CORONAVIRUS: THE US CARES ACT AND THE MAIN STREET LENDING PROGRAM

On April 9, the Federal Reserve announced $2.3 trillion of new or expanded facilities under the Coronavirus Aid, Relief, and Economic Security Act (the “**CARES Act**”) that was enacted by the US Congress and signed into law by the President just two weeks earlier. Through one of the new programs, the Main Street Lending Program, the central bank will make available as much as $600 billion in Eligible Loans (as defined below) for US businesses with up to 10,000 employees or up to $2.5 billion in 2019 annual revenues. The Main Street Lending Program is intended to provide financial support to small and mid-sized business that were in good financial health before the circumstances caused by the COVID-19 pandemic, subject to certain eligibility conditions and other restrictions. The program creates two facilities – one for new Eligible Loans (the Main Street New Loan Facility (the "**New Loan Facility**")), and one to upsize existing Eligible Loans (the Main Street Expanded Loan Facility (the "**Expanded Loan Facility**" and together with the New Loan Facility, the "**Facilities**")).

The Main Street Lending Program is authorized specifically by the Coronavirus Economic Stabilization Act of 2020 (“**CESA**”), enacted as Title IV, Subtitle A of the CARES Act. The program calls for the Department of the Treasury (the "**Treasury**") to make a $75 billion equity investment in a common special purpose vehicle (the "**SPV**") common to both Facilities, using funds appropriated for the Treasury’s Exchange Stabilization Fund. The SPV will purchase a 95% loan participation in each new Eligible Loan for the New Loan Facility and each upsized tranche of Eligible Loans for the Expanded Loan Facility, and lenders will retain a 5% exposure. The Treasury has already used the Exchange Stabilization Fund to provide equity investments and credit protection to the six Federal Reserve facilities previously established to address the economic consequences of the COVID-19 pandemic (the "**Pre-CESA Facilities**").

A. FEDERAL RESERVE ACT REQUIREMENTS

"For the avoidance of doubt," CESA makes clear that the requirements of Section 13(3) of the Federal Reserve Act are applicable to any program or facility that receives Federal Reserve Program Assistance. Section 13(3), among other things, requires the program or facility—

- to have "broad-based eligibility," meaning that the program or facility is designed "for the purpose of providing liquidity to the financial system" and not "structured to remove assets from the balance sheet of a single and specific company" or to help the company avoid insolvency;
- to prohibit borrowing by insolvent entities or businesses; and
- to require all loans to be satisfactorily secured by specific collateral.

Section 13(3) applies to each of the Pre-CESA Facilities as well as to the Main Street Lending Program.

B. THE FACILITIES

The Federal Reserve released term sheets for the Facilities (available here), which are summarized below, along with any key differences between the terms of the New Loan Facility and the Expanded Loan Facility.

Eligible Lender Requirements

The term sheets specify that "eligible lenders" are limited to US insured depository institutions, US bank holding companies, and US savings and loan holding companies.

Eligible Borrower Requirements

- Must be a business with up to 10,000 employees or up to $2.5 billion in 2019 annual revenues
- Must be a business entity created or organized in the US with significant operations in and a majority of employees based in the US.
- Eligible Borrowers that participate in either of the New Loan Facility or Expanded Loan Facility are precluded a borrower from participating in the other Facility, as well as in the Primary Market Corporate Credit Facility.

Key Features and Terms

In addition to the restrictions discussed elsewhere, loans under both Facilities ("**Eligible Loans**") are subject to the eligibility requirements, unless otherwise indicated:

- Loan Eligibility
    - Eligible Loans under the New Loan Facility must be unsecured term loans originated on or after April 8, 2020
    - Eligible Loans upsized under the Expanded Loan Facility must be term loans originated before April 8, 2020

- Maturity: 4 years
- Amortization: Principal and interest deferred for one (1) year
- Interest rate: Adjustable rate of SOFR + 250-400 basis points
- Minimum size: $1 million
- Maximum size:
  - For New Loan Facility loans, no greater than the lesser of:
    - (i) $25 million; or
    - (ii) an amount that, when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed 4x the borrower's 2019 EBITDA.
  - For Expanded Loan Facility loans, no greater than the lesser of:
    - (i) $150 million;
    - (ii) 30% of the borrower's existing outstanding and committed but undrawn bank debt; or
    - (iii) an amount that, when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed 6x the borrower's 2019 EBITDA.
- Prepayment premium: None.
- Collateral: Eligible Loans under the New Loan Facility will be unsecured. For Eligible Loans under the Expanded Loan Facility, any collateral securing the loan (whether pledged in connection with the original loan or the new tranche), will secure the SPV's participation on a pro rata basis.
- Fees:
  - *Origination/Upsize Fee:* Borrower to pay 100 basis points of the principal amount of the new Eligible Loan or upsized tranche of an Eligible Loan at time of origination/upsizing
  - *Servicing Fee:* Borrower to pay lender 25 basis points of the principal amount of the new loan or the upsized tranche per annum.
  - *Facility Fee:* Applicable to Eligible Loans under the New Loan Facility only. Lender to pay (or require borrower to pay) the SPV 100 basis points of the principal amount of the participation purchased by the SPV

Required Attestations

Companies seeking financing under the Main Street Lending Program must make certain certifications required under the CARES Act, along with additional attestations with respect to each loan or upsized tranche, including that:

- The Borrower requires the financing under the Facilities due to the exigent circumstances caused by the COVID-19 pandemic, and will use reasonable efforts to maintain payroll and retain workers;
- Borrower will follow compensation, stock repurchase, and dividend restrictions that apply to direct loan programs under the CARES Act;
- Loan proceeds will not be used to repay or refinance any pre-existing loans or lines of credit made by the lender to the borrower, or to repay other loan balances;
- The Borrower will not repay equal or lower priority debt before repaying amounts owed to the lender under the relevant Facility in full (except for mandatory principal payments owed under other facilities);
- The Lender will not cancel or reduce any pre-existing loans or lines of credit made by the lender to the borrower; and
- The Borrower will not cancel or reduce any pre-existing loans or lines of credit made by the lender to the borrower, or by any other lender.

C. ISSUES AND QUESTIONS

The term sheets described above are preliminary in nature and raise several questions for a variety of potential users of the Main Street Lending Program. We highlight a few of these issues below and will monitor guidance from the Federal Reserve as it becomes available.

***Eligible Borrower Requirements*:**

- It is unclear whether calculation of the employee cap is based on an average for a fixed period or upon a specific date of determination.
- Businesses around the world are feeling the impact of COVID-19. The terms of the Main Street Lending Program and the liquidity it makes available are attractive to businesses outside the United States. The term sheets for the Facilities provide that each Eligible Borrower must be a business that is created or organized in the US or under the laws of the US with significant operations in and a majority of its employees based in the United States. It seems to be the case that a US subsidiary of a foreign parent may be eligible to be a borrower under one of the Facilities as long as it otherwise meets the eligibility requirements. It remains to be seen whether this will indeed be the case or if there may be other restrictions to come.

Eligible Lender Requirements: A borrower looking to utilize the Expanded Loan Facility to upsize an existing facility may not be able to do so if none of the lenders party to the existing facility are deemed "eligible lenders". This raises the question of whether a borrower can bring an "eligible lender" into the syndicate in order to take advantage of the Expanded Loan Facility. While this may appear to be a solution, restrictions in or terms of the relevant loan agreement that make doing so difficult.

Maximum Size of Loan: The cap is expressed as the lesser of a fixed amount and an amount based on the borrower's 2019 EBITDA. EBITDA is typically calculated as "adjusted" EBITDA which using a combination of add-backs and other adjustments and can vary by industry and other factors. The term sheets do not specify whether this calculation should be used and whether it can take into account each individual borrower's calculation of EBITDA

Use of Proceeds: The term sheets make it clear that proceeds of a new loan or additional tranche issued under either of the Facilities may not be used to repay or refinance existing debt. However, in certain transactions such as those mentioned below, there is a flow of payments or collateral to the a finance parties that is not in and of itself "repayment" of debt.

- Repos: In a repurchase transaction, one party sells an asset (typically, fixed-income securities) to another party and then commits to repurchase the same or a part of the same asset at a certain price at a future date or on demand. It is not clear whether proceeds of the Facilities could be used for this purpose
- Margin Loans: Similarly, in a margin loan facility, the collateral typically consists of shares of a publicly traded company. If certain conditions are met, the borrower must post additional collateral to the lender. Again, it is unclear whether the proceeds of a Main Street Lending Program loan could be used to purchase such securities in order to post them as collateral as required.

The Federal Reserve has invited comments and feedback regarding the Main Street Lending Program through April 16, 2020, and the Federal Reserve and the Department of the Treasury may make adjustments to the terms that are described herein. Given the ambiguities present in the initial terms sheets, we expect that members of the private sector, financial institutions, industry experts and other key stakeholders will submit comments for consideration. While the extent of changes that will ultimately be accepted is unclear, in order for the Main Street Lending Program to be most effective in accomplishing its stated purpose, changes and additional guidance will be necessary in order to overcome the practical challenges presented by the initial term sheets. We will continue to monitor developments as the facilities are further developed.

Our briefings on "Coronavirus: The Economic Stabilization Provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act" and other Coronavirus (Covid-19) materials can be found here:

https://www.cliffordchance.com/insights/thought_leadership/coronavirus.html

CONTACTS

Jeff Berman
Partner

T +1 212 878 3460
E jeffrey.berman
@cliffordchance.com

Gary Brooks
Partner

T +1 212 878 8242
E gary.brooks
@cliffordchance.com

Cliff Cone
Partner

T +1 212 878 3180
E clifford.cone
@cliffordchance.com

Gareth Old
Partner

T +1 212 878 8539
E gareth.old
@cliffordchance.com

Daniel Winick
Partner

T +1 212 878 4918
E daniel.winick
@cliffordchance.com

Leah Edelboim
Counsel

T +1 212 878 4969
E leah.edelboim
@cliffordchance.com

Andrew Young
Counsel

T +1 212 878 8012
E andrew.young
@cliffordchance.com

Rebecca Isaacs
Associate

T +1 212 878 8261
E rebecca.isaacs
@cliffordchance.com

John McManmon
Associate

T + 1 212 878 8223
E john.mcmanmon
@cliffordchance.com

Leonela Vaccaro Padron
Associate

T + 1 212 878 8594
E leonela.vaccaropadron
@cliffordchance.com

Katherine Ward
Associate

T + 1 212 878 8363
E katherine.ward
@cliffordchance.com