

# The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

SEPTEMBER 2020

**EDITOR'S NOTE: A BUSY OCC**

Victoria Prussen Spears

**OCC GOES ITS OWN WAY ON NEW COMMUNITY REINVESTMENT ACT REGULATIONS**

Jeffrey P. Taft, Stephanie C. Robinson, and Kerri Elizabeth Webb

**OCC PROPOSES WIDESPREAD CODIFICATION TO CORPORATE GOVERNANCE RULES FOR NATIONAL BANKS AND FEDERAL ASSOCIATIONS**

Douglas P. Faucette

**OCC AND FDIC ISSUE FINAL RULES ON "VALID WHEN MADE"**

Marc P. Franson

**NEWLY ADOPTED VOLCKER RULE AMENDMENTS EXPAND OPPORTUNITIES FOR BANKS TO SPONSOR AND INVEST IN PRIVATE CREDIT FUNDS**

Jeff Berman and Eric Bernstein

**CLASS ACTION LITIGATION TRENDS WARN OF RENEWED FOCUS ON OVERDRAFT PRACTICES**

Abigail M. Lyle and Rachael Craven

**PROJECT FINANCE TRANSACTIONS – MANAGING INTEREST RATE RISK**

Adam Lapidus

**SOME GOOD NEWS FOR THE LOAN INDUSTRY – LOANS ARE NOT SECURITIES**

Elliott R. Curzon, John M. Timperio, Michael L. Sherman,  
David A. Kotler, and Christopher Desmond

**ELECTRONIC CLOSINGS: KEY ISSUES FOR BANKS**

Michael J. Heller

**FEDERAL RESERVE UPDATES TERMS OF MAIN STREET LENDING PROGRAM**

Jason D. Navarino, Richard J.L. Lomuscio, and Hannah J. Greendyk



LexisNexis

# THE BANKING LAW JOURNAL

---

---

VOLUME 137

NUMBER 8

September 2020

---

<b>Editor’s Note: A Busy OCC</b> Victoria Prussen Spears	393
<b>OCC Goes Its Own Way on New Community Reinvestment Act Regulations</b> Jeffrey P. Taft, Stephanie C. Robinson, and Kerri Elizabeth Webb	396
<b>OCC Proposes Widespread Codification to Corporate Governance Rules for National Banks and Federal Associations</b> Douglas P. Faucette	406
<b>OCC and FDIC Issue Final Rules on “Valid When Made”</b> Marc P. Franson	410
<b>Newly Adopted Volcker Rule Amendments Expand Opportunities for Banks to Sponsor and Invest in Private Credit Funds</b> Jeff Berman and Eric Bernstein	414
<b>Class Action Litigation Trends Warn of Renewed Focus on Overdraft Practices</b> Abigail M. Lyle and Rachael Craven	423
<b>Project Finance Transactions – Managing Interest Rate Risk</b> Adam Lapidus	428
<b>Some Good News for the Loan Industry – Loans Are Not Securities</b> Elliott R. Curzon, John M. Timperio, Michael L. Sherman, David A. Kotler, and Christopher Desmond	437
<b>Electronic Closings: Key Issues for Banks</b> Michael J. Heller	444
<b>Federal Reserve Updates Terms of Main Street Lending Program</b> Jason D. Navarino, Richard J.L. Lomuscio, and Hannah J. Greendyk	450

**QUESTIONS ABOUT THIS PUBLICATION?**

---

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Matthew T. Burke at ..... (800) 252-9257  
Email: ..... matthew.t.burke@lexisnexis.com  
Outside the United States and Canada, please call ..... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844  
Outside the United States and Canada, please call ..... (518) 487-3385  
Fax Number ..... (800) 828-8341  
Customer Service Website ..... <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940  
Outside the United States and Canada, please call ..... (937) 247-0293

---

ISBN: 978-0-7698-7878-2 (print)

ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

---

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2020 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

**EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

**EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

**BOARD OF EDITORS**

**BARKLEY CLARK**

*Partner, Stinson Leonard Street LLP*

**MICHAEL J. HELLER**

*Partner, Rivkin Radler LLP*

**SATISH M. KINI**

*Partner, Debevoise & Plimpton LLP*

**DOUGLAS LANDY**

*Partner, Milbank, Tweed, Hadley & McCloy LLP*

**PAUL L. LEE**

*Of Counsel, Debevoise & Plimpton LLP*

**TIMOTHY D. NAEGELE**

*Partner, Timothy D. Naegele & Associates*

**STEPHEN J. NEWMAN**

*Partner, Stroock & Stroock & Lavan LLP*

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2020 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail [Customer.Support@lexisnexis.com](mailto:Customer.Support@lexisnexis.com). Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, [smeyerowitz@meyerowitzcommunications.com](mailto:smeyerowitz@meyerowitzcommunications.com), 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

# Federal Reserve Updates Terms of Main Street Lending Program

*Jason D. Navarino, Richard J.L. Lomuscio, and Hannah J. Greendyk\**

*The Main Street Lending Program, aimed at businesses facing difficulties as a result of the COVID-19 outbreak that are too large to qualify for, or need additional support beyond that provided under the Small Business Administration's Paycheck Protection Program or Economic Injury Disaster Loan Program, has been revised. The authors of this article discuss the program.*

The Federal Reserve has released additional details on the previously announced Main Street Lending Program (the "Program"). The Program is aimed at businesses facing difficulties as a result of the COVID-19 outbreak that are too large to qualify for, or need additional support beyond that provided under, the Small Business Administration's Paycheck Protection Program ("PPP") or Economic Injury Disaster Loan Program. The Main Street New Loan Facility ("MSNLF") and Main Street Priority Loan Facility ("MSPLF") are intended to help facilitate new loans to businesses, while the Main Street Expanded Loan Facility ("MSELF") is intended to help facilitate the extension of already existing loans. Under each facility, private lenders are responsible for originating loans that meet the Program's requirements, but may then sell a 95 percent participation in such loans to a special purpose vehicle established by the Federal Reserve Bank of Boston, thereby shifting most of the risk off of their books.

The key revised terms for loans under the Program are as follows:

## **BORROWER ELIGIBILITY**

Each facility under the Program is now available to U.S.-based businesses that:

---

\* Jason D. Navarino (jnavarino@riker.com) is a partner in Riker Danzig Scherer Hyland & Perretti LLP's Tax and Corporate Groups, whose practice encompasses domestic and cross-border mergers and acquisitions, joint ventures, and equity and debt investment transactions, as well as corporate and LLC governance, commercial contracts, and tax planning and compliance for for-profit and nonprofit entities. Richard J.L. Lomuscio (rlomuscio@riker.com) is a partner in the firm's Commercial Litigation and Securities Litigation Practices handling commercial and regulatory matters for a variety of clients, including complex securities class actions and disputes relating to financial instruments, mortgage securitizations, and corporate governance. Hannah J. Greendyk (hgreendyk@riker.com) is an associate in the firm's Corporate and Tax, Trusts & Estates Departments.

## MAIN STREET LENDING PROGRAM

- Were established prior to March 13, 2020;
- Together with affiliated entities (determined under the Small Business Administration's affiliation rules, which also apply to PPP), have up to 15,000 employees or less than \$5 billion in revenue in 2019 (up from 10,000 employees and \$2.5 billion in 2019 revenues);
- Do not also participate in one of the other facilities under the Program or the Primary Market Corporate Facility (note that affiliated entities may each participate in the Program, but all must participate in the same facility);
- Are not a type of business listed in 13 CFR 120.110(b)-(j) and (m)-(s); and
- Have not received specific support (i.e., support to air carriers, businesses critical to national security, etc.) pursuant to the Coronavirus Economic Stabilization Act of 2020 (Subtitle A of Title IV of the CARES Act).

### **MINIMUM LOAN AMOUNTS**

- For loans under the MSNLF and MSPLF, the minimum loan amount has been lowered to \$250,000.
- For loans under the MSELF, the minimum loan amount has been lowered to \$10 million.

### **MAXIMUM LOAN AMOUNTS**

- Under the MSNLF, the maximum amount for new loans is the lesser of (i) \$35 million and (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 EBITDA (i.e., earnings before interest, tax, depreciation and amortization).
- Under the MSPLF, the maximum amount for new loans is the lesser of (i) \$50 million and (ii) an amount that, when added to the eligible borrower's existing outstanding and undrawn available debt, does not exceed six times the borrower's 2019 EBITDA;
- Under the MSELF, the maximum loan size is the lesser of (i) \$300 million and (ii) 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.

Note that, for these purposes, any portion of a PPP loan that is unforgiven at the time a loan under the Program is obtained counts as outstanding debt, thereby reducing the amount that can be borrowed under the Program.

## **INTEREST**

The interest rate for loans under all three facilities will be an adjustable rate of LIBOR (one or three month) plus 300 basis points. Interest payments under all three facilities are deferred for one year.

## **TERM AND MATURITY**

Loans under all three facilities will have a five-year maturity. In addition, loans will have principal amortization of 15 percent at the end of the third year, 15 percent at the end of the fourth year and a balloon payment of 70 percent at maturity at the end of the fifth year.

## **PREPAYMENT**

Loans may be prepaid without penalty.

## **OTHER DEBT**

Under the MSNLF, the loan may not be contractually subordinated in terms of priority to any of the borrower's other loans or debt instruments. Under the MSPLF and the MSELF, the loan (or upsized tranche, in the case of MSELF) must be senior to or *pari passu* with, in terms of priority and security, the borrower's other loans or debt instruments, other than mortgage debt.

Under the MSPLF, a borrower may, at the time of origination of its loan, refinance existing debt (other than debt owed to the lender from which it is receiving the MSPLF loan). Any such refinanced debt is not treated as outstanding for purposes of determining the maximum loan amount.

## **RESTRICTIONS**

Borrowers must abide by the following stock repurchase, capital distribution and compensation restrictions for the term of the loan (or upsized tranche, in the case of MSELF) and 12 months thereafter:

- A borrower and its affiliates may not repurchase any equity securities of the borrower or its parent listed on a national securities exchange, except to the extent required by a contractual obligation in effect on or prior to March 27, 2020.
- A borrower may not pay dividends or make other capital distributions with respect to its common stock or membership interests, except (1) tax distributions to owners of pass-through entities for tax purposes, to



enable them to pay taxes on their share of the entity's income, and (2) as provided below with respect to officers and employees.

- Note that redemptions and repurchases are not considered dividends or distributions for this purpose.
- No officer or employee whose total 2019 compensation exceeded \$425,000 may receive total compensation during any 12 consecutive months in excess of his or her 2019 compensation, nor may any officer or employee receive severance pay or other termination benefits exceeding twice his or her 2019 compensation. Additionally, no officer or employee whose total 2019 compensation exceeded \$3 million may receive total compensation during any 12 consecutive months in excess of the sum of (i) \$3 million and (ii) 50 percent of the total compensation received by that officer or employee in calendar year 2019 in excess of \$3 million.
  - “Officer or employee” means an individual who performs compensated services for a borrower and either receives a W-2 or is a partner in a partnership or a member of an LLC. Therefore, a service-providing owner of an LLC or S corporation can presumably receive compensation, subject to the limits set forth above, and such compensation would not be considered an impermissible dividend or capital distribution.
  - For this purpose, total compensation includes amounts paid by the borrower and its affiliated entities.
  - Distributions to officers and employees that are included in permissible compensation are excluded from the prohibition against dividends and capital distributions. However, making distributions that are so permitted without making distributions to other owners could run afoul of the “single class of stock” requirement applicable to S corporations, or to the terms of the distributing entity's shareholders', partnership or operating agreement.

The Program deadline (previously September 30, 2020) has been extended to December 31, 2020.

