Reinhart

Main Street Lending Program: Updated Guidance

POSTED:

May 4, 2020

RELATED PRACTICES:

Corporate Law

https://www.reinhartlaw.com/practices/corporate-law

Banking and Finance

https://www.reinhartlaw.com/practices/banking-and-finance

RELATED SERVICES:

Family-Owned Business

https://www.reinhartlaw.com/services/family-owned-business

RELATED PEOPLE:

Robert J. Heinrich

https://www.reinhartlaw.com/people/robert-heinrich

UPDATE: Please see Main Street Program: Summary Reflecting Updated Guidance for the most recent information available.

Under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), the Federal Reserve received authority to set up a Main Street Lending Program (Program) to facilitate lending to small and mid-sized businesses. On April 30, 2020, the Federal Reserve released updated information on the Program.

The new guidance overhauls and expands upon key aspects of the two original facilities under the Program – the Main Street New Loan Facility (New Loan Facility) and the Main Street Expanded Loan Facility (Expanded Loan Facility) – and also creates a third option, the Main Street Priority Loan Facility (Priority Loan Facility), featuring increased risk sharing by lenders for borrowers with greater leverage.

This alert summarizes and compares the three facilities as spelled out in the new press releases and FAQs.

Under the Program, eligible lenders will originate new term loans (or expand the size of an existing credit facility) to eligible borrowers. Under the New Loan Facility and the Expanded Loan Facility, a special purpose vehicle (SPV) funded by the Federal Reserve Bank of Boston (Reserve Bank) will then purchase a 95 percent participation in such loans (or the upsized tranches). Lenders will retain 5 percent of each such loan (or each upsized tranche). Under the Priority Loan Facility, the participation percentages differ: The SPV will purchase an 85 percent participation of each such loan, with lenders retaining 15 percent.

In all, the SPV will purchase up to $600 billion in participations. The launch date has not been announced, but the purchases by the SPV will continue until at least September 30, 2020.

Among the changes in the new guidance are the following:

- Increasing the size of company that is an eligible borrower, but also adding affiliation limitations;
- Clarifying that not-for-profits are not eligible borrowers;
- Reducing the minimum loan size to $500,000 for the New Loan Facility;

- Expanding the definition of eligible lenders to include U.S. branches and agencies of a foreign bank;
- Revising the repayment terms; and
- Changing the benchmark index from SOFR to LIBOR.

The Program differs from the Paycheck Protection Program (PPP) in many ways. Most significantly, the Program does not feature a loan forgiveness component.

Eligible Borrowers. The eligibility criteria for borrowers under the Program has been updated significantly from the initial guidance.

An eligible borrower is a “Business”[note]A “Business” is an entity that is organized for profit as a partnership; a limited liability company; a corporation; an association; a trust; a cooperative; a joint venture with no more than 49 percent participation by foreign business entities; or certain tribal business concerns. Not-for-profits are expressly ineligible.[/note] that:

1. Was established prior to March 13, 2020;
2. Is not an Ineligible Business;[note]An “Ineligible Business” is a type of business listed in 13 CFR 120.110(b)-(j) and (m)-(s), as modified by regulations implementing the PPP on or before April 24, 2020 – for example, banks and other lenders, life insurance companies and more.[/note]
3. Meets at least one of the following two conditions: (i) has 15,000 employees or fewer; or (ii) had 2019 annual revenues of $5 billion or less;
4. Is 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;
5. Does not also participate in one of the other facilities under the Program or the Primary Market Corporate Credit Facility; and
6. Has not received specific support pursuant to the Coronavirus Economic Stabilization Act of 2020 (Subtitle A of Title IV of the CARES Act) (but an eligible borrower that has received a PPP loan may still participate in the Program).

The updated guidance introduces a critical wrinkle to the size limitations: The SBA affiliation regulations apply for purposes of calculating a business's employees and 2019 revenues. So the employees and revenues of the borrower must be aggregated with the employees and revenues of its affiliated entities. These regulations specify that companies are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. These restrictions could prove problematic for private equity portfolio companies.

Eligible Lenders. The eligibility criteria for lenders under the Program now includes certain institutions related to foreign banks.

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.

Private loan funds remain ineligible to lend under the Program.

Eligible Loans. Each loan must be made by an eligible lender(s) to an eligible borrower and satisfy the following criteria. The new guidance changes, among other things, the loan sizes, the amortization requirements, the benchmark index and the leverage calculation.

Criteria	New Loan Facility	Priority Loan Facility	Expanded Loan Facility
Term Loan or Revolving Loan	Term loan		The underlying loan may be a term loan or a revolving credit facility; the upsized tranche must be a term loan *Note:* The underlying loan must have a remaining maturity of at least 18 months (taking into account any adjustments made to the maturity of the loan after April 24, 2020, including at the time of upsizing) *Note:* The eligible lender must hold an interest in the underlying loan on the date of upsizing

<table>
<tr><th>Criteria</th><th>New Loan Facility</th><th>Priority Loan Facility</th><th>Expanded Loan Facility</th></tr>
<tr><td>Secured or Unsecured</td><td colspan="2">Secured or unsecured</td><td>The underlying loan and the upsized tranche may be secured or unsecured (if the underlying loan is secured, the upsized tranche must be secured)

Note: An eligible lender can require the pledge of additional collateral</td></tr>
<tr><td>Origination Date</td><td colspan="2">After April 24, 2020</td><td>The underlying loan must have been originated on or before April 24, 2020</td></tr>
<tr><td>Maturity</td><td colspan="3">Four years</td></tr>
<tr><td>Payment Deferral</td><td colspan="3">Principal and interest payments deferred for one year (unpaid interest will be capitalized)</td></tr>
<tr><td>Amortization</td><td>Years 2-4: 33.33 percent each year</td><td colspan="2">Years 2-4: 15 percent, 15 percent, 70 percent</td></tr>
<tr><td>Interest Rate</td><td colspan="3">Adjustable rate of LIBOR (1 or 3 month) + 3 percent</td></tr>
<tr><td>Minimum Loan Amount</td><td colspan="2">$500,000</td><td>$10 million</td></tr>
</table>

Criteria	New Loan Facility	Priority Loan Facility	Expanded Loan Facility
Maximum Loan Amount	Lesser of (i) $25 million; or (ii) an amount that, when added to the eligible borrower's existing outstanding and undrawn available debt, does not exceed 4x the eligible borrower's adjusted 2019 EBITDA To calculate adjusted 2019 EBITDA, use the 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	Same as for New Loan Facility, except using 6x adjusted EBITDA Same EBITDA methodology as the New Loan Facility	Lesser of (i) $200 million; (ii) 35 percent of the eligible borrower's existing outstanding and undrawn available debt that is *pari passu* in priority with the eligible loan and equivalent in secured status (i.e., secured or unsecured); or (iii) an amount that, when added to the eligible borrower's existing outstanding and undrawn available debt, does not exceed 6x the eligible borrower's adjusted 2019 EBITDA To calculate adjusted 2019 EBITDA, use the methodology the eligible lender previously used for adjusting EBITDA when originating or amending the eligible loan on or before April 24, 2020

Criteria	New Loan Facility	Priority Loan Facility	Expanded Loan Facility
Priority Position	The eligible loan is not, at the time of origination or at any time during the term of the eligible loan, contractually subordinated in terms of priority to any of the eligible borrower's other loans or debt instruments	At the time of origination and at all times the eligible loan is outstanding, the eligible loan is senior to or *pari passu* with, in terms of priority and security, the eligible borrower's other loans or debt instruments, other than mortgage debt	At the time of upsizing and at all times the upsized tranche is outstanding, the upsized tranche is senior to or *pari passu* with, in terms of priority and security, the eligible borrower's other loans or debt instruments, other than mortgage debt
Prepayment Penalty	No prepayment penalty		

With respect to the leverage test, note that:

- It now utilizes an "adjusted EBITDA" concept; and
- The guidance specifies that "existing outstanding and undrawn available debt" does not include:
  - Any undrawn commitment that serves as a backup line for commercial paper issuance;
  - Any undrawn commitment that is used to finance receivables (including seasonal financing of inventory);
  - Any undrawn commitment that cannot be drawn without additional collateral; and
  - Any undrawn commitment that is no longer available due to change in circumstance.

Finally, any borrower intending to use an accordion or incremental facility provision in an existing credit facility, in connection with the Expanded Loan Facility, should carefully consider whether the upsizing complies with the credit agreement.[note]Borrowers and lenders should consider how any stimulus loan [might impact, and require amendments to, a borrower's existing loan documents](#).[/note]

Borrower Certifications and Covenants. In addition to other certifications required by applicable law, the eligible borrower must make certain certifications and covenants under each facility.

<table>
<tr><th>Topic</th><th>New Loan Facility</th><th>Priority Loan Facility</th><th>Expanded Loan Facility</th></tr>
<tr><td>Repayment of other debt</td><td colspan="2">The eligible borrower must commit to refrain from repaying the principal balance of, or paying any interest on, any debt until the eligible loan is repaid in full, unless the debt or interest payment is mandatory and due</td><td>Same, but refers to the upsized tranche: The eligible borrower must commit to refrain from repaying the principal balance of, or paying any interest on, any debt until the upsized tranche of the eligible loan is repaid in full, unless the debt or interest payment is mandatory and due</td></tr>
<tr><td>Cancellation or reduction of existing lines</td><td colspan="3">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</td></tr>
</table>

Topic	New Loan Facility	Priority Loan Facility	Expanded Loan Facility
Solvency	The eligible borrower must certify that it has a reasonable basis to believe that, as of the date of origination of the eligible 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		Same, but refers to the upsized tranche: The eligible borrower must certify that it has a reasonable basis to believe that, as of the date of upsizing of the eligible loan and after giving effect to such upsizing, 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
Compensation, stock purchase and distribution restrictions	The eligible borrower must commit that it will follow the compensation, 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		
Eligibility	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		

Importantly, the reference to the dividend restrictions above now specifically permits the eligible borrower to make certain tax distributions.

Finally, each eligible borrower that participates in the Program is expected to make commercially reasonable efforts to maintain its payroll and retain its employees during the time the eligible loan (or the upsized tranche) is outstanding. According to the FAQ, this requires the borrower to make 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.

Lender Certifications and Covenants. In addition to other certifications required by applicable law, the eligible lender must make certain certifications and covenants under each facility. One of the updates in the new guidance is to clarify that an eligible lender may cancel or terminate an existing committed line of credit if there has been an event of default.

Topic	New Loan Facility	Priority Loan Facility	Expanded Loan Facility
Repayment of other debt extended by the eligible lender	The eligible lender must commit that it will not request that the eligible borrower repay debt extended by the eligible lender to the eligible borrower, or pay interest on such outstanding obligations, until the eligible loan is repaid in full, unless the debt or interest payment is mandatory and due, or in the case of default and acceleration		Same, but refers to the upsized tranche: The eligible lender must commit that it will not request that the eligible borrower repay debt extended by the eligible lender to the eligible borrower, or pay interest on such outstanding obligations, until the upsized tranche of the eligible loan is repaid in full, unless the debt or interest payment is mandatory and due, or in the case of default and acceleration
Cancellation or reduction of existing lines	The eligible lender must commit that it will not cancel or reduce any existing committed lines of credit to the eligible borrower, except in an event of default		

Topic	New Loan Facility	Priority Loan Facility	Expanded Loan Facility
Adjusted EBITDA	The eligible lender must certify that the methodology used for calculating the eligible borrower's adjusted 2019 EBITDA for the leverage requirement above is the methodology it has previously used for adjusting EBITDA when extending credit to the eligible borrower or similarly situated borrowers on or before April 24, 2020		The eligible lender must certify that the methodology used for calculating the eligible borrower's adjusted 2019 EBITDA for the leverage requirement above is the methodology it previously used for adjusting EBITDA when originating or amending the eligible loan on or before April 24, 2020
Eligibility	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		

Moreover, the new guidance specifies that the eligible lenders are expected to conduct an assessment of each potential borrower's financial condition at the time of the potential borrower's application. The mere fact that a company is eligible under the Program does not mean that a lender must approve a loan or entitle the company to the maximum loan amount.

Note that the eligible lender is tasked with collecting the eligible borrower's required certifications and covenants at the time of origination (or upsizing) of the eligible loan. Eligible lenders are entitled to rely on the eligible borrower's certifications and covenants, as well as any subsequent self-reporting by the eligible borrower.

Finally, the updated guidance adds a requirement as to risk rating classification.

New Loan Facility	Priority Loan Facility	Expanded Loan Facility
If the eligible borrower had other loans outstanding with the eligible lender as of December 31, 2019, such loans must have had an internal risk rating equivalent to a "pass" in the Federal Financial Institutions Examination Council's (FFIEC) supervisory rating system on that date		The eligible loan must have had an internal risk rating equivalent to a "pass" in the FFIEC's supervisory rating system as of December 31, 2019

Fees. The new guidance revised the fee rates and also added a transaction fee under the Expanded Loan Facility.

Fee	New Loan Facility	Priority Loan Facility	Expanded Loan Facility
Transaction Fee	An eligible lender will pay the SPV a transaction fee of 100 basis points of the principal amount of the eligible loan at the time of origination (the eligible lender can require the eligible borrower to pay this fee)		An eligible lender will pay the SPV a transaction fee of 75 basis points of the principal amount of the upsized tranche of the eligible loan at the time of upsizing (the eligible lender can require the eligible borrower to pay this fee)
Loan Origination or Upsizing Fee	An eligible borrower will pay an eligible lender an origination fee of up to 100 basis points of the principal amount of the eligible loan at the time of origination		An eligible borrower will pay an eligible lender an origination fee of up to 75 basis points of the principal amount of the upsized tranche of the eligible loan at the time of upsizing

Fee	New Loan Facility	Priority Loan Facility	Expanded Loan Facility
Servicing Fee	The SPV will pay an eligible lender 25 basis points of the principal amount of its participation in the eligible loan per annum for loan servicing		Same, but refers to the upsized tranche: The SPV will pay an eligible lender 25 basis points of the principal amount of its participation in the upsized tranche of the eligible loan per annum for loan servicing

Loan Participations. As mentioned above, the SPV will purchase participations in the eligible loans (or in the upsized tranches of eligible loans).

Criteria	New Loan Facility	Priority Loan Facility	Expanded Loan Facility
Participation Percentage	The SPV will purchase at par value a 95 percent participation in the eligible loan	The SPV will purchase at par value an 85 percent participation in the eligible loan	The SPV will purchase at par value a 95 percent participation in the upsized tranche of the eligible loan, provided that it is upsized on or after April 24, 2020

Criteria	New Loan Facility	Priority Loan Facility	Expanded Loan Facility
Retention	The eligible lender must retain its 5 percent of the eligible loan until it matures or the SPV sells all of its participation, whichever comes first	The eligible lender must retain its 15 percent of the eligible loan until it matures or the SPV sells all of its participation, whichever comes first	The eligible lender must retain its 5 percent portion of the upsized tranche of the eligible loan until the upsized tranche of the eligible loan matures or the SPV sells all of its participation, whichever comes first Further, the eligible lender must retain its interest in the underlying eligible loan until the underlying eligible loan matures, the upsized tranche of the eligible loan matures, or the SPV sells all of its participation, whichever comes first
Risk Sharing	The SPV and the eligible lender will share risk in the eligible loan on a *pari passu* basis		Same, but refers to the upsized tranche: The SPV and the eligible lender will share risk in the upsized tranche on a *pari passu* basis

Criteria	New Loan Facility	Priority Loan Facility	Expanded Loan Facility
Existing Collateral	N/A		Any collateral securing the eligible loan (at the time of upsizing or on any subsequent date) must secure the upsized tranche on a pro rata basis
Structure	True sale		
Timing of Sale	To be completed expeditiously after the eligible loan's origination		Same, but refers to upsizing: To be completed expeditiously after the eligible loan's upsizing

Facility Termination. The SPV will cease purchasing participations in eligible loans on September 30, 2020, unless the Board of Governors of the Federal Reserve System and the U.S. Department of the Treasury extend the applicable facility.

If you have any questions about the Main Street Lending Program or your eligibility to participate as a borrower or a lender, please contact your Reinhart attorney.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.