Client Alert

April 2020

US Chamber of Commerce Comments to the Main Street Lending Program

On April 16, 2020, the US Chamber of Commerce (the **Chamber**) delivered a letter to the Federal Reserve and the United States Department of Treasury setting forth recommendations relating to the Main Street Lending Program that was announced by the Federal Reserve on April 9 and authorized pursuant to Title IV of the Coronavirus Aid, Relief, and Economic Security Act (**CARES Act**). After announcing the Main Street Program, the Federal Reserve solicited comments on the Main Street Program through April 16. The Main Street Program's purpose is to facilitate lending to small and medium-size businesses through the Federal Reserve's purchase of up to $600 billion in loans through two facilities, the Main Street New Loan Facility (the **New Facility**) and the Main Street Expanded Loan Facility (the **Expanded Facility**, and together with the New Facility, the **Main Street Program**). Concurrent with the announcement of the Main Street Program, the Federal Reserve released term sheets setting forth high-level details of the New Facility and the Expanded Facility (the **Term Sheets**). Further information on the Main Street Program can be found here.

We have heard of very few instances in which either bankers or potential borrowers plan to take advantage of the Main Street Program. The deficiencies in the Main Street Program limit its utility for banks and potential borrowers. The Chamber's letter proposes significant changes to the structure of the Main Street Program. This client alert discusses those proposed changes (thereby highlighting existing deficiencies) as well as references other comment letters that we believe are worth considering.

<u>Key Points for Borrowers in the Chamber Letter</u>

1. **Provide greater flexibility on loan maturity dates by allowing loan maturity to extend up to six years**: Under the Term Sheets, all loans guaranteed under the Main Street Program have a four-year maturity date. The Chamber's request addresses a concern for businesses that may need to extend the length of repayment to ensure stable operations in the future.

2. **Reduce minimum loan size significantly**: The Term Sheets set the minimum loan size under the Main Street Program at $1 million. Given the Main Street Program's stated aim of providing support to small and medium-size businesses, a $1 million minimum loan amount may exclude smaller businesses that have been unable to access relief through other CARES Act programs.

3. **Employee and revenue thresholds should be modified to prevent arbitrary exclusion of certain potential borrowers**: To qualify as an "eligible borrower" under the Main Street Program, businesses, among other restrictions, must have under 10,000 employees or less than $2.5 billion in 2019 annual revenues. A change in these thresholds would open the Main Street Lending Program to more businesses in need of relief.

4. **Clarify what "reasonable efforts" to maintain payroll means**: The Term Sheet requires that borrowers under the Main Street Program attest that they will make reasonable efforts to maintain their payroll and retain their employees until the loan made under the Main Street Program is repaid in full. Many potential borrowers have sought clarity on what the implications of this

attestation are. Businesses will need greater certainty on what “reasonable efforts” entail and what the consequences are for failing to comply with the attestation for the life of the loan in determining whether or not to seek a loan under the Main Street Program.

5. **Allow US branches/affiliates of non-US institutions to be lenders under the Main Street Program**: The Term Sheets allow only US-insured depository institutions, US bank holding companies and US savings and loan holding companies to participate as “eligible lenders” for purposes of the Main Street Program. As noted in our prior alert, this restriction, if left unchanged, could create difficulties for potential borrowers who had existing relationships with US branches or affiliates of non-US banking institutions, particularly in accessing the Expanded Facility.

6. **Allow use of “adjusted” EBITDA in determining loan size eligibility**: As discussed in our prior alert, many businesses use “adjusted” EBITDA for purposes of reporting under existing credit agreements. Businesses have expressed concern that without the use of “adjusted” EBITDA in determining loan size, the amount of loan they would be eligible for would be too low to meet their current liquidity needs.

7. **Relax restrictions on share buybacks and dividends**: The restrictions in the Term Sheet (which are derived from Section 4003 of the CARES Act) on share buybacks (of equity securities listed on a national securities exchange of the eligible borrower or any parent company of the eligible borrower) and dividends or capital distributions (in respect of common stock of the eligible borrower) have been the subject of much consternation among potential borrowers as these restrictions last for the term of the loan plus an additional 12 months. The text of the CARES Act itself is somewhat ambiguous on the application of the restriction to certain entities (i.e., the capital distribution restriction to equity interests in limited liability companies). Potential borrowers may be dissuaded from participating in the Main Street Program due to a lack of clarity around these restrictions so any clarification would allow businesses to make more informed decisions about borrowing under the Main Street Program.

8. **Carve out certain corporate structures that are obligated to make distributions to shareholders from the restrictions on dividends and share buybacks**: The Chamber correctly notes that certain corporate and tax structures require businesses to make distributions to equity holders, either by contract or out of necessity to cover tax payments based on the income of the business. The application of the dividend restrictions on these businesses could prevent them from participating in the Main Street Program as their structure is not compatible with the restrictions presented in the Term Sheets. The Chamber specifically notes that real estate investment trusts (REITs), regulated investment companies and pass-through limited liability companies are business forms that are harmed by these restrictions due to their previously established structures.

9. **Use LIBOR initially to determine interest rates with SOFR as “fall back”**: The Term Sheet sets the rates for loans under the Main Street Program at the Secured Overnight Financing Rate (**SOFR**) plus 250-400 basis points. Due to the ongoing phase-out of London Interbank Offered Rate (**LIBOR**), the Chamber has suggested that LIBOR be used initially for determining rates under the Main Street Program with SOFR being used as the “fall back” rate once LIBOR is no longer available. As SOFR and LIBOR have recently closely tracked one another this may be of little practical consequence to borrowers.

10. **Allow borrowers without existing term loans to participate in the Expanded Facility**: The Term Sheet for the Expanded Facility contemplates participation in the Expanded Facility only being available for borrowers to add an upsized tranche onto an existing <u>term</u> loan. The Chamber’s suggestion is to open the Expanded Facility to borrowers who currently use revolving credit facilities and other debt facilities in addition to term loans. As the Expanded Facility has a higher maximum loan size, this change would not only allow more borrowers to access the Expanded Facility but could increase the funds available to such borrowers.

Next Steps

There is no guarantee that any of the Chamber's suggestions will be reflected when the Federal Reserve releases further guidance on the Main Street Program but potential borrowers should pay close attention to any changes that are announced. The Federal Reserve has not set a date to release further guidance on the Main Street Program but it is expected that such guidance will be forthcoming in the near future.

Numerous trade associations and organizations submitted comments to the Federal Reserve on the Main Street Lending Program. For information purposes only, we have prepared links to a sampling of these comments from various groups below.

- Loan Syndication and Trading Association
- Consumer Bankers Association
- American Bankers Association
- Association for Corporate Growth
- National Association of Wholesale Distributors
- NAREIT

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