

Prohibitions on Early Repayment of Other Indebtedness

June 4, 2020

The Borrower must certify and covenant that it will not repay the principal balance of, or pay any interest on, any indebtedness for borrowed money, unless the principal or interest payment is mandatory and due, until 1) the Eligible Loan is repaid in full or 2) the government no longer holds an interest in the Eligible Loan. This prohibition would not prohibit the Borrower from using Eligible Loan proceeds to refinance existing indebtedness.

This prohibition is not unlike comparable customary prohibitions in credit facilities and indentures on making restricted payments where multiple creditors may have each lent to the same borrower. The concept is that each lender makes an investment decision to lend to a borrower knowing that the borrower will have scheduled payments to another lender. Should the borrower accelerate the repayment of principal to another lender that would reduce the risk of the lender receiving the accelerated principal, and arguably increase the risk to the other creditors in the capital structure. To encourage lenders to lend at different levels of a borrower's capital structure, these types of prohibitions on prepayment exist.

In the case of the Main Street Lending Programs (MSLP), the government anticipates that many borrowers will have preexisting debt. Rather than require the borrower to use the Main Street loan proceeds to repay that preexisting debt, and instead use the proceeds for operations and payroll, the government has determined to reduce its risk by requiring borrowers not to prepay other lenders ahead of schedule.

However, the prohibition on payment of preexisting debt will not apply to:

- » **A line of credit.** For example, borrowers who have revolving lines of credit that permit them to borrow and repay and reborrow and repay over time may continue to use their lines in the ordinary course of business and consistent with the terms of the line of credit; this includes credit cards used for business as well.
- » **Purchase money financing.** For example, after closing a Main Street program loan, borrowers may obtain inventory and equipment financing as long as this inventory and equipment financing is secured only by the debt purchased with this financing, and the priority of the lien granted to the inventory and equipment financier is *pari passu* or subordinated to the Eligible Loan.
- » **Refinancing maturing debt.** Borrowers may refinance, and thus repay ahead of schedule, indebtedness that matures no later than 90 days after the date of repayment.

These exceptions should prove helpful to borrowers as they will allow borrowers to manage working capital using their revolvers, acquire inventory and equipment as needed, and refinance debt within a quarter of its maturity date.

In addition, borrowers must promise and certify not to cancel or reduce availability under a committed line of credit until the Eligible Loan is repaid in full or the government no longer holds an interest in the Eligible Loan. The government wants borrowers to maintain levels of liquidity necessary to operate their businesses, and the reduction in a credit line commitment can reduce

the exposure of a revolving lender similar to how prepayment reduces risk for a term-loan lender. This would not prohibit reducing or eliminating a line of credit within 90 days of its maturity.

A borrower must also certify that it has the ability to meet its financial obligations (including expressly its undisputed debts due as of the date of closing of the Eligible Loan and that will become due during the 90-day period after the closing) for the next 90 days and does not expect to file for bankruptcy during that time.

If the borrower is a company and if it has subsidiaries, it should be aware that Selected Subsidiaries will need to guaranty the Main Street facility on a joint and several basis, and, if the Main Street facility is secured, then the guarantees must also be secured.

If the borrower is a subsidiary of a foreign parent, it must covenant and certify not to repatriate or dividend Eligible Loan proceeds to the foreign parent nor use them for the benefit of the foreign parent and foreign affiliates and subsidiaries of the borrower. The guidance does not explain what type of use might benefit the non-U.S. persons in the borrower's capital structure, but the intent appears that the proceeds should be spent in the U.S.

Borrowers must also certify that they have disclosed whether they have previously received, or have another pending application to receive, Main Street program loan proceeds as well as the amount of the applied for or pending loans. Caps on maximum Main Street loan borrowing apply on an entity basis and not on a program basis. Although multiple loans under a facility are not prohibited, no one entity may borrow total loans in excess of the cap. Borrowers cannot try to avoid these limitations by taking multiple loans across affiliates in a single organizational structure. Borrowers must certify whether affiliates have previously received or have pending applications for loans under the Main Street facility. Also, an affiliated group of companies can participate in only one Main Street facility and may not participate in both a Main Street facility and the Primary Market Corporate Credit Facility.

Information contained in this alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.
