FOLEY HOAG LLP

Business Alert

Main Street Lending Facilities under the CARES Act

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On June 8, 2020, the Board of Governors of the Federal Reserve System (the "Fed") released improvements favorable to borrowers for its three lending programs (the "Main Street Facilities") under the Coronavirus Aid, Relief and Economic Security Act ("CARES Act"). The Main Street Facilities will make credit available to small and medium sized businesses through (i) a New Loan Facility, (ii) a new Priority Loan Facility or (ii) an Expanded Loan Facility for an existing loan agreement. Through these facilities, the Fed will use up to $600 billion to purchase loan participations equal to 95% of eligible term loans. As updated, the guidelines for the Main Street Facilities are as follows:

Eligible Borrowers

To be eligible under any of the Main Street Facilities, a company must:

1. Have, when aggregated with its affiliates, either (a) no more than 15,000 employees or (b) no more than $5,000,000,000 in revenue in 2019 [*The Small Business Administration affiliation rules set forth in 13 CFR 121.301(f) apply to both the employee and revenue tests in the same manner as for the Paycheck Protection Program ("PPP"), including control considerations for companies with private equity and venture capital investors.Also similar to PPP loans, employees are counted using the average number of full and part-time employees (but not independent contractors) over the previous 12 months.Borrowers may use either GAAP revenue or revenue reported to the IRS for tax purposes*];
2. Have been established before March 13, 2020;
3. Have been created or organized in the United States or under US law [*For a US subsidiary of a foreign parent, the affiliation rules will require aggregating foreign employees and foreign revenues from the parent's other subsidiaries*];
4. Have significant operations and a majority of its employees in the United States;
5. Not be an Ineligible Borrower [*Examples of Ineligible Borrowers are businesses (a) primarily engaged in lending, (b) conducted on a not-for-profit basis, (iii) engaged in illegal activities, gambling activities, and activities that appeal to prurient interests, (iv) that have previously defaulted on a federal loan or federal assisted financing or (v) of another type set forth in 13 CFR 120.110(b)-(j), (m)-(s)*]; and
6. If at December 31, 2019 the borrower had a loan with the lender providing the Main Street Facility, such loan must have then had a risk rating equivalent to "pass" under Fed rules.

A borrower may not participate in more than one of the Main Street Facilities. If an affiliate of a borrower has received, or has a pending application for, a Main Street Facility, then a borrower may only participate in the same type of Main Street Facility as its affiliate and the borrower will be consolidated with its affiliate for the purpose of determining the maximum loan amount to the group. Borrowers who have received PPP loans are eligible to borrow under the Main Street Facilities. Unlike PPP loans, Main Street Facility loans are not forgivable.

Eligible Lenders

Eligible Lenders are US insured depository institutions, US branches of foreign banks, US bank holding companies, US savings and loan holding companies and US subsidiaries of any of the foregoing. [*Non-bank lenders, such as private fund direct lenders, are not eligible. For an Expanded Loan Facility, only the lender making the incremental loan need be an Eligible Lender, but such lender must be a lender under the existing loan agreement*].

Certifications Required of Borrowers

To participate in any of the Main Street Facilities, a borrower must certify:

1. That, until the Main Street Facility loan is repaid in full, it will not pay principal of, or interest on, any debt except mandatory amounts when due, regular payments and reborrowings under a revolving line of credit, purchase money debt and refinancings of debt at maturity, provided that the proceeds of a Priority Loan Facility may be used to refinance debt that is not owed to the lender under the Priority Loan Facility;
2. That it will not seek to reduce or terminate any outstanding line of credit;
3. That it will make commercially reasonable efforts to maintain its payroll and retain its employees during the term of the Main Street Facility [*Borrowers that have already laid off or furloughed workers are eligible to apply*];
4. That it has a reasonable basis to believe that, after giving effect to the Main Street Facility loan, it will be able to meet its financial obligations for the next 90 days and not file for bankruptcy during such period [*Unlike PPP loans, the Borrower is not required to demonstrate that the Main Street Facility is necessary for its ongoing operations as a result of the pandemic*];
5. That, while the Main Street Facility loan is outstanding and for 12 months thereafter, it will not repurchase its stock if its stock is publicly traded (except to the extent contractually committed prior to the CARES Act) or pay dividends [*Tax distributions from a limited liability company or other tax flow-through entity are permitted.No guidance has been provided on whether dividends from a US subsidiary to a foreign parent for overhead expenses are permitted*]; and
6. That, while the Main Street Facility loan is outstanding and for 12 months thereafter, it will not pay any employee (i) whose total compensation (including bonuses, stock awards and other financial benefits) exceeded $425,000 for 2019, more than such employee was paid in 2019 (and any termination benefits for such employee cannot exceed 2x 2019 total compensation) or (ii) whose total compensation exceeded $3,000,000 for 2019, more than the sum of $3,000,000 plus 50% of the excess of total 2019 compensation over $3,000,000.

Certifications Required of Lenders

To make a loan under any of the Main Street Facilities, a lender must certify:

1. That it will not request the borrower to pay principal of, or interest on, any debt extended by the lender to the borrower until the Main Street Facility is repaid in full, unless such payment is mandatory, including upon acceleration as a result of a default;
2. That it will not reduce or terminate any outstanding credit line to the borrower, except as a result of a default; and
3. That it has calculated the borrower's EBITDA for the purpose of determining the maximum loan amount in accordance with the applicable methodology set forth below.

Eligible Loans

Note that a borrower's existing loan agreements will typically require waivers or amendments to permit the incurrence of the Main Street Facilities described below. New Loan Facilities and Priority Loan Facilities will be stand-alone agreements for borrowers that either do not have an existing loan agreement or whose existing loan agreement permits such additional debt. Expanded Loan Facilities will be provided as an additional tranche under the accordion or incremental credit provisions of a borrower's existing loan agreement.

A. *New Loan Facility*
   To qualify as a New Loan Facility, a loan must be made by an Eligible Lender to an Eligible Borrower and have the following terms:

   1. Maximum size that is the lesser of: (i) $35 million (increased from $25 million) and (ii) an amount that, when added to the borrower's existing outstanding and available committed but undrawn debt, does not exceed 4x 2019 EBITDA [*The lender must calculate EBITDA according to the methodology it used to calculate the borrower's, or similarly situated borrowers', EBITDA prior to April 24, 2020. Committed but undrawn debt excludes commercial paper back-up facilities and receivables financing, including seasonal inventory financing*];
   2. Minimum size of $250,000 (decreased from $500,000);
   3. Five year maturity (increased from four years);
   4. Two year deferral of principal (increased from one year) and one year deferral of interest [*Interest for the first year will be*

capitalized and thereafter will be payable in accordance with the terms of the loan agreement.];

5. Principal amortization of 15% at the end of the third year, 15% at the end of the fourth year and the remaining 70% at maturity (first two year amortization reduced by more than half);
6. Prepayment permitted without penalty;
7. Adjustable interest rate of one or three month LIBOR plus 300 basis points;
8. May be secured or unsecured, but cannot be contractually subordinated to any other debt of the borrower; and
9. (i) 100 basis point fee on the principal amount payable by the borrower to the lender, (ii) 100 basis point fee on the principal amount payable by the lender to the Fed, which the lender may require the borrower to reimburse and (iii) 25 basis point administration fee of the principal amount per annum payable by the Fed to the lender.

B. *Priority Loan Facility*
Priority Loan Facilities have the same terms as New Loan Facilities, with the following changes:

1. Maximum size that is the lesser of: (i) $50 million (increased from $25 million) and (ii) an amount that, when added to the borrower's existing outstanding and available committed but undrawn debt, does not exceed 6x 2019 EBITDA; and
2. Senior to, or pari passu with, the borrower's other debt in priority and security, other than mortgage and purchase money debt.

C. *Expanded Loan Facility*

To qualify under an Expanded Loan Facility, a loan must be made by an Eligible Lender that is also a lender under an existing term or revolving loan agreement that has a remaining maturity of at least 18 months. [*Borrowers must analyze whether Most Favored Nation and other protections for existing lenders will prohibit a new loan that has a shorter maturity or shorter weighted average life to maturity than existing loans under the same loan agreement. Similar MFN protections may apply to the interest rate and upfront fees for the Expanded Loan Facility*]. Expanded Loan Facilities have the same terms as New Loan Facilities, with the following changes:

1. Maximum size that is the lesser of: (i) $300 million (increased from $200 million) and (ii) an amount that, when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed 6x 2019 EBITDA (deleted requirement relating to committed and undrawn debt)[*The lender must calculate EBITDA according to the methodology used to calculate EBITDA in the borrower's existing loan agreement*];
2. Minimum size of $10 million;
3. Senior to, or pari passu with, the borrower's other debt in priority and security, other than mortgage or purchase money debt [*If the borrower's existing facility has split collateral tranches, with a revolving loan given a first priority lien on inventory and receivables and a second priority lien on other assets and with a term loan given a first priority lien on other assets and a second priority lien on inventory and receivables, then the Expanded Loan Facility need only share collateral on a* pari passu *basis with the term loan.*]; and
4. (i) 75 basis point fee on the principal amount payable by the borrower to the lender and (ii) 25 basis point administration fee of the principal amount per annum payable by the Fed to the lender.

<u>Beginning and Termination</u>

The Fed expects to begin purchasing loan participations through the Main Street Facilities very soon, and will cease purchasing such participations on September 30, 2020.

For more information on these topics, please contact Malcolm Henderson, Jennifer Audeh or Thomas Draper.

Foley Hoag has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our Resource Page or contact your Foley Hoag attorney.

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