KIRKLAND & ELLIS

Blog Post

Revisions to Main Street Lending Program Open Door to More Opportunity for Energy and Infrastructure Companies

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The Federal Reserve has released updated term sheet guidance and a detailed FAQ on the Main Street loan programs. The revised guidance should open up the program to more energy and infrastructure borrowers. At the same time, some energy and infrastructure companies may not qualify for loans due to the incorporation of SBA affiliation rules and loan sizing metrics. Further, asset-based borrowers in the oil & gas and renewables sectors will need to wait while the Federal Reserve and Treasury "evaluat[es] the feasibility of adjusting the loan eligibility metrics of the Program for such borrowers."

Background

In addition to further detailing the Main Street New Loan Facility ("New Loan Program") which provides new loans of up to $25 million to eligible small and medium sized businesses — and the Main Street Expanded Loan Facility ("Upsize Program") — which provides upsize loans of up to $200 million to eligible small and medium sized businesses with existing eligible debt — the Fed also introduced a new facility, the Main Street Priority Loan Facility ("Priority Loan Program"). The Priority Loan Program also provides new loans of up to $25 million, but is designed as an opportunity for borrowers with greater leverage (but no existing loan facility with an eligible lender) to take advantage of the Main Street programs, but in exchange will require the lender providing the loan to retain additional risk (lenders are required to retain a 15% participation vs. a 5% participation).

The application and launch date for the Main Street programs are still to be determined and the guidance is subject to further updates.

Basic Main Street Loan Terms

Although certain industry participants had lobbied to allow lenders and borrowers the flexibility to negotiate loan terms (at least within specified ranges), the sizing, interest rate and amortization are all fixed under the revised guidance.

- **Loans Sizing.** The guidance increases the minimum loan amount under the Upsize Program to $10 million (from $1 million) and the maximum loan to the lesser of (i) $200 million (from $150 million), (ii) 35% of outstanding and undrawn available debt that is pari passu in priority and security to the Upsize Loan (from 30% of all bank debt) and (iii) 6x 2019 EBITDA (when taken together with outstanding and undrawn available debt). Existing loans eligible for upsizing include term loans or revolving credit facilities; however, the Upsize Loan itself will be in the form of a term loan. The New Loan Program and the Priority Loan Program have a minimum size of $500,000 and a maximum size of $25 million (capped at 4x 2019 EBITDA for the New Loan Program and 6x 2019 EBITDA for the Priority Loan Program).
- **Interest Rate.** Interest for all Main Street loans will be LIBOR (1 or 3 month) plus 3%.Under previous guidance the interest rate was to be based on SOFR plus a margin of 2.5%–4%.
- **Amortization.** No principal and interest payments for 12 months (interest will be capitalized). Thereafter, loans will amortize 33.3% over years 2, 3 and 4 under the New Loan Program and will amortize 15%, 15% and 70% over years 2, 3 and 4 under the Upsize Program and Priority Loan Program. The previous guidance did not specify the amortization.
- **Subordination.** New Loans can be either secured or unsecured (previously had just been unsecured) and cannot be contractually subordinated to any other debt (i.e., for purposes of contractual priority in bankruptcy), but the new guidance clarifies that a New Loan may be unsecured even if the borrower has secured debt. As for Upsize Loans (and Priority Loans), the new guidance specifies they must be senior to or pari passu with all other loans (other than mortgage debt) of the borrower. While not specified in the guidance, it seems loans under the New Loan Program and Priority Loan Program could be structurally subordinated to other debt (e.g. taking the loan at a holdco). Upsize Loans are required to be at the same level and share the same priority and security as the existing facility being upsized.

Other Key Changes Relevant to Energy and Infrastructure Borrowers

The guidance provides for key changes to eligibility requirements and loan sizing criteria that will increase the overall pool of potential energy and infrastructure borrowers, but also disqualify other energy and infrastructure companies and limit the amount many potential borrowers would be permitted to borrow under the Main Street programs.

New Employee/Revenues Thresholds and Affiliation Rules

With respect to the eligibility requirement that borrowers must have fewer than a maximum number of employees or less than a maximum amount of 2019 revenue, the new guidance makes clear that a borrower only needs to satisfy one (not both) of the employee or revenue tests, and increases the maximum thresholds under both tests to up to 15,000 employees and $5 billion of 2019 revenue (from 10,000 employees and $2.5 billion). However, the guidance notes that a borrower must calculate its employees/revenue together with its affiliates and suggests that affiliation will be determined based on the expansive SBA affiliation rules. As such, we would expect in most cases all portfolio companies of a private equity sponsor would be aggregated together for purposes of these tests, in the same way as under the Paycheck Protection Program.

More Flexibility on EBITDA Calculation and Possibility of Use of Other Financial Metrics

For purposes of the leverage ratio limits on loan sizes, EBITDA will be determined with applicable adjustments, based on the calculation of EBITDA used to originate the underlying loan (in the case of the Upsize Program) or used to originate loans by the applicable lender to the borrower or to similarly situated borrowers in the past (in the case of the New Loan Program and Priority Loan Program). For purposes of the EBITDA leverage test, “outstanding debt” will be any existing debt borrowed under any facility (including banks, non-banks, bonds, etc.), and “undrawn available debt” will not include commitments that (i) backstop commercial paper, (ii) would be drawn to finance receivables, (iii) would require the borrower to give additional collateral or (iv) are no longer available because of changed circumstances.

The new guidance acknowledges that asset-based borrowers (and not-for-profit organizations) generally obtain credit based on metrics other than EBITDA and suggests there may be future programs to address those types of borrowers. However, they are not eligible for Main Street loans at this time based on criteria other than EBITDA.

CARES Act and Other Restrictions on Borrowers in Main Street Program

Energy and infrastructure companies that are interested in the Main Street program should carefully review the program eligibility requirements, certifications and restrictions on ongoing operations. Borrowers will be subject to restrictions on compensation, stock repurchase and capital distributions in the CARES Act, as well as conflict of interest rules. The revised guidance did include one important clarification that for purposes of the restriction on borrowers making distributions during the term of the loan and for 12 months thereafter, the new guidance expressly permits tax distributions in the case of a flow-through borrower. It does not address any ability to make distributions for other specific purposes (e.g., to pay holdco expenses or to comply with regulated investment company or real estate investment trust rules).

The new guidance also adds a requirement that borrowers should use “commercially reasonable efforts” to maintain payroll/employees, which it describes as good faith efforts in light of capacity, economic environment, available resources and business need for labor — although it expressly notes that a borrower that had laid off/furloughed employees in connection with the COVID crisis is eligible to apply for Main Street loans.

Looking Ahead

The revised Main Street program guidance includes four key changes that should expand the universe of energy and infrastructure companies that are able to participate, namely by (i) increasing the revenue/size test to either $5 billion in revenues or 15,000 employees, (ii) allowing proceeds of the Priority Loan Program to be used to pay existing debt, (iii) permitting loans under the Main Street program to be either secured or unsecured and (iv) providing flexibility for borrowers and lenders to determine EBITDA based on the calculation of EBITDA used to originate the underlying loan or used to originate other loans between the lender and the borrower or similarly situated borrowers. If the Federal Reserve and Treasury revise the guidance to provide for additional loan sizing criteria for asset-based borrowers, this would open up the program to additional energy and infrastructure companies in the oil & gas and renewables subsectors.

At the same time, many energy and infrastructure companies backed by private equity funds or large parent companies may be ineligible because the incorporation of affiliation rules means that these companies may fail maximum revenue and sizing tests for eligibility — even though they would be eligible if those tests were applied at the company level only. Other borrowers may not be able to participate because they are unable to meet the 4x and 6x 2019 EBITDA requirement or because the Main Street loans do not fit in permitted debt baskets under existing loan agreements given the fixed 4-year tenor and subordination requirements.

It is likely that the Treasury and the Federal Reserve will continue to make adjustments to the Main Street program. Energy and infrastructure companies should continue to monitor this blog and further developments.

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