

Program-Specific Rules Relating to Capital Access and Multiple-Dipping Under the CARES Act

CARES Act Program	Rules Relating to Access to Multiple Streams of Funds
<p>Section 4003 Loans (Title IV, Subtitle A)</p>	<ul style="list-style-type: none"> • Credit Availability Review. A borrower is eligible if “credit is not reasonably available” to the borrower “at the time of the” loan.ⁱ Treasury “and its financial and legal advisors will take into account evidence from the prospective borrower’s particular circumstances, including its relationships with existing and potential creditors, as well as general market conditions.”ⁱⁱ • Additional stipulations for non-air-carrier businesses. Businesses may be eligible if they are non-air-carrier U.S. businesses that “have not otherwise received adequate economic relief in the form of loans or loan guarantees provided under the CARES Act that are certified under 14 CFR Part 145 and approved to perform inspection, repair, replace, or overhaul services (‘Part-145 certified repair station operators’); ticket agents as defined in 49 U.S.C. § 40102; or businesses critical to maintaining national security.”ⁱⁱⁱ • Federal Reserve Facilities. A recipient of a loan under Section 4003 is not eligible to receive support under the Main Street Lending Program or either of the Corporate Credit Facilities.
<p>Main Street Lending Program (MSLP) (Title IV, Subtitle A)</p>	<ul style="list-style-type: none"> • PPP Recipients: The Federal Reserve has taken the position^{iv} that “a Business that has received PPP loans, or that has affiliates that have received PPP loans, is permitted to borrow under Main Street, provided that the Business is an Eligible Borrower.”^v An MSLP borrower, however, must complete a certification form reporting its PPP debt load.^{vi} • Economic Injury Disaster Loan (EIDL) Recipients: Similarly, a business receiving a loan under the SBA’s “EIDL program can be an Eligible Borrower under Main Street if it meets the Eligible Borrower criteria.”^{vii} • An entity eligible for more than one of the Main Street Lending Program facilities—the Main Street Priority Loan Facility (MSPLF); the Main Street New Loan Facility (MSNLF); the Main Street Expanded Loan Facility (MSELF); the Nonprofit Organization New Loan Facility (NONOLF); or the Non-profit Organization Expanded Loan Facility (NOELF)—may only participate in one. • An entity that participates in any one of the Main Street Lending Programs cannot also participate in the Primary Market Corporate Credit Facility or the Secondary Market Corporate Credit Facility.^{viii} An entity that participates in either the NONOLF or the NOELF may not also participate in the Municipal Liquidity Facility.^{ix}
<p>Primary Market Corporate Credit Facility (PMCCF) (Title IV, Subtitle A)</p>	<ul style="list-style-type: none"> • An eligible entity “may not participate in the PMCCF and a Main Street Lending Facility.”^x • An eligible entity “must not have received specific support pursuant to the CARES Act or any subsequent^{xi} federal legislation.” • An eligible entity may “utilize tax credits or tax relief in the CARES Act and still participate in the CCFs.”^{xii} • Secondary Market Corporate Credit Facility (SMCCF) Participants Subject to Per-Issuer Limits. An eligible entity may “participate in . . . the PMCCF at the same time its bonds have been or are being purchased by the SMCCF . . . but the collective purchases by the PMCCF and SMCCF of an eligible issuer’s debt are subject to the per-issuer limits described in the respective Term Sheets.”^{xiii}

Secondary Market Corporate Credit Facility (SMCCF) (Title IV, Subtitle A)

- An “eligible issuer must not have received **specific support pursuant to the CARES Act or any subsequent federal legislation.**”^{xiv}
- “An issuer may utilize **tax credits or tax relief in the CARES Act** and still participate in the CCFs.”^{xv}
- **PMCCF Participants Subject to Per-Issuer Limits.** “An eligible issuer [may] participate in . . . the PMCCF at the same time its bonds have been or are being purchased by the SMCCF . . . but the collective purchases by the PMCCF and SMCCF of an eligible issuer’s debt are subject to the per-issuer limits described in the respective Term Sheets.”^{xvi}

Term Asset-Backed Securities Facilities (TALF II) (Title IV, Subtitle A)

- **Credit Availability Review.** “Under the Board’s Regulation A, the New York Fed must obtain evidence that participants in the TALF are unable to secure adequate credit accommodations from other banking institutionsLack of adequate credit does not mean that no credit is available. Credit may be available, but inadequate in its amount, price, or terms.”^{xvii}
- “SBA Pool Certificates that include **PPP** loans in the underlying collateral pool are eligible ABS.”^{xviii}
- **Procedure for Requesting Multiple Loans.** “An eligible borrower may request an unlimited number of loans at each subscription date. If a borrower requests loans through multiple TALF Agents, it must deliver the collateral for each loan through the respective TALF Agent, unless the collateral is a new issuance delivered by the underwriter/other syndicate desk.”^{xix}
- **ABS Issued by Recipients of Loans under Section 4003(b)(1)-(3).** “Eligible ABS do not include ABS issued by or sponsored by (or, in the case of CLOs, with collateral managers which are) U.S. entities that have received specific support pursuant to Section 4003(b)(1)-(3) of the Coronavirus Aid, Relief, and Economic Security Act of 2020 (Subtitle A of Title IV of the CARES Act).”^{xx}

Payroll Support Program (PSP) (Title IV, Subtitle B)

- **No Express Prohibitions on Other CARES Act Support.** Treasury appears to have issued no specific guidance, stating only that “[a]n air carrier or contractor that has applied for or received support under other provisions of the CARES Act is precluded, by virtue of such application or support, from applying for and receiving Payroll Support. The eligibility criteria for other CARES Act support programs are set forth in the Act and any applicable guidance or regulations.”^{xxi}

Coronavirus Relief Fund (Title V)

- **Local Governments Eligibility.** The CARES Act does not explicitly prevent local governments (regardless of their eligibility for direct assistance) from receiving Coronavirus Relief Fund payments from state governments, so long as the funds are used for eligible purposes.

Paycheck Protection Program (PPP)

- **Loan Must Be New in Purpose and Amount.** “An eligible recipient applying for a covered loan shall make a good faith certification”
 - “that the eligible recipient does not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan”^{xxii}
 - “during the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under this subsection

for the same purpose and duplicative of amounts applied for or received under a covered loan.”^{xxiii}

- **SBA Guidance Regarding EIDL Recipients.**
 - “Nothing in this paragraph shall prohibit a recipient of an economic injury disaster loan made under subsection (b)(2) during the period beginning on January 31, 2020 and ending on the date on which covered loans are made available that is for a purpose other than paying payroll costs and other obligations described in subparagraph (F) from receiving assistance under this paragraph.”^{xxiv}
 - “Borrowers can apply for both the PPP and EIDL, although funds from both cannot be used for the same purpose.”^{xxv}
 - “If you took out an Economic Injury Disaster Loan (EIDL) between February 15, 2020 and June 30, 2020 and you want to refinance that loan into a PPP loan, you would add the outstanding loan amount to the payroll sum.”^{xxvi}
- **Rules for Current Federal Awards.** “[P]ayroll costs paid with the Paycheck Protection Program (PPP) loans or any other Federal CARES Act programs must not be also charged to current Federal awards as it would result in the Federal government paying for the same expenditures twice.”^{xxvii}
- **MSLP Recipients:** The Federal Reserve has taken the position that “a Business that has received PPP loans, or that has affiliates that have received PPP loans, is permitted to borrow under Main Street, provided that the Business is an Eligible Borrower.”^{xxviii} But an MSLP borrower must complete a certification form reporting its PPP debt load.^{xxix}

Economic Injury Disaster Loan (EIDL)

- **SBA Guidance Regarding PPP Recipients.** “Borrowers can apply for both the PPP and EIDL, although funds from both cannot be used for the same purpose.”^{xxx}
- **New SBA Loans Must Be Separate.** “Each SBA Disaster Loan is a separate loan; they cannot be consolidated or used to pay off earlier loans. If you qualify for another SBA disaster loan due to a different declared disaster in your area, the new loan must be used for the purposes listed in your loan closing documents, which may include working capital or physical damage repairs. It cannot be used to refinance or payoff existing SBA disaster loans from previous disaster events, including COVID-19.”^{xxxi}
- A business that already has both an EIDL loan and a PPP loan “may still qualify for a new SBA disaster loan for losses resulting from a declared disaster in your community.”^{xxxii}
- **Main Street Lending.** A business receiving a loan under the SBA’s “EIDL program can be an Eligible Borrower under Main Street if it meets the Eligible Borrower criteria.”^{xxxiii}

ⁱ CARES Act § 4003(c)(2)(A).

ⁱⁱ <https://home.treasury.gov/system/files/136/CARES-Airline-Loan-Support-Q-and-A-national-security.pdf>.

ⁱⁱⁱ <https://home.treasury.gov/system/files/136/CARES-Airline-Loan-Support-Q-and-A-national-security.pdf>.

^{iv} The Federal Reserve’s position on the eligibility of PPP and EIDL recipients for the MSLP appears to stem from an interpretation of CARES Act § 4002(4)(B) that is at odds with how the Department of the Treasury has interpreted that same provision. CARES Act § 4002(4)(B) defines the term “eligible business” as a non-air-carrier “United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act.” In its guidance regarding the loan program under Title IV, Subtitle A, Treasury further defines the term “eligible business,” in part, as non-air-carrier “businesses certified by the Department of Transportation under 14 C.F.R. Part 145 . . . that have not otherwise received adequate economic relief in the form of loans or loan guarantees under other programs authorized by the Act.” Procedures and Minimum Requirements for Loans to Air Carriers and Eligible Businesses and National Security Businesses under Division A, Title IV, Subtitle A of

the Coronavirus Aid, Relief, and Economic Security Act, U.S. Dep’t Treasury, at 2 (March 30, 2020), <https://home.treasury.gov/system/files/136/Procedures%20and%20Minimum%20Requirements%20for%20Loans.pdf>. That guidance defines “the Act” as the entire CARES Act. *Id.* at 1. Accordingly, it appears Treasury understands the definition of “eligible business,” as provided in CARES Act § 4002(4)(B), to exclude otherwise qualifying non-air-carrier businesses that have received an adequate loan or loan guarantee under *any* program established under the CARES Act. This would not allow an MSLP applicant to have participated in the PPP. The Federal Reserve’s guidance, however, provides that an MSLP applicant “must not have received specific support pursuant to the Coronavirus Economic Stabilization Act of 2020 (Subtitle A of Title IV of the CARES Act),” which the Federal Reserve clarifies to mean that “[a] Business is not eligible [for the MSLP] if it has received support pursuant to Section 4003(b)(1)-(3) of the CARES Act.” Main Street Lending Program FAQs, For-Profit Businesses, Board of Governors of the Federal Reserve System, at 27 (Dec. 29, 2020), <https://www.bostonfed.org/mslp-faqs>. Accordingly, it appears the Federal Reserve understands the definition of “eligible business,” as provided in CARES Act § 4002(4)(B), to exclude only those otherwise qualifying non-air-carrier businesses that have received an adequate loan or loan guarantee under Title IV, Subtitle A. This would allow an MSLP applicant to have participated in the PPP.

v <https://www.bostonfed.org/mslp-faqs>.

vi <https://www.bostonfed.org/-/media/Documents/special-lending-facilities/mslp/legal/ppp-forgiveness-form.pdf?la=en>.

vii <https://www.bostonfed.org/mslp-faqs>.

viii <https://www.newyorkfed.org/markets/primary-and-secondary-market-faq/corporate-credit-facility-faq>.

ix <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201030a4.pdf>;

<https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201030a5.pdf>.

x <https://www.newyorkfed.org/markets/primary-and-secondary-market-faq/corporate-credit-facility-faq>.

xi Notably, the prohibition against receiving specific support under “subsequent federal legislation” appears to be unique to the Corporate Credit Facilities and is not incorporated into the Federal Reserve’s guidance regarding other facilities — nor is such a prohibition included in Treasury’s guidance, which, as explained above, deviates slightly from the guidance issued by the Federal Reserve.

xii <https://www.newyorkfed.org/markets/primary-and-secondary-market-faq/corporate-credit-facility-faq>.

xiii <https://www.newyorkfed.org/markets/primary-and-secondary-market-faq/corporate-credit-facility-faq>.

xiv <https://www.newyorkfed.org/markets/primary-and-secondary-market-faq/corporate-credit-facility-faq>. “To participate in the PMCCF as an issuer or in the SMCCF as an issuer of eligible individual corporate bonds, the issuer must certify that it has not received specific support pursuant to the CARES Act. This issuer certification is not required in connection with the SMCCF broad market index purchase program. “Specific support” in this context means specific support pursuant to Section 4003(b)(1)-(3) of the Coronavirus Economic Stabilization Act of 2020 (Subtitle A of Title IV of the CARES Act) An issuer will not be eligible for the PMCCF or SMCCF if it has received a loan, loan guarantee, or other investment from the Treasury Department under Section 4003(b)(1)-(3).” *Id.*

xv <https://www.newyorkfed.org/markets/primary-and-secondary-market-faq/corporate-credit-facility-faq>.

xvi <https://www.newyorkfed.org/markets/primary-and-secondary-market-faq/corporate-credit-facility-faq>.

xvii <https://www.newyorkfed.org/markets/term-asset-backed-securities-loan-facility/term-asset-backed-securities-loan-facility-faq>.

xviii <https://www.newyorkfed.org/markets/term-asset-backed-securities-loan-facility/term-asset-backed-securities-loan-facility-faq>.

xix <https://www.newyorkfed.org/markets/term-asset-backed-securities-loan-facility/term-asset-backed-securities-loan-facility-faq>.

xx <https://www.newyorkfed.org/markets/term-asset-backed-securities-loan-facility/term-asset-backed-securities-loan-facility-faq>.

xxi <https://home.treasury.gov/system/files/136/QandA-Payroll-Support-to-Air-Carriers-and-Contractors.pdf>.

xxii CARES Act § 1102 (15 USC 636(a)(36)(G)(i)(III)).

xxiii CARES Act § 1102 (15 USC 636(a)(36)(G)(i)(IV)).

xxiv CARES Act § 1102 (15 USC 636(a)(36)(Q)).

xxv <https://www.sba.gov/sites/default/files/2020-11/COVID%20EIDL%20FAQ%20rev%20112320-508.pdf>.

xxvi https://www.sbc.senate.gov/public/_cache/files/2/9/29fc1ae7-879a-4de0-97d5-ab0a0cb558c8/1BC9E5AB74965E686FC6EBC019EC358F.the-small-business-owner-s-guide-to-the-cares-act-final-.pdf.

xxvii <https://www.whitehouse.gov/wp-content/uploads/2020/06/M-20-26.pdf>.

xxviii <https://www.bostonfed.org/mslp-faqs>.

xxix <https://www.bostonfed.org/-/media/Documents/special-lending-facilities/mslp/legal/ppp-forgiveness-form.pdf?la=en>.

xxx <https://www.sba.gov/sites/default/files/2020-11/COVID%20EIDL%20FAQ%20rev%20112320-508.pdf>. SBA also previously provided the following guidance: “Note that businesses that received an EIDL Advance in addition to the PPP loan will have the amount of the EIDL Advance subtracted from the forgiveness amount of their PPP loan.” The rule underlying that guidance, however, has since been repealed, and the repeal is intended to apply retroactively. See Economic Aid Act § 333(c), (d).

xxxi <https://www.sba.gov/sites/default/files/2020-11/COVID%20EIDL%20FAQ%20rev%20112320-508.pdf>.

xxxii <https://www.sba.gov/sites/default/files/2020-11/COVID%20EIDL%20FAQ%20rev%20112320-508.pdf>.

xxxiii <https://www.bostonfed.org/mslp-faqs>.