Client Alert

June 2020

Main Street Loan Facilities

On June 8, 2020, the Federal Reserve released additional guidance on the Main Street Lending Program, completely replacing earlier sets of FAQs (April 30, 2020 and May 27, 2020) with new FAQs. The changes expand the Main Street Lending Program to allow more small and medium-sized businesses to be able to receive support. The model loan documents issued on May 27 remain in effect. The Main Street Lending Program comprises the Main Street Priority Loan Facility (the "***Priority Loan Facility***"), 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

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95 percent (at par) of any Main Street Loan. Under the Expanded Loan Facility, the 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 currently ineligible, although the Federal Reserve Board has stated that it is working towards establishing a program for these organizations. An Eligible Borrower may be a subsidiary of a foreign company, provided that the borrower itself is created or organized in the United States or under the laws of the United States, and the borrower on a consolidated basis has significant operations in and a majority of its employees based in the United States. The proceeds of any such loan can only be used for the benefit of the U.S. borrower, its consolidated U.S. subsidiaries and other affiliates of the borrower that are U.S. businesses.

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. An Eligible Borrower will be considered to have significant operations if, on a consolidated basis together with its subsidiaries, but not its parent companies or sister affiliates, it has greater than 50% of its (a) assets located in the United States; (b) annual net income generated in the United States; (c) annual net operating revenues generated in the United States; or (d) annual consolidated operating expenses (excluding interest

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expense and any other expenses associated with debt service) generated in the United States. The foregoing is a non-exhaustive list of examples that reflects the principles that should be applied by a potential borrower when evaluating its eligibility under this criteria.

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 and private equity funds once again find themselves on the outside looking in.

5. ***Subsidy Limits*** – An Eligible Borrower, together with its affiliated entities, 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. An affiliated group can have different loans under one type of facility, but the total participation of all borrowers cannot exceed the maximum loan size that the affiliated group as a whole is eligible to receive on a consolidated basis. Accordingly, an eligible borrower's maximum loan size would be limited by its own leverage level, the leverage level of the affiliated group on a consolidated basis, and the size of any loan extended to other affiliates in the group.

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.

7. ***Inability to Secure Other Credit Accommodation***s – The Borrower Certifications add an additional requirement that Eligible Borrowers must be "unable to secure adequate credit accommodations from other banking institutions." This does not mean that there is no credit from other sources available to the borrower. Rather, a borrower may certify that it is unable to secure "adequate credit accommodations" because the amount, price, or terms of credit available from other sources are inadequate for the borrower's needs during the current unusual and exigent circumstances. Borrowers are not required to demonstrate that

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applications for credit have been denied by other lenders or otherwise document that the amount, price, or terms of credit available elsewhere are inadequate.

Principal Size Limits

Subject to a minimum principal amount of $250,000 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) $35 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) $50 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) $300 million or (b) 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

For all Main Street Loans, principal payments must occur as follows: (a) 15 percent at the end of the third year, (b) 15 percent at the end of the fourth year, and (c) 70 percent at maturity at the end of the fifth 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).

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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) five-year maturity, (b) deferral of interest for one year and of principal for two years, (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 a Priority Loan or Extension Loan must be secured if, at the time of origination, the Eligible Borrower has any other secured loans or debt instruments, other than mortgage debt or limited recourse equipment financing. If a Priority Loan must be secured because the Eligible Borrower has secured debt, then the Collateral Coverage Ratio (as defined below) for the Priority Loan at the time of its origination must be either (i) at least 200 percent or (ii) not less than the aggregate Collateral Coverage Ratio for all of the Eligible Borrower's other secured debt (other than mortgage debt). "Collateral Coverage Ratio" means (i) the aggregate value of any relevant collateral security, including the pro rata value of any shared collateral, divided by (ii) the outstanding aggregate principal amount of the relevant debt.

3. ***Nonsubordination*** – A New Loan, at the time of origination or at any time during its term, may not be contractually subordinated in terms of priority to the Eligible Borrower's other loans or debt instruments. This means that the New Loan may not be junior in priority in bankruptcy to the Eligible Borrower's other unsecured loans or debt instruments. This does not preclude an Eligible Borrower from taking on new secured or unsecured debt after receiving a New Loan, provided that the new debt does not have higher contractual priority in bankruptcy than the New Loan. Priority Loans and Extension Loan 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.

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

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be able to meet its financial obligations and does not expect to file for bankruptcy during the next ninety days.

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***").

9. ***Financial Reporting Requirements*** – Appendix C of the FAQs sets forth the financial information that the borrower is required to provide on an ongoing basis, annually and quarterly, during the term of the loan. These include reporting on assets, liabilities, income, EBITDA (and its components), expenses and expenditures, accounts receivable, accounts payable, collateral values and covenant defaults and cure.

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.

New Customers

An Eligible Borrower does not need to be a pre-existing customer of an Eligible Lender to get a New Loan or Priority Loan.

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Loan Documents

An Eligible Lender can use its own loan documentation. However, the loan documentation must contain certain mandated provisions, which are included in the new FAQs.

Mandatory Prepayment upon Misrepresentation

Main Street loans are subject to mandatory prepayment in the event of a knowing material misrepresentation or material breach of certain certifications by a borrower relating to the CARES Act, the Federal Reserve Act, or the Board of Governors of the Federal Reserve System's Regulations. If the Federal Reserve determines that a borrower has materially breached, made a material misrepresentation with respect to, or otherwise failed to comply with those certifications in any material respect, then the Federal Reserve may notify the lender and the borrower will then be required to prepay the Main Street loan in full within two business days.

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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