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Federal Reserve Announces Updated Terms of "Main Street Lending Program"

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As previously described in a prior Alert on April 9, 2020, the Federal Reserve announced a "Main Street Lending Program," which will make loans available for eligible borrowers. On April 30, 2020, following review of commentary on the initial terms of the Main Street Lending Program, the Federal Reserve announced updated terms for the Main Street New Loan Facility (New Loan Facility) and Main Street Expanded Loan Facility (Expanded Loan Facility) and terms for a new Main Street Priority Loan Facility (Priority Loan Facility).

The term sheets for the Main Street New Loan Facility, the Main Street Expanded Loan Facility and the Main Street Priority Loan Facility are available here. The Federal Reserve's FAQ Sheet for the Main Street Lending Program is available here.

Key Updates to Original Terms

- ***Borrower Eligibility:***
  - Borrowers must have either 15,000 employees ***or*** fewer, or $5 billion or less of revenue in 2019. Borrowers must meet at least one of these conditions, but are not required to meet both. To determine how many employees a Borrower has or a Borrower's 2019 revenues, the employees and revenues of the Borrower must be aggregated with the employees and revenues of its affiliated entities. Affiliation rules will generally be applied in the same manner as in the PPP loan program (although the exceptions relating to hospitality, restaurants, franchises and recipients of SBIC assistance are not expected to carry over). As a result, Borrowers owned by private equity funds will need to take into account the employees and revenue of other funds and portfolio companies in determining eligibility.
  - Borrowers that are categorically excluded from participating in SBA loan programs pursuant to 13 C.F.R. 120.110(b)-(j), (m)-(s), including financial businesses primarily engaged in the business of lending, gambling businesses, and life insurance businesses, are ineligible to participate in the Main Street Lending Program.
  - Borrowers must not have received support pursuant to Subpart A of Title IV of the CARES Act relating to emergency relief to distressed industries, including airlines and businesses important to maintaining national security. However, Borrowers that have received PPP loans, or that have affiliates that have received PPP loans, are permitted to borrow under Main Street.
  - Eligible lenders are required to conduct an assessment of each potential borrower's financial condition at the time of the potential borrower's application. Eligible lenders will apply their own underwriting standards in evaluating the financial condition and creditworthiness of a potential borrower, and may require additional information and documentation in making this evaluation and will ultimately determine whether a borrower is approved for a loan in light of these considerations.

- ***Leverage Test Requirements:***
  - Maximum leverage under the Main Street Lending Program is based upon the borrower's adjusted 2019 EBITDA and existing and undrawn available debt.
  - For loans under the New Loan Facility and the Priority Loan Facility, the methodology to calculate adjusted 2019 EBITDA must be the methodology used by the lender for adjusting EBITDA when extending credit to the borrower or to similarly situated borrowers on or before April 24, 2020.
  - For loans under the Expanded Loan Facility, the methodology to calculate adjusted 2019 EBITDA must be the methodology used for adjusting EBITDA when originating or amending the underlying loan on or before April 24, 2020.
  - The Federal Reserve is evaluating the feasibility of non-EBITDA-based criteria for asset-based borrowers, but no additional guidance is currently available.
  - "Existing outstanding and undrawn available debt" 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. It also includes all unused commitments under any loan facility, excluding (1) any undrawn commitment that serves as a backup line for commercial paper issuance, (2) any undrawn commitment that is used to finance receivables (including seasonal financing of inventory), (3) any undrawn commitment that cannot be drawn without additional collateral, (4) any undrawn commitment that is no longer available due to change in circumstance. Existing outstanding and undrawn available debt should be calculated as of the date of the loan application.
- ***LIBOR***: Index rate changed from SOFR to LIBOR (plus 300 basis points).
- ***Tax Distributions***: S corporations and other tax pass-through entities may make distributions to the extent reasonably required to cover its owners' tax obligations in respect of the entity's earnings. Excess tax distributions are not permitted.
- ***Maturity and Loan Amortization***: Four-year maturity for each loan. Amortization is as follows:
  - Under the New Loan Facility, no principal is paid in the first year. The loan will be amortized over the remaining term of the loan, with one-third of principal due at the end of each of years 2 and 3, and one-third due at maturity at the end of year 4.
  - Under the Priority Loan Facility and Expanded Loan Facility, no principal is paid in the first year. The loan will be amortized over the remaining term of the loan, with 15% of principal due at the end of year 2, 15% of principal due at the end of year 3, and a balloon payment of 70% of principal due at maturity at the end of year 4.
  - The maturity and amortization requirements may create an issue for borrowers seeking loans under the Expanded Loan Facility. Accordion provisions will typically require that any incremental term loan matures no earlier than the maturity of existing loans, and have a weighted average life to maturity no greater than the weighted average life to maturity of existing loans. As a result, if the four-year term required under the Expanded Loan Facility is inside the maturity of an existing term loan, or the existing term loan has lesser amortization, participation in the Expanded Loan Facility will likely not be

permitted absent an "inside maturity" basket (i.e. a limited basket that permits earlier maturing debt with a greater weighted average life to maturity) or consent of the borrower's existing lenders.

- ***Borrower Certifications***: The updated term sheets removed the requirement that borrowers attest that the need for financing is due to exigent circumstances presented by COVID-19, though borrowers are required to:
  - (1) certify that they have a reasonable basis to believe that they have the ability to meet their financial obligations for at least the next 90 days and do not expect to file for bankruptcy during that time period.
  - (2) use commercially reasonable efforts to maintain payroll and retain employees during the time the loan is outstanding, in light of capacities, the economic environment, available resources, and the business need for labor. Borrowers that have already laid-off or furloughed workers as a result of the disruptions from COVID-19 are eligible to apply for Main Street loans.
- ***Syndicated Loans***. The FAQs have clarified that the "eligible lender" requirement would not in and of itself prevent a borrower with syndicated term loans from participating in the Expanded Loan Facility, as long as an Eligible Lender held an interest in the underlying loan at the date of the upsizing.
- ***Lender Internal Risk Rating***. For the Expanded Loan Facility, the Eligible Lender must have assessed an internal risk rating equivalent of "pass" to the underlying loan as of December 31, 2019. For the New Loan Facility and Priority Loan Facility, if the Eligible Lender had any other loan outstanding with the borrower as of December 31, 2019, the Eligible Lender must have assessed an internal risk rating equivalent of "pass" to such other loan as of December 31, 2019.

Summary of Other Principal Terms

- ***New Loan Facility – General Terms:***
  - Eligible lenders extend new loans ranging in size from $500,000 to a maximum of $25 million—in general, this facility may be available to borrowers that either do not have existing credit agreements or that have sufficient basket capacity under existing credit agreements to incur indebtedness under this facility. It is possible that entities other than a current borrower might be eligible to borrow under this facility.
  - The maximum size of a loan made in connection with the New Loan Facility cannot, when added to the borrower's existing outstanding and undrawn available debt, exceed 4x the borrower's adjusted 2019 EBITDA.
- ***Expanded Loan Facility – General Terms:***
  - Eligible lenders upsize existing term loans or add a tranche of term loans under existing revolving credit facilities—if an existing credit agreement does not include accordion provisions that would permit the upsized or new tranche of term loans, consent of the borrowers' existing lenders may be required in order for a borrower to participate.
  - Loans ranging in size from $10 million to a maximum of $200 million.
  - The maximum size of a loan made in connection with the Expanded Loan Facility cannot exceed (1) 35% of the borrower's existing outstanding and undrawn available debt that is pari passu in priority with

the Expanded Loan and equivalent in secured status (i.e., secured or unsecured); or (2) when added to the borrower's existing outstanding and undrawn available debt, 6x the Eligible Borrower's adjusted 2019 EBITDA.

- The existing term loans or existing revolving credit facilities must have a remaining maturity of at least 18 months.

- ***Priority Loan Facility – General Terms:***
  - Eligible lenders extend new loans ranging in size from $500,000 to a maximum of $25 million.
  - The maximum size of a loan made in connection with the Priority Loan Facility cannot, when added to the borrower's existing outstanding and undrawn available debt, exceed 6x times the borrower's adjusted 2019 EBITDA.
  - Borrowers may, at the time of origination of the loan, refinance existing debt owed by the borrowers to a lender that is not the eligible lender.
- ***Eligible Lenders:***
  - An Eligible Lender is a U.S. federally insured depository institution (including a bank, savings association, or credit union), a U.S. branch or agency of a foreign bank, a U.S. bank holding company, a U.S. savings and loan holding company, a U.S. intermediate holding company of a foreign banking organization, or a U.S. subsidiary of any of the foregoing.
  - Non-bank lenders are not currently eligible to serve as lenders under this program. This may limit the ability of borrowers that have existing credit agreements with non-bank lenders to participate in the Expanded Loan Facility.
  - It may be possible for borrowers with existing credit agreements with non-bank lenders to cause an eligible lender to join the lending syndicate (making the Expanded Loan Facility available), but borrowers should determine whether there are any rights of first offer or similar provisions that require that any incremental term loan be offered to existing lenders prior to being offered to new lenders.
- ***Executive Compensation/Stock Repurchase/Dividend Limitations:***
  - Borrowers are required to follow executive compensation, stock repurchase and capital distribution limitations described in the CARES Act applicable to direct loans. These include the following so long as the loan is outstanding and for 12 months after repayment:
    - Employees who received total compensation in 2019 of over $425,000 cannot receive total compensation during any 12-month period that exceeds the amount received in 2019 or termination benefits that exceed 2x 2019 compensation.
    - Employees who received total compensation in 2019 of over $3 million may not receive more than $3 million plus 50% of the excess over $3 million received in 2019 during any 12-month period.
      - "Total compensation" is defined as salary, bonuses, awards of stock, and other financial benefits provided by an eligible business to an officer or employee. The CARES Act

does not specify when or how “awards of stock” are to be valued for purposes of determining total compensation, which may have implications on future sale transactions.

- Publicly traded borrowers cannot repurchase equity securities.
- Borrower cannot pay dividends or make other capital distributions (other than permitted tax distributions).
- While consent of the Federal Reserve would not be required for a change of control of borrowers, executive compensation and distribution limitations would continue to apply to borrowers following completion of change-of-control transactions, and distribution limitations may complicate structures to effect change of control transactions.

- ***Interest:***
  - Adjustable rate of LIBOR (one- or three-month) + 300 basis points.
  - As with any incremental loan, borrowers should confirm that MFN provisions under existing credit agreements are not triggered (which would result in a gross-up of the interest rate on existing loans).
- ***Prepayment***: Permitted without penalty.
- ***Collateral:***
  - New Loan Facility loans may be secured or unsecured, but may not be contractually subordinated in terms of priority to any of the borrower’s other loans or debt instruments.
  - Priority Loan Facility loans and Expanded Loan Facility upsized tranches may be secured or unsecured, but must be senior to or pari passu, in terms of both priority and security, with the borrower’s other loans or debt instruments, other than mortgage debt. This may create a challenge for a borrower that has cross-collateralized debt (for example, an ABL Facility that has a first lien on current assets and a secured Term Loan that has a first lien on fixed assets) to avail itself of these programs, and although unclear from the Term Sheets, may require an intercreditor agreement for a borrower to establish the pari passu nature of the security if the borrower has any other secured debt.
  - Expanded Loan Facility upsized tranches must be secured if the underlying loan is secured. In such case, any collateral securing the underlying loan (at the time of upsizing or on any subsequent date) must secure the Expanded Loan Facility upsized tranches on a pro rata basis. Under such an arrangement, if the borrower defaults, the Federal Reserve SPV and lender(s) would share equally in any collateral available to support the loan relative to their proportional interests in the loan. Eligible lenders can require borrowers to pledge additional collateral to secure an Expanded Loan Facility upsized tranche as a condition of approval.
- ***Restrictions on Repayment of Debt:***
  - Borrowers are not permitted to repay the principal balance of, or pay any interest on, any debt until the New Loan Facility loan, the Priority Loan Facility loan or the Expanded Loan Facility upsized tranche is repaid in full, unless the debt or interest payment is mandatory and due.

- However, borrowers under the Priority Loan Facility may, at the time of origination of the loan, refinance existing debt owed by the borrowers to a lender that is not the eligible lender
- Borrowers are also prohibited from seeking to cancel or reduce any of its committed lines of credit with the eligible lender or any other lender.
- Borrowers are permitted to take the following actions:
  - Repay lines of credit in accordance with the borrowers' normal course of business usage of such line of credit.
  - Incur and pay additional debt obligations required in the normal course of business and on standard terms, including inventory and equipment financing, provided that such debt is secured by newly acquired property (e.g., inventory or equipment), and, apart from such security, is of equal or lower priority than the Main Street loan.
  - Refinance maturing debt.

- ***Fees:***
  - **New Loan Facility and Priority Loan Facility**: Fee of up to 100 basis points of the principal amount of the loan payable by borrowers to lenders.
  - **Expanded Loan Facility**: Fee of up to 75 basis points of the principal amount of the loan payable by borrowers to lenders.