# Main Street Lending and What's Next for Oversight

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## Addressing the ongoing federal responses to COVID-19


Speakers:

**Elizabeth Vella Moeller**
Partner
Washington, DC
elizabeth.moeller@pillsburylaw.com
+1.202.663.9159

**Matthew Oresman**
Partner
London & Washington, DC
matthew.oresman@pillsburylaw.com
+44.20.7847.9516 | +1.202.663.8047


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# THE CARES ACT AT-A-GLANCE

## $2.3 Trillion Stimulus Package
(expected $4 trillion in economic activity)

**$500 billion**
in loans for distressed companies

**$242 billion**
for public health

**$260 billion**
in unemployment insurance benefits

**$150 billion**
for hospitals to invest in equipment and infrastructure

**$377 billion**
in small business loans

**$150 billion**
to assist hard-hit state and local governments

**$250 billion**
in direct checks to qualifying individuals/ families

**$32 billion**
in airline-related support



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# Main Street Lending Program Overview

- The Main Street Lending Program establishes three new loan facilities:
  - The Main Street New Loan Facility (MSNLF) for term loans originated after April 24, 2020
  - The Main Street Priority Loan Facility (MSPLF) for term loans originated after April 24, 2020, with increased risk sharing by lenders (15% vs 5%) for more highly leveraged borrowers, and
  - The Main Street Expanded Loan Facility (MSELF) for term loans or revolving credit facilities originated on or before April 24, 2020 (referred to as the Eligible Loan), with remaining maturity of at least 18 months and being subsequently upsized with a term loan tranche (referred to as the upsized tranche).



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# Eligibility

- Businesses with up to 15,000 employees or up to $5 billion in 2019 revenues.
- Must be a business that is 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.
  - Note that the U.S. incorporated subsidiaries of foreign companies can apply, but waiting on Fed clarification of affiliation rule application.
- May not also participate in the MSELF/MSNLF/MSPLF (as applicable) or the Primary Market Corporate Credit Facility, *but can participate in the PPP program*.
- Borrowers should make commercially reasonable efforts to maintain their payroll and retain their employees. Borrowers that have already laid-off or furloughed workers as a result of the disruptions from COVID-19 are still eligible to apply.



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# Loan Terms

- 4-year maturity, with principal payments required at end of years 2 and 3 -- 33.3%/yr for MSNLF; 15%/yr for MSELF and MSPLF
- Payment of principal and interest deferred for one year (unpaid interest will be capitalized)
- Rate: LIBOR + 3%
- Minimum loan size of $500,000 for MSNLF & MSPLF; $10,000,000 for MSELF
- Loans may be secured or unsecured term loans
- Loans under the MSNLF may not be contractually subordinated in terms of priority to other debt.
- Loans under the MSPLF and the upsized tranche under the MSELF shall be senior to or pari passu in terms of priority and security with other debt (except mortgage debt).
- Prepayment permitted without penalty



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# Maximum Loan Size

## MSNLF

Lesser of:

i. $25 million, or
ii. an amount that, when added to the Eligible Borrower's existing outstanding and undrawn available debt, does not exceed four times the Eligible Borrower's adjusted 2019 EBITDA.

## MSPLF

Lesser of

i. $25 million, or
ii. an amount that, when added to the Eligible Borrower's existing outstanding and undrawn available debt, does not exceed six times the Eligible Borrower's adjusted 2019 EBITDA.

## MSELF

Lesser of

i. $200 million,
ii. 35% of the Eligible Borrower's existing outstanding and undrawn available debt that is pari passu in priority with the Eligible Loan and equivalent in secured status (i.e.,, secured or unsecured), or
iii. an amount that, when added to the Eligible Borrower's existing outstanding and undrawn available debt, does not exceed six times the Eligible Borrower's adjusted 2019 EBITDA.



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# Maximum Loan Size Formulas

## MSNLF

Lesser of:

i. $25 million, or

ii. [Loan Amount] + [outstanding debt + undrawn available debt] ≤ [4 x EBIDTA]

## MSPLF

Lesser of

i. $25 million, or

ii. [Loan Amount] + [outstanding debt + undrawn available debt] ≤ [6 x EBIDTA]

## MSELF

Lesser of

i. $200 million,

ii. .35 x [existing outstanding debt + undrawn available debt that is *pari passu* in priority with the Eligible Loan and equivalent in secured status (i.e., secured or unsecured)]

iii. [Loan Amount] + [outstanding debt + undrawn available debt] ≤ [6 x EBIDTA]



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# Loan Requirements, Restrictions and Certifications

- Borrowers must commit to refrain from repaying other debt, *with the exception of mandatory principal and interest payments or, in the case of the MSPLF, refinancing of debt owed to other lenders*, until the Eligible Loan (or, in the case of the MSELF, the upsized tranche) has been repaid in full.
- Borrowers must certify that they will not seek to cancel or reduce any of their outstanding lines of credit.
- Borrowers must certify that they have a reasonable basis to believe that on a pro forma basis they have the ability to meet their financial obligations for at least the next 90 days and do not expect to file for bankruptcy during this period
- Borrowers that are public companies, may not buy back any related stock.



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# Loan Requirements, Restrictions and Certifications (cont'd)

- Borrowers may not pay any dividends or make other capital distribution (other than tax distributions for pass-through entities) for 12 months following repayment of the loan.
- Borrowers may not increase compensation for employees making more than $425,000, with additional limits on those making more than $3 million.
- Lenders are expected to conduct an assessment of each potential borrower's financial condition at the time of application.
- Lenders must certify as to the methodology for calculating adjusted 2019 EBITDA and make certain other certifications.
- Open Question: Whether labor restrictions from Cares Act will be imposed under this program.
- *Note: The Federal Reserve will disclose information regarding the names of lenders and borrowers, amounts borrowed, interest rates charged, and overall costs, revenues and other fees.*



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# Sample Issues Raised by Clients

Borrower Issues:

- How do we calculate revenues and employees for eligibility purposes?
- How do we calculate employees for determining whether we are a US business?
- Must we calculate EBITDA and existing debt on a consolidated basis for determining the maximum loan amount available?

Lender Issues:

- What do you think the participation agreement with the Fed will look like?
- Should the lender certifications be included in the loan agreement with the borrower?
- Can we sell participations in the portion of the Main Street Loans that are not sold to the Federal Reserve?

# Resources

- Pillsbury MSL Questions email address (MSLquestions@Pillsburylaw.com)
- Federal Reserve Board Term Sheets
- Federal Reserve Board FAQs

# Compliance/Investigations for Those Taking Government Money



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CNN politics

## Coronavirus oversight panel staffs up

REUTERS

## Mnuchin warns some U.S. firms could face criminal liability over coronavirus loans

WASHINGTON (Reuters) - The U.S. Treasury Department will audit every loan for more than $2 million given under the Paycheck Protection Program for businesses hurt by the coronavirus fallout, Treasury Secretary Steven Mnuchin said on Tuesday.

## Watchdogs scramble to keep tabs on billions in stimulus spending

CORONAVIRUS

## House creates new select coronavirus oversight committee over GOP objections

"This is about taking responsibility," Pelosi says.

POLITICO

Bloomberg Law

## Pandemic Watchdog Activates Site to Track Trillions in Spending

abc NEWS | CORONAVIRUS GOVERNMENT RESPONSE

## Experts warn about big dollar fraud in $2.2 trillion coronavirus relief package

*Former watchdog warns one program could be "be defrauded in massive ways."*

Source: CNN, Politico, Bloomberg Law, ABC News, Reuters

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SPECIAL REPORT The Rescue

CNN Money

## TARP cop wants bank accountability

## Senate panel to step up TARP oversight: chairman

REUTERS

GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

September 6, 2013

Congressional Committees:

Subject: *Troubled Asset Relief Program: GAO's Oversight of the Troubled Asset Relief Program Activities*

The Emergency Economic Stabilization Act of 2008 (EESA) authorized the creation of the Troubled Asset Relief Program (TARP) to address the most severe crisis that the U.S. financial system had faced in decades.[1] EESA provided GAO with broad oversight authorities for actions taken under TARP and required that we report at least every 60 days on TARP activities and performance.

**GAO's Oversight Has Been Comprehensive**

THE WALL STREET JOURNAL.

## TARP Oversight Panel Urges Transparency, Accountability

Source: Reuters, The Wall Street Journal, GAO, CNN

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# SIGTARP

**430** Criminally Charged

**373** Convicted

**291** Sentenced to Prison

Including

**93** Homeowner Scammers

**85** Bank Borrowers

**76** Bankers

**$11 Billion** Recovered from Investigations = **31x** Return on Investment



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# Congressional Investigations

- House Select Committee on the Coronavirus Crisis (“Benghazi 2.0?”)
  - Root out waste/fraud/abuse
  - Protect against price gouging and profiteering
  - Ensure that federal response is guided by science/health experts
  - *First Investigation: Public companies taking PPP loans*
- Congressional Oversight Commission (“TARP 2.0”)
  - Oversight of Treasury/Federal Reserve Board’s economic relief activities
  - Will last for 5 years and will report to Congress every 30 days
  - Hearings/reports likely
- Government Accountability Office reporting/audits
  - Strong relationships with IGs/agencies
  - Bipartisan credibility in Congress



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# Executive Branch Oversight/Investigations

- Department of Justice
  - Already making indictments for PPP fraud
- Special Inspector General for Pandemic Recovery (SIGPR)
  - Audits/investigations of Treasury Department activity related to COVID-19 response
- Pandemic Response Accountability Committee (PIGIE)
  - IGs from various agencies
  - "Promote transparency and conduct and support oversight" of the government's coronavirus response in order to "prevent and detect fraud, waste, abuse, and mismanagement" and "mitigate major risks that cut across program and agency boundaries."
  - Develop website to foster transparency in the use of CARES Act funds
- Agency-by-agency reporting



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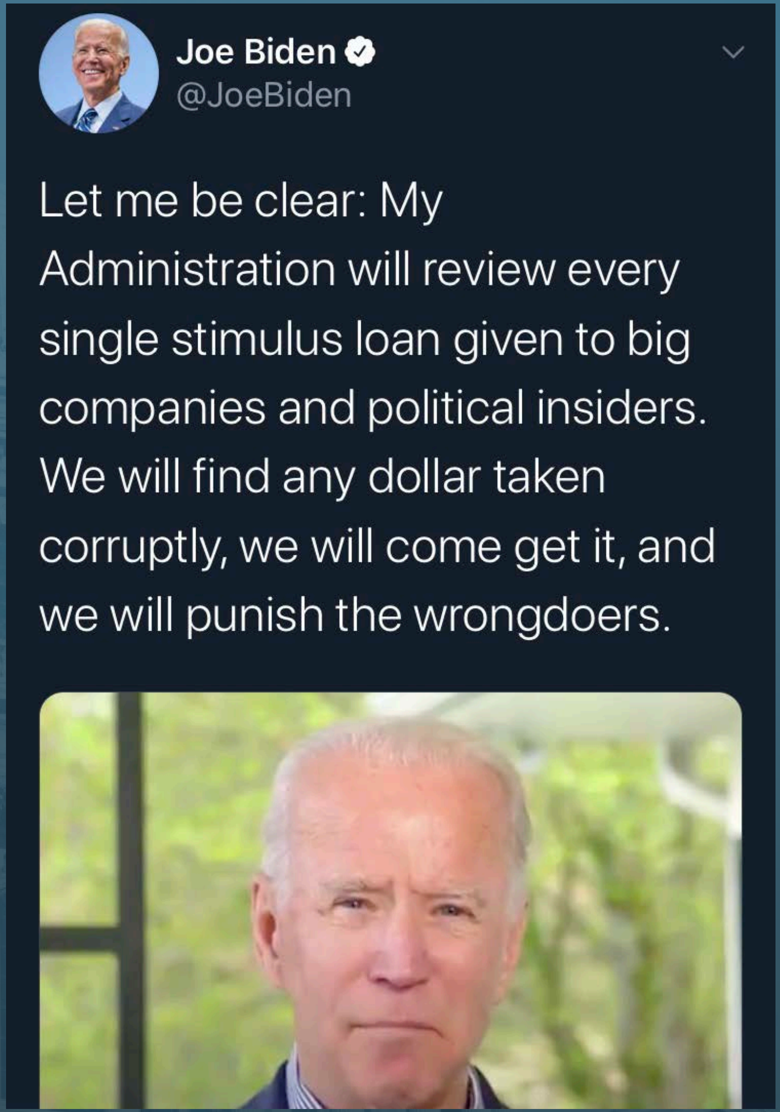
# Oversight/Investigations




Source: Joe Biden Twitter Account

# Sample Fraud and Misconduct Schemes

## Internal Fraud (Employees or Management)

- False statements - deception/fraud by employees working for financial institutions - promising individuals that they qualify for benefits
- Invalid recipients – Recipients do not meet the minimum standards to qualify for benefits
- Invalid payments – payments of expenditures which are no allowable or permissible under the program requirements
- Unsupported payments
- Misclassification of expenditures
- Co-mingling of program funds

## External Fraud (Vendors, Agents, etc.)

- Fraud by third parties (e.g., brokers or agents) working on behalf of organizations
- False information provided
- Fraud by fraudsters – pay for program entry scams
- Loss of eligibility – over time, otherwise valid recipients may no longer qualify for benefits
- Vendor fraud

## Collusion (Internal and external parties collude in fraudulent schemes)

- Kickback schemes
- Bid rigging



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# Compliance Questions

1. Do you have an adequately resourced and fulsome compliance program addressing your company's current legal and compliance risks?
2. Is that program subject to regular updating and testing to regularly integrate new requirements and test its effectiveness to address new challenges?
3. How do you establish, within that program or a new program, adequate controls, policies and procedures for the new requirements your organization faces for both CARES Act loan obligations and reopening conditions?
4. Do all relevant stakeholders, including the Board, employees and third-party business partners, understand their obligations and know how to report issues?
5. How should you plan to communicate and train relevant stakeholders regarding the company's new and existing legal and compliance obligations?



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# Elements of a Compliance Program

- Tone from the top
- Code of conduct, policies and procedures
- Risk assessment processes
- Training and communications
- Confidential reporting/ internal hotline
- Investigations
- Vendor management controls
- Adequately resources legal and compliance team
- Incentives and discipline
- Monitoring and testing
- Analysis, remediation and updating



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# What's Next: Reopening, Cares Act 2.0 and Infrastructure

- Challenges of 'reopening' and strategies to reduce liability
  - Legislation in development
  - Outlook for insurance coverage
- CARES Act 2.0:
  - Broadband development, state and local government funding; Hospitals and PPE; US Post Service
- What is next?  Planning for Infrastructure Spending
    - Water and wastewater
    - Transportation
    - Energy and climate change



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# Pillsbury's Public Policy and Trade Teams


**Elizabeth Vella Moeller**
Partner
Washington, DC
elizabeth.moeller@pillsburylaw.com
+1.202.663.9159



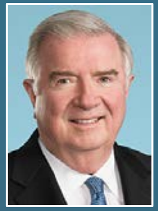
**Brian E. Finch**
Partner
Washington, DC
brian.finch@pillsburylaw.com
+1.202.663.8062



**Craig J. Saperstein**
Partner
Washington, DC
craig.saperstein@pillsburylaw.com
+1.202.663.9244



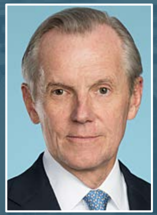
**Matthew Oresman**
Partner
London & Washington, DC
matthew.oresman@pillsburylaw.com
+44.20.7847.9516
+1.202.663.8047


**The Honorable Gregory H. Laughlin**
Senior Counsel
Washington, DC
greg.laughlin@pillsburylaw.com
+1.202.663.9163



**The Honorable Jeffrey S. Merrifield**
Partner
Washington, DC
jeff.merrifield@pillsburylaw.com
+1.202.663.8718


**The Honorable Christopher R. Wall**
Partner
Washington, DC
cwall@pillsburylaw.com
+1.202.663.9250



**Richard Mroz**
Managing Director
Resolute Strategies, LLC
rmroz@resolutestrategies.net
856-261-3066



**Cassie Lentchner**
Senior Counsel
New York
cassie.lentchner@pillsburylaw.com
+1.212.858.1211



**Nadia Barazi**
Counsel
London
nadia.barazi@pillsburylaw.com
+44.20.7847.9619



**Aimee P. Ghosh**
Counsel
Washington, DC
aimee.ghosh@pillsburylaw.com
+1.202.663.8091



**Jeff Metzler**
Special Counsel
New York
jeffrey.metzler@pillsburylaw.com
+1.212.858.1153



**Zachary M. Kessler**
Associate
Washington, DC
zachary.kessler@pillsburylaw.com
+1.202.663.9012



**Nicole Steinberg**
Associate
Washington, DC
nicole.steinberg@pillsburylaw.com
+1.202.663.8151



**Stephanie Rosenberg**
Associate
Washington, DC
stephanie.rosenberg@pillsburylaw.com
+1.202.663.8129

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# Pillsbury's Public Policy and Trade Teams

Stephan E. Becker
Partner
Washington, DC
stephan.becker@pillsburylaw.com
+1.202.663.8277

Benjamin J. Cote
Counsel
Washington, DC
benjamin.cote@pillsburylaw.com
+1.202.663.8305

Nancy A. Fischer
Partner
Washington, DC
nancy.fischer@pillsburylaw.com
+1.202.663.8965

Sahar J. Hafeez
Associate
Washington, DC
sahar.hafeez@pillsburylaw.com
+1.202.663.8051

Aaron R. Hutman
Partner
Washington, DC
aaron.hutman@pillsburylaw.com
+1.202.663.8341

Moushami P. Joshi
Attorney
Washington, DC
moushami.joshi@pillsburylaw.com
+1.202.663.8021

Roya Motazedi
Associate
Washington, DC
roya.motazedi@pillsburylaw.com
+1.202.663.8052

Matthew Ross Rabinowitz
Counsel
Washington, DC
matthew.rabinowitz@pillsburylaw.com
+1.202.663.8623

Stephanie T. Rosenberg
Associate
Washington, DC
stephanie.rosenberg@pillsburylaw.com
+1.202.663.8129

Zachary C. Rozen
Associate
Washington, DC
zachary.rozen@pillsburylaw.com
+1.202.663.8039

Mario A. Torrico
Associate
Washington, DC
mario.torrico@pillsburylaw.com
+1.202.663.8188

Christopher R. Wall
Partner
Washington, DC
cwall@pillsburylaw.com
+1.202.663.9250



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# Pillsbury's Banking & Leveraged Finance Team

**Ronald Brody**
Partner
New York
ronald.brody@pillsburylaw.com
+1.212.858.1286

**Daniel N. Budofsky**
Partner
New York
daniel.budofsky@pillsburylaw.com
+1.212.858.1219

**Joseph M. Fastiggi**
Partner
New York
joseph.fastiggi@pillsburylaw.com
+1.212.858.1067

**Thomas K. Gump**
Partner
San Francisco
thomas.gump@pillsburylaw.com
+1.415.983.1823

**Christopher S. Harrison**
Partner
London
christopher.harrison@pillsburylaw.com
+44.20.7847.9525

**Michael E. Michetti**
Partner
New York
michael.michetti@pillsburylaw.com
+1.212.858.1078

**Rodney R. Peck**
Partner
San Francisco
rodney.peck@pillsburylaw.com
+1.415.983.1516

**Joel M. Simon**
Partner
New York
joel.simon@pillsburylaw.com
+1.212.858.1094

**Philip Jonathan Tendler**
Partner
San Francisco
philip.tendler@pillsburylaw.com
+1.415.983.1870

**Jonathan B. Whitney**
Partner
New York
jonathan.whitney@pillsburylaw.com
+1.212.858.1405

**Trevor Wood**
Partner
London
trevor.wood@pillsburylaw.com
+44.20.7847.9561

**Russell DaSilva**
Senior Counsel
New York
russell.dasilva@pillsburylaw.com
+1.212.858.1066

# Pillsbury's Banking & Leveraged Finance Team

**Kenneth Suh**
Senior Counsel
New York
kenneth.suh@pillsburylaw.com
+1.212.858.1297

**Jin Kim**
Special Counsel
New York
jin.kim@pillsburylaw.com
+1.212.858.1226

**Heidi Spalholz**
Special Counsel
New York
heidi.spalholz@pillsburylaw.com
+1.212.858.1179

**Andrew Taggart**
Counsel
San Francisco
andrew.taggart@pillsburylaw.com
+1.415.983.1108

**Cecilia Wang**
Counsel
New York
cecilia.wang@pillsburylaw.com
+1.212.858.1183

**Irina Tsveklova**
Senior Associate
San Francisco
irina.tsveklova@pillsburylaw.com
+1.415.983.1088

**Gloria Kim**
Associate
New York
gloria.kim@pillsburylaw.com
+1.212.858.1138

**Olivia Lugar**
Associate
San Francisco
olivia.lugar@pillsburylaw.com
+1.415.983.1016

**Alexandra Murphy**
Associate
San Francisco
alexandra.murphy@pillsburylaw.com
+1.415.983.7496

**Marissa Prieto**
Associate
New York
marissa.prieto@pillsburylaw.com
+1.212.858.1282

**Daniel Welch**
Associate
New York
daniel.welch@pillsburylaw.com
+1.212.858.1283



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# Pillsbury's COVID-19 Resources:

If you have questions about how the Coronavirus impacts you or your business, please contact us.

Global Trade & Sanctions Blog:
https://www.globaltradeandsanctionslaw.com/

Client Alert: U.S. Subsidiaries of Foreign Companies Can Also Benefit from the CARES Act
https://www.pillsburylaw.com/en/news-and-insights/subsidiaries-cares-act.html

COVID-19 (Coronavirus) Resource Center:
https://www.pillsburylaw.com/en/services/covid-19-coronavirus.html

Trending Topics:

- Business Interruption & Insurance Recovery
- CARES Act (Stimulus)
- Crisis Management
- Insurance & Contract Disputes
- Liquidity & Financial Markets
- Real Estate
- Stay-at-Home Orders & Reopening
- Workforce & Employment Law