

Paycheck Protection Program Flexibility Act

July 16, 2020



Paycheck Protection Program Flexibility Act

- ❖ June 5, 2020 – Signed into law
- ❖ June 10-11, 2020 – New guidance issued
- ❖ June 19, 2020 – Updated Interim Final Rule issued
- ❖ Likely to have more guidance issued

Paycheck Protection Program Flexibility Act

- ❖ New 24 week forgiveness period; existing borrowers as of June 5th can still elect 8 week period
 - ❖ Even if use 24 week period, can file for forgiveness prior to end of the period
- ❖ Extension for safe harbor to eliminate the reduction in employment to December 31, 2020
 - ❖ Allows for safe harbor for attempting to hire back but employee turning down employment
 - ❖ Allows for safe harbor if unable to return to same level of business as of February 15, 2020
- ❖ 5 year minimum maturity period for new loans
 - ❖ Lenders and borrowers can mutually agree to extend the 2 year period to 5 years for loans issued prior to June 5th
- ❖ 75/25 rule changed to 60/40 rule
- ❖ Compensation caps adjusted to reflect the longer covered period
- ❖ Forgiveness application forms issued
 - ❖ Form 3508 PPP Loan Forgiveness Application (Standard)
 - ❖ Form 3508EZ PPP Loan Forgiveness Application (EZ Application)
 - ❖ Self-employed with no employees
 - ❖ Did not reduce employees or paid hours of employees and did not reduce salary/wages by more than 25%
 - ❖ Did not reduce salary/wages by more than 25% and unable to operate at same level of business due to COVID-19
- ❖ Extended payment deferral period to after date the amount of forgiveness is determined

Paycheck Protection Program Flexibility Act

- ❖ Still over \$130 Billion available (August 8, 2020 deadline to apply)

Federal Reserve Board's Main Street Lending Program

July 16, 2020



The Federal Reserve Board's (the "Board") Main Street Lending Program launched on July 6, 2020. The Board encouraged lenders prior to the start date to process loan applications to the point where all that needs to be done is to fund the loan. Now that the Program is operational, lenders will be able to submit these loans for approval.

Under the three Facilities—the Main Street New Loan Facility (the "New Facility"), the Main Street Priority Loan Facility (the "Priority Facility"), and the Main Street Expanded Loan Facility (the "Expanded Facility")—the Federal Reserve Bank of Boston (the "Reserve Bank") will commit to lend to a single common special purpose vehicle ("SPV") which will purchase 95% participations in Eligible Loans issued by Eligible Lenders. The Reserve Bank's website (bostonfed.org) contains information about the Program.

The Board has asked for public comment on whether the Program should be opened to non-profits.

The following table compares each of the options and their differences.

Main Street Lending Program Loan Options	New Loans	Priority Loans	Expanded Loans
Term	5 years (previously 4 years)		
Minimum Loan Size	\$250,000 (previously \$500,000)		\$10M
Maximum Loan Size	The lesser of \$35M, or an amount that, when added to outstanding and undrawn available debt, does not exceed 4.0x adjusted EBITDA (previously \$25M)	The lesser of \$50M, or an amount that, when added to outstanding or undrawn available debt, does not exceed 6.0x adjusted EBITDA (previously \$25M)	The lesser of \$300M, or an amount that, when added to outstanding or undrawn available debt, does not exceed 6.0x adjusted EBITDA (previously \$200M)
Risk Retention	5%	5% (previously 15%)	5%
Principal Repayment	Principal deferred for two years, years 3-5: 15%, 15%, 70% (previously principal deferred for one year and 33.33% repayment due in years 2-4)	Principal deferred for two years, years 3-5: 15%, 15%, 70% (previously principal deferred for one year and 15%, 15%, 70% repayment due in years 2, 3, and 4, respectively)	
Interest Payments	Deferred for one year		
Rate	LIBOR + 3%		

Rules of General Applicability

The Program rules discussed below are applicable to all three Main Street Loan Facilities.

Facility loans are full-recourse loans and are not forgivable.

A business may only participate in one of the three Facilities. If a business participates in one of the three Facilities, it cannot participate in the Board's Primary Market Corporate Credit Facility.

Eligible Lenders

An Eligible Lender is a U.S. federally insured depository institution (including banks, savings associations, or credit unions), 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. Non-bank lenders are not considered Eligible Lenders. However, the Board may expand the list in the future.

Eligible Borrowers

An Eligible Borrower is a Business that:

1. was established prior to March 13, 2020;
2. is not an Ineligible Business;
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 (see below for how to count employees and revenues);
4. is created or organized in the U.S. or under the laws of the U.S. with significant operations in, and a majority of its employees based in, the U.S.;
5. Participates in only one Main Street Facility and does not participate in the Primary Market Corporate Credit Facility; and
6. has not received specific support pursuant to the Subtitle A of Title IV of the CARES Act.

Businesses that have received paycheck protection program (PPP) loans and Economic Injury Disaster Loans (EDIL) are permitted to borrow under one of the Facilities, provided that they are Eligible Borrowers.

Under the three Facilities, 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% participation by foreign business entities; or a tribal business concern as defined in 15 U.S.C. § 657a(b)(2)(C), except that “small business concern” in that Section should be replaced with “Business” as defined herein. Other forms of organization may be considered for inclusion as a Business under this Facility at the discretion of the Federal Reserve.

In addition, the three Facilities define an Ineligible Business as a type of business listed in the SBA rules at 13 CFR 120.110(b)-(j) and (m)-(s), as modified by regulations implementing the PPP established by Section 1102 of the CARES Act on or before April 24, 2020.

Private equity funds are Ineligible Businesses. A portfolio company of such a fund may be able to participate in the Program if it is an Eligible Borrower.

Businesses must meet at least one of two conditions specified in item #3 of the Eligible Borrower definition above, but are not required to meet both.

When counting employees, a Business should follow the framework outlined in the SBA's regulation at 13 CFR 121.106. Under this regulation, the Business should count all full-time, part-time, seasonal, or otherwise employed persons—excluding volunteers and independent contractors—as employees. Businesses should also count employees employed by their affiliates.

In order to determine the applicable number of employees, Businesses should use the average of the total number of persons employed by the Eligible Borrower and its affiliates for each pay period over the 12 months prior to the origination or upsizing of the Facility loan.

The SBA's affiliate aggregation rules will also be applied to calculate the business's 2019 revenues for the purposes of determining eligibility for Facility loans. An applicant must aggregate all of its revenues together with all revenues of affiliated businesses for purposes of determining whether the revenue caps are satisfied. Affiliate for this purpose is broadly defined (see 13 CFR 121.301(f)).

Question E.8. of the Board's Main Street Lending Program FAQ provides examples of how a borrower can determine if it has significant operations in the U.S. (#4 of Eligible Borrower criteria). See also E.9. for a discussion of whether a subsidiary of a foreign company can participate in the Program.

Required Lender Certifications and Covenants

In addition to other certifications required by applicable statutes and regulations, an Eligible Lender must for each Facility Loan:

- ❖ 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.
- ❖ Commit that it will not cancel or reduce any existing committed lines of credit to the Eligible Borrower, except in an event of default.
- ❖ Certify that the methodology used for calculating the Eligible Borrower's adjusted 2019 EBITDA for the leverage requirement 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.
- ❖ Certify that it is eligible to participate in the Facility Loan, including in light of the conflicts of interest prohibition in section 4019(b) of the CARES Act (see Compliance with Section 4019(b) of the CARES Act, below).

Required Borrower Certifications and Covenants

In addition to other certifications required by applicable statutes and regulations, an Eligible Borrower must for a Facility Loan:

- ❖ Commit to refrain from repaying the principal balance of, or paying any interest on, any debt until the Eligible Loan (or the upsized tranche of an Expanded Facility Loan) is repaid in full, unless the debt or interest payment is mandatory and due.
- ❖ 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.
- ❖ Certify that it has a reasonable basis to believe that, as of the date of origination of the Eligible Loan (or the upsizing of an Expanded Facility Loan) and after giving effect to such loan (or 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.

- ❖ Commit that it will 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 (see Compliance with Section 4003(c)(3)(A)(ii) of the CARES Act, below), 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.
- ❖ 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 (see Compliance with Section 4019(b) of the CARES Act, below).

The Eligible Lender should collect these certifications from the Eligible Borrower at the time of origination of the Eligible Loan (or the upsizing of an Expanded Facility Loan). Eligible Lenders may rely on an Eligible Borrower's certifications and covenants, as well as any subsequent self-reporting by the Eligible Borrower.

There are a number of other certifications that a borrower must make. For example, the borrower must certify that it is unable to secure adequate credit accommodations from other banking institutions. This does not necessarily mean that no other credit is available for the borrower's purposes. Rather, the borrower can certify that it is unable to secure "adequate credit accommodations" because the amount, price, or terms of credit available from other sources are inadequate for the borrower's needs during the current unusual and exigent circumstances.

Loan Classification

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 supervisory rating system on that date.

Loan Participations

The SPV will purchase at par a 95% participation in each Eligible Loan. The risk in the Eligible Loan will be shared on a pari passu basis by the SPV and the Eligible Lender.

An Eligible Lender must retain its 5% interest in the underlying Eligible Loan until the underlying Eligible Loan matures (or the upsized tranche of an Expanded Facility Loan matures) or the SPV sells all of its 95% participation, whichever comes first.

For an Expanded Facility Loan, the Eligible Lender must retain its interest in the underlying loan until that loan matures, the upsized tranche matures or the SPV sells all of its 95% participation, whichever comes first.

Any collateral securing an Expanded Facility Loan—at the time of upsizing or on any subsequent date—must secure the upsized tranche on a pro rata basis.

The sale of a participation in an Eligible Loan (or the upsized tranche of an Expanded Facility Loan) to the SPV must be completed expeditiously after the Eligible Loan's origination (or upsizing) and will be structured as a “true sale.”

Transaction Fee

At the time of upsizing of an Expanded Facility Loan, an Eligible Lender will pay the SPV a transaction fee of 75 basis points of the principal amount of the upsized tranche of an Expanded Facility Loan.

At the time of origination of a New or Priority Facility Loan, an Eligible Lender will pay the SPV a transaction fee of 100 basis points of the principal amount of the Eligible Loan.

The Eligible Lender may require the Eligible Borrower to pay the transaction fee. Eligible Borrower also must pay 75-100 basis points origination fee to Eligible Lender.

Servicing Fees

To pay for loan servicing, the SPV will pay annually to an Eligible Lender 25 basis points of the principal amount of the SPV's participation in the Eligible Loan or 25 basis points of the principal amount of the SPV's participation in the upsized tranche of an Expanded Facility Loan.

Retaining Employees

An Eligible Borrower should make a good faith effort to maintain payroll and retain employees—which could be up to five years—in light of its capacities, the economic environment, its available resources, and the business' need for labor.

Borrowers that have already laid-off or furloughed workers as a result of COVID-19 are eligible to apply for Facility loans.

Facility Termination

Unless the Board and the Department of the Treasury extend the Facilities, the SPV will cease purchasing participations in Eligible Loans on September 30, 2020. The Reserve Bank will continue to fund the SPV after such date until the SPV's underlying assets mature or are sold.

New Facility Loans

An Eligible New Facility Loan is a secured or unsecured term loan made by an Eligible Lender to an Eligible Borrower that was originated after April 24, 2020, provided that the loan has all of the following features (which were updated on June 8, 2020):

1. 5 year maturity;
2. principal payments deferred for two years and interest payments for one year (unpaid interest will be capitalized);
3. adjustable rate of LIBOR (1 or 3 month) + 300 basis points;
4. principal amortization of 15% at the end of the third year, 15% at the end of the fourth year, and 70% at maturity at the end of the fifth year;
5. minimum loan size of \$250,000;
6. maximum loan size that is the lesser of (i) \$35 million or (ii) an amount that, when added to the Eligible Borrower's existing outstanding and undrawn available debt (as defined below in Loan Processing Procedures), does not exceed four times the Eligible Borrower's adjusted 2019 earnings, before interest, taxes, depreciation and amortization (adjusted 2019 EBITDA);
7. 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; and
8. prepayment permitted without penalty.

As to #7, this means that a New Facility Loan may not be senior in priority in bankruptcy to the Eligible Borrower's other loans or debt instruments.

Loan Processing Procedures

In processing an application for an Eligible Loan, Eligible Lenders are expected to:

- ❖ conduct an assessment of each potential borrower's financial condition at the time the borrower submits the application; and
- ❖ when evaluating the financial condition and creditworthiness of a borrower to apply their own underwriting standards.

An Eligible Lender may require additional information and documentation in making this evaluation. The decision as to whether an Eligible Borrower should receive an Eligible Loan in light of these considerations is solely up to the Eligible Lender. As a consequence, businesses that otherwise meet the Eligible Borrower requirements may not be approved for a loan or may not receive the maximum allowable amount.

When calculating adjusted 2019 EBITDA, an Eligible Lender must use the methodology the lender previously used for adjusting EBITDA when extending credit to the Eligible Borrower or, if the Eligible Borrower is a new customer, similarly situated borrowers on or before April 24, 2020.

As defined, the phrase “existing outstanding and undrawn available debt” includes all amounts borrowed under any loan facility, including unsecured or secured loans from any bank, non-bank financial institution or private lender, as well as any publicly issued bonds or private placement facilities. It also includes all unused commitments under any loan facility, excluding:

- ❖ 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.

Existing outstanding and undrawn available debt should be calculated as of the date of the loan application.

If a borrower is the only business in an affiliated group that has received funding through a Facility Loan, the debt and EBITDA of the borrower, and not the entire group, is used to determine the maximum amount of a Facility Loan.

Expanded Facility Loans

An Eligible Expanded Facility Loan is a secured or unsecured term loan or revolving credit Facility made by an Eligible Lender to an Eligible Borrower that was originated on or before April 24, 2020, and has 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—provided that the upsized tranche of the loan is a term loan that has all of the following features (which were updated on June 8, 2020):

1. 5 year maturity;
2. principal payments deferred for two years and interest deferred for one year (unpaid interest will be capitalized);
3. adjustable rate of LIBOR (1 or 3 month) + 300 basis points;
4. principal amortization of 15% at the end of the third year, 15% at the end of the fourth year, and a balloon payment of 70% at maturity at the end of the fifth year;

5. minimum loan size of \$10 million;
6. maximum loan size that is the lesser of (i) \$300 million, or (ii) an amount that, when added to the Eligible Borrower's existing outstanding and undrawn available debt (as defined above in Loan Processing Procedures), does not exceed six times the Eligible Borrower's adjusted 2019 EBITDA (as defined above in New Facility Loans);
7. 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; and
8. prepayment permitted without penalty.

If the underlying loan is secured, the upsized tranche must also be secured.

See Loan Processing Procedures above, for a discussion of the Eligible Lender's obligations when processing an Expanded Facility Loan application.

Priority Facility Loans

An Eligible Priority Facility Loan is a secured or unsecured term loan made by an Eligible Lender to an Eligible Borrower that was originated after April 24, 2020, provided that the loan has all of the following features (which were updated on June 8, 2020):

1. 5 year maturity;
2. principal payments deferred for two years and interest payments deferred for one year (unpaid interest will be capitalized);
3. adjustable rate of LIBOR (1 or 3 month) + 300 basis points;
4. principal amortization of 15% at the end of the third year, 15% at the end of the fourth year, and a balloon payment of 70% at maturity at the end of the fifth year;
5. minimum loan size of \$250,000;

6. maximum loan size that is the lesser of (i) \$50 million or (ii) an amount that, when added to the Eligible Borrower's existing outstanding and undrawn available debt (as defined above in Loan Processing Procedures) does not exceed six times the Eligible Borrower's adjusted 2019 EBITDA (as defined above in New Facility Loans);
7. 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; and
8. prepayment permitted without penalty.

See Loan Processing Procedures above, for a discussion of the Eligible Lender's obligations when processing a Priority Facility Loan application.

An Eligible Borrower may use the proceeds of the loan to refinance existing debt to lenders other than the Eligible Lender that is making the Priority Facility Loan. When calculating the amount of debt (#6 above), the amount being refinanced should not be included in this calculation.

Compliance with Section 4003(c)(3)(A)(ii) of the CARES Act

Under the New Facility, the Expanded Facility and the Priority Facility, an Eligible Borrower must comply with Section 4003 (c)(3)(A)(ii) of the CARES Act. This Section requires an Eligible Borrower to agree that:

- ❖ until the date 12 months after the date on which the Eligible Loan is no longer outstanding, it will not repurchase an equity security that is listed on a national securities exchange of the Eligible Borrower—or any parent company of the Eligible Borrower—except to the extent required under a contractual obligation that is in effect as of the date of enactment of CARES Act; and
- ❖ until the date 12 months after the date on which the Eligible Loan is no longer outstanding, it will not pay dividends or make other capital distributions with respect to the common stock of the Eligible Borrower, 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; and
- ❖ it will comply with the limitations on compensation set forth in Section 4004 of the CARES Act.

Section 4004 of the CARES Act provides that an Eligible Borrower must agree that until 12 months after the Eligible Loan is no longer outstanding:

- ❖ No officer or employee of the Eligible Borrower whose total compensation exceeded \$425,000 in 2019—other than an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020—will receive from the Eligible Borrower (i) total compensation, which exceeds during any 12 consecutive months of such period the total compensation received by such officer or employee from the Eligible Borrower in 2019; or (ii) severance pay or other benefits upon termination of employment with the Eligible Borrower which exceeds twice the maximum total compensation received by the officer or employee from the Eligible Borrower in 2019.
- ❖ No officer or employee of the Eligible Borrower whose total compensation exceeded \$3,000,000 in 2019 may receive during any 12 consecutive months of such period total compensation in excess of the sum of:
 - \$3,000,000; and
 - 50% of the excess over \$3,000,000 of the total compensation received by the officer or employee from the Eligible Borrower in 2019.

The term “total compensation” includes salary, bonuses, awards of stock, and other financial benefits provided by an Eligible Borrower to an officer or employee of the Eligible Borrower.

Compliance with Section 4019(b) of the CARES Act

Each Eligible Borrower and Eligible Lender must comply with the conflicts of interest provisions of Section 4019 of the CARES Act, which requires the principal executive officer and principal financial officer of an Eligible Borrower or an Eligible Lender to certify that it is not a Covered Entity when entering into a transaction described in Section 4003 of the CARES Act.

A “Covered Entity” is an entity in which a Covered Individual directly or indirectly holds a Controlling Interest. For the purpose of determining whether an entity is a Covered Entity, the securities owned, controlled, or held by two or more individuals who are related as described in the second bullet point of the definition of Covered Individual shall be aggregated.

A “Covered Individual” is:

- ❖ The President, Vice President, head of an Executive department, or a Member of Congress; and
- ❖ The spouse, child, son-in-law, or daughter-in-law, as determined under applicable common law, of an individual described above.

The term “Controlling Interest” means owning, controlling, or holding not less than 20%, by vote or value, of the outstanding amount of any class of equity interest in an entity.

The term “equity interest” means:

- ❖ A share in an entity, without regard to whether the share is:
 - transferable; or
 - classified as stock or anything similar.
- ❖ A capital or profit interest in a limited liability company or partnership; or
- ❖ warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share or interest described in either of the two preceding bullet points.

Thank You



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