CLEARY GOTTLIEB

ALERT MEMORANDUM

June 1, 2020

Federal Reserve Releases Details of Main Street Lending Program

On May 28, the Federal Reserve published the structural and operational details of the Main Street Lending Program, releasing program documentation and updated FAQs. These documents are the final remaining pieces before the facilities open. Last week's publication brings the Federal Reserve closer to a new frontier, where it will be able to lend against non-investment grade credits to small and mid-size nonfinancial corporates. Depending on uptake by eligible Lenders and Borrowers, the Main Street Lending Program has the potential to be an important supplement to the Paycheck Protection Program in supporting sectors of the economy most affected by the pandemic.

Now the real work begins—potential Lenders and Borrowers will be evaluating the various documents, conditions and restrictions, paying particular attention to the certifications and covenants required of both Lenders and Borrowers. The documentation appears to strike a delicate balance between the Federal Reserve's twin Congressional mandates to provide credit to businesses struggling with the pandemic-induced economic slowdown and to lend only to solvent borrowers on a satisfactorily secured basis.

We set out below a few key considerations for Lenders and Borrowers as they review the Program.

Lenders

- The Program significantly relies on Lenders to perform both their typical underwriting function (including review of eligibility and creditworthiness of the Borrower) and a significant administrative agent function (including maintaining robust records in relation to the Lender's and the Borrower's participation in and eligibility for the Program).
- The Federal Reserve appears to be responding to concerns of Lenders by allowing significant reliance on documents and certifications delivered by the Borrower to the Lender regarding information within the knowledge of the Borrower. Furthermore, the Federal Reserve indicated that "[t]he Lender is not expected to monitor the Borrower's ongoing compliance with covenants set out in the Borrower Certifications and Covenants, but is expected to promptly notify the [Federal Reserve] if the Lender becomes aware of a Borrower's material breach of such covenants as a result of the Borrower self-reporting."
- While some Lenders will pause over the extent of the certifications required, it appears that the Federal Reserve's approach is intended, at least in part, to enhance certainty for Lenders by including specific certifications (often with reliance on Borrower certifications) rather than setting out a general due diligence and liability standard.

- For certain provisions that the Federal Reserve is requiring in the loan documentation, but that were not anticipated by the term sheet (such as CARES Act-specific breach language or cross-acceleration language), the Federal Reserve has provided model language as appendices to the updated FAQs.

- Particularly for the Main Street Expanded Loan Facility, a Lender should consider carefully the relationship between the existing loan (and its syndicate) and the upsized tranche (and any participating syndicate members), in terms of, among other things, collateral sharing, modifications to existing documents, voting/consent required of syndicate members, cross-acceleration, etc.

Borrowers

- While the Federal Reserve has clearly sought to broaden Lender participation, it is not clear whether all or only certain types of Lenders will participate in the Program and how quickly different Lenders can implement the necessary procedures. As a result, Borrowers interested in participating in the Program may wish to contact multiple relationship Lenders.

- Borrowers will need to evaluate the incremental certification, reporting and indemnification obligations associated with participating in the Program, which differ from a traditional commercial lending arrangement. While the Federal Reserve's documentation evidences an intent to provide flexibility, the practical effects will depend in part on how Lenders implement the Program requirements. Some Borrowers may face particular challenges due to limited resources available for accounting and compliance during the current crisis.

- Borrowers seeking to participate in the Main Street Expanded Loan Facility will in many cases need to amend their existing syndicated loan agreements (and in some cases even other debt documents) in order to accommodate the tranche, even though the most recent guidance reduces the amendments that are required. This may limit participation in the Program, particularly for borrowers experiencing the most distress where existing Lenders may not be willing to grant the necessary amendments.

Attention now will turn to when the Program will be launched, as well as how quickly the Federal Reserve and Lenders can process loan requests. While the Federal Reserve has not formally announced a date, senior officials have recently said that the facility is expected to purchase its first loan participations in early-to-mid-June.

A deck containing a summary of the key Program terms and conditions is here. The full set of documentation is here, and a blackline showing revisions to the FAQs is here.

…

CLEARY GOTTLIEB