Client Alert

May 2020

Main Street Loan Facilities

In recently released FAQs (April 30, 2020), the Treasury Department ("***Treasury***") announced a new third loan facility under the Main Street Lending Program — the Main Street Priority Loan Facility (the "***Priority Loan Facility***"). In addition, the new FAQs revise the terms of the two previously announced loan facilities — the Main Street New Loan Facility (the "***New Loan Facility***") and the Main Street Expanded Loan Facility (the "***Expanded Loan Facility***" and, collectively, the "***Main Street Loan Facilities***").

The FAQs include new and revised term sheets (the "***Term Sheets***") for the Priority Loan Facility, the New Loan Facility and the Expanded Loan Facility.

Basic Structure of the Main Street Loan Facilities

The Main Street Loan Facilities are intended to incentivize Eligible Lenders (as defined below) to make new loans and to advance additional principal under outstanding Eligible Loans (as defined below). A loan qualifying under either the Priority Loan Facility (a "***Priority Loan***") or the New Loan Facility (a "***New Loan***") is a new loan, per Priority Loan Facility or New Loan Facility specifications (as the case may be).

In contrast, a loan under the Expanded Loan Facility (an "***Expanded Loan***") is an advance of additional principal on an Eligible Loan, per Expanded Loan Facility specifications. An "***Eligible Loan***" is a secured or unsecured loan or revolving credit facility that (a) was originated by an Eligible Lender to an Eligible Borrower (as defined below) on or prior to April 24, 2020 (the "***Start Date***") and (b) as of the Start Date, has a remaining term of at least eighteen months (taking into account any term adjustments made after Start Date or in connection with the making of the Expanded Loan).

To incentivize Eligible Lenders to make Priority Loans, New Loans and Expanded Loans (collectively, the "***Main Street Loans***"), a newly established government special purpose vehicle (the "***SPV***") will purchase (a) 85 percent (at par) of any Priority Loan and (b) 95 percent (at par) of any New Loan or Expanded Loan. Under the Expanded Loan Facility, the

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SPV purchases only the Expanded Loan (*i.e.*, only the upsized principal tranche of the underlying Eligible Loan), leaving the underlying Eligible Loan with the Eligible Lender. The SPV will remain open for business until September 30, 2020, with authorization to purchase up to $600 billion of Main Street Loans.

Eligible Borrowers

Under a common definition for all Main Street Loans, a person qualifies as an eligible borrower (an "***Eligible Borrower***") by meeting all of the following requirements:

1. ***Existing U.S. Business Entity*** – An Eligible Borrower must be a ***for-profit*** entity formed in the United States prior to March 13, 2020, other than a "joint venture" with greater than "49 percent participation" by "foreign business entities." Given that the Term Sheets specifically permit U.S. corporations, partnerships and limited liability companies to apply without regard to their ownership structure, it is unclear what "joint venture" means and how and when "foreign participation" is measured. Non-profits are flatly ineligible, although this may be changed in future guidance.

2. ***Eligible Borrower Size Limitation*** – An Eligible Borrower must meet one of the following size tests: (a) no more than 15,000 employees or (b) 2019 annual revenues of no more than $5 billion (GAAP or tax basis). The Small Business Association's affiliation rules apply in determining whether an Eligible Borrower meets these size tests.

3. ***Significant U.S. Operations*** – An Eligible Borrower must have "significant operations" and a "majority of its employees" based in the United States. No guidance is provided on how and when these employee and operation tests are applied.

4. ***Real Estate and Other Ineligible Businesses*** – In a change from earlier guidance, the Term Sheets now import the ineligible business list used in the Paycheck Protection Program ("***PPP***") into the Main Street Loan Facilities, thereby excluding loans to "sin" businesses, speculative activities, "passive" real estate ventures, and certain other businesses from the Main Street Loan Facilities. So, as in the case of the PPP, typical commercial landlords once again find themselves on the outside looking in.

5. ***Subsidy Limits*** – An Eligible Borrower can only use one Main Street Loan Facility or the Primary Market Corporate Credit Facility (a corporate bond purchasing program established by the Federal Reserve in parallel with the Main Street Loan Facilities) and cannot receive specific support under the CARES Act. A PPP loan does not constitute specific support under the CARES Act.

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6. ***Good Credit Rating*** – If an Eligible Borrower has any loans outstanding on December 31, 2019, with the Eligible Lender lending under the relevant Main Street Loan Facility, then such loans must have an internal risk rating (as of December 31, 2019) equivalent to a "pass" under the Federal Financial Institutions Examination Council's supervisory rating system.

Principal Size Limits

Subject to a minimum principal amount of $500,000 in the case of a Priority Loan or New Loan or $10 million in the case of an Expanded Loan, maximum principal amounts are determined as follows:

1. ***Priority Loan (6X EBITDA)*** – Priority Loan principal cannot exceed the lesser of (a) $25 million or (b) the excess (if any) of (1) six times the Eligible Borrower's adjusted 2019 EBITDA over (2) the Eligible Borrower's outstanding debt and used and unused credit lines ("***Total Debt***").

2. ***New Loan (4X EBITDA)*** – New Loan principal cannot exceed lesser of (a) $25 million or (b) the excess (if any) of (1) four times the Eligible Borrower's adjusted 2019 EBITDA over (2) Total Debt.

3. ***Expanded Loan (6X EBITDA)*** – Expanded Loan principal (exclusive of the principal on the underlying Eligible Loan) cannot exceed the lesser of (a) $200 million, (b) 35 percent of the Eligible Borrower's existing outstanding and undrawn available debt that is pari passu in priority with the Expanded Loan and equivalent in secured status (*i.e.*, secured or unsecured), or (c) the excess (if any) of (1) six times the Eligible Borrower's adjusted 2019 EBITDA over (2) Total Debt.

To calculate an Eligible Borrower's adjusted 2019 EBITDA, an Eligible Lender must use the methodology previously used for adjusting EBITDA when extending credit to the Eligible Borrower or similarly situated borrowers on or before the Start Date.

Principal Amortization

Depending on the type of Main Street Loan, principal amortization varies as follows:

1. ***Balloon Principal Amortization (Priority and Expanded Loans)*** – In the case of a Priority Loan or an Expanded Loan, principal payments must occur as follows: (a) 15 percent at the end of the second year, (b) 15 percent at the end of the third year, and (c) 70 percent at maturity at the end of the fourth year.

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2. ***Level Principal Amortization (New Loans)*** – In the case of a New Loan, principal payments must occur as follows: (a) one-third at the end of the second year, (b) one-third at the end of the third year, and (c) one-third at maturity at the end of the fourth year.

Permitted Uses of Loan Proceeds

In general, there are no restrictions on the use of Main Street Loan proceeds, except that (a) no proceeds from a New Loan or an Expanded Loan may be used to prepay or refinance any debt and (b) proceeds from a Priority Loan can be used to refinance existing debt when the Priority Loan is originated only if the existing debt is owed to a person other than an Eligible Lender. However, when using proceeds from any Main Street Loan, an Eligible Borrower should keep in mind its other commitments under the Main Street Loan, in particular the Employee Retention Commitment (as defined below).

Common Terms for All Main Street Loans

Under the Term Sheets, all Main Street Loans share the following common terms and conditions:

1. ***Financial Terms*** – A Main Street Loan must include the following terms (a) four-year maturity, (b) deferral of interest and principal payments for one year, (c) interest at an adjustable rate equal to adjustable LIBOR (1 or 3 month) plus 300 basis points, and (d) no prepayment penalty.

2. ***Collateral*** – As determined in conjunction with an Eligible Lender, a Main Street Loan may be secured or unsecured, except that an Expanded Loan must be secured if the underlying Eligible Loan is secured.

3. ***Nonsubordination*** – At all times, a Main Street Loan must be senior to or pari passu with the Eligible Borrower's other loans or debt instruments (other than mortgage debt in the case of a Priority Loan or an Expanded Loan).

4. ***No Prepayment of Other Debt*** – While any Main Street Loan remains outstanding, an Eligible Borrower may not prepay any other debt (other than refinancing permitted in connection with a Priority Loan) or reduce or cancel any line of credit with any lender.

5. ***No Imminent Bankruptcy*** – In connection with a Main Street Loan, an Eligible Lender must certify that it reasonably expects to be able to meet its financial obligations and does not expect to file for bankruptcy during the next ninety days.

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6. ***Other CARES Act Restrictions*** – An Eligible Borrower must comply with the limits on equity repurchases, dividends, distributions (other than tax distributions), and compensation, as specified in Section 4003 of the CARES Act.

7. ***Origination and Other Transaction Fees*** – An Eligible Lender may charge an Eligible Borrower an origination fee equal to a percentage of the Main Street Loan's principal amount: 100 basis points in the case of Priority Loan or New Loan and 75 basis points in the case of an Expanded Loan. In addition, an Eligible Lender may pass through a transaction fee charged to the Eligible Lender by the SPV: 100 basis points in the case of Priority Loan or New Loan and 75 basis points in the case of an Expanded Loan.

8. ***Employee Retention Commitment*** – While a Main Street Loan is outstanding, an Eligible Borrower must make commercially reasonable efforts to maintain its payroll and retain its employees (the "***Employee Retention Commitment***").

Eligible Lenders

In another change from earlier guidance, the Term Sheets expand the roster of lenders eligible to participate in the Main Street Lending Program (each, an "***Eligible Lender***"). The new list of Eligible Lenders includes any U.S. federally insured depository institution (such as a bank, savings association, or credit union), a U.S. branch or agency of a foreign bank, a U.S. bank holding company, a U.S. savings and loan holding company, a U.S. intermediate holding company of a foreign banking organization, and a U.S. subsidiary of any of the foregoing.

For More Information

Olshan lawyers from multiple practice groups are working together with clients to address COVID-19-related matters, including the CARES Act stimulus programs (i.e., the PPP and EIDL) and other corporate matters, including contractual analysis and financing, tax, restructuring, employee benefits and employment practices, insurance coverage, and litigation. Click here to access additional materials addressing issues raised by COVID-19.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys listed below if you would like to discuss this client alert or have questions about its content.

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