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

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

 **Susanna Post, Senior Counsel**

**Date: September 26, 2018**

**Subject: Updates to CRE form Loan Agreements – LIBOR Replacement Rate; HVCRE**

 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 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. **LIBOR Replacement Rate Provisions**

We have updated our form loan agreements to include provisions contemplating a move to a replacement rate upon a permanent or indefinite discontinuation of LIBOR. The language provides for transition to a rate based on a market accepted alternative reference rate selected by the Federal Reserve or similar institution (or a committee or working group thereof), with SunTrust making adjustments to the new reference rate, considering prevailing market conventions, so that the replacement interest rate will be substantially equivalent to LIBOR. The replacement rate will not become effective until the parties have executed an amendment to the loan agreement reflecting the replacement rate (which means the borrower does have a say in the replacement rate, as it will have to agree to an amendment).

The new language is detailed in full on **Exhibit A** to this memo, in both bilateral and syndicated forms. The only substantive difference in the syndicated version is the inclusion of the Required Lender negative consent right that has been widely adopted in the syndicated markets.

The bank has a strong desire to maintain consistency of this language across deals, so we will be reluctant to further negotiate this language. If you have issues with this language on a given deal, please reach out to either of us directly to discuss.

For deals that may currently be in process, you may either incorporate this language or continue to use existing form language and alternative options for changes to the Base Rate definition that have been previously approved.

Note also that this LIBOR replacement rate language is intended for use only in: (i) deals originated by our Commercial Real Estate line of business, and (ii) deals originated by our Commercial and Private Wealth Management lines of business where the Commercial Real Estate form loan agreement is being used. Otherwise, at this point in time, other SunTrust lines of business are not utilizing this LIBOR replacement language.

1. **HVCRE**

We have also updated our HVCRE exemption provisions from those circulated in June of this year (see our June 25, 2018 memo for reference on this topic). The revised provisions now require that the borrower maintain only the minimum 15% equity contribution in the project until the loan can be reclassified by the bank as a non-HVCRE ADC loan (our June provisions had required that the entirety of the borrower’s initially contributed capital remain in the project). The updated HVCRE exemption provisions are detailed on **Exhibit B** to this memo.

For applicable deals that may currently be in process, you may either use the June 2018 HVCRE exemption provisions, or these updated provisions.

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

Exhibit A

LIBOR Replacement Provisions for Bilateral CRE Loan Agreements

##

## *Revised Section 2.7:*

## Section 2.7 Inability to Determine Interest Rates.

(a) If at any time, Lender shall have determined (which determination shall be conclusive and binding upon Borrower**)** that (i) by reason of circumstances affecting the relevant interbank market, adequate means do not exist for ascertaining the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** (including, without limitation, because the Screen Rate is not available or published on a current basis) and such circumstances are likely to be temporary, or (ii) the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** does not adequately and fairly reflect the cost to Lender of making, funding or maintaining the Loan, then Lender shall give written notice thereof (or telephonic notice, promptly confirmed in writing) to Borrower as soon as practicable thereafter. Until Lender notifies Borrower that the circumstances giving rise to such notice no longer exist, the Loan shall be converted to a Loan bearing interest at the Base Rate**.**

***New provisions for permanent LIBOR discontinuation –***

 (b) Notwithstanding the foregoing clause (a), if at any time Lender determines (which determination shall be conclusive absent manifest error) that (i) the circumstances set forth in clause (a)(i) above have arisen and such circumstances are unlikely to be temporary or (ii) the circumstances set forth in clause (a)(i) above have not arisen but the administrator of the Screen Rate, the applicable supervisor for the administrator of the Screen Rate or a Governmental Authority having jurisdiction over Lender has made a public statement that the administrator of the Screen Rate has ceased or will cease to provide the Screen Rate permanently or indefinitely,then Lender may[[1]](#footnote-1) [, **in consultation with Borrower,]**[[2]](#footnote-2) establish as a substitute for the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** an interest rate based on an alternative reference rate selected by the central bank, reserve bank, monetary authority or any similar institution (including any committee or working group thereof) that is consistent with accepted market practice (such alternative reference rate, the “**Alternative Index”**) giving due consideration to then prevailing market conventions, including without limitation, by making adjustments (“**Adjustments**”) to the Alternative Index so that the interest rate based on the Alternative Index will be substantially equivalent to the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]**, as well as adjustments to the business day convention, interest rate determination dates and related provisions and definitions (the Alternative Index, as adjusted by the Adjustments, referred to as the “**Replacement Rate**”.)[[3]](#footnote-3)  Lender and Borrower shall endeavor to enter into an amendment to this Agreement to reflect the Replacement Rate. Until such an amendment has been executed, (y) in the case of the circumstances described in clause (i) of the first sentence of this Section 2.7(b), the Loan shall bear interest at the Base Rate as provided in Section 2.7(a), and (z) in the case of the circumstances described in clause (ii) of the first sentence of this Section 2.7(b), while the Screen Rate for such Interest Period continues to be published at such time on a current basis, the Loan shall continue to bear interest at the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** plus the Applicable Margin. If at any time the Replacement Rate is less than zero percent (0%), the Replacement Rate will be deemed to be zero percent (0%) for purposes of this Agreement. Absent manifest error, Lender’s determination of the Replacement Rate for an interest rate period will be binding and conclusive on the parties. **[The determination by Lender of the Replacement Rate, and its calculation of interest for any interest rate period, will be maintained on file at Lender’s principal executive offices and will be made available to Borrower upon request.][[4]](#footnote-4)**

 (c) If at any time subsequent to implementation of the Replacement Rate, Lender shall have determined (which determination shall be conclusive and binding upon Borrower**)** that adequate means do not exist for ascertaining the Replacement Rate, then Lender shall give written notice thereof (or telephonic notice, promptly confirmed in writing) to Borrower as soon as practicable thereafter. Until Lender notifies Borrower that the circumstances giving rise to such notice no longer exist, the Loan shall be converted to a Loan bearing interest at the Base Rate**.**

***Additional conforming revisions to CRE form loan agreements:***

**Add to Definitions:**

 “Screen Rate” shall mean the rate specified in clause (i) of the definition of [Adjusted LIBOR Rate] [LIBOR Index Rate].

**Revised Section 2.4 (additions in blue):**

## Section 2.4 Interest on Loan.

### (a) Subject to Section 2.7 and Section 2.8 below, Borrower shall pay interest on the Loan: (i) at the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** in effect for the applicable Interest Period plus the Applicable Margin in effect from time to time, or (ii)from and after implementation of the Replacement Rate pursuant to Section 2.7(b), at the Replacement Rate in effect for the applicable Interest Period plus the Applicable Margin in effect from time to time (the “**Applicable Interest Rate**”).

**Revised Section 2.9(a)(i) (additions in blue):**

### (a) If any Change in Law shall:

#### impose, modify or deem applicable any reserve, special deposit or similar requirement that is not otherwise included in the determination of the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** or the Replacement Rate hereunder against assets of, deposits with or for the account of, or credit extended by, Lender (except any such reserve requirement reflected in the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** or the Replacement Rate**)**; or

**Revised Section 2.13 (additions in blue):**

## Funding Indemnity

**.** In the event of any (a) payment of any principal of any portion of the Loan other than on the last day of the Interest Period applicable thereto (including as a result of an Event of Default) or (b) the failure by Borrower to borrow or prepay any portion of the Loan on the date specified in any applicable notice (regardless of whether such notice is withdrawn or revoked) then, in any such event, Borrower shall compensate Lender, within five (5) Business Days after written demand from Lender, for any loss, cost or expense attributable to such event. Such loss, cost or expense shall be deemed to include an amount determined by Lender to be the excess, if any, of (A) the amount of interest that would have accrued on the principal amount of such portion of the Loan if such event had not occurred at the **[LIBOR Index Rate] [Adjusted LIBOR Rate]** or the Replacement Rateapplicable to the Loan for the period from the date of such event to the last day of the then current Interest Period therefor (or in the case of a failure to borrow for the period that would have been the Interest Period for such portion of the Loan) over (B) the amount of interest that would accrue on the principal amount of such portion of the Loan for the same period if the **[LIBOR Index Rate] [Adjusted LIBOR Rate]** or the Replacement Rate, as applicable, were set on the date such portion of the Loan was prepaid or the date on which Borrower failed to borrow such portion of the Loan. A certificate as to any additional amount payable under this Section 2.13 submitted to Borrower by Lender shall be conclusive, absent manifest error.

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LIBOR Replacement Provisions for Syndicated CRE Loan Agreements

## *Revised Section 2.7:*

## Section 2.7 Inability to Determine Interest Rates.

(a) If at any time, Administrative Agent shall have (i) determined (which determination shall be conclusive and binding upon Borrower**)** that by reason of circumstances affecting the relevant interbank market, adequate means do not exist for ascertaining the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** (including, without limitation, because the Screen Rate is not available or published on a current basis) and such circumstances are likely to be temporary, or (ii) received notice from the Required Lenders that the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** does not adequately and fairly reflect the cost to such Lenders of making, funding or maintaining the Loan, then Administrative Agent shall give written notice thereof (or telephonic notice, promptly confirmed in writing) to Borrower and the Lenders as soon as practicable thereafter. Until Administrative Agent notifies Borrower and the Lenders that the circumstances giving rise to such notice no longer exist, the Loan shall be converted to a Loan bearing interest at the Base Rate**.**

***New provisions for permanent LIBOR discontinuation –***

 (b) Notwithstanding the foregoing clause (a), if at any time Administrative Agent determines (which determination shall be conclusive absent manifest error) that (i) the circumstances set forth in clause (a)(i) above have arisen and such circumstances are unlikely to be temporary or (ii) the circumstances set forth in clause (a)(i) above have not arisen but the administrator of the Screen Rate, the applicable supervisor for the administrator of the Screen Rate or a Governmental Authority having jurisdiction over Administrative Agent has made a public statement that the administrator of the Screen Rate has ceased or will cease to provide the Screen Rate permanently or indefinitely,then Administrative Agent may[[5]](#footnote-5) [, **in consultation with Borrower,]**[[6]](#footnote-6) establish as a substitute for the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** an interest rate based on an alternative reference rate selected by the central bank, reserve bank, monetary authority or any similar institution (including any committee or working group thereof) that is consistent with accepted market practice (such alternative reference rate, the “**Alternative Index**”) giving due consideration to then prevailing market conventions, including without limitation, by making adjustments (“**Adjustments**”) to the Alternative Index so that the interest rate based on the Alternative Index will be substantially equivalent to the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]**, as well as adjustments to the business day convention, interest rate determination dates and related provisions and definitions (the Alternative Index, as adjusted by the Adjustments, referred to as the “**Replacement Rate**”.)[[7]](#footnote-7) Administrative Agent and Borrower shall endeavor to enter into an amendment to this Agreement to reflect the Replacement Rate, and notwithstanding anything to the contrary set forth in Section 9.2, such amendment shall become effective without any further action or consent of any other party to this Agreement so long as the Administrative Agent shall not have received, within five (5) Business Days of the date notice of such Replacement Rate is provided to the Lenders, a written notice from the Required Lenders stating that such Required Lenders object to such amendment. Until such an amendment has been executed, (y) in the case of the circumstances described in clause (i) of the first sentence of this Section 2.7(b), the Loan shall bear interest at the Base Rate as provided in Section 2.7(a), and (z) in the case of the circumstances described in clause (ii) of the first sentence of this Section 2.7(b), while the Screen Rate for such Interest Period continues to be published at such time on a current basis, the Loan shall continue to bear interest at the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** plus the Applicable Margin. If at any time the Replacement Rate is less than zero percent (0%), the Replacement Rate will be deemed to be zero percent (0%) for purposes of this Agreement. Absent manifest error, Administrative Agent’s determination of the Replacement Rate for an interest rate period will be binding and conclusive on the parties. **[The determination by Administrative Agent of the Replacement Rate, and its calculation of interest for any interest rate period, will be maintained on file at Administrative Agent’s principal executive offices and will be made available to Borrower upon request.][[8]](#footnote-8)**

 (c) If at any time subsequent to implementation of the Replacement Rate, Administrative Agent shall have determined (which determination shall be conclusive and binding upon Borrower**)** that adequate means do not exist for ascertaining the Replacement Rate, then Administrative Agent shall give written notice thereof (or telephonic notice, promptly confirmed in writing) to Borrower and the Lenders as soon as practicable thereafter. Until Administrative Agent notifies Borrower and the Lenders that the circumstances giving rise to such notice no longer exist, the Loan shall be converted to a Loan bearing interest at the Base Rate**.**

***Additional conforming revisions to CRE form loan agreements:***

**Add to Definitions:**

 “Screen Rate” shall mean the rate specified in clause (i) of the definition of [Adjusted LIBOR Rate] [LIBOR Index Rate].

**Revised Section 2.4 (additions in blue):**

## Section 2.4 Interest on Loan.

### (a) Subject to Section 2.7 and Section 2.8 below, Borrower shall pay interest on the Loan: (i) at the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** in effect for the applicable Interest Period plus the Applicable Margin in effect from time to time, or (ii)from and after implementation of the Replacement Rate pursuant to Section 2.7(b), at the Replacement Rate in effect for the applicable Interest Period plus the Applicable Margin in effect from time to time (the “**Applicable Interest Rate**”).

**Revised Section 2.9(a)(i) (additions in blue):**

### (a) If any Change in Law shall:

#### impose, modify or deem applicable any reserve, special deposit or similar requirement that is not otherwise included in the determination of the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** or the Replacement Rate hereunder against assets of, deposits with or for the account of, or credit extended by, Lender (except any such reserve requirement reflected in the **[Adjusted LIBOR Rate]** **[LIBOR Index Rate]** or the Replacement Rate**)**; or

**Revised Section 2.15 (additions in blue):**

##  Funding Indemnity

. In the event of any (a) payment of any principal of any portion of the Loan other than on the last day of the Interest Period applicable thereto (including as a result of an Event of Default) or (b) the failure by Borrower to borrow or prepay any portion of the Loan on the date specified in any applicable notice (regardless of whether such notice is withdrawn or revoked) then, in any such event, Borrower shall compensate each Lender, within five (5) Business Days after written demand from such Lender, for any loss, cost or expense attributable to such event. Such loss, cost or expense shall be deemed to include an amount determined by such Lender to be the excess, if any, of (A) the amount of interest that would have accrued on the principal amount of such portion of the Loan if such event had not occurred at the **[LIBOR Index Rate] [Adjusted LIBOR Rate]** or the Replacement Rateapplicable to the Loan for the period from the date of such event to the last day of the then current Interest Period therefor (or in the case of a failure to borrow for the period that would have been the Interest Period for such portion of the Loan) over (B) the amount of interest that would accrue on the principal amount of such portion of the Loan for the same period if the **[LIBOR Index Rate] [Adjusted LIBOR Rate]** or the Replacement Rate, as applicable, were set on the date such portion of the Loan was prepaid or the date on which Borrower failed to borrow such portion of the Loan. A certificate as to any additional amount payable under this Section 2.15 submitted to Borrower by any Lender (with a copy to Administrative Agent) shall be conclusive, absent manifest error.

Exhibit B

Updated HVCRE Exemption Provisions

***Added definition for Construction Loan Agreements:***

**“Equity Maintenance Requirement”** means the requirement that Borrower maintain a minimum capital contribution invested in the Project of at least:  (i) \_\_\_\_\_\_\_\_\_\_\_\_\_ (which amount is equal to 15% of the Property’s appraised, “as completed” value, as determined by Lender)[[9]](#footnote-9), plus (ii) any additional capital required pursuant to Section 2.2(d)(ii) hereof,  such that the Loan will not constitute an “*HVCRE ADC loan*” pursuant to Section 51 of The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.).  For purposes of this definition, “capital” shall mean cash, unencumbered readily marketable assets, paid development expenses out-of-pocket, or contributed real property or improvements.

***Added definition for Term Loan Agreements:***

**“Equity Maintenance Requirement”** means the requirement that Borrower maintain a minimum capital contribution invested in the Project of at least \_\_\_\_\_\_\_\_\_\_\_\_\_(which amount is equal to 15% of the Property’s appraised, “as completed” value, as determined by Lender)[[10]](#footnote-10), such that the Loan will not constitute an “*HVCRE ADC loan*” pursuant to Section 51 of The Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.).  For purposes of this definition, “capital” shall mean cash, unencumbered readily marketable assets, paid development expenses out-of-pocket, or contributed real property or improvements.

***Affirmative Covenant****:*

***Revised Section 6.3 (this is Section 6.2 in term loan agreements):***

**Section 6.3  Equity Maintenance.**

Borrower shall satisfy the Equity Maintenance Requirement 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 Covenant:***

***Revised Section 7.8(b):***

## Section 7.8.  Limitations on Distributions.

 …………….

### Borrower shall not at any time make a Distribution that would violate Borrower’s Equity Maintenance Requirement 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.

Defined term “Required Equity” has been removed from Section 3.3(c) in our construction loan agreements and deleted from definitions.

***In our term loan agreements, Section 3.1(d) is revised to read as follows:***

### **[Lender shall have received reasonably satisfactory evidence of Borrower’s satisfaction of the Equity Maintenance Requirement.]**

1. *Note to drafter*: start with “may”, but this is acceptable to change to “shall” where there is significant pushback from a borrower on “may”. [↑](#footnote-ref-1)
2. *Note to drafter:* Bracketed language should not be included in the first draft. May be added in response to borrower's comments. [↑](#footnote-ref-2)
3. *Note to drafter – optional insert that can be added here if needed in response to borrower comments:*

***If borrower wants confirmation that the Adjustments will only happen once (which is the intent), the following can be added:***

“For avoidance of doubt, in determination of the Replacement Rate, the Alternative Index shall adjust with any published fluctuations in the Alternative Index, but the Adjustments, once initially determined by Lender, shall not thereafter adjust.”  [↑](#footnote-ref-3)
4. *Note to drafter:* Bracketed language should not be included in the first draft. May be added in response to borrower's comments. [↑](#footnote-ref-4)
5. *Note to drafter*: start with “may”, but this is acceptable to change to “shall” where there is significant pushback from a borrower on “may”. [↑](#footnote-ref-5)
6. *Note to drafter:* Bracketed language should not be included in the first draft. May be added in response to borrower's comments. [↑](#footnote-ref-6)
7. *Note to drafter – optional insert that can be added here if needed in response to borrower comments:*

***If borrower wants confirmation that the Adjustments will only happen once (which is the intent), the following can be added:***

“For avoidance of doubt, in determination of the Replacement Rate, the Alternative Index shall adjust with any published fluctuations in the Alternative Index, but the Adjustments, once initially determined by Administrative Agent, shall not thereafter adjust.”  [↑](#footnote-ref-7)
8. *Note to drafter:* Bracketed language should not be included in the first draft. May be added in response to borrower's comments. [↑](#footnote-ref-8)
9. Note to drafter: SunTrust deal team will need to provide this number. This number is the minimum equity requirement needed to avoid HVCRE designation. [↑](#footnote-ref-9)
10. Note to drafter: SunTrust deal team will need to provide this number. This number is the minimum equity requirement needed to avoid HVCRE designation. [↑](#footnote-ref-10)