

Notable Tax Relief Provisions in the Coronavirus Aid, Relief and Economic Security Act (H.R. 748) (the “CARES Act”) for Large Contractors

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

Section 2301 of the CARES Act — Employee Retention Credit for Employers Subject to Closure Due to COVID-19

The CARES Act provides a new payroll tax credit equal to 50% of the “qualified wages” paid by an employer to employees with respect to wages paid between March 13 and December 31, 2020. The employee retention credit is available for employers (1) who fully or partially suspend operations due to orders from a government agency due to COVID-19 or (2) who see gross receipts for a given calendar quarter decline by more than 50% compared to the corresponding quarter in the previous year. In the latter case, the employer’s eligibility for the credit will continue until the end of the first quarter thereafter when gross receipts exceed 80% of the gross receipts for the corresponding quarter in the prior year.

For employers with more than 100 employees, “qualified wages” means wages paid to employees who are unable to provide services due to COVID-19 (and the related order from a government agency). The employee retention credit applies to wages paid and certain qualified health plan expenses incurred by the employer to provide or maintain a group health plan. The credit is capped at \$5,000 per employee. The credit will not apply for certain wages already taken into account for purposes of other credits (such as the credits for paid leave time that were included in the prior stimulus package). Also, a business that receives an SBA loan under the new loan program enacted as part of this legislation will not be eligible for the credit.

The IRS has subsequently issued guidance saying that the credit for wages paid during the period March 13-31, 2020 shall be claimed on Form 941 for the second quarter of 2020, along with the credit for wages paid during that quarter, rather than being claimed on Form 941 for the first quarter of 2020. Any qualified wages paid in excess of the employer’s payroll tax liability is refundable as a credit to the employer. Treasury has also implemented procedures for advance payment of the credits to employers, which include filing a Form 7200 (Advance Payment of Employer Credits Due to COVID-19) with the IRS to obtain an advanced refund of any excess credits.

A key limitation on the credit, however, is that a business that receives an SBA loan or other benefits under the new program enacted as part of this same legislation will not be eligible for the credit. So employers will need to calculate which benefit will be more valuable to them — the credit or the SBA program. For large contractors with over 500 employees who are not eligible to participate in the SBA loan programs, the tax credit is a good option.

Section 2302 of the CARES Act — Delay of Payment of Employer Payroll Taxes

The CARES Act also generally allows employers to defer payment of the employer-portion of Social Security taxes (generally 6.2% on employee wages up to \$137,700). Such deferred employment taxes are required to be paid in later years, with 50% of such employment taxes due on December 31, 2021, and the remaining 50% due on December 31, 2022. The deferral will not apply, however, for an employer who receives the benefit of forgiveness of indebtedness under the SBA portions of the Act.

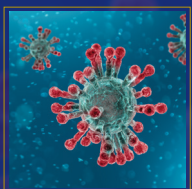


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CARES Act: Main Street Lending Program Summary for All Contractors

On April 9, 2020, the Federal Reserve released term sheets for a Main Street Lending Program, a new program intended to provide liquidity to most businesses (except those that are very large) to help withstand the coronavirus crisis. The Main Street Lending Program enables up to \$600 billion in new financing of eligible term loans from eligible lenders to eligible businesses and consists of the Main Street New Loan Facility (the MSNLF) and the Main Street Expanded Loan Facility (MSELF). The Department of the Treasury, using funds appropriated under section 4027 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), will provide \$75 billion in equity to a single common special purpose vehicle (SPV) in connection with the MSNLF and the MSELF. The Federal Reserve Banks will lend the remainder of funds to the SPV for the MSNLF and the MSELF.

Although it targets similar businesses, the Main Street Lending Program is distinct from the mid-sized business loan program contemplated to be created under Section 4003(c)(3)(D) of the CARES Act. Material features of the MSNLF and the MSELF and certain interpretive questions raised by the term sheets for the Main Street Lending Program are summarized below.

Who is an Eligible Lender?

U.S. insured depository institutions, U.S. bank holding companies, and U.S. savings and loan holding companies are eligible lenders under this program. Nonbank lenders are not eligible lenders under this program.

Who is an Eligible Borrower?

Businesses are eligible borrowers if they satisfy each of the following:

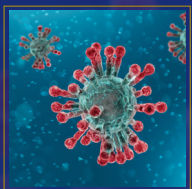
- Have up to 10,000 employees or less than \$2.5 billion in 2019 annual revenues
- Were created or organized in the United States or under the laws of the United States with significant operations in and a majority of its employees based in the United States
- Are not insolvent

Borrowers may only participate in one of the MSNLF, the MSELF or the separate Primary Market Corporate Credit Facility for U.S. issuers of certain corporate debt. Borrowers that have participated in the Paycheck Protection Program established under the CARES Act may also be eligible to participate in the MSNLF or the MSELF. Whether an entity organized and operating in the United States, but that has a foreign parent company or other foreign ownership, could be an eligible borrower remains one of several unanswered interpretive issues raised by the MSNLF and MSELF term sheets and is expected to be addressed prior to commencement of the program.

What is an Eligible Loan?

An eligible loan is made by an eligible lender(s) to an eligible borrower pursuant to the following terms:

- Origination
 - ♦ MSNLF: On or after April 8, 2020
 - ♦ MSNLF: Upsize provided on or after April 8, 2020 to a term loan originated before April 8, 2020
- Security
 - ♦ MSNLF: Unsecured
 - ♦ MSNLF: Unsecured unless original loan is secured, in which case security is *pari passu* with original loan
- Four-year maturity
- Amortization of principal and interest deferred for one year (the amortization schedule for an eligible loan otherwise is not specified in the term sheets released by the Federal Reserve)



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- Adjustable rate of Secured Overnight Financing Rate plus 250-400 basis points
- Minimum loan size of \$1 million
- Maximum loan size
 - ♦ *MSNLF*: The lesser of (i) \$25 million or (ii) an amount that, when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed four times the borrower's 2019 earnings before interest, taxes, depreciation and amortization (EBITDA)
 - ♦ *MSNLF*: The least of (i) \$150 million, (ii) 30% of the borrower's existing outstanding and committed but undrawn bank debt, or (iii) an amount that, when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed six times the borrower's 2019 EBITDA
 - ♦ *EBITDA*: The term sheets provided by the Federal Reserve do not address the principles on which EBITDA will be calculated, including whether add-backs under a borrower's existing credit facility will be allowed for an MSELF. The issue of whether additional, customary add-backs beyond the simple definition of EBITDA in the term sheets is expected to be addressed prior to commencement of the program.
- Prepayment permitted without penalty

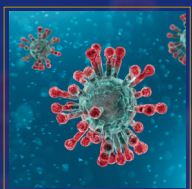
Will the Federal Reserve Participate in the Loan?

The SPV will purchase at par value a 95% participation and the lender(s) will retain 5% of an eligible loan or upsized tranche of an eligible loan.

What Conditions and Restrictions would be Imposed by a Loan?

The following attestations will be required with respect to each loan:

- The lender must attest that:
 - ♦ The proceeds of the loan will not be used to repay or refinance pre-existing loans or lines of credit made by the lender to the borrower
 - ♦ It will not cancel or reduce any existing lines of credit outstanding to the borrower
 - ♦ It is eligible to participate in the facility, including in light of the conflicts of interest provision in section 4019(b) of the CARES Act relating to ownership interests by certain government officials and their family members
- The borrower must:
 - ♦ Commit to refrain from using the proceeds of the loan to repay other loan balances
 - ♦ Commit to refrain from repaying other debt of equal or lower priority, with the exception of mandatory principal payments (interest is not mentioned), unless the borrower has first repaid the loan in full
 - ♦ Attest that it will not seek to cancel or reduce any of its outstanding lines of credit with the lender or any other lender
 - ♦ Attest that it requires financing due to the exigent circumstances presented by COVID-19, and that, using the proceeds of the loan, it will make reasonable efforts to maintain its payroll and retain its employees during the term of the loan
 - ♦ Attest that it meets the EBITDA leverage condition summarized above in “What is an Eligible Loan”
 - ♦ Attest that it will follow compensation, stock repurchase, and dividend and other capital distribution restrictions that apply to direct loan programs under section 4003(c)(3)(A)(ii) of the CARES Act (see below)



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- ◆ Certify that it is eligible to participate in the facility, including in light of the conflicts of interest provision in section 4019(b) of the CARES Act relating to ownership interests by certain government officials and their family members

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 are:

- *No Stock Repurchases* – Until 12 months after a direct loan is no longer outstanding, no purchase of equity securities listed on a national securities exchange of (a) the business receiving the loan or (b) any parent company of the business while the direct loan is outstanding is permitted, except to the extent required under a contractual obligation in effect as of the date of enactment of the CARES Act (March 27, 2020)
- *No Dividends* – Until 12 months after a direct loan is no longer outstanding, no payment of dividends or other capital distributions with respect to the common stock of the business receiving the loan is permitted
- *Compensation Restrictions* – While the loan is outstanding and for one year thereafter:
 - ◆ No officer or employee of the business whose calendar year 2019 total compensation exceeded \$425,000 (unless set by CBA entered into before March 1, 2020) will:
 - » Receive from the business total compensation that exceeds during any consecutive 12-month period total compensation received by the person from the business in calendar year 2019
 - » Receive severance pay or other termination benefits exceeding two times the maximum total compensation received by the person from the business in calendar year 2019
 - ◆ No officer or employee of the business whose total compensation exceeded \$3 million in calendar year 2019 may receive during any consecutive 12-month period total compensation in excess of (1) \$3 million plus (2) 50% of the compensation over \$3 million of total compensation received from the business in calendar year 2019

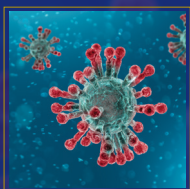
Are There any Fees?

- *Facility Fee:* A lender will pay, or may require the borrower to pay to the SPV, a facility fee of 100 basis points of the principal amount of the loan participation purchased by the SPV. This fee only applies to the MSNLF and not to the MSELF. The lender may require the borrower to pay this fee.
- *Loan Origination Fee:* A borrower will pay a lender an origination fee of 100 basis points of the principal amount of the new or upsized loan
- *Loan Servicing Fee:* The SPV will pay a lender 25 basis points of the principal amount of the new or upsized loan

When Will the Main Street Lending Program Commence?

The program (as outlined in the term sheets provided by the Federal Reserve effective April 9, 2020) is subject to further rulemaking and guidance from the Federal Reserve and Treasury. The Federal Reserve is soliciting comments through April 16, 2020 prior to opening the application process for the program at a subsequent date.

Borrowers that may be considering an MSELF should consider contacting their current lender in advance of the actual commencement date of the program.



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What Is the Termination Date?

The SPV will cease purchasing participations in loans on September 30, 2020, unless the facility is extended. The Department of the Treasury will continue to fund the SPV after such date until the SPV's underlying assets mature or are sold.

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