

## | Main Street Program | Legal Architecture – Updated

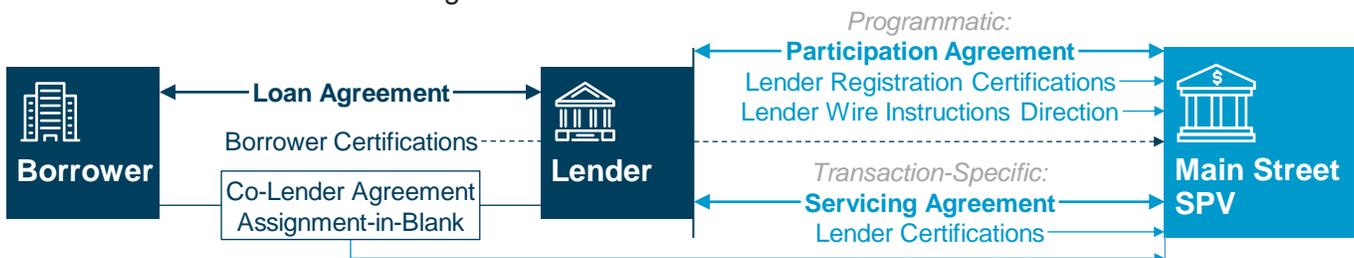
*UPDATE: This memo has been updated to reflect versions of all of the Main Street program documents released by the Federal Reserve as of 11 June 2020.*

The Federal Reserve has **released** updated **Main Street FAQs** and eighteen documents that together establish the legal architecture of the \$600 billion Main Street Program. This memorandum provides Lenders and Borrowers who wish to participate in the Main Street Program an overview of the intricate Main Street contracts, certificates and other documents. For more information on the Main Street Program’s overall structure and specific terms, see **Davis Polk’s visual memo**. Current versions of all of the program documents, each with a blackline against its previous version, are available at Davis Polk’s **Government Support for Business** resource center.

No comment period was provided for the program documents when the initial versions were released on May 27, or when updated versions were released on June 11 with conforming changes to reflect the revised term sheets as of June 8. We believe that Lenders and Borrowers should accordingly view the program documents as final for purposes of the Main Street Program’s launch, though we anticipate that further clarification may be provided through future FAQs and potentially further document refinements. In addition, a Lender who participates in the Main Street Program will need to implement and maintain a related compliance program and systems for the life of its Main Street loans plus one year.

### I. Introduction and Program Structure

The Main Street documentation includes a standard form Participation Agreement and forms of the Lender and Borrower Certifications, together with related instructions. Certain documents apply to a party’s involvement in the Main Street Program; others are transaction-specific, executed in connection with each Main Street loan. The figure below shows the basic structure:



The **Instructions** specify which documents are programmatic and which ones are transaction-specific. The Participation Agreement is documented pursuant to programmatic **Participation Agreement Standard Terms and Conditions**, which are incorporated by reference into **Participation Agreement Transaction Specific Terms** that are to be executed by the Lender and Main Street SPV for each Main Street loan. The Lender Certifications include both a **Lender Registration Certification** to be executed once and **Transaction Specific Lender Certifications** for each Main Street loan. The appendices to the Main Street FAQs set out certain provisions that must be included in all loan agreements with Borrowers, each of whom must separately provide the required **Borrower Certifications**. Each of the three Main Street facilities – New, Priority and Expanded – has its own variants of the transaction-specific Lender and Borrower Certifications, accounting for six documents altogether.

Some of the Main Street Program documents were less widely anticipated before their release: an Assignment-in-Blank and Co-Lender Agreement, which together provide the legal machinery for the Main Street SPV to elevate its participation interest to an assignment, so that the Main Street SPV becomes a

lender of record with respect to the relevant Main Street loan and a bilateral loan agreement is transformed into a multi-lender agreement with an administrative agent. For each Main Street loan, the Borrower and Lender must execute and deliver to the Main Street SPV an **Assignment-in-Blank** and **Co-Lender Agreement Transaction Specific Terms** (which incorporate the **Co-Lender Agreement Standard Terms and Conditions**). Rather than countersigning these documents upon acceptance of the Main Street loan, the Main Street SPV would hold them for potential future use.

Last, the release also includes a **Lender Wire Instructions Direction** that each Lender must execute and deliver to the Main Street SPV at the time of its registration, and a **Servicing Agreement** that a Lender must execute and deliver with the sale of each participation.

The Main Street Program will import some of the structures of the syndicated loan markets into mid-market and small business lending that traditionally have not emphasized multi-lender participations and assignments. The grid below shows which documents apply on a programmatic basis (blue background, white check mark), and which documents will be signed and delivered with each new loan (regular background, blue check mark).

	Borrower	Lender	Main Street SPV
Loan Agreement	✓	✓	
Borrower Certifications	✓		
Assignment-in-Blank	✓	✓	
Co-Lender Agreement Standard Terms and Conditions	✓*	✓*	
Co-Lender Agreement Transaction Specific Terms	✓	✓	
Participation Agreement Standard Terms and Conditions		✓*	✓*
Participation Agreement Transaction Specific Terms		✓	✓
Lender Registration Certifications and Covenants		✓	
Lender Wire Instructions Direction		✓	
Servicing Agreement		✓	✓
Lender Certifications		✓	

\* The Standard Terms and Conditions for the Co-Lender Agreement and Participation Agreement are incorporated by reference into the Transaction Specific Terms relating to each of these agreements.

The Main Street FAQs acknowledge Lender concerns as to how supervisors might view their underwriting standards and credit decisions on Main Street loans – noting that supervisors “acknowledge the high degree of uncertainty” and that Lenders are “encouraged to work with borrowers” – but stop short of any express statement that Lenders will not be subject to supervisory criticism for making Main Street loans to less creditworthy borrowers than their pre-pandemic underwriting standards would otherwise allow.

The remainder of this memorandum describes the Loan Agreements, the Participation Agreement and participation assignment structure, and the Lender and Borrower Certifications.

**II. Loan Agreements**

Lenders are permitted to use their own forms for loan agreements with Borrowers. The Federal Reserve has, however, provided a Loan Document Checklist of elements that must be incorporated into a loan agreement to meet the requirements of the Main Street Program. The Loan Document Checklist is set out in Appendix A of the Main Street FAQs. Appendix B of the Main Street FAQs provides model language for many provisions, which Lenders are permitted but not required to use.

Other than the required provisions, a Lender's form Main Street loan agreements are expected to be substantially similar to its form agreements for ordinary-course lending to similarly situated borrowers. The Main Street FAQs also clarify that Main Street loans must have an interest rate of LIBOR (1 month or 3 month) + 300 bps, and that Lenders may require Borrowers to pay the transaction fee but are not permitted to charge any additional fees except *de minimis* fees that are customary and necessary. Permissible fees include appraisal and legal fees, as well as customary consent fees if necessary to amend the documentation for an existing loan in connection with upsizing it under the Expanded facility.

The Federal Reserve's Loan Document Checklist sets forth (1) two required covenants, (2) a mandatory prepayment provision and (3) a cross-acceleration provision, each with model language. Lenders must incorporate the model language, or substantially similar language, into their agreements for Main Street loans where all applicable lender consents are readily available, *i.e.*, for all New loans, all Priority loans and any Expanded loans made under an existing bilateral credit facility. The Loan Document Checklist provides alternative methods of meeting these requirements for Expanded loans extended under an existing multi-lender facility, given the need for coordination among multiple lenders with pre-existing contractual arrangements. Summarized below are the key requirements for Main Street loan agreements, with relevant differences for Expanded loans under multi-lender facilities noted where appropriate.

All of the model language is provided in Appendix B of the Main Street FAQs, which begins on page 54 of the [PDF document of the Main Street FAQs linked here](#).

#### A. Priority and Security Covenant

- All Main Street loans must not be contractually subordinated in terms of payment priority to any of the Borrower's other loans or debt instruments. No specific language is needed to meet this requirement; the absence of any provision to the contrary in a Main Street loan agreement would suffice.
- Priority and Expanded loans must be senior to or *pari passu* with the Borrower's other loans or debt instruments (other than mortgage debt and limited recourse equipment financing) in terms of priority and security. These loan agreements must include a lien covenant or negative pledge that is of the type and that contains exceptions, limitations, carve-outs, baskets, materiality thresholds and qualifiers that are consistent with the Lender's ordinary course documentation. Model language is at page 54 in the PDF of the Main Street FAQs linked above.
  - For purposes of determining whether Priority loans are senior to or *pari passu* with other debt of the Borrower, if such loans are secured, the Collateral Coverage Ratio (defined below) at the time of origination of the loan must be either (1) at least 200% or (2) not less than the aggregate Collateral Coverage Ratio for all of the Borrower's other secured loans or debt instruments (other than mortgage debt and limited recourse equipment financing).
  - Further, if Priority loans are secured by the same collateral as any of the Borrower's other loans or debt instruments (other than mortgage debt and limited recourse equipment financing), then the lien upon such collateral must be and remain senior to or *pari passu* with the lien(s) of the other creditor(s) upon such collateral. The Priority loans **do not** need to share in all of the collateral that secures such other loans or debt instruments.
    - The "Collateral Coverage Ratio" means (1) the aggregate value of any relevant collateral security, including the pro rata value of any shared collateral, divided by (2) the outstanding aggregate principal amount of the relevant debt.

- In order to comply with the obligation that **Expanded** loans be **senior to or pari passu** with the other debt of the Borrower (other than mortgage debt and limited recourse equipment financing), an Expanded loan must be secured if the Borrower has any other secured debt at the time of origination. If the underlying credit facility is secured, an Expanded loan must be secured by the same collateral securing any other term loan tranche(s) (but not necessarily revolver tranches) under such underlying credit facility on a pari passu basis. Likewise, if the underlying credit facility itself consists of mortgage debt or limited recourse financing, an Expanded loan must be secured by the same collateral on a pari passu basis.
- **Expanded loans under multi-lender facilities** must include a lien covenant or negative pledge that is of the type and that contains exceptions, limitations, carve-outs, baskets, materiality thresholds and qualifiers that are consistent with the Lender's ordinary course documentation. The underlying credit facility's lien covenant or negative pledge will be deemed sufficient if it was negotiated in good faith before April 24, 2020.

## B. Financial Reporting Covenant

- **All New, Priority and bilateral Expanded** Main Street loans must contain a financial reporting covenant requiring extensive financial information and calculations to be delivered quarterly and annually.
  - The reporting requirement creates a new, highly detailed reporting regime that goes beyond typical financial reporting for most syndicated or bilateral credit facilities. The financial reporting regime is set out in Appendix C, at page 59 in the PDF of the Main Street FAQs linked above.
- **Expanded loans under multi-lender facilities** must include a financial reporting covenant requiring delivery of the specified financial information required for other Main Street loans. The underlying credit facility's financial reporting provision will be deemed sufficient if it was negotiated in good faith before April 24, 2020.

## C. Mandatory Prepayment Provision for Material Breaches of Borrower Certifications and Covenants

- **All New, Priority and bilateral Expanded** Main Street loans must contain a mandatory prepayment provision relating to a Borrower's material misstatement with respect to certain certifications, or its material breach of certain covenants. Model language is at page 56 in the PDF of the Main Street FAQs linked above.
  - These certifications and covenants address eligibility requirements under the CARES Act and Section 13(3) that are not directly related to the credit quality of the Main Street loan, as discussed below in the Borrower Certifications section.
  - These certifications **do not** include the Borrower's certification that it is not an "Ineligible Business," as defined by reference to SBA regulations.
  - The mandatory prepayment would be triggered by the Federal Reserve or its designee, after consultation with the Lender, providing written notice to the Lender that the Borrower is in material breach.
  - Although the mandatory prepayment provision does not constitute an event of default, if the Borrower is unable to prepay the loan within two business days of the triggering notice, it may result in a payment event of default and thus may trigger cross-defaults or cross-payment defaults in other credit agreements.
- **Expanded loans under multi-lender facilities** must contain the same mandatory prepayment provision to the extent feasible in light of existing voting arrangements.

- If existing lenders agree to any other changes to the loan documents in the process of upsizing the loan or selling the participation to the Main Street SPV, the new mandatory prepayment provision must also be included.
- If the existing lenders' agreement is unanimous, the mandatory prepayment provision must be inserted into the loan documents as a "sacred right" requiring 100% lender consent for amendments or waivers to such provisions.

#### D. Cross-Acceleration

- **All New, Priority and bilateral Expanded** Main Street loans must contain a cross-acceleration provision that would trigger an event of default under the Main Street loan if a different debt instrument of the Borrower owed to the Lender or any affiliate of the Lender is accelerated. Model language is at page 57 in the PDF of the Main Street FAQs linked above.
  - The other debt instrument would not need to be above any particular materiality threshold in order to trigger an event of default under the Main Street loan if accelerated.
- **Expanded loans under multi-lender facilities** must include a similar cross-acceleration provision. The underlying credit facility's cross-default or cross-acceleration provision will be deemed sufficient if it was negotiated in good faith before April 24, 2020.

### III. Participation Structure

#### A. Framework of Participation Documents

Six documents set forth the rights and obligations of Lenders and the Main Street SPV in relation to participations of Main Street loans. Together they form the framework that governs the sale of each participation interest, the management of any subsequent elevation or transfers, and decision-making among the parties during the life of the loan. These six documents are as follows:

- **Participation Agreement.** This is the agreement pursuant to which the Main Street SPV purchases a participation interest in each Main Street loan from the Lender.
  - It has two components: (1) Standard Terms and Conditions that govern the overarching relationship between the Main Street SPV and the Lender and (2) Transaction-Specific Terms setting forth the principal terms of the participation of each Main Street loan.
  - With respect to each Main Street loan, the Participation Agreement governs:
    - funding and sale mechanics,
    - subsequent transfer rights,
    - the right of the Main Street SPV to elevate, via assignment, from a participant to a lender of record,
    - pre-and post-default voting matters,
    - the waiver by the Main Street SPV of any special administrative priority status under Section 507(a)(2) of the Bankruptcy Code, and
    - the relationship between the Lender and the Main Street SPV, as the seller and the buyer, respectively, of the participation interest in the Main Street loan, including (1) the absence of any repurchase or buy-back rights, and (2) an acknowledgement that the Lender may be engaged in a broad range of transactions with the Borrower that involve interests that differ from those of the Main Street SPV and which need not be disclosed to the Main Street SPV.

- ***Servicing Agreement.*** This agreement sets forth the rights and obligations of the Main Street SPV, and the Lender, as servicer, in connection with:
  - administration of the participation interest purchased under the Participation Agreement, including performance of customary administrative agent functions,
  - delivery of enhanced financial reporting pursuant to the financial reporting covenants of each Main Street loan agreement,
  - within 60 days of each calendar quarter, delivery by the servicer to the Main Street SPV of the current outstanding balance of the relevant Main Street loans, and
  - the limited liability of the Lender, as servicer, to the Main Street SPV or any governmental assignee, other than as a result of the Lender's gross negligence, fraud, willful misconduct or material breach of any duty or obligations, as determined by a court of competent jurisdiction by a final and non-appealable judgment.
- ***Assignment-in-Blank.*** The Assignment-in-Blank is intended to be used by the Main Street SPV to facilitate the elevation of its participation, or the elevation and transfer of its participation in a "Specified Permitted Transfer," as defined in the Participation Agreement and discussed below.
  - By executing and delivering an Assignment-in-Blank in connection with each Main Street loan, the Lender and Borrower consent in advance to any such elevation and/or transfer.
  - In a bilateral facility, the Lender and Borrower would use the Federal Reserve's standard form Assignment-in-Blank. In a multi-lender facility governing an Expanded loan, the parties would instead use the facility's pre-existing assignment document.
  - The Main Street SPV would not countersign this document at the time it acquires the participation in the loan, but would hold it for potential future use.
- ***Co-Lender Agreement.*** This agreement is executed in connection with each bilateral facility to provide mechanics for a multi-lender facility if the Main Street SPV later elevates its participation interest to that of a lender of record.
  - Like the Participation Agreement, the Co-Lender Agreement has two parts: (1) Standard Terms and Conditions that govern the relationship between the Main Street SPV and each Lender, and (2) Transaction-Specific Terms setting forth the principal terms of each Main Street loan.
  - Upon taking effect, the Co-Lender Agreement would transform a bilateral facility into a multi-lender facility by adding provisions to govern inter-creditor relationships, allowing the Main Street SPV to become a lender of record alongside the Lender, and designating the Lender as the administrative agent to act on behalf of all lenders for certain functions.
  - As with the Assignment-in-Blank, the Main Street SPV would not countersign this document at the time of acquiring its participation interest, but would hold it for potential future use in connection with an elevation, including to effect an assignment to another holder that would thereby become a Lender under the Main Street loan facility.
  - The voting provisions in the Co-Lender Agreement would require unanimous Lender consent both for actions affecting sacred rights and for other matters that would customarily be the subject of a required lender consent, similar in relevant substance to the provisions of the Core Rights Acts described below that are included in the Participation Agreement.
  - No Co-Lender Agreement would be required in a multi-lender facility, because the underlying credit documents would already contain provisions governing inter-creditor relationships.

## B. Participation Agreement

The Participation Agreement is the primary contract governing the relationship between Lenders and the Main Street SPV with respect to the purchase of each participation interest in a Main Street loan. Its key terms are as follows:

- **Funding of Loan and Purchase of Participation.** The sale of a participation is not required to be contemporaneous with the funding of the underlying Main Street loan.
  - Lenders may either (1) fund the Main Street loan and submit all of the required documentation, completed and signed, for processing by the Main Street SPV no later than 14 days after funding, or (2) condition funding on the receipt of a binding commitment letter from the Main Street SPV to purchase the participation.
    - Under the latter option, the commitment letter would indicate that the Lender is required to fund the Main Street loan within three business days following the date of the commitment letter and that the Main Street SPV will purchase the participation in the Main Street loan not later than three business days after the Lender notifies the Main Street SPV, via the Main Street Portal, that the loan has been funded.
    - The Main Street SPV's obligation to purchase a participation is contingent on its receipt of all completed and signed transaction specific program documentation. The FAQs state that the Main Street SPV will purchase a 95% participation in any Main Street loan without additional conditions, so long as the transaction documents are complete, properly executed and consistent with the relevant facility's requirements.
    - If the Lender elects to use the commitment letter option, the Main Street loan documentation should include a condition precedent to borrowing similar to the model provision to that effect. Model language is at page 48 in the PDF of the Main Street FAQs linked above.
  - The June 8 update to the FAQs states that any Main Street loans made in conformance with the previous version of the term sheets will be accepted for purchase by the Main Street SPV during its first 14 days of operation, or that such loans may be amended or refinanced in accordance with the updated term sheets. Although few Main Street loans, if any, are likely to have been made in reliance on the term sheets as of April 30, the Federal Reserve's pragmatic approach sends a positive signal with respect to any operational issues that may arise in the future as a result of further changes to the Main Street Program's terms and conditions.
- **Transfer Rights.** A Lender may not transfer its rights or obligations under the Participation Agreement, including to affiliates or other eligible lenders, without the consent of the Main Street SPV.
  - Prior to an elevation of any participation into an assignment of the Main Street loan, the Main Street SPV cannot transfer its participation interest without the consent of the Lender, unless such transfer is in connection with a "Specified Permitted Transfer."
  - Following an elevation, the Main Street SPV may transfer its rights and obligations in respect of the relevant Main Street loan, but only to the extent of the elevation. In each case, the consent of, or notice to, the Lender is not required, subject to the terms of the applicable Co-Lender Agreement for bilateral facilities or the applicable credit agreement for multi-lender facilities.
  - Accordingly, Lenders do not have full control over their potential co-lenders and/or participants, given the lack of consent rights, tag rights, or rights of first refusal or first offer in connection with a Specified Permitted Transfer.

- The Main Street SPV, on the other hand, may control who will be its seller/counterparty, given its consent right, not to be unreasonably withheld, on transfers by the Lender.
- Lenders would, however, have consent rights with respect to a transfer undertaken to effect a securitization.
- A “*Specified Permitted Transfer*” includes:
  - any elevation or pre-elevation transfer by or to the Main Street SPV or any other assignee following a payment event of default under the applicable Main Street loan,
  - any elevation or pre-elevation transfer by or to the Main Street SPV or any other assignee following any obligor bankruptcy defaults under the applicable Main Street loan,
  - deemed elevation in connection with the Lender taking, or refraining from taking, a “Core Rights Act” (as defined and discussed below) that the Main Street SPV reasonably determines would result in any reduction of the principal amount of the Main Street loans or other action that could reasonably be expected to result in a violation of the prohibition on loan forgiveness under the CARES Act,
  - any pre-elevation transfer or sub-participation by the Main Street SPV, other than for securitization purposes, of the full participation interest to a governmental assignee,
  - any elevation or pre-elevation transfer required by statute or court order, and
  - any elevation or pre-elevation transfer following a bankruptcy or insolvency event with respect to the Lender.
- *Participation Agreement – Pre-Elevation Voting Rights.* Lenders are granted sole authority for most decisions and votes relating to the Main Street loan that may arise during the life of the loan. The Main Street SPV, however, maintains the power to vote on **Core Rights Acts** (as defined below) which include both market standard sacred rights and an additional list (set forth below) of Core Rights Acts which are typically determined by majority lender vote. As a result, unless the loan agreement contains divisible voting, Lenders will be dragged along by any Main Street SPV vote on such matters, even on sacred rights.
  - *Divisible Voting.* If the votes with respect to the interest in the Main Street loan are **divisible** (see box), then the Lender would vote the Main Street SPV’s participated interest as instructed by the Main Street SPV but may vote its 5% interest separately from the Main Street SPV’s participated interest.
  - *Non-Divisible Voting.* If the votes with respect to the interest in the Main Street loan are **not divisible**:
    - *Pre-Bankruptcy.* The Main Street loan would be voted at the direction of the majority holders of interests in the Main Street loan. As a result, the Main Street SPV (or its assignee), as majority holder, can direct the vote of the full Main Street loan with respect to Core Rights Act matters. In the MSELF, if the Lender’s existing loans are not divisible from the Main Street loan, then the majority determination would be made in the aggregate (i.e., taking into account the Lender’s existing loans and the Main Street loan), and the Lender would need to vote its aggregate position based on such determination.

**Divisibility:** A vote is divisible if the Lender may vote the retained and participated interests in the Main Street loan separately. A vote is not divisible if the Lender must vote the interests in the entire Main Street loan as one unit. Note that most standard loan agreements will not provide for voting to be divisible, and so **Lenders will need to ensure the loan agreement permits the divisibility of votes.**

- *Post-Bankruptcy*. If the loan agreement does not provide for divisibility of the Lender's votes in respect of its loans under the loan agreement, but the vote **is divisible** in respect of all claims in the same class that the Lender may have against the Borrower, then, with respect to claims arising from the loan agreement that governs the Main Street loan, the Lender would be required to act at the direction of the majority holders of interests in the loan agreement, whether directly or through a participation. If the vote is **not divisible** in respect of all claims that the Lender may have against the Borrower in the class, then presumably acts with respect to all of the Lender's claims in such class would be at the direction of the majority holders of the Lender's claims of such class, whether directly or through a participation. In bankruptcy, it is possible that all pari passu claims, whether under the loan agreement or otherwise, may be classified for voting and distribution purposes in the same class.
- *Limit*. Lender is not required to follow instructions that would expose Lender to material obligation, liability or expense without adequate indemnity or violate any applicable law, rule, order or the loan documents.
- *Post-Elevation Voting Rights*. Once the Main Street SPV (or its assignee) becomes a lender of record, the Lender's retained 5% interest and the Main Street SPV's (or its assignee's) interest will be voted separately.
- Elevation has different consequences on the requisite vote, however, depending on whether the Main Street loan is a new bilateral loan subject to the Co-Lender Agreement or is subject to voting mechanics in an existing loan agreement:
  - For bilateral loans governed by the Co-Lender Agreement, any Core Rights Act remains an "each Lender" or "each directly and adversely affected Lender" vote requiring the consent of the Lender and the Main Street SPV (or its assignee) voting separately.
  - For MSELF loans that are subject to existing voting arrangements in the underlying loan agreement (that have not been otherwise modified in connection with entering into the MSELF expanded tranche), voting would default to the existing voting mechanics which would likely provide for majority vote determinations for many of the Core Rights Acts.

- *Core Rights Acts*. The definition of Core Rights Act includes the following actions (and inactions) in respect of the Main Street SPV's participated and/or elevated interest relating to customary sacred rights typically requiring each affected lender's consent under market standards, as well as certain additional rights which would, under customary market practice, often require a majority vote:

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**Customary Sacred Rights**

1. Any extension, increase or reinstatement of any commitment,
2. Any reduction in the principal, the rate of interest or any fees or other amounts payable in respect of the participated interest, including any loan forgiveness,
3. Any delay or postponement of any date scheduled for any payment of principal, interest, fees or other amounts payable in respect of the SPV's interest, or any reduction in the amount of, waiver or excuse of any such payment,
4. Any change of the pro rata sharing provisions or application of proceeds provisions in the loan documents affecting the SPV's interest,
5. Any release of all or substantially all of the collateral in any transaction or series of transactions or all or substantially all of the value of the guaranties,
6. Any change to any lender voting approval level under or pursuant to any loan document with respect to any of the foregoing,

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**Other Voting Items**

7. The waiver of any condition precedent to closing, effectiveness or funding under the applicable Main Street loan agreement,
8. With respect to certain Borrower Certification and Covenants relating to solely CARES Act and the Federal Reserve's emergency lending powers, any amendment, modification, waiver or consent to any departure from any provision in any loan document, including any mandatory prepayment, relating thereto,
9. Any amendment to, modification of, waiver of or consent to any departure from any provision in any loan document requiring the periodic financial and notice reporting, other than any consent to the temporary delay in, but not the permanent waiver of, delivery of any such periodic financial and notice reporting:
  - originally required to be delivered on or before September 30, 2020, or
  - originally required to be delivered after September 30, 2020 for a period not to exceed 90 days after such original delivery requirement date,
10. The express subordination of the Main Street loans, or any encumbrance in or over all or substantially all of the collateral,
11. Any greater restriction on the ability of, or any additional consent necessary for, any lender to assign, participate or pledge its rights or obligations under any loan document,
12. An adverse effect on the transferred rights that would be disproportionate to the effect on any other class of obligations under the applicable Main Street loan document,
13. Any amendment to, modification of, waiver of or consent to any departure with respect to a cross-acceleration of debt owed to the Lender or one of its affiliates (a **Seller Debt Cross-Acceleration**),
14. The declaration, or failure to declare, any obligations of the applicable borrower due and payable upon the occurrence and during the continuance of a Seller Debt Cross-Acceleration, and
15. The exercise, or failure to exercise, of any rights or remedies with respect to any of the collateral at any time that the Lender or any of its affiliates, or their representatives, is exercising rights or remedies with respect to any collateral securing, or purporting to secure, any other indebtedness owed to the Lender or one of its affiliates, the default under which has resulted in a Seller Debt Cross-Acceleration.

- **Elevation Rights.** The Main Street SPV may not elevate its participation interest to an assignment of the applicable portion of the loan without the consent of the Lender unless such transfer is in connection with a Specified Permitted Transfer. In connection with a Specified Permitted Transfer, Lenders would have pre-consented by executing and delivering an Assignment-in-Blank, and a Co-Lender Agreement for any bilateral facility, upon the sale of the participation.
  - According to FAQ J.5, the Main Street SPV would not typically seek to elevate except in connection with a Specified Permitted Transfer. Instead, the Fed would expect Lenders to follow market-standard workout processes and to exercise the standard of care set out in the Participation Agreement and the Servicing Agreement in addressing any Borrower downside scenario.
  - The Fed expects that the Main Street SPV would not elevate and assign except in situations where (1) the economic interests of the Lender and the Main Street SPV are misaligned or (2) the loan amount is relatively large in comparison to other loans in the Main Street SPV's portfolio of participations.
- **Equal Treatment and Pro Rata Sharing.** Both the Participation Agreement and the Co-Lender Agreement expressly address the risk that the Main Street loan may not be treated the same as a private-sector commercial loan in a bankruptcy proceeding. These agreements include an express waiver of, and covenant by the Main Street SPV not to assert, any right or claim under or pursuant to Section 507(a)(2) of the Bankruptcy Code that could provide the Main Street SPV special administrative priority in a bankruptcy proceeding ahead of the Lenders.
  - There is no express obligation for the Main Street SPV to turn over and share with the Lenders any preferential proceeds that it may obtain notwithstanding this express waiver.
  - According to FAQ A.10, in the event of a restructuring or workout scenario, the Main Street SPV may agree to reductions in interest, including capitalized interest, extended amortization schedules and maturities, and higher priority "priming" loans.
- **Irrevocable Sale and No Put-Back.** The Participation Agreement contains representations, warranties, acknowledgements and standard of care provisions that generally conform to market conventions.
  - The Participation Agreement contains an express acknowledgement from the Main Street SPV that (1) the sale of each participation is irrevocable and (2) the Main Street SPV has no right to put back or otherwise require Lenders to repurchase, buy back, rescind or void any participation, including in the event of:
    - a breach by any party of its representations, warranties, covenants or agreements under or in connection with the Participation Agreement,
    - any action taken or omitted to be taken by the Lender under in connection with the Participation Agreement or any applicable loan document, or
    - any default or breach by a Borrower or other obligor under any loan document.
  - The Main Street FAQs also emphasize that each participation interest is a true participation, the sale of each participation interest is a true sale, and the Main Street SPV has no right to put any participation interest back to a Lender once it has been sold.

## IV. Lender and Borrower Certifications and Covenants

### A. Lender Certifications

- ***Due Inquiry with Respect to Formation.*** A Lender must certify that, following due inquiry, it has no knowledge or reason to believe that the certifications made by the Borrower that Borrower is a Business<sup>1</sup> and was established before March 13, 2020 are incorrect or untrue in any material respect.
  - The due inquiry standard for purposes of this certification requires a Lender to receive documentation from the Borrower evidencing the Borrower's legal formation certified by the appropriate governmental authority and to take those steps to verify such formation as are required under the Lender's ordinary underwriting policies and procedures.
- ***Reliance on Borrower Certifications.*** The Lender must certify that the Borrower has delivered the Borrower Certifications (discussed below) to the Lender. In making such certification, the Lender assumes no responsibility for verifying the accuracy of the Borrower Certifications and may rely on them entirely – subject only to the following exceptions:
  - for **all Main Street loans**, the Due Inquiry With Respect to Formation requirement (see above),
  - for **Priority and Expanded loans**, the Lien Certifications and Covenants, and for **secured Priority loans**, the Debt Certifications and Covenants as well (see below).
- ***Other Lender Certifications and Covenants.*** Certifications and covenants required from the Lender are generally consistent with, though more detailed than, the previously released Main Street term sheets. These include the following:
  - ***EBITDA methodology.*** The Lender must certify that the methodology it required the Borrower to use when calculating the Borrower's adjusted 2019 EBITDA and related entities is the methodology it has previously required to be used for adjusting EBITDA when extending credit to the Borrower or others similarly situated borrowers prior to April 24, 2020.
    - ***EBITDA Requirement for Holding Company.*** If the Borrower is a holding company, Lender must certify, based solely on financial records received from the Borrower and the EBITDA calculations certified to the Lender by the Borrower, that the Main Street loan does not exceed applicable limits on maximum loan size based on the aggregate adjusted 2019 EBITDA of the Borrower's subsidiaries that are guaranteeing the Main Street loan. Generally speaking, for loans to a holding company, market practice would be to measure EBITDA by reference not only to guarantors, but to all restricted subsidiaries.
    - ***EBITDA Requirement for Borrower's Affiliated Group.*** If the Borrower notifies the Lender that one of its affiliates has previously applied for or received funding from the same Main Street facility, the Lender must certify, based solely on financial records received from the Borrower and the EBITDA calculations certified to the Lender by the Borrower, that the aggregate of all Main Street loans under such facility to the Borrower and all of its affiliates does not exceed applicable limits on maximum loan size based on the combined adjusted 2019 EBITDA of the Borrower and all of its affiliates.

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<sup>1</sup> For purposes of the Lender Certifications, Business means an entity that is organized for profit as a partnership; a limited liability company; a corporation; an association; a trust; a cooperative; a joint venture with no more than 49 percent participation by foreign business entities; a tribal business concern that is (1) 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 (2) 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; or any other form of organization that has been publicly designated by the Federal Reserve as a "Business" in the Main Street FAQs.

- *Debt and Lien Certifications and Covenants.*
  - As noted above, if a **Priority loan is secured**, the Lender must certify that the Collateral Coverage Ratio is at least 200%, or else not less than the aggregate Collateral Coverage Ratio for the Borrower's other secured debt (other than mortgage debt and limited recourse equipment financing). For purposes of this certification, the Lender must inquire with any officers and employees of the Lender that manage the relationship with the Borrower and conduct a good faith, reasonable search of the Lender's records to determine whether the Borrower has accurately reported the outstanding debt it has with the Lender, but the Lender can otherwise rely on the Borrower Certifications.
  - If a **Priority loan is secured by a shared pool of collateral**, the Lender must certify that it has no knowledge or reason to believe that its lien is not senior to or pari passu with the lien that secures the Borrower's other debt (other than mortgage debt and limited recourse equipment financing). If a **Priority or Expanded loan is unsecured**, the Lender must certify that the Lender has no knowledge or reason to believe that the Borrower's other debt (other than mortgage debt and limited recourse equipment financing) is secured at the time the Main Street loan is originated. For purposes of these certifications, the Lender must conduct lien searches and other customary diligence that is consistent with its ordinary course approach to similarly situated borrowers, but can otherwise rely on the Borrower Certifications.
  - For **Expanded loans**, the Lender must certify and commit that any collateral securing the underlying credit facility at the time the Expanded loan is originated secures both the underlying credit facility and the Expanded loan on a pari passu basis, until the Expanded loan matures or neither the Main Street SPV nor any government assignee hold any interest in the Expanded loan.
- *Repayment of Other Debt.* The Lender must commit that it will not request that the Borrower repay debt owed to the Lender, or pay interest on such outstanding obligations unless the debt or interest payment is mandatory and due, until the Main Street loan is repaid in full or neither the Main Street SPV nor any government assignee hold any interest in the Main Street loan.
- *Committed Lines.* The Lender must commit that it will not cancel or reduce any existing committed lines of credit to the Borrower until the Main Street loan is repaid in full or neither the Main Street SPV nor any government assignee hold any interest in the Main Street loan, except in an event of default.
- *Prompt Notice.* The Lender must promptly notify the Main Street SPV and the Federal Reserve Bank of Boston if:
  - the Lender becomes aware of a material breach of covenant under the Lender Certifications, or
  - a Borrower reports a material misrepresentation or material breach of any material covenant under the Borrower Certifications while its loan is outstanding and the Main Street SPV or a government assignee hold any interest in it, or up to one year afterwards.
- *Lender Registration.* To participate in the program, a Lender must provide a separate, one-time certification stating, among other things, that it is an Eligible Lender and is not insolvent as defined under Section 13(3)'s implementing regulations. These certifications must be signed and delivered on behalf of the Lender by its CEO and CFO, or individuals performing similar functions. If any of the Lender registration certifications becomes untrue, the Lender must promptly notify the Federal Reserve and cease engaging in any new Main Street transactions.

## B. Borrower Certifications

- **Mandatory Prepayment.** A Main Street loan would promptly become subject to mandatory prepayment upon discovery of a material misrepresentation or a material breach by the Borrower of certain certifications and covenants that address requirements under the CARES Act and Section 13(3).
- These certifications and covenants, which are not directly related to the credit quality of a Main Street loan, include the following:
  - **CARES Act Eligibility.** Each Borrower must certify that it meets certain requirements to be eligible for financial assistance under the CARES Act, including that it is a U.S. business,<sup>2</sup> has not received “specific support” under certain other CARES Act programs,<sup>3</sup> and is not a “covered entity” for purposes of the conflicts of interest prohibition in section 4019(b).<sup>4</sup> The conflict of interest certification also prescribes a standard for the due diligence that the Borrower must perform.
  - **CARES Act Payout Restrictions.** Each Borrower must commit to following the restrictions on employee compensation, and the prohibition on buybacks and paying dividends on common stock, that apply to direct loan programs under the CARES Act, which also apply for one year after the loan is repaid.<sup>5</sup>
  - **13(3) Requirements.** Each Borrower must certify that it is not “insolvent,” as defined in Section 13(3)’s implementing regulations, and that it is “unable to secure adequate credit accommodations from other banking institutions.”
    - In making the latter certification, Borrowers do not need to establish that no credit is available from other sources, only that the amount, price, or terms of such credit is inadequate for the Borrower’s current needs.
    - 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.
- **Indemnity.** The Borrower Certifications include an indemnity to the Lender, the Federal Reserve and the Treasury that covers any liability or loss of the beneficiary associated with any material breach of any of the Borrower’s certifications or covenants.

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<sup>2</sup> The revised Main Street FAQs state that a U.S. subsidiary of foreign company may be an Eligible Borrower, provided that it otherwise meets the program’s eligibility requirements and does not use the proceeds of the Main Street loan for the benefit of any foreign parents or affiliates. To be eligible, the U.S. subsidiary must be organized in the United States with significant operations in and a majority of its employees based in the United States. The Main Street FAQs mirror the Fed’s language in response to the same question in the FAQs for the Primary and Secondary Market Corporate Credit Facilities.

<sup>3</sup> “Specific support” means support under section 4003(b)(1)-(3) of the CARES Act, which authorizes Treasury to provide loans or guarantees to air carriers, certain related companies and businesses that are critical to national security.

<sup>4</sup> Section 4019(b) prohibits the use of CARES Act economic stabilization funds to provide financial assistance to any entity in which a “covered individual” directly or indirectly holds a controlling interest. The “covered individuals” include the United States President, the Vice President, the head of an Executive Department or a Member of Congress (or a spouse, child, daughter-in-law or son-in-law of any of the foregoing). A controlling interest is owning, controlling or holding 20% or more, by vote or value, of any class of equity. For more information on Section 4019(b) of the CARES Act, refer to Davis Polk’s client memorandum on the key terms, features and mechanics of the Main Street Program [here](#).

<sup>5</sup> The restriction on payment of dividends is subject to the exception that an S corporation or other tax pass-through entity that is an Eligible Borrower may make distributions to the extent reasonably required to cover its owners’ tax obligations in respect of the entity’s earnings.

- *No Mandatory Prepayment.* Certifications and covenants that would not trigger mandatory prepayment if materially breached, but which are in scope of the Borrower's indemnity, include the following:
  - *Ineligible Business.* Each Borrower must certify that it is not an Ineligible Business, as defined in the SBA's regulations and as modified for purposes of the Paycheck Protection Program by regulations implemented on or before April 24, 2020.
    - For purposes of this certification, Borrowers are expected to review the list of Ineligible Businesses in the SBA's regulations and make a reasonable, good faith effort to determine if the Borrower's activities or ownership would cause it to be an Ineligible Business.
    - If the Borrower has reason to believe that it may be an Ineligible Business, it is expected to conduct further inquiry into the SBA's interpretations of its regulations, including in the recent interim final rules related to the Paycheck Protection Program, and to reference the Main Street FAQs. For more information on Ineligible Businesses, refer to Davis Polk's client memorandum on the key terms, features and mechanics of the Main Street Program [here](#).
  - *Repayment of Other Debt.* Each Borrower must commit to refrain from repaying the principal balance of, or paying any interest on, any other debt unless mandatory and due, until the Main Street loan is repaid in full or neither the Main Street SPV nor any government assignee hold any interest in the Main Street loan, with an exception under the Priority facility allowing Borrowers to use loan proceeds to refinance existing debt to another lender. Borrowers are permitted to refinance debt that is maturing no later than 90 days from the date of such refinancing. FAQ H.7 also clarifies the meaning of "mandatory and due" in a way that ensures that Lenders and Borrowers cannot amend scheduled prepayment or mandatory prepayment triggers of existing indebtedness in contemplation of, or following the incurrence of, Main Street loans or once the Main Street loans are in place.
  - *Forward-looking Solvency.* Each Borrower must certify that it has a reasonable basis to believe that it has the ability to meet its financial obligations for at least 90 days after the Main Street loan's origination date and does not expect to file for bankruptcy during that period.
  - *Holding Company Borrowers.* If the Borrower is a holding company, it must certify that the loan is fully guaranteed on a joint and several basis by all of its subsidiaries that are included in the EBITDA Requirement for Holding Company Lender certification described above and if the loan is secured, that such guarantees are also secured.
- *FAQs Incorporated by Reference.* The instructions to the Borrower Certifications provide that the Main Street FAQs are incorporated by reference, and Borrowers may rely on them for purposes of the required certifications and covenants.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

## Finance and Restructuring

**Donald S. Bernstein** [donald.bernstein@davispolk.com](mailto:donald.bernstein@davispolk.com)  
**Hilary Dengel** [hilary.dengel@davispolk.com](mailto:hilary.dengel@davispolk.com)  
**Meyer C. Dworkin** [meyer.dworkin@davispolk.com](mailto:meyer.dworkin@davispolk.com)  
**James A. Florack** [james.florack@davispolk.com](mailto:james.florack@davispolk.com)  
**Vanessa L. Jackson** [vanessa.jackson@davispolk.com](mailto:vanessa.jackson@davispolk.com)  
**Jason Kyrwood** [jason.kyrwood@davispolk.com](mailto:jason.kyrwood@davispolk.com)  
**Jeong M. Lee** [jeong.lee@davispolk.com](mailto:jeong.lee@davispolk.com)  
**Jonathan B. Brown** [jonathan.brown@davispolk.com](mailto:jonathan.brown@davispolk.com)  
**Stephanie S. Hong** [stephanie.hong@davispolk.com](mailto:stephanie.hong@davispolk.com)

## Financial Institutions Group

**Randall D. Guynn** [randall.guynn@davispolk.com](mailto:randall.guynn@davispolk.com)  
**Margaret E. Tahyar** [margaret.tahyar@davispolk.com](mailto:margaret.tahyar@davispolk.com)  
**Eric McLaughlin** [eric.mclaughlin@davispolk.com](mailto:eric.mclaughlin@davispolk.com)  
**Kirill Lebedev** [kirill.lebedev@davispolk.com](mailto:kirill.lebedev@davispolk.com)  
**Andrew B. Samuel** [andrew.samuel@davispolk.com](mailto:andrew.samuel@davispolk.com)

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