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

**From:** **Jennifer Rentenbach**

**Date: February 8, 2016**

**Subject: The EU Bail-In Rule and SunTrust CRE Syndicated Loan Documents**

 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.

 As you may be aware, a European Union (“EU”) Directive became effective on January 1st, giving recovery and resolution powers to European Economic Area (“EEA”) regulators (the regulators for the EU, Iceland, Liechtenstein and Norway) to facilitate the rescue of a failing EEA financial institution.  If an EEA financial institution is a party to an agreement governed by non-EU law (such as any of our CRE syndicated loan agreements) and it has a potential liability under the agreement (such as a funding or indemnification obligation), the EEA financial institution is required to have the parties to the agreement acknowledge that if they have any claims against such institution (such as by virtue of it becoming a defaulting lender) they will be subject to any “write-down” and “conversion” actions taken by the EEA authorities.  These actions may cancel or reduce the liabilities of the EEA financial institution or turn them into equity interests. Affected EEA financial institutions will be subject to regulatory sanctions if they do not comply with this obligation to obtain express contractual agreement of their counterparties to acknowledge that their obligations are subject to bail-in and to accept the terms of any bail-in as they apply to such contractual obligations.

 Going forward, the EU Bail-In provisions, in the form recommended by the LSTA, should be included in all of our CRE deals documented on syndicated loan documents, so that we maintain the flexibility to bring European lenders into deals, whether at or after closing or in secondary market transactions. (The LSTA EU Bail-In provisions are attached for your reference.) Updated versions of our CRE syndicated forms of loan agreements containing these provisions will be uploaded to our CRE loan documentation website shortly. In the interim, please include the LSTA provisions in any deals that you document for us on syndicated forms. Subsequently, in any deal documented on syndicated forms where for any reason you are not using the most recent versions of our form loan agreements, please make sure the EU Bail-in provisions are incorporated into your documents, along with any other subsequent form updates.

 We also ask that you do not agree to delete the EU Bail-In provisions from any deal unless you have first consulted with either CRE Syndications (Rico Simon or Carl Evenstad) or SunTrust internal legal (myself or Shelli Willis in my absence).

 Thank you for your partnership and we look forward to continuing to work with you.

EU Bail-In Rule

Form of Contractual Recognition Provision

LSTA Variant[[1]](#footnote-1)

Acknowledgement and Consent to Bail-In of EEA Financial Institutions[[2]](#footnote-2). Notwithstanding anything to the contrary in any Loan Document or in any other agreement, arrangement or understanding among any such parties, each party hereto acknowledges that any liability of any EEA Financial Institution arising under any Loan Document, to the extent such liability is unsecured, may be subject to the write-down and conversion powers of an EEA Resolution Authority and agrees and consents to, and acknowledges and agrees to be bound by:

1. the application of any Write-Down and Conversion Powers by an EEA Resolution Authority to any such liabilities arising hereunder which may be payable to it by any party hereto that is an EEA Financial Institution; and
2. the effects of any Bail-in Action on any such liability, including, if applicable:
3. a reduction in full or in part or cancellation of any such liability;
4. a conversion of all, or a portion of, such liability into shares or other instruments of ownership in such EEA Financial Institution, its parent undertaking, or a bridge institution that may be issued to it or otherwise conferred on it, and that such shares or other instruments of ownership will be accepted by it in lieu of any rights with respect to any such liability under this Agreement or any other Loan Document; or
5. the variation of the terms of such liability[[3]](#footnote-3) in connection with the exercise of the write-down and conversion powers of any EEA Resolution Authority.

“Bail-In Action” means the exercise of any Write-Down and Conversion Powers by the applicable EEA Resolution Authority in respect of any liability of an EEA Financial Institution.

“Bail-In Legislation” means, with respect to any EEA Member Country implementing Article 55 of Directive 2014/59/EU of the European Parliament and of the Council of the European Union, the implementing law for such EEA Member Country from time to time which is described in the EU Bail-In Legislation Schedule.[[4]](#footnote-4)

“EEA Financial Institution” means (a) any credit institution or investment firm established in any EEA Member Country which is subject to the supervision of an EEA Resolution Authority, (b) any entity established in an EEA Member Country which is a parent of an institution described in clause (a) of this definition, or (c) any financial institution established in an EEA Member Country which is a subsidiary of an institution described in clauses (a) or (b) of this definition and is subject to consolidated supervision with its parent;

“EEA Member Country” means any of the member states of the European Union, Iceland, Liechtenstein, and Norway.

“EEA Resolution Authority” means any public administrative authority or any person entrusted with public administrative authority of any EEA Member Country (including any delegee) having responsibility for the resolution of any EEA Financial Institution.

“EU Bail-In Legislation Schedule” means the EU Bail-In Legislation Schedule published by the Loan Market Association (or any successor person), as in effect from time to time.[[5]](#footnote-5)

“Write-Down and Conversion Powers” means, with respect to any EEA Resolution Authority, the write-down and conversion powers of such EEA Resolution Authority from time to time under the Bail-In Legislation for the applicable EEA Member Country, which write-down and conversion powers are described in the EU Bail-In Legislation Schedule.

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“Defaulting Lender”[[6]](#footnote-6) means, subject to Section [*Defaulting Lender Cure*], any Lender that (a) has failed to (i) fund all or any portion of its Loans within two Business Days of the date such Loans were required to be funded hereunder unless such Lender notifies the Administrative Agent and the Borrower in writing that such failure is the result of such Lender’s determination that one or more conditions precedent to funding (each of which conditions precedent, together with any applicable default, shall be specifically identified in such writing) has not been satisfied, or (ii) pay to the Administrative Agent, any Issuing Bank, any Swingline Lender or any other Lender any other amount required to be paid by it hereunder (including in respect of its participation in Letters of Credit or Swingline Loans) within two Business Days of the date when due, (b) has notified the Borrower, the Administrative Agent or any Issuing Bank or Swingline Lender in writing that it does not intend to comply with its funding obligations hereunder, or has made a public statement to that effect (unless such writing or public statement relates to such Lender’s obligation to fund a Loan hereunder and states that such position is based on such Lender’s determination that a condition precedent to funding (which condition precedent, together with any applicable default, shall be specifically identified in such writing or public statement) cannot be satisfied), (c) has failed, within three Business Days after written request by the Administrative Agent or the Borrower, to confirm in writing to the Administrative Agent and the Borrower that it will comply with its prospective funding obligations hereunder (provided that such Lender shall cease to be a Defaulting Lender pursuant to this clause (c) upon receipt of such written confirmation by the Administrative Agent and the Borrower), or (d) has, or has a direct or indirect parent company that has, (i) become the subject of a proceeding under any Debtor Relief Law, (ii) had appointed for it a receiver, custodian, conservator, trustee, administrator, assignee for the benefit of creditors or similar Person charged with reorganization or liquidation of its business or assets, including the Federal Deposit Insurance Corporation or any other state or federal regulatory authority acting in such a capacity, or (iii) become the subject of a Bail-in Action; provided that a Lender shall not be a Defaulting Lender solely by virtue of the ownership or acquisition of any equity interest in that Lender or any direct or indirect parent company thereof by a Governmental Authority so long as such ownership interest does not result in or provide such Lender with immunity from the jurisdiction of courts within the United States or from the enforcement of judgments or writs of attachment on its assets or permit such Lender (or such Governmental Authority) to reject, repudiate, disavow or disaffirm any contracts or agreements made with such Lender. Any determination by the Administrative Agent that a Lender is a Defaulting Lender under any one or more of clauses (a) through (d) above shall be conclusive and binding absent manifest error, and such Lender shall be deemed to be a Defaulting Lender (subject to Section [*Defaulting Lender Cure*]) upon delivery of written notice of such determination to the Borrower, each Issuing Bank, each Swingline Lender and each Lender.

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Reallocation of Participations to Reduce Fronting Exposure. All or any part of such Defaulting Lender’s participation in L/C Obligations and Swingline Loans shall be reallocated among the Non-Defaulting Lenders in accordance with their respective Applicable Percentages (calculated without regard to such Defaulting Lender’s Commitment) but only to the extent that such reallocation does not cause the aggregate Revolving Credit Exposure of any Non-Defaulting Lender to exceed such Non-Defaulting Lender’s Revolving Credit Commitment. Subject to Section [*Acknowledgment and Consent to EEA Financial Institution Bail-In]*, no reallocation hereunder shall constitute a waiver or release of any claim of any party hereunder against a Defaulting Lender arising from that Lender having become a Defaulting Lender, including any claim of a Non-Defaulting Lender as a result of such Non-Defaulting Lender’s increased exposure following such reallocation.

1. This model provision has been prepared for inclusion in a New York law governed credit agreement and will be included in the LSTA’s Model Credit Agreement Provisions (MCAPs). Further background on the scope and requirements of the European bail-in rules can be found [here](http://cl.exct.net/?qs=277f798deaff9123c55e5c85920c18db27c639323c057e3316bfa90dde0fe06fc1623bfc8b74d990) in the LSTA’s September 2015 Market Advisory. Affected European institutions and their counterparties incorporating these model provisions into any agreements are responsible for making an independent determination of their suitability for the transactions in question, their individual circumstances, and compliance with any applicable law. [↑](#footnote-ref-1)
2. Affected European institutions are required to include certain specified elements in contractual recognition provisions. Those requirements are set out in the technical standards published on 3 July 2015 by the European Banking Authority for adoption by the European Commission for application in all EU Member States (which can be found at [https://www.eba.europa.eu/documents/10180/1132911/EBA-RTS-2015-06+RTS+on+Contractual+Recognition+of+Bail-in.pdf](https://www.eba.europa.eu/documents/10180/1132911/EBA-RTS-2015-06%2BRTS%2Bon%2BContractual%2BRecognition%2Bof%2BBail-in.pdf) . This provision incorporates the elements appropriate for the typical liabilities of lenders party to a credit agreement but would need to be adapted for use in other situations, e.g. for an affected European institution as borrower, or in a contract or instrument pursuant to which it has issued equity.

The draft technical standards also require a description of the write-down and conversion powers of each applicable EEA Resolution Authority in accordance with the national law implementing the European Bail–In Rules. The applicable definitions, therefore, contain a reference to the EU Bail-In Legislation Schedule published on the website of the Loan Market Association (LMA) which set forth the relevant national implementing legislation and write-down and conversion powers. [↑](#footnote-ref-2)
3. As the typical U.S. credit agreement contains many provisions regulating the liabilities and relationship between other parties that are not EEA Financial Institutions, this provision makes clear by its inclusion of the words “of such liability” that the required acknowledgment of the powers of the applicable EEA Resolution Authority is limited to the liabilities of the affected EEA Financial Institution to other parties under the agreement, and not to the provisions of the agreement as they may otherwise apply to the other parties thereto. [↑](#footnote-ref-3)
4. The LMA variant of the contractual recognition clause offers an option to anticipate future bail-in legislation in countries outside the EEA. This is not required for compliance with the EU Bail-In legislation. [↑](#footnote-ref-4)
5. The EU Bail-In Legislation Schedule may be found at <http://www.lma.eu.com/uploads/files/EU%20BAIL-IN%20LEGISLATION%20SCHEDULE%20131334-2-14%20v3%200.pdf>. [↑](#footnote-ref-5)
6. These provisions contemplate a modification of the LSTA MCAPs Defaulting Lender Language to extend their scope to a European Lender subject to bail-in, as it is not possible to allow for a reduction in commitments without considering the broader effects of this on the other parties to the agreement. This offers a pragmatic approach to arrangements relating to fronting exposures and other provisions affected by a reduction in commitments and the reinstatement of bailed-in commitments using existing LSTA MCAPs and procedures familiar to the market. [↑](#footnote-ref-6)