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May 29, 2020

Federal Reserve Releases Updated Main Street Lending FAQs and Form Agreements

As previously described in Alerts issued on [April 9, 2020](#) and [May 1, 2020](#), the Federal Reserve announced that it is establishing a \$600 billion Main Street Lending Program to support lending to qualified businesses. The Main Street Lending Program will operate through three facilities: the Main Street New Loan Facility (MSNLF), the Main Street Priority Loan Facility (MSPLF), and the Main Street Expanded Loan Facility (MSELF).

On May 27, 2020, the Federal Reserve released updated Main Street Lending Program [FAQs](#) and form agreements and other standardized [documents](#) to be utilized in connection with loans made pursuant to the program and loan participations sold to the Main Street SPV sponsored by the Federal Reserve.

The launch date for the Main Street Lending Program has not been announced, but the Federal Reserve indicated it is currently working to create the infrastructure necessary to operationalize the program. The program will be administered by the Federal Reserve Bank of Boston, which will establish the Main Street SPV to purchase loan participations from eligible lenders in each of the twelve Federal Reserve districts. The Federal Reserve has indicated that the documents released on May 27, 2020 are final, but further clarifications and guidance may be issued in subsequent FAQs.

This Alert provides an overview of the structure of the Main Street Lending Program and related documentation framework.

Main Street SPV: As noted in our prior Alerts, loans under MSNLF, MSPLF and MSELF will be made directly by eligible lenders. A description of eligible lenders can be found in our prior Alerts. The Main Street SPV, a single common special-purpose vehicle sponsored by the Federal Reserve and the Treasury Department, will purchase 85% to 95% participations in new loans originated by eligible lenders.

Lender Registration: Prior to making any loans under the Main Street Lending Program, each eligible lender will be required to register with the Main Street SPV and make certifications and covenants regarding the eligible lender's eligibility to participate in the program and the eligible lender's solvency.

Loan Participation Documents: In connection with the sale of participation interests to the Main Street SPV, eligible lenders and the Main Street SPV will enter into a series of documents governing the sale of participation interests, subsequent assignments and transfers of participation interests, intercreditor arrangements and decision making among lenders and the Main Street SPV during the term of the loan.

- **Voting Rights and Core Rights Acts:** Consent of the Main Street SPV (and other lenders to whom the Main Street SPV transfers its interest) is required with respect to Core Rights Acts, which not only include customary sacred rights, but also matters which would be the subject of required lender action in commercial loans, including the exercise of rights and remedies arising from a cross-acceleration.

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- Assignments and Transfers of Participation Interests: Eligible lenders and borrowers are required to execute an assignment-in-blank and/or co-lender agreement, consenting in advance to any elevation of the Main Street SPV's participation interest to an assignment of its portion of the loan and the subsequent transfer of the loan upon the occurrence of a "Special Permitted Transfer," which includes a payment default under the loan and the bankruptcy of the borrower or eligible lender.

Loan Agreements and Requirements:

- General Loan Agreement Requirements:
 - Eligible lenders are permitted to use their own loan agreements in relation to Main Street Lending Program loans, so long as such agreements are substantially similar, including with respect to required covenants, to the loan documentation that the eligible lenders use in the ordinary course to similarly situated borrowers. However, loan documents are required to reflect terms set out in the Loan Document Checklist on Appendix A of the FAQs (Loan Document Checklist), which include maturity, principal and interest deferrals, interest rate, amortization, security, priority and loan size requirements described in our prior Alerts.
 - Eligible lenders may require borrowers to pay transaction fees, but are not permitted to charge any additional fees other than de minimis fees customarily charged in similar transactions.
- Borrower Covenants:
 - Priority and Security Covenant – Main Street loans must not be contractually subordinated to the borrower's other loans or debt instruments, subject to exceptions, limitations, carve-outs, baskets, materiality thresholds and qualifiers that are consistent with the eligible lender's ordinary course documentation.
 - Financial Reporting Covenant – Main Street loans are required to contain a financial reporting covenant requiring annual and quarterly delivery of certain financial information and calculations set out in the Loan Document Checklist, including with respect to total assets, current assets, cash, total liabilities, current liabilities, total debt, total equity, revenue, net income, unadjusted EBITDA, adjusted EBITDA, dividends, inventory, fixed assets, expenses, fixed charges, collateral value, capital expenditures and covenant defaults and cures.
- Additional Affiliation Implications:
 - An affiliated group of companies can participate in only one Main Street facility. For example (and assuming satisfaction of the affiliation rules), if one portfolio company of a private equity fund participates in (or has a pending application to participate in) an MSELF loan, then other portfolio companies of the same private equity fund cannot participate in the MSNLF or MSPLF programs.
 - For each affiliated group, the maximum loan size constraints (including leverage test and maximum debt quantum) apply to the group on a consolidated basis. For example, the maximum aggregate borrowing capacity for all portfolio companies (measured collectively) of the same private equity fund is \$25 million for the MSNLF and MSPLF program and \$200 million for the MSELF program. As a result, the borrowing capacity for one portfolio company of a private equity fund must take into account the EBITDA, leverage ratios and Main Street borrowings of other portfolio companies.

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- For more information on application of affiliation rules to Main Street loans, refer to our prior Alerts linked above.
- **Mandatory Prepayment Upon Certification Misrepresentations:** Main Street loans are subject to mandatory prepayment in the event of a knowing material misrepresentation or material breach of certain certifications by a borrower, including the following:
 1. Borrower meets the eligibility requirements for financial assistance under the CARES Act, including that it is a U.S. business¹, has not received specific support under Section 4003(b) of the CARES Act relating to loans and loan support to air carriers and businesses critical to national security, and is not an entity in which the President, Vice President, heads of Executive Departments of the U.S. federal government, members of the U.S. Congress or family members own a controlling interest.
 2. Borrower will abide by the restrictions on employee compensation and the prohibition on paying dividends on common stock set forth in the CARES Act for the term of the loan and one year thereafter. For more information on such restrictions, refer to our prior Alerts linked above.²
 3. Borrower is not insolvent and is unable to secure adequate credit accommodations from other banking institutions. The FAQs clarify that being unable to secure adequate credit accommodations does not mean that no credit from other sources is available to the borrower. Rather, the borrower may certify that it is unable to secure “adequate credit accommodations” because the amount, price, or terms of credit available from other sources are inadequate for the borrower’s needs during the current unusual and exigent circumstances. Borrowers are not required to demonstrate that applications for credit have been denied by other lenders or otherwise document that the amount, price, or terms of credit available elsewhere are inadequate.
- Mandatory prepayments may be triggered by the Federal Reserve after consultation with the eligible lender.
- Knowing material misrepresentations or material breaches of other certifications by a borrower, including (1) those relating to the eligibility of the borrower based on the employee headcount and 2019 revenues of the borrower and its affiliates, (2) the go-forward solvency of the borrower and (3) restrictions on repayment of other debt of the borrower not mandatory and due would not trigger mandatory prepayment, but would be covered by a mandatory indemnity. For additional detail regarding such certifications, refer to our prior Alerts linked above.

¹ U.S. subsidiaries of foreign companies may be eligible borrowers if the subsidiaries are organized in the United States, have significant operations and a majority of its employees in the United States and must use the proceeds of a Main Street loan only for the benefit of the eligible borrower, its consolidated U.S. subsidiaries, and other affiliates of the Eligible Borrower that are U.S. businesses. The updated FAQs clarify that in determining whether an eligible borrower has “significant operations” in the United States, the eligible borrower’s operations should be evaluated on a consolidated basis together with its subsidiaries, but not its parent companies or sister affiliates. An eligible borrower has significant operations in the United States if, when consolidated with its subsidiaries, greater than 50% of the eligible borrower’s assets, net income, net operating revenues or operating expenses are located or generated, as applicable, in the United States.

² While borrowers under the Main Street facilities will be subject to the executive compensation restrictions under section 4003(c)(3)(A)(ii) of the CARES Act, the FAQs continue to lack any guidance on when or how “awards of stock” are to be valued for purposes of determining total compensation, which may have implications on future sale transactions.

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- Cross-Acceleration: Main Street loans will contain a cross-acceleration provision that would trigger an event of default if a different debt obligation of the borrower owed to the eligible lender or any of its affiliates is accelerated.