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April 16, 2020

The Honorable Steven Mnuchin
Secretary
U.S. Treasury Department
1500 Pennsylvania Avenue, NW
Washington D.C., 20220

The Honorable Jerome Powell
Chairman
Federal Reserve
20th Street and Constitution Avenue, NW
Washington, DC 20551

Dear Secretary Mnuchin and Chairman Powell:

Thank you for the work the Treasury Department and Federal Reserve are doing on behalf of the American people and the U.S. economy. As you work to implement Title IV of the Coronavirus Aid, Relief, and Economic Security Act, including the Main Street Lending Program, we appreciate the opportunity to provide comments and questions related to the term sheets released on April 9, 2020. On behalf of clients across a wide range of industries and of diverse sizes, we are submitting the following comments and questions regarding the Main Street Lending Program in response to the Federal Reserve's request for comment.

- **Expand eligibility for (b)(4) programs** by relaxing limits on employee count and revenue:
    - While small- and medium-sized businesses, defined in current guidelines as businesses with up to 10,000 employees and no more than $2.5 billion in revenue, are employers critical to the U.S. economy, larger firms are also a segment of employers in dire need during this crisis. Given many of the issues described in greater detail below, these larger firms may also not have access to the other programs under the CARES Act. Additionally, many of these larger firms provide critical support and supplies to small- and medium-sized firms. The Main Street Lending facilities should also be available to these larger firms who are critical to U.S. employment, and to smaller firms across the country.
- **"US business" clarification**: clarify that a U.S. business employing a majority of its employees in the U.S. can qualify for programs regardless of whether it is owned by a

non-U.S. parent, with restrictions to require that funds are only used to support the U.S. business and its employees in the U.S.

- **Eligible Lenders:** the current guidance requires that lenders be certain U.S. financial institutions. This could create issues for Eligible Borrowers seeking an expansion of an existing syndicated facility where none of, or not all of, the lenders are approved U.S. financial institutions. For example, many facilities now include various private direct lenders or U.S. branches of foreign banks which could otherwise result in a disqualification of a lender group. It also limits the available lenders that might be available to lend, particularly in instances where a working capital line is in place to a company but no existing term loan is in place, as the best option for most companies will be to access either term loan through their working capital lender or factor.
  - Solution: Allow expansion of term loans for Eligible Borrowers if the administrative agent is an approved U.S. financial institution or a majority of the existing and expanded term loans are held by approved U.S. financial institutions, or an eligible institution otherwise agrees to provide the expanded term loan. Allow non-bank providers of working capital lines or factoring arrangements.
  - Clarifying Question: Where existing loan facilities are in place how will voting and consent right issues work given the extended 95% hold of the new term loan by Treasury? Will Treasury allow the lender to drive consent, amendment, waiver and enforcement issues, particularly if the lender will retain a majority of the overall credit risk to the company?
- **Eligible Loans under the MSELF:** the current guidance only allows for term loans originated before April 8, 2020 to serve as eligible loans. Many borrowers utilize revolving lines of credit to finance working capital needs and often these revolving lines of credit are made in conjunction with or under a facility that also has a term loan.
  - Clarifying question: Can revolving lenders and borrowers agree to convert all or a portion of outstanding revolving loans into a term loan (or add to an existing term loan) that would otherwise be eligible to allow for participation in the MSELF?
- **SOFR as Rate of Interest on Eligible Loans:** the current guidance only allows for loans with adjustable rates based on SOFR plus an applicable spread. Many lenders have not transitioned from LIBOR to SOFR and the spread (250+400 bps) may exclude a large pool of “main street” businesses.
  - Solution: allow for LIBOR to control interest rate until LIBOR succession event occurs. In addition, allow spread to be set by the Eligible Borrower and Lender, with a floor of LIBOR + 250.
  - Clarifying question: if SOFR must control, can Eligible Lenders use LIBOR succession language to impose SOFR to create an Eligible Loan.

   - Clarifying question: Many lenders use LIBOR floors in their calculations. Can these sorts of floors continue to be used (whether for LIBOR or SOFR)?

- **Increase maximum loan size**: it is hard to overstate the severe conditions U.S. employers are facing given the current economic crisis and the COVID-19 pandemic. To remain on or regain solid economic footing, U.S. businesses are going to need substantial loan support. The current Main Street Lending program loan sizes are currently limited (1) for loans under the Main Street New Loan Facility, to the lesser of (a) $25 million and (b) the amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed 4X EBITDA, and (2) for loans under the Main Street Expanded Loan Facility, to the lesser of (a) $150 million, (b) 30% of the Eligible Borrower's existing outstanding and committed but undrawn bank debt, and (c) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed 6X EBITDA.

   - *Solution*: allow lenders to approve larger loans as they judge an application, allow for larger loan amounts by replacing *lesser* with *greater*, and increasing the EBITDA threshold, for example, to a multiple of 6 for new loans and a multiple of 8 for expanded loans based on what the lender and borrower negotiate.

   - *Solution*: many employers have revolving amounts levels of debt and credit throughout the year. To avoid unfairly penalizing borrowers based on an arbitrary point in time, allow for a 12-month average of outstanding and committed but undrawn debt.

   - *Solution*:: Eliminate the "committed but undrawn" component of "existing outstanding and committed but undrawn bank debt" calculation or change it to permit a historical lookback on actual available amounts under asset-backed liquidity facilities.

   - *Solution*: allow netting of cash against "existing outstanding and committed but undrawn bank debt" in calculation of maximum loan size.

- **EBITDA definition**: EBITDA, if interpreted as its classical definition, will exclude several adjustments that lenders and borrowers have agreed are appropriate to the specific circumstances of a particular credit if not industry-standard altogether. This, in turn, will lower the maximum loan size or make many borrowers ineligible to participate. Moreover, whether intended or not, any company with negative EBITDA over a relevant measurement period will not be able to participate even if it has de minimis currently outstanding debt. Additionally, metrics other than EBITDA are often employed in commercial credits in early stage businesses whose innovations are important to the economy; under a pure EBITDA based approach many of these businesses will not qualify.

- *Solution*: For the MSELF program, utilize the definition of Adjusted EBITDA defined under the borrower's existing credit agreement. For the MSNLF program, allow banks to agree with lenders on the definition of Adjusted EBITDA consistent with market practices. For businesses where EBITDA is an inappropriate or limiting metric, allow lenders and borrowers to agree on alternative metrics such as a multiple of recurring revenue.

- **Clarify availability to nonprofits:** while Section 4003 of the CARES Act suggests that eligible businesses should include, "to the extent practicable," nonprofit organizations, the initial guidance is silent on whether they are able to participate in the program. Treasury should clarify whether nonprofit organizations, including entities organized under Section 501(c)(3) of the Internal Revenue Code, are eligible. If nonprofit organizations are able to participate, some guidance may need to be modified (for example, the cap on loan size based on EBITDA would likely not be appropriate).

- **Amortization not defined**: If the intent is to have this loan pari with an existing term loan, the lender should be able to mirror amortization to the extent practical, subject to the maturity date of four years.

- **Interest**: How will interest accrue and be paid? Can it be added to principal, then paid at maturity?

- **Prohibition on use of proceeds**: While it is reasonable to disallow use of proceeds of loans under the Main Street facilities simply to pay down existing debt generally, the guidelines should make clear that like the Small Business Administration Paycheck Protection Program (the "PPP"), proceeds can be used to pay outstanding interest on existing debt.

  - *Clarifying question:* Further definition of debt is needed – i.e. how do the guidelines define "debt" and "bank debt" (used once)? The definition should be limited to something like "funded debt" not "debt" as typically defined in existing lending arrangements.

  - *Solution:* Tightly define "capital distribution" to permit intercompany distributions and only prohibit cash distributions to ultimate beneficial owners.

- **Prohibition on prepaying other debt**: While it is reasonable to disallow prepayment of existing funded debt until the loans until the Main Street facilities are repaid, the guidelines should carve out repayment of (a) revolving lines and other short term liquidity facilities that do not represent long term debt, (b) repayment of term debt that in a current liability (i.e. maturing debt), and (c) any SBA loans (whether under the CARES Act or otherwise). Many companies have had to use these short term facilities while waiting on CARES Act programs to stand up and should not be penalized for doing so, or have facilities that cannot be refinanced in the current market.

  - *Clarifying question*: further definition of debt is needed (as noted above).
  - *Solution*: change repayment/refinancing restriction to focus solely on term loan debt and expressly carve out revolving and capital lease debt and trade credit.

- **Modify prohibitions on capital distributions:** The CARES Act restricts capital distributions and dividends for employers that take advantage of Main Street facilities, and appropriately so. Congress clearly intended to prevent capital distributions to shareholders with this provision. Treasury should make clear that this restriction does not apply to certain payments where Congress did not intend to apply those restrictions. Without clear direction from Treasury, many lenders are likely to exclude employers with this structure from participating in the program.
  - *Solutions:* Permit limited distributions (a) for employers with a corporate structure where, to service existing debt, taxes or other obligations, dividends are paid up from an operating company to a parent company, (b) to shareholders/members/partners to pay related income tax obligations (as would typically be permitted by a senior lender where the borrower is a pass-through entity for tax purposes); and (c) relating to existing compensation and benefit plans (i.e. such as for ESOPs to pay plan participants to related benefits). Additionally, provide clarity that the foregoing restrictions are not intended to prevent change of control transactions that may necessitate a dividend or distribution during the one year period after repayment.

- **Four year maturity:** the Main Street Expanded Loan Facility guidelines include a limitation to loans that have a 4 year maturity. To conform to the existing loans that were originated before the release of this guidance, and to ensure more flexibility to borrowers and lenders, the expanded loans should match the maturity of the existing loan being expanded, where the maturity is in excess of 4 years.

- **Reasonable efforts to make payroll:** to increase certainty in Main Street loans, further guidance is needed on what "reasonable efforts to maintain" payroll and employees during the term of the loan means.
  - *Solution:* Alternative/suggestion: Provide explicit immunity for lending/borrowing under the loan programs except in the case of fraud. Alternatively, add concrete details around what constitutes "exigent" (i.e., a particular amount of cash runway based on good faith projections), and what "reasonable efforts" must be made.

- **Assignability:** The current guidance requires that lenders retain 5% of each eligible loan, to ensure adequate due diligence by lenders. Once the eligible loan is made, and to promote lender involvement and market liquidity in the eligible loan, consider providing

additional guidance that would clarify that eligible lenders would be permitted to assign and/or participate it's 5% share to other eligible lenders, on terms consistent with, and in an otherwise customary manner for, the commercial loan market, generally.

- **Credit ratings**: Many critical businesses and employers who have been affected by the COVID-19 pandemic are over the 10,000 employee threshold, and thus are currently unable to access the Main Street Lending programs. We understand that others programs, such as the Primary and Secondary Corporate Credit Facilities (PMCCF and SMCCF), are available to many of these employers. However, these programs are limited only to those who have an investment grade rating from a nationally recognized rating agency that the Federal Reserve considers "major." Also, under the current guidelines participation in these programs requires a BBB-/Baa3 credit rating from a Nationally Recognized Securities Ratings Organization (NRSRO). Solutions:
    - Employers who would otherwise qualify for the PMCCF and SMCCF programs should be allowed to participate if they have sufficient ratings from *one* NRSRO, even if ratings from other ratings organizations are below the required rating.
    - Ratings from any Federal Reserve designated "eligible" ratings agency should also be recognized for purposes of the PMCCF and SMCCF.
    - Reduce the required credit rating standards to allow greater access to capital for employers in need.

Thank you for your consideration of these comments and questions and for your continued work on behalf of the American people.

Sincerely yours,

HOLLAND & KNIGHT