CLIENT ALERT

Main Street Lending Program: Revised Guidance for Borrowers and Lenders and New Operational Documents Published by Federal Reserve

Jun.01.2020

On May 27, 2020, the Federal Reserve Bank of Boston (the "Boston Fed") released borrower and lender operational documents, including proposed loan document covenants for the Main Street Lending Program (the "Program") in anticipation of the Program's launch. Additionally, the Board of Governors of the Federal Reserve (the "Federal Reserve"), released a revised Frequently Asked Questions ("FAQs") document, providing further guidance to borrowers and lenders in addition to clarification of previously issued FAQs.

Both borrowers and lenders should note that the complexities built into the substance and the structure of the Program and into the procedures for obtaining a Program loan are likely the result of balancing competing interests, such as, speed of delivery, borrower needs, taxpayer protection, and traditional lender safety and soundness considerations. The result is a highly structured and cumbersome undertaking that will give many lenders reason to pause before signing up, and many borrowers, other than those who have no other viable options, second thoughts about taking on financial and performance obligations that ultimately may have burdensome consequences (such as aggressive principal amortization requirements), both foreseen and unforeseen. Both lenders and borrowers should carefully consider the pros and cons of participating in the Program and seek advice from financial and legal professionals before making a commitment to participate.

Overview of the Program

The Program, administered by the Boston Fed, is intended to facilitate lending to small and medium-sized businesses that were financially stable prior to the COVID-19 pandemic so that they may maintain operations and payroll during the COVID-19 pandemic emergency period. The Program operates through three types of loans (the New Loan Facility ("MSNLF"), the Priority Loan Facility ("MSPLF"), and the Expanded Loan Facility ("MSELF")) each offering a 4-year term loan, with an adjustable interest rate based on LIBOR plus 300 basis points, and with principal and interest payments deferred during the first year of the loan.[1][1] Loans range in size from $500,000 to $200 million, depending upon the loan facility selected. The lending is conducted through lenders who meet the Program's eligibility criteria ("Eligible Lenders"). Program loans are secured or unsecured new term loans originated after April 24, 2020 (in the case of MSNLF and MSPLF) or are based upon, and are an upsized tranche of an existing term loan to an Eligible Borrower, originated on or before April 24, 2020 (in the case of MSELF). The loans are full recourse loans, and unlike the SBA's Paycheck Protection Programs ("PPP") loans, the Program loans have no forgiveness of debt features. When the Boston Fed announces the opening of the Program, Eligible Lenders that wish to participate in the Program must first register with the Boston Fed. The Program will remain active until September 30, 2020, unless it is extended by the Federal Reserve and the Department of Treasury.

Borrowers who meet the Program's eligibility criteria ("Eligible Borrowers") may use loan proceeds to maintain U.S. operations and payroll until conditions normalize. The new FAQs explain that an Eligible Borrower should undertake good-faith efforts to retain employees and payroll in light of its capacities, the economic environment, available resources and the business need for labor. Borrowers that have already laid-off or furloughed workers as a result of the disruptions from COVID-19 are eligible to apply for a Program loan. The proceeds of Program loans may not be used for the benefit of an Eligible Borrower's foreign parents, affiliates, or subsidiaries.

Program Mechanics

An Eligible Borrower applies for one of the three types of Program loans with an Eligible Lender using the lender's own loan application and documentation as well as underwriting and other relevant policies and procedures. The new FAQs explain that loan documents for Program loans should be substantially similar to documentation used by the Eligible Lender in its ordinary course lending. The Eligible Lender evaluates the application based on the Program's eligibility criteria and the Eligible Lender's own underwriting criteria. In other words, Eligible Lenders are expected to base their approval not only on minimum criteria required by the Program, but may also apply their own underwriting standards in evaluating an Eligible Borrower's financial condition and creditworthiness which may result in additional requirements beyond the Program minimums. Appendix A attached to the new FAQs[2] contains a loan document checklist that sets forth minimum required components of the loan documentation. The Eligible Lender, not the Boston Fed, will ultimately determine whether an Eligible Borrower is approved for a Program loan. If approved, the Eligible Lender makes the loan to the Eligible Borrower and then sells to the special purpose vehicle established for the Program (the "Program SPV"), no later than 14 days after closing the Program loan, 85% or 95% of the Program loan, depending on the type of Program loan. The remaining 5% (if a MSNLF or a MSELF loan) or 15% (if a MSPLF loan) is retained by the Eligible Lender that continues to service the loan.

Lender Registration and Certification

To participate in the Program, Eligible Lenders[3] must first register by submitting the following registration documents[4]:

1. ***Lender Registration Certifications and Covenants*** (must be signed by a prospective Eligible Lender's CEO and CFO or officers performing similar functions). The document requires the lender to certify:
    i. that it is one of the institution types denoted as an Eligible Lender;
    ii. that it is not deemed ineligible under the Conflict of Interest Prohibition, Section 4019(c), of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"); and
    iii. that it is not insolvent.
2. ***Lender Wire Instructions Directions*** to provide instructions for the bank account into which the Program Special Purpose Vehicle will transfer the purchase amount, servicing fees, and any other payments related to the Program.

Transaction Documents Required for Selling Loan to the Program SPV[5]

For each transaction under the MSNLF, the MSPLF, or the MSELF lending facility, an Eligible Lender must submit the following documents to the Boston Fed:

1. ***Participation Agreement.*** This document sets forth the terms and conditions under which the Program SPV purchases a participation in a Program loan.
2. ***Servicing Agreement.*** This document between the Eligible Lender and the Program SPV establishes the services to be provided and servicing standards to be followed by the Eligible Lender.
3. ***Loan Transaction Specific Lender Certifications and Covenants***. The Eligible Lender must complete the specific certification form for the appropriate loan facility under the Program. The Eligible Lender must certify that the loan documentation meets the specific requirements in Appendix A of the new FAQs.
4. ***Borrower Certifications and Covenants***. Eligible Lenders are required to have Eligible Borrowers complete a certification and covenants form specific to each type of Program loan. The certifications and covenants cover not only borrower eligibility criteria under the Program but also requirements under the CARES Act and other statutes and regulations. By signing the form, an Eligible Borrower certifies that:
    i. it is eligible to participate in the Program facility;
    ii. it meets the CARES Act eligibility criteria (i.e., it is a U.S. Business with substantial operations and a majority of its employees located in the U.S, it cannot have a conflict of interest as defined in the CARES Act, and must comply with other CARES Act requirements during the term of the Program loan and for one year thereafter, such as, restrictions on compensation, repurchase of equity securities and capital distributions);
    iii. it is unable to secure adequate credit accommodation from other banking institutions;[6]
    iv. after receiving the Program loan, the Eligible Borrower is able to meet its financial obligations for at least 90 days and does not expect to file for bankruptcy in that period (the proceeds of the Program loan may be recognized in making this determination); and
    v. the Eligible Borrower has provided accurate financial records and a calculation of the borrowers (and, if relevant, its affiliates' and/or selected subsidiaries who have provided a guarantee for the loan) adjusted 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA") to the Eligible Lender.

    Additionally, an Eligible Borrower is required to covenant that it will not repay the principal balance of, or pay any interest on, any debt unless the principal or interest payment is *mandatory and due*, until (i) the Program loan is repaid in full or (ii) neither the Program SPV nor a Governmental Assignee holds an interest in the such loan in any capacity.[7]

5. ***Assignment-in-Blank.*** This document must be signed by the Eligible Borrower and is to be completed, signed, and submitted by the Eligible Lender to the Program SPV. This document is intended to be used by the Program SPV to elevate its participation to co-lender status or to elevate and transfer its participation in limited circumstances. In order to facilitate such transfer, the Assignment-in-Blank serves as advance consent by the Eligible Lender and the Eligible Borrower to any such transfer.
6. ***Co-Lender Agreement***. This document must be signed by the Eligible Borrower. In the event the Program SPV elevates its participation in a Program loan to co-lender status, this form sets out intercreditor arrangements for the Program SPV (or its successor) and the Eligible Lender with respect to the Eligible Borrower's loan.
7. ***Loan Document Checklist***. Eligible Lenders must include in the loan documentation for eligible loans the checklist that is set forth in Appendix A of the new FAQs.

Updates on Borrower Eligibility Criteria

General Qualification Requirements. To qualify as Eligible Borrower under the Program, a business must (i) have been created or organized in the U.S. prior to March 13, 2020, (ii) have significant operations and a majority of its employees in the United States, and (iii) have fewer than 15,000 employees OR no more than $5 billion in 2019 annual revenue. Participation is limited to one of the three Program loan types, and the business may not be of a type listed as "Ineligible Business" in 13 CFR 120.110(b)-(j) and (m)-(s), as modified and clarified by SBA regulations for purposes of the Payroll Protection Program, on or before April 24, 2020. As already noted above, an Eligible Borrower must be able to make all certifications required by the Program. To the extent that a business has an existing loan with the Eligible Lender, the Eligible Lender's internal credit rating of that loan must be at least a "pass" credit under applicable rating guidelines.

Meaning of significant operations in the United States. The new FAQs clarify the meaning of "*significant operations in the United States*." To determine if an Eligible Borrower has "significant operations" in the United States, a business's operations will be evaluated on a consolidated basis (including its subsidiaries, but excluding parent companies or affiliates). An Eligible Borrower satisfies the consolidated basis test if, together with its subsidiaries, (i) it has more than 50% of its assets located in the United States, (ii) its annual net income is generated in the United States, (iii) its annual net operating revenues are generated in the United States, or (iv) its annual consolidated operating expenses (excluding interest expense and any other expenses associated with debt service) are generated in the United Sates. A U.S. subsidiary of a foreign company may qualify as an Eligible Borrower, but it must use the proceeds of the Program loan *only* for the benefit of itself, its U.S. subsidiaries, and other affiliates of the Eligible Borrower that are U.S. businesses, and *not* for the benefit of its foreign parent, affiliates or subsidiaries.

Limits on Participation by an Affiliated Group of Companies. The new FAQs further explain that an affiliated group of companies may only participate in one of the three Program loan types and may not participate in both the Program and the Primary Market Corporate Credit Facility ("PMCCF"). If an affiliate has previously participated in a Program Loan Facility, or has a pending application to participate in a particular Program loan, the prospective Eligible Borrower can only participate in the Program by using the same loan facility accessed by its affiliate. Eligible Borrowers that have received loans under the CARES Act PPP loan program or an Economic Injury Disaster Loan are also eligible for a Program loan. Note, however, that unforgiven portions of a PPP loan are included in the maximum loan size EBITDA calculation.

Updates on 2019 EBITDA Adjustments

The size of loans under the Program range from $500,000 to $25 million under the MSNLF and the MSPLF, and from $10 million to $200 million under the MSELF. The maximum loan size available to an individual borrower is an amount, that when added to a business's currently existing outstanding and committed but undrawn debt, brings its total debt relative to its 2019 EBITDA to no more than 4 times under the MSNLF or no more than 6 times under the MSPLF or the MSELF.

The new FAQs explain that Eligible Lenders should require Eligible Borrowers to adjust their 2019 EBITDA based on the methodology that the Eligible Lender has previously used when extending credit to the Eligible Borrower, or if the Eligible Borrower is a new customer, the methodology used by similarly situated borrowers (in similar industries with comparable risk and size) on or before April 24, 2020. If an Eligible Lender has used multiple EBITDA adjustment methods with respect to the Eligible Borrower or similarly situated borrowers (e.g., one for use within a credit agreement and one for internal risk management purposes), the Eligible Lender should choose the most conservative method it has employed. In all cases, the

Eligible Lender must select a single method used at a point in time in the recent past and before April 24, 2020 and provide a rationale for its selection of the particular methodology.

Updates on MSELF Upsized Tranches

The MSELF lending facility allows Eligible Lenders to upsize a term loan or a revolving credit facility currently in place with an Eligible Borrower by adding a new term loan increment or tranche to such existing loan or credit facility. The new FAQs explain that the Eligible Lender does not need to be the same Eligible Lender that originated the loan underlying the MSELF upsized tranche, but the Eligible Lender must have purchased the interest in the underlying loan as of December 31, 2019, and must have assigned an internal risk rating to the underlying loan equivalent to a "pass" as of that date. The new FAQs also note that an Eligible Lender may sell to the Program SPV a participation in an upsized tranche of a loan that was originated as part of a multi-lender facility so long as the Eligible Lender is one of the lenders that holds an interest in the underlying loan at the date of upsizing. To the extent that the existing loan facility does not have appropriate features to allow for the incurrence of additional debt, the existing loan documents may need to be amended to provide for "accordion" expansion.

Updates on Priority and Security Requirements

As mentioned above, all three Program loans have various common features (same 4-year maturity, interest rate, deferral of principal and interest for one year, and prepayment ability), and all three Program loans may be secured or unsecured loans. The three Program loans, differ, however, in how they interact with the Eligible Borrowers' existing outstanding debt.

MSNLF	MSPLF	MSELF
At the time of origination or at any time during the term of the MSNLF Loan, the MSNLF loan must not be contractually subordinated in terms of priority to any of the Eligible Borrower's other loans or debt instruments. This means that the MSNLF loan may not be junior in bankruptcy to the Eligible Borrower's other unsecured loans or debt instruments. The priority requirement does not prevent: (i) the issuance of	At the time of origination and at all times thereafter, the MSPLF Loan (whether secured or unsecured) must be *senior to or pari passu with*, both in terms of priority and security with the Eligible Borrower's other Loans or Debt Instruments[8], other than Mortgage Debt[9]. The MSPLF Loan must be secured if, at the time of origination, the Eligible Borrower has any other secured loans or debt Instruments, other than mortgage Debt. If the MSPLF Loan is secured, then the	At the time of upsizing and at all times thereafter, the MSELF upsized tranche must be *senior to or pari passu* with, in terms of priority and security, the Eligible Borrower's other loans or debt instruments, other than mortgage debt. The MSELF upsized tranche must be secured if, at the time of origination, the Eligible Borrower has any other secured loans or debt instruments, other than mortgage debt. The MSELF

an MSNLF Loan that is a secured loan (including in a second lien or other capacity) to an Eligible Borrower, whether or not the Eligible Borrower has an outstanding secured loan of any lien position or maturity; (ii) the issuance of an MSNLF Loan that is an unsecured loan to an Eligible Borrower, regardless of the term or secured or unsecured status of the Eligible Borrower's existing indebtedness; or (iii) the Eligible Borrower from taking on new secured or unsecured debt after receiving an MSNLF Loan, provided the new debt would not have higher contractual priority in bankruptcy than the MSNLF Loan.	Collateral Coverage Ratio[10] for the MSPLF Loan, at the time of its origination, must be either (i) at least 200% or (ii) not less than the aggregate Collateral Coverage Ratio for all of the Borrower's other secured Loans or debt instruments, other than mortgage debt. The MSPLF Loan need not share in all of the collateral that secures the Eligible Borrower's other Loans or Debt Instruments. The MSPLF Loan can be unsecured only if the Eligible Borrower does not have, as of the date of origination, any secured loans or debt instruments (other than mortgage debt). Over the life of the loan, the MSPLF loan may not become contractually subordinated to any of the Eligible Borrower's other loans or debt instruments.	upsized tranche must be secured by the collateral securing any other tranche of the underlying credit facility on a *pari passu* basis. Eligible Lenders and Eligible Borrowers may add new collateral to secure the loan (including the MSELF upsized tranche on a pari passu basis) at the time of upsizing. If the underlying credit facility includes both term loan tranche(s) and revolver tranche(s), the MSELF upsized tranche needs to share collateral on a *pari passu* basis with the term loan tranche(s) only. Secured MSELF upsized tranches must not be contractually subordinated in terms of priority to any of the Eligible Borrower's other loans or debt instruments. The MSELF upsized tranche can be unsecured only if the Eligible Borrower does not have, as of the date of origination, any secured loans or debt instruments (other than mortgage debt). Unsecured MSELF upsized tranches must not be contractually subordinated in terms of priority to the Eligible Borrower's other unsecured Loans or debt instruments. Over the life of the loan, the MSELF upsized tranche may not become subordinated to Eligible Borrower's other loans or debt instruments and the MSELF

		upsized tranche must remain secured on a *pari passu* basis by the collateral securing the underlying loan.

Further Information and Updates on the Program

The terms of the Program are available at the Federal Reserve's website, and the operational documents are available at the Boston Fed's website.

Parties interested in receiving further information on the Program may submit inquiries by email to mslp@bos.frb.org.

---

[1] Term sheets with further details on the Program loans are available at the following Federal Reserve website: https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm and at https://www.crowell.com/Practices/Coronavirus-COVID-19-Resource-Center/news/Federal-Reserve-Announces-Expansion-of-Main-Street-Lending-Program.

[2] The FAQs are available at the following website https://www.bostonfed.org/mslp-faqs.

[3] The new FAQs explain banking entities and certain non-bank affiliates may register as Eligible Lenders under the Program. At this time, non-bank financial institutions are not eligible to participate in the Program.

[4] The documents are available at the following website: https://www.bostonfed.org/supervision-and-regulation/supervision/special-facilities/main-street-lending-program/information-for-lenders/docs.aspx

[5] The necessary documents can be found at the website of the Boston Fed.

[6] The new FAQs explain that being "*unable to secure adequate credit accommodations from other banking institutions*" does not mean that no credit from other sources is available. No evidence of a credit denial is required to be produced. Rather, the Eligible Borrower must certify that it is unable to secure "adequate credit accommodations" because the amount, price, or terms of credit available from other sources are inadequate for the borrower's needs during the current unusual and exigent circumstances.

[7] The new FAQs clarify the meaning of what debt and interest are considered "*mandatory and due*." With respect to debt that predates the loan, principal and interest are "mandatory and due" (i) on the future date upon which they were scheduled to be paid as of April 24, 2020, or (ii) upon the occurrence of an event that automatically triggers mandatory prepayments under a loan contract that a borrower executed prior to April 24, 2020, except that any such prepayments triggered by the incurrence of new debt can only be paid if such prepayments are *de*

minimis or under the MSPLF at the time of origination of an MSPLF loan. Note: If an existing debt arrangement requires prepayment of an amount that is not *de minimis* upon the incurrence of new debt, an Eligible Borrower cannot receive an MSNLF or MSELF loan unless such requirement is waived or reduced to the *de minimis* amount by the relevant creditor. Proceeds of a MSPLF loan may, under certain circumstances, be used to refinance existing debt at the time of the origination of the MSPLF loan.

[8] Defined to mean: debt for borrowed money and all obligations evidenced by bonds, debentures, notes, loan agreements or other similar instruments, and all guarantees of the foregoing.

[9] Defined to mean debt secured by real property at the time of the MSPLF Loan's origination.

[10] Defined to mean (i) the aggregate value of any relevant collateral security, including the pro rata value of any

---

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Scott Lessne
Senior Counsel – Washington, D.C.
Phone: +1 202.624.2597
Email: slessne@crowell.com

James G. Flood
Partner – Washington, D.C.
Phone: +1 202.624.2716
Email: jflood@crowell.com

Manuela Siragy
Counsel – Washington, D.C.
Phone: +1 202.624.2836
Email: msiragy@crowell.com

Nicholas James
Counsel – Washington, D.C.
Phone: +1 202.624.2959
Email: njames@crowell.com