

## SPV Voting Rights in Participations and Other Related Matters

June 4, 2020

Eligible Lenders are required to enter into a Participation Agreement with the Special Purpose Vehicle (SPV). An Eligible Lender has the option of either 1) funding a loan and then submitting the documentation to the SPV for purchase of its participation interest within 14 days or 2) once documents are ready, submit them to the SPV and once the SPV clears the documents, it will issue a commitment letter to the Eligible Lender indicating that the Eligible Lender is required to fund within three business days and that the SPV will purchase its participation in the loan no later than three business days of being notified that the loan has been funded. The SPV will take either an 85 percent or a 95 percent participation interest in the loan, depending upon which Main Street facility includes the specific loan.

With the SPV holding such a large participation interest in the loans, questions have been raised as to what role the SPV will take in the management of the loans.

### Voting

Whether the voting is divisible or not, the SPV either must consent (when divisible) or direct (when not divisible) as to any vote regarding any Core Rights Acts. Except for voting related to the Core Rights Acts, the Eligible Lender controls all voting matters.

The Core Rights Acts include the customary lender "sacred rights" as well as the following additional voting rights:

- » amendments or waivers of condition precedent
- » amendments or waivers relating to borrower's Main Street loan certifications and covenants
- » amendments or waivers of financial reporting requirements (except for certain temporary delays in delivery not to exceed 90 days)
- » amendments or waivers to subordinate any Main Street loan
- » amendments modifying the ability to do assignments or participations
- » amendments or waivers with respect to 1) an event of default relating to a cross-acceleration of other debt owed to the Eligible Lender (or any common controlled affiliate thereof), 2) the declaration of a default following any such cross-acceleration event of default or 3) the exercise of remedies with respect thereto

### Transfer and Elevation Rights

Eligible Lenders are not permitted to assign their obligations without SPV consent. However, the SPV may assign, sub-participate or elevate its participation interest at any time with Eligible Lender consent or at any time without Eligible Lender consent as it relates to a Specified Permitted Transfer.

Specified Permitted Transfers are any transfer:

- » following a payment or bankruptcy default under the Main Street loan
- » following any action that the SPV determines is in violation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) as it relates to the loan forgiveness prohibition provisions
- » that constitutes a transfer to a government entity
- » that is required by statute or court order, or
- » related to the insolvency of the Eligible Lender

The SPV is not expected to elevate or assign its rights except when 1) the economic interest of the Eligible Lender and the SPV are misaligned or 2) the size of a certain Main Street loan amount is large compared to the other loans in the SPV's participation portfolio.

### **Other Related Matters**

The SPV acknowledges in the Participation Agreement that the sale of the participation is final and irrevocable and that the SPV has no right to require the Eligible Lender to repurchase, buy back, rescind or void the participation.

The SPV, in each of the Participation Agreement and the Co-Lender Agreement, covenants not to, and waives any right to, file or assert any claim under or pursuant to Section 507(a)(2) of the Bankruptcy Code that would give the SPV special administrative priority ahead of Eligible Lenders in a bankruptcy proceeding.

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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.

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