

Federal Reserve Announces Main Street Lending Program Will Accept Multi-Borrower Loans and Issues New FAQs Outlining Requirements; Also Announces Acceptance of Non-Profit Borrower Loans; Alters Lenders' Standards for Evaluating Borrowers; Provides Guidance on Insider Loans and Compensation Treatment

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On September 18, 2020, the Federal Reserve issued new Frequently Asked Questions (FAQs) for its Main Street Lending Program (MSLP). Separate FAQs for the MSLP's three for-profit programs (the Main Street New Loan Facility (MSNLF), the Main Street Priority Loan Facility (MSPLF), and the Main Street Expanded Loan Facility (MSELF)), and its two non-profit programs (the Nonprofit Organization New Loan Facility (NONLF) and the Nonprofit Organization Expanded Loan Facility (NOELF)) have been issued.

In the FAQs, the Federal Reserve announced that starting on or about the week of September 21, it will begin accepting multi-borrower loans under the MSLP. As is discussed below, the FAQs set forth key guidance for such loans. The Federal Reserve also announced that the two non-profit programs under the MSLP would be available on September 24, 2020.

Equally important, the FAQs set forth a new standard regarding the time period lenders are to consider when evaluating applicants. The FAQs include new language stating that lenders must evaluate applicants for their "pre-pandemic" financial condition "and post-pandemic prospects".

The FAQs also address a number of other topics discussed below, including federal regulators' standards for reviewing MSLP loans; repayments of loans between MSLP borrowers and their owners; treatment of loans from MSLP borrowers to employees or officers; and other subjects.

Lenders Must Now Assess Borrowers' Pre-Pandemic Financial Condition and Post-Pandemic Prospects

Prior guidance provided that lenders were to apply their own underwriting standards, and conduct an assessment of each potential borrower's "financial condition at the time of ... application." The new FAQs instead state that lenders are to assess each potential borrower's "pre-pandemic" financial condition "and post-pandemic prospects," while also taking into account the payment deferral features in Main Street loans. The FAQs state that EBITDA-based leverage requirements should be viewed as minimum requirements for the Program, with the lender having to perform the above analysis as well.

Multi-Borrower Loans

Eligibility Requirements In Multi-Borrower Loans Apply To All Co-Borrowers: The FAQs affirmed that the Federal Reserve is now accepting multi-borrower loans under the MSLP. In multi-borrower situations, all borrowers must meet the MSLP eligibility requirements. Like all other borrowers, each borrower in a multi-borrower loan must be an MSLP “Business” formed before March 13, 2020.

Each Co-Borrower Must Submit Complete Eligibility and Application Paperwork: Each co-borrower must submit complete, separate eligibility and application paperwork, even if the co-borrowers have the same principal executive officer and same principal financial officer. Limited designated financial information may be aggregated.

Data May Be Aggregated in MSPLF Loan Applications: For an MSPLF loan, co-borrowers may elect to submit aggregated Lien and Collateral Valuation Reporting in relation to Section 4.C of the MSPLF Borrower Certifications and Covenants, where permitted by the lender. The lender may choose to do this because maximum loan size must be determined in reference to the adjusted 2019 EBITDA and existing outstanding and undrawn available debt of all the co-borrowers collectively.

If the lender allows this, it should instruct the co-borrowers to use the lender’s typical practices to aggregate such information in a manner that accounts for transactions between the co-borrowers and accurately reflects the financial position of the co-borrowers and their ability to repay the loan, in order to avoid double counting of revenues, assets, or liabilities.

Question H.25 of the FAQs sets forth detailed instructions on how aggregated and non-aggregated financial information, including EBITDA calculations, should be used in conjunction with the Lender Transaction Specific Certifications and Covenants.

Sample Document Templates For Multi-Borrower Loans: The FAQs previously contained links to sample filled-in templates of various MSLP documents and information fields that have to be completed for MSNLF, MSPLF and MSELF single borrower loans. The new FAQs added links to similar completed templates for documents and information fields for non-profit NONLF loans to multiple borrowers, and stated that the forms for multi-borrower MSNLF, MSPLF and MSELF loans would be filled out in the same fashion.

Loans Between An MSLP Borrower And An Owner of the Borrower; Loans From An MSLP Borrower To An Employee or Officer

Restrictions on Dividend Payments and Capital Distributions: Restrictions on dividend payments and capital distributions apply to loans made by a borrower to an individual that is an owner of such borrower.

Loans Made After Origination: After September 18, a loan made by a borrower after origination of an MSLP loan to an individual owner of the borrower will be presumed to be a capital distribution unless the loan is (i) bona fide and (ii) either repaid according to its terms, or the borrower exercises its rights as a creditor upon default.

A loan will be considered bona fide if:

- (i) it is a written instrument with a stated interest rate and a stated maturity date;
- (ii) it has terms that are at least as favorable to the borrower as demonstrated market terms for similar loans at the time of origination;
- (iii) the borrower has a reasonable expectation of repayment, including that payments on the loan are not deferred;
- (iv) the debt is enforceable under state law; and
- (v) the borrower has remedies upon default (e.g., a security interest with respect to other creditors).

Loans Made Before Origination: A loan made before origination of the MSLP loan to an individual owner will be presumed to be a capital distribution if (i) it is forgiven or discharged, in whole or in part, or (ii) if the borrower does not exercise its rights as a creditor, including draws on existing lines of credit, renewals of existing loans, or amendments to an existing loan that results in the terms of the loan becoming more favorable to the owner.

Restrictions On An MSLP Borrower's Repayment Of A Loan Made To The Borrower By Its Owner: An MSLP borrower's repayment of a loan made to it by an owner would not be considered a capital distribution provided that the loan is a bona fide loan and repayment is made when mandatory and due. For these purposes, a loan will be considered bona fide if it meets the requirements for a bona fide loan set forth above, and it contains terms that are at least as favorable to the MSLP borrower as market terms for similar loans at the time of origination.

Loans Made by an MSLP Borrower to An Employee Or Officer – Application Of Restrictions On Compensation: When an MSLP borrower makes a loan to an employee or officer, the MSLP borrower must apply the normal MSLP standards for determining if the loan constitutes compensation. Accordingly, the MSLP borrower must determine whether a loan, or whole or partial forgiveness or discharge of a loan, would be considered compensation to an officer or employee according to these rules, including federal tax rules if the MSLP borrower uses tax rules to determine compensation.

Other Topics in The FAQs

Borrowers May Participate In Only One Type of MSLP Loan: The restriction that a borrower may participate in only one MSLP facility have been expanded to include the non-profit facilities. A borrower may only participate in one of the five total facilities (i.e., the MSNLF, the MSPLF, –the MSELF, the NONLF, or the NOELF). This is important for borrowers in multi-borrower loans to remember – they must make sure the multi-borrower loan program aligns with any other MSLP loan programs of any of the co-borrowers.

All Available Debt to Be Considered: In calculating “existing outstanding and undrawn available debt,” all available debt is to be considered, regardless of its position in the borrower’s capital structure. This includes all amounts borrowed under any loan facility, including unsecured or secured loans from any bank, non-bank financial institution, or private lender, as well as any publicly issued bonds or private placement facilities. The FAQs provide an example: subordinated debt and debt with deferred principal and interest payments should be included in the definition of debt.

Still No Asset Based Loans: The MSLP program is not being expanded to include asset based lending. The Federal Reserve will continue to monitor to determine if that becomes appropriate in the future.

S-Corporation Distributions to Cover Owners’ Tax Obligations - Reconciliation Requirements: An MSLP borrower that is an S-corporation or other tax pass-through entity may make distributions in respect of its common stock equivalents to the extent reasonably required to cover its owners’ tax obligations. Such distributions shall be subject to an annual reconciliation, with any surplus or deficiency to be deducted from or added to distributions, as applicable, in the following year. The reconciliation is based on the owners’ tax year, and the payment should be reconciled to the owner’s tax liability.

Governing Law For Loan Documents: MSLP loan documents must be governed by the laws of a U.S. state, the District of Columbia, or a U.S. territory.

Federal Supervisor Review of MSLP Loan Programs: The new FAQs provide a more specific description of how federal regulators will review MSLP loans made by lenders. The FAQs now state that:

“Supervisors will not criticize Eligible Lenders for originating Main Street loans in accordance with the Program’s requirements, including cases when such loans are considered non-pass at the time of origination, provided these weaknesses stem from the pandemic and are expected to be temporary or if such loans are part of a bank’s prudent risk mitigation strategy for an existing borrower.”

Buchalter’s Commercial Finance Group has organized its attorneys to create in-depth expertise in every aspect and requirement of the MSLP. Buchalter’s Commercial Finance Group is comprised of attorneys with extensive transactional and regulatory expertise, and is one of the largest creditor focused practice on the West Coast. Thus, our commercial finance attorneys are uniquely positioned to advise clients on the MSLP and help structure and document any of the credit facilities that are offered under the program. Please feel free to contact any of the attorneys in Buchalter’s Commercial Finance Group if you have questions regarding the MSLP or would like to discuss the various options and details under the program.



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