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FEDERAL RESERVE RELEASES APPLICATION MATERIALS AND GUIDANCE FOR THE MAIN STREET LENDING PROGRAMS

To Our Clients and Friends:

On May 27, 2020, the Federal Reserve Bank of Boston released additional information on the three lending facilities the Federal Reserve is creating under the *Coronavirus Aid, Relief, and Economic Security Act* (“CARES Act”): the Main Street New Loan Facility (“MSNLF”); the Main Street Expanded Loan Facility (“MSELF”); and the Main Street Priority Loan Facility (“MSPLF,” together with the MSNLF and MSELF, the “Main Street Programs”).

The Federal Reserve Bank of Boston released both application documents and high-level guidance. The release of these documents comes on the heels of Secretary Mnuchin’s recent testimony before the Senate Banking Committee in which he said the Main Street Programs will launch by the end of May and money will start flowing to applicants soon thereafter. Most recently, Federal Reserve Chairman Powell said he expects that Main Street Program loans will be issued in the coming days.

This client alert first discusses the key new guidance on the Main Street Programs. It then provides a high-level summary of the new documents released.

Key Guidance

- ***Credit Certification:*** To participate in the Main Street Programs, a borrower must certify that “it is unable to secure adequate credit accommodations from other banking institutions.”
 - Guidance clarifies that “[b]eing unable to secure adequate credit accommodations does not mean that no credit from other sources is available to the borrower.” Rather, the requirement is satisfied if “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.” Accordingly, borrowers need not demonstrate that “applications for credit ha[ve] been denied by other lenders or otherwise document that the amount, price, or terms of credit available elsewhere are inadequate.”
- ***Criminal and Civil Liability:*** If an application includes “knowing material misrepresentation,” the lender or borrower may be referred to law enforcement authorities for investigation and possible action under applicable criminal and civil law.

- The application documents cite 8 U.S.C. § 1001, which criminalizes false statements made “knowingly and willfully” and is punishable by up to 5 years of imprisonment, and 31 U.S.C. § 3729, the False Claims Act, which carries heavy fines.
- ***Additional Guidance on “Significant Operations in United States”:*** To determine if a borrower has “significant operations in the United States,” a business will be evaluated on a consolidated basis with its subsidiaries, but not with its parent companies or sister affiliates. As a non-exhaustive example, the guidance notes that a borrower would have significant operations in the United States if greater than 50% of the borrower’s:
 - Assets are located in the United States;
 - Annual net income is generated in the United States;
 - Annual net operating revenues are generated in the United States; or
 - Annual consolidated operating expenses (excluding interest expense and any other expenses associated with debt service) are generated in the United States.

This guidance is helpful to many businesses that are based in the United States yet have a majority of employees overseas.

- ***Subsidiaries of Non-U.S. Borrowers Can Participate:*** The guidance clarifies that a subsidiary of a non-U.S. company can participate in the Main Street Programs, so long as the borrower itself (1) is created or organized in, or under the laws of, the United States and (2) on a consolidated basis has significant operations in, and a majority of its employees based in, the United States.
 - But borrowers must only use loan proceeds to benefit the borrower, its consolidated United States subsidiaries, or the borrower’s affiliates that are United States businesses. The loan may not be used to benefit non-U.S. parents, affiliates, or subsidiaries.
- ***Loans to “New Customers”:*** Under the MSNLF and MSPLF, lenders may originate loans to new customers—*e.*, a business that has not previously worked with the lender.
- ***MSPLF Loans Can Refinance Existing Loans:*** Guidance clarifies that, when a MSPLF loan is originated, a borrower may use the proceeds of that loan to refinance existing loans owed to other lenders.
 - After origination and until the MSPLF loan is repaid in full, however, the borrower must refrain from repaying the principal balance of, or paying any interest on, any debt other than the MSPLF loan, unless the debt or interest payment is mandatory and due.
- ***MSELF Does Not Require Use of Original Lender:*** Under the MSELF, the lender for the upsized tranche need not be the lender that originally extended the underlying loan.

- The MSELF lender must, however, have acquired the interest in the underlying loan as of December 31, 2019. The lender also must have assigned an internal risk rating to the underlying loan equivalent to a “pass” in the FFIEC’s supervisory rating system as of that date.
- ***Program Restrictions Apply to Affiliates:*** A borrower can only participate in one Main Street Program, and a borrower cannot participate in both a Main Street Program and the Primary Market Corporate Credit Facility. This restriction applies to a borrower’s affiliates.
- ***Clarification on EBITDA Calculations:*** A borrower must adjust its 2019 EBITDA by using either: (1) the methodology that the lender has previously required for EBITDA adjustments when extending credit to the borrower; or (2) if the borrower is a new customer, the methodology employed for similarly situated borrowers on or before April 24, 2020. The guidance notes that “similarly situated borrowers” are borrowers in similar industries with comparable risk and size characteristics.
 - If a lender has used multiple EBITDA adjustment methods for the borrower or similarly situated borrowers, the lender should choose the most conservative method it has employed.
 - Lenders must select a single EBITDA adjustment method that it used at a point in time in the recent past and before April 24, 2020. The guidance forbids “cherry pick[ing]” different methodologies and applying adjustments used at different points in time or for a range of purposes.
- ***Additional Guidance on MSELF Maximum Loan Size:*** Under the MSELF, the maximum size of the upsized tranche cannot exceed 35% of the borrower’s existing outstanding and undrawn available debt that is (i) *pari passu* in priority with the upsized tranche and (ii) equivalent in secured status (*e.*, secured or unsecured) to the upsized tranche.
 - **Secured Loans:** If the upsized tranche is part of a secured loan, then all secured debt for borrowed money of the borrower that has not been made junior in priority through contractual subordination should be included in the calculation, regardless of the value or type of collateral.
 - **Unsecured Loans:** If the upsized tranche is part of an unsecured loan, then all unsecured debt for borrowed money of the borrower that has not been made junior in priority through contractual subordination should be included in the calculation.
- ***Additional Guidance on MSPLF Loan Priority and Security:*** Under the MSPLF, loans must be senior to or *pari passu* with, in terms of priority and security, the borrower’s “Loan or Debt Instruments” and “Mortgage Debt.”
 - The guidance defines both terms:

- § “Loan or Debt Instruments” means debt for borrowed money and all obligations evidenced by bonds, debentures, notes, loan agreements or other similar instruments, and all guarantees of the foregoing.
- § “Mortgage Debt” means debt secured by real property at the time of the MSPLF loan’s origination.
- The MSPLF loan must be secured if, at the time of origination, the borrower has any other secured Loans or Debt Instruments, other than Mortgage Debt.
- If the MSPLF loan is secured, then the “Collateral Coverage Ratio” for the MSPLF Loan at the time of its origination must be either (i) at least 200% or (ii) not less than the aggregate Collateral Coverage Ratio for all of the borrower’s other secured Loans or Debt Instruments (other than Mortgage Debt).
 - § “Collateral Coverage Ratio” means (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.
- If the MSPLF loan is secured by the *same collateral* as the borrower’s other Loans or Debt Instruments (other than Mortgage Debt), the lien upon such collateral securing the loan must be and remain senior to or *pari passu* with the lien(s) of the other creditor(s) upon such collateral. The loan need not share in all of the collateral that secures the borrower’s other Loans or Debt Instruments.
- The MSPLF loan can be unsecured only if the borrower does not have, as of the date of origination, any secured Loans or Debt Instruments (other than Mortgage Debt).
 - § The unsecured loan must not be contractually subordinated in terms of priority to any of the borrower’s other unsecured Loans or Debt Instruments.
- ***Additional Guidance on MSELF Loan Priority and Security Requirements:*** The MSELF’s security and priority requirements are largely the same as the requirements described above that apply to the MSPLF. The major difference is for secured loans: under the MSELF, the upsized tranche must be secured by the collateral securing any other tranche of the underlying credit facility on a *pari passu* basis. Lenders and borrowers may add new collateral to secure the loan (including the upsized tranche on a *pari passu* basis) at the time of upsizing.
 - § If the underlying credit facility includes both term loan tranche(s) and revolver tranche(s), the upsized tranche needs to share collateral on a *pari passu* basis with the term loan tranche(s) only. Secured upsized tranches must not be contractually subordinated in terms of priority to any of the borrowers’ other Loans or Debt Instruments.

Documents Released

- **Lender Registration Certifications and Covenants:** This document, which includes the certifications and covenants that lenders must make to participate in the Main Street Programs, must be signed and submitted by the lender at the time of its registration with the Main Street Special Purpose Vehicle (“SPV”). The document must be signed by the lender’s CEO and CFO or officers performing similar functions.
- **Transaction Specific Lender Certifications and Covenants:** Each Main Street Program has its own document regarding the lender certifications and covenants that apply to the program. The document must be signed by an authorized officer of the lender.
 - MSNLF Lender Transaction Specific Certifications and Covenants
 - MSELF Lender Transaction Specific Certifications and Covenants
 - MSPLF Lender Transaction Specific Certifications and Covenants
- **Borrower Certifications and Covenants:** Each Main Street Program has its own document regarding the borrower certifications and covenants that apply to the program. The borrower’s CEO or CFO (or officers performing similar functions) must sign the document. The lender must submit this document at the time a loan participation in the borrower’s loan is sold to the SPV.
 - MSNLF Borrower Certifications and Covenants
 - MSELF Borrower Certifications and Covenants
 - MSPLF Borrower Certifications and Covenants
 - The certifications and covenants include the following:
 - § The borrower is an entity that is organized for profit as one of the following:
 - § Partnership;
 - § Limited liability company;
 - § Corporation;
 - § Association;
 - § Trust;
 - § Cooperative;

- § Joint venture with no more than 49 percent participation by foreign business entities;
 - § Tribal business concern that is (i) wholly owned by one or more Indian tribal governments, or by a corporation that is wholly owned by one or more Indian tribal governments, or (ii) owned in part by one or more Indian tribal governments, or by a corporation that is wholly owned by one or more Indian tribal governments, if all other owners are either U.S. citizens or Businesses;
 - § Any other form of organization that has been publicly designated by the Federal Reserve as a “Business.”
- § The borrower is not an “Ineligible Business.”
- § An “Ineligible Business” is a business of any of the types listed in 13 CFR 120.110(b)-(j), (m)-(s), as modified and clarified by Small Business Administration regulations for purposes of the Paycheck Protection Program on or before April 24, 2020.
- § The borrower was established prior to March 13, 2020.
- § The borrower meets at least one of the following conditions:
- § Has 15,000 employees or fewer; or
 - § 2019 annual revenues of \$5 billion or less.
- § The borrower has identified its affiliates, in accordance with the principles set forth in 13 CFR 121.301(f).
- § Neither the borrower nor the borrower’s affiliates have participated in, or will attempt to participate in, another Main Street Program or the Primary Market Corporate Credit Facility.
- § The borrower has not received “specific support” under the *CARES Act*, which is limited to support under Section 4003(b)(1)–(3).
- § The borrower is a business created or organized in the United States that has significant operations in, and a majority of its employees based in, the United States.
- § The borrower complies with the *CARES Act*’s conflicts of interest requirements in Section 4019(c).

- § The borrower will comply with the compensation, stock repurchase, and capital distributions restrictions in Section 4003(c)(3)(A)(ii).
- § The borrower is unable to secure adequate credit accommodations from other banking institutions.
- § The borrower is not insolvent.
 - § A borrower 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 (as defined in paragraph B(ii) of section 13(3) of the Federal Reserve Act), or if it was generally failing to pay undisputed debts as they become due during the 90 days preceding the date of borrowing.
- § The borrower has provided financial records to the lender and a calculation of borrower's adjusted 2019 EBITDA, and these records fairly present borrower's financial condition.
- § The borrower will adhere to the priority, security, and repayment restrictions under the respective Main Street Program.
- § The borrower has a reasonable basis to believe that, as of the date of the loan origination or upsizing, it has the ability to meet its financial obligations for at least the next 90 days and does not expect to file for bankruptcy during that time period.
- § If the borrower is a subsidiary of a foreign company, the borrower will use loan proceeds only for the benefit of the borrower, its consolidated U.S. subsidiaries, and other affiliates of the borrower that are U.S. businesses.
- § The borrower told the lender whether it previously received, or applied for, funds under another Main Street Program.
- § If the borrower is a company, all or substantially all of the assets of which comprise equity interests in other entities, then the borrower must certify that the loan is fully guaranteed on a joint and several basis by its selected subsidiaries.
- § The borrower will indemnify the beneficiaries of such certifications and covenants for any liability, claim, cost, loss, judgment, damage or expense that a beneficiary incurs or suffers as a result of or arising out of a material breach of any of the borrower's certifications or covenants.

- **Loan Participation Agreement:** This agreement has two parts:
 - § **Loan Participation Agreement Standard Terms and Conditions:** This document sets forth the terms and conditions for all participations in the Main Street Programs. It is incorporated in the Transaction Specific Terms and will be publicly available on the Federal Reserve Bank of Boston's webpage.
 - § **Loan Participation Agreement Transaction Specific Terms:** To effectuate the sale of a loan participation to the SPV, lenders must sign and submit this form.
- **Servicing Agreement:** Lenders must submit the Servicing Agreement at the time a loan participation is sold to the SPV.
- **Assignment-in-Blank:** Lenders must submit this to the SPV at the time a loan participation is sold to the SPV. Borrowers also must sign the document.
- **Co-Lender Agreement:** This agreement has two parts, and neither is required for existing multi-lender facilities.
 - § **Co-Lender Agreement Standard Terms and Conditions:** This document sets out the terms and conditions for the Co-Lender Agreement. It is incorporated into the Transaction Specific Terms and will be publicly available on the Federal Reserve Bank of Boston's webpage.
 - § **Co-Lender Agreement Transaction Specific Terms:** Lenders must sign and submit this document at the time a loan participation is sold to the SPV. Borrowers are also required to sign the document.
- **Lender Wire Instructions:** This document provides wire instructions for the bank account into which the SPV will transfer the purchase amount, servicing fees, and other payments related to the transaction under the specific Main Street Program.
- **Updated FAQs on Main Street Programs:** This revised version of the FAQs published on April 30 provides additional guidance on the Main Street Programs.



Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. Please feel free to contact the Gibson Dunn lawyers with whom you usually work, any member of the firm's Public Policy or Financial Institutions practice groups, or the following authors:

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