credit with the Eligible Lender or any other lender.
	The Eligible Borrower must certify that it has a reasonable basis to believe that, as of the date of origination of the loan and after giving effect to such loan, it 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 Eligible Borrower must commit that it will follow compensation, ⁴ stock repurchase, and capital distribution restrictions that apply to direct loan programs under section 4003(c)(3)(A)(ii) of the CARES Act, except that an S corporation or other tax pass-through entity that is an Eligible Borrower may make distributions to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings.
	The Eligible Borrower must certify that it is eligible to participate in the facility, including in light of the conflicts of interest prohibition in section 4019(b) of the CARES Act.

Noteworthy Clarifications

Number of Employees: In determining whether a Business has 15,000 or fewer employees, the FAQ clarifies that the framework in the SBA regulation (13 CFR 121.106) is applicable. Full-time, part-time, seasonal or otherwise employed persons are included but volunteers and independent contractors are excluded. The FAQ also clarifies that employees of affiliates are included in the calculation. Affiliates are determined in accordance with the affiliation test set forth in 13 CFR 121.301(f). Businesses should use the average of the total number of persons employed by the proposed borrower and its affiliates for each pay period over the 12 months prior to the origination or upsizing of the loan under the MSLP.

How to Calculate 2019 EBITDA: For loans made under MSNLF and MSPLF, the methodology used to calculate adjusted 2019 EBITDA must be a methodology the Eligible Lender previously used for adjusting EBITDA when extending credit to the Eligible Borrower or similarly situated borrowers on or before April 24, 2020. For loans made under MSELF, the methodology used must be what was previously used for adjusting EBITDA when originating or amending the underlying loan on or before April 24, 2020.

Revenue Calculation: As with the number of employees, revenues of affiliated entities are included in determining whether a Business had 2019 annual revenues of \$5 billion or less. Affiliates are determined in accordance with the affiliation test set forth in 13 CFR 121.301(f). A Business may use its and its affiliates' annual "revenue" on its audited GAAP financial statements or it may use annual receipts as reported to the Internal Revenue Service (and, for this purpose, "receipts" has the same meaning used by the SBA in 13 CFR 121.104(a).

What Debt Counts in Determining Maximum Loan Size: "Existing outstanding and undrawn available debt" is calculated as of the date of the loan application and includes all amounts borrowed under any loan facility as well as publicly issued bonds or private placement facilities. It also includes all unused commitments under any loan facility but excludes any undrawn commitment that:

- serves as a backup line for commercial paper issuance;
- is used to finance receivables (including seasonal financing of inventory);
- cannot be drawn without additional collateral; or
- is no longer available due to change in circumstance.

Additional information, details on the application process and documentation, and a start date for the program, are expected to be announced soon. Like with other programs implemented by the CARES

Act, BCLP is tracking these developments closely, and will continue to publish additional guidance over the coming weeks. You can also view other thought leadership, guidance, and helpful information on BCLP's dedicated [COVID-19 / Coronavirus resources page](#).

[1] - See Federal Reserve, Term Sheet: Main Street New Loan Facility (April 30, 2020),

<https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200430a1.pdf>; Federal Reserve, Term Sheet: Main Street Priority Loan Facility (April 30, 2020),

<https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200430a2.pdf>;

Federal Reserve, Term Sheet: Main Street Expanded Loan Facility (April 30, 2020),

<https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200430a3.pdf> (collectively, the "Term Sheets").

[2] - See Federal Reserve, Main Street Lending Program: Frequently Asked Questions (April 30, 2020),

<https://www.federalreserve.gov/monetarypolicy/files/main-street-lending-faqs.pdf>.

[3] - Businesses must be legally formed entities that are organized for profit as a partnership, limited liability company, corporation, association, trust, cooperative, joint venture (with no more than 49% participation by foreign business entities) or a tribal business concern. The FAQs also detail the requirements for a "tribal business concern" to qualify (see FAQ E.2.).

[4] - Ineligible Businesses include Businesses listed in 13 CFR 120.110(b)-(j), (m)-(s), as modified and clarified by SBA regulations for purposes of the PPP on or before April 24, 2020. Such modifications and clarifications include the SBA's recent interim final rules available at 85 Fed. Reg. 20811, 85 Fed. Reg. 21747, and 85 Fed. Reg. 23450. The Fed may further modify the application of these restrictions to the MSLP.

[5] - A Business that has received a PPP loan is permitted to borrow under MSLP.

[6] - A MSELF upsized tranche must be secured if the underlying loan is secured—and any collateral securing the underlying loan must secure the upsized tranche on a pro rata basis. MSNLF and MSPLF loans are permitted to be secured as well.

[7] - The Fed is currently evaluating the feasibility of adjusting eligibility metrics of MSLP for borrowers that have asset-based loans.

[8] - The London Inter-Bank Offered Rate ("LIBOR"). The Fed initially announced that the interest rate would be based on "SOFR" - the Secured Overnight Financing Rate. After receiving feedback regarding implementation issues, the Fed switched the reference

rate to LIBOR, with the recommendation that loan documentation should include fallback language in the event that LIBOR become unavailable during the term of the loan.

[9] - This means that a MSNLF loan may not be junior in priority to other unsecured loans. See the FAQ for further details.

[10] - A business that receives a loan or loan guarantee under Title IV of the CARES Act must agree that during the lifetime of such loan or guarantee, it will not pay total compensation (meaning salary, bonuses, award of stock, and other financial benefits) that exceeds the following limits:

- The total compensation during any consecutive 12 months for any officer or employee who made over \$425,000 in 2019 may not exceed their 2019 total compensation, and severance or other benefits on termination of employment may not exceed twice their 2019 maximum total compensation.

The total compensation during any consecutive 12 months for any officer or employee who made over \$3,000,000 in 2019 may not exceed the sum of \$3,000,000, and 50% of the compensation the officer or employee received over \$3,000,000 in 2019.

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Boston Fed Releases Program Documentation and Updated FAQs for Main Street Lending Program

June 2, 2020

Summary

On May 27, 2020, The Federal Reserve Bank of Boston (the “**Boston Fed**”) released [documentation and additional details](#) with respect to the Federal Reserve’s Main Street Lending Program (“**MSLP**”). This release, along with recent statements made by Federal Reserve Chair Jerome Powell, Treasury Secretary Steven Mnuchin, and Boston Fed President Eric Rosengren, indicate that the program will go live in early to mid June.

The Main Street Lending Program is fully operational as of July 6, 2020. The links and some details in this post have been updated since publication. For more recent thought leadership on the program, please visit the post published on [June 17, 2020](#).

The newly available MSLP materials include:

- **Updated FAQs:** The updated set of FAQs answer many open questions with respect to borrower eligibility (including application of affiliation rules), calculation of loan size under each facility, required certifications, covenants and restrictions associated with the program, and the mechanics of the

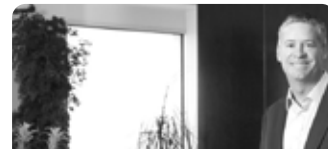
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government participation in loans. Appendix A to the FAQs includes a checklist of items that must be reflected in the loan documentation in order to qualify under the MSLP; Appendix B lists the covenants and provisions required to be incorporated into the loan documents; and Appendix C sets forth a list of financial information that Eligible Borrowers must be required to provide during the term of the loan.

- **Instructions**: The Instructions document sets out a road map for lender and borrower participation in the MSLP.
- **Lender Registration Materials and Wire Instructions**: In order to participate in MSLP, an Eligible Lender must first register by completing and submitting the documents included at this link (note that this registration need not be repeated each time an Eligible Loan is made).
- **Participation Agreement – Transaction Specific Terms and Standard Terms and Conditions**: The Eligible Lender must complete and submit the Transaction Specific Terms, which incorporate by reference the Standard Terms and Conditions. These documents contain the economic details and substantive contractual provisions of the MSLP SPV's participation in MSLP.^[1]
- **Co-Lender Agreement – Transaction Specific Terms, Standard Terms and Conditions, and Assignment-in-Blank**: Intended for use in bilateral loan transactions, the Co-Lender Agreement is not effective at closing of the Eligible Loan but contains the terms and conditions that would become effective if the MSLP SPV becomes a direct lender pursuant to the Participation Agreement by elevating its participation interest to a loan assignment under limited circumstances, such as a payment default or a bankruptcy event. Similarly, the Assignment-in-Blank is executed, but not effective, at closing (and provides advance consent by the Eligible Lender and Eligible Borrower) and would become effective if the MSLP SPV elevates its position to a loan assignment or if it assigns its participation interest under the limited circumstances contemplated by the Participation Agreement, such as a payment default or a bankruptcy event.² In a loan under the MSLP that is documented at



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origination as a syndicated loan, an assignment and assumption would be executed in blank at closing, but the form would be the form included as part of the underlying loan documentation.

- **Servicing Agreement:** The Eligible Lender that originates the loan must complete this document, which governs its role as the servicer of an Eligible Loan.
- **Borrower Transaction Specific Certifications and Covenants for MSNLF, MSELF, and MSPLF:** The Eligible Borrower must complete, and the Eligible Lender must submit the document applicable to the facility under which the Eligible Loan is made. These forms set forth the certifications and covenants that are required for the Eligible Borrower for each category of facility.
- **Lender Transaction Specific Certifications and Covenants for MSNLF, MSELF, and MSPLF:** The Eligible Lender must complete and submit the document applicable to the facility under which the Eligible Loan is made. These forms set forth the certifications and covenants that are required for the Eligible Lender for each category of facility.

Other Loan Documents: Lenders are expected to use their own loan documentation for MSLP loans, which should be substantially similar, including with respect to required covenants, to the loan documentation that such lender uses in its ordinary course lending to similarly situated borrowers, adjusted only as appropriate to reflect the requirements of the applicable MSLP program.

For our previous alerts relating to the MSLP facilities, please visit BCLP's previously published thought leadership [here](#) and [here](#).

Like with other programs implemented by the CARES Act, BCLP is tracking these developments closely, and will continue to publish additional guidance over the coming weeks. In particular, we anticipate publishing later this week further guidance with respect to the updated FAQs and documentation described in this alert. You can also view other thought leadership, guidance, and helpful information on BCLP's dedicated COVID-19 / Coronavirus resources page at <https://www.bclplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html>.

[1] A special purpose vehicle, capitalized with funds from the Treasury Department and loans from the Fed, will purchase 95% participations in Eligible Loans under MSNLF, MSPLF (up from the previously suggested 85%), and MSELF.

[2] See FAQ J.4 for the full list of the limited circumstances under which the SPV can assign its participation interest or elevate its participation interest to an assignment.

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Boston Fed Releases Updated FAQs, Forms and Agreements Related to the Main Street Lending Program

June 17, 2020

Summary

1. On June 26, the Federal Reserve Bank of Boston (the “**Boston Fed**”) released updated and revised Frequently Asked Questions regarding the Federal Reserve’s Main Street Lending Program (“**MSLP**”). On June 11, the Boston Fed released updated and revised documentation with respect to the MSLP.
2. **For Lenders:** On June 15, the MSLP Program went live for lender registration. [Click here for more details and to register.](#)

The Main Street Lending Program is fully operational as of July 6, 2020, and the links below have been updated as of July 13, 2020.

Definitions:

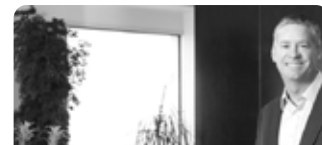
1. “New Loans” are those MSLP loans originating on or after April 24, 2020 in a minimum principal amount of \$250,000 up to a maximum principal amount that is the lesser of (i) \$35 million or (ii) an amount that, when added to the borrower’s existing outstanding and undrawn available debt, is less than or equal to 4.0x the borrower’s 2019 adjusted EBITDA.

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2. "Priority Loans" are those MSLP loans originating on or after April 24, 2020 in a minimum principal amount of \$250,000 up to a maximum principal amount that is the lesser of (i) \$50 million or (ii) an amount that, when added to the borrower's existing outstanding and undrawn available debt, is less than or equal to 6.0x the borrower's adjusted 2019 EBIDTA.

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3. "Expanded Loans" are those upsized tranches of the borrower's existing loans (those loans originated before April 24, 2020) ranging from a minimum principal amount of \$10 million up to a maximum principal amount that is the lesser of (i) \$300 million or (ii) an amount that, when added to the borrower's existing outstanding and undrawn available debt, is less than or equal to 6.0x the borrower's adjusted 2019 EBIDTA.



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Significant Revised Terms in the Updated Forms include:

1. Five year terms for New, Priority and Expanded Loans (up from the original four year term);
2. The Boston Fed intends to purchase 95% participations in each MSLP loan submitted for purchase (up from 85% for Priority Loans);
3. Principal payments are deferred for two years (up from one year);
4. The minimum loan size for New and Priority Loans is \$250,000 (down from the previous minimum of \$500,000); and
5. The maximum loan amounts for (i) New Loans is \$35 million (up from \$25 million), (ii) Priority Loans is \$50 million (up from \$25 million), and (iii) Expanded Loans is \$300 million (up from \$200 million).
6. Clarification that MSLP loans previously originated will be considered to be in compliance with the newly revised terms, if they were in compliance with the terms in place at the time of origination.
7. Clarification that if a borrower is the only business applying for an MSLP loan in that borrower's affiliated group, only the borrower's and its subsidiaries' EBIDTA will be counted for terms of lending.

Summary of MSLP Terms and Requirements:

The table below provides a summary of the updated terms and requirements for MSLP loans.

	MSNLF /	MSPLF /	MSELF /
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		"New" Loans	"Priority" Loans	"Expanded" Loans
Term		5 years (previously 4 years)		
Origination		After April 24, 2020	After April 24, 2020	An upside tranche after April 24, 2020 to an existing loan that closed on or before April 24, 2020 (with a remaining maturity of at least 18 months)
Minimum Loan Size		\$250,000 (previously \$500,000)	\$250,000 (previously \$500,000)	\$10,000,000
Maximum Loan Size is the lesser of:		• \$35,000,000 (previously \$25,000,000); and, when added to outstanding and undrawn available debt, ≤4.0x adjusted EBITDA	• \$50,000,000 (previously \$25,000,000); and • an amount that, when added to outstanding and undrawn available debt, ≤6.0x adjusted EBITDA	• \$300,000,000 (previously \$200,000,000); and an amount that, when added to outstanding and undrawn available debt, ≤6.0x adjusted EBITDA
Payment	Year 1	All principal and interest payments deferred (unpaid interest will be capitalized)		
	Year 2	All principal payments deferred		
	Year 3	15%	15%	15%
	Year 4	15%	15%	15%
	Year 5	70%	70%	70%
Interest Rate		LIBOR (1 or 3 month) + 3%		
Priority		Cannot be contractually subordinated in terms of priority to other loans or debt instruments	Must be senior to or pari passu with, in terms of priority and security, other loans or debt instruments, other than mortgage debt	
Eligible Lender's Risk Retention		SPV and the Eligible Lender would share in any losses on a pari passu basis		
		5%	5% (previously 15%)	5%
Transaction Fee		An Eligible Lender will pay the SPV a transaction fee of: <ul style="list-style-type: none">• 100 basis points of the principal amount for MSNLF and MSPLF loans, and• 75 basis points on the principal amount of the upsized tranche for MSELF loans. The Eligible Lender may require the Eligible Borrower to pay this fee.		
Loan Origination/Upsizing and Servicing Fees		An Eligible Borrower will pay an Eligible Lender: <ul style="list-style-type: none">• an origination fee of up to 100 basis points of the principal amount for MSNLF and MSPLF loans, or		

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Prepayment Penalty	<ul style="list-style-type: none"> an origination fee of up to 75 basis points of the upsized tranche for MSELF loans. <p>The SPV will pay an Eligible Lender 25 basis points of the principal amount of its participation per annum for loan servicing.</p>
	None
	Required to be equivalent to a "pass" in the Federal Financial Institutions Examination Council's supervisory rating system
	Eligible Lenders are expected to conduct an assessment of each potential borrower's financial condition at the time of application.
	Each Eligible Borrower must make commercially reasonable efforts to maintain its payroll and retain its employees while the loan is outstanding.
Required Lender Certifications and Covenants	The Eligible Lender must commit that it will not: (1) request that the Eligible Borrower make principal or interest payments on other debt (except mandatory principal or interest payments, or defaulted/accelerated debt), until the MSLP loan is repaid in full; or (2) cancel or reduce any existing committed lines of credit to the Eligible Borrower, except in an event of default.
Required Borrower Certifications and Covenants	See below for methodology to calculate EBITDA.
	The Eligible Lender must certify that it is eligible to participate in the MSLP, including in light of the conflicts of interest prohibition in section 4019(b) of the CARES Act.
	The Eligible Borrower must commit to refrain from repaying the principal balance of, or paying any interest on, any debt until the MSLP loan/upsized tranche is repaid in full, unless the debt or interest payment is mandatory and due.
	In the case of MSPLF loans only, the Eligible Borrower may, at the time of origination of the loan, refinance existing debt owed to a different lender.
	The Eligible Borrower must commit that it will not seek to cancel or reduce any of its committed lines of credit.
	The Eligible Borrower must certify that it has a reasonable basis to believe that, as of the date of origination of the loan and after giving effect to such loan, it 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 Eligible Borrower must commit that it will follow compensation, ¹ stock repurchase, and capital distribution restrictions that apply to direct loan programs under section 4003(c)(3)(A)(ii) of the CARES Act, except that an S corporation or other tax pass-through entity that is an Eligible Borrower may make distributions to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings.
	The Eligible Borrower must certify that it is eligible to participate in the MSLP, including in light of the conflicts of interest prohibition in section 4019(b) of the CARES Act.
	The Eligible Borrower must certify that it is unable to secure adequate credit accommodations from other banking institutions. See FAQ H.9 for the Fed's discussion of this requirement.

For those interested, please see the Fed's [updated MSLP term sheets](#). The [revised documentation](#) is subject to further Fed revision. In addition, our earlier alerts regarding the MSLP can be found at the following links: [June 2](#), [May 7](#) and [April 15](#).

BCLP is tracking other economic stimulus programs created as a result of the Coronavirus pandemic, and will continue to publish additional guidance over the coming weeks. You may also view other thought leadership, guidance, and helpful information on BCLP's dedicated [COVID-19 / Coronavirus resources page](#).

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