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Main Street Lending Program “Very Close” to Operational

Senior officials from the Federal Reserve announced that the Main Street Lending Program (the “Program”) is “very close” to being operational during a webinar broadcast on Friday, May 29, 2020. The webinar, which was designed to provide potential borrowers an opportunity to learn more about the Program, aired two days after the Federal Reserve released updated [FAQs](#) and [Program Forms and Agreements](#).

This article summarizes key updates to the FAQs and key provisions of the Program Forms and Agreements for borrowers and lenders in preparation for the impending launch of the Main Street Lending Program.

1. Updated FAQs

While the general terms for each of the three Main Street Loan Facilities (the “Facilities”) remain unchanged, the Federal Reserve has updated the FAQs to provide additional guidance in response to more than 2,000 questions and comments received from industry participants since the Program was initially announced. Frost Brown Todd has prepared an updated detailed chart comparing the three Facilities, which can be accessed [here](#). Highlights from the updated FAQs include:

- [EBITDA Adjustments](#) – The Federal Reserve emphasized that lenders may not “cherry-pick” or apply adjustments to earnings before interest, taxes, depreciation and amortization (EBITDA) used at different points in time or for a range of purposes of determining the eligible loan amount. Rather, lenders must select a single method used at a point in time in the recent past and before April 24, 2020, with respect to the borrower or, if the borrower is a new customer, with respect to similarly situated borrowers. If the lender has used multiple EBITDA adjustment methods, the lender should choose the most conservative method. The lender should document the

rationale for its selection of an adjusted EBITDA methodology and its process for identifying similarly situated borrowers.

- Security Requirements – Main Street Priority Loan Facility (MSPLF) loans and Main Street Expanded Loan Facility (MSELF) upsized tranches must be secured if, at the time of origination, the borrower has any other secured loans or debt instruments, other than mortgage debt. The value of the collateral securing an MSPLF loan must satisfy a specified coverage ratio as more particularly described in the FAQs. The MSELF upsized tranche must be secured by the collateral securing any other term loan tranche(s) of the underlying credit facility on a pari passu basis. If an MSELF upsized tranche must be secured, lenders and borrowers may add collateral to the underlying loan at the time of upsizing.
- Additional Restrictions on Use of Proceeds – In addition to the restrictions on the repayment of other debt and restrictions on executive compensation, stock repurchase and distributions, the Federal Reserve clarified that loan proceeds may only be used for the benefit of the borrower, its consolidated U.S. subsidiaries, and other affiliates of the borrower that are U.S. businesses (and not for the benefit of a borrower's foreign parents, affiliates or subsidiaries).
- Borrower and Lender Solvency – Borrowers and lenders must certify that they are not insolvent. For purposes of this certification, a borrower or lender is "insolvent" if it is in bankruptcy, resolution under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, or any other federal or state insolvency proceeding. A borrower or lender is also "insolvent" if it was generally failing to pay undisputed debts as they become due during the 90 days preceding the date of borrowing. The Federal Reserve does not consider a borrower to have been "generally failing to pay undisputed debts as they become due" if such borrower is behind on its debts for reasons related to disruptions to its business resulting from the COVID-19 pandemic.
- Unavailability of Other Credit – Borrowers must certify that they are unable to secure adequate credit accommodations

from other banking institutions. This does not necessarily mean that no other credit is available for the borrower's purposes. Rather, the borrower can 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

- Loan Documentation – The updated FAQs indicate that each participating lender should use its own loan documentation for loans extended under the Program. Such documentation should be substantially similar, including with respect to required covenants, to the loan documentation that the lender uses in its ordinary course lending to similarly situated borrowers, adjusted only as appropriate to reflect the requirements of the Program.
 - [Appendix A to the FAQs](#) contains a checklist of the items that must be reflected in the loan documentation in order for the Main Street Special Purpose Vehicle ("SPV") established by the Federal Reserve Bank of Boston to purchase a participation in a loan.
 - [Appendix B to the FAQs](#) includes certain model covenants that lenders can elect to reference when drafting their loan documentation in order to satisfy the Appendix A requirements.
 - [Appendix C to the FAQs](#) includes a list of the financial information that lenders must require borrowers to provide on an ongoing basis until the loans mature. The list of required reporting includes (i) adjusted & unadjusted EBITDA calculations, (ii) descriptions of EBITDA adjustments, (iii) accounts receivable, inventory, accounts payable, and other balance sheet items, (iv) summaries of capital expenditures, (v) fixed charges, (vi) details of the collateral value, and (vii) whether all

covenants remain satisfied.

- Operational Details – Lenders will have two options for funding loans under the Program:
 - Funded Loan – Lenders may fund the loan in full and then seek to sell a participation in such loan to the SPV. Lenders will be required to submit all of the required documentation, completed and signed, for processing no later than 14 days after the closing of such loan.
 - Condition of Funding – Lenders may make funding of the loan contingent on a binding commitment from the SPV that it will purchase a participation in the loan. Lenders will be required to submit all required documentation, completed and signed, for processing, but indicate in their submissions that the loan has not yet been funded. Lenders will be required to fund the loan within three business days of the date of the SPV's commitment letter. The SPV will purchase the participation not later than three business days after the lender notifies the SPV that the lender has funded the loan.
- Accounting & Supervisory Expectations – The updated FAQs provide guidance on how a lender should account for the transfer of an undivided participation interest in the loan to the SPV and how federal supervisors will treat loans extended through the Program.
- Servicing – The Federal Reserve expects lenders to follow market-standard workout processes and to exercise the same duty of care in approaching such proceedings as it would exercise if it retained a beneficial interest in the entire loan.

2. Program Forms and Agreements

In addition to the updated FAQs, the Federal Reserve has also published [Program Forms and Agreements](#). Each of the Program Forms and Agreements is summarized below.

- Instructions for Lender Required Documentation – This document provides detailed instructions for completing the required Lender Registration Documents as well as the required Transaction Specific Documents.
- Lender Registration Required Documentation – Prior to participation in the Program, lenders must register by submitting the following completed forms to the SPV:
 - Lender Registration Certifications and Covenants – The lender’s principal executive officer and principal financial officer (or individuals performing similar functions) must certify to the SPV, the Federal Reserve Bank of Boston, the Board of Governors of the Federal Reserve (“Board”) and the Secretary of the Treasury (“Treasury”) that (i) the lender is eligible to participate in the Program, (ii) the lender is not in violation of the conflicts of interest provisions set forth in Section 4019(b) of the CARES Act, and (iii) the lender is not insolvent. The instructions accompanying the form certification outline the lender eligibility and insolvency standards and prescribe the level of diligence required to make the required conflict of interest certification in good faith. The lender must also (i) consent to certain disclosures relative to the loan, (ii) covenant to retain records for a period of 10 years following the termination of all of the Facilities or for the period of time required by the lender’s document retention policies, whichever is longer, containing the basis for the conflict of interest certification and (iii) commit to notify the SPV and the Reserve Bank promptly, and to cease engaging in new transactions with the Facilities, if, at any time prior to September 30, 2020, or such later date to which any of the Facilities is extended by the Board and the Secretary, as applicable, the lender’s certifications are no longer true and correct.
 - Wire Instructions – The lender must provide wire instructions for the bank account into which the SPV will transfer the purchase price and any other amounts the

SPV is required to deliver to the lender under the Program requirements.

- Transaction Specific Required Documentation – The following documents are required to be submitted by the lender to the SPV in connection with each participation sale:
 - Loan Participation Agreement – This agreement, which incorporates the Loan Participation Agreement Standard Terms and Conditions, must be executed by the lender and the SPV and governs the terms and conditions of the participation purchase, including records retention requirements, voting rights, standards of care, and permitted transfers. The SPV will generally be permitted to sell its participation (without elevating to an assignment) only with the contemporaneous consent of the lender. Lender consent will not be required in connection with a sale or transfer of a loan participation in full at any time to any governmental assignee (but not to effect a securitization). The SPV will generally be permitted to elevate its participation into an assignment only with the contemporaneous consent of the borrower, the lender, and other necessary parties (i.e., the administrative agent in a multi-lender facility), but the SPV will be able to sell or transfer or elevate its participation to an assignment if (i) the borrower has failed to make any payment due under its loan contract with the lender beyond applicable grace periods, (ii) the borrower or lender has become the subject of bankruptcy or other insolvency proceedings, (iii) the lender would take, or refrain from taking, an action that would result in impermissible forgiveness of principal, or (iv) if required to do so by a statute or court.
 - Borrower Certifications and Covenants – The borrower's principal executive officer and principal financial officer (or individuals performing similar functions) must execute the form certifications and covenants listed below for the applicable Facility. In each case, the

borrower generally certifies to the SPV, the lender, the Federal Reserve Bank of Boston, the Board and the Secretary (i) that borrower satisfies all of the generally applicable Program and CARES Act eligibility requirements (including the conflicts of interest and solvency requirements), (ii) the accuracy of the borrower's financial records, (iii) that borrower will refrain from repaying existing debt or reducing existing credit lines in violation of the Program's specific restrictions, (iv) that the proceeds will only be used for the benefit of the borrower, its consolidated U.S. subsidiaries and other affiliates of the borrower that are U.S. businesses, and (v) that the loan is fully guaranteed by a qualified subsidiary of the borrower to the extent the borrower is a holding company. Additionally, the borrower agrees to notify the lender of any material breach or misrepresentation while the loan is outstanding and the SPV, or any governmental assignee, holds an interest in the loan, and for one year after the loan is no longer owned in any capacity by the SPV or any governmental assignee. Finally, the borrower must also (i) consent to certain disclosures relative to the loan and (ii) covenant to retain records for a period of 10 years following the termination of all of the Facilities or for the period of time required by the borrower's document retention policies, whichever is longer, containing the basis for the conflict of interest certification.

- [Main Street New Loan Facility Borrower Certifications and Covenants](#)
- [Main Street Priority Loan Facility Borrower Certifications and Covenants](#)
- [Main Street Expanded Loan Facility Borrower Certifications and Covenants](#)
- [Lender Transaction Specific Certifications and Covenants](#) – An authorized officer or representative of

the lender must execute the form certifications and covenants listed below for the applicable Facility. In each case, the lender generally certifies to the SPV, the Federal Reserve Bank of Boston, the Board and the Secretary (i) that the borrower has delivered all required borrower certifications and that the lender has no knowledge or reason to believe that certain of the eligibility certifications made by the borrower are incorrect or untrue in any material respect, (ii) that the specific terms of the loan are in compliance with the applicable Program requirements (including the methodology used to calculate the borrower's adjusted 2019 EBITDA), (iii) that all required mandatory prepayment, cross acceleration, financial reporting and lien covenants set forth on Exhibit B to the FAQs are included in the loan documentation, (iv) that the lender will retain its interest in the loan for as long as required under the Program requirements and (v) that the lender will not request early repayment of borrower's other existing debt or cancel or reduce any existing committed lines of credit to the borrower in violation of the Program requirements. Additionally, the lender agrees to notify the SPV of any material breach or misrepresentation while the loan is outstanding and the SPV, or any governmental assignee, holds an interest in the loan, and for one year after the loan is no longer owned in any capacity by the SPV or any governmental assignee. Finally, the lender must also consent to certain disclosures relative to the loan.

- [Main Street New Loan Facility Lender Transaction Specific Certifications and Covenants](#)
- [Main Street Priority Loan Facility Lender Transaction Specific Certifications and Covenants](#)
- [Main Street Expanded Loan Facility Lender Transaction Specific Certifications and Covenants](#)

- [Assignment in Blank](#) – The assignment executed in blank is intended to be used by the SPV to elevate its participation or to elevate and transfer its participation only in the limited circumstances set forth in the Loan Participation Agreement. In general, the Federal Reserve expects that the SPV generally would not expect to elevate and assign except in situations where (i) the economic interests of the lender and the SPV are misaligned or (ii) the loan amount is relatively large in comparison to other loans in the SPV's portfolio of participations. However, the assignment is required to be executed by the lender (in its capacity as the assignor and as the administrative agent) and the borrower at the time of the participation purchase as evidence of their pre-consent to such elevation and assignment. The form of assignment and assumption agreement provided by the Federal Reserve should only be used to the extent the loan documentation does not contain customary syndicated loan facility provisions, including agency, assignment, voting, sharing and other multi-lender provisions. For any loan that is a syndicated facility, an assignment and assumption agreement should still be executed in blank and delivered to the SPV at the time of the participation purchase, but the form would be the form specified in the applicable loan documentation, modified only as required to comply with Program requirements.
- [Co-Lender Agreement](#) – This agreement, which incorporates the [Co-Lender Agreement under the Main Street Program Standard Terms and Conditions](#), provides the necessary agency and operational mechanics to accommodate multiple lenders. This agreement will be required to be executed in blank by the lender (as both the initial lender and the administrative agent), the borrower and any other loan parties (i.e., guarantors) only to the extent the loan documentation does not contain customary syndicated

loan facility provisions, including agency, assignment, voting, sharing and other multi-lender provisions. Under the Co-Lender Agreement, the lender is appointed as an administrative agent with respect to the loan, effective upon the elevation (or elevation and transfer) of the loan by the SPV such that there will then be multiple lenders with respect to the loan. The Co-Lender Agreement will not be required for syndicated facilities.

- [Servicing Agreement](#) – This agreement will be executed by the lender and the SPV at the time of the participation purchase. This agreement sets forth the annual servicing fee due from the SPV to the lender and the enhanced reporting services that the lender undertakes to the SPV (which correspond to the financial reporting requirements set forth on Exhibit C to the FAQs) in consideration for such servicing fee.

The Federal Reserve still has not announced an official launch date for the Program; however, with the finalization of the Program Forms and Agreements, the Program is expected to be operational any day. Market participants are still unsure whether the level of demand will match the \$600 billion that has been allocated to the Program. Many newer companies have negative EBITDA and, thus, will be disqualified from participating in the Program. Otherwise, eligible borrowers may be deterred from participating in the Program by the hefty principal repayments due at the end of years two, three and four of the loan terms and/or the security requirements. The Federal Reserve has indicated that it may consider changes to the Program if necessary to make the Program more functional for borrowers and lenders.

Frost Brown Todd is here to keep you informed and to help you analyze the availability and features of the Program. For more information on the Main Street Lending Program and other financial assistance under the CARES Act, please contact [Becky Moore](#), [Amanda England](#), [Maria Kroeger](#), [Meghan Jackson Tyson](#) or any attorney in Frost Brown Todd's [Financial Services](#) Industry Team.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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