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Main Street Lending Program: 5 Points for Lenders

The Main Street Lending Program (Program) is finally up and running. In addition to the general parameters and terms of the Program – including borrower eligibility and the calculation of the maximum loan amount – here are five points specifically for lenders:

1. *Underwriting*. The lender is expected to conduct its own underwriting of the borrower and assessment of the borrower's financial condition and creditworthiness. The Program's term sheets spell out the minimum requirements for the Program and do not prohibit the lender from, for example, requiring guaranties. The mere fact that a company is eligible under the Program does not mean that the lender must approve a loan or extend the maximum loan amount.

2. *Loan Documents.* The lender can use its standard loan documents when evidencing the loan. The documents must be substantially similar to those used for similarly situated borrowers. That said, certain concepts must be included, such as: (a) mandatory prepayment if the borrower makes a material misstatement in certifications, or materially breaches covenants, relating to the CARES Act or other specified statutes; (b) cross acceleration; (c) priority and security covenants; and (d) detailed financial reporting requirements.

3. *Program-Level Documents.* Several Program-mandated documents must be entered into by the lender, the forms of which are not negotiable.For example, the lender must complete a "Lender Transaction Specific Certifications and Covenants" (Lender Certifications). This confirms, among other things, (a) the method used for calculating the borrower's EBITDA; (b) that certain of the required concepts listed above are included in the loan documents; (c) that the loan is not subordinated; and (d) that the lender will not cancel or reduce any existing committed lines of credit to the borrower, except in an event of default.

   The lender must also enter into a participation agreement with the Program's special purpose vehicle (SPV). Under this agreement, the lender generally has sole authority for voting and the exercise of rights in connection with the loan, except with respect to specific "Core Rights Acts." These Core Rights Acts include not only the typical sacred rights that

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usually require unanimous lender consent, but also other actions like waiving or amending financial reporting requirements.

4. *Standard of Care.* Many lenders are concerned about incurring liability as a result of participating in the Program.According to the instructions and guidance for the Lender Certifications, the lender assumes no responsibility for verifying the accuracy of the "Borrower Certifications and Covenants" (Borrower Certifications) and is entitled to rely entirely on these certifications (with limited exceptions). The lender is not expected to monitor the Borrower's ongoing compliance with the covenants in the Borrower Certifications, but is expected to promptly notify the SPV if the borrower notifies the lender that the borrower has materially breached such covenants.

   In addition, the participation agreement describes the lender's standard of care. Generally, the lender will not be held to the standard of care of a fiduciary, but is required to exercise the same duty of care with respect to the administration and enforcement of the SPV's participation interest as it would exercise if it held the participation interest solely for its own account. Further, the lender may, with respect to its obligations under the participation agreement and the loan documents, rely on legal counsel, public accountants and other experts selected in good faith by the lender. The lender is expressly not liable for any action taken (or not taken) in good faith in accordance with the advice of these experts.

5. *Funding the Loan*. The lender has two options for funding a loan. Under the "Funded Loan" option, the lender funds the loan before looking to sell the participation. After funding, the lender submits the required signed documentation for processing and, assuming a satisfactory review, the SPV purchases the participation. In contrast, the "Condition of Funding" option allows the lender to make its funding of the loan contingent on receipt of a binding commitment from the SPV to purchase the participation. After receipt of the SPV's commitment, the lender must fund the loan and the SPV will then purchase the participation.

If you have any questions about the Program, please contact Bob Heinrich or your Reinhart attorney.

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