Main Street Support for Nonprofits

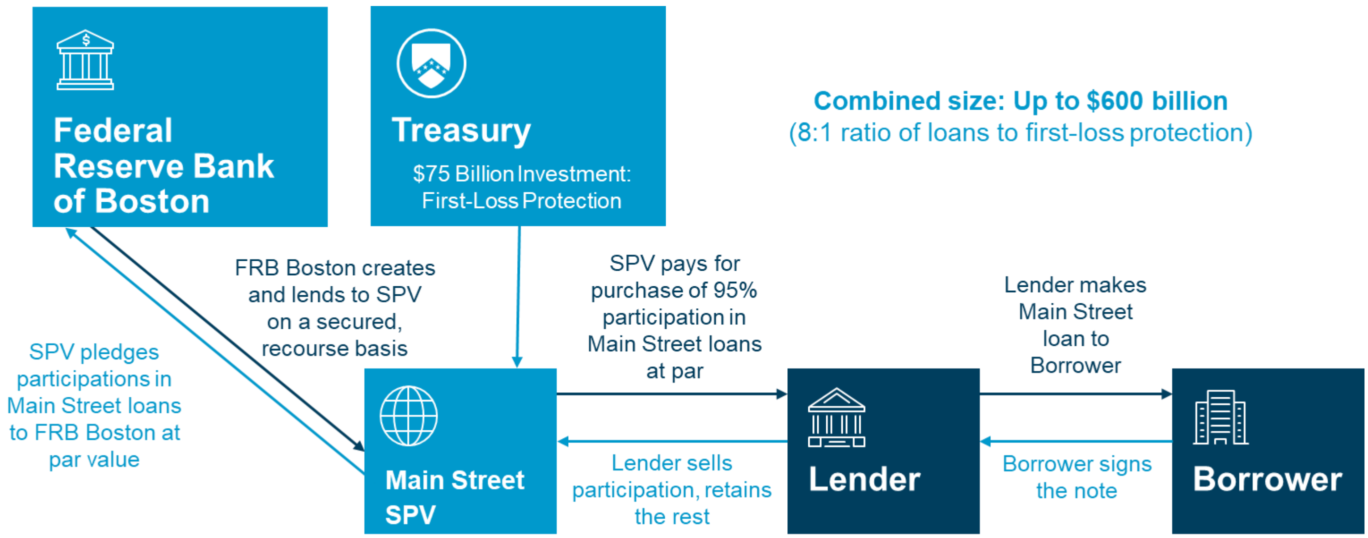
The Federal Reserve established the Main Street Lending Program to support small and medium-sized businesses, nonprofits and their employees by making it easier for them to access credit on commercially reasonable terms. The terms and requirements of Main Street loans are complicated, even by the market standards of commercial bank middle-market business loans. The fact that Main Street's nonprofit lending facilities were bolted onto an existing framework for profit-driven corporations adds another layer of complexity.[1] We hope that this memo will serve as a resource for decision-makers at banks and nonprofits who are considering a Main Street loan or are in the application process.

For more information on the broader Main Street Lending Program, you can read Davis Polk's **visual memo** on the Main Street Lending Program and our memo on its **legal architecture**. Davis Polk is also collecting and posting Main Street Nonprofit materials and resources on our Government Support for Business **website**, under the "Main Street Nonprofit Lending" tab.

Main Street Lending Program | Introduction and Background

Congress passed the Coronavirus Aid, Relief, and Economic Security Act (**CARES Act**) in March 2020 to help mitigate the damage from the COVID-19 pandemic, authorizing funding for programs to assist businesses, nonprofits, states, municipalities and individuals. The CARES Act included $454 billion for the Treasury to provide support to programs established by the Federal Reserve, of which the Treasury has invested $75 billion in the Main Street Lending Program.

The Federal Reserve established the Main Street Lending Program under section 13(3) of the Federal Reserve Act, a statutory provision that sets out the Federal Reserve's emergency lending authority and dates back to the Great Depression. The Federal Reserve Bank of Boston (the **Boston Fed**) administers the program and regularly publishes **information for borrowers** on its website. The following graphic illustrates the program's structure.



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[1] Nonprofits should be mindful that certain terms and requirements from the Main Street Lending Program's for-profit facilities have been copied into program documents relating to the nonprofit facilities but have not been tailored to nonprofits in all cases. As such, certain requirements – for example, those relating to equity interests, or to control or affiliation based on ownership of equity interests – will be inapplicable to many nonprofit organizations.

Main Street Nonprofit Loans

The Federal Reserve initially announced the Main Street Lending Program in April 2020 as a program to provide loans to small and medium-sized U.S. businesses and expanded its scope in June 2020 to include U.S. nonprofits. The structure of the Main Street Lending Program allows the Federal Reserve to work with the U.S. banking sector to channel credit to small and medium-sized businesses and nonprofits across the country.

Each Main Street loan is made by a private-sector commercial bank that is eligible to participate in the program. Following origination, the bank sells a 95% participation in the loan to a special purpose vehicle (the **Main Street SPV**) set up by the Boston Fed.[2] The purpose of the program is to support lending to small and medium-sized businesses and nonprofits that were in sound financial condition before the COVID-19 pandemic and could benefit from additional liquidity to maintain their operations.

Two types of loans are available to nonprofits: **Nonprofit New Loans**, which are newly originated loans, and **Nonprofit Expanded Loans**, which are newly added tranches to existing credit facilities.[3]

The Federal Reserve published initial versions of the Main Street nonprofit term sheets on June 15, 2020, setting forth proposed terms and conditions applicable to Nonprofit New Loans and Nonprofit Expanded Loans (together, **Nonprofit Loans**) with a request for comments from the public. The changes that were reflected in revised term sheets on July 17, 2020, expanded access to the program to a broader set of nonprofit organizations by making the eligibility requirements less stringent. Federal Reserve Chair Jay Powell stated in the accompanying press release: “Nonprofits provide vital services across the country and employ millions of Americans. We have listened carefully and adapted our approach so that we can best support them in carrying out their vital mission during this extraordinary time.”

The Federal Reserve has also released **FAQs** and standard form **transaction documents** for the Nonprofit Loan facilities. The FAQs are periodically updated, and the transaction documents are updated as needed to reflect changes to the program’s terms and requirements. Current versions of all of these documents are available on the **Forms and Agreements** website maintained by the Boston Fed and on our Government Support for Business **website**, under the “Main Street Nonprofit Lending” tab.

Participation in the program will be available until December 31, 2020, unless the program is extended by the Federal Reserve and the Treasury.

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2 The SPV structure allows the Federal Reserve to rely on Treasury’s $75 billion investment as a first-loss buffer and provide leverage to multiply its impact, supporting up to $600 billion in loans through the Main Street Lending Program.

3 In total, the Main Street Lending Program includes five loan facilities. In addition to the two nonprofit facilities discussed in this memorandum – the Nonprofit Organization New Loan Facility and the Nonprofit Organization Expanded Loan Facility – there are three loan facilities for for-profit businesses: the Main Street New Loan Facility, the Main Street Expanded Loan Facility and the Main Street Priority Loan Facility.

Main Street and the Paycheck Protection Program

Unlike the Small Business Administration (**SBA**)'s Paycheck Protection Program (the **PPP**), the Main Street Lending Program is not a forgivable loan program; its purpose is to bridge the gap during the COVID-19 crisis and help organizations that were in sound financial condition before the pandemic to access credit on commercially reasonable terms in order to maintain their operations until conditions normalize.

A nonprofit that previously participated in the PPP may also be eligible for Main Street.[4] Participating in one program will not make an organization ineligible to participate in the other. The following table summarizes key terms of the PPP and Main Street to show the differences between the two programs.

	Paycheck Protection Program	Main Street for Nonprofits
Eligible Borrower Size	▪ 500 employees or fewer ***or*** meet other SBA standards for a small business	▪ At least 10 employees ▪ Either (1) no more than 15,000 employees or (2) 2019 annual revenues of $5 billion or less among all affiliates ▪ Endowment of less than $3 billion
Loan Forgiveness	▪ Loans can be completely or partially forgiven if used for specified purposes, subject to reductions in loan forgiveness amount for decreases in payroll	▪ No loan forgiveness
Use of Funds	▪ 60% of the proceeds of the loan must be used for payroll	▪ Nonprofit borrower must use loan proceeds only in furtherance of its tax-exempt purpose
Credit Underwriting	▪ Loans are 100% guaranteed by the SBA and no credit decision by the lender is required	▪ 5% of the loan must be retained by the lender during the term of the loan or until the Main Street SPV sells its 95% participation interest in the loan ▪ Lenders are to apply their own credit underwriting standards
Size of Program	▪ Capped at total funding of $659 billion; would require legislation to expand further	▪ Program is currently limited to $600 billion in loans, but the Federal Reserve and Treasury may adjust that limit without legislation

4 The deadline to apply for a PPP loan was August 8th, and unless Congress acts to restart the program, no further PPP loans will be made.

Main Street Nonprofit Loan Terms

The terms of both types of Main Street nonprofit loans, New and Expanded, are summarized in the following table.

	Nonprofit New Loans	Nonprofit Expanded Loans
Type of loan	▪ Term loan originated after June 15, 2020 and may be secured or unsecured	▪ An upsized term loan tranche on an existing secured or unsecured term loan or revolving credit facility that: ▪ Was originated on or before June 15, 2020 ▪ Is currently held, at least in part, by an eligible lender ▪ Has a remaining maturity of at least 18 months (taking into account any adjustments made to the maturity of the loan after June 15, 2020, including at the time of upsizing)
Minimum Loan Size	▪ $250,000	▪ $10 million
Maximum Loan Size	▪ The lesser of (1) $35 million or (2) the borrower's average 2019 quarterly revenue	▪ The lesser of (1) $300 million or (2) the borrower's average 2019 quarterly revenue
Interest Rate	▪ LIBOR[5] (1-month or 3-month) + 300 basis points	▪ Same
Maturity	▪ 5 years	▪ Same
Payment Deferral	▪ Principal payments deferred for two years ▪ Interest payments deferred for one year—unpaid interest will be capitalized in accordance with the lender's customary practices for capitalizing interest (e.g., at quarter-end or year-end)	▪ Same
Principal Amortization	▪ 15% at end of third year ▪ 15% at end of fourth year ▪ Balloon payment of 70% at maturity	▪ Same
Prepayment	▪ Permitted without penalty	▪ Same
Ranking and Priority	▪ At the time of origination or at any time during the term of the loan, must *not* be contractually subordinated in terms of priority to any of the nonprofit's other loans or debt instruments[6]	▪ At the time of upsizing and at all times the upsized tranche is outstanding, must be senior to or *pari passu* with, in terms of priority and security, the nonprofit's other loans or debt instruments, other than mortgage debt[7]

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[5] Consistent with the recommendations of the Alternative Reference Rates Committee, lenders and borrowers should include fallback contract language to be used should LIBOR become unavailable during the term of the loan.

[6] **Loans or Debt Instruments** 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.

[7] **Mortgage debt** is (1) debt secured only by real property at the time of the upsized tranche's origination; and (2) limited recourse equipment financings (including equipment capital or finance leasing and purchase money equipment loans) secured only by the acquired equipment.

Borrower Eligibility Requirements

The Federal Reserve has set minimum requirements for nonprofits to be eligible to participate in the Main Street Lending Program. A nonprofit that meets the program's minimum eligibility requirements, however, is not automatically approved for a Nonprofit Loan. The minimum eligibility requirements establish baseline criteria for nonprofit participation in the Main Street Lending Program, but each nonprofit still needs a participating lender to agree to make a loan using its standard underwriting criteria. This section describes the minimum eligibility requirements set by the Federal Reserve and certain certifications that borrowers must be able to make in order to receive a Nonprofit Loan.

Non-Financial Requirements

- *Borrower is an eligible nonprofit organization*. An eligible "nonprofit organization" is defined for purposes of the Main Street nonprofit facilities as a tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code or a tax-exempt veterans' organization described in section 501(c)(19) of the Internal Revenue Code.[8] The Federal Reserve may consider expanding this definition to include other types of nonprofit organizations in the future.
- *Continuous operation*. The borrower has been in "continuous operation" if that organization, or a predecessor organization, was established on or before January 1, 2015, and has been engaged in the activities in furtherance of its tax-exempt status since that date.
- *Not an Ineligible Business*. The borrower cannot be an Ineligible Business as defined in SBA regulations.[9] Being a nonprofit organization does not, on its own, suffice to meet this criterion. While it is unlikely that a nonprofit that is otherwise eligible under the Main Street Lending Program would be classified as an Ineligible Business due to the nature of its activities, nonprofits should nonetheless be aware of the need to provide a certification relating to this eligibility criterion.
- *10 employee minimum*. The borrower must have at least 10 employees[10] at the time of origination of the Nonprofit Loan.
- *Employee and revenue maximums*. The borrower must meet at least one of the following two conditions: (1) has 15,000 employees or fewer, ***or*** (2) had 2019 annual revenues of $5 billion or less.
  - *Aggregation with affiliates*. A borrower's employees and revenues must be aggregated with the employees and revenues of its affiliated entities for purposes of determining its eligibility.
  - *Calculating employees*. To determine how many employees a borrower has, it should follow the framework set out in the SBA's affiliation rules. Under these rules, entities are generally affiliates when one entity controls or has the power to control the other, or a third party or parties controls or

[8] An organization such as a public college or university or a public hospital may not be recognized as a tax-exempt organization under section 501(c)(3) but may qualify as tax-exempt under another provision of the Internal Revenue Code. For purposes of the Nonprofit Loans, these organizations may qualify as organizations described in 501(c)(3) and thus be considered nonprofit organizations. To be considered a nonprofit organization for the Nonprofit Loans, a public hospital or public college or university must reasonably determine, in a written record maintained by the organization, that it is an organization described in section 501(c)(3). Further details are provided in the **FAQs**.

[9] For purposes of the Borrower Certifications and Covenants, an "Ineligible Business" means a business of any of the types listed in **13 CFR 120.110(b)-(j), (m)-(s)**, as modified and clarified by certain SBA regulations for purposes of the PPP. The applicable SBA modifications and clarifications are identified in the Federal Reserve's Main Street Nonprofit FAQs. More information on what is included in the definition of an "Ineligible Business" can be found in Davis Polk's **visual memo** on the Main Street Lending Program.

[10] **Employees** include all full-time, part-time, seasonal, or otherwise employed persons, excluding volunteers and independent contractors. A Nonprofit Organization that is an institution of higher education must exclude student workers participating in a Federal Work Study Program, on the same basis as, and subject to the same conditions and requirements of, the SBA's regulations at 85 Fed. Reg. 27287-90 (May 8, 2020).

has the power to control both entities. Common control includes, among other circumstances, a fact pattern in which a single individual, concern, or entity that controls the board of directors or management of one entity also controls the board of directors or management of another entity.

- *Calculating revenues*. A borrower may use the following methods to calculate its 2019 annual revenues for purposes of determining its eligibility:
  - the annual "revenue" of the borrower (and its affiliates) in its U.S. GAAP-based audited financial statements for 2019;
  - the annual receipts of the borrower (and its affiliates) as reported to the IRS for fiscal year 2019; or
  - if a potential nonprofit organization borrower (or its affiliate) does not yet have audited financial statements or annual receipts for 2019, the borrower (or its affiliate) should use its most recent audited financial statements or annual receipts.

- *Endowment of less than $3 billion*. The size of the borrower's endowment must be less than $3 billion and should be calculated as of the date of origination of the Nonprofit Loan.
- *U.S. organization*. The borrower must be created or organized in the United States or under the laws of the United States, with significant operations in and a majority of its employees based in the United States.
  - The Nonprofit Loan FAQs provide a non-exhaustive list of examples of what constitutes "significant operations" in the United States. A borrower would meet this condition if, when consolidated with its subsidiaries but not its parent companies or sister affiliates, more than 50% of the nonprofit's:
    - 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 any other expenses associated with debt service) are generated in the United States.
- *Conflict of interest prohibition*. A borrower must certify that it is in compliance with the CARES Act's prohibition on conflicts of interest, which prohibits financial assistance to any entity in which a "Covered Individual" directly or indirectly holds a controlling interest.[11] Because a "controlling interest" is defined by reference to equity ownership, the CARES Act's prohibition cannot apply to a nonprofit that does not have and cannot issue equity interests, and such nonprofits need not conduct any due diligence to certify this criterion.
- *Pass credit rating as of year-end 2019*. If the borrower had other loans from its lender that were outstanding as of December 31, 2019, those loans must have had an internal risk rating (based on the lender's risk rating system) equivalent to a **"pass"** in the Federal Financial Institutions Examination Council's (**FFIEC**) supervisory rating system on that date.
  - In order for an eligible nonprofit to receive a Nonprofit Expanded Loan, if the underlying loan was originated on or before December 31, 2019, and held by the lender on that date, the underlying

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[11] The term "Covered Individual" means the U.S. President, the Vice President, the head of an Executive Department or a Member of Congress (or a spouse, child, daughter-in-law or son-in-law of any of the foregoing). The definition of "Executive Department" includes the Departments of: State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans Affairs and Homeland Security. A "Member of Congress" includes a member of the Senate or House of Representatives, a Delegate to the House of Representatives and the Resident Commissioner from Puerto Rico.

loan must have had an internal risk rating (based on the lender's risk rating system) equivalent to a **"pass"** in the FFIEC's supervisory rating system as of December 31, 2019.

  - If the underlying loan for an upsized tranche was originated or purchased by the lender after December 31, 2019, the lender should use the internal risk rating given to that loan at the time of its origination or purchase, respectively, to determine whether the loan is eligible for upsizing under the expanded facility.

- *Double Dipping Limited*. A borrower is not eligible for a Nonprofit Loan if it has also received financial support from the federal government through certain other programs. For avoidance of doubt, the receipt of a PPP loan **would not** disqualify a nonprofit organization from Main Street eligibility. However, to be eligible for a Nonprofit Loan:
  - a borrower must not have received a loan or guarantee under the specific CARES Act programs for air carriers, certain related companies and businesses critical to national security; and
  - a borrower and its affiliates must not participate in more than one Main Street facility (NONLF, NOELF, MSNLF, MSPLF, MSELF), the Primary Market Corporate Credit Facility, or the Municipal Liquidity Facility.

Financial Eligibility Requirements

- *Financial records*. A borrower must certify that it has provided certain financial records and calculations to the lender, that the financial records fairly present, in all material respects, its financial condition, and that the calculations are true and correct in all material respects. Further requirements would apply if the borrower has selected one or more subsidiaries to guarantee the Nonprofit Loan. For a Nonprofit Expanded Loan, borrowers must provide additional certifications relating to the ranking and priority of the loan; the required certifications vary depending on whether the loan is secured or unsecured.
- *Financial thresholds*. Borrowers are required to meet four separate financial thresholds to be eligible for a Nonprofit Loan.
  - *EBIDA Ratio*. The ratio of (1) adjusted 2019 earnings before interest, depreciation, and amortization ("**EBIDA**") to (2) unrestricted 2019 operating revenue must be greater than or equal to 2%.[12]
  - *Liquidity ratio*. The ratio, expressed as a number of days, of (1) liquid assets at the time of the origination of the loan or upsized tranche to (2) average daily expenses over the previous year must be greater than or equal to 60 days.[13]
  - *Unrestricted cash and investments to debt ratio*. The ratio of (1) unrestricted cash and investments to (2) existing outstanding and undrawn available debt, plus the amount of any loan

[12] The borrower should calculate **operating revenue** as unrestricted operating revenue, excluding funds committed to be spent on capital, and including a proxy for endowment income in place of unrestricted investment gains or losses. To calculate its adjusted 2019 EBIDA and its proxy for endowment income, the borrower must use the methodology provided by its lender, which must be the same methodology used by the lender for such calculations when extending credit to the borrower or to similarly situated borrowers on or before June 15, 2020.

[13] **Liquid assets** are unrestricted cash and investments that can be accessed and monetized within 30 days. An organization may include in "liquid assets" the amount of cash receipts it reasonably estimates to receive within 60 days related to the provision of services, facilities, or products, or any other program service that exceed its reasonably estimated cash outflows payable within the same 60-day period.

Total expenses are equal to total expenses as defined in IRS Form 990 Part IX Line 25 minus depreciation, depletion and amortization as defined in IRS Form 990 Part IX Line 22. For purposes of the ratio of liquid assets to average daily expenses, a nonprofit organization should calculate average daily expenses as its total expenses for 2019, as described above, divided by 365.

under the Facility, plus the amount of any CMS Accelerated and Advance Payments,[14] must be greater than 55% at the time of the origination of the loan or upsized tranche.

- *Non-donation revenue*. The borrower must have average total annual non-donation revenues of at least 60% of average annual expenses for the period from 2017 through 2019.[15] The Nonprofit Loan FAQs include illustrative examples of how different kinds of revenues would be treated for the purposes of the non-donation revenues calculation.

- *Unavailability of credit*. The borrower must certify that it is unable to secure "adequate credit accommodations" from other banking institutions. The certification does not require that *no* other credit be available to the borrower, only that the borrower believes that the amount, price, or terms of such credit are inadequate to meet its needs during the current circumstances.
- *Solvency*. The borrower must certify that it is not "insolvent," which is defined for purposes of the Main Street Lending Program as currently being in insolvency proceedings or generally failing to pay undisputed debts that became due within the preceding 90 days. The borrower must also certify that it has the ability to meet its financial obligations for 90 days going forward, after giving effect to the Nonprofit Loan.

Application Process

As mentioned above, loans made through the Main Street Lending Program, including the nonprofit facilities, are more complex than their normal commercial counterparts, which is little surprise given the backdrop of the tremendous economic damage caused by the pandemic, the CARES Act and the Federal Reserve's emergency lending powers. Potential borrowers will need to make judgment calls throughout the application process and should be advised by legal counsel. This section provides an overview of the major steps in the process.

1. Reach out to an Eligible Lender.

A nonprofit that is considering a Main Street loan should first reach out to the bank it normally works with to ask whether the bank is participating in the Main Street Lending Program. Not all banks have registered to participate in the Main Street Lending Program as lenders, and many banks that have registered are providing loans only to their existing customers. A list of the participating lenders that are accepting new customers can be found **here** on the Boston Fed's website.

2. Provide information and documents to the Lender.

As described above, lenders must apply their underwriting criteria to reach a credit decision to determine whether to provide a Nonprofit Loan to a potential borrower, and lenders are expected to approve loans only to creditworthy borrowers. Thus, a borrower will need to provide information and documents to establish its eligibility to participate in the program and for the lender to reach a credit decision.

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14 CMS Accelerated and Advance Payments refer to payments made pursuant to a program established by the Centers for Medicare & Medicaid Services to increase cash flow to Medicare providers and suppliers affected by the COVID-19 pandemic.

15 **Non-donation revenues** are equal to gross revenues minus donations.

Donations *include* proceeds from fundraising events, federated campaigns, gifts, donor-advised funds, and funds from similar sources, but ***exclude*** government grants, revenues from a supporting organization, grants from private foundations that are disbursed over the course of more than one calendar year, and any contributions of property other than money, stocks, bonds, and other securities (noncash contributions) provided that such noncash contributions are not sold by the organization in a transaction unrelated to the organization's tax-exempt purpose.

Expenses, for purposes of this requirement, are equal to total expenses minus depreciation, depletion and amortization.

A lender should be able to provide each potential borrower with a list of required information and a general overview of the process to receive a Nonprofit Loan. Each potential borrower is, however, responsible for making sure that all of its information is correct and that the nonprofit organization meets all of the program's requirements. Specific requirements apply to the financial records that a potential borrower must provide, including:

- *U.S. GAAP*. A borrower that is subject to U.S. GAAP or that prepares its financials in accordance with U.S. GAAP must submit U.S. GAAP-compliant financial records, but otherwise is not required to do so.
- *Financial Statements*. A borrower that typically prepares audited financial statements should submit those statements. Otherwise, a borrower should submit reviewed financial statements or financial statements prepared for the purpose of filing tax returns. If a borrower does not yet have audited or reviewed financial statements for 2019, the borrower should use its most recent audited or reviewed financial statements. If a borrower's fiscal year 2019 does not coincide with calendar year 2019, it may use its 2019 fiscal year, unless otherwise required by the lender.
- *Consolidation*. A borrower that typically prepares its own financial statements that consolidate the borrower with its subsidiaries, but not its parent companies or sister affiliates, must submit such consolidated financial statements. If the borrower does not typically do so, however, it needs to do so only if required by the lender.

3. Review the draft documents.

Set out below is a list of the documents that a borrower must sign to receive a Nonprofit Loan. Except for the loan agreement, all of these documents are standard forms issued by the Federal Reserve that are not subject to negotiation or amendment by lenders and borrowers.

- *Loan Agreement*. Lenders are permitted to use their own forms of loan agreements with borrowers, so long as the loan agreement meets the requirements set forth in the Federal Reserve's Loan Document Checklist.
  - *Standard terms*. Many of the loan agreement's key provisions are dictated by the Main Street Lending Program's requirements, such as the interest rate (other than the potential choice between 1-month or 3-month LIBOR), the 5-year term and the amortization schedule.
  - *Limited flexibility*. Within the parameters of the program's requirements, certain aspects of the loan agreement are subject to determination by borrowers and lenders, such as the collateral for a secured loan and which legal entity or entities are identified as the borrower(s) or the guarantor(s).
  - *EBIDA Calculation*. A borrower must calculate its 2019 adjusted EBIDA to determine the maximum size of the loan it can receive. This calculation might be different from the calculations normally used in the borrower's financial statements, because the borrower is required to use a methodology agreed upon with its lender that is consistent with the methodology that the lender previously used for extending credit to the borrower or similarly situated borrowers.
- *Borrower Certifications and Covenants*. The Borrower Certifications and Covenants address the program's requirements and are quite detailed. The document setting them forth is, along with the loan agreement, one of the most important documents that a borrower must sign to obtain a Nonprofit Loan.
  - In signing the Borrower Certifications and Covenants, a borrower certifies each criterion of its eligibility to participate in the Main Street Lending Program, as described above, and agrees to abide by each of the covenants going forward.

  - A material misrepresentation or breach of covenant may result in a contractual default and require immediate repayment of the Nonprofit Loan. A knowingly false statement or material misrepresentation may result in civil or criminal liability.
- *Co-Lender Agreement*. By signing and submitting the Co-Lender Agreement to the Main Street SPV, the borrower and lender give the Main Street SPV the right to step in and elevate its participation interest to that of a lender of record if it later wishes to do so. That is not expected to happen except in situations where the borrower becomes financially distressed.
- *Assignment in Blank*. The Assignment-in-Blank is intended to be used by the Main Street SPV to facilitate the elevation of its participation, or the elevation and transfer of its participation interest. As with the Co-Lender Agreement, this agreement is part of the legal machinery designed to make it possible for the Federal Reserve to purchase a 95% participation in every Main Street loan and also be able to transfer its interest to another party if it wants to.

4. Sign the documents and be prepared to maintain compliance with the Borrower covenants.

A potential borrower should review the draft documents carefully – ideally with help from legal counsel – to confirm that all of the information is true and accurate. A borrower will need to ensure that it maintains compliance with all covenants through the life of the loan, and with the restrictions on payouts for one year after the loan has been fully repaid. The covenants are as follows:

- *Prompt notice*. The borrower agrees to promptly notify the lender of any material misrepresentation with respect to any certification, or of any material breach of any covenant.
- *Use of proceeds*. A borrower must certify that it will use the Nonprofit Loan proceeds only in furtherance of its tax-exempt purposes.[16]
- *Restrictions on payouts*. The borrower must agree to the following restrictions on payouts to its employees and shareholders, which continue to apply for one year after the loan has been repaid:
  - *Compensation restrictions*. Restrictions on compensation of officers and employees, excluding employees whose compensation is determined through an existing collective bargaining agreement entered into before March 1, 2020:
    - If an officer or employee's calendar year 2019 total compensation exceeded $425,000, her total compensation[17] during any 12-month period is limited to calendar year 2019 total compensation (i.e., no raises);
    - If an officer or employee's calendar year 2019 total compensation exceeded $3 million, her total compensation during any 12-month period is limited to the sum of $3 million plus 50% of the excess over $3 million of calendar year 2019 total compensation (i.e., a pay cut); and
    - For both categories above, severance pay or other benefits upon termination of employment are capped at two times the officer or employee's calendar year 2019 total compensation.
  - *Stock repurchase restriction*. No repurchases of equity securities of the borrower (or a parent company of the borrower) that are listed on a national securities exchange, except to the extent required by a contractual obligation in effect as of March 27, 2020. This certification would not apply if the borrower (and any parent company of the borrower) does not have and cannot issue equity securities.

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16 If the borrower is a subsidiary of a foreign company, it must also certify that it will not use Main Street loan proceeds for the benefit of any of its non-U.S. affiliates.

17 Total compensation includes salary, bonus, equity awards and other financial benefits; the calculation method is not clear.

  - *Capital distribution restriction*. No dividends or other capital distributions on common stock or equivalent equity interest. This certification would not apply if the borrower does not have and cannot issue common stock equivalents.
- *Prohibition on early repayment of other debt*. The borrower must commit not to repay the principal balance of, or pay any interest on, any debt until either the Nonprofit Loan is repaid in full or neither the Main Street SPV nor any government assignee holds any interest in the Nonprofit Loan, unless the principal or interest payment is mandatory and due.
- *Prohibition on early cancellation or reduction of other existing credit lines*. The borrower must commit that it will not seek to cancel or reduce any of its committed lines of credit with its lender, or any other lender, until either the Nonprofit Loan is repaid in full or neither the Main Street SPV nor any government assignee holds any interest in the Nonprofit Loan.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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