
May 29, 2020

UPDATE: Federal Reserve Issues Updated Guidance and Publishes Legal Forms and Agreements for Main Street Lending Facilities

Key Takeaways

- *On May 27, 2020, the Federal Reserve (“Fed”) issued a number of legal forms and agreements, with accompanying instructions, that must be completed and submitted by eligible borrowers and lenders participating in the Main Street New Loan Facility (“MSNLF”), Main Street Expanded Loan Facility (“MSELF”) and Main Street Priority Loan Facility (“MSPLF”).¹*
- *The Fed also updated the Main Street Frequently Asked Questions (“FAQ”) to provide additional guidance on the terms and conditions of the Main Street Lending Program.²*

* * *

Overview

When participating in any of the Main Street Lending Facilities (“Main Street”), borrowers and lenders must use the new legal forms and agreements recently provided by the Fed (or, where permitted, incorporate substantially similar provisions into their agreements), which include loan participation agreement terms and conditions as well as certain certifications and covenants required to be made by lenders and borrowers. The newly published forms and agreements are generally consistent with the guidance, terms and conditions of the Main Street program as previously outlined by the Fed.³

The revised FAQ similarly preserves many of its predecessor’s key terms and layers on some additional clarifying guidance. As such, many prospective borrowers will continue to face challenges in qualifying for and obtaining Main Street loans.

We highlight here certain updates and clarifications implemented by the recent guidance and documents.

¹ For the legal forms and agreements and accompanying instructions, please click [here](#).

² For the FAQs, please click [here](#).

³ For additional information regarding Main Street’s prior guidance, please click [here](#) and [here](#).

-
- **Loan Seniority.** Consistent with prior guidance, loans under MSPLF or MSELF must be “senior to or pari passu with, in terms of priority and security, the borrower’s other loans or debt instruments, other than mortgage debt.” The FAQ adds the following clarifications:
 - ***Secured Loans.*** MSPLF loans and MSELF upsized tranches must be secured if, at the time of origination, the borrower has any other secured loans or debt, other than mortgage debt.
 - If a MSPLF loan is secured, the Collateral Coverage Ratio⁴ at the time of origination of the MSPLF loan must be (i) at least 200 percent or (ii) not less than the aggregate Collateral Coverage Ratio for all of the other borrower’s other secured debt (other than mortgage debt). If the MSPLF loan is secured by the same collateral as any of the borrower’s other debt (other than mortgage debt), the lien securing the MSPLF loan must be senior to, or pari passu with, any lien of any other creditor upon such collateral.
 - A secured MSELF upsized tranche must be secured by the collateral securing any other tranche of the underlying credit facility on a pari passu basis.
 - ***Unsecured Loans.*** A MSPLF loan or MSELF upsized tranche may be unsecured if the borrower does not have any secured debt (other than mortgage debt), but the Main Street loan cannot be contractually subordinated in terms of priority to any of the borrower’s other unsecured debt.
- **Restrictions on Repayment of Other Debt.**
 - While a MSPLF loan may be used to repay a borrower’s existing debt in connection with the MSPLF loan’s origination, after origination the borrower may no longer repay its other debt, subject to certain exceptions.
 - The primary exception to the Main Street program’s prohibition on repayment of other debt is when other debt repayment is “mandatory and due.” The FAQ clarifies that principal and interest payments are mandatory and due (i) on the date scheduled to be paid, as of April 24, 2020 or (ii) when an event automatically triggers mandatory prepayments under a “contract for indebtedness” executed prior to April 24, 2020. If a payment is due as a result of the incurrence of the Main Street loan, such payment is limited to those prepayments that are de minimis or payable in respect of repayment of debt in connection with MSPLF origination.⁵ Future debt incurred by the borrower

⁴ “Collateral Coverage Ratio” is defined as “(i) the aggregate value of any relevant collateral security, including the pro rata value of any shared collateral, divided by (ii) the outstanding aggregate principal amount of the relevant debt.”

⁵ A borrower is therefore ineligible for MSNLF and MSELF if its existing debt requires more than a de minimis prepayment upon origination of the Main Street loan, and in that case the borrower would need to seek a waiver or reduction of such prepayment from its existing lenders prior to participating.

will also be deemed “mandatory and due” on its scheduled date(s) or upon the occurrence of an event that automatically triggers prepayments, so long as the debt is incurred in accordance with the terms and conditions of the applicable Main Street facility.

- **MSELF: Multi-Lender Facilities.** Consistent with prior guidance, a loan with multiple lenders may still qualify for an MSELF upsized tranche so long as the lender providing such upsized tranche (i) is an eligible lender and (ii) holds an interest in such loan as of the date of upsizing.⁶ However, the FAQ now provides that such lender must retain its 5% participation in the upsized tranche and may not share it with other lenders (regardless of whether those other lenders are part of the underlying multi-lender facility).
- **Eligible Borrowers.** While borrower eligibility criteria have not changed materially from prior guidance, the FAQ sheds additional light on the meaning of some of these criteria.
 - *“Significant Operations” in the United States.* In order to determine if a borrower has “significant operations” in the United States, the borrower’s operations must be evaluated on a consolidated basis with its subsidiaries but without considering its parent companies and sister affiliates. The FAQ provides four illustrative examples of circumstances which would satisfy this “significant operations” test: if a borrower, when consolidated with its subsidiaries, has greater than 50% of its (i) assets located in the United States, (ii) annual net income generated in the United States, (iii) annual net operating revenues generated in the United States or (iv) annual consolidated operating expenses (excluding expenses associated with debt service) generated in the United States.
 - *Subsidiaries of Foreign Companies.* Subsidiaries of foreign companies may be eligible borrowers under the Main Street program if the subsidiary is “created or organized in the United States or under the laws of the United States” and has significant operations and a majority of its employees in the United States. However, the proceeds of a Main Street loan may not be used to benefit a borrower’s foreign parents, affiliates or subsidiaries.
 - *Inability to Secure Adequate Credit.* A borrower must certify it is unable to secure “adequate credit accommodations” in order to be eligible to participate. The latest guidance clarifies that this certification means that the “amount, price or terms of credit available are inadequate for the borrowers needs during the current unusual and exigent circumstances,” and also confirms that borrowers need not “demonstrate that applications for credit had been denied by other lenders or otherwise document that the amount, price, or terms of credit available elsewhere are inadequate.” This begs the question as to how a borrower will in good faith make such determination

⁶ The lender is not required to have originated the underlying loan, but it must have acquired its interest in the loan as of December 31, 2019.

(notwithstanding the lack of a requirement to demonstrate such determination), and borrowers should consult with counsel in this regard.

- *Affiliation Requirements.*
 - Affiliate Consolidation. A borrower and its affiliates may only participate in the same Main Street facility as each other (e.g., if two borrowers are affiliated and the first participates in MSNLF, then the second is prohibited from participating in MSELF or MSPLF). Furthermore, the maximum loan size of each Main Street program applies in the aggregate to all affiliated borrowers, meaning that each affiliated borrower's individual loan amount will be consolidated for purposes of measuring loan sizes. This requires affiliated borrowers to aggregate their EBITDA for purposes of calculating the leverage-based maximum loan amount in addition to calculating their individual leverage-based maximum loan amount, and in any event affiliated borrowers will also be subject to a single dollar-capped maximum loan amount based on the applicable facility (i.e., \$25 million in the cases of MSNLF and MSPLF or \$200 million in the case of MSELF). For example, three affiliated borrowers each participating in MSNLF would be subject to a \$25 million maximum loan amount on a consolidated basis, even if their individual and consolidated EBITDA leverage ratio tests would permit them to borrow more.
 - Private Equity Firms and Portfolio companies. While prior guidance incorporated certain eligibility criteria by cross-reference to the Small Business Administration's regulations and related guidance in connection with its Paycheck Protection Program ("PPP"), the FAQ now explicitly states that private equity firms are ineligible to participate in Main Street. This is not a substantive change from prior guidance, but it affirms that the Fed is espousing a level of hostility to private equity similar to that seen in the PPP. However, portfolio companies of private equity firms remain eligible to borrow to the extent they are otherwise qualified under the applicable Main Street facility's terms, including affiliation requirements.
- Lender Fees. Generally, lenders are not permitted to charge fees to borrowers other than as explicitly permitted under the Main Street facilities. However, the FAQ now provides that lenders may also charge borrowers "de minimis fees for services that are customary and necessary," such as legal fees.
- EBITDA Methodologies. The FAQ clarifies that if a lender has used multiple methods when adjusting EBITDA for a specific borrower or similarly situated borrowers, the lender should utilize the "most conservative method" previously used. Lenders are not permitted to "cherry pick" adjustments used at different points in time or for different purposes, and lenders should document their rationale for the selection of an EBITDA adjustment methodology.
- Fed Actions in Distressed Situations. Generally, the Fed intends to rely on lenders to service Main Street loans on a basis consistent with how those lenders service their ordinary loans outside of Main Street.

But if a borrower defaults on loan payments or a borrower or lender enters into bankruptcy or similar proceedings, the Fed may “elevate its participation to an assignment” so that the Main Street special purpose vehicle (“SPV”) is in direct privity with the borrower. The guidance further notes that the Fed generally does not expect the SPV to exercise this right unless (i) the economic interests of the lender and SPV are not aligned or (ii) the loan amount in question is large in comparison to other loans in the SPV’s portfolio, and instead expects lenders to follow standard market workout processes.

- **Required Covenants.** Appendix B to the FAQ contains model covenants that lenders should reference when drafting loan documentation. Among them are covenants relating to priority and security, mandatory prepayments in the event of material breaches of borrower certifications or covenants, cross-acceleration and financial reporting.
- **Required Financial Reporting.** Appendix C to the FAQ provides a detailed list of financial information that must be delivered on a quarterly and/or annual basis in all Main Street loans.

Ongoing Updates

The Main Street program remains under continuing review and the Fed and the U.S. Treasury may make adjustments to the terms and conditions of any of the lending facilities described above as they deem appropriate. We will continue to provide updates on any further developments.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Ariel J. Deckelbaum

+1-212-373-3546

ajdeckelbaum@paulweiss.com

Brian P. Finnegan

+1-212-373-3079

bfinnegan@paulweiss.com

Roberto J. Gonzalez

+1-202-223-7316

rgonzalez@paulweiss.com

Gregory F. Laufer

+1-212-373-3441

glaufer@paulweiss.com

Brian C. Lavin

+1-212-373-3650

blavin@paulweiss.com

Jean M. McLoughlin

+1-212-373-3135

jmcloughlin@paulweiss.com

Carl L. Reisner

+1-212-373-3017

creisner@paulweiss.com

T. Robert Zochowski Jr.

+1-212-373-3762

rzochowski@paulweiss.com

Associates Jeffrey L. Stricker and Alexander T. Louis contributed to this Client Memorandum.