Seyfarth

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Real Estate on Main Street

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The Federal Reserve Bank of Boston (Fed) recently issued updated FAQs, form agreements and instructions for the Main Street Lending Program (MSLP). The MSLP was established pursuant to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to purchase up to $600 billion in loans from eligible borrowers. This Legal Update sets forth considerations for borrowers and lenders in the real estate industry in evaluating whether to participate in the MSLP. This Legal Update is not intended as a comprehensive description of the terms, conditions and requirements for the MSLP, which can be found in our June 1, 2020 Legal Update. This Legal Update incorporates changes made to the MSLP on June 7, 2020 and we continue to monitor the developments with respect to the MSLP and will issue updates as the Fed publishes additional guidance.

It is important to point out that the MSLP is not "Paycheck Protection Program (PPP) 2.0". Although some concepts of the PPP carry over to the MSLP, a MSLP loan (Main Street Loan) is not "one size fits all" credit. The MSLP comprises three different types of loans, of which two are new loan facilities (the New Loan and the Priority Loan), and one is a facility used to upsize an existing loan (the Expanded Loan). The MSLP requires lenders to underwrite and retain a percentage of Main Street Loans, in order to have skin in the game, and allows lenders to impose their own requirements—such as security and guaranties—on borrowers.

Considerations for Borrowers

Are all real estate companies eligible for a Main Street Loan?

No. A real estate business seeking to obtain a Main Street Loan must satisfy many of the same eligibility criteria as those required to obtain a PPP loan. This means that passive real estate companies, such as special purpose vehicles that own a single asset, as well as entities that own and self-manage their own properties, as well as co-operatives are all ineligible. On the other hand, for-profit entities that conduct active businesses in real estate they own are eligible assuming they meet applicable size and other criteria, as are entities that own and operate hotels.[1] Management companies owned by real estate enterprises are eligible, even if they manage real estate owned by their affiliates.

Are there any other eligibility requirements?

Yes, a business must be organized in the US or under US law prior to March 13, 2020 and must have been in good financial standing prior to the COVID-19 crisis. A business (together with affiliates) must either have (i) fewer than 15,000 employees or (ii) 2019 annual revenues of less than $5 billion. A business also must have significant operations, and a majority of employees based, in the US.
Is a US entity owned by a foreign parent eligible for the MSLP? Yes, as long as it meets the other eligibility requirements. Also, if a US subsidiary of a foreign parent obtains a Main Street Loan, it must use the loan only for its own benefit and that of its US affiliates (and not for the benefit of a foreign parent or any foreign affiliates).

Can affiliates apply for separate loans?

Yes, but certain restrictions apply. If an entity has a Main Street Loan, an affiliate can only participate in the same type of Main Street Loan and the total amount of loans of the affiliated borrowers cannot exceed the maximum loan size the affiliated group is eligible to receive. Also, if an affiliate of the business has participated in the Fed's Primary Market Corporate Credit Facility, the business cannot receive a Main Street Loan.

If a borrower obtains a Main Street Loan, can the proceeds be used by an affiliate?

Yes, as long as it is a US affiliate.

What are the minimum and maximum loan amounts?

The minimum loan amount for a New Loan and a Priority Loan is $250,000, and $10 million for an Expanded Loan.

The maximum loan amount for a New Loan is the lesser of $35M or an amount that when added to outstanding and undrawn available debt does not exceed 4.0x adjusted 2019 EBITDA. The maximum loan amount for a Priority Loan is the lesser of $50M or an amount that when added to outstanding and undrawn available debt does not exceed 6.0x adjusted 2019 EBITDA.

For an Expanded Loan, the maximum is the lesser of $300M or an amount that when added to outstanding and undrawn available debt does not exceed 6.0x adjusted 2019 EBITDA. This means that a potential borrower that no adjusted 2019 EBITDA cannot borrow under the MSLP.

Are borrowers required to pay any fees for a Main Street Loan?

Yes, borrowers will pay a 1.0% fee to the lender for a New Loan or a Priority Loan and a .75% "upsizing" fee for an Expanded Loan. Lenders may charge *de minimis* fees typically charged by lenders for underwriting commercial loans, such as appraisal fees and legal fees, but lenders may not charge borrowers servicing or other fees. In addition, lenders have discretion to pass on to borrowers the transaction fees that the lenders will pay to the SPV in connection with the origination of the applicable loans (1.0% of the principal amount, in the case of a New Loan or a Priority Loan, and 0.75% of the principal amount, in the case of an Expanded Loan).

Can a borrower use a Main Street Loan to refinance existing debt?

No, with a few exceptions. A borrower of a Priority Loan may, at the time of the origination of the Priority Loan, refinance an existing debt owed to a lender other than the lender that originates the Priority Loan. Additionally, a borrower of any Main Street Loan may, refinance maturing debt, make mandatory principal and interest payments on existing debt, repay lines of credit in accordance with its existing practice, and obtain new debt in the ordinary course of its business. Also, a borrower may not seek to cancel or reduce any existing lines of credit.

Are there any strings attached to a Main Street Loan?

Yes. Two of the "strings" that last for a year after the Main Street Loan is paid back include compensation restrictions for officers and employees making more than

$425,000 and limitations on stock buybacks, dividend distributions or other capital distributions on common stock equivalents. Also, the names of borrowers under the MSLP are subject to public disclosure. For a more complete discussion of the conditions and restrictions on borrowers, click here.

Considerations for Lenders

The MSLP imposes conditions on, and requires certifications from, lenders participating in the MSLP. Listed here are a number of points about the MSLP that a commercial real estate lender should consider. A more complete description of the conditions and certifications required of lenders in the MSLP can be found here.

What type of lenders are eligible to participate in the MSLP?

US federally insured depository institutions are eligible lenders. This may include banks, US branches of foreign banks, savings associations and credit unions. Nonbank financial institutions are not eligible lenders. This means that traditional commercial real estate lenders such as insurance companies, pension funds and private equity firms are not eligible to participate in the MSLP as lenders.

Will commercial real estate lenders and servicers analyze the MSLP in a manner similar to the PPP?

No. Main Street Loans differ from PPP loans in many respects. A Main Street lender will have to underwrite a Main Street Loan as it would any other commercial loan must also retain at least 5% of the loan and corresponding risk. A Main Street Loan is not guaranteed by the federal government nor is it forgivable. A commercial real estate lender should consider an opportunity to make a Main Street in the same manner that it would treat an opportunity to make any other commercial loan. Also, institutional lenders and servicer with existing loans secured by commercial real estate will likely review requests for approval more stringently than they did PPP loans, especially if the MSLP loans require collateral.

Is a lender participating in the program required to fund a potential borrower seeking a Main Street Loan?

No. A lender is under no obligation to make a Main Street Loan to any particular borrower, regardless of whether the borrower is otherwise eligible under the MSLP. A lender should perform its normal underwriting of a potential borrower (taking into account any additional MSLP criteria) in determining whether to make a Main Street Loan.

Can a lender condition a Main Street Loan on being able to sell a participation interest to the Main Street SPV?

Yes. A lender has a choice of making a Main Street Loan and then selling a participation interest to the Main Street SPV or conditioning the funding of the loan on the Main Street SPV's purchase of a participation interest.

Can a lender sell a participation interest in a Main Street Loan to a buyer other than the Main Street SPV provided that it retains its minimum required participation in the loan?

While the MSLP guidance is not clear on whether a lender can sell a participation interest in the loan to entities other than the Main Street SPV, a sale to the Main Street SPV would be the most beneficial and straightforward given the loan participation requirements by the Main Street SPV and the overall intent of the MSLP to limit lenders' risk to motivate their willingness to extend credit.

Are multi-lender loan facilities eligible to participate in the MSLP?

Multi-lender facilities are eligible to participate in an Expanded Loan subject to certain terms and conditions more fully described in the MSLP documentation.

Can a Main Street Loan be sold to a CMBS trust?

A Main Street Loan would not be eligible for a CMBS trust because the borrower of a loan eligible for a CMBS, a special purpose vehicle owning a single real estate asset, would not be an eligible borrower under the MSLP.

Can a Main Street Loan be sold to a real estate mortgage investment conduit (REMIC)?

No. A Main Street lender must retain at least 5% of the loan and cannot sell 100% of the Main Street Loan.

If most real estate entities, such as SPVs that own and operate real estate, are ineligible for the MSLP, can real estate secure a Main Street Loan?

Yes, the MSLP expressly permits real estate to collateralize a Main Street Loan.

If real estate can secure a Main Street Loan, must the security be a first mortgage or are second mortgages permitted?

Second mortgages are permitted.

Does this mean that a real estate SPV, an entity that owns a single real estate asset, can be a guarantor of a Main Street Loan, even though it may not be an eligible borrower?

Yes, there are no eligibility requirements for guarantors of Main Street Loans, although a real estate SPV may be constrained in acting in such a guarantor capacity as a result of certain covenants to which the SPV may be subject.

Can a Main Street Loan be secured by an interest in an SPV that owns commercial real estate?

Yes, although this may be prohibited by existing loan documentation to which the SPV and its equity owners are subject.

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[1] Eligible hotels must derive more than 50% of the business's revenue for the prior year from transients who stay for 30 days or less at a time.

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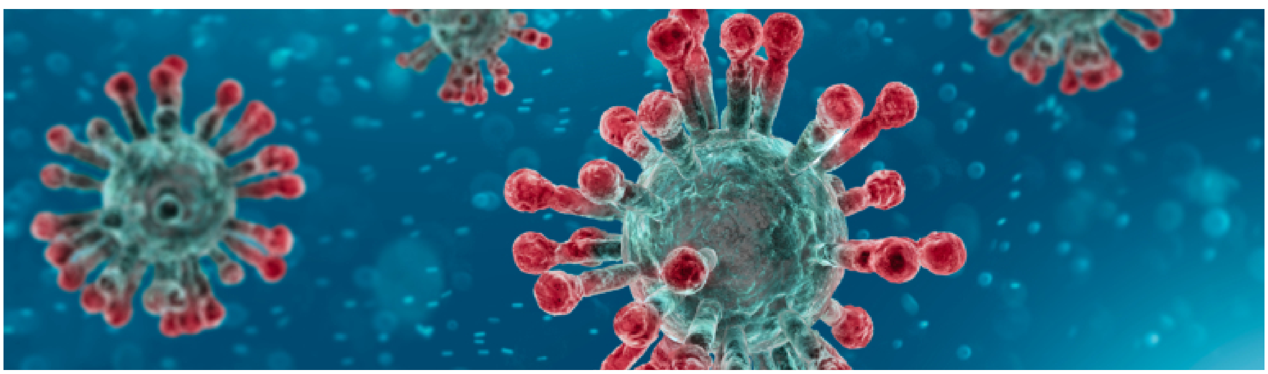

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