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**To:** **CRE Outside Counsel**

**From:** **Jennifer Rentenbach, Assistant General Counsel**

 **Susanna Post, Senior Counsel**

**Date: June 25, 2018**

**Subject: Updates to CRE form Loan Agreements – HVCRE; Beneficial Ownership Certification; Lender ERISA Representations; Exit Fees**

 Please note that we are providing this memorandum to only one contact at each of our outside law firms.

Please circulate this memorandum to each of your firm’s attorneys who may work on matters for the SunTrust

Commercial Real Estate (“***CRE***”) line of business.

 Attached are updated versions of the CRE form Loan Agreements, which are in process of being uploaded to our CRE Loan Documentation Website. These versions include the updates detailed below. Redline change pages from our syndicated construction loan agreement are attached for your reference as well.

 In any deal where for any reason you are not using the most recent version of our form loan agreement, please make sure these updates, as applicable, are included in your documents along with any other subsequent form updates.

 Updates:

1. HVCRE

As you may be aware, the recently-enacted Economic Growth, Regulatory Relief and Consumer Protection Act of 2018[[1]](#footnote-1) (the “***Act***”) clarifies the treatment of acquisition, development and construction (“***ADC***”) loans characterized as high volatility commercial real estate (HVCRE) exposures under U.S. Basel III capital rules. The new legislation requires that HVCRE exposures must also meet a new, narrower definition of “***HVCRE ADC loan***” to trigger a required 150% risk weighting (impacting the capital that banks must reserve for these loans).

 The Act contains an exclusion from the definition of HVCRE ADC loan for commercial real estate projects (i) that meet applicable maximum loan to value ratios; (ii) for which the borrower has contributed capital of at least 15% of the real estate’s appraised, ‘as completed’ value of the project, before the bank advances funds (other than an initial “nominal” advance); and (iii) for which the capital contributed by the borrower is contractually required to remain in the project until the loan has been reclassified by the bank as a non-HVCRE ADC loan as permitted by the Act (collectively, the “***LTV/Capital Contribution Exemption***”).

 In light of the Act, our updated loan agreements include the provisions detailed on Exhibit A (“***HVCRE Exemption Provisions***).[[2]](#footnote-2) Going forward, for all ADC loans you document for SunTrust that do not clearly meet another exemption from the definition of HVCRE ADC loan in the Act,[[3]](#footnote-3) please ensure that the HVCRE Exemption Provisions are included in the loan agreement.[[4]](#footnote-4)

 Note that under the Act’s LTV/Capital Contribution Exemption borrowers can now use and withdraw capital that is internally generated by the project (net operating income) so long as the required capital contribution remains satisfied. While the Act *may* be read to suggest that initially contributed capital in excess of the 15% minimum may also be withdrawn and used by the borrower, the statutory language is not clear on that point. Absent guidance from federal banking regulators that they agree with an interpretation that only the minimum 15% contribution must be contractually required to remain in the project, SunTrust will need clear and unambiguous language in our loan documents that requires the entirety of the borrower’s initially contributed capital to remain in the project in order to achieve the capital relief of avoiding HVCRE designation.

2. Beneficial Ownership Certification

The U.S. Treasury Department’s Financial Crimes Enforcement Network published new Customer Due Diligence Requirements for Financial Institutions (the “*CDD Rule*”), which became effective on May 11, 2018. The CDD Rule contains explicit customer due diligence requirements for certain financial institutions under the Bank Secrecy Act and requires those financial institutions to identify and verify the identity of the beneficial owners of certain legal entity customers. We have incorporated into our loan agreements provisions recently proposed by The Loan Syndications and Trading Association (the “*LSTA*”) to address the Beneficial Ownership Certification requirement; these new provisions are highlighted in the redline change pages for our syndicated construction loan agreement that are attached (the changes have been included in all four updated loan agreements attached).

 3. Lender ERISA Representations

 We have added the LSTA model Lender ERISA representations to both of our syndicated form loan agreements (new Section 9.22 in the syndicated term loan agreement and new Section 9.24 in the syndicated construction loan agreement). A copy of the LSTA September 8, 2017 Market Advisory regarding these representations is attached for reference.

 4. Exit Fees

 We are including exit fees in term sheets for many of our multifamily construction and bridge loans. These fees are intended to help drive business to our agency (Fannie Mae, Freddie Mac and FHA) lending business and to our permanent loan platform. We have added the following provision to Section 2.5 of our bilateral loan agreements for payment of the exit fee, for use in deals where the fee applies:

**Section 2.5 Fees. …… (b) Except as provided in this Section 2.5(b), in connection with any voluntary, involuntary or mandatory payment or prepayment of all or any part of the principal of the Loan (including, without limitation, payment in full on the Maturity Date), Borrower shall pay to Lender the Exit Fee at the time of such payment or prepayment.  Notwithstanding the foregoing, no Exit Fee shall be due and payable (i) upon the Lender’s application of the proceeds of a casualty or condemnation to the unpaid principal balance of the Loan as permitted pursuant to the terms of the Loan Documents, or (ii) with respect to any payment or prepayment made in connection with a refinance loan provided by or arranged through Lender or any of its Affiliates.[[5]](#footnote-5) Borrower acknowledges and agrees that neither Lender nor any of its Affiliates have guaranteed, represented or warranted that they will provide any such refinance loan *[or Agency Loans]*].]**

We have also added a reference to the Exit Fee in Section 2.3(a) (Optional Prepayments).[[6]](#footnote-6) Where we have negotiated an exit fee in a deal that will be syndicated, we are generally including the Exit Fee payment provision in our Fee Letter, rather than in the body of the loan agreement, and including a reference to the Fee Letter in Section 2.3(a).[[7]](#footnote-7)

 A few other minor updates and “clean-up” changes are included in the revised loan agreement attached.

 Please let us know if you have questions about these matters.  Thank you for your continued assistance and partnership.

Exhibit A

HVCRE Exemption Provisions

***Include in conditions precedent to advances or conditions to effectiveness:***

### **[Prior to the first advance of Loan proceeds [(other than the Initial (Nominal) Advance)]]**, Lender shall have received reasonably satisfactory evidence of a minimum **[cash equity investment in the project] [equity investment in the project consisting of cash and/or the appraised value of contributed real property]** by an equity provider satisfactory to Lender in an amount not less than $[\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (the “**Required Equity**”). *[Note to drafter: this amount should be the full amount of required equity for the deal, not just the minimum 15% needed to avoid HVCRE designation]*

***Affirmative Covenant****:*

**Section 6.3 Equity Maintenance.**

Borrower shall maintain the Required Equity invested in the Project at all times during the term of the Loan, until such time as Lender in its sole discretion may determine that Lender is permitted to reclassify the Loan as a non-HVCRE ADC loan pursuant to Section 51 of The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.). Within ten (10) Business Days of Lender’s request from time to time, Borrower shall provide a certification to the Lender, in form and substance acceptable to Lender, confirming the Borrower’s compliance with the provisions of this Section 6.3, supported by appropriate calculations and documentation.

***Negative Covenants:***

**Section 7.8 Limitations on Distributions.**

##### Following the occurrence and during the continuance of any Event of Default or any monetary or other material Default, Borrower shall not distribute any money or other property to any partner or other direct or indirect owner of Borrower, whether in the form of return of capital contributions orearnings, income or other proceeds from the Property, nor shall Borrower repay any principal or interest on any loan or other advance made to Borrower by any partner or other direct or indirect owner of Borrower, nor shall Borrower loan or advance any funds to any such partner or other direct or indirect owner of Borrower (any of the foregoing, a “**Distribution**”).

(b) Borrower shall not at any time make a Distribution that would violate Borrower’s obligation to maintain the Required Equity invested in the Project as set forth in Section 6.3. Within ten (10) Business Days of Lender’s request from time to time, Borrower shall provide a certification to the Lender, in form and substance acceptable to Lender and supported by appropriate documentation, confirming that Borrower has not made any Distribution prohibited by this Section 7.8(b). For the avoidance of doubt, this Section 7.8(b) shall not be deemed to restrict Distributions by Borrower of Net Operating Income generated by the Project, provided Borrower continues to satisfy the covenant in Section 6.3.

1. Codified at Section 51 of The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.). [↑](#footnote-ref-1)
2. We have included the HVCRE Exemption Provisions in both our construction and term loan agreement forms, as certain types of loans documented on our term loan agreements forms will require these provisions in order for us to avoid HVCRE designation.

Specifically, under the Act, the term “HVCRE ADC loan” does **not** include a loan that finances: (i) the acquisition or refinance of existing income-producing real property, or (ii) improvements to existing income-producing improved real property, **if**, in the case of either (i) or (ii), the cash flow being generated by the property is sufficient to support debt service and expenses, in accordance with SunTrust’s underwriting criteria for permanent financings.

Thus, loans to finance rehab or renovations/repositioning (value add projects) and bridge loans will need to include the HVCRE Exemption Provisions, if the property is not already generating cash flow sufficient to meet our underwriting criteria for permanent loans (and expected to continue to do so during renovations or improvements). The provisions can be deleted for loans we originate under our permanent loan program. Please confirm with the SunTrust relationship manager or portfolio manager on any given deal of these types that the loan meets our underwriting criteria for permanent financings before deleting the HVCRE Exemption Provisions. [↑](#footnote-ref-2)
3. E.g. HVCRE ADC loans do not include loans that finance the acquisition, development, or construction of properties that are: (i) one- to four- family residential properties; (ii) real property that would qualify as an investment in community development; or (iii) agricultural land. [↑](#footnote-ref-3)
4. There may be isolated instances where we intend to designate a specific loan as HVCRE – in those instances, the HVCRE Exemption Provisions may be deleted. [↑](#footnote-ref-4)
5. ***Note to drafter: add only if included in term sheet:***, or (iii) if, during the term of the Loan, an Affiliate of Borrower and Guarantor closes one or more Loans provided by or arranged through Lender or any of its Affiliates and issued under the Fannie Mae, Federal Home Loan Mortgage Corporation, or U.S. Department of Housing and Urban Development loan programs (“**Agency Loans**”). [↑](#footnote-ref-5)
6. The added reference in Section 2.3(a) is the highlighted text in yellow: “Such amount shall be due and payable on the date designated in such notice, together with **[the Exit Fee due pursuant to Section 2.5(b) and]** accrued interest to such date on the amount so prepaid in accordance with Section 2.4(a); provided that if all or any portion of the Loan is prepaid on a date other than the last day of an Interest Period applicable thereto, Borrower shall also pay all amounts required pursuant to Section 2.13.” [↑](#footnote-ref-6)
7. The added reference in Section 2.3(a) for syndicated deals is the highlighted text in yellow: “Such amount shall be due and payable on the date designated in such notice, together with **[any payment required pursuant to the Fee Letter and]** accrued interest to such date on the amount so prepaid in accordance with Section 2.4(a); provided that if all or any portion of the Loan is prepaid on a date other than the last day of an Interest Period applicable thereto, Borrower shall also pay all amounts required pursuant to Section 2.15.” [↑](#footnote-ref-7)