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April 16, 2020

Board of Governors of The Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, N.W.  
Washington, DC 20551

U.S. Department of the Treasury  
The Treasury Building  
1500 Pennsylvania Avenue, N.W.  
Washington, DC 20220

Re: Comments to Federal Reserve Main Street Lending Program

Dear Sir/Madam,

We are sending this letter to you in response to the solicitation of comments on the Main Street Lending Program announced by the Federal Reserve and the U.S. Department of the Treasury on April 9, 2020 and the related Main Street New Loan Facility and Street Expanded Loan Facility term sheets. Troutman Sanders and Pepper Hamilton have agreed to merge effective July 1, 2020. We are responding in our joint capacity as law firms that once combined, will have over 1,100 attorneys and 23 offices in the United States with extensive experience representing both lenders and middle market borrowers in a wide variety of debt financings and loan transactions. We are, consequently, quite familiar with customary terms and provisions in lending facilities as well as the issues and concerns lenders and mid-size businesses seeking to participate in the Main Street Lending Program face.

We applaud the efforts the Federal Reserve and U.S. Treasury Department have taken to bolster the economy and ensure that credit continues to flow to small and mid-sized businesses in these unprecedented times. Below are our comments to certain items contained in the Main Street New Loan Facility and Street Expanded Loan Facility term sheets that we believe need clarification and / or modifications.

1. EBITDA and Size Limitations

a. EBITDA

As currently written, the amount eligible borrowers would be entitled to borrow under the Main Street Program is to be determined in part on eligible borrowers' pro forma leverage. We believe that, especially if EBITDA is calculated strictly for purposes of these thresholds, many potential borrowers will not be eligible or will be eligible for much smaller amounts than are necessary to achieve the goals of the Main Street Lending Program. Many middle market businesses that are eagerly hoping for a lifeline from this Program will already have leverage ratios in excess of the proposed limits even if the customary add-backs to EBITDA in addition to just interest, taxes, depreciation and amortization commonly included in most credit agreements are permitted. And in certain industries it is not uncommon to have zero or negative EBITDA, making them ineligible at any leverage level used as a basis for determining financing availability. Consequently, we believe the leverage caps should be significantly increased or dropped altogether allowing eligible lenders to determine the appropriate leverage underwritten for loans based on eligible borrowers' particular facts and circumstances and credit profiles as they would ordinarily. We also believe the Federal Reserve should consider providing an alternative standard so that otherwise sound companies are not excluded. We believe the requirement that eligible lenders retain a 5% interest in eligible loans will provide a sufficient mechanism to maintain prudent lending standards while providing the necessary flexibility to account for the wide variety of borrower profiles.

In addition, if leverage ratios are utilized, we do not believe the leverage ratio limitations should be so drastically different in size for new loans and upsized tranche loans. Instead we believe they should be similar or alternatively a secured leverage ratio could be applied for any secured loan and a total leverage ratio could be applied for any unsecured loan to better address the different risk profiles between new unsecured term loans and upsized tranche loans that may or may not be secured.

b. Upsized Tranche Loan Borrowing Capacity

As currently written, the amount of upsized tranche loans eligible borrowers would be entitled to borrow is limited to 30% of the eligible borrowers existing outstanding and committed but undrawn "bank" debt. As the alternative lending industry makes up a significant portion of middle market lending, many borrowers' lenders are often not banks. We believe the final rules should clarify that loans from non-bank lenders should be taken into account in this component of the limitation on the size of upsized tranche loans.

2. Upsized Tranche Loan Eligibility

The Main Street Expanded Loan Facility permits borrowers with term loans "made by" eligible lenders that was originated before April 8, 2020 to obtain upsized tranche loans to their existing term

loans. We believe the final rules should confirm that this requirement does not disqualify eligible borrowers who have existing loans with a syndicate consisting of both eligible and ineligible lenders which is common in the alternative lending industry. We also believe that eligible borrowers with revolving credit facilities that have a term loan accordion feature should be entitled to obtain upsized tranche loans even if their term loan accordion was not utilized before April 8, 2020.

Finally, we believe the requirement that borrowers' existing term loans were "made by" eligible lenders needs to be clarified. Specifically, if an ineligible lender originated a loan that was assigned or participated to an eligible lender prior to April 2020 we believe that loan should qualify the eligible borrower to obtain an upsized tranche loan. We believe the requirement that upsized tranche loans only be made by eligible lenders will provide the Federal Reserve the needed protection to ensure a bank that it regulates underwrites the loan that is being participated to the Federal Reserve.

### 3. Eligible Lenders

We believe the eligible lender definition should be expanded to include the Farm Credit Banks and other lending institutions overseen by the Farm Credit Administration.

### 4. Size and U.S. Eligibility Components

In order to obtain a loan under the Main Street Lending Program an eligible borrower must have (1) either no more than 10,000 employees or had no more than \$2.5 billion in 2019 annual revenue and (2) significant operations and a majority of its employees based in the United States. The Main Street New Loan Facility and Street Expanded Loan Facility term sheets are silent as to how to count the number of employees and whether any affiliate aggregation rules will apply either for purposes of the 10,000 employee test, the \$2.5 billion annual revenue test, or the U.S. employee majority test.

The SBA's affiliate aggregation rules have resulted in most portfolio companies of private equity sponsors being ineligible to participate in the Paycheck Protection Program. These portfolio companies make up a large percentage of the middle market companies the Main Street Lending Program is designed to support. Accordingly, we do not believe that the SBA's affiliate aggregation rules should apply to the Main Street Lending Program's eligibility requirements. Instead, we believe a bright line rule should be applied to ensure certainty and suggest these eligibility requirements be based on the rules for filing a consolidated U.S. federal tax return.

### 5. Exceptions to Dividend Restrictions

Eligible borrowers participating in the Main Street Lending Program are prohibited from paying dividends or making capital distributions with respect to their common stock while the loan is outstanding and for 12 months thereafter. Many middle market companies are organized as "pass

through” entities for tax purposes. Tax on the earnings of these entities is owed and paid by their equity holders rather than by the entity itself, as is the case with most corporations. As a result, these entities need to make tax distributions to their equity holders in order for their equity holders to satisfy those tax obligations. If the prohibition on dividends and distributions does not contain an exception for these dividends and distributions for tax obligations, then these “pass through” entities will for all practical effect be precluded from participating in the Main Street Lending Program. We believe there should be a limited exception for such “pass through” entities to make tax distributions so that they are able to participate.

In addition, real estate investment trusts (REITs) are required to distribute substantially all of their income each year. Accordingly, an exception to the dividend restrictions would be necessary for REITs to be able to participate in the Main Street Lending Program.

6. Lender Attestations

The Main Street Lending Program requires eligible lenders to agree not to cancel or reduce any existing lines of credit outstanding to the eligible borrower. As written, this requirement could be construed to preclude lenders from calling a default or cancelling an outstanding line of credit or an existing term loan for legitimate business reasons following a default or event of default even if the eligible loan and other indebtedness of the borrower were being accelerated and remedies were being exercised. We believe the final rules should clarify that this is not the case as such a requirement would likely deter most lenders from participation.

7. Voting Rights

Pursuant to the Main Street New Facility term sheet and the Main Street Expanded Loan Facility term sheet, eligible lenders will sell a 95% participation interest in eligible loans to a newly established special purpose vehicle (SPV) established by the Federal Reserve. Holders of participation rights do not generally have the right to exercise or to cause the selling lender of the participation to exercise voting rights in respect of the loan, except as to certain customary high-level material matters. We believe the Federal Reserve should confirm that will be the case for the SPV’s 95% participation in eligible loans.

8. Assignability

Neither the Main Street New Facility term sheet nor the Main Street Expanded Loan Facility term sheet address whether eligible lenders are entitled to assign or sell participation interests in the 5% of eligible loans not participated to the Federal Reserve. We believe they should be entitled to do so (at least to eligible lenders at a minimum) so that the secondary market in loans made under the Main Street Lending Program remains liquid. To the extent necessary to ensure that the record holder of its participation interest who is servicing its participation interest has an economic interest in the loan, the Federal Reserve could require that any such assignment be made together with the


SPV's 95% participation interest.

9. Lender Liability and Certainty

In order to ensure lenders are willing to participate in the Main Street Lending Program, we believe the Federal Reserve should expressly confirm that, like Paycheck Protection Program loans, lenders are not liable for the required borrower attestations and instead may rely on them without being required to perform any cumbersome verification procedures. In addition, we believe the Federal Reserve needs to provide clarity to eligible lenders regarding what, if any, their liability will be to the Federal Reserve in the event eligible borrowers default on loans underwritten by eligible lenders. We believe the Federal Reserve needs to provide clarity to eligible lenders as to what rights, if any, eligible lenders may exercise if borrowers fail to comply with their attestations.

Finally, we believe the Federal Reserve should provide clear, "bright line" procedures and requirements in how the participation process will work so that eligible lenders have the certainty they need when making eligible loans that the Federal Reserve SPV will purchase its 95% participation interest in the loan from the lender.

Please contact either Scott R. Saks of Pepper Hamilton LLP (212.808.2734; sakss@pepperlaw.com) or Hazen H. Dempster of Troutman Sanders (404.885.3126; hazen.dempster@troutman.com) if you have any questions about any of our comments.

Very truly yours,  
  
PEPPER HAMILTON LLP

  
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