

The “Main Street Lending Program”: What It Is and How It Works

by Anthony J. Zeoli and Kenneth M. Crane

A FREEBORN & PETERS LLP CLIENT ALERT

The “Main Street Lending Program” (the “Program”) was established by the Federal Reserve Board (the “FRB”) to support lending to small and medium-sized businesses that were in sound financial condition prior to the onset of the COVID-19 pandemic. Under the Program, which was authorized under Title IV the “Coronavirus Aid, Relief, and Economic Security Act” (the “CARES Act”) and previously announced on April 9, 2020, the FRB has currently allocated \$600 billion in funds to indirectly facilitate loans to eligible borrowers. While the FRB has not yet announced an actual start date for the Program, they have released a significant amount of guidance regarding the Program. Below are some of the highlights of what we know so far about the Program, including a comparison of the available types of loans under the Program and the respective eligibility requirements of each.



Overview

Initially, the FRB had announced that it would establish two different loan facilities under the Program. However, in later guidance released in late April the FRB established a third loan facility. As discussed below, all three facilities have the same qualifications for determining eligible lenders (*each an “Eligible Lender”*) and eligible borrowers (*each an “Eligible Borrower”*). The following is a brief description of the three loan facilities currently provided for under the Program:

- **Main Street New Loan Facility** (*a/k/a MSNLF; a “New Loan”*) – This refers to a new loan made by an Eligible Lender to an Eligible Borrower which is structured to meet the requisite New Loan terms, as discussed below. For clarity, a New Loan can be made to either an existing or new customer of an Eligible Lender, as long as it is a new facility. **The total amount of a New Loan can range from \$250k to \$35M** (*subject to a 4x borrower’s 2019 EBITDA cap*).
- **Main Street Priority Loan Facility** (*a/k/a MSPLF; a “Priority Loan”*) – Like the New Loan described, this refers to a new loan made by an Eligible Lender to an Eligible Borrower, but is structured to meet the requisite Priority Loan terms, as discussed below. In general, Priority Loans carry many of the same terms as New Loans; including the fact that the **total amount of a Priority Loan can range from \$250k to \$50M**. However, there are certain variations, which may make them more favorable to Eligible Borrowers (*including a higher loan amount cap of 6x borrower’s 2019 EBITDA*).
- **Main Street Expanded Loan Facility** (*a/k/a MSELF; an “Expanded Loan”*) – This refers to a situation where an Eligible Borrower has an existing loan with an Eligible Lender and the parties agree to roll such loan into (*and generally increase the principal amount of such loan pursuant to the terms of*) a new loan which is structured to meet the requisite Expanded Loan terms, as discussed. **The total amount of an Expanded Loan can range from \$10M to \$300M** (*subject to a 6x borrower’s 2019 EBITDA cap*).

For clarity, it should be noted that the FRB is not making loans directly to borrowers. Administratively speaking, essentially the Program will work as follows. Eligible Lenders will underwrite, and fund loans under the Program to, Eligible Borrowers. The FRB (through a newly created "special purpose vehicle" created by the Federal Reserve Bank of Boston) will then buyback between 85%-95% (depending on the loan facility) of such Program loans made by Eligible Lenders.

Eligibility Requirements

Under each of the above facilities, the following eligibility requirements will apply:

- **Eligible Lenders** – Currently any of the following are eligible to register to make Program loans:
 - U.S. federally-insured depository institutions (*including banks, savings associations, and credit unions*);
 - U.S. branches or agencies of foreign banks;
 - U.S. bank holding companies;
 - U.S. savings and loan holding companies;
 - U.S. intermediate holding companies of foreign banking organizations; and/or
 - any U.S. subsidiary of any of the foregoing.

Currently nonbank financial institutions are not eligible for participation in the Program. However, the FRB is said to be considering options to expand the above list in the future.

In addition, to the extent an Eligible Lender has an existing loan or other credit facility with the subject Eligible Borrower, the Eligible Lender would also need to covenant and agree that it will not:

- cancel or reduce any then-existing committed lines of credit of such Eligible Borrower, except in an event of default;¹ or
 - require such Eligible Borrower to make any principal or interest payments (including any prepayment) under such existing credit facilities until the Program loan is paid in full (*other than such payments which become "mandatory and due"*² per the terms of such credit facility).
- **Eligible Borrowers** – Currently, in order for a borrower to be eligible to receive a Program loan, all of the following must be satisfied:
 - such borrower must:
 - have been established prior to March 13, 2020;
 - be an entity 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% participation by foreign business entities, or a tribal business concern;³
 - be created or organized in the United States or under the laws of the United States and have a majority of its business operations and employees based in the United States;
 - have been in sound financial condition prior to the onset of the COVID-19 pandemic;
 - either, when calculated together with its "affiliates",⁴ (a) have less than 15,000 employees; or (b) have had 2019 annual revenues of \$5 Billion, or less; and
 - be able to both make the required certifications and comply with the required covenants;

¹ Note that this does not prohibit any reduction or termination of uncommitted lines of credit, the expiration of existing lines of credit in accordance with their terms, or the reduction of availability under existing lines of credit in accordance with their terms due to changes in borrowing bases or reserves in asset-based or similar structures.

² This is defined in item H.7. of the FAQ and essentially provides that "mandatory and due" includes regularly scheduled payments of principal and interest (provided they were scheduled before the date of the respective Program loan) and payments resulting from an acceleration of indebtedness upon default. It should also be noted that this covenant would not prevent the Eligible Lender from accepting prepayments with respect to any revolving/line-of-credit facilities.

³ It should be noted that the FAQ specifically provides that other forms of entities may be considered by the FRB for participation in the Program. Moreover, as discussed herein, not-for-profit entities may soon be able to participate in a separate Program facility.

⁴ The Program incorporates the U.S. Small Business Administration's affiliation test set forth in 13 CFR 121.301(f) for purposes of this affiliation analysis. As such, determining the total number of employees a particular borrower has is similar to how such determination is made with respect to PPP Loans and would include all full-time, part-time, seasonal, or otherwise employed persons, excluding volunteers and independent contractors.

- such borrower must not
 - have received other specific support under the CARES Act (*other than an “Economic Injury Disaster Loan” (EIDL) or “Paycheck Protection Program” (PPP) loan*);
 - be a “Covered Entity;” meaning that no “Covered Individual”⁵ owns, controls, or holds 20% or more (*by vote or value*) of any class of equity ownership interest in such borrower; or
 - be an Ineligible Business (*as defined below*).

For clarity, an Eligible Borrower may only participate in one of the available Program facilities. Further, an Eligible Borrower that gets a Program loan cannot subsequently apply for/receive economic support from the FRB or otherwise under the CARES Act (*other than EIDL and/or PPP loans*).

- **Ineligible Businesses** – Notwithstanding the above, the FAQ specifically provides that a borrower whose business qualifies as any of the following (*each, an “Ineligible Business”*)⁶ will not be eligible to apply for/receive a Program loan:
 - non-profit businesses (*except for those specifically permitted under the CARES Act*), however for-profit subsidiaries are eligible;
 - financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (*pawn shops, although engaged in lending, may qualify in some circumstances*);
 - passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (*except “Eligible Passive Companies” under [13 CFR 120.111](#)*);
 - life insurance companies;
 - businesses located in a foreign country (*although businesses in the U.S. owned by aliens may qualify*);
 - pyramid sale distribution plans;
 - businesses deriving more than one-third of gross annual revenue from legal gambling activities;
 - businesses engaged in any illegal activity;
 - private clubs and businesses which limit the number of memberships for reasons other than capacity;
 - government-owned entities (*except for businesses owned or controlled by a Native American tribe*);
 - businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting;
 - loan packagers earning more than one third of their gross annual revenue from packaging SBA loans;
 - businesses with an associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude;
 - businesses in which the lender or a “Certified Development Company” (CDC), or any of its associates, owns an equity interest;
 - businesses which:

⁵ Meaning the President, the Vice President, the head of any Executive Department, any Member of Congress, and certain immediate family members of the foregoing.
⁶ The FAQ requires that the borrower not be an “ineligible business” of a type identified in any of sections (b)-(l) or (m)-(s) of [13 CFR 120.110](#) (*as such rules are modified and clarified by the SBA for purposes of the PPP*).

- present live performances of a prurient sexual nature; or
- derive directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;
- unless waived by SBA for good cause, businesses that have previously defaulted on a federal loan or federally assisted financing, resulting in the federal government or any of its agencies or departments sustaining a loss in any of its programs, and businesses owned or controlled by an applicant or any of its associates which previously owned, operated, or controlled a business which defaulted on a federal loan (or guaranteed a loan which was defaulted) and caused the federal government or any of its agencies or departments to sustain a loss in any of its programs;
- businesses primarily engaged in political or lobbying activities; and/or
- speculative businesses (including private equity and hedge funds).

Comparison of Other Loan Terms

The FRB has prepared a separate term sheet⁷ for each of the Program facilities outlining the principal terms of each. The three Program facilities actually have many similar features. In particular, as noted above, all three facilities currently have the same requirements for determining Eligible Lenders and Eligible Borrowers. Further, all three facilities have the same terms with respect to maturity, interest rate, deferral of principal/interest, and the ability of the borrower to prepay without penalty. There are, however, some distinct differences between the three facilities that borrowers should be aware of.

For ease of comparison, attached hereto is a comparison matrix summarizing the primary terms of each facility side-by-side.

Frequently Asked Questions

With respect to the Program the FRB has released a detailed, 63 page, set of "[Frequently Asked Questions](#)" (as most recently released on June 8, 2020; the "**FAQ**"). For a breakdown of the FAQ answers to some of the more common borrower questions, including with respect to the calculation of EBITDA and the other components affecting a particular borrower's potential Program loan amount cap, please see [FRB Releases Updated FAQ Regarding The "Main Street Lending Program"](#).

Please note, the rules and guidance surrounding the Program are in flux and are changing rapidly, any related information, guidance or interpretations herein (including in the attached comparison matrix) are date/time sensitive and subject to change without notice.

We will continue to follow this and the other CARES Act programs and offer updates as further developments arise. If you have any questions, please contact Anthony Zeoli (azeoli@freeborn.com), Kenneth Crane (kcrane@freeborn.com) or another member of the Freeborn & Peters LLP CARES Act team.

⁷ The "term sheet" for New Loans, effective as of June 8, 2020, is available [HERE](#);
The "term sheet" for Priority Loans, effective as of June 8, 2020, is available [HERE](#);
The "term sheet" for New Loans, effective as of June 8, 2020, is available [HERE](#);

EXHIBIT A Program Loan Terms Comparison Matrix

	New Loans	Priority Loans	Expanded Loans
Minimum Loan Size:	\$250,000	\$250,000	\$10 million
Maximum Loan Size:¹	<p>The <u>lesser of</u>:</p> <ul style="list-style-type: none"> \$35 million; or an amount equal to the result of: <ul style="list-style-type: none"> 4x the subject borrower's 2019 "adjusted EBITDA," <u>minus</u> the aggregate amount of the subject borrower's then "existing outstanding and undrawn debt" 	<p>The <u>lesser of</u>:</p> <ul style="list-style-type: none"> \$50 million; or an amount equal to the result of: <ul style="list-style-type: none"> 6x the subject borrower's 2019 "adjusted EBITDA," <u>minus</u> the aggregate amount of the subject borrower's then "existing outstanding and undrawn debt" 	<p>The <u>lesser of</u>:</p> <ul style="list-style-type: none"> \$300 million; or an amount equal to the result of: <ul style="list-style-type: none"> 6x the subject borrower's 2019 "adjusted EBITDA," <u>minus</u> the aggregate amount of the subject borrower's then "existing outstanding and undrawn debt"
Term:	Five years		
Interest Rate:	Equal to the then effective LIBOR (<i>one or three months, as determined by the respective lender</i>) + 3.00%		
Interest Payments:	<p>No interest payments are required during loan year 1</p> <p>Deferred interest will be capitalized in accordance with the respective lender's customary practices (<i>e.g. monthly, quarterly, annually, etc.</i>)</p>		
Principal Payments:	<p>No principal payments are required during loan years 1 and 2</p> <p>The then outstanding principal amount, together with all then capitalized interest, will be payable over the remainder of term as follows: (a) 15% at the end of year 3; (b) 15% at the end of year 4; and (c) 70% at the end of year 5</p>		
Voluntary Prepayment:	Permitted, in whole or in part, without penalty		
Mandatory Prepayment:	Each loan will require a full prepayment if the borrower breaches certain covenants and/or makes a material misstatement with respect to its loan certifications		
Payment Priority:	The loan must not be contractually subordinated to any of the borrower's other debt in terms of payment priority (<i>whether in or outside of bankruptcy</i>)		

¹ Please note, while these calculations are presented under the title of "maximum" loan amount, the FAQ makes it clear that if the resulting amount of the respective calculations is less than the respective "minimum" amount of such Program loan, the respective borrower would not be eligible to apply for/receive such Program loan.

	New Loans	Priority Loans	Expanded Loans
Security:	May be secured or unsecured (as determined by the respective lender)	May be secured or unsecured (as determined by the respective lender); <u>provided that</u> it may be unsecured only if the respective borrower does not, as of the date of the loan origination, have any secured debt other than “Mortgage Debt”	May be secured or unsecured (as determined by the respective lender); <u>provided that</u> (a) it may be unsecured <u>only if</u> the respective borrower does not, as of the date of the loan origination, have any secured debt other than “Mortgage Debt”; and (b) any collateral that secures the underlying loan must also secure the upsized “Expanded Loan” tranche on a pari passu basis
Security Priority:	N/A	With respect to any collateral securing the loan, the interests of the lender must, in terms of priority and security, be senior to or parri-passu with the interests of the other secured lenders; <u>provided that</u> , the foregoing would not apply with respect to any property securing then existing “Mortgage Debt” ²	With respect to any collateral securing the loan, the interests of the lender must, in terms of priority and security, be senior to or pari-passu with the interests of the other secured lenders; <u>provided that</u> , the foregoing would not apply with respect to any property securing then existing “Mortgage Debt” Further, with respect to any collateral that secures the underlying loan, lender’s interest in such collateral will be shared on a pari-passu basis between the existing loan and the upsized “Expanded Loan” tranche
Fees:	The borrower will be required to pay the following fees to the lender in connection with the loan: <ul style="list-style-type: none"> • an origination fee of up to 1% of the loan amount; • a transaction fee of up to 1% of the loan amount; and • applicable underwriting/appraisal fees 		The borrower will be required to pay the following fees to the lender in connection with the loan: <ul style="list-style-type: none"> • an origination fee of up to .75% of the loan amount; • a transaction fee of up to .75% of the loan amount; and • applicable underwriting/appraisal fees
FRB Participation Percentage:	FRB to buy-back 95% of the amount of the loan from the applicable lender who made the Program loan	FRB to buy-back 85% of the amount of the loan from the applicable lender who made the Program loan	FRB to buy-back 95% of the amount of the loan from the applicable lender who made the Program loan

	New Loans	Priority Loans	Expanded Loans
Equity Repurchase / Distribution Restrictions:	<p>For the period from the funding of the loan through the date that is 1-year from the repayment in full of such (<i>the "Restricted Period"</i>), the borrower <u>will not</u> be permitted to:</p> <ul style="list-style-type: none"> • repurchase any of its (<i>or any parent entity's</i>) equity securities which are listed on a national exchange at any time while the Program loan was outstanding (<i>except to the extent such purchase was made pursuant to an agreement that was in effect prior to March 27, 2020</i>); or • pay dividends or make other capital distributions to its equity holders (<i>other than tax distributions to the extent borrower is an S corporation or other tax pass-through entity</i>) 		
Employee Compensation Restrictions:	<p>During the Restricted Period the maximum compensation paid to such borrower's officers and employees must be limited as follows:</p> <ul style="list-style-type: none"> • with respect to each officer and employee of the borrower whose total compensation³ for the 2019 calendar year (<i>respectively, their "2019 Compensation"</i>) was more than \$425k but less than (<i>or equal to</i>) \$3M,⁴ such person may not receive from such borrower: <ul style="list-style-type: none"> • during any 12-month period during the Restricted Period, total compensation which exceeds their 2019 Compensation; and/or • severance pay or other employment termination benefits which exceeds 2x their 2019 Compensation; • with respect to each officer and employee of the borrower whose 2019 Compensation was more than \$3M,⁵ such person may not receive from such borrower: <ul style="list-style-type: none"> • during any 12-month period during the Restricted Period, total compensation which exceeds the sum of: (a) \$3M; plus (b) 50% of the amount by which their 2019 Compensation exceeds \$3M; and/or • severance pay or other employment termination benefits which exceeds 2x their 2019 Compensation 		
Debt Reduction/ Repayment Restrictions:	<p>For so long as the loan remains outstanding the borrower <u>will not</u> be permitted to:</p> <ul style="list-style-type: none"> • make any payments of principal or interests on any of its other debt, other than: (a) repayments/prepayments with respect to any revolving/line-of-credit facilities made in the ordinary course of borrower's business; and (b) such other payments which become "mandatory and due" per the terms of such credit facility;⁶ or • seek to cancel or reduce any of its committed lines of credit, whether with the respective lender making the Program loan or any other lender 		
Employee Retentions Covenants:	<p>For as long as the loan remains outstanding the borrower must undertake good-faith efforts to maintain payroll and retain employees, in light of its capacities, the economic environment, its available resources, and the business need for labor⁷</p>		

³ "Total compensation" includes salary, bonuses, awards of stock, and other financial benefits.

⁴ Note that employees who would otherwise fall into this category but whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020 would be excluded.

⁵ Note that employees who would otherwise fall into this category but whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020 would be excluded.

⁶ This is defined in item H.7. of the FAQ and essentially provides that "mandatory and due" includes: (a) with respect to credit facilities which pre-date the origination date of the subject Program loan, regularly scheduled payments of principal and interest (provided they were scheduled before the origination date of the respective Program loan) and all mandatory payments resulting from an acceleration of indebtedness upon default; and (b) with respect to credit facilities that were entered into after date the origination date of the subject Program loan, only mandatory payments resulting from an acceleration of indebtedness upon default.

⁷ For clarity, a borrower that has already laid-off or furloughed workers as a result of the disruptions from COVID-19 are eligible to apply for a Program loan.

	New Loans	Priority Loans	Expanded Loans
Financial Reporting Covenants:	For as long as the loan remains outstanding the borrower must comply with extensive quarterly and annual reporting requirements as respectively outlined in <u>Appendix C</u> of the FAQ under the “MSNLF” column	For as long as the loan remains outstanding the borrower must comply with extensive quarterly and annual reporting requirements as respectively outlined in <u>Appendix C</u> of the FAQ under the “MSPLF” column	For as long as the loan remains outstanding the borrower must comply with extensive quarterly and annual reporting requirements as respectively outlined in <u>Appendix C</u> of the FAQ under the “MSELF” column; provided that, if the underlying loan is a multi-lender facility that was documented prior to April 24, 2020, the negotiated reporting provisions therein would apply in lieu of the foregoing
Cross-Default/ Acceleration:	To the extent the borrower has another credit facility with the applicable lender making the program loan (including a multi-lender facility which includes the respective lender), any default of the borrower under such facility will be deemed a default under, and cause an acceleration of, such borrower’s Program loan		

This comparison matrix is provided by Freeborn & Peters LLP and its affiliates for educational and informational purposes only, should not be relied on, and is not intended and should not be construed as legal advice. Further, neither Freeborn & Peters LLP nor any of its affiliates assumes, or will otherwise be responsible for, any liability whatsoever in connection with the use of the comparison matrix.

ABOUT THE AUTHORS



Anthony J. Zeoli

Partner

Chicago Office
(312) 360-6798
azeoli@freeborn.com

Anthony Zeoli is a Partner in the Corporate Practice Group and the Leader of the Emerging Industries Team. He concentrates his practice in the areas of banking and commercial finance, securities, real estate, and general corporate law. Anthony’s commercial finance practice includes the representation of borrowers and lenders in: secured and unsecured lending transactions; corporate reorganizations and restructuring; syndicated commercial financing transactions; and loan workouts.



Kenneth M. Crane

Partner

Chicago Office
(312) 360-6603
kcrane@freeborn.com

Ken Crane is a Partner and member of the Corporate Practice Group and a member of the Private Equity, Emerging Industries, and Food Industry Teams. He is a deal lawyer who represents private equity, venture capital and family office-backed companies, focusing on acquisition and sale transactions. Ken gets involved at all stages in the business growth and succession process, from acquisition, capital raising, financing and growth equity transactions, strategic partnering and joint ventures, to pre-sale and succession planning.

140+ Attorneys. 5 Offices.

Freeborn & Peters LLP is a full-service law firm with international capabilities and offices in Chicago, Ill.; New York, Ny; Richmond, Va.; Springfield, Ill.; and Tampa, Fla. Freeborn is always looking ahead and seeking to find better ways to serve its clients. It takes a proactive approach to ensure its clients are more informed, prepared and able to achieve greater success – not just now, but also in the future. While the firm serves clients across a very broad range of sectors, it has also pioneered an interdisciplinary approach that serves the specific needs of targeted industries.

Freeborn's major achievements in litigation are reflective of the firm's significant growth over the last several years and its established reputation as a Litigation Powerhouse®. Freeborn has one of the largest litigation departments among full-service firms of its size – currently with more than 90 litigators, which represents about two-thirds of the firm's lawyers.

Freeborn is a firm that genuinely lives up to its core values of integrity, effectiveness, teamwork, caring and commitment, and embodies them through high standards of client service and responsive action. Its lawyers build close and lasting relationships with clients and are driven to help them achieve their legal and business objectives.

For more information visit: www.freeborn.com

CHICAGO

311 South Wacker Drive
Suite 3000
Chicago, IL 60606
(312) 360-6000
(312) 360-6520 fax

NEW YORK

230 Park Avenue
Suite 630
New York, NY 10169
(212) 218-8760
(212) 218-8761 fax

SPRINGFIELD

217 East Monroe Street
Suite 202
Springfield, IL 62701
(217) 535-1060
(217) 535-1069 fax

RICHMOND

901 East Byrd Street
Suite 950
Richmond, VA 23219
(804) 644-1300
(804) 644-1354 fax

TAMPA

1 Tampa City Center
201 North Franklin Street
Suite 3550
Tampa, FL 33602
(813) 488-2920

Disclaimer: This publication is made available for educational purposes only, as well as to provide general information about the law, not specific legal advice. It does not establish an attorney/client relationship between you and Freeborn & Peters LLP, and should not be used as a substitute for competent legal advice from a licensed professional in your state.

© 2020 Freeborn & Peters LLP. All rights reserved. Permission is granted to copy and forward all articles and text as long as proper attribution to Freeborn & Peters LLP is provided and this copyright statement is reproduced.