Morgan Lewis | White Paper

MAIN STREET LENDING PROGRAM

August 2020

This White Paper gives a broad understanding of the terms and implications of the Main Street Lending Program by delving into the key questions market participants are likely to have and addressing the latest changes implemented in the final legal forms and agreements.

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MAIN STREET LENDING PROGRAM – KEY DATES

April 9 | The US Department of the Treasury and the Federal Reserve announce the Main Street Lending Program (MSLP) to support eligible businesses during the coronavirus (COVID-19) pandemic.

May 27 | The Federal Reserve Bank of Boston (FRB) releases legal forms and agreements to be utilized by eligible borrowers and eligible lenders[1] looking to participate in the MSLP.

June 8 | The Federal Reserve takes further actions to update the terms of the MSLP to allow more small and medium-sized businesses to receive support, and in conjunction with this expansion, updates previously released term sheets and FAQs providing more in-depth guidance.

June 11 | Previously released legal forms are updated to conform to the new terms of the program.

June 15 | The FRB launches the lender registration portal for lenders interested in participating in the MSLP. The Federal Reserve and the Treasury announce they are seeking comments on two facilities designed to support lending to nonprofit organizations: (1) the Nonprofit Organization New Loan Facility (NONLF) and (2) the Nonprofit Organization Expanded Loan Facility (NOELF). Comments on the proposed NONLF and NOELF term sheets will be accepted through June 22, 2020.

June 26 | The FRB publishes updated FAQs providing further guidance on the executive compensation limitation applicable to borrowers and setting out new financial reporting requirements for lenders and borrowers.

July 6 | The FRB announces that the MSLP is now fully operational, and is ready to purchase 95% participations in eligible loans submitted by lenders. The FRB also announces that it intends to publish a state-by-state listing of eligible lenders that are accepting new business customers under the MSLP and have elected to be listed.

July 15 | The FRB publishes updated FAQs providing further guidance on a number of issues including clarifying the mortgage debt exception for the MSPLF and MSELF, setting financial requirements for businesses established in 2020, and announcing a waiver of CARES Act capital distribution restrictions with respect to tribal businesses paying dividends to tribal governments.

July 23 | The FRB publishes term sheets and FAQs for nonprofits, opening the MSLP to nonprofits and allowing education, health, social service, and other groups with as few as 10 employees to tap central bank funding.

August 24 | The FRB publishes updated FAQs to provide clarity on the use of cash collateral deposits, compensating balances, cash reserve accounts, and delayed draw balances as part of Main Street loans.

PURPOSE & DESIGN

The **Main Street Lending Program** is designed to help companies that were in sound financial condition prior to the COVID-19 pandemic to maintain their operations and payroll until conditions normalize. The Federal Reserve Bank of Boston set up the Main Street special purpose vehicle (Main Street SPV) to work with the US banking sector to channel credit to small and medium-sized businesses across the country.

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[1] For purposes of this White Paper, references to "lender(s)" and "borrower(s)" mean Eligible Lender(s) and Eligible Borrower(s), respectively (as applicable, and as such terms are defined under the terms of the Main Street Lending Program).

The US Department of the Treasury will make a $75 billion equity investment in the Main Street SPV, which will support up to $600 billion of lending. Main Street loans are to be made by private financial institutions, which will then sell a 95% participation in each loan to the Main Street SPV pursuant to certain participation-specific documents (discussed in depth below).

The MSLP offers three different secured or unsecured five-year term loan options set at an adjustable rate of LIBOR (one or three month) plus 300 basis points. The principal payments are deferred for two years, and interest payments are deferred for one year. However, unlike Paycheck Protection Program (PPP) loans, Main Street loans are full-recourse loans and not forgivable; the FRB and other governmental entities have expressed in no uncertain terms that loans under the MSLP are not grants.

KEY QUESTIONS FOR BORROWERS, LENDERS & OTHER STAKEHOLDERS

Can direct (i.e., non-bank) lenders participate as MSLP lenders?

No. While the FRB and Treasury have noted that they would examine the possibility of expanding the scope of lender eligibility to include direct lenders, this expansion has not yet occurred.

If direct lenders can't participate, is the MSLP even relevant to them?

Yes. Given the broad participation of direct lenders in middle market loans, there are many circumstances in which the loans under the MSLP may be relevant for them, including the following:

- **Term Loan Lending.** Direct lenders are key market participants in the middle market as term loan lenders. Many direct lenders have comprehensive incremental facility provisions (including accordion features) in their loan documentation, setting forth in detail the parameters for incremental term loans and/or revolving loans within those facilities. As such, direct lenders should expect to encounter requests from borrowers to incur Main Street Expanded Loan Facility (MSELF) loans pursuant to existing incremental facility provisions because MSELF loans may well work within the scope of those provisions.
- **Credits for Distressed Borrowers.** Direct lenders may be involved in credits in which the borrower is in some measure of distress. In this context, given the MSELF and Main Street Priority Loan Facility (MSPLF) both provide flexibility for the borrower to incur substantial amounts of new debt on very borrower-favorable fee and interest terms, direct lenders may well support an MSELF or MSPLF coming in via a "sidecar" credit facility, even if the borrower's existing credit documents might not permit the incurrence of such debt. This is because an MSELF or MSPLF loan would very likely have much more favorable terms for the borrower than a "rescue financing" from an equity investor, a mezzanine lender, or even from the direct lender itself.

  The pricing on MSELF and MSPLF loans is identical to that on the Main Street New Loan Facility (MSNLF), even though the MSPLF and MSELF loans come in at a 6.0x leverage multiple versus 4.0x for the MSNLF. At LIBOR plus 300 basis points, an MSPLF or MSELF loan may well be a transformative part of a distressed capital structure, allowing a borrower to survive and all existing creditors to come out whole, without significant interest and fee leakage.

  While MSPLF and MSELF loans may not be contractually subordinated to other debt of the borrower, they may come in on a pari passu basis. This means that existing creditors, including direct lenders, would not be required to subordinate their debt to the MSPLF or MSELF loan. Once again, given these attractive features when compared with most scenarios in which a distressed borrower may line up financing on potentially higher price terms and which may be required to come in on a senior basis to any other credit, direct lenders may well find that in many credits, cooperating with the borrower to line up an MSELF or MSPLF loan is a great solution to a challenging capital structure.

- **Credits Related to Exposure on Portfolio of Loan Investments.** Direct lenders may have credits in which they have very significant exposure relative to their portfolio of other loan investments. Direct lenders are most often in the position of investing to hold and build a relationship with a private equity sponsor/borrower and not to syndicate to other investors. In a situation where a direct lender has a substantial term loan exposure to a single borrower, it may well find the MSLP an attractive source of additional liquidity for its borrower, even if the borrower is not yet in a "distressed" situation. For example, if the choice is between (a) having the existing lender front an additional $5 million for working capital needs to bridge a gap in liquidity for a limited period or (b) having an MSLP lender do so, the existing lender may favor the borrower drawing under the MSLP.

  However, given the requirement that a borrower must be unable to obtain "adequate credit accommodation" from other sources, borrowers may not be able to take advantage of the MSLP if existing lenders are willing to provide credit. The adequate credit accommodation test requires the borrower to certify it was not able to secure "adequate credit accommodations" because otherwise available credit is inadequate for the borrower's needs during the "current unusual and exigent circumstances." Assuming the existing lender is willing to provide such credit but the borrower determines that the amount, price, or terms of credit are inadequate, it could satisfy this certification requirement. In any event, the onus is on the borrower to determine if it has met this test, and if it has, it can pursue a loan under the MSLP.
- **Joint Ventures & Similar Arrangements with Commercial Bank Lenders.** Direct lenders often enter into joint ventures or similar arrangements with commercial bank lenders. In these circumstances, direct lenders would often provide the term loan facility and the commercial bank lenders the revolver facility, or they would participate together in a unitranche facility. The joint venture partner that is a commercial bank lender could well serve to provide an MSLP loan at the request of the direct lender, or the direct lender might approve an MSLP loan from the commercial bank because they have commercial arrangements in place that would require or encourage this sort of cooperation.

Can asset-based loan (ABL) lenders participate in the MSLP and, if so, how?

Existing ABL lenders to borrowers—which also qualify as Eligible Lenders under the MSLP—can make MSLP loans even though the MSLP does not use ABL underwriting criteria; rather, the MSLP underwriting criteria is based on earnings before interest, tax, depreciation, and amortization (EBITDA). If an ABL borrower is otherwise an MSLP Eligible Borrower and has 2019 adjusted EBITDA, an ABL lender could extend an MSELF loan even if its existing credit facility only has a revolver, so long as the new tranche is a term loan. The fact that a loan facility does not have an existing term loan facility tranche is not automatically disqualifying relative to MSELF loans.

As an ABL lender, when would the MSLP be relevant to me, if I do not provide an MSLP loan myself?

There are numerous circumstances in which an ABL lender may find itself negotiating with the borrower and other creditors in relation to an MSLP loan, including the following:

- **Permitting an MSLP loan in the Context of an Existing Capital Structure.** Whether or not an ABL facility has an existing incremental facilities or "accordion" provision, a borrower may ask to permit the borrowing of an MSELF or MSPLF loan. With respect to an ABL lender, this is complicated in ways that are different than would be the case for direct lenders in most term loan facilities. ABL facilities would typically have a first priority lien over all current assets, including inventory and accounts receivable. Even ABL facilities layered in with a term loan would typically have a first lien over these current assets, with the term loan creditors potentially having a first lien on all other assets and a second lien over current assets (a "split lien" deal). MSELF and MSPLF loans must generally be pari passu or senior to any other Loans or Debt Instruments (other than Mortgage Debt, which may be senior in lien priority to

MSPLF loans and which may be senior in payment and lien priority to MSELF loans). An ABL lender would presumably be less likely to revise its security priority to be pari passu on current assets with an MSLP lender. However, this would be a more challenging decision for an ABL lender to make: In the context of a distressed borrower otherwise in the middle of a liquidity crisis, the most rational decision for the ABL lender may be to agree to a downgrade in its collateral priority when compared with a freefall situation, or providing the additional working capital liquidity itself.

Can private equity portfolio companies access the MSLP?

Portfolio companies of private equity firms, unlike private equity funds themselves, may be eligible for MSLP loans. However, the Small Business Administration's (SBA's) existing affiliation rules 13 CFR 121.301(f) and Question E.5 of the MSLP FAQ apply without any of the recent exceptions applicable to the SBA's PPP. These rules may require that private equity funds aggregate all of their controlled portfolio companies—across all of their funds—in calculating MSLP loan eligibility. As a practical matter, multi-fund sponsors and sponsors with many existing portfolio companies will find the MSLP inaccessible based on the affiliation rules.

What should private equity portfolio companies consider if accessing the MSLP?

Context will matter greatly in this evaluation. If a private equity portfolio company is eligible for an MSLP loan, it may well be that the favorable pricing of MSLP loans—particularly for the MSELF and MSPLF, both of which may be incurred at a 6.0x leverage multiple—are worth it even though the MSLP contains numerous off-market and unusual restrictions when evaluated in the context of sponsor-backed loans in the middle market.

Some of the more challenging MSLP terms for sponsor-backed borrowers include the following:

- **Dividend restrictions, other than tax distributions, for the life of the loan plus one year.** This overall restriction is very different when compared with pre-coronavirus (COVID-19) sponsor-driven middle market loan documentation. "Restricted payment" covenants in sponsor-backed deals would very often contain broad permission to make dividends and junior debt payments, including leverage ratio-based and EBITDA-based percentage "grower" baskets. Sponsors may not be willing to live with such onerous dividend restrictions unless the borrower is in such a distressed situation that the sponsor is left with little alternative, other than to fund more equity into the borrower itself.
- **Reporting requirements that are robust and unusual.** In a bilateral MSNLF or MSPLF loan, the lender is mandated to include the reporting requirements set forth in Appendix C to the MSLP FAQ. The Appendix C reporting requirements—some annual and some quarterly—are uniform across all borrowers in this situation. This means that ABL-style reporting on accounts receivable and accounts payable balances is required, even though this would not be common in a normal sponsor-backed middle market term loan. Other unusual and otherwise off-market reporting requirements include collateral coverage and collateral valuation reporting.
- **Restrictions on repayment of debt.** The MSLP contains onerous restrictions limiting repayment of debt outside of certain specific circumstances. In addition, MSLP loans are not permitted to be forgiven or canceled under any circumstance. These factors, when taken together, are limiting relative to a borrower's ability to "workout" or restructure its capital structure, outside of a bankruptcy case. It would be very challenging for a private equity–owned borrower to draw an MSLP loan with the ultimate plan of restructuring its capital structure while leaving the MSLP loan in place.

What are some challenges in evaluating whether to apply for an MSLP loan?

Whether private equity owned or not, in addition to the items noted in the question directly above, any borrower may find certain aspects of the MSLP challenging when comparing an MSLP loan with other available market credit. Below are some of the key issues we see:

- **The Main Street SPV will have voting control over many decisions affecting the borrower's loans.** This voting control—which derives from the MSLP participation arrangements—includes more rights than would be afforded to a participant under the Loan Syndications and Trading Association's (LSTA's) form of participation agreement. The following are examples of rights that require the consent of the Main Street SPV:
  - Limitations, waivers, or modifications to financial statement delivery or reporting
  - Action (or inaction) that would cause an adverse effect on transferred rights disproportionate to the effect of any other class of obligation under the credit documents
  - Action (or inaction) relating to a default or event of default upon the acceleration of any other debt owed by the borrower to the lender or an affiliate of the lender

  The Main Street SPV may also "elevate" to a lending position relative to the borrower, including in an insolvency context. This structure, and the role of the Federal Reserve in administrating MSLP loans, is very unusual, and the introduction of the federal government as a market participation in this manner presents a high degree of uncertainty into the ongoing administration of MSLP loans. This uncertainty may be more than a private equity sponsor would be willing to bear relative to its portfolio company participating in the MSLP.

- **MSLP borrowers' required certifications are extensive and not customary for market documentation.** For example, MSLP borrowers are required to certify at the time of loan application as to their not being insolvent, defined in part as "generally failing to pay undisputed debts as they become due" during the *90 days preceding* the date of application. In a standard middle market loan document, the solvency representation would be made at the time of closing and it would speak to the closing date, on a pro forma basis, after giving effect to the borrowing of loans, and not include a look-back period. Another certification that is not customary in middle market loan documentation is the certification that the borrower is unable to secure adequate credit accommodations from other banking institutions. While some clarification on this certification has been provided in the borrower certification form, it still is challenging to make given that many borrowers may not have a good means to assess whether they can, in fact, make the certification in good faith. As we have seen in the SBA's PPP rollout relative to the "necessity" certification, certifications that are not objective and clear may well lead to market participants not taking up the program funds. Another challenging certification for borrowers will be that the borrower "has a reasonable basis" to believe that 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." Once more, this forward-looking variation on a solvency representation, including the prong related to a future putative bankruptcy filing, is highly unusual and would not be included in middle market loan documents.

- **Cross-acceleration to other lender debt.** The MSLP requires for bilateral loan facilities that there would be a cross-acceleration to any other debt owed by the borrower to the MSLP lender or any of its affiliates. This means that there is no threshold of materiality associated with the cross-acceleration clause. For example, even if the borrower had a de minimis purchasing card program with the MSLP lender for a $100,000, an acceleration of that debt would trigger a cross-acceleration of the MSLP loan.

- **MSLP requires a Collateral Coverage Ratio calculation for secured MSPLF loans.** This is not a customary financial maintenance covenant in middle market loan documentation. As such, borrowers would not likely have a preexisting methodology in place for calculating it. As discussed below, there are also many questions in need of further clarity raised by the FAQ about how this covenant would be calculated even under existing guidance.

- **MSNLF caps at $35 million; MSPLF caps at $50 million.** These caps hamstring borrowers with larger EBITDA that might otherwise benefit from the liquidity the MSLP offers.

What MSLP features are attractive to borrowers?

- **Pricing.** MSLP loans are priced at LIBOR (one or three month) plus 300 basis points. This is true even for the MSELF and MSPLF loans that may be at a 6.0x leverage multiple. This sort of pricing is almost certainly not available for middle market term loans outside of the MSLP. In addition, the fees charged for the MSLP are lower than what would be expected for regular middle market loans. Lenders are required to pay to the Main Street SPV a transaction fee of 100 basis points of the principal amount of the MSNLF or MSPLF loan at time of origination, and a transaction fee of 75 basis points of the principal amount of the MSELF Upsized Tranche at the time of upsizing, and in each case can pass the applicable transaction fee on to the borrowers. Borrowers are required to pay to lenders an origination fee of 100 basis points of the principal amount of the MSNLF or MSPLF loan at the time of origination, and an origination fee of 75 basis points of the principal amount of the MSELF Upsized Tranche at the time of upsizing. Lenders may include such fees in the principal amount of the Main Street loan.
- **Generous principal and interest runways.** The amortization and interest schedule allows a borrower a two-year runway before principal would become due, and a one-year runway before interest would become due.
- **No prepayment premiums or penalties due in any circumstance.** In most middle market term loans, there would at least be a "soft call" premium due for a period of time on an early prepayment of the loans.
- **Few specific covenants mandated.** This means that the borrower and lender would have latitude to negotiate their covenant package on a bilateral basis, or multi-lender basis in the case of MSELF loans. Outside of the specifically mandated provisions set forth in the FAQ and its appendices, the underwriting and negotiation of loan terms are up to the parties.
- **EBITDA underwriting designed to be borrower-favorable.** While there is no ABL limb to the MSLP at this time, the fact that the EBITDA definition is an adjusted EBITDA, applying either the lender's prior adjustment methodology, or that which it applies to "similarly situated" borrowers is very borrower favorable. In standard middle market loan documents, EBITDA has frequently been a heavily adjusted metric, particularly in sponsor-backed credits. Given the MSLP has not mandated a single definition of EBITDA, as with covenants overall, borrowers and lenders have a measure of flexibility in negotiating this core term.

Why would a lender participate in the MSLP?

While the pricing terms, lack of a prepayment premium, and borrower-favorable interest and amortization provisions may be less attractive for some lenders, there are scenarios in which a lender may be interested in participation and making loans under the MSLP:

- **For defensive reasons:** If a lender is already heavily committed to a borrower in its capital structure, it may be of great benefit to provide additional liquidity to the borrower via an MSLP loan given the significant government risk-sharing (95%). As a strategic matter, when the lender might have reasons to further support the borrower and thereby enhance the likelihood of recovery on its existing loans to that borrower, the MSLP is an attractive option.
- **For relationship reasons:** A lender may have relationship-driven reasons to make an MSLP loan to a borrower. The MSLP is designed in a way that affords lenders with discretion to undertake their own underwriting processes while still having the benefit of government economic participation. This makes the MSLP an attractive option for a lender seeking to sustain or build a relationship with a borrower, whether sponsor backed or not.
- **For commercial reasons:** For some lenders, the MSLP pricing terms may actually amplify their existing pricing in a deal. For example, some middle market ABL loans would be priced below the MSLP's LIBOR plus 300 basis points pricing. Given that an MSELF loan may be extended by a lender, even if the preexisting facility is a revolver, this may be a way for ABL

lenders in a lower-priced deal to extend additional liquidity to borrowers with an increased interest rate, taking into account the higher degree of leverage for these loans and the unusual lender-unfavorable provisions. Lenders may also charge customary consent fees if such fees are necessary to amend existing loan documentation in connection with the upsizing of a loan under the MSELF.

Are US subsidiaries of foreign companies eligible to borrow under the MSLP?

Yes. The MSLP eligibility requirements specifically state that an "Eligible Borrower must be created or organized in the United States or under the laws of the United States," but do not prohibit an entity owned by a foreign company from being an Eligible Borrower.

For purposes of eligibility, a US borrower that is a subsidiary of a foreign company must (1) be created or organized in the United States or under the laws of the United States and (2) on a consolidated basis have significant operations in and a majority of its employees based in the United States (what constitutes "significant operations" and "majority of employees" is covered in depth below).

Borrowers that are subsidiaries of a foreign company should note that the proceeds of an MSLP loan are permitted to be used solely for the benefit of the borrower, its consolidated US subsidiaries, and other affiliates of the borrower that are US businesses, and cannot be used for the benefit of the borrower's foreign parents, affiliates, or subsidiaries.

How does a borrower determine "affiliates" for purposes of satisfying the MSLP size standards?

In determining whether a borrower, together with its affiliates, satisfies the applicable standard under the MSLP, it must aggregate its employees or its revenues with the employees or revenues of its affiliates. A borrower must look to the affiliation test set forth in 13 CFR 121.301(f). Affiliation can be established by determining whether an entity—directly or indirectly—has "control" of the borrower. Our LawFlash on affiliation under the CARES Act provides a useful guide to affiliation generally, but it should be noted that the exceptions to affiliation regarding the PPP do not apply to the MSLP affiliation requirements.

How is "Mortgage Debt" distinct from "Loans and other Debt Instruments"?

Under the MSPLF and MSELF, the loans must be senior to or pari passu to the borrower's other Loan or Debt Instruments, but this requirement is not applicable to any Mortgage Debt. It is not clear whether, in certain cases, "Mortgage Debt" would be distinct from "Loans or Debt Instruments" as the MSLP defines those terms.

"Mortgage Debt" means (1) debt secured only by real property at the time of origination of the MSPLF loan or the MSELF loan's upsized tranche, as applicable, and (2) limited recourse equipment financings (including equipment capital or finance leasing and purchase money equipment loans) secured only by the acquired equipment. "Loans or Debt Instruments" is defined as debt for borrowed money and all obligations evidenced by bonds, debentures, notes, loan agreements or other similar instruments, and all guarantees of this debt.

Therefore, if a term loan is partly secured by real estate, it will be characterized as "Loans and other Debt Instruments" and would not be treated as "Mortgage Debt." This distinction will be important to many borrowers and lenders given that there are exceptions for Mortgage Debt with respect to MSLP's priority and security covenant requirements.

How does a borrower calculate its Collateral Coverage Ratio?

The updated Main Street FAQ clarifies that the borrower is required to calculate its Collateral Coverage Ratio by taking the aggregate value of any relevant collateral security (including the pro rata value of any shared collateral) and dividing by the outstanding aggregate principal amount of its relevant debt. However, it is unclear what "relevant collateral" includes. Does it include all of the collateral or a sub-set of collateral that is relevant to the Main Street loan? The updated FAQ does not address this question. It is also unclear how a borrower is to determine the "pro rata" value of shared collateral that may be extended to secure multiple lien holders' credit facilities. While it is clear that the borrower is the one valuing the collateral, it is not clear what specific methodology should be used to do so. The FRB provides examples of Collateral Coverage Ratio calculations here.

What about record retention requirements?

Main Street loans are subject to scrutiny under the False Claims Act (FCA) and the False Statements Act (FSA). As such, both borrower and lender certifications could lead to FCA (civil) or FSA (criminal) liability. Therefore, there are record retention requirements for both lenders and borrowers.

The MSLP requires borrowers and lenders to retain records in respect of the conflicts of interest prohibition and compliance with related covenants for the later of 10 years following termination of all Main Street facilities or a period required by the lender's document retention policies. Given that Main Street loans have a maturity of five years, such a requirement would impose a minimum records retention requirement of 15 years.

Can a business participate as a borrower if its affiliate has already borrowed under the MSLP or the Primary Market Corporate Credit Facility (PMCCF)?

If any affiliate of a business has participated in the PMCCF, the business may not be a borrower under the MSLP. If an affiliate has participated, or has a pending application to participate, in the MSLP, the business can only participate in the same Main Street facility accessed by such affiliate. For example, if a borrower's affiliate has participated in the MSNLF, then the borrower would only be able to participate in the MSNLF.

Can a lender require a borrower to provide collateral or guarantees solely with respect to the lender's 5% retained portion of a Main Street loan?

No. The lender and Main Street SPV must share losses on a pari passu basis. Any collateral pledged or guarantees made in connection with a Main Street loan must apply to the entire MSLP loan.

Is a lender required to hold all of its position in the credit facility underlying an MSELF upsized tranche for the life of the loan?

A lender may sell down part of its interest in the underlying credit facility *before* originating the MSELF upsized tranche. However, *after* originating an MSELF upsized tranche, the lender must retain its interest in the credit facility underlying the MSELF upsized tranche until the earliest of (1) the underlying credit facility matures, (2) the MSELF upsized tranche matures, and (3) neither the Main Street SPV nor a Governmental Assignee holds an interest in the MSELF upsized tranche in any capacity. This requirement is not intended to extend to the purchase or sale of short-term positions by a lender's trading desk with unaffiliated parties for market-making purposes.

In order to be treated as a market-making position under this exemption, the following conditions must be met:

- The position cannot be the position the lender relied on in order to upsize the loan (i.e., it cannot be a lender's only position in the underlying credit facility).
- The position must be purchased or sold by a trading desk in a transaction with an unaffiliated party, and segregated from the position the lender relied on to upsize the loan.
- The position must be held in an available-for-sale capacity in anticipation of reasonably expected near-term demand.

If a lender comes into possession of additional positions in the underlying credit facility *after* the upsizing of such facility in connection with the MSELF, it is not required to retain such new positions.

Are lenders and borrowers able to structure cash collateral deposits, compensating balances, cash reserve accounts, or cash escrow accounts at origination or during the life of a Main Street loan?

Yes, but with the following limits:

- **Cash Balances for Purposes of Collateral or Loan Payments**. Lenders and borrowers may include cash balances that are restricted to serve as collateral or for the payment of principal or interest on the Main Street loan when mandatory and due (e.g., compensating balances, cash collateral, or cash escrow accounts) at origination or during the life of a Main Street loan, so long as (1) such terms are a normal component of the lender's underwriting practices for similarly situated borrowers, and (2) do not exceed 15% of the outstanding balance of the Main Street loan. Such balances should not be used to prepay principal or interest of the Main Street loan, except at the option of the borrower. Lenders should make every effort to minimize such requirements and align their approach with the expected interest payment and principal amortization schedule specified for the applicable MSLP loan. The FRB does not encourage the posting of cash collateral or similar requirements.

- **Delayed Draw Balances**. Lenders and borrowers may place a portion of the proceeds of a Main Street loan in an account maintained by the lender and structure a delayed draw of those funds until certain conditions related to the borrower's operations are met. Such conditions may include requirements that (1) the borrower provide documentation or other evidence that loan proceeds are being withdrawn to fund pre-agreed activities or purchases by the borrower, or (2) the borrower pledge additional collateral to secure the Main Street loan not otherwise available at the time of origination. Any restriction must be substantially similar to a condition placed on similarly situated borrowers by the lender in the course of its ordinary underwriting. Lenders may not use such loan features for the purpose of ensuring funds are available for mandatory and due payments on other debt owed by the borrower, except in the case of a permitted refinancing of existing debt under the MSPLF. These conditions must be included in the loan agreement at origination and must be fully transparent to the borrower.

LOAN DOCUMENTATION

The MSLP includes full forms of documents that are unique to the program, including documents required to become a Main Street lender and required at the time a loan participation is sold by such lender to the Main Street SPV.

Lender Documents

To participate in the program, lenders must first register with the Main Street SPV by submitting the following in favor of the Main Street SPV, the FRB, Board of Governors and the Secretary of Treasury:

- Lender Registration Certifications and Covenants: To be executed by the principal executive officer and principal financial officer (or individuals performing similar functions.
- Lender Wire Instructions Direction: To be executed by the principal financial officer (or individual performing similar function) and must include the bank account to which the Main Street SPV will transfer the (1) purchase amount, (2) servicing fees, and (3) any other payments related to Main Street loan transactions.
- Financial institutions interested in participating in the MSLP as a lender should create a lender account here.

At the time a loan participation is sold to the Main Street SPV, the lender must submit the following:

- **Participation Agreement** (between lender and Main Street SPV)
  - Standard Terms and Conditions
  - Transaction Specific Terms

- **Servicing Agreement** (between lender and Main Street SPV)
- **Assignment and Assumption** (borrower and lender must sign this document; for multi-lender facilities in relation to the MSELF, existing assignment and assumption form may be used so long as it contains specific required provisions)
- **Co-Lender Agreement** (borrower and lender must sign this document, and this agreement is not required for existing multi-lender facilities)
  - Standard Terms and Conditions
  - Transaction Specific Terms

- **Certifications and Covenants**: One of the following must be submitted for each loan participated in:
  - MSNLF Lender Transaction Specific Certifications and Covenants
  - MSELF Lender Transaction Specific Certifications and Covenants
  - MSPLF Lender Transaction Specific Certifications and Covenants

In addition to the documents above, a lender must submit certain borrower financial information (as described below) at the time (or within a given period of time after) a loan participation is sold to the Main Street SPV. A lender must also input the following fields into the Main Street Portal in order to complete its submission to sell a loan participation to the Main Street SPV:

- Borrower Identification (e.g., name, address, primary contact)
- Select Borrower Characteristics (e.g., 2019 adjusted EBITDA, 2019 revenues, total outstanding and undrawn debt)
- Loan Characteristics (e.g., loan type, loan amount, interest capitalization frequency)
- Legal Agreements and Certifications (e.g., description of credit agreement and tranche in the credit agreement, bilateral facility, agent)

The FRB is in the process of adjusting the Main Street Portal and its operational capabilities to accommodate co-borrower arrangements. The Participation Agreement, Co-Lender Agreement, Assignment and Assumption, and Servicing Agreement have already been drafted to accommodate co-borrower loans. Instructions for completing and executing these forms and agreements—for co-borrower loans, making the required Borrower and Lender Transaction-Specific Certifications and Covenants with respect to co-borrower loans, and submitting co-borrower loans to the Main Street Portal—is forthcoming.

Borrower Documents

At the time a loan participation is sold to the Main Street SPV, the lender must submit to the Main Street SPV one of the following certifications and covenants (executed by the principal executive officer and principal financial officer (or individuals performing similar functions) of the borrower) for each loan participated in:

- MSNLF Borrower Certifications and Covenants
- MSELF Borrower Certifications and Covenants
- MSPLF Borrower Certifications and Covenants

With respect to the underlying loan documentation, lenders are permitted to use their own forms and require the borrower to execute such forms as required by the lender.

Financial Information

For Main Street loans originated after June 28, 2020, a borrower is required to provide a lender with two sets of financial information at the time of origination:

1. **2019 Financial Information.** 2019 financial records as required under section 4.A of the Borrower Certifications and Covenants. The lender must submit all of the borrower's 2019 financial data in the Main Street Portal with other loan participation documents at the time a loan is submitted to the Main Street SPV for sale of a participation.
2. **Most Recent Quarter Available at Time of Origination.** Financial data required per Table II of Appendix C to the FAQ (which vary by Main Street facility). The lender must input all of the data into the Main Street Portal.

   - For loans submitted to the portal on or after September 4, 2020, such data must be submitted at the time the other required documentation to sell a loan participation is submitted.
   - For loans submitted before September 4, 2020, such data must be submitted either
     - at the time the other required documentation to sell a loan participation is submitted; or
     - at a later date, not to exceed (a) 60 days after the submission of the documentation required to sell a participation in the loan, or (b) 15 business days after communication from the Main Street SPV indicating an alternative process to submit the data is available, whichever is later.

Lenders may require other financial information as appropriate under their underwriting practices. All data collected by lenders should be uploaded to the Main Street Portal, in the format it was received, when the other required documentation to sell a loan participation is submitted.

BORROWER ELIGIBILITY & REQUIREMENTS

To be an Eligible Borrower for an MSLP loan, a business must meet the following criteria:

- Established before March 13, 2020
- Not an Ineligible Business listed in 13 CFR 120.110(b)-(j), (m)-(s) (e.g., private equity funds and sole proprietorships not otherwise established as a "Business")
  - Lenders under the MSLP are not required to verify this borrower criteria.
  - No borrower is deemed ineligible based solely on ownership by the lender and its corporate affiliates of equity interests in the borrower which, in the aggregate, do not exceed 5% of the borrower's total outstanding equity interests.
- More than 15,000 employees **or** 2019 annual revenues of no more than $5 billion
- Created or organized in the United States with significant operations in and a majority of its employees based in the United States
- Not a participant in one of the other Main Street loan facilities or the Primary Market Corporate Credit Facility (**exception:** businesses that received support through the PPP or obtained an Economic Injury Disaster Loan can be eligible to receive a Main Street loan if they meet the other Eligible Borrower criteria)

- Have not received specific support pursuant to the CARES Act Subtitle A of Title IV (i.e., loans for air carriers, air cargo, and businesses critical to national security)
- If outstanding loans with the lender exist as of December 31, 2019, must have an internal risk rating equivalent to "pass" in the Federal Financial Institutions Examination Council's supervisory rating system on that date

The SBA's affiliation rules apply in determining compliance with the employee count and revenue ceiling limitations. Therefore, if sufficient control exists, a business will have to aggregate the number of employees and 2019 annual revenues of such business with those of its affiliated companies to determine whether it meets the employment and annual revenue limitations. In counting employees, the MSLP advises businesses to refer to SBA regulations by counting all full-time, part- time, seasonal, or otherwise employed persons, excluding volunteers and independent contractors.

A borrower may be a subsidiary of a foreign company if the borrower itself is created or organized in the United States, and the borrower, on a consolidated basis with its subsidiaries, has significant operations in and a majority of its employees based in the United States. However, the proceeds of a Main Street loan may only be used for the benefit of the US borrower, its consolidated US subsidiaries and other affiliates of the borrower that are US businesses.

"Significant operations" in the United States is determined on a consolidated basis together with the borrower's subsidiaries, but not its parent companies or sister affiliates. Although this is not an exhaustive list, a business can determine whether it has significant operations in the United States when, on a consolidated basis with its subsidiaries, greater than 50% of its

- assets are located in the United States;
- annual net income is generated in the United States;
- annual net operating revenues are generated in the United States; or
- annual consolidated operating expenses (excluding interest expense and other expenses associated with debt service) are generated in the United States.

"Majority of employees" based in the United States is determined based on a consolidated basis together with the borrower's subsidiaries, but not its parent companies or sister affiliates.

Adjusted EBITDA

The MSLP sets maximum loan amounts based on the particular loan facility. However, each facility imposes limitations based on the borrower's adjusted 2019 EBITDA and "existing outstanding and undrawn available debt" (which includes the portion of any outstanding PPP loan that has not yet been forgiven, but does not include any outstanding debt of the borrower that is being refinanced by an MSPLF loan):

- **Main Street New Loans**: Lesser of (1) $35 million or (2) an amount that, when added to the borrower's existing outstanding and undrawn available debt, does not exceed four times the borrower's adjusted 2019 EBITDA
- **Main Street Priority Loans**: Lesser of (1) $50 million or (2) an amount that, when added to the borrower's existing outstanding and undrawn available debt, does not exceed six times the borrower's adjusted 2019 EBITDA
- **Main Street Expanded Loans**: Lesser of (1) $300 million or (2) an amount that, when added to the borrower's existing outstanding and undrawn available debt, does not exceed six times the borrower's adjusted 2019 EBITDA

If a borrower is the only business in its affiliated group that has sought funding through Main Street, its affiliated group's debt and EBITDA are not relevant to determining whether such business can qualify, unless such borrower's subsidiaries are consolidated into its financial statements. However, if the borrower has an affiliate(s) that has previously borrowed or has an application pending through a Main Street facility, then the entire affiliated group's debt and EBITDA are relevant to determining such borrower's maximum loan size.

If an entity was established before March 13, 2020 and has no financial record of its own, but has clear predecessors or subsidiaries that can be referenced, the financial records of such predecessors or subsidiaries can be used to calculate adjusted 2019 EBITDA. This nuance potentially allows for M&A activity around the MSLP.

For MSNLF and MSPLF loans, a Main Street lender should require the borrower to adjust its 2019 EBITDA by using the methodology that such lender has previously required for EBITDA adjustments when extending credit to the borrower or, if the borrower is a new customer, similarly situated borrowers on or before April 24, 2020. "Similarly situated borrowers" are borrowers in similar industries with comparable risk and size characteristics.

For MSELF loans, a Main Street lender should require the borrower to adjust its 2019 EBITDA by using the methodology such lender required for adjusting EBITDA when originating or amending the underlying loan on or before April 24, 2020.

If a Main Street lender has used multiple EBITDA adjustment methods with respect to the borrower or similarly situated borrowers (e.g., one for use within a credit agreement and one for internal risk management purposes), the lender should choose the most conservative method it has employed. The lender should document the rationale for its selection of an adjusted EBITDA methodology.

RESTRICTIONS ON THE BORROWER

Adequate Credit Accommodations

Borrowers must be unable to secure adequate credit accommodations from other banking institutions. It is not necessary to show that no credit is available at all from other sources. Instead, the certification may be made if the amount, price, or terms of credit available from other sources are inadequate for the borrower's needs during the current exigent circumstances. Borrowers are not required to show that they have been denied credit by other lenders or to document that the amount, price, or terms of credit available elsewhere are inadequate.

Employee Retention

Borrowers that participate in any MSLP facility should make commercially reasonable efforts to maintain payroll and retain employees during the time that the term loan is outstanding. To make "commercially reasonable efforts," borrowers should undertake good-faith efforts to maintain payroll and retain employees, in light of (1) their capacities, (2) the economic environment, (3) their available resources, and (4) the business need for labor. Businesses that have already laid off or furloughed workers as a result of COVID-19 are still eligible to apply for Main Street loans. The key takeaway here: The MSLP gives deference to a business's judgement.

Affiliates

An affiliated group of companies can only participate in one Main Street facility, and the entire group can only participate in either a Main Street facility or the Primary Market Corporate Credit Facility, which is another lending program authorized under the CARES Act. An affiliated group can have different loans under one type of facility, but the total participation of all borrowers (with the affiliates) cannot exceed the maximum loan size that the affiliated group as a whole is eligible to receive on a consolidated basis.

CARES Act Restrictions

No member of Congress, head of a US federal executive department, the US president or vice president, or family members of any of these individuals (each, a Covered Individual) can have a controlling interest in the borrower (20% or more by vote or value). The borrower must use reasonable diligence to make this certification in good faith (which standard applies to all types of equity interests, including common stock, preferred stock, and equivalent interest in LLCs or partnerships).

Reasonable diligence requires that the borrower

- consider its actual knowledge,
- determine if beneficial owners (of any 5% or greater equity interest) are Covered Individuals, and
- if necessary, ask the beneficial owners to confirm whether they are Covered Individuals.

In addition to its actual knowledge, a borrower may rely on information regarding beneficial ownership which has been disclosed pursuant to sections 13(d) and 13(g) of the Securities Exchange Act of 1934 (Exchange Act). For equity interests held by financial intermediaries, a borrower must consider its actual knowledge (including disclosures pursuant to the Exchange Act) and determine, based on that information, whether any identified beneficial owners (of any 5% or greater equity interest) are Covered Individuals.

The borrower must retain records in respect of this conflict of interest prohibition and compliance with related covenants for the later of (a) 10 years following termination of all Main Street facilities or (b) the period of time required by lender's document retention policies.

Additionally, during the term of any MSLP loan, borrowers cannot do the following:

- Stock buybacks of equity listed on a national securities exchange—through the life of the loan, plus one year
  - ***Exceptions***: Repurchases under a contractual obligation in effect as of March 27, 2020 are permitted. An employee stock ownership plan (ESOP) holding shares of a non-public company with an obligation to repurchase shares allocated to the employee's ESOP account upon the employee's retirement or termination of employment would not be prohibited under these restrictions from making such repurchases.
- Dividends and capital distributions—through the life of the loan, plus one year (the Treasury secretary may waive this limitation upon a determination that such waiver is "necessary to protect the interests of the Federal Government")
  - ***Exceptions***: S corporations and other tax pass-through entities (including tribal businesses) may continue to make distributions to the extent reasonably required to cover their owners' tax obligations in respect of the entity's earnings. Tribal businesses, with ownership interests held by investors other than the tribal government, may make distributions to their tribal government owners only. Preferred stock or any other equity interest in a borrower that provides for mandatory or preferential payment of dividends or other distributions shall be subject to these restrictions unless both the equity interest and the obligation to pay dividends or distributions existed as of March 27, 2020. A dividend or other capital distribution with respect to a borrower's common stock or an equivalent interest held by an ESOP would be subject to restrictions on capital distributions, unless both the equity interest and the obligation to pay dividends or distributions existed as of March 27, 2020.

- The award of stock-based compensation would not be considered a capital distribution and is not subject to restrictions on capital distributions. However, dividend payments made on such stock of the borrower owned by the officer or employee would be prohibited under the restrictions on capital distributions, subject to the above exceptions.
- The award of an interest in a partnership or limited liability company would not be considered a capital distribution and is not subject to restrictions on capital distributions. However, the borrower is prohibited from making a distribution with respect to a partnership or limited liability company interest, including a capital or profits interest, except to the extent reasonably required to cover its owners' tax obligations in respect of the borrower's earnings.

- Executive compensation—through the life of the loan, plus one year
  - Officers and employees who received more than $425,000 in total compensation in 2019 cannot receive more than their 2019 compensation and cannot receive severance pay of more than twice their 2019 compensation
  - Officers and employees who received more than $3 million in total compensation in 2019 cannot receive, during any 12-consecutive-month period, more than $3 million plus 50% of their excess compensation over $3 million

"Total compensation" includes salary, bonuses, awards of stock, and other financial benefits provided by the borrower and its affiliates to an officer or employee of the borrower, but does not include benefits paid in connection with a termination of employment (e.g., severance pay).

A borrower that ***is*** a public company, or is a consolidated subsidiary of public company, must calculate total compensation according to the methodology set out in item 402(c) of Regulation S-K (item 402(c)) (17 CFR 229.402(c)(2)).

A borrower that ***is not*** a public company may choose to calculate total compensation in a manner consistent with the federal tax rules if the borrower meets the criteria described below.

- A borrower that (a) is not a public company and (b) had gross revenues of less than or equal to $10,000 for its 2019 fiscal year may calculate total compensation in a manner consistent with the federal tax rules.
- A borrower that (a) is not a public company and (b) had gross revenues of greater than $10,000 for its 2019 fiscal year may calculate total compensation in a manner consistent with the federal tax rules for all officers or employees who are not Significant Deferred Compensation Recipients (borrower to use US GAAP to make such determination).

  - "Significant Deferred Compensation Recipient" means an officer or employee who, during any 12-month period from January 2019 through the life of the Main Street loan plus one year, has total compensation that exceeds $425,000, out of which the fair value of deferred compensation granted to such officer or employee exceeds 30%.
  - Deferred compensation is a legally binding right to receive compensation awarded in one taxable year but not payable until a later taxable year, and includes stock-based compensation the fair value of which is determined according to FASB ASC topic 718.

A borrower that is not a public company and does not choose to calculate total compensation in a manner consistent with the federal tax rules must use item 402(c). Borrowers must choose an approach upon disbursement of the Main Street loan and apply such approach for the life of the Main Street loan plus one year.

A borrower that has chosen to use the federal tax rules may later be required to switch to using item 402(c) if (1) such borrower later becomes a public company or (2) such borrower's officers or employees that were not Significant Deferred Compensation Recipients later become Significant Deferred Compensation Recipients (***exception***: a borrower that had gross revenues of less than or equal to $10,000 for its 2019 fiscal year is exempt unless it becomes a public company). In each such case, the borrower must include any compensation granted but not paid in the preceding 90-day period in its calculation of total compensation.

The restrictions on compensation, stock repurchase, and capital distributions apply to the MSLP borrower. Accordingly, if two affiliates borrow from the MSLP, each would be subject to the restrictions on compensation, capital distributions, and stock repurchases. However, some restrictions also affect affiliates that are not borrowers. For example, the calculation of total compensation includes salary, bonuses, awards of stock, and other financial benefits received by an officer or employee from the borrower and its affiliates. In addition, the borrower may be restricted from repurchasing shares of its parent(s) if those shares are traded on a national exchange.

Limitations on Use of Proceeds

The CARES Act's restrictions on paying dividends, distributing capital, repurchasing equity, or paying compensation over specified thresholds apply to MSLP loans. Borrowers that are subsidiaries of a foreign company are prohibited from using the proceeds of an MSLP loan for the benefit of a foreign parent, affiliate, or subsidiary. Borrowers also cannot use MSLP loans to repay other debt ahead of schedule. However, borrowers may use the proceeds of an MSLP loan to refinance or accelerate payment of existing debt (1) at the time of origination of an MSPLF loan if the debt was owed to a different, unaffiliated lender, or (2) under the limited exception for mandatory and due debt and interest payments after the origination of the Main Street loan.

LENDER ELIGIBILITY

Eligible Lenders include US federally insured depository institutions (including banks, savings associations, and credit unions) as well as any US branch or affiliate of a foreign bank. Nonbank financial institutions are not considered Eligible Lenders at this time.

To participate in the MSLP, lenders must first register by submitting certain documents to the Main Street SPV (as noted above). Multiple affiliated entities may register as lenders under the program. In the Lender Registration Certifications and Covenants, a lender must make a one-time certification, among other things, as to the following:

- It is an eligible lender (and it must notify the Main Street SPV and FRB if, at any time prior to September 30, 2020, it is no longer a lender).
  - The eligible lender is not required to have been the lender that originally extended the loan underlying an MSELF upsized tranche.
- No Covered Individual has a controlling interest in the lender (and it must notify the Main Street SPV and FRB, if at any time prior to September 30, 2020, such certification ceases to be true).
  - The lender must use reasonable diligence, as outlined above in the borrower CARES Act restrictions section, to make this certification in respect of the lender in good faith.
  - The lender also certifies that it will retain records in respect of this conflicts of interest prohibition and compliance with related covenants for the later of (a) 10 years following termination of all Main Street facilities or (b) a period of time required by lender's document retention policies.

- It has a reasonable basis to believe that, as of the date of borrowing, 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 (and it must notify the Main Street SPV and FRB if, at any time prior to September 30, 2020, such certification ceases to be true).

A lender is also required to complete and submit Lender Wire Instructions for the bank account into which the Main Street SPV will transfer the purchase amount, servicing fees, and any other payments related to Main Street loan transactions.

LOAN DOCUMENTATION & REQUIRED COVENANTS

Each lender is allowed to use its own form of loan documents when making loans to borrowers, adjusted only as appropriate to reflect the requirements of the program. In order for the Main Street SPV to participate in a loan, the loan documentation must reflect certain required items set out in the appendices to the Main Street FAQ.

While lenders have flexibility in specifying how prepayments of Main Street loans can be applied against future payments, they should make efforts to align their approach with the expected amortization schedule specified for each loan type under the program.

Main Street loans must have an interest rate of LIBOR (one or three month) plus 300 basis points (LIBOR floors are not permissible), and lenders may require borrowers to pay the origination and transaction fees but are not permitted to charge any additional fees except de minimis fees that are customary and necessary (e.g., appraisal and legal fees). However, lenders may charge customary consent fees if such fees are necessary to amend existing loan documentation in connection with the upsizing of a loan under the MSELF.

The transaction fee will be based on the principal amount of the MSLP loan at the time a loan participation is submitted for sale to the Main Street SPV. Where deferred interest has been capitalized and added to the principal amount and purchase amount, the transaction fee will be based on the principal amount including such capitalized interest. Unpaid interest should be capitalized in accordance with the lender's customary practices for capitalizing interest (e.g., at quarter-end or year-end). The Federal Reserve does not expect that interest would be capitalized more frequently than monthly. Lenders must incorporate (1) two required covenants (lien covenant and financial reporting covenant), (2) a mandatory prepayment provision, and (3) a cross-acceleration provision, each with model language (or substantially similar language) into their agreements for Main Street loans.

Required Covenants

Priority and Security Covenant

Loans under the MSNLF must not be, at the time of origination or at any time during the term of the loan, contractually subordinated in terms of payment priority to any of the borrower's other "Loans or Debt Instruments" (as defined above and discussed further below).

Loans under the MSELF and MSPLF 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, which may be senior in lien priority to MSPLF loans and which may be senior in payment and lien priority to MSELF loans). Loan documentation for MSPLF loans and MSELF loans upsized tranches that are bilateral facilities may not include provisions that would cause such loans to be contractually subordinated (whether in or outside of bankruptcy), however, nothing specific needs to be included stipulating that such loans would not be contractually subordinated.

Main Street Priority Loan Facility

- If the loan is **secured** because the borrower has other secured debt that is not Mortgage Debt, the Collateral Coverage Ratio (defined below) under the MSPLF used at the time of origination of the loan must be either (1) at least 200% or (2) not less than the aggregate Collateral Coverage Ratio for all of the borrower's other secured Loans or Debt Instruments (other than Mortgage Debt). Priority loans **do not** need to share in all of the collateral that secures such other Loans or Debt Instruments. However, if MSPLF loans are secured by the same collateral as any of the borrower's other Loans or Debt Instruments (other than Mortgage Debt) because the borrower has other secured debt that is not Mortgage Debt, then the lien upon such collateral must be and remain senior to or pari passu with the lien(s) of the other creditor(s). Borrowers would be responsible for valuing the collateral.
  - "Collateral Coverage Ratio" means (a) the aggregate value of any relevant collateral security, including the pro rata value of any shared collateral, divided by (b) the outstanding aggregate principal amount of the relevant debt. This definition does not address what "relevant collateral" is and how to determine "pro rata" value of shared collateral.

- MSPLF loans can be **unsecured** only if the borrower does not have, as of the date of origination, any secured Loans or Debt Instruments (other than Mortgage Debt). If a borrower has no other secured debt (other than Mortgage Debt), the Collateral Coverage Ratio and pari passu requirements <u>do not apply</u> to the collateral that secures the MSPLF Loan. However, unsecured MSPLF loans must not be contractually subordinated in terms of payment priority to any of the borrower's other unsecured Loans or Debt Instruments.
- **Life of the Loan.** In order to comply with the priority and security requirement after the date of origination, the loan documentation must
  - ensure that the loan does not become contractually subordinated in terms of priority to any of the borrower's other Loan or Debt Instruments; and
  - contain a lien covenant or negative pledge that is of the type with exceptions, limitations, carve-outs, baskets, materiality thresholds, and qualifiers consistent with the lender's ordinary course lending to similarly situated borrowers.

Main Street Expanded Loan Facility

- If, at the time of origination, the borrower has any other secured Loans or Debt Instruments, MSELF loans must also be **secured**. Such loans must be secured by the same collateral (including, if applicable, any Mortgage Debt) securing any other term loan tranche(s) under such underlying credit facility (but not revolver tranches) on a pari passu basis.
- The MSELF loan upsized tranche can be **unsecured** if, at the time of origination, the borrower does not have any other secured Loans or Debt Instruments (other than Mortgage Debt that does not secure any other tranche of the underlying credit facility).
- **Life of the Loan.** In order to comply with the priority and security requirement after the date of origination, the loan documentation must
  - ensure that the upsized tranche does not become contractually subordinated in terms of priority to any of the borrower's other Loan or Debt Instruments;
  - ensure that the upsized tranche remains secured on a pari passu basis by the collateral securing the underlying credit facility; and
  - contain a lien covenant or negative pledge that is of the type and that contains exceptions, limitations, carve-outs, baskets, materiality thresholds, and qualifiers consistent with the lender's ordinary course lending to similarly situated borrowers (with respect to an underlying existing multi-lender credit facility, any lien covenant

or negative pledge that was negotiated in good faith before April 24, 2020 is sufficient to satisfy this requirement).

Financial Reporting Covenant

- For bilateral **MSNLF**, **MSPLF**, and **MSELF** loans, the loan documentation must contain a financial reporting covenant requiring extensive financial information and calculations (i.e., assets, liabilities, EBITDA, debt, distributions, etc.) to be delivered quarterly and annually. The financial reporting regime is set out in detail in Appendix C of the Main Street FAQ.
- For **MSELF** loans that are part of multi-lender facilities, the facility must include a financial reporting covenant requiring delivery of the specified financial information required for other Main Street loans. However, the underlying credit facility's financial reporting provision will be deemed sufficient if it was negotiated in good faith before April 24, 2020.

As discussed above, the quarterly reporting requirement is burdensome and contains information that is in excess of what would have been market in middle market term loan deals prior to COVID-19.

Mandatory Prepayment Provision

- For bilateral **MSNLF**, **MSPLF**, and **MSELF** loans, the loan documentation must contain a mandatory prepayment provision related to a material breach of the borrower's certifications in Section 2 (CARES Act Borrower Eligibility Certificates and Covenants) and Section 3 (FRA and Regulation A Borrower Eligibility Certifications) of the Borrower Certifications and Covenants. If the Board of Governors determines that a borrower has materially breached covenants or made a material misrepresentation with respect to the certifications, then the Board of Governors will notify the lender in writing, and the borrower will be required to prepay the Main Street loan in full (along with any accrued and unpaid interest thereon). If the borrower is unable to prepay the loan within two business days of the triggering notice, it may result in a payment event of default and thus may trigger cross-defaults or cross-payment defaults in other credit agreements.
- For **MSELF** loans that are part of multi-lender facilities, the facility must contain the same mandatory prepayment provision if the percentage (or number) of lenders required to consent to a new mandatory prepayment provision under the existing agreements consents to any other changes to the loan documents in the process of upsizing the loan or selling the participation to the Main Street SPV. If the existing lenders' agreement is unanimous, the mandatory prepayment provision must be inserted into the loan documents as a "sacred right" requiring 100% lender consent for amendments or waivers to such provisions.

Among the certifications and covenants that would **not** trigger mandatory prepayment if materially breached, but which are in scope of the borrower's indemnity, include the following:

- Borrower is not an Ineligible Business (as defined in SBA regulations)
- Commitment to refrain from repaying other debt
- Forward-looking solvency
- Certification associated with holding company borrowers

For bilateral **MSNLF**, **MSPLF**, and **MSELF** loans, the Board of Governors can determine that material misrepresentations have been made, thereby triggering a mandatory prepayment of the debt. It appears the lender cannot unilaterally waive the requirement to prepay, given the FRB has the economic risk, so this may be challenging for borrowers in the market to bear.

Cross-Acceleration Provision

- For bilateral **MSNLF**, **MSPLF**, and **MSELF** loans, the loan documentation must contain a cross-acceleration provision that would trigger an event of default under the Main Street loan if other debt owed by the borrower to the Main Street lender or any affiliate of the Main Street lender is accelerated.
- For **MSELF** loans that are part of multi-lender facilities, the facility must include a similar cross-acceleration provision. However, the underlying credit facility's cross-default or cross-acceleration provisions will be deemed sufficient if they were negotiated in good faith before April 24, 2020.

LOAN PROCESS

Lenders have two options for funding loans under the MSLP:

1. **Funded Loan**: A lender may, but is not required to, commit and pre-fund Main Street loans and then sell a participation in such loans to the Main Street SPV by submitting all required documentation within 14 days of the closing of such loans (**exception**: for the first 14 days that the Main Street SPV purchases participations, the Main Street SPV will accept submission of any Main Street loan for sale of a participation interest, so long as such Main Street loan was originated after April 24, 2020 and before the date that the relevant Main Street facility begins purchasing participation in loans).

2. **Condition of Funding**: A lender may extend a loan to a borrower but make the funding of the loan contingent on a binding commitment from the Main Street SPV that it will purchase participation in the loan. The lender is required to fund the loan within three business days of the date of the commitment letter (template available here). The Main Street SPV will generally be able to advance funds to purchase the participation within one business day of receiving notice that the loan was funded, if such notice is received before 7:00 pm ET. If the notice that the loan was funded is submitted by the lender on or after 7:00 pm ET, the notice will be treated as if it were received the next business day.

   - The option in which the lender may pursue a commitment letter from the Main Street SPV to have it purchase a participation is going to potentially cause issues in leveraged financings and deals in which there is a "no outs" commitment needed on the part of the borrower vis a vis another party. For example, how would a borrower seeking an MSELF loan to finance a "no outs" transaction rely on the MSELF loan actually being funded if the Main Street SPV does not approve the relevant lender's paperwork?

Any loans that were issued in reliance on the April 30, 2020 term sheets will be accepted for purchase by the Main Street SPV during the first 14 days of the relevant facility's operation, so long as (1) the required documentation is complete and consistent with the relevant facility's requirements under such term sheets, and (2) the loan was funded before June 10, 2020. Such loans may also be amended or refinanced in accordance with the June 8, 2020 terms, but lenders and borrowers must then execute the legal forms and agreements that align with the June 8, 2020 term sheets. Lenders may not charge borrowers any additional fees in connection with such refinancing, apart from customary and necessary fees for services (e.g., legal fees).

CERTIFICATIONS & COVENANTS

Borrowers

In addition to the facility-specific certifications and the other certifications required by statutes and regulations, a borrower must make the following certifications:

- It is an Eligible Borrower under the CARES Act and under the terms of the facility to which it is applying.
- It is created or organized in the United States with significant operations in and a majority of its employees based in the United States.
- It is unable to secure adequate credit accommodations from other banking institutions.
- It has provided financial records and a calculation of its adjusted 2019 EBITDA to the Main Street lender, and such financial records fairly represent its financial condition.
  - Borrowers that are subject to or that already prepare their financials in accordance with generally accepted accounting principles (GAAP) must submit GAAP-compliant financial records in connection with this certification.
  - Borrowers that typically prepare audited financial statements must submit audited financial statements or financial statements prepared for the purpose of filing taxes (or the most recent audited or reviewed financial statements if the borrower does not yet have audited or reviewed financial statements for 2019). If a borrower's 2019 fiscal year does not coincide with calendar year 2019, such borrower may use its 2019 fiscal year (unless the lender requires otherwise).
  - Borrowers that typically prepare financial statements that consolidate the borrower with its subsidiaries, must submit consolidated financial statements.
- It will commit to follow the restrictions on employee compensation, and the prohibition on buybacks and paying dividends on common stock, that apply to direct loan programs under the CARES Act.
- It has a reasonable basis to believe that, as of the date of origination of the Main Street 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 (a borrower has been generally failing to pay undisputed debts as they become due to the extent it is behind on its debts for reasons other than disruptions to its business resulting from COVID-19).
- It will refrain from repaying principal balance or interest on any debt until the Main Street loan is repaid in full, unless the debt or interest payment is "mandatory and due."
- It will not seek to cancel or reduce any of its committed lines of credit with the Main Street lender or any other lender.
- If the borrower is a holding company, it must further certify that (1) the loan is fully guaranteed on a joint and several basis by all of its subsidiaries that are included in the EBITDA calculation and (2) if the loan is secured, such guarantees are also secured.

If a borrower is acquired or otherwise merged into another business, the acquiring or resulting entity would generally assume all rights and obligations of the borrower, including the rights and obligations of the predecessor entity under a Main Street loan.

Mandatory & Due

Principal and interest payments are "mandatory and due" (1) on the future date upon which they were scheduled to be paid as of the date of origination of a Main Street loan, or (2) upon the occurrence of an event that automatically triggers mandatory prepayments under a contract for indebtedness that the borrower executed before the date of origination of a Main Street loan (any such prepayments triggered by the incurrence of new debt can only be paid if such prepayments are de minimis).

The borrower may continue to pay, and the lender may request that the borrower pay, interest or principal payments on outstanding debt on or after the payment due date, so long as the payment due date was scheduled before the date of origination of a Main Street loan. The borrower may also refinance debt that is maturing no later than 90 days from the date of such refinancing (such refinancing may not be done at origination of the MSLP loan, unless it is a qualifying MSPLF refinancing). Borrowers and lenders are, however, discouraged from originating Main Street loans for the purpose of funding debt payments that are, or are presently expected to become, mandatory by operation of a debt covenant or mandatory prepayment provision.

This requirement will not prevent the lender from (1) exercising remedies, including acceleration, upon an event of default under other debt or (2) accepting repayments on a line of credit from the borrower in accordance with the borrower's normal usage for such line of credit.

Indemnity

The borrower agrees to indemnify the lender, Main Street SPV, FRB, and Treasury secretary and their respective affiliates for liabilities, claims, losses, and expenses arising out of a material breach of any of the borrower's representations, warranties, covenants, or agreements in those certifications and covenants.

Lenders

Apart from the certifications a lender must make at the time of registration with the Main Street SPV, a lender must also make transaction-specific certifications and covenants.

The lender is required to certify that the borrower has delivered the transaction-specific Borrower Certifications and Covenants. The lender may rely upon the Borrower Certifications and Covenants without independently verifying its contents or actively monitoring the borrower's ongoing compliance therewith. However, the lender must certify that, following due inquiry, it has no knowledge or reason to believe that the certifications made in the Borrower Certifications and Covenants are incorrect or untrue in any material respect.

The lender must also certify the following:

- The subject loan is eligible (e.g., five-year maturity, loan amount, interest rate, and subordination) for the applicable MSLP facility, and the terms of the loan documentation meet all of the requirements of such facility.
- It will not request that the borrower repay principal balance or interest on any debt owed to the Main Street lender until the Main Street loan is repaid in full, unless the debt or interest payment is "mandatory and due" or in the case of default and acceleration.
- The participation sold to the Main Street SPV (95%) and the percent of the loan retained by the lender (5%).
  - Lenders that sell a participation to the Main Street SPV cannot share their 5% retention of the MSELF upsized tranche with other members of a multi-lender facility.
- It will not cancel or reduce existing lines of credit with the borrower, except (1) termination upon an event of default as provided in the existing loan documents, (2) reduction or termination of uncommitted lines of credit, (3) expiration of existing lines of credit in accordance with their terms or (4) reduction of availability under existing lines of credit in accordance with their terms due to changes in borrowing bases or reserves in asset-based or similar loans.
- If the borrower had other loans outstanding with the Main Street lender as of December 31, 2019, the Main Street lender must further certify that such loans had an internal risk rating equivalent to a "pass" in the Federal Financial Institutions Examination Council's supervisory rating system on that date.

A lender may rely on—and is not expected to independently verify, except for the formation certifications—a borrower's certifications and covenants. A lender is not expected to actively monitor ongoing compliance with covenants required for borrowers. However, if a lender becomes aware that a borrower has made a material misstatement or otherwise breached a covenant during the term of a Main Street loan, the lender must notify the FRB.

Investigation & Enforcement Risk

The Main Street SPV, Federal Reserve, or Treasury may refer any knowing material misrepresentation to relevant law enforcement authorities for investigation and possible action in accordance with criminal and civil law. FCA liability can arise for anyone who, or any entity that, knowingly submits a false claim to the government or causes another to submit a false claim to the government (or knowingly makes a false record or statement to get a false claim paid by the government).

Additionally, FCA liability can arise from improperly retaining federal funds or avoiding paying them back (e.g., if a borrower received more than the amount of the loan they were to receive). Such liability can arise where the government initiates an investigation or from a private whistleblower who challenges an entity’s claim for payment with federal funds.

A certification could also give rise to civil FCA liability where a materially false certification is made with (1) actual knowledge, (2) deliberate ignorance of the truth or falsity of the information, or (3) reckless disregard of the truth or falsity of the information.

This is broader than what gives rise to criminal liability and is why the process for the certifications is so important—it is not enough to hope that certifications are accurate; the absence of any process to ensure that information provided to the government is truthful could be viewed as deliberate ignorance or as recklessly disregarding whether the information is truthful.

In other settings where explicit certifications are made to the government by senior executives, a best practice can be to support the certifications with a process to gather necessary documents or sub-certifications. Here, for example, for each of the certification provisions, businesses should consider documenting the specific certification and/or the diligence performed to support the certification. Some areas where that may be especially warranted are (1) those analyses that call for a specific representation as to eligibility under SBA rules, (2) qualification as a US business, and (3) for those provisions that address current business circumstances (e.g., solvency and unavailability of credit elsewhere).

A CEO or CFO signing the Borrower Certification and Covenants could rely on her/his assessment of the underlying documents or on a sub-certification (e.g., that a finance executive certifies to the CFO that the entity can make the certification as to solvency or credit elsewhere). The Borrower Certification and Covenants included in the MSLP loan documentation also expand express limitations in the CARES Act on the granting of Main Street loans to debtors in bankruptcy (see section 4003(c)(D)(V) of the CARES Act). While the CARES Act renders ineligible a borrower that is a debtor in bankruptcy, the Borrower Certification and Covenants will require a borrower to certify that it has the ability to meet its financial obligations for at least 90 days and does not expect to file for bankruptcy protection during that period.

Given an unpredictable future and the possibility that an intervening bankruptcy could render previously solicited Main Street funds unauthorized, borrowers should only make the required certifications when they can do so comfortably and in good faith. Accordingly, borrowers should closely monitor their financials, including good faith projections of future performance, and speak with advisers before applying for a Main Street loan, particularly if the business is evaluating the potential need for bankruptcy relief down the road.

The key factor in mitigating FCA and criminal enforcement risk is to be truthful and not misleading in the representations. In making their respective certifications, lenders and borrowers should consider that knowingly false certifications (e.g., a representation that an entity is a US business when it does not meet the definition of a US business) carry the risk of criminal enforcement. Criminal enforcement could arise from certifications that are *knowingly false* when they are made.

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LOAN PARTICIPATION

Participation Structure

In connection with the Main Street SPV's purchase of participation interests, lenders, borrowers, and the Main Street SPV must enter into certain documents that will effect the sale of a qualifying participation interest and govern funding mechanics, assignments, transfers, elevation rights, and voting rights.

The participation documentation required under the MSLP is primarily modeled on LSTA participation documents but includes key provisions distinct to the MSLP.

The below table highlights the series of participation documents required by the MSLP, as well as the parties responsible for executing and delivering such documents on the agreement date.

Document	Borrower	Lender	Main Street SPV
Participation Agreement			
Standard Terms and Conditions		X	X
Transaction-Specific Terms*		X	X
Servicing Agreement*		X	X
Assignment and Assumption Agreement*	X	X	
Co-Lender Agreement			
Standard Terms and Conditions	X	X	
Transaction-Specific Terms*	X	X	

*Documents must be delivered with each Main Street loan

Below we have highlighted some key differences between a customary LSTA participation transaction and the participation structure under the MSLP.

Participation Agreement

The MSLP participation agreement (Participation Agreement) is composed of the Participation Agreement Transaction-Specific Terms and the Participation Agreement Standard Terms and Conditions, incorporated by reference to the former document. The Participation Agreement governs the relationship between the lender, as a seller, and the Main Street SPV, as a buyer of a participation interest in the Main Street loan.

Unlike a traditional participation for a loan where a buyer and seller enter into a participation agreement and rights as to elevation and voting are negotiated (which can vary significantly from transaction to transaction), under the MSLP, all rights with respect to elevation and voting are dictated by the MSLP terms and are already set forth in the Participation Agreement.

Timing of Participation Sale

The participation documents do not need to be entered into simultaneously with the lender's funding of the Main Street loan. Lenders can either (1) fund the loan and then apply to the Federal Reserve through its Main Street SPV and submit fully executed documents within 14 days after funding for review to the Main Street SPV, or (2) make funding of the loan conditioned on a binding commitment letter from the Main Street SPV to purchase the participation interest.

Payment-in-Kind Interest

The updated FAQ notes that all accrued (but uncapitalized) payment-in-kind (PIK) interest on the participation interest portion of the Main Street loan is for the account of the Main Street SPV, regardless of when such interest accrued, so the lender does not retain the benefit of the accrued interest on the participated amount during the period between funding and the Participation Agreement date.

Since the purchase price is based upon the purchase amount as of the Participation Agreement date, the Participation Agreement does not require the Main Street SPV to pay for such PIK interest if it has not yet been added to the principal amount as of the Participation Agreement's effective date.

Transfer and Elevation Rights

Under standard LSTA participation documentation, the seller's consent is required for the buyer to be able to transfer any of its rights under the participation agreement (such consent not to be unreasonably withheld or delayed). Additionally, the parties typically negotiate if the buyer can sub-participate its rights to a third party and whether the participation can be elevated into an assignment, which may be requested by either party. If either party so requests, then the parties work together to follow the assignment provisions of the underlying loan document in order to have the participated interest actually assigned to the buyer.

By contrast, under the current MSLP, pre-elevation transfers, sub-participations, and elevation to the buyer or a third-party assignee are pre-negotiated in the Participation Agreement, and the Assignment and Assumption Agreement and the Co-Lender Agreement are signed in advance, as discussed further below.

The Main Street SPV is generally permitted to sell its participation only with the consent of the lender and to elevate its participation to an assignment only with the consent of the applicable parties under the credit documents. The following "specified permitted transfers" permit transfers and/or elevations of the participation without the consent of any party at such time, since all requisite consents are obtained on the Participation Agreement date:

- Pre-elevation transfer or sub-participation if all of the interests are transferred to a governmental assignee
- Elevation to buyer or another assignee, pre-elevation transfer or sub-participation:
    - If any obligor has failed to make any payment under the credit agreement (**note**: if there is a revolving facility as well as a term loan, this applies even if there is only a default under the revolving facility)
    - Upon bankruptcy or insolvency of the borrower
- Elevation to buyer, pre-elevation transfer or sub-participation:

  - If required to do so by any statute or court
  - Upon insolvency of seller or a direct or indirect parent company of seller

- Elevation to buyer (buyer automatically deemed to request an elevation) if the seller takes a Core Rights Act (discussed below) or refrains from taking an action that would constitute a Core Rights Act that would, in either case, result in loan forgiveness which the buyer reasonably believes would violate the CARES Act

While the Main Street participation documentation provides the pre-consent to elevation under the foregoing circumstances, the updated FAQ notes that the Federal Reserve does not expect the Main Street SPV to use this right except in circumstances where (1) the economic interests of the lender and the Main Street SPV are misaligned, or (2) the loan amount is relatively large in comparison to other loans in the Main Street SPV's portfolio of participations.

Core Rights Acts

In a traditional LSTA participation, the buyer and seller agree at the time the participation is entered into as to which modifications or waivers to the underlying documents the seller can agree to without the buyer's consent. These can vary from transaction to transaction. Similar to standard LSTA participation agreement documentation, the lender under the MSLP is granted sole authority for most actions in connection with the loan, but the lender must obtain the buyer's consent for negotiated "sacred rights," referred to in the Main Street documentation as the "Core Rights Acts."

The Core Rights Acts are similar in many instances to what a traditional buyer and seller would negotiate in a typical LSTA syndicated participation (e.g., extension of date of mandatory payments, reduction of interest, modification to requisite lender definitions and provisions, and modifications to pro rata sharing provisions), but the following Core Rights Acts are less customary and require the consent of the buyer under the Main Street participation documentation:

- Limitations, waivers, or modifications to financial statement delivery/reporting
- Action (or inaction) that causes an adverse effect on the transferred rights that would be disproportionate to the effect of any other class of obligations under the credit documents (not just limited to same type or class of loans)
- Action (or inaction) relating to default or event of default upon the acceleration of any other debt owed by the borrower to the seller or an affiliate of the seller
- Action (or inaction) that causes any amendment/modification/waiver with respect to any provision in the credit documents that provides a default or event of default upon the acceleration of any other debt owned by the borrower to the seller or an affiliate of the seller
- Action (or inaction) that causes the exercise, or failure to exercise, of any rights or remedies with respect to loan collateral at a time that the seller or seller's affiliate is exercising rights or remedies with respect to other debt obligations of the borrower owing to the seller or the seller's affiliate, the default under which results in that debt being accelerated

Servicing Agreement

The servicing agreement under the MSLP (Servicing Agreement) sets forth the rights of the Main Street SPV and the duties of the lender as servicer of the Main Street loan. Such duties include customary administrative agent responsibilities over the participation interest and delivery of financial reporting under the financial reporting covenants of the Main Street loan documentation. Additionally, the Main Street SPV is allowed to terminate the Servicing Agreement and remove the lender as servicer at any time for "cause" as defined in the Servicing Agreement, which is customary. As compensation for the lender's services, the Main Street SPV pays an annual servicing fee based on the outstanding principal amount of the Main Street loans, however, the updated FAQ notes that such fee does not represent any type of recourse or credit support for the participation interest. The updated FAQ also notes that this servicing relationship between the lender and the Main Street SPV under the Servicing Agreement does not impact the determination that the sale of participation interests are considered a "true sale" (discussed below).

Assignment & Assumption Agreement, Co-Lender Agreement

The assignment and assumption agreement under the MSLP (Assignment and Assumption Agreement) is executed by all parties, other than the assignee at the time of the sale of participation interest. This differs from the process in a traditional participation, where the assignment and assumption agreement is executed at time of elevation and subject to the consent of the applicable parties at such time. Upon the occurrence of a specified permitted transfer, all that is required for the Assignment and Assumption Agreement to become effective is for the buyer (or a third party assignee selected by the buyer to countersign and deliver the fully-executed agreement to the agent together with the MSLP co-lender agreement (Co-Lender Agreement) (if required).

If the underlying loan document is a bilateral agreement and the participation is elevated, then the buyer (or the designated assignee, as the case may be) will sign and deliver the Co-Lender Agreement, which, like the Assignment and Assumption Agreement, is also signed and delivered on the participation sale date by the borrower and the seller. The Co-Lender Agreement sets forth the rights between the buyer and seller, as co-lenders. Once the Co-Lender Agreement is effective, it transforms a bilateral agreement into a multi-lender facility with traditional agency provisions, with the initial lender serving as the agent.

The Co-Lender Agreement contains traditional agency appointment provisions, including authorization to file proofs of claim in bankruptcy, manage collateral, and release guarantees upon certain conditions. As with any multi-lender facility, voting is generally vested with the majority lenders, with the customary "sacred rights" requiring unanimous or affected lender consent which, in the Co-Lender Agreement, generally track the Core Rights Acts in the Participation Agreement. Further, remedies are exercised upon and during the continuance of an event of default "at the request of the Required Lenders," so there is no separate agent discretion to exercise remedies without majority lender direction.

TREATMENT OF PARTICIPATION AS TRUE SALE

Lenders may sell a percentage of participation in Main Street loans to the Main Street SPV (95%). Such sales will be structured as "true sales" under applicable law and must be completed expeditiously after the origination of the loan.

Consistent with the intended true sale of the participation, the Participation Agreement provides for a complete and irrevocable transfer by the lender of the participation interest and does not allow the lender to purchase or acquire or otherwise repurchase or reacquire the participation interest once it has been sold to the Main Street SPV, nor does it give the lender any right of first refusal or other similar rights, or pay any additional amount for a loss of value with respect to such participation interest once it has been sold to the Main Street SPV. Similarly, the Main Street SPV cannot put the participation interest back to the lender.

Further, the lender does not guarantee prepayment of the participation interest of the Main Street loan underlying such interest nor is there any recourse inconsistent with the sale of the interest, which includes, as set forth in the updated FAQ, that the participation interests purchased by the Main Street SPV qualify for a safe harbor in relation to both the Federal Deposit Insurance Corporation (FDIC) resolution proceedings and the National Credit Union Administration (NCUA) resolution proceedings.

The transfer of an undivided participation in Main Street loans is structured with the intent to (a) meet the accounting definition of a participating interest; (b) qualify as a "true sale" under the Bankruptcy Code; and (c) meet the criteria for sale accounting outlined in ASC 860, Transfers and Servicing.

The program transactions terms, which are consistent with a true sale, include the following:

- The express language of the Participation Agreement reflecting
  - the intent of the parties to sell an undivided participation interest of 95%,
  - a complete and irrevocable transfer by the Main Street lender of the rewards and risks of ownership of the participation interest,
  - that the participation interest cannot be voided or rescinded, and
  - the intent of the parties to relinquish the benefits and risks associated with ownership of the participation interest.
- The economic substance of the transfer of the participation interest is a sale.
- The Main Street lender will receive the entire consideration for the participation interest representing at least fair market value on the closing date.

The FRB has additionally clarified that it will not assert in any proceeding that the sales of the participation interests are other than true sales.

Lenders would generally be able to support the conclusion that the transfer of a participation in Main Street loans made in accordance with the program requirements qualifies for sale accounting under ASC 860. However, a lender will need to evaluate any entity-specific considerations in determining the appropriate conclusion.

BANKRUPTCY

Under Section 507(a)(2) of the Bankruptcy Code, claims of the Main Street SPV in the bankruptcy case of a borrower would have been treated as unsecured priority claims (due to the priority mandated for loans authorized under Section 13(3) of the Federal Reserve Act), potentially elevating the claims of the Main Street SPV above the claims of a Main Street lender resulting from the lender's 5% risk retention requirement.

To avoid a potential chilling effect on a lender's willingness to participate in the Main Street program as a result of these unequal rights and to avoid unintended consequences on a borrower's ability to reorganize and restructure its debts in the event of distress as a result of the Main Street SPV's expanded rights, the Participation Agreement and Co-Lender Agreement expressly waive the Main Street SPV's rights under Section 507(a)(2) of the Bankruptcy Code.

Per the FAQ, the FRB has structured the transfer of interests in financial assets under the Participation Agreement from a Main Street lender to the Main Street SPV with the intent that it would qualify for the safe harbor regulations adopted by (a) the FDIC under 12 CFR 360.6(d)(1), and (b) the board of the NCUA under 12 CFR 709.9(d)(1), in each case regarding the treatment of financial assets transferred in connection with a qualified securitization or participation. The safe harbor under the regulation applicable to the FDIC provides that the FDIC, acting in a conservatorship or receivership capacity, will not use its statutory insolvency authority to repudiate contracts to which an insolvent depository institution is a party in cases involving the depository institution's sales of interests in qualified securitizations to a third party. A similar analysis applies to the regulation applicable to the NCUA with respect to insolvent credit unions.

REGULATORY TREATMENT

The regulatory treatment of the three Main Street loan facilities is generally similar to existing regulatory capital and other regulatory/supervisory requirements. Further, any credit risk mitigant permitted under the current regulatory capital rules for secured loans may be applied to reduce the regulatory capital required to be maintained against the retained participation interests. However, there appear to be no "special rules" or forbearances under current regulatory capital requirements for Main Street loans.

Retained Participation

- The participation interests retained by lenders under the three Main Street facilities are treated as on-balance-sheet assets for risk-based and leverage capital purposes, and are presumptively assigned a 100% risk-weighting like any other standard corporate exposures.
- The treatment of the retained participation interests for Main Street loans, for stress testing and other supervisory risk management purposes, will be consistent with existing supervisory requirements (with no special consideration or dispensation given to the retained interests in these loans).

Sold Participation

- The participation interests in Main Street loans (including the upsized tranches of MSELF loans) sold to the Main Street SPV, however, will be treated as "true sales" and therefore may be taken off the regulatory balance sheet of the lender.

In connection with anti-money laundering and know-your-customer requirements associated with loans to borrowers, existing loan customers that apply for Main Street loans will **not** be treated as new customers (e.g., reverification of beneficial ownership information will not be necessary). Further, verification of customer due diligence information will **not** be separately required for existing borrowers if the lender has not already obtained the necessary beneficial ownership information.

Although the federal banking agencies are encouraging lenders to work with borrowers impacted by COVID-19, lenders generally are expected to evaluate and approve Main Street loans consistent with existing safety-and -oundness standards for commercial lending relationships. Stated otherwise, the latest Main Street program guidance does not suggest that there will be any material departure from existing safety-and-soundness standards in the review of these loans by bank supervisory agencies. That said, the banking agencies will be applying existing supervisory guidance applicable to institutions affected by a major disaster.

Lending Limit

For a lender that is a national bank, federal savings association, or state savings association, loans made under the MSLP apply toward such lender's lending limit as follows:

- **Funded Loan.** Since these loans are funded before the lender seeks to sell a participation to the Main Street SPV, the full amount of the loan would count toward the lender's lending limit until such time as the Main Street SPV has purchased the participation (i.e., once the lender has received full payment by the Main Street SPV). After purchase by the Main Street SPV, the portion of the loan that has been sold as a participation to the Main Street SPV will no longer be treated as a loan to the relevant borrower for purposes of the Office of the Comptroller of the Currency's (OCC's) lending limit regulations.
- **Condition of Funding**. If the lender enters into a loan agreement for which funding of such loan is contingent on the binding commitment from the Main Street SPV to purchase a participation in the loan, the lender need only include the retained percentage of the loan when calculating its lending limit to the borrower (so long as such lender notified the Main Street SPV that the loan was funded by the specified deadline). Loans extended in this manner are structured to be exempt loan participations under the OCC's regulation (12 CFR 32.2(q)(2)(vi)(A)-(B)). In instances where funding from the Main Street SPV occurs more than one business day after the loan is funded by the lender, the entirety of the loan will be treated as a loan to the relevant borrower and count toward the lender's lending limit (provided such delays were outside of the lender's control). However, any amount of the loan exceeding the lender's lending limit will not be considered a violation and will instead be treated as nonconforming for the interim period under 12 CFR 32.2(q)(2)(vi)(B). Once the borrower receives full payment from Main Street SPV for the portion of the loan that has

been sold as a participation to the Main Street SPV, that portion of the loan will no longer be treated as a loan to the relevant borrower for purposes of the OCC's lending limit regulations.

PUBLIC REPORTING

The Federal Reserve announced that it will follow extensive reporting procedures around the MSLP by reporting on a monthly basis:

- Names and details of participants in each program
- Amounts borrowed and interest rate charged
- Overall costs, revenues, and fees for each facility

CORONAVIRUS COVID-19 TASK FORCE

For our clients, we have formed a multidisciplinary Coronavirus COVID-19 Task Force to help guide you through the broad scope of legal issues brought on by this public health challenge. Find resources on how to cope with the post-pandemic reality on our NOW. NORMAL. NEXT. page and our COVID-19 page to help keep you on top of developments as they unfold. If you would like to receive a daily digest of all new updates to the page, please subscribe now to receive our COVID-19 alerts, and download our biweekly COVID-19 Legal Issue Compendium.

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