

The Fed Updates the Main Street Lending Program *As of June 15, 2020*

The Main Street Lending Program has opened for lender registration as of June 15, 2020, and interested lenders may register using the portal on the Federal Reserve Bank of Boston's website. This client memo summarizes recent changes to the Program and provides an overview as to where things stand as of the latest guidance, FAQs and form documents published by the Federal Reserve (the Fed) and the Federal Reserve Bank of Boston (the Boston Fed).

A. Most Recent Updates to Terms.

On June 8, 2020, the Fed announced revised terms to the Main Street Lending Program (MSLP or Program) which will allow even more small and mid-sized borrowers to receive support through the Program. The revised terms include:

- The minimum size for New Loan and Priority loans was decreased to \$250,000 from \$500,000;
- The maximum loan size for all facilities (subject to compliance with EBITDA requirements) was increased to:
 - \$35 million for New Loans;
 - \$50 million for Priority Loans; and
 - \$300 million for Expanded Loans.
- The term of each facility was increased to 5 years from 4 years. Principal payments are now deferred for the first 2 years, instead of only the first year. Interest payments remain deferred only for the first year. Unpaid interest will be capitalized.
- The amortization schedule for New Loans was revised to match the amortization schedule for the Priority Loans and the Expanded Loans. Now, all loans under the MSLP will amortize as follows:
 - 15% of principal will be due in year 3;
 - 15% of principal in year 4; and
 - 70% of principal due in year 5.
- The Fed's participation for Priority Loans was increased from 85% to 95% and now matches the New Loans and Expanded Loans. Now, Eligible Lenders will retain 5% of the risk for each type of MSLP facility.

B. Summary of the Revised MSLP.

The MSLP contemplates three types of loans (each, an MSLP Loan or a Main Street Loan):

- New Loans up to \$35,000,000 (total leverage capped at four times adjusted EBITDA);
- Priority Loans up to \$50,000,000 (total leverage capped at six times adjusted EBITDA); and
- Expanded Loans up to \$300,000,000 in aggregate facility size (total leverage capped at six times adjusted EBITDA).

As noted above, the minimum loan size for New Loans and Priority Loans is \$250,000, while the minimum loan size for Expanded Loans is \$10,000,000.

Under each Loan Facility structure, Eligible Lenders will retain a 5% share of the loan.

Under all of the loan options, lenders will apply their industry-specific expertise and underwriting standards to best measure a borrower's income. This will likely include additional adjustments to earnings (i.e. EBITDA add-backs) which were not contemplated under the Fed's original formulation of the MSLP on April 9.

Businesses with up to 15,000 employees or up to \$5 billion in annual revenue are now eligible for any of the loans under the MSLP. We note, however, that the Program includes rules requiring businesses to account for affiliates in their eligibility calculations which will limit access by some otherwise eligible companies.

All three loan programs under the MSLP share common requirements around Eligible Lenders, Eligible Borrowers, required certifications by lenders and borrowers, and other key features, with a few differences as noted below.

1. **Eligible Lenders.** Includes any U.S. bank, savings and loan or credit union, and now includes any U.S. branch or agency of a foreign bank, and a U.S. subsidiary of any foreign banking organization. In an Expanded Loan, the Eligible Lender must be one of the lenders that holds an interest in the underlying loan at the time of upsizing. In a multi-lender facility, only the Eligible Lender for the Expanded Loan is required to meet these criteria, even if there are other non-eligible lenders in the existing facility.
2. **Eligible Borrowers.** Includes any "Business" that:
 - a. was established prior to March 13, 2020;
 - b. is not an Ineligible Business;¹
 - c. meets at least one of the following two conditions (when aggregated with its affiliates, as provided in the SBA's affiliation principles² and in accordance with the instructions to the Borrower Certifications and Covenants): (i) has 15,000 employees or fewer; or (ii) had 2019 annual revenues of \$5 billion or less;
 - d. is created or organized in the United States or under the laws of the U.S. with significant operations in and a majority of its employees based in the U.S.;
 - e. does not participate in more than one MSLP facility, or in the Primary Market Corporate Credit Facility; and
 - f. has not received specific support pursuant to Section 4003(b)(1)-(3) of the Coronavirus Economic Stabilization Act of 2020 (Subtitle A of Title IV of the CARES Act), which refers to certain loans made available to passenger air carriers, cargo air carriers and businesses critical to maintaining national security.

Sound Financial Condition. In addition, each Eligible Borrower cannot be insolvent, and must be in a sound financial condition prior to the onset of the COVID-19 pandemic. In order to qualify for any Eligible Loan, any existing loan (or the underlying loan for the Expanded Loan Facility) that the borrower had with an Eligible Lender as of December 31, 2019, must have had an internal risk rating (based on the Eligible Lender's risk rating system) that was equivalent to a "pass" in the Federal Financial Institutions Examination Council's (FFIEC) supervisory rating system as of that date. If an existing loan was originated or purchased after December 31, 2019, the Eligible Lender should use the internal risk rating given to the loan at origination or purchase to determine whether the loan is eligible for upsizing.

Asset-Based Borrowers. Note that the adjusted EBITDA levels also function as an eligibility test for Borrowers to participate as well. In particular, the Fed's Frequently Asked Questions (most recently

¹ Ineligible Business is defined in 13 CFR 120.110(b)-(j), (m)-(s), as modified and clarified by the Small Business Association (SBA) regulations for purposes of the PPP on or before April 24, 2020.

² The SBA's affiliation principles are set forth in 13 CFR 121.301(f) (1/1/2019 ed.).

updated as of June 8, 2020, the FAQs) note that for asset-based borrowers, the use of EBITDA is generally not applicable in practice for their loans, and that the Fed and Treasury will be evaluating the feasibility of adjusting the loan eligibility metrics to work for such borrowers.

Non-Profit Borrowers. The MSLP is currently not available to non-profits, but the Fed and Boston Fed have highlighted this issue, and in its June 8 announcement the Federal Reserve Board (the Board) stated that “nonprofit organizations play a critical role throughout the economy, and the Board is working to establish a program soon for these organizations”. We will keep monitoring this space for new developments around a Fed supported credit program for non-profits.

3. **Eligible Loans.** Key details will vary for each loan program.
 - a. For the New Loan and Priority Loan Facilities, an Eligible Loan is a **secured or unsecured term loan** made by Eligible Lender(s) to an Eligible Borrower that was originated after April 24, 2020, provided it meets the other required criteria.
 - b. For the Expanded Loan Facility, the existing underlying loan can be a **secured or unsecured term loan or revolving credit facility** made by one or more Eligible Lenders to an Eligible Borrower that was originated on or before April 24, 2020, and that has a **remaining maturity of at least 18 months** (taking into account any adjustment made to the maturity of the loan after April 24, 2020, including at the time of MLSP expansion), provided the new “upsized tranche” of the loan meets all other required criteria. The FAQs make clear that the new upsized tranche must be a 5-year term loan, even if the underlying original loan was a revolving credit facility.
 - c. Other key details for Eligible Loans are summarized in the table below.
4. **Assessment of Financial Condition.** Lenders are expected to conduct an assessment of each potential borrower’s credit risk and financial condition at the time of application.
5. **Loan Participations.** The Fed’s Special Purpose Vehicle (SPV) will purchase a 95% participation in eligible New Loans, Priority Loans and Expanded Loans, and in all cases the SPV and Eligible Lender will share risk on a pari passu basis. Each participation will be structured as a “true sale” and must be completed “expeditiously” after the Eligible Loan is originated.

In all loan types, the Eligible Lender must retain its 5% of the Eligible Loan until the loan matures or the SPV sells the participation, whichever comes first. For Expanded Loans, the Eligible Lender must also retain its interest in the underlying Eligible Loan. In multi-lender loans, the Eligible Lender must retain the full 5% of the upsized tranche.
6. **Collateral.** Eligible loans may be secured or unsecured; however, if there is any collateral securing the underlying loan for an Expanded Loan Facility (at the time of upsizing or on any subsequent date), it must also secure the upsized tranche on a pro rata basis.
7. **Lender Certifications and Covenants.** Eligible Lenders will be required to make the following certifications and covenants:
 - a. The Eligible Lender must commit that it will not request the Eligible Borrower to repay debt extended by the Eligible Lender to the Eligible Borrower, or pay interest on such outstanding obligations, until the Eligible Loan (or Eligible Loan upsized tranche) is repaid in full, unless the debt or interest payment is mandatory and due, or in the case of default and acceleration.
 - b. The Eligible Lender must commit that it will not cancel or reduce any existing committed lines of credit to the Eligible Borrower, except in an event of default.

- c. The Eligible Lender must certify that the methodology used for calculating the Eligible Borrower's adjusted 2019 EBITDA for the applicable leverage requirement (see the Table below), is the methodology it previously used for adjusting EBITDA when extending credit to the Eligible Borrower or similarly situated borrowers (or for Expanded Loans, when originating or amending the Eligible Loan), in each case on or before April 24, 2020.
- d. The Eligible Lender must certify that it is eligible to participate in the Program, including in light of the conflicts of interest prohibition in section 4019(b) of the CARES Act (as further discussed in Section B.8.c below).

8. Borrower Certifications and Covenants. In addition to other certifications required by applicable statutes and regulations, Eligible Borrowers will be required to make the following certifications and covenants:

- a. **Restriction on payments or cancellations of other debt.** The Eligible Borrower must commit not to pay any principal of, or any interest on, any other debt until the Eligible Loan (or upsized tranche for Expanded Loans) is repaid in full, *unless the debt or interest payment is mandatory and due* (see additional guidance in Section C.8 below). However, for any Priority Loan, the Borrower may, at the time of originating a Priority Loan, refinance existing debt owed by the Borrower to another lender that is **not** the Eligible Lender. The Eligible Borrower must also 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.

In the FAQs, the Fed provided important clarifications, including that these covenants would not prohibit a Borrower from doing any of the following during the term of an Eligible Loan:

- i. Repaying a line of credit in accordance with the Borrower's normal course of business usage for such line of credit;
 - ii. Taking on and paying additional debt obligations required in the normal course of business and on standard terms, including inventory and equipment financing, provided that such debt is secured by newly acquired property and, apart from such security, is of equal or lower priority to the Eligible Loan; or
 - iii. Refinancing maturing debt.
- b. **The Eligible Borrower must commit to follow certain compensation, stock repurchase, and capital distribution restrictions** that apply to direct loan programs under section 4003(c)(3)(A)(ii) of the CARES Act. Those other restrictions provide for the following, during the time such loan is outstanding plus an additional 12 months:
 - i. No repurchases of equity securities of the Borrower or its parent company where the Borrower or its parent company has equity securities listed on a national securities exchange, except to the extent required by a contractual obligation existing as of March 27, 2020;
 - ii. No payment of dividends or other capital distributions on common stock or other equity interests – *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
 - iii. Restrictions on employee compensation:
 - a) For any officer or employee (excluding union employees) whose 2019 total compensation exceeded \$425,000, total compensation for any 12-month period is capped at 2019 total compensation levels.
 - b) For any officer or employee whose total compensation exceeded \$3.0 million in 2019, total compensation for any 12-month period is capped at the sum of (a) \$3.0 million plus (b) 50% of the excess over \$3.0 million of 2019 total compensation.

- c) For any officer or employee in either of these categories, severance payouts upon any termination are capped at twice the 2019 maximum total compensation.
- c. **The Eligible Borrower must 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.**
 - i. This provides that any borrower shall not be eligible for such loans (or for loan guarantees or investments under the CARES Act), if the company is one in which the President, the Vice President, an executive department head, Member of Congress, or any of such individual's spouse, child, son-in-law, or daughter-in-law, own at least 20 percent (by vote or value) of the outstanding amount of any class of equity interests in the company.
 - d. **No insolvency or bankruptcy.** The Eligible Borrower must certify that (i) it is not insolvent (as defined in Fed regulations) and (ii) has a reasonable basis to believe that, as of the date of origination of the Eligible Loan, 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.
 - e. **No Other Adequate Credit Accommodations.** The Eligible Borrower must certify that it is “unable to secure adequate credit accommodations from other banking institutions”. This is not intended to mean that no other credit is available, in any form, for the Borrower’s purposes. Rather, the Eligible Borrower is certifying 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 Eligible Borrower’s needs during the current unusual and exigent circumstances. As stated in the FAQs, in H.9., Borrowers are not required to “demonstrate that applications for credit had been denied by other lenders or otherwise document that the amount, price, or terms of credit available elsewhere are inadequate.”
 - f. **Holding Company Borrowers, and Guarantees by Subsidiaries.** Each Borrower that is a holding company (where substantially all of its assets consist of equity interests in other entities), must certify that the Eligible Loan is fully guaranteed on a joint and several basis by all of its “Selected Subsidiaries,” which means all of its operating subsidiaries the Borrower has included in its adjusted 2019 EBITDA used to calculate the maximum loan size.
 - g. **Lender Role in Verifying Certifications and Covenants.** An Eligible Lender must collect the required certifications and covenants from each Eligible Borrower at the time of origination or upsizing, and Eligible Lenders may rely on those certifications and covenants, as well as any subsequent self-reporting by an Eligible Borrower. However, the Fed has confirmed that an Eligible Lender is not expected to independently verify certifications or actively monitor ongoing compliance with covenants – but if it learns of a material breach, an Eligible Lender should notify the Boston Fed.
 - h. **Retaining Employees.** Each Eligible Borrower that participates in the Facility *should make commercially reasonable efforts to maintain its payroll and retain its employees* during the time the Eligible Loan (or upsized tranche) is outstanding. In the FAQs, the Fed also explains the following: “Specifically, *an Eligible Borrower should 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 labor.* Borrowers that have already laid-off or furloughed workers as a result of the disruptions from COVID-19 are eligible to apply for Main Street loans.” FAQs, G.8.
- 9. **Other Key Documents.** The revised Program now provides for other key documents, including a Co-Lender Agreement and an Assignment-in-Blank. Together, the Co-Lender Agreement and the Assignment-in-Blank allow the SPV to elevate its participation interest to a full assignment of a portion of the MSLP loan. In this case, the SPV would become a lender and the bilateral loan agreement would become a multi-lender loan agreement with an administrative agent. Each of these documents are executed by the Eligible Borrower and the Eligible

Lender at closing and are delivered to the SPV in connection with the origination of the Main Street Loan. The SPV does not countersign these documents upon closing of the Main Street Loan at closing, but rather holds the documents for delivery in the event that the SPV elects to elevate and/or transfer its interest in the future, including to effect an assignment to another holder that would then become a Lender under the Main Street facility.

- a. **Co-Lender Agreement.** The Co-Lender Agreement is intended to govern the multi-lender facility that would exist if the SPV elevates its position to a lender of record. The document contains Standard Terms and Conditions which govern the relationship between the SPV and each Lender, and the co-lender terms applicable to each Main Street Loan. The Co-Lender Agreement also governs intercreditor relationships, allows the SPV to become a lender of record, and designates the Eligible Lender as the administrative agent. Voting under the Co-Lender Agreement requires unanimous Lender consent for sacred rights and other customary rights, similar to the provisions of the Core Rights Acts (see Section C.14 below for a more detailed discussion of the Core Rights Acts). The Co-Lender Agreement is not required in connection with an upsize of an existing multi-lender facility, because the existing credit documents would already address relationships among the lenders and agent.
- b. **Assignment-in-Blank.** By signing the Assignment in Blank in advance, each of the Eligible Lender and Eligible Borrower consent to any future elevation and/or transfer by the Fed. For bilateral facilities, the Eligible Lender and Eligible Borrower will use the Fed's form Assignment-in-Blank, which is available on Boston Fed's website. For Expanded Loans with an underlying multi-lender facility, the Eligible Lender and the Eligible Borrower will be permitted to use the facility's existing assignment document.

10. **Types of Fees.** The Program also provides for certain fees (which are detailed in the table below), including:

- a. a transaction fee that the Eligible Lender will pay to the SPV on loan principal (which the Eligible Lender may require the Eligible Borrower to pay);
- b. a one-time loan origination fee, which the Eligible Borrower will pay to the Eligible Lender; and
- c. a loan servicing fee, which the SPV will pay the Eligible Lender on the participation amount.
- d. In addition, Eligible Lenders may also charge "customary consent fees" if such fees are necessary to amend existing loan documentation in the context of upsizing a loan under the Expanded Loan Facility.

In recent updates to the FAQs, the Fed has made clear that Eligible Lenders are not permitted to charge any additional fees to Eligible Borrowers, except de minimis fees for services that are customary and necessary in the Eligible Lender's underwriting of commercial and industrial loans to similar borrowers (such as appraisal and legal fees).

11. **Administered by the Boston Fed.** The Boston Fed will administer the Program, and will establish the Main Street SPV to purchase loan participations from Eligible Lenders in any of the twelve Federal Reserve districts. More detail on how the Program will be operationalized will be made available in the future.

Summary of Certain Key Terms:

Main Street Lending Program Loan Options	New Loans	Priority Loans	Expanded Loans
Term / Maturity	5 years	5 years	5 years
Minimum Loan Size	\$250,000	\$250,000	\$10,000,000

Maximum Loan Size	Lesser of \$35M or, an amount that, when added to outstanding or undrawn debt, does not exceed 4x 2019 adjusted EBITDA.	Lesser of \$50M or an amount that, when added to outstanding or undrawn debt, does not exceed 6x 2019 adjusted EBITDA.	Lesser of \$300M or an amount that, when added to outstanding or undrawn debt, does not exceed 6x 2019 adjusted EBITDA.
Lender Risk Retention	5%	5%	5%
Principal and Interest deferral	Year 1 for Interest Years 1-2 for Principal	Year 1 for Interest Years 1-2 for Principal	Year 1 for Interest Years 1-2 for Principal
Amortization payments	Years 3-5: 15%, 15% and 70%.	Years 3-5: 15%, 15% and 70%.	Years 3-5: 15%, 15% and 70%.
Interest Rate	LIBOR plus 3.0%	LIBOR plus 3.0%	LIBOR plus 3.0%
Transaction Fee	1.0% of loan	1.0% of loan	0.75% of upsized tranche
Fees for Loan Origination and Servicing	1.0% of Eligible Loan, paid by Borrower to Lender. SPV will pay Lender 0.25% of the participation amount, for loan servicing.	1.0% of Eligible Loan, paid by Borrower to Lender. SPV will pay Lender 0.25% of the participation amount, for loan servicing.	0.75% of upsized tranche – paid by Borrower to Lender. SPV will pay Lender 0.25% of the participation amount, for loan servicing.
Prepayment permitted	Prepayment permitted without penalty.	Prepayment permitted without penalty.	Prepayment permitted without penalty.
Collateral	Optional for Lender.	Optional for Lender.	Any collateral securing an existing loan must secure the upsized tranche on pro rata basis.
Ranking and Priority	Eligible Loan is not, at any time, contractually subordinated in terms of priority to any of Eligible Borrower's other loans or debt instruments.	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.	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.

C. Key Clarifications and Considerations.

The FAQs have been issued by the Fed to guide prospective lenders' and borrowers' evaluation of the MSLP, and have been updated twice since our last memo dated May 1, 2020. The following discusses certain key changes and clarifications made in the updated FAQs issued on each of May 27, 2020 and June 8, 2020, and in certain other form documents (such as the form Participation Agreement) and provisions of the Borrower's and Lender's Covenants and Certifications.

1. **Eligible Lender's Role.** The Fed provides certain form documents and language that must be included in an MSLP loan documentation package, but otherwise requires an Eligible Lender to use its own form of loan

agreement and documents and conduct its typical underwriting process. The Eligible Lender is also tasked with significant administrative roles in connection with determining eligibility and record maintenance. In at least one instance in the FAQs, the Fed encouraged Eligible Lenders to act within the spirit of the Program in administering key details, such as prepayments. Specifically, in reference to determining how voluntary prepayments of a Main Street Loan will be applied, the FAQs notes that while Eligible Lenders have flexibility in specifying prepayment terms, the Lenders should make an effort to align their approach with the expected amortization schedule specified under the MSLP.

2. **Eligible Lender Participation.** Given the significant responsibilities imposed on Eligible Lenders, mentioned above, it is possible that some otherwise Eligible Lenders may choose not to participate in the MSLP. For this reason, it may be efficient for an interested Eligible Borrower to pursue an MSLP Loan with multiple lenders. It should be noted, however, that one of the Eligible Borrower certifications requires each Eligible Borrower to disclose whether it has any other pending applications related to the MSLP. Eligible Borrowers should also consider whether some lenders may not wish to begin the process with a Borrower that is also applying elsewhere.
3. **Eligible Borrowers' Reporting Requirements.** Eligible Borrower should carefully review the reporting requirements attached as Appendix C to the FAQs. The requirements are more onerous and extensive than those required in a typical commercial loan, and prospective borrowers should confirm they can comply on an on-going basis.
4. **Eligible Borrowers in Affiliate Groups.** While multiple companies in an affiliated group can apply for a Main Street facility, Eligible Borrowers within these affiliated groups should be mindful that maximum loan availability and, in certain circumstances, other eligibility criteria are calculated on a consolidated basis. As an example, the maximum loan size for an Eligible Borrower that is part of an affiliated group in which one or more of its affiliates has also received a loan through the MSNLF (New Loan) would be the lesser of:
 - i. \$35 million *reduced by* any amount extended to an affiliate of the Eligible Borrower under the MSNLF;
 - ii. an amount that when added to the Eligible Borrower's existing outstanding and undrawn available debt does not exceed 4x the Eligible Borrower's adjusted 2019 EBITDA; or
 - iii. an amount that, when added to the Eligible Borrower's affiliated groups' existing outstanding and undrawn available debt, does not exceed 4x the entire affiliated group's adjusted 2019 EBITDA.

Note, however, that the 2019 EBITDA calculations of affiliates are not relevant where the none of an Eligible Borrower's affiliates is receiving an MSLP loan.

5. **Priority Loan Security Requirement.** Priority Loans are required to be "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." A Priority Loan must be secured if, at origination, the Eligible Borrower has any other secured loans or debt instruments, other than Mortgage Debt. If, however, an Eligible Borrower has only secured Mortgage Debt outstanding, the Priority Loan may be obtained on an unsecured basis.

The Fed has issued guidance in determining compliance with the security requirement at origination. If the Priority Loan is secured, the Collateral Coverage Ratio for the Priority Loan at origination must be either (i) at least 200% (i.e., the value of collateral must equal at least twice the loan amount) or (ii) not less than the aggregate Collateral Coverage Ratio for all of the Borrower's other secured Loans or debt instruments (other than Mortgage Debt).

The "**Collateral Coverage Ratio**" means (1) the aggregate value of any relevant collateral security, including the pro rata value of any shared collateral, *divided by* (2) the outstanding aggregate principal amount of the relevant debt (i.e., the debt secured by such relevant collateral). There is no further guidance issued to date on

how to determine the pro rata value of shared collateral, except that the Borrower will determine and report the “market value of the collateral” annually and quarterly, as part of its required financial reporting under the Program.

The Eligible Lender must certify that the Collateral Coverage Ratio complies with this requirement and has a duty to make due inquiry in evaluating the Eligible Borrower’s calculation of outstanding debt. The Eligible Lender must (i) inquire with any of its officers and employees that manage its relationship with the Eligible Borrower and (ii) conduct a good faith, reasonable search of the Eligible Lender’s records to determine whether the Borrower has actually reported the outstanding debt it has with the Eligible Lender.

If the Priority Loan is secured by the same collateral as any of the Eligible Borrower’s other loans or debt instruments (other than Mortgage Debt), the lien on the collateral securing the Priority Loan must remain senior to or pari passu with the lien or liens of the other creditor(s) on such collateral. As a result of using the Collateral Coverage Ratio test, the Priority Loan is not required to share in all of the collateral that secures the Eligible Borrower’s other Loans or debt instruments.

6. **Mortgage Debt now includes some Equipment Financings.** As discussed above, the seniority/pari passu requirements in terms of priority and security do not apply to Mortgage Debt. The definition of Mortgage Debt previously only included debt secured by real property. It has been updated to include limited equipment financings (including equipment capital leasing or finance leasing and purchase money equipment loans) secured only by the acquired equipment.
7. **Use of Proceeds to Pay Other Debt.** Priority loans can be used to refinance existing loans owed to other lenders. With this limited exception, Main Street Loans are not intended to be used to refinance other debt and can only be used to pay existing debt obligations that are “*mandatory and due*”. The Fed has provided some additional clarity on this requirement.

Payments of principal and interest on debt are considered “mandatory and due”:

- on the future date upon which they were scheduled to be paid, or
- upon the occurrence of an event that automatically triggers mandatory prepayments under a debt contract that was executed by the Eligible Borrower prior to the origination of the Main Street Loan; except that, any such prepayments triggered by the incurrence of new debt can only be paid (i) if such prepayments are de minimis, or (ii) under the MSPLF at the time of origination of an MSPLF Loan. If the prepayments are not de minimis, the Eligible Borrower cannot receive a Main Street Loan unless the applicable lender waives the prepayment or reduces it to a de minimis amount.

An Eligible Borrower can also pay existing debt that was due prior to the date of the origination of the Main Street Loan.

8. **New Business Assets.** Questions have been raised as to whether the purchase of new business assets is a permitted use of MSLP proceeds. In two webinars it hosted for Borrowers, the Fed staff’s response to this question was not clear cut, but rather reiterated that the Eligible Borrower, as the business owner, may use its own judgment in determining the best way to sustain its operations and retain employees – provided that the Borrower complies with the other express restrictions on use of loan proceeds (such as limits on making payments of other debt).
9. **Retaining Employees.** The Fed has stated that Eligible Borrowers should make “commercially reasonable efforts to retain employees” during the term of an MSLP loan. Per the FAQs, this entails good faith efforts by the Eligible Borrower to maintain payroll and retain employees, in light of its capacities, the economic environment, its available resources, and the business need for labor. Lay-offs or furloughs due to the

pandemic that occurred prior to an Eligible Borrower's application for a Main Street Loan do not preclude eligibility.

10. **Amendments to Existing Loan Documentation.** If an Eligible Borrower and an Eligible Lender are pursuing an Expanded Loan, the original loan documentation must be reviewed to determine what changes are necessary to permit the upside. Eligible Borrowers should consider that some Eligible Lenders may be reluctant to amend the existing loan documentation in the ways necessary to permit the Expanded Loan.
11. **Special Considerations for U.S. Subsidiaries of Foreign Companies.** An Eligible Borrower must be created or organized in the United States or under the laws of the United States; however, it can be a subsidiary of a foreign company. The FAQs and Borrower covenants have clarified that, in this instance, the Eligible Borrower must use the proceeds of a Main Street Loan only for the benefit of the Eligible Borrower, its consolidated U.S. subsidiaries and other affiliates of the Eligible Borrower that are U.S. businesses. As a result, the proceeds cannot be used for the benefit of an Eligible Borrower's foreign parent entities, affiliates or subsidiaries.

Similarly, Eligible Borrowers must have "significant operations in the United States". This is evaluated on a consolidated basis together with a borrower's subsidiaries, but not with its parent companies or sister affiliates. Some examples that reflect "significant operations in the U.S." are:

- i. more than 50% of assets are located in the US;
- ii. more than 50% of annual net income is generated in the US;
- iii. more than 50% annual net operating revenues are generated in the US; or
- iv. more than 50% annual consolidated operating expenses (including interest expense and any other expense associated with debt service) are generated in the US.

This list is not intended to be exhaustive, but these examples should guide a potential borrower in evaluating whether it is eligible under this test.

12. **Non-Profit Organizations.** As noted above, the Fed has announced that while non-profits are currently ineligible for the MSLP, the Fed is working on developing one or more loan programs that will be suitable for non-profits.
13. **Co-existence with other Federal assistance programs.** Eligible Borrowers *are not* allowed to participate in both the MSLP and the Primary Market Corporate Credit Facility. However, Eligible Borrowers *are* allowed to participate in the MSLP simultaneously with a PPP loan and/or an Economic Injury Disaster Loan.

The Fed has clarified that PPP loans do count as "outstanding debt" for the purposes of the Main Street maximum loan size test, even if the intent is that the PPP loan will be forgiven. Until the PPP loan is *actually* forgiven, it will count as debt.

Eligible Borrowers are also limited to participation in one Main Street facility, although an Eligible Borrower can apply for multiple loans within that facility, as long as the aggregate amount of loans is within its maximum loan size.

14. **SPV's Role in Voting.** Lenders have inquired as to the SPV's role in voting. Because the SPV acts as a lender and not a grant provider, the SPV will make commercially reasonable decisions to protect taxpayers from losses on Main Street Loans and will not be influenced by non-economic factors when exercising its voting rights (including in connection with an Eligible Borrower that is the subject of a workout or restructuring).
 - a. The form Participation Agreement makes clear that, generally speaking, each Eligible Lender is provided the authority for making decisions relating to and voting under the MSLP Loan. However, for

- any “**Core Rights Act**,” which is an expansive concept as explained below, the consent of the SPV is required before the Eligible Lender may act or make decisions.
- b. The definition of a Core Rights Act covers what are traditionally considered “sacred rights” for lenders in multi-lender agreements, along with numerous other additional matters that typically would not require 100% lender votes.
- c. As provided in the Participation Agreement, a Core Rights Act includes any action or inaction by a lender that would include or result in the following:
- (i) any extension, increase or reinstatement of any commitment;
 - (ii) any reduction in the principal, the rate of interest or any fees or other amounts payable in respect of the loan participation interest, including, without limitation, any loan forgiveness;
 - (iii) any delay or postponement of any date scheduled for any payment of principal, interest, fees or other amounts payable in respect of the loan participation interest any reduction in the amount of, waiver or excuse of any such payment;
 - (iv) any change of the pro rata sharing provisions or application of proceeds provisions in the credit documents affecting the loan participation interest;
 - (v) any release of all or substantially all of the collateral provided for the loan in any transaction or series of transactions or all or substantially all of the value of the guaranties in respect of the loan participation interest;
 - (vi) the waiver of any condition precedent to closing, effectiveness or funding under the credit agreement to the extent applicable to the loan participation interest;
 - (vii) any amendment to, modification of, waiver of or consent to any departure from any provision in any credit document, including any mandatory prepayment, relating to Borrower’s certifications and covenants in Section 2 (CARES Act Borrower Eligibility Certifications and Covenants) or Section 3 (FRA and Regulation A For Borrower Eligibility Certifications) of the Borrower Certifications and Covenants;
 - (viii) any amendment to, modification of, waiver of or consent to any departure from any provision in any credit document requiring the periodic financial reporting by Borrower or any other Obligor, other than any consent to the temporary delay in (but not the permanent waiver of) delivery of any such periodic financial reporting:
 - A. originally required to be delivered on or before September 30, 2020; or
 - B. originally required to be delivered after September 30, 2020 for a period not to exceed 90 days after such original delivery requirement date;
 - (ix) the express subordination of (A) the MSLP Loans or (B) any encumbrance in or over all or substantially all of the loan collateral;
 - (x) any greater restriction on the ability of, or any additional consent necessary for, any lender to assign, participate or pledge its rights or obligations under any credit document;
 - (xi) an adverse effect on the transferred rights that would be disproportionate to the effect on any other class of obligations under a credit document;
 - (xii) any amendment to, modification of, waiver of or consent to any departure with respect to any provision in any credit document that provides a default or event of default upon the acceleration of any other indebtedness owed by borrower to the Lender/seller or an affiliate of the Lender (any such default or event of default, a “**Seller Debt Cross-Acceleration**”);

- (xiii) the declaration, or failure to declare, any obligations of Borrower due and payable upon the occurrence and during the continuance of a Seller Debt Cross-Acceleration;
- (xiv) the exercise, or failure to exercise, of any rights or remedies with respect to any of the loan collateral at any time that the Lender, or any affiliate of the Lender, or any of their respective agents or representatives, is exercising rights or remedies with respect to any collateral securing, or purporting to secure, any indebtedness owed by the borrower to the Lender, or any affiliate of Lender, the default under which has resulted in a Seller Debt Cross-Acceleration; and
- (xv) any change to any lender voting approval level under or pursuant to any credit document with respect to any of the foregoing.

15. **SPV Logistics, and Commitment to Purchase.** The FAQs have further clarified the process by which the SPV enters a Main Street Loan. Eligible Lenders have two options. Under the first option, an Eligible Lender can choose to fund a loan as it normally would, and then approach the SPV to purchase a participation. Alternatively, in the second option, an Eligible Lender can approach the SPV prior to funding to obtain a commitment from the SPV that it will purchase a participation. The Eligible Lender can make receipt of the SPV commitment a closing condition. The Fed has said the goal is to have a quick turn-around (even in one business day) in response to Eligible Lender's requests for commitments. We expect that most Eligible Lenders will be more comfortable making the loan upon receipt of an SPV commitment rather than seeking such commitment after the loan is made.

16. **Mandatory Prepayment of MSLP Loans.** Each Eligible Borrower should carefully review the Borrower Certifications and Covenants because a misrepresentation or breach can carry significant consequences.

For all Main Street Loans that are part of a bilateral facility, the loan documents are required to contain a mandatory prepayment provision. This provision must provide that if an Eligible Borrower makes a material misstatement with respect to certain representations or materially breaches certain covenants, the Board may notify the Eligible Lender to trigger a mandatory prepayment requirement under the Main Street Loan. The full loan amount would become due two (2) Business Days after the Board notifies the Eligible Lender or Administrative Agent, as applicable, in writing of the material breach.

Certifications and covenants where a material misrepresentation or material breach can trigger mandatory prepayment include:

- (i) CARES Act Eligibility. The Eligible Borrower must certify that it satisfies certain requirements to be eligible for financial assistance under the CARES Act, including that it 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., has not received "specific support" under certain other CARES Act programs, and is not a Covered Entity as outlined in the conflicts of interest prohibition in Section 4019 of the CARES Act.
- (ii) Limits on Compensation, Stock Buybacks and Distributions. The Eligible Borrower must commit to the restrictions on compensation, stock repurchases and capital distributions that apply under Section 4003(c)(3)(A)(ii) of the CARES Act.
- (iii) Insolvency. The Eligible Borrower must certify that it is not Insolvent, meaning that it is not in bankruptcy or insolvency proceedings, and has not been "generally failing to pay undisputed debts as they become due" during the 90 days preceding the date of borrowing. The Borrower certifications clarify that a Borrower will not be considered Insolvent, or "generally failing to pay its undisputed debts as they become due," if it is behind on its debts because of business disruptions resulting from the COVID-19 pandemic (e.g., it suffered reduced business activity because of stay-at-home or similar orders by any government authorities).

- (iv) Unavailability of Credit. The Eligible Borrower must also certify that it is “unable to secure adequate credit accommodations from other banking institutions.” This does not mean that the Borrower must establish that no other credit is available, but only that it is unable to secure “adequate credit accommodations” because the terms or amount of such credit accommodations do not meet the Eligible Borrower’s needs (as further discussed in Section C.8.e above).

17. **Indemnity by Eligible Borrower.** Each Eligible Borrower should also be aware that the Borrower’s Certifications and Covenants require an indemnity by the Borrower. Each Eligible Borrower indemnifies the beneficiaries of the certifications and covenants (including each Lender, the Fed and Treasury) for any liability, claim, cost, loss, judgment, damage or expense that a beneficiary incurs as a result of or arising out of a material breach of any of the Borrower’s certifications or covenants. The following are examples of certifications and covenants that would not result in mandatory prepayment if materially breached, but are subject to the Eligible Borrower’s indemnity (as are all of the mandatory prepayment events):

- (i) Eligible Borrower is not an Ineligible Business under SBA regulations;
- (ii) Eligible Borrower must commit that it will not repay any debt unless the principal or interest is mandatory and due until (i) the Eligible Loan is repaid in full or (ii) neither the SPV nor a Governmental Assignee holds an interest in the Eligible Loan, with an exception for using proceeds to refinance existing debt; and
- (iii) Eligible Borrower must certify that it has a reasonable basis to believe it can meet its financial obligations for at least 90 days after the loan closes and does not expect to file for bankruptcy during such time.

About the Authors:



Yuanshu Deng
ydeng@goulstonstorrs.com
617-574-6478

Yuanshu is a real estate who advises real estate owners and developers as well as financial institutions in connection with commercial real estate financing, acquisitions and dispositions. She generally counsels clients that develop office, multifamily, retail and mixed-use properties throughout the United States. She also serves as a Group Leader of the firm's Real Estate Banking & Finance Group. [Click here to learn more about Yuanshu.](#)



Pamela M. MacKenzie
pmackenzie@goulstonstorrs.com
617-574-4106

Acquisition finance, secured and unsecured REIT facilities, leveraged cash flow and asset-based loans, investor bridge facilities, credit enhancement bond transactions, debtor-in-possession facilities, intercreditor arrangements, first-lien and second-lien facilities and cross-border transactions are all part of Pam MacKenzie's experience. [Click here to learn more about Pam.](#)



Casey Milianta
cmilianta@goulstonstorrs.com
212-878-5180

Casey Milianta is a real estate attorney who focuses her practice on a variety of commercial real estate transactions including acquisitions, dispositions, joint ventures, and financing. [Click here to learn more about Casey.](#)



Zachary Perron
zperron@goulstonstorrs.com
212-878-5047

Zach is a real estate attorney who represents clients in a wide range of commercial real estate matters, including financings, acquisitions and dispositions. [Click here to learn more about Zach.](#)



David R. Wiles
dwiles@goulstonstorrs.com
212-878-5150

David Wiles is a corporate banking and commercial lending attorney. He represents both borrowers and lenders, including large banks and multinational companies with operations in the United Kingdom, Europe, Latin America, and Asia. [Click here to learn more about David.](#)