

## Alert

### Main Street Lending Program: Boston Fed Releases Additional Information for Potential Borrowers

June 4, 2020

On May 27, 2020, the Federal Reserve Bank of Boston (“Boston Fed”) released loan documentation and additional guidance for eligible borrowers and eligible lenders looking to participate in the Main Street Lending Program (“MSLP”), including a series of [FAQs](#)<sup>1</sup> that will be supplemented or updated, as necessary. Perhaps most notably, this new guidance makes clear that the size criteria used to determine MSLP eligibility for any borrower that is part of an affiliated group<sup>2</sup> will be measured on an aggregate basis. Accordingly, among other criteria, an eligible borrower, *together with any affiliates*, must either (i) not have greater than 15,000 employees or (ii) not have had greater than \$5 billion in annual revenue for 2019.

This *Alert* provides a brief overview of the borrowing process and the certifications and covenants a borrower must make in order to participate in the Main Street Facilities, and supplements our May 1, 2020 [Alert](#).<sup>3</sup> As we indicated therein, the Board of Governors of the Federal Reserve System (“Federal Reserve”) established the MSLP to support small- and medium-sized businesses affected by the COVID-19 pandemic that were either unable to access the Payroll Protection Program (“PPP”) created by the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) or that require additional financial support after receiving a PPP loan. The Boston Fed will administer the MSLP and use funds appropriated to the Exchanges Stabilization Fund under Section 4027 of the CARES Act to set up a special purpose vehicle (“Main Street SPV”)<sup>4</sup> that will purchase up to \$600 billion<sup>5</sup> of participations in loans/upsized tranches originated in accordance with the program (each, a “Main Street Loan”).<sup>6</sup>

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<sup>1</sup> See <https://www.bostonfed.org/-/media/Documents/special-lending-facilities/mslp/legal/frequently-asked-questions-faqs.pdf?la=en>.

<sup>2</sup> As determined in accordance with the affiliation test set forth in 13 C.F.R. § 121.301(f).

<sup>3</sup> See <https://www.srz.com/resources/businesses-with-up-to-15-000-employees-or-5-billion-in-revenue.html>.

<sup>4</sup> The Boston Fed, acting under the direction of the Federal Reserve, and together with the twelve Federal Reserve banks, has committed to lend to a special purpose vehicle, MS Facilities LLC, a Delaware limited liability company.

<sup>5</sup> The Federal Reserve and the Treasury Department will continue to assess the situation and needs of eligible borrowers and may adjust the MSLP’s size in the future.

<sup>6</sup> In the case of New Loan Facility, the Main Street SPV will purchase 95% participations in certain eligible loans made by eligible lenders to eligible borrowers and eligible lenders will retain 5% of each such eligible loan. In the case of Priority Loan Facility, the Main Street SPV will purchase 85% participations in certain eligible loans made by eligible lenders to eligible borrowers and eligible lenders will retain 15% of each such eligible loan. In the case of Expanded Loan Facility, the Main Street SPV will purchase 95% participations in the upsized tranches of certain eligible loans made by eligible lenders to eligible borrowers and eligible lenders will retain 5% of each upsized tranche.

The MSLP consists of three facilities (collectively, the “Main Street Facilities”): (i) the Main Street New Loan Facility (“New Loan Facility”), (ii) the Main Street Expanded Loan Facility (“Expanded Loan Facility”) and (iii) the Main Street Priority Loan Facility (“Priority Loan Facility”). Borrowers (and their affiliates) may only participate in one of the Main Street Facilities. For more information on the terms under each Main Street Facility, please see our May 1, 2020 [Alert](#).<sup>7</sup>

The Main Street SPV will cease purchasing loan participations on Sept. 30, 2020, unless the MSLP is extended by the Federal Reserve and the Treasury Department. The Boston Fed will continue to fund the Main Street SPV after such date until the Main Street SPV’s underlying assets mature or are sold. The Federal Reserve will provide periodic reports on the size of the MSLP and its remaining capacity.

### **Borrowing Process**

An eligible borrower must apply for a Main Street Loan by submitting an application and other required documentation to a lender participating in the MSLP. Note that each participating lender will provide its own Main Street Loan documentation, which must be substantially similar to the loan documentation that such lender typically uses in its ordinary course for similarly situated borrowers. The lender then evaluates the borrower’s application based on the MSLP’s eligibility criteria and the lender’s own underwriting criteria. The lender will ultimately determine whether an eligible borrower is approved for a Main Street Loan.

An affiliated group of businesses can participate in only one of the Main Street Facilities and cannot participate in both a Main Street Facility and the Primary Market Corporate Credit Facility (“PMCCF”).<sup>8</sup> In particular:

- If a business has participated in the PMCCF, neither it nor its affiliates may borrow under any Main Street Facility.
- If a business has previously participated, or has a pending application to participate in one of the Main Street Facilities, it and its affiliates may only participate in the same facility.
- A business’ total participation under any facility may not exceed the maximum loan size that the affiliated group is eligible to receive on a consolidated basis. As result, an eligible borrower’s maximum loan size would be limited by its own leverage level, the leverage level of its affiliated group on a consolidated basis and the size of any loan extended to any of its affiliates.

### **Borrower Certifications and Covenants**

In addition to the eligibility requirements and attestations set forth in the specific term sheet for each Main Street Facility (available [here](#),<sup>9</sup> [here](#)<sup>10</sup> and [here](#)<sup>11</sup>), and as discussed in our May 1, 2020 [Alert](#),<sup>12</sup>

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<sup>7</sup> See <https://www.srz.com/resources/businesses-with-up-to-15-000-employees-or-5-billion-in-revenue.html>.

<sup>8</sup> The Primary Market Corporate Credit Facility was created by the Federal Reserve to support large companies through the purchase of eligible corporate bonds from, and lending through syndicated loans to, large companies.

<sup>9</sup> See <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a7.pdf>.

<sup>10</sup> See <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a4.pdf>.

<sup>11</sup> See <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200430a2.pdf>.

<sup>12</sup> See <https://www.srz.com/resources/businesses-with-up-to-15-000-employees-or-5-billion-in-revenue.html>.

under the new guidance issued by the Boston Fed, all eligible borrowers must provide the following certifications and covenants (to be executed by both the principal executive officer and principal financial officer (or individuals performing similar functions)):

General Eligibility Certifications:

- *Borrower Is a Business.* The borrower must certify that it is a business.
- *Date of Establishment.* The borrower must certify that it was established prior to March 13, 2020.
- *Not an Ineligible Business.* The borrower must certify that, after reasonable, good faith diligence, it has no reason to believe it is an “ineligible business,” which, among others, includes banks, finance companies, investment funds, life insurance companies, government-funded companies, businesses primarily engaged in political or lobbying activities and businesses engaged in any illegal activity.<sup>13</sup>
- *Maximum Size.* The borrower must certify that it meets at least one of the following two conditions: (i) the borrower, *together with its affiliates*, has 15,000 employees or fewer; or (ii) the borrower, *together with its affiliates*, had 2019 annual revenues of \$5 billion or less.
- *Other Similar Credit Programs.* The borrower must certify that it has not also participated, and commit that it will not seek to participate simultaneously, in any of the other Main Street Facilities or the PMCCF.

CARES Act Eligibility Certifications:

- *Specific Support Under CARES Act.* Consistent with the definition of an “eligible business” under section 4002(4) of the CARES Act, the borrower must certify that it has not received specific support pursuant to Subtitle A of Title IV of the CARES Act.<sup>14</sup>
- *U.S. Business Requirement.* The borrower must certify that it is a business that is created or organized in the United States or under the laws of the United States and that has significant operations, and a majority of its employees based, in the United States. For the avoidance of doubt, an eligible borrower may be a subsidiary of a foreign company, provided that the borrower itself is created or organized in the United States or under the laws of the United States, and the borrower on a consolidated basis together with its subsidiaries, but not its parent companies or sister affiliates, has significant operations in and a majority of its employees are based in the United States. The proceeds of the loan may not be used for the benefit of an eligible borrower’s foreign parents, affiliates or subsidiaries.
- *Eligible Under Conflicts of Interest Prohibition.* The borrower must certify to the Secretary and the Federal Reserve that the borrower’s participation will not violate the conflicts of interest

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<sup>13</sup> For a full list of ineligible businesses, please refer to those listed in 13 C.F.R. §§ 120.110(b)-(j), (m)-(s), as modified and clarified by the Small Business Association.

<sup>14</sup> Sections 4003(b)(1)-(3) of the CARES Act authorizes up to \$46 billion for direct Treasury support for passenger air carriers (and certain specified related businesses), cargo air carriers and businesses critical to maintaining national security.

prohibition in Section 4019(b) of the CARES Act.<sup>15</sup>

- *Direct Loan Restrictions.* The borrower must commit to comply with restrictions under section 4003(c)(3)(A)(ii) of the CARES Act. Specifically, until one year after the Main Street Loan is repaid, the borrower must not:
  - Engage in stock buybacks of its nationally listed shares<sup>16</sup> or pay dividends or make other capital distributions with respect to common stock<sup>17</sup> (in each case, unless contractually obligated as of March 27, 2020);
  - Increase the compensation of any employee whose compensation exceeded \$425,000 in 2019 or offer such employee severance benefits that exceed twice his/her total 2019 compensation (in each case, unless required under a collective bargaining agreement entered into before March 1, 2020 (an “Outstanding CBA”)); and
  - Pay any employee whose total compensation exceeded \$3 million in 2019 annual compensation greater than \$3 million, plus 50% of the amount over \$3 million he/she received in 2019 or (unless required under an Outstanding CBA) offer such employee severance benefits that exceed twice his/her total 2019 compensation.

Federal Reserve Act/Regulation A Eligibility Certifications:

- *Unavailability of Credit.* Consistent with 12 C.F.R. § 201.4(d)(8), the borrower must certify that it is unable to secure adequate credit accommodations from other banking institutions (e.g., 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). Borrowers are not, however, required to demonstrate that applications for credit had been denied by other lenders.
- *Solvency.* Under section 13(3) of the Federal Reserve Act,<sup>18</sup> the Borrower must certify that it is not “insolvent,” as defined under 12 C.F.R. § 201.4(d)(5)(iii).

Eligible Loan Certifications:

- *Financial Records.* The borrower must certify that (i) it has provided financial records to the eligible lender and a calculation of the borrower’s (and, if relevant, the borrower’s affiliates’ and/or selected subsidiaries’) adjusted 2019 earnings before interest, taxes, depreciation and amortization (“EBITDA”), reflecting only those adjustments permitted pursuant to the methodology that the borrower agreed upon with the eligible lender; and (ii) such financial records fairly present, in all material respects, the financial condition of such entities for the period covered thereby in accordance with Generally Accepted Accounting Principles (GAAP) (if applicable), consistently applied, and that such EBITDA calculations are true and correct in all material respects.

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<sup>15</sup> Section 4019 of the CARES Act is intended to prohibit any business that is directly or indirectly owned by the president, vice president, the head of all executive branch departments (but not other federal agencies) and any member of congress, as well as their spouse, child (including adult children) or son- or daughter-in-law.

<sup>16</sup> The borrower must also refrain from purchasing any such shares of its parent entities until the loan is repaid.

<sup>17</sup> Except that a tax pass-through entity may make distributions to the extent reasonably required to cover its owners’ tax obligations in respect of the borrower’s earnings.

<sup>18</sup> 12 U.S.C. § 226.

Additional Borrower Certifications and Covenants for all Main Street Facilities:

- *Prohibition on Early Repayment of Other Debt.*<sup>19</sup> The borrower must commit that it will not repay the principal balance of, or pay any interest on, any debt, unless the principal or interest payment is mandatory and due, until (i) the eligible loan is repaid in full or (ii) neither the Main Street SPV nor a governmental assignee holds an interest in the Main Street Loan in any capacity.
- *Prohibition on Early Cancellation or Reduction of Other Existing Credit Lines.* The Borrower must 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 until (i) the Main Street Loan is repaid in full or (ii) neither the Main Street SPV nor a governmental assignee holds an interest in the Main Street Loan in any capacity.
- *Ability to Meet Financial Obligations for 90 Days.* The borrower must certify that it has a reasonable basis to believe that the borrower 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.
- *Use of Proceeds.* If the borrower is a subsidiary of a foreign company, the borrower must commit that it will use the proceeds of the Main Street Loan only for the benefit of the borrower, its consolidated U.S. subsidiaries and other affiliates of the borrower that are U.S. businesses.
- *Previous Use of the Facility by the Borrower.* The borrower must certify that it has informed the eligible lender if it has previously received, or has a pending application to receive, funds in connection with any Main Street Facility, as well as the value of such funding.
- *Previous Use of Other Credit Programs by Affiliates.* The borrower must certify that, to its knowledge after reasonable diligence, none of its affiliates has accessed any Main Street Facility.
- *Use of the Facility by Borrower That Is a Holding Company.* If the borrower is a company, all or substantially all of the assets of which are comprised of equity interests in other entities, then the borrower must certify that the Main Street Loan is fully guaranteed on a joint and several basis by its selected subsidiaries.
- *Indemnity.* Borrower agrees to provide an indemnity to the beneficiaries of the certification (the lender and the Main Street SPV) for losses that may result out of a material breach of any of the borrower's certifications or covenants.

Additional Borrower Certifications and Covenants for the Expanded Loan Facility:

- *Unsecured Upsized Tranches — Pari Passu.* The borrower must certify that, if the upsized tranche is unsecured, then the borrower's other "Loans or Debt Instruments"<sup>20</sup> outstanding at the time of origination (other than debt secured by real property) (collectively, "Non-Mortgage Debt"), including the underlying credit facility, are unsecured at the time of origination of the upsized tranche, as well.

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<sup>19</sup> Under the Priority Loan Facility, the borrower may, at the time of origination, use the proceeds of the Main Street Loan to refinance existing debt owed by the borrower to a lender that is unaffiliated with the lender of the Main Street Loan.

<sup>20</sup> "Loans or Debt Instruments" means debt for borrowed money and all obligations evidenced by bonds, debentures, notes, loan agreements or other similar instruments and all guarantees of the foregoing.

- *Secured Upsized Tranches — Shared Collateral.* The borrower must certify that, if the upsized tranche is secured, then the borrower has no knowledge or reason to believe that the lien of the eligible lender in any “Shared Collateral”<sup>21</sup> is not senior to or *pari passu* with the lien on such Shared Collateral that secures any of the Borrower’s Non-Mortgage Debt.

Additional Borrower Certifications and Covenants for the Priority Loan Facility:

- *Unsecured Eligible Loans — Pari Passu.* The borrower must certify that, if the eligible loan is unsecured, the borrower’s Non-Mortgage Debt is unsecured, as well.
- *Secured Eligible Loans — Valuations and Calculations.* The borrower must certify that, if the eligible loan is secured, the borrower has provided the eligible lender with (i) good faith valuations of any collateral security for the eligible loan (including security for the selected subsidiaries’ guarantees, if applicable) at the time of origination of the eligible loan, (ii) good faith valuations of any collateral security the borrower’s Non-Mortgage Debt, (iii) good faith calculation of the outstanding aggregate principal amount of the borrower’s Non-Mortgage Debt and (iv) confirmation as to whether any collateral security for the eligible loan (including security for the selected subsidiaries’ guarantees, if applicable) is Shared Collateral.
- *Secured Eligible Loans — Shared Collateral.* The borrower must certify that, if the eligible loan is secured, the borrower has no knowledge or reason to believe that the lien of the eligible lender in any Shared Collateral is not senior to or *pari passu* with the lien on such Shared Collateral that secures any of the borrower’s Non-Mortgage Debt.

For more information, please see the “Borrower Certifications and Covenants Instructions and Guidance” specific to each Main Street Facility (available [here](#),<sup>22</sup> [here](#)<sup>23</sup> and [here](#)<sup>24</sup>).

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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This is a fast-moving topic and the information contained in this Alert is current as of the date it was published.

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<sup>21</sup> “Shared Collateral” means any collateral security for a Main Street Loan (including security for the selected subsidiaries’ guarantees, if applicable) that is also collateral security for any of the borrower’s Non-Mortgage Debt.

<sup>22</sup> See <https://www.bostonfed.org/-/media/Documents/special-lending-facilities/mslp/legal/msnlf-borrower-certifications-and-covenants.pdf?la=en>.

<sup>23</sup> See <https://www.bostonfed.org/-/media/Documents/special-lending-facilities/mslp/legal/mself-borrower-certifications-and-covenants.pdf?la=en>.

<sup>24</sup> See <https://www.bostonfed.org/-/media/Documents/special-lending-facilities/mslp/legal/msplf-borrower-certifications-and-covenants.pdf?la=en>.