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Updates and Developments on the Main Street Lending Program

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Background of Main Street Lending Program

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New Loan v. Expanded Loan Programs

- On April 9, 2020, the Federal Reserve (the "Fed") announced its commitment to purchase up to $600 billion in loan participations through the Main Street Lending Programs ("MSLPs").
- Main Street New Loan Facility ("MSNLF"):
  - This program will provide new secured or unsecured loan facilities to Eligible Borrowers.
- Main Street Expanded Loan Facility ("MSELF"):
  - This program will provide Eligible Borrowers and Eligible Lenders with secured or unsecured loan facilities in place prior to April 24, 2020 with new financing to "upsize" existing loan facilities.

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Main Street Priority Loans

- On April 30, 2020, the Federal Reserve issued revised term sheets for the MSNLF and MSELF as well as a term sheet for the newly announced Main Street Priority Loan Facility ("MSPLF").
- Main Street Priority Loan Facility:
  - This program will provide new secured or unsecured loan facilities to Eligible Borrowers subject to a higher EBITDA multiple cap than the MSNLF.

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Today's Topics

- On May 27, 2020, the Fed issued a number of legal forms, certifications and agreements that must be submitted by Eligible Lenders and Eligible Borrowers participating in the MSLP facilities.
- Additionally, the Fed updated its program FAQs to provide further guidance on (among other things) the eligibility criteria, terms and conditions, and administration of the MSLPs.

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Overview of New Fed Guidance in Updated MSLP FAQs

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Inability to Secure Adequate Credit

- An Eligible Borrower must certify that it is unable to secure "adequate credit accommodations from other banking institutions."
- New Fed guidance clarifies that this certification means the "amount, price or terms of credit available are inadequate for the borrower's needs during the current unusual and exigent circumstances."
  - The FAQs, however, state 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."
  - Despite this, Eligible Borrowers may still want to retain documentation of their consideration and/or pursuit of other "credit accommodations."

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Affiliation Issues

- An Eligible Borrower and its affiliates must participate in the same MSLP facility as each other.
  - If one Eligible Borrower participates in the MSNLP, another affiliated Eligible Borrower could not participate in the MSELF.
- An Eligible Borrower cannot participate in both the MSLP and the Primary Market Corporate Credit Facility.

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Affiliate Issues (cont.)

- Furthermore, the maximum loan size of each MSLP facility applies in the aggregate to all affiliated Eligible Borrowers.
  - This requires affiliated Eligible 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.
  - In any event, affiliated Eligible Borrowers will also be subject to a single, dollar-capped maximum loan amount based on the applicable MSLP facility.

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Affiliate Issues (cont.)

- Private Equity Firms and Portfolio Companies:
  - The FAQs now explicitly state that private equity firms are ineligible to participate in the MSLPs.
  - However, portfolio companies of private equity firms remain eligible to borrow to the extent they are otherwise qualified under the applicable MSLP facility's terms (including affiliation requirements).
  - This is essentially the same approach taken by the Treasury and Small Business Administration under the Paycheck Protection Program (PPP).

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EBITDA Methodologies

- Among other things, maximum loan size under each MSLP facility is determined by reference to the Eligible Borrower's EBITDA.
- The FAQs clarify that if an Eligible Lender has used multiple methodologies when adjusting EBITDA for a specific borrower or similarly situated borrowers, the Eligible Lender should utilize the "most conservative method" previously used.
- Lenders may not "cherry pick" adjustments used at different points in time or for different purposes.
  - Lenders should document their rationale for the selection of an EBITDA adjustment methodology.

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Mandatory Prepayments

- MSLPs loans are subject to mandatory prepayment in the event of a knowing material misrepresentation or material breach of certain certifications, including the following:
  - Borrower meets the eligibility requirements;
  - Borrower will abide by the restrictions on employee compensation and the prohibition on paying dividends set forth in the CARES Act; and
  - Borrower will abide by the restrictions on repayment of other debt under the MSLP terms.

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Loan Seniority and Security

- Loans under the MSPLF or MSELF must be "senior to or *pari passu* with, in terms of priority and security, the Eligible Borrower's other loans or debt instruments, other than mortgage debt."
  - "Loan or Debt Instruments" has been clarified to mean 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 MSLP loan's origination.

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Loan Seniority and Security (cont.)

- The FAQs clarify that MSPLF loans and MSELF upsized tranches must be secured if, at the time of origination, the Eligible Borrower has any other secured loans or debt (besides mortgage debt):
  - If a MSPLF loan is secured, the FAQs now articulate minimum collateral coverage ratios.
  - If the MSPLF loan is secured by the same collateral as any of the borrower's other debt (besides 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.

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Loan Seniority and Security (cont.)

- Unsecured Loans - A MSPLF loan or MSELF upsized tranche may be unsecured if the Eligible Borrower does not have any secured debt (besides mortgage debt), but the MSLP loan cannot be contractually subordinated in terms of priority to any of the Eligible Borrower's other unsecured debt.

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Restriction on Repayment of Other Debt

- While a MSPLF loan may be used to repay an Eligible Borrower's existing debt in connection with the MSPLF loan's origination, after origination the Eligible Borrower may no longer repay its other debt, subject to certain limited exceptions:
  - Repaying a line of credit (including a credit card) in accordance with the normal course of business usage for such line of credit;
  - Taking on and paying additional debt obligations required in the normal course of business and on standard terms, including inventory and equipment financing; or
  - Refinancing maturing debt.

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Restriction on Repayment of Other Debt (cont.)

- 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 FAQs clarify 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 loan, such payment is limited to those amounts that are *de minimis* or payable in respect of repayment of debt in connection with MSPLF origination.
- Future debt incurred by the borrower 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 applicable MSLP terms and conditions.

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"Significant Operations" in the United States

- All Eligible Borrowers must have "significant operations in the United States
- In determining 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 <u>without considering its parent companies and sister affiliates</u>.

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"Significant Operations" in the United States (cont.)

- The FAQs provide four non-exhaustive examples of circumstances which would satisfy this "significant operations" test. If a borrower, when consolidated with its subsidiaries, has greater than 50% of its:
  - assets located in the United States,
  - annual net income generated in the United States,
  - annual net operating revenues generated in the United States, or
  - annual consolidated operating expenses (excluding expenses associated with debt service, such as interest payments) generated in the United States.

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Eligible Borrowers

- Subsidiaries of Foreign Companies
  - Subsidiaries of foreign companies may be Eligible Borrowers under the MSLP 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 MSLP loan may not be used to benefit an otherwise Eligible Borrower's foreign parents, affiliates or subsidiaries.

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Required Covenants

- Appendix B to the updated FAQs contains model covenants that Eligible Lenders and Borrowers should reference when drafting and negotiating 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.

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Required Financial Reporting

- Appendix C to the updated FAQs provides a detailed list of financial information that must be delivered quarterly and annually for all MSLP loans.
- Among the required financial reporting are the following:
  - Total Assets & Liabilities;
  - Total Revenue and EBITDA;
  - Dividends / Distributions;
  - Total Expenses, Fixed Charges and CapEx; and
  - Collateral Value Reporting.

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Lender Fees

- Generally, Eligible Lenders are not permitted to charge fees to Eligible Borrowers, except as expressly permitted under the terms of each MSLP facility.
- However, the FAQs now provide that Eligible Lenders may also charge Eligible Borrowers "*de minimis* fees for services that are customary and necessary," such as legal fees.

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Criminal and Civil Liability

- If an application includes "knowing material misrepresentations," the lender or borrower may be referred to law enforcement authorities for investigation and possible action under applicable criminal and civil law.

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Overview of Fed Certifications, Documents and Agreements

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General Loan Agreement

- Eligible Lenders are permitted to use their own loan agreements, so long as the agreements are substantially similar to the loan documentation that Eligible Lenders use in the ordinary course for similarly situated borrowers.
- However, loan documents are required to reflect the terms outlined in the Loan Document Checklist on Appendix A of the updated FAQs, which include maturity, principal and interest deferrals, interest rate, amortization, security, priority and loan size requirements.

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Lender MSLP Registration Documents

- Lender Registration Certifications and Covenants
  - Must be signed by the Eligible Lender's CEO and CFO (or officers performing similar functions) at the time of its registration with the Main Street Special-Purpose Vehicle (SPV).
- Lender Wire Instructions
  - Eligible Lenders must submit this document providing wire instructions for the bank account into which the Main Street SPV will transfer the purchase amount, servicing fees, and any other payments related to MSLP transactions.

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Documents Required at the Time a Loan Participation is Sold to the Main Street SPV

- Loan Participation Agreement
- Servicing Agreement
- Assignment-in-Blank
- Co-Lender Agreement
- Facility Transaction Specific Certifications and Covenants
- Facility Borrower Certifications and Covenants

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Loan Participation Agreement

- This agreement comes in two parts:
  - Loan Participation Agreement Transaction Specific Terms – This document must be signed and completed in order to effect the sale of a loan participation to the Main Street SPV.
  - Loan Participation Agreement Standard Terms and Conditions – This document sets out the terms and conditions for all Main Street loan participations and is incorporated in the above Transaction Specific Terms.

Assignment-in-Blank

- Both the Eligible Lender and Eligible Borrower must sign this document, and Eligible Lenders should reference the specific instructions on the Assignment-in-Blank's cover pages to accurately complete this agreement.
  - **Note**: For existing multi-lender facilities under the MSELF program, the form assignment-in-blank comes from the documentation for the existing multi-lender facility.

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Co-Lender Agreement

- This agreement comes in two parts:
  - Co-Lender Agreement Transaction Specific Terms – Both the Eligible Lender and Eligible Borrower must sign this document.
  - Co-Lender Agreement Standard Terms and Conditions – This document sets out the terms and conditions of Co-Lender Agreement and is incorporated into the above Transaction Specific Terms.
- Note – This document is not required for existing multi-lender facilities.

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Facility Transaction Specific Lender Certifications & Covenants

- An authorized officer of the Eligible Lender must submit one of three documents in relation to each loan participated to the Main Street SPV.
- While the documents vary by MSLP facility, there are some common provisions in each.

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Facility Borrower Certification and Covenants

- The CEO and CFO (or officers performing similar functions) of the Eligible Borrower must sign one of these documents for each loan participated to the Main Street SPV.
- While the documents vary by MSLP facility, there are some common provisions in each.

Conclusions

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Conclusions

- The MSLP is not a “do-it-yourself” program.
- Eligibility criteria and required certifications, covenants and affiliation issues may limit the appeal of MSLP to some would-be borrowers.
- Documentation will be more complex than Paycheck Protection Program (PPP) loan applications and promissory notes.
- Important to have professional advisors involved to understand and navigate the terms and conditions of the MSLP facilities.

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