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Boston Fed Releases FAQs, Operational Documents for Main Street Lending Program

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Borrowers and lenders have eagerly anticipated additional details and guidance on the Federal Reserve's rollout of the $600 billion Main Street Lending Program, as there has been scant information regarding the specific timing and processes for the loans contemplated by the new programs. On May 27, 2020, the Boston Fed released the Main Street Lending Program's **forms and agreements** as well as related **FAQs** to provide more information regarding eligibility and conditions for the borrowers and lenders thereunder. The FAQs supersede in their entirety the **prior FAQs released** by the Federal Reserve on April 30, 2020.

The Main Street Lending Program consists of three facilities, the Main Street New Loan Facility (MSNLF), the Main Street Priority Loan Facility (MSPLF) and the Main Street Expanded Loan Facility (MSELF), the terms of which remain unchanged from the term sheets **posted previously** by the Federal Reserve.

Key takeaways

Affiliation rules for Main Street Lending Program

- FAQ E.10 provides that availability under the Main Street Lending Program may be looked at on a portfolio basis to the extent more than one affiliated borrowers apply for any Main Street Lending Program. This is a further application of the SBA affiliation rule to the Main Street Lending Program that may make eligibility for the programs difficult for portfolio companies of private equity or venture capital sponsors (please refer to this **explanation of the SBA affiliation rules** in the context of the PPP program). The three main implications for eligibility are:
  - If an affiliate has participated in the Primary Market Corporate Credit Facility, no other affiliated business may borrow under any Main Street Lending Program
  - If an affiliate of a business has previously participated, or has a pending application to participate, in a Main Street Lending Program, the business (and any other affiliate) may only participate in the same Main Street Lending Program and not any other Main Street Lending Program
  - To the extent any business notifies the lender that any of the business's affiliates has previously received, or has applied to receive, funding from a Main Street Lending Program, the business's availability under such program may not exceed the affiliated group's total participation in such program on a consolidated basis – so, amongst other things, the leverage limits in the maximum loan amount in such a scenario will be tested across the affiliated group on a consolidated basis.
- Note also, that private equity funds are not eligible to borrow directly under the program (but portfolio companies are eligible, subject to the above limitations).
- As noted in prior guidance, loans under the Main Street Lending Programs will contain restrictions on employee compensation of the borrower as well as its ability to make distributions or consummate stock buybacks, in each case, for the life of the loan plus 12 months. The form of the borrower certification published contains the model covenants for each of these provisions and such covenants do not contain language that would indicate that these restrictions would apply to any affiliates of the borrower.

EBITDA calculation

- **Lender certification:** The lender must now certify in a transaction-specific lender certification that the methodology that the lender required the borrower to use when calculating adjusted 2019 EBITDA is the methodology that the lender has previously required to be used for EBITDA adjustments when extending credit to the borrower or, for borrowers who have not been calculating EBTIDA under loan facilities, similarly situated borrowers on or before April 24, 2020.
- **Affiliate group EBITDA requirement:** If the borrower notifies the lender that any of the borrower's affiliates has previously received, or has applied to receive, funding from a Main Street Lending Program, the lender must certify leverage calculation on a consolidated basis for the borrower and its affiliates (based on the EBITDA methodology applicable to the borrower) in addition to the individual leverage limitations applicable to the borrower.
- **EBITDA requirement for holding company**: If the borrower is a holding company, leverage and EBITDA calculation must be consolidated with its "Selected Subsidiaries"[1], defined to include guarantors that themselves would be eligible under the Main Street Lending Program.

US subsidiaries of foreign parents

- A US subsidiary of a foreign parent may be eligible for the Main Street Lending Program so long as it otherwise satisfies borrower eligibility requirements, including that the borrower itself is created or organized in the United States or under the laws of the United States, and the borrower on a consolidated basis has significant operations in and a majority of its employees based in the United States.
- The "significant operations in the United States" test looks to the borrower and its consolidated subsidiaries (but not its parent companies or sister affiliates). If on such a consolidated basis, the borrower has 50% of either assets, annual net income, annual net operating revenues or annual operating expenses (excluding interest expense and any other expenses associated with debt service), in each case, generated or located in the United States, then it will be deemed to have significant operations in the US
- FAQ E.9 does further explain that the proceeds of a Main Street loan may not be used for the benefit of a borrower's foreign parents, affiliates or subsidiaries.

Fees

Lender may not charge additional fees other than fees previously disclosed in the term sheets for the Main Street Lending Program (e.g., the transaction fees), but lender may charge for appraisal and legal expenses customary for such transactions. Interest rates may not be higher than LIBOR plus 300 basis points.

Forms and loan agreements

- The forms and agreements provided by the Boston Fed provide for standard terms and conditions to be entered into by lenders, borrowers and the Main Street SPV, as well as transaction specific agreements, including separate certification forms to be executed by both borrower and lender depending on the facility the borrower has elected (copies of which can be found on the Boston Fed's **website**).
- No standard form loan agreement has been provided. Lenders must use their own loan documentation that should be substantially similar, including with respect to required covenants, to the loan documentation that the lender uses in its ordinary course lending to similarly situated borrowers, adjusted only as appropriate to reflect the requirements of the program.

Loan terms and required covenants

- **Loan document checklist**: Appendix A attached to the FAQs sets forth the terms that must be included in each applicable facility.
- **Required covenants in loan documentation** – Appendix B attached to the FAQs includes model covenants for loan agreements. These are only examples, and lenders may use variations to the extent they serve the same substantive purpose and are otherwise substantially similar to provisions that the lender uses in its ordinary course lending to similarly situated borrowers. Those covenants include:
  - **Priority and security covenant**
    - MSNLF loans must not be contractually subordinated in terms of priority to any of the borrower's other loans or debt instruments.
    - MSPLF and MSELF loans also may not be contractually subordinated in terms of priority to any of the borrower's other loans or debt instruments and 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). In addition, MSPLF and MSELF loans must include a lien covenant consistent with the sample covenant, subject to exceptions, limitations, carve-outs, baskets, materiality thresholds and qualifiers that are consistent with the lender's ordinary course documentation.
      - If the MSPLF loan is secured, then the collateral coverage ratio for the MSPLF Loan at the time of its origination must be either (i) at least 200 percent or (ii) not less than the aggregate collateral coverage ratio[2] for all of the borrower's other secured loans or debt Instruments (other than mortgage debt).
      - If the MSPLF is secured by the same collateral as any of the borrower's other loans or debt instruments (other than mortgage debt), the lien must be senior to or pari passu with any other creditor's lien on such collateral. The MSPLF need not share in all of the collateral that secures the borrowers' other debt.
      - Note also that the MSPLF loan may be unsecured solely to the extent the borrower has no other secured debt in its capital structure (other than mortgage debt).
    - MSELF loans may satisfy this requirement to the extent the existing loan documentation has a lien covenant that was negotiated in good faith prior to April 24, 2020.
  - **Borrower certification and covenants mandatory prepayment provision**
    - Loan agreements must include a mandatory prepayment provision that is triggered if the borrower has materially breached or made a material misrepresentation or failed to comply with the certifications and covenants in Section 2 of the borrower certification (including limitations on distributions, stock buybacks and employee compensation in the CARES Act applicable to direct loans, as well as the US business requirements) and Section 3 (certifications as to solvency and the unavailability of credit elsewhere).
    - The mandatory prepayment provision must be included in all bilateral loan agreements. In the case of an MSELF upsize to an existing multi-lender facility, the mandatory prepayment provision is only required to be included to the extent the existing facility is being amended.
  - **Cross-acceleration provision**
    - MSPLF, MSNLF and MSELF must all contain a cross-acceleration provision that would be triggered if debt owed by the borrower to the lender or the lender's affiliates (whether material or immaterial) is accelerated.
    - Existing cross-default or cross-acceleration provisions in existing loans under the MSELF will be deemed satisfactory if negotiated in good faith prior to April 24, 2020
  - **Financial reporting covenant**
    - MSPLF, MSNLF and MSELF must all contain financial reporting covenants, consistent with requirements in Appendix C. Note the financial reporting requirements are extensive and go beyond customary reporting requirements in loan agreements.
    - Existing financial reporting provisions in existing loans under the MSELF will be deemed satisfactory if negotiated in good

faith prior to April 24, 2020.

Other Main Street Lending borrower agreements and certifications

- **Prohibition on early repayment of other debt:** Must not repay or cancel any existing lines of credit, other than (i) repayments of lines of credit in the ordinary course, (ii) taking on and paying additional debt obligations such as inventory and equipment financing and (iii) refinancing debt that is maturing no later than 90 days from the date of such refinancing. Such restriction does not prevent principal and interest payments that are mandatory and due under the agreements as in effect prior to April 24, 2020.
- **Adequate credit elsewhere**: The borrower must certify that it is unable to secure adequate credit accommodations from other banking institutions. Borrowers are not, however, required to demonstrate that applications for credit had been denied by other lenders or otherwise document that the amount, price or terms of credit available elsewhere are inadequate.
- **Ability to meet financial obligations for 90 days:** In addition to the solvency certification, the borrower must certify 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.
- **Indemnity:** As part of the borrower certification, borrower must agree to provide an indemnity to the beneficiaries of the certification (the lender and the Main Street SPV) for losses that may result out of a material breach by the certifications or covenants.

Funding option for Main Street lenders

When the Main Street Lending Program becomes operational, lenders may fund the loans under two different scenarios (note there is no obligation to fund):

- **Funded loan** – Lender may fund the loan and then submit required documentation to the Main Street SPV for purchase. Lender must submit request for purchase to the Main Street SPV expeditiously and no later than 14 days after funding.
- **Condition of funding** – Lender may require that the loan funding is contingent on a binding commitment from the Main Street SPV to purchase the participation. The Main Street SPV would review documentation and, if approved, provide a commitment letter to the lender to purchase the participation. The commitment letter will provide that lender is required to fund the loan within three business days of the date of commitment letter and the Main Street SPV will purchase its participation within three business days of the date the lender notifies the Main Street SPV that it has funded the loan.

Notes

1. "Selected Subsidiaries" means one or more operating subsidiaries selected by the Borrower to provide a guarantee for the Eligible Loan on a joint and several basis, provided that (i) a Borrower is only required to designate Selected Subsidiaries if it is a holding company, all or substantially all of the assets of which comprise equity interests in other entities; (ii) each Selected Subsidiary must itself be eligible to borrow under the Facility's eligibility criteria; and (iii) the aggregate adjusted 2019 EBITDA of the Selected Subsidiaries must be used to calculate the Borrower's maximum loan size under the Facility (in addition to the other tests, as applicable).
2. "Collateral coverage ratio" means (i) the aggregate value of any relevant collateral security, including the pro rata value of any shared collateral, divided by (ii) the outstanding aggregate principal amount of the relevant debt.

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