

## Affiliation Issues Under the Main Street Lending Program

June 4, 2020

The accurate identification and analysis of a Business's affiliates is a critical step in determining eligibility for the Main Street Lending Program (MSLP). In order to be eligible for the MSLP, a Business must meet at least one of the following two conditions: (a) the Business has 15,000 employees or fewer, or (b) the Business has 2019 annual revenues of \$5 billion or less. However, for both criteria the Business must include the employees and revenues of its affiliated entities in accordance with the affiliation test set forth in 13 CFR 121.301(f)(1/1/2019 ed.). Footnote 3 to the May 27, 2020, edition of the frequently asked questions (FAQs) clarifies that the U.S. Small Business Administration's (SBA) affiliation exceptions set forth in 13 CFR 121.103(b) apply to the program, including the exception for businesses' concerns owned in whole or substantial part by Small Business Investment Companies (SBIC). However, no additional exceptions to the affiliation rules have been made at this time. Recall that for the Paycheck Protection Program, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provided certain additional exceptions from the affiliation rules in order to benefit certain food service and accommodation businesses, and businesses that have received financing from a SBIC.

The proper analysis of the affiliation rules may make accessing the MSLP difficult for entities with large or numerous affiliates. Private equity and venture capital firms and family offices may find that a business, together with its affiliates, satisfies neither the number of employees test nor the 2019 revenues test. Moreover, an affiliated group of companies may only participate in one Main Street facility. For example, if one affiliated company were to participate in the Main Street New Loan Facility (MSNLF), one of its other affiliated companies could not participate in the Main Street Priority Loan Facility (MSPLF) or the Main Street Expanded Loan Facility (MSELF). Further, the total participation by an affiliated group of companies cannot exceed the applicable program limits. Because the programs vary by size and leverage limiters, an affiliated group of companies wishing to access the MSLP should be aware of – and carefully assess – their options.

The FAQs make particularly clear that private equity funds are not eligible to borrow under the MSLP because they are an Ineligible Business by virtue of being primarily engaged in investment or speculation. However, portfolio companies of private equity funds may be eligible for the MSLP if they qualify after applying the affiliation rules and being mindful of the above-described one Main Street facility rule.

The proper application of the MSLP's affiliation rules and eligibility criteria to foreign-related business will also be of importance. For example, a subsidiary of a foreign entity may nevertheless be an Eligible Borrower as long as the subsidiary/potential Eligible Borrower itself is created or organized in the United States – or under the laws of the United States – and otherwise qualifies for the MSLP, including meeting either the number of employees or 2019 revenue criteria when taken together with its affiliates. However, in order to determine whether a business has a majority of its employees in the United States, the borrower's operations should be evaluated on a consolidated business together only with its subsidiaries, but not their parent and sister affiliates. Similarly, to determine whether an Eligible Borrower has "significant operations" in the United States, the Business's

operations should be evaluated on a consolidated basis together with its subsidiaries, but not its parent companies or sister affiliates. The FAQs provide the following example:

An Eligible Borrower has significant operations in the United States if, when consolidated with their subsidiaries, greater than 50 percent of the Eligible Borrower'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.

Note that this is a self-described, nonexhaustive list of examples that reflect the principles that should be applied by a potential borrower when evaluating their eligibility under this criterion, and further worth noting that one of, but not all, are needed to satisfy the significant operations in the United States criteria.

Importantly, the FAQs provide that an Eligible Borrower that is a subsidiary of a foreign company must use the proceeds of a Main Street loan only for the benefit of the Eligible Borrower, their consolidated U.S. subsidiaries, and other affiliates of the Eligible Borrower that are U.S. businesses and may not be used for the benefit of an Eligible Borrower's foreign parents, affiliates or subsidiaries.

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Information contained in this alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.

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