

April 15, 2020

Chairman Jerome H. Powell
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue N.W.,
Washington, DC 20551

Re: Main Street Lending Program

Chairman Powell,

Thank you for the opportunity to comment on the Main Street Lending Program. As a brief introduction, Cohen & Company, Ltd. is a CPA firm that has had a strong emphasis on tax expertise since the firm's inception in 1977. We provide tax, assurance and consulting services to a significant number of businesses.

Regarding the Main Street Lending Program, we commend the Federal Reserve and the Department of Treasury with the speed at which this program was introduced. Businesses desperately need this aid to facilitate maintaining employees' pay while weathering the financial effects of COVID-19. As the Federal Reserve and the Department of Treasury finalize the rules, we request you consider the following:

Maximum Loan Size

The maximum loan size is defined as the lesser of (i) \$25 million or (ii) an amount that, when added to the Eligible Borrower's existing outstanding and committed but undrawn debt, does not exceed four times the Eligible Borrower's 2019 earnings before interest, taxes, depreciation, and amortization ("EBITDA").

Comments:

- 1.) Using a calculation only taking into account 2019 could hurt businesses with one-time events that decreased EBITDA. We received comments from clients with pertinent examples, such as the United Auto Workers Union and General Motors strike and its impact on manufacturers in the supply chain, natural disasters, product recalls and one-time litigation.

We recommend that the calculation be changed to a three-year average of EBITDA to alleviate such anomalies. We also recommend that eligible lenders are given authority to accept adjustments to EBITDA for one-time, nonrecurring expenses and non-cash charges such as impairment losses.

- 2.) We recommend that eligible lenders and borrowers are provided clear definitions as to how to calculate EBITDA. Lenders struggled with the Paycheck Protection Program because a number of items in determining the maximum loan size were not clearly defined. As such, we recommend the following definitions be used in the EBITDA calculation:

Basis of accounting: Accrual basis

Method of accounting: Accounting principles generally accepted in the United States of America (GAAP)

Earnings: Net income/net earnings in accordance with GAAP (i.e. sales minus cost of goods sold, selling, general and administrative expenses, operating expenses, depreciation, interest, taxes, and other expenses)

Taxes: Federal, state, and local taxes that the eligible borrower is subject to, including both current and deferred taxes

Eligible Borrowers

Eligible borrowers are defined as businesses with up to 10,000 employees or up to \$2.5 billion in 2019 annual revenues. Each Eligible Borrower must be a business that is created or organized in the United States or under the laws of the United States with significant operations in and a majority of its employees based in the United States. Eligible Borrowers that participate in the Facility may not also participate in the MSELF or the Primary Market Corporate Credit Facility.

Comments:

- 1.) We recommend that 2019 annual revenues are clearly defined as all sources of income on the accrual basis in accordance with GAAP.
- 2.) Significant operations should be clearly defined. We recommend this is measured by full-time equivalent employees (FTE) located in the U.S. versus total FTEs. A business will meet this test if they have at least 51% FTEs in the U.S.
- 3.) There was significant confusion for the Paycheck Protection Program around how to apply the SBA's affiliation rules. The affiliation rules were put in place to require companies with parent subsidiary or brother sister relationships to aggregate sales and employee numbers to determine if the business was an eligible borrower. Both lenders and borrowers struggled in applying these rules for the Paycheck Protection Program, which led to certain businesses who were eligible being denied loans. The term sheet is silent on whether similar rules would apply. We recommend to not include affiliation rules or similar provisions to this program.

Attestations

There are a number of attestations included in the term sheet that may be problematic for lenders and borrowers.

- 1.) The Eligible Lender must attest that it will not cancel or reduce any existing lines of credit outstanding to the Eligible Borrower.

Comment: We are concerned this could cause lenders not to loan funds if they perceive they can't take corrective action if a customer's business goes south.

- 2.) The Eligible Borrower must attest that it will not seek to cancel or reduce any of its outstanding lines of credit with the Eligible Lender or any other lender.

Comment: We feel this language should be clarified to say: The Eligible Borrower must attest that it will not use proceeds of the MSL to cancel or reduce any of its outstanding lines of credit with the Eligible Lender or any other lender.

- 3.) The Eligible Borrower must attest that it requires financing due to the exigent circumstances presented by the coronavirus disease 2019 ("COVID-19") pandemic, and that, using the proceeds of the Eligible Loan, it will make reasonable efforts to maintain its payroll and retain its employees during the term of the Eligible Loan.

Comment: We recommend using the certification in the CARES Act, which states: The uncertainty of economic conditions as of the date of the application makes necessary the loan request to support the ongoing operations of the recipient.

The statement “due to the exigent circumstances” appears to be a stronger statement that might 1) discourage Eligible Borrowers and 2) cause Eligible Lenders to conduct more detailed underwriting, which will slow down loan processing.

We received numerous comments from clients on the Paycheck Protection Program regarding the certification statement: “Current economic uncertainty makes this loan request necessary.” The CARES act includes a provision in other sections of the Act that all borrowers are assumed to be affected by COVID-19. Both borrowers and lenders struggled applying this certification statement and whether risk was assumed if, at the time of application, the borrower hadn’t yet experienced a loss. A loss was not required under the PPP program, only that economic uncertainty existed.

We recommend that Eligible Borrowers and Eligible Lenders can rely on the presumption that all borrowers are assumed to be affected by COVID-19.

Missing Items

The following items were missing from the term sheet but were included in Section 4003 of the CARES Act.

- 1.) The funds the borrower receives will be used to retain at least 90 percent of the recipient’s workforce, at full compensation and benefits, until September 30, 2020;
- 2.) The recipient intends to restore not less than 90 percent of the workforce of the recipient that existed as of February 1, 2020, and to restore all compensation and benefits to the workers of the recipient no later than four months after the termination date of the public health emergency declared by the Secretary of Health and Human Services on January 31, 2020, under Section 319 of the Public Health Services Act (42 U.S.C. 247d) in response to COVID–19;
- 3.) The recipient will not outsource or offshore jobs for the term of the loan and two years after completing repayment of the loan.

We thank you for your consideration of our comments and, again, we appreciate all you have done to provide guidance on the Main Street Lending Program.

We welcome the opportunity to discuss our recommendations further. Please feel free to contact Dave Sobochan at 216.774.1163 or dsobochan@cohencpa.com, Adam Hill at 216.774.1130 or ahill@cohencpa.com, or Tony Bakale at 216.774.1147 or tbakale@cohencpa.com.

Very truly yours,



COHEN & COMPANY, LTD.