

**COMMENTS TO THE FEDERAL RESERVE  
REGARDING MAIN STREET LENDING PROGRAM TERM SHEETS**

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1. Borrower eligibility

- Regarding a borrower's eligibility for Main Street Loans:
  - Please confirm that the borrower's ownership structure will not be relevant (e.g., that having a sole proprietor, disregarded entity (for tax purposes), special purpose entity, or foreign ownership will not be disqualifying).
  - Please confirm that there will not be any consolidation of the borrower (for purposes of the maximum employee count or revenue calculation) with parent companies, non-majority owned subsidiaries or sister companies.
  - Please confirm whether and how a borrower should count employees held by or revenue generated by its majority-owned subsidiaries.

If the Fed contemplates ownership or affiliation requirements, those requirements should be easily understood and applied, and preferably not akin to the restrictive and complex affiliation rules that apply in the SBA context.

- At what date is the employee count measured for purposes of determining borrower eligibility? The borrower eligibility employee count test should have the flexibility to use different measurement dates, including the date of the Main Street loan application (which would meet the business where it presently stands as a result of the COVID-19 impact it has experienced).
- The borrower eligibility revenue test should have the flexibility to use either 2019 annual revenues or the trailing twelve months revenues (as of the date of its Main Street loan application). This measurement would meet the business where it presently stands as a result of the COVID-19 impact it has experienced.
- Will an eligible borrower under Section 4003(b)(1), (2) or (3) of the CARES Act also be eligible to receive Main Street loans?
- Assuming a borrower meets the other eligibility requirements established, please confirm that an Eligible Borrower can be any type of US entity form such as a trust (e.g., a REIT or a business trust), limited liability company, partnership, joint venture, quasi-governmental entity, nonprofit entity or tribal entity.

## 2. Lender and Loan eligibility

- A significant number of the target businesses for the Main Street Loan program access credit from non-Eligible Lenders. Completely excluding non-Eligible Lenders from the Main Street Loan program will significantly hamper the program's impact on the target market. To increase accessibility of the Main Street Loan program in a manner that balances the Fed's other considerations, please consider the following changes:
  - An otherwise Eligible Loan should not be tainted because some or all of it passes through a non-Eligible Lender. Instead, consider eliminating or de-emphasizing the identity of the underlying loan originator so long as an Eligible Lender leads the expanded loan (which loan would be subject to the collateral sharing requirements described in the term sheets). However, if the Fed chooses not to eliminate the Eligible Lender origination requirement entirely, it should, at a minimum, loosen the requirement by allowing the following loans as Eligible Loans in the Main Street Expanded Loan Facility:
    - A loan that was originated by a non-Eligible Lender but was assigned in whole or in part to an Eligible Lender.
    - A loan that was originated by a syndicate of lenders that includes one or more non-Eligible Lenders and one or more Eligible Lenders.
    - A loan that was originated by an Eligible Lender that syndicated or assigned some or all of that loan to a non-Eligible Lender.
  - Similarly, please clarify the rules that apply to lender roles after a Main Street New Loan or Main Street Expanded Loan is funded such as:
    - Allowing either an Eligible Lender or a non-Eligible Lender to acquire an assignment or participation interest in a Main Street New Loan or Main Street Expanded Loan.
    - Allowing loan servicing responsibilities to be performed only by another Eligible Lender
    - Confirming that the SPV's 95% risk participation in each Main Street New Loan or Main Street Expanded Loan is an undivided interest such that an assignment by an Eligible Lender of all or a portion of its loan will include a ratable assignment of the 95% risk participation.

## 3. Loan approval and closing/ Role of SPV.

- To increase certainty and reduce transaction costs in the application process (which will increase overall accessibility of the Main Street Loan program):
  - The term sheets seem to describe underwriting standards in the form of the Eligible Loan definition, the collateral requirements (applicable to the Main Street Expanded Loan Facility), and the loan repayment and priority restrictions.

However, it is highly likely that lenders will apply their own additional underwriting standards to the Main Street Loan program. To promote predictability, efficiency and accessibility of the Main Street Loan program, the term sheets and related Fed and Treasury public guidance should clearly articulate the Main Street Loan program underwriting standards and consider what incentives or support the Fed and Treasury can provide to encourage lenders to exclusively use those underwriting standards. The Fed and Treasury should consider that the same need exists for underwriting standards to smooth the borrower's process for obtaining consent from those existing lenders needed in order for the Main Street Loan to proceed.

- Lenders and borrowers otherwise should be allowed to prepare and negotiate the loan document on their own terms.
- What will the finalization process be for the loan closing, e.g., would the borrower and lender send finalized documents to the SPV for funding and what would be the expected timing for loan funding?
- It is important for the parties to understand what consent rights the SPV will retain under its participation agreement after the Main Street loan has been funded. Would those consent rights be limited to:
  - increasing the Main Street principal loan amount
  - changing the maturity date
  - extending the principal or interest holiday
  - reducing the interest rate
  - allowing proceeds to be used to repay or refinance pre-existing loans or lines of credit
  - allowing the borrower to repay other debt of equal or lower priority with the exception of mandatory principal repayments
  - releasing collateral without a corresponding principal repayment of the senior debt secured by such collateral (except, for purposes of the Main Street Expanded Loan Facility, as otherwise agreed in an Eligible Loan prior to April 8, 2020)
  - changing or waiving the compensation, stock repurchase or capital distribution restrictions.
- A related matter to clarify is the degree of flexibility that the private lenders will have in dealing with the borrower in a post-default workout or restructuring situation.

#### 4. Maximum Loan Size

- For purposes of the maximum loan size calculation, debt should be defined as senior debt for borrowed money only and expressly exclude:

- Undrawn letters of credit.
  - Capital leases (including as characterized pursuant to ASC 842).
  - Potentially forgivable loans under the CARES Act or other governmental loan programs relating to the COVID-19 crisis.
  - Acquisition earnout obligations.
  - Unsecured loans or intercompany or other debt that in each case, would be subordinated to the Main Street Loans.
  - Mandatory redemption of preferred stock.
- Is the date of the Main Street Loan application considered the measurement date for the debt size limitations?
  - The debt size limitations--4x EBITDA for Main Street New Loans and 6x EBITDA for Main Street Expanded Loans--are too limiting for most small and mid-sized businesses and should be increased. In addition, counting undrawn debt in the debt sizing calculation can significantly hamper a business's accessibility to Main Street Loans. This can be especially punishing to businesses that also cannot meet the terms for accessing their undrawn debt. Therefore, the Main Street Loan program should not count (and does not need to count) undrawn debt in the debt sizing calculation. The same drawing requirements that regulate (on a real-time basis) the accessibility to undrawn debt protect both the existing and Main Street lenders. Before a business can draw down on the undrawn debt in the future, it will need to satisfy the commercially-determined conditions to that debt incurrence.
  - The EBITDA calculation should allow standard addbacks as agreed between the borrower and lender (such as nonrecurring or unusual expenses), and in fact the parties should be encouraged to use the EBITDA calculation contained in the borrower's other loan documents.
  - Will a borrower have the ability to count as earnings in its EBITDA calculation any cash equity investments made in 2019 or in 2020 up to the date of the Main Street loan funding (i.e., including an equity investment made contemporaneous with the Main Street loan) thereby enabling the borrower to obtain a larger Main Street loan? In addition, or alternatively, will a borrower have the ability to provide valuable collateral for such purpose to provide asset-based support? This could be a very valuable feature for businesses whose 2019 EBITDA was not high but underlying fundamentals nonetheless are strong as evidenced by equity holders' willingness to make an additional investment.
  - Many borrowers possess valuable assets but may not have had significant 2019 EBITDA and therefore would qualify for only a small loan (e.g., infrastructure businesses). Adding a loan to value test (in a secured loan transaction) as an alternative to the EBITDA test for maximum loan sizing would greatly increase the accessibility of the Main

Street loan program without increasing exposure to the Fed or Eligible Lender (and in many cases, this might reduce exposure).

## 5. Facility Uses & Payment Terms

- We would expect the need for amendments, consents and waivers relating to existing debt whether or not it is being expanded under Main Street Loan program. It would be very helpful for the Fed and Treasury to endorse lender flexibility in the amendment and consent process to enable borrowers to access these loans and consider the extent to which lenders' fees will limit access to the program.
- The Main Street Loan should have a 4 year maturity except to the extent an earlier maturity is needed to comply with covenants contained in the borrower's existing debt.
- Since it will be difficult to return to "business as usual" until after the COVID-19 emergency declaration is terminated, the principal and interest accrual/ payment holiday should extend until the later of (a) one year after loan issuance and (b) six months after the termination of COVID-19 emergency declaration.
- Please confirm that Main Street Loan proceeds can be used for interest payments on existing debt.
- Please clarify that all mandatory principal payments are permitted whether required due to an amortization schedule or special triggers such as asset dispositions, casualty events or excess cash flow or overadvances.
- Please confirm that a deferred payment obligation to an employee or service provider (whether or not evidenced by a note) can be repaid with the Main Street Loan proceeds. Such a repayment should be permitted as it is tantamount to an expense payment.
- The principal amortization on the Main Street Loans should not be more onerous from a borrower perspective than straight line annual amortization starting at the end of the principal amortization holiday (i.e., using the holiday described in the term sheet, the borrower would not be required to make principal reductions of more than one-third of the original principal amount in Year 2, one-third of the original principal amount in Year 3 and one-third of the original principal amount in Year 4).
- Is there a one year holiday on interest accrual or on interest payments? We assume that the lender and borrower will have broad flexibility to structure payment terms for that deferred interest and all interest, including structures that would minimize or eliminate potential tax consequences associated with imputed interest.

- As a practical matter, it appears that many otherwise eligible lenders will not be able to operationalize loans using SOFR as the interest rate reference index within this timeframe:
  - SOFR remains an emerging index with many different calculation methods and significant associated volatility and uncertainty. Furthermore, there would need to be a mechanism to amend the rate to implement another reference rate option if SOFR is not available, workable, etc.
  - Most existing loans use LIBOR (and/or other rates, such as a Prime Rate-based rate, a fixed rate or a competitive bid set rate) and introducing a different index makes it more complex to calculate, hedge, maintain spread between the different classes of debt and maintain preferred pricing arrangements in existing loan documents.
- Please confirm that a borrower will be allowed to make elective payments on a revolver.
- Please consider the need to allow for some debt forgiveness such as in the case of post-default workouts and restructurings where lenders typically can reorganize, reduce or forgive the outstanding debt. We recognize the concern about the prohibition on loan forgiveness in Section 4003(d)(3) of the CARES Act. However, that could be interpreted as applying only to the extent of direct loans made by Treasury (and Treasury's participation in the Main Street program might not even be considered a direct loan under the CARES Act), and not as a prohibition on the Fed's authority to design the loan programs.

## 6. Negative covenants

- Please clarify that distributions by tribal entities, quasi-governmental entities and other entities who do not have common stock and whose dividends or distributions are not for personal or private profit (e.g., returns on capital) will be allowed under the Main Street Loan programs.
  - Here is some further detail on tribal gaming operations: whether organized as Section 17 corporations, tribal corporations, tribal limited liability companies, chartered governmental authorities or instrumentalities, these gaming operations are considered part of an essential governmental function of federally recognized Indian tribes. Tribal gaming is regulated by federal law, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"). IGRA requires that a Tribe have the sole proprietary interest in its gaming operation (25 U.S.C. § 2710 (b)(2)(A)). The concept that the Tribal government have the sole proprietary interest in the gaming operation contradicts any concept that tribal casino entity has the ability to issue "common stock," even if such tribal casino entity may be organized as a tribal corporation, tribal limited liability company

or a Section 17 corporation. IGRA also requires under 25 U.S.C. § 2710(b)(2)(B) that net revenues from the gaming operation be used solely for the following five purposes: (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies. As evidenced by the required uses of gaming revenues under federal law, tribal casino operations are not designed to operate for personal or private profit of the entity.

- Please confirm that distributions to disregarded (or pass-through) entities (such as S-Corps, limited liability companies and partnerships) that enable equity holders to pay taxes associated with the Eligible Borrower's business activity will be allowed. Since a tax distribution is not a return of capital and only is being made to enable an equity holder to comply with his legal obligation to pay taxes (and in doing so protects the US Treasury), this should not be considered a dividend on common stock (or is permitted as a contractually mandated payment) within the meaning of Section 4003(c)(3)(A)(ii) of the CARES Act. Using a similar analysis, please confirm that the same answer applies to a tax distribution to a holding company that is the tax paying entity.
- Please confirm that equity owners in pass through entities (such as S Corps and LLCs) who, in accordance with past conduct, receive their employment compensation in the form of distributions will not be considered dividends on common stock within the meaning of Section 4003(c)(3)(A)(ii) of the CARES Act. That type of distribution is not a return of capital and is a payment pursuant to a contractual obligation (for employment).
- Please confirm that dividends or distributions to holding company entities to pay overhead and related administrative expenses associated with the Eligible Borrower's business activity will not be considered dividends on common stock within the meaning of Section 4003(c)(3)(A)(ii) of the CARES Act.
- Please confirm that dividend payments by subsidiaries of an Eligible Borrower will be permitted.
- Please clarify how the dividend and compensation restrictions would apply for an Eligible Borrower whose common stock is acquired by another entity or an Eligible Borrower that is merged into another entity.
- Will dividends or distributions on common stock that are paid in kind be allowed?
- Please confirm that the compensation of a new employee hired in 2020 or later will not be subject to the compensation restrictions in Section 4004 of the CARES Act.

- Please confirm that expense reimbursements (e.g., travel, meals and entertainment) do not constitute “other financial benefits” treated as employee compensation within the meaning of Section 4004 of the CARES Act.

## 7. Collateral and intercreditor issues

- The requirement that the Eligible Borrower must commit to refrain from repaying other debt “of equal or lower priority” until the Eligible Loan is repaid in full (even with an exception for mandatory prepayments) creates difficult intercreditor issues. The following clarifications and changes would ease this problem:
  - A loan of “equal priority” should mean (1) in the case of Main Street New Loans, any unsecured debt whether existing at the Main Street closing or incurred thereafter that is not contractually subordinated to the Main Street New Loan and (2) in the case of Main Street Expanded Loans, (i) the existing loan that is being upsized and (ii) if the existing loan that is being upsized is unsecured, any unsecured debt whether existing at the Main Street Loan closing or incurred thereafter that is not contractually subordinated to the existing loan (as expanded by the Main Street Loan). Any other loan would be of higher or lower priority than the Main Street loan.
  - Repayments and prepayments of debt of equal priority with the Main Street loan (as applicable, the “Program Loan”) should be permitted so long as the payments are shared between the Program Loan and the equity priority debt on a pro rata basis. Requiring borrowers to keep all of their debt outstanding until all of it can be paid off at the same time may be unduly expensive and counterproductive. Assuming that loans from employees or deferred payments to service providers are considered debt to which these restrictions apply, repayments should be permitted in any event without the need for pro rata treatment as that is tantamount to an expense payment.
  - A secured loan that is not part of the Program Loan (to be referred to here as “Secured Loan 2”) should have higher priority than the Program Loan (1) in its entirety if the Program Loan is unsecured or (2) with respect to its priority collateral if the two loans are secured by different collateral or if the two are secured by the same collateral but the lender of Secured Loan 2 has higher priority in that collateral (e.g., by virtue of having a purchase money security interest or by virtue of any contractual subordination). Since Secured Loan 2 has higher priority, the borrower should be allowed to repay Secured Loan 2 in whole or in part at any time. This should apply:
    - for any Secured Loan 2 that was incurred before April 8, 2020 and
    - for any Secured Loan 2 that was incurred on or after April 8, 2020 so long as:

- both (i) new borrowed money was provided and (ii) the borrower complies with the EBITDA test as then re-measured; or
- such Secured Loan 2 is purchase money secured debt, a capital lease (including as so characterized pursuant to ASC 842) or a sale/ leaseback.
- The collateral value should not matter in the seniority classification—the fact that a lender may be undersecured should not affect its seniority.
- Clarify that, when an upsized tranche of a Main Street Expanded Loan is secured by collateral because the prior tranche was secured, any release by the existing lenders of their liens will extend to the liens securing the upsized tranche as well.

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