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Mid-sized Businesses May Be Eligible to Participate in the Main Street New Loan Facility and the Main Street Expanded Loan Facility

Related People:
Curtis A. Johnson
Howard M. Berkower

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In addition to the programs established and the powers granted as part of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), the Treasury Department and Federal Reserve Board of Governors are leveraging the existing powers of the Federal Reserve under Section 13(3) of the Federal Reserve Act to provide credit to private enterprises under the "exigent" circumstances created by the COVID-19 pandemic. On Thursday, April 9, 2020, they announced that they will establish two new facilities to support lending to midsized businesses that are adversely affected by the COVID-19 pandemic: (i) the Main Street New Loan Facility and (ii) the Main Street Expanded Loan Facility (collectively, the "Facilities"). The Main Street New Loan Facility will finance new loans originated on or after April 8, 2020 ("New Loans"). The Main Street Expanded Loan Facility will finance the extension of additional credit (an "Upsized Tranche") with respect to loans originated prior to April 8, 2020. Included in the announcement were "term sheets" that, by their nature, are not exhaustive of the details of the Facilities.

The programs will work as follows: (1) a single-purpose vehicle ("SPV") will be established and the Treasury Department will capitalize it with $75 billion made available under the CARES Act; (2) the Federal Reserve Bank will commit to lending $525 billion to the SPV pursuant to its powers under Section 13(3) of the Federal Reserve Act; (3) eligible lenders (i.e., federally regulated institutions) may but are not required to make a New Loan or provide an Upsized Tranche for an "Eligible Loan" to "Eligible Businesses"; and (4) the SPV will purchase "participations" equal to 95 percent of the amount of the New Loan or Upsized Tranche up to a combined $600 billion for both Facilities. A participation is an agreement under which economic beneficial ownership of a percentage of a loan is purchased from the lead lender by a participant but under which the lead lender retains the right to administer the loan subject to the terms of the participation agreement. Presumably, lenders will make loans that qualify for the purchase of a participation under the Facilities in circumstances where they would not otherwise provide such loans, and in that way the borrowers of such loans that are adversely affected by the COVID-19 pandemic will benefit.

To take advantage of the program, businesses will need to be an Eligible Business, which, according to the term sheet, will include the following criteria:

- Businesses with up to 10,000 employees or up to $2.5 billion in 2019 annual revenues.
- Businesses created or organized in the United States or under the laws of the United States with significant operations in the United States and with a majority of their employees based in the United States.

The SPV will only purchase participations that meet the criteria for a New Loan or an Upsized Tranche of an Eligible Loan, which, according to the term sheets, include the following:

- A four-year maturity with amortization of principal deferred for one year.
- Interest at a rate equal to the adjustable rate of the Secured Overnight Financing Rate plus 240-400 basis points.
- A minimum size of $1 million.
- Prepayment permitted without penalty.
- Maximum loan size as follows:
  - In the case of the Main Street Expanded Loan Facility, the maximum Upsized Tranche loan size is the lesser of (i) $150 million, (ii) 30 percent of the business's existing outstanding and committed but undrawn bank debt, or (iii) an amount that, when added to existing outstanding and committed but undrawn debt, does not exceed six times 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA").
  - In the case of the Main Street New Loan Facility, the maximum size of a New Loan is the lesser of (i) $25 million or (ii) an amount that, when added to the business's existing outstanding and committed but undrawn debt, does not exceed four times the business's 2019 EBITDA.

According to the term sheet in the case of an Upsized Tranche, the collateral securing the existing loan must be shared pro rata with the Upsized Tranche. This requirement will be a critical factor as to whether lenders will be willing to provide an Upsized Tranche. Of perhaps even more significance is the requirement in the second bullet point under the section regarding required "Attestations," in which it is stated that borrowers must commit to refrain from repaying other debt of equal or lower priority, with the exception of mandatory principal payments, unless the borrower has first repaid the Eligible Loan in full. If this means that the Upsized Tranche needs to be repaid before the remaining amounts owed to a lender, this may make the program unattractive to lenders.

The term sheets also lay out other requirements for any New Loans or Upsized Tranches, which include:

- Proceeds not be used to repay or refinance preexisting loans or lines of credit.
- The lender and borrower must agree not to cancel or reduce any existing lines of credit outstanding to the borrower.
- The borrower will make reasonable efforts to maintain its payroll and retain its employees during the term of the Upsized Tranche or New Loan.
- The borrower must follow compensation, stock repurchase, and capital distribution restrictions that apply to direct loan programs under Section 4003(c)(3)(A)(ii) of the CARES Act.

The term sheets do not incorporate all the requirements for loans under the CARES Act, such as the rigorous requirements regarding maintaining employment. The term sheet provides that a borrower must make "reasonable efforts to maintain its payroll and retain employees" during the period that the Upsized Tranche or New Loan is outstanding. This is a far lower standard than the general requirements imposed under the CARES Act. This is possible because Section 4003(c)(3)(D)(ii) of the CARES Act expressly provides that action by the Federal Reserve under Section 13(3) of the Federal Reserve Act, including actions in which the Treasury participates, need not comply with all the requirements in that subsection of the CARES Act.

The next steps in the process will presumably be (1) establishing the terms of the participation being purchased by the SPV by drafting a form of participation agreement and (2) drafting definitive model documents or standard terms for New Loans and Upsized Tranches. Those terms will determine whether the lenders will be willing to make New Loans and Upsized Tranches and whether borrowers will be willing to enter into such transactions. In the case of an Upsized Tranche, the documents will probably need to be custom tailored to work with the existing credit documents.

We are available to assist clients that are potential borrowers with determining whether they are eligible for a Main Street New Loan Facility or Main Street Expanded Loan Facility, whether these programs will be beneficial to them, and what steps they may want to undertake to obtain a New Loan or an Upsized Tranche from their new or an existing lender.

We are also available to assist clients that wish to provide comments to the program, which are due on April 16. Once a proposed form of participation agreement and standard loan terms are available, we can assist clients that are lenders in evaluating whether the program makes sense for them either in general or with respect to a particular borrower.