Issues with Main Street Lending Facility (MSLF)

EBITDA LOAN SIZING TEST

- **Problem #1** – We are uncertain whether EBITDA is meant to be unadjusted without any addbacks or pro forma impacts included. Calculating EBITDA without taking into account any adjustments or pro forma treatment would likely prevent many such companies from meeting the leverage tests as virtually all loan facilities provide for EBITDA on an adjusted basis. For companies that have made acquisitions or other investments or dispositions, this also creates uncertainty in how EBITDA should be calculated. Further, this would lead to inconsistencies between the EBITDA definition already included in the existing loan facility and the EBITDA required for the Expanded Loan Facility leverage loan sizing test.
- **Solution #1** – For the Expanded Loan Facility (ELF) leverage sizing test, provide for EBITDA to include the same adjustments and pro forma treatment that the existing loan facility includes. For the New Loan Facility (NLF) leverage loan sizing test, provide for the ability of the lender and the company to agree on the addbacks and pro forma treatment that can be included in EBITDA.
- **Problem #2** – Because many growth companies do not have positive EBITDA, without some other test, most growth companies will be excluded from MSLF.
- **Solution #2** – For private growth companies, provide a test that looks to a percentage of the most recent 409(A) valuation or post-money valuation from the most recent financing round. For public growth companies, provide a test that looks to a percentage of 52-week average market capitalization with the end date for the period covered by such test being a date before the start of the COVID-19 pandemic.

MEANING OF "BANK DEBT" IN THE 30% SIZE LIMITING TEST FOR EXPANDED LOAN FACILITY

- **Problem** – It is unclear to us whether "bank debt" is meant to pick up (i) all debt of any kind with only commercial banks, (ii) all loans, notes and loan commitments with any kind of lender or (iii) some combination of both. If this term is to pick up all debt of any kind with commercial banks, cash management arrangements could limit borrowing. If this term was to pick up only debt of banks, then companies that only have loans, notes and loan commitments with a non-bank lender would not be able to take advantage of a MSLF.
- **Solution** – Clarify that this term is meant to include "all loans, notes and loan commitments with any lender".

MEANING OF "COMMITTED BUT UNDRAWN DEBT" IN THE LEVERAGE SIZE LIMITING TEST

- **Problem** – The language "committed but undrawn debt" is problematic for a few reasons. First, it is not typical for undrawn debt to be picked up in a leverage test and would likely cause many companies issues with meeting the leverage test for availability. It also sends the signal that the company is required to draw on every last dollar available because the company is going to get penalized for it anyway in the

leverage test. Part of the purpose of the program is to provide companies liquidity that need it, and this would cause the company to put itself in a very vulnerable situation. The term sheets also provide that no existing debt may be reduced or terminated, so, therefore, even if a company would be willing to reduce its undrawn commitment to satisfy the leverage test, it would be unable to do so. Second, it is unclear as to whether "debt" is meant to pick up just loans and notes or all types of debt.

- **Solution** – First, have such leverage test for availability only pick up amounts outstanding and not amounts that are committed but undrawn. Second, clarify that such leverage test only includes loans and notes.

MATURITY LENGTH FOR EXPANDED LOAN FACILITY

- **Problem** – Most existing credit agreements prevent new loans to mature inside the maturity of existing loans as existing lenders do not want new loans get paid off before the existing loans. Therefore, limiting the maturity for an ELF to four years will present an issue for existing lenders that hold loans under the existing loan facility with a later maturity date.
- **Solution** – Allow for the maturity date of an ELF to be the later of (i) four years and (ii) the latest maturity date of any of the existing loans under the existing loan facility.

ELIGIBLE LENDERS

- **Problem** – Limits the lenders eligible to participate in MSLF to only U.S. banks and U.S. savings and loan holding companies. This means that direct and other non-bank lenders and foreign lenders (including potentially foreign banks with U.S. branches) are excluded. With the amount of direct and other non-bank lenders and foreign lenders that are in the lending market and that are existing lenders under the ELF, this is going to exclude amount of lenders and is likely to overwhelm the U.S. banks that are eligible.
- **Solution** – Include direct and other non-bank lenders and foreign lenders (and clarify that U.S. branches of foreign banks) are eligible lenders.

ELIGIBLE BORROWER

- **Problem** – It is not clear whether a holding company may be an eligible borrower even assuming that proceeds will be used by the borrower and its affiliates for authorized uses only, or that if an operating company is an eligible borrower proceeds of its MSLF can be used for authorized purposes through its parents, subsidiaries and affiliates under common control. This is particularly important in addressing intercreditor issues that may potentially block a company's access to the MSLF (including, for example, if the borrower under an existing loan is a holding company).
- **Solution** – Clarify that the eligible borrower does not need to be an operating company.

DISTRIBUTION AND EQUITY REPURCHASE ISSUES

- **Problem #1** – The restriction on distributions does not appear to allow public companies to purchase back the equity of officers and directors and their spouses, estates and heirs upon termination of employment, death, etc., especially with respect to officers and directors that enter into agreements with a company after the closing of the loan facility. It is also not completely clear that this restriction does not apply to private companies.

- **Solution #1** – Provide a carve-out from the distribution restriction for such equity buybacks.
- **Problem #2** – The restriction on distributions does not provide for (i) tax distributions or (ii) distributions for fees or expenses that need to be paid by holding companies.
- **Solution #2** – Provide a carve-out such tax distributions and distributions covering fees and expenses that are to be paid by a holding company.
- **Problem #3** – We are uncertain whether the capital distribution limitation requirement would foreclose liquidity from acquisition or IPO activity for up to 12 months after repayment of the loan. For instance, this would be problematic if the loan is retired in an acquisition or an IPO, but equity holders are unable to receive value for their equity for one year following the closing of such transaction.
- **Solution #3** – Either (i) provide clarity that an acquisition or IPO will be exempt from the capital distribution limitation requirements, other than to ensure full repayment of the MSLF loan prior to distributions, or (ii) remove the restriction from applying once the MSLF loan is paid off (without any 12-month tail applying).

ISSUES WITH LIMITATIONS ON DEBT AND EXISTING REVOLVER REDUCTIONS BY THE LENDER

- **Problem** – The limitations on lenders ability to reduce revolving facilities or otherwise reduce debt available to companies during the period in which the MSLF loan is outstanding will make it more dangerous for banks to service loans from existing customers if they fear losing the ability to manage lending terms for their clients.
- **Solution** – Require that limitations on reductions in debt and existing revolving facilities by the lender to exist only for the first year of the loan. Even during the first year, exclude from this limitation repayments of revolving loan advances so long as commitments are not reduced.

ISSUES WITH RESTRICTION ON ABILITY TO REPAY "OTHER DEBT OF EQUAL OR LOWER PRIORITY"

- **Problem #1** – The restrictions on debt of equal or lower priority creates ambiguity that apparently does not allow for revolving loan repayments. Companies cash flow and their need for working capital changes from time to time, especially over a several year period. Companies need the ability to repay revolving loans and reborrow later. Also, it is not completely clear that existing mandatory **pre**payments are permitted as well as scheduled amortization payments for debt of equal priority.
- **Solution #1** – Clarify that (i) revolving loans may be repaid at any time and (ii) mandatory **pre**payments (in addition to scheduled amortization payments) for debt of equal priority are permitted.
- **Problem #2** – Causes issues for any seller notes and other debt that was entered into prior to the closing of the MSLF that have repayments due during the term of the MSLF.
- **Solution #2** – Provide a carve-out for any repayments, including prepayments, required under any agreements that were in effect prior to the closing of the MSLF.
- **Problem #3** – Does not clarify what is meant by "debt" and whether such term includes items such as earnouts and holdbacks, which would be problematic.
- **Solution #3** – Clarify that the term "debt" in such restriction means only loans and notes.

ABILITY FOR NEW LOAN FACILITY TO BE UNSECURED AND NOT REQUIRE GUARANTEES

- **Problem** – It is somewhat unclear whether the NLF may be unsecured and whether no guarantees will be required therefor as the term sheet is silent on these points.
- **Solution** – Confirm that the NLF may be unsecured and require no guarantees of any other person.

INTEREST RATE ISSUES

- **Problem #1** – NLF and ELF only provides a SOFR option for the interest rate. Many lenders are still developing SOFR policies and procedures and language to implement them in their loan documents. Also, there is no base rate option, even in a situation where SOFR is unavailable for any reason.
- **Solution #1** – Allow also for a base rate option to address these issues. In an ELF, permit the reference rate, including alternate rate provisions related to the end of LIBOR, to be the same as the existing loan.
- **Problem #2** – During the one year deferral of interest, the term sheets do not provide how interest will be deferred, i.e., whether it will simply accrue and be payable in cash at a later date (or later dates) or whether it is to be paid in-kind after the one year deferral.
- **Solution #2** – Clarify how interest will accrue during the deferral period and how be paid at the end of the deferral period.

AMORTIZATION

- **Problem** – Does not provide the amortization for principal after the one year deferral (such as amount or how often). Typically, there would be no or very little amortization (such as 0.25% of outstanding principal amount per quarter) for term loans of this type.
- **Solution** – Either (i) provide that there should be no principal amortization for the life of the MSLF with just a balloon payment due at the end or (ii) specify the amount and the frequency of the amortization principal payments.

FOREIGN OWNERSHIP OF COMPANIES

- **Problem** – Does not provide whether (i) foreign ownership of U.S. companies is permitted or (ii) non-U.S. subsidiaries may be co-borrowers or guarantors (e.g., where they are part of a credit group in an existing loan facility).
- **Solution** – Clarify that (i) foreign ownership of U.S. companies is allowed and (ii) non-U.S. co-borrowers and guarantors are allowed in an ELF to the extent that they are obligors under the existing loan.

PREEXISTING EQUITY AGREEMENT CONCERNS WITH COMPENSATION LIMITATIONS

- **Problem** – The limitations on compensation seem to include equity vesting from equity compensation arrangements entered into prior to the closing of the MSLF. This could cause extreme compensation limitations based on illiquid equity. This could potentially cause companies that were intended to be eligible for a MSLF to be excluded.
- **Solution** – For purposes of calculating compensation during the time period that the loan remains outstanding, disregard equity that vests under equity agreements which were entered into prior to the closing of the MSLF.

PRACTICAL ACCESS TO EXPANDED LOAN FACILITY

- **Problem #1** – Existing lenders that are not providing the loans under an ELF may have no incentive to consent, especially where there is not already available debt flexibility under the existing credit agreement and considering the new loans would be secured by the same collateral on a pari passu basis.
- **Solution #1** – Have the SPV pay a fee to any existing lenders whose consent is needed that consent to the ELF.
- **Problem #2** – Many of the terms for an ELF will make it hard to utilize the program due to difficulties with including a new tranche in the existing loan facility or providing the ability to provide for a new tranche in separate loan documentation. The issues include, among others, (i) the requirement to secure an ELF by the same collateral, which can present intercreditor agreement issues, (ii) potentially using a different interest rate in SOFR before LIBOR is phased out under the existing loan facility (and essentially making SOFR be used on a going forward basis for the existing loans), (iii) amortization potentially being different than the existing loans, and (iv) no ability to repay loans of equal priority under the same loan documents (or separate loan documents).
- **Solution #2** – One option would be to allow for a holding company structure where the debt is above the entity level where the existing loans sit.
- **Problem #3** – The $1 million minimum loan size may prohibit small business from participating in the MSLF even though they may be shut out of the Paycheck Protection Program (or in COVID-19 Disaster Loan program) due to demand in excess of appropriations.
- **Solution #3** -- Permit minimum loan size to be $250,000 where proceeds will be used exclusively for uses that are authorized uses under the Paycheck Protection Program and COVID-19 Disaster Loan Program.

goodwinlaw.com

This informational piece, which may be considered advertising under the ethical rules of certain jurisdictions, is provided on the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin Procter or its lawyers. Prior results do not guarantee a similar outcome. Goodwin Procter is an international legal practice carried on by Goodwin Procter LLP and its affiliated entities. For further information about our offices and the regulatory regimes that apply to them, please refer to http://www.goodwinlaw.com/Legal-Notices. © 2020 Goodwin Procter. All rights reserved.