

**CRE OUTSIDE COUNSEL WEBSITE BULLETIN**

**Date:**  August 10, 2016

**Title:** High Volatility Commercial Real Estate Exposure (“**HVCRE**”) Matters

**Audience:** Outside Counsel Representing SunTrust Bank on Commercial Loan Transactions Originated by SunTrust’s Commercial Real Estate (“**CRE**”) Line of Business, and forms on the outside counsel website for CRE commercial lending transactions

(<https://www.suntrust.com/Microsites/CREloandocuments/index.html>)

The Basel III High Volatility Commercial Real Estate requirements (150% risk weighting), which are applicable to SunTrust Bank as of January 1, 2015, apply to all loans that finance **acquisition, development and/or construction** of real property, excluding (i) 1-to-4 family residential properties, (ii) certain qualifying community development investments by a bank, (iii) the purchase or development of agricultural land, and (iv) commercial real estate projects satisfying the specific LTV and cash equity requirements set forth below.[[1]](#footnote-1) The requirements would not apply to permanent term financing for a stabilized, income producing property,[[2]](#footnote-2) so the HVCRE minimum requirements could be deleted for those transactions.

To the extent relevant to your work for SunTrust, please see below the following HVCRE provisions applicable to term sheets and commitments:

**Suggested Term Sheet / Commitment Letter HVCRE language:**

**Loan:** A senior, secured [*construction/term]* loan (“**Loan**”) in an aggregate amount equal to the least of:

1. $\_\_\_\_\_\_\_\_;
2. \_\_\_\_% of the **[**lesser of acquisition cost or ***–add for an acquisition loan*]** projected appraised value of the Project [“as is”/“as completed”/”as stabilized”], as determined by reference to an appraisal in form and substance satisfactory to Bank;[[3]](#footnote-3)
3. \_\_\_\_\_\_\_\_.

**Required**

**Equity:** Borrower must provide evidence to the Bank’s satisfaction of a minimum investment of equity of $\_\_\_\_\_\_\_\_\_\_\_\_\_ in the form of **[cash] [acceptable project value]** prior to any advances of Loan proceeds. Without limitation of the foregoing, (i) Borrower’s equity investment in the Project must at a minimum include a contribution, in the form of cash, unencumbered readily marketable assets or paid development expenses out-of-pocket, of at least 15% of the “as completed” value of the Project, as determined in an appraisal satisfactory to the Bank in its sole discretion (the “**Minimum Required Cash Equity**”), and (ii) the Minimum Required Cash Equity must be contributed by Borrower to the Project prior to any advances of Loan proceeds and no distributions shall be permitted during the term of the Loan that would cause the Loan to be classified as High Volatility Commercial Real Estate pursuant to Part 217 of Chapter II of title 12 of the Code of Federal Regulations.

The Loan Documents will include a covenant regarding item (ii) above.

**HVCRE Loan Agreement Inserts:**

As indicated in the “Required Equity” section above, in order for a loan not to be classified as High Volatility Commercial Real Estate under Basel III Regulations, one statutory requirement is that there be a contractual requirement that the required equity remain invested in the project throughout the term of the loan. Accordingly, the CRE form loan agreements were updated last Augustto include the following provision *[bold text is the new language added]*:

“**Section 7.8 Limitations on Distributions**.

(a) 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 earnings, 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 cause the Loan to constitute a high volatility commercial real estate (HVCRE) exposure pursuant to Part 217 of Chapter II of title 12 of the Code of Federal Regulations.**”

In addition, we have also recently updated the CRE form construction loan agreements to include the following language in the loan balancing/borrower deposit provision *[bold text is the new language added]*:

### **Section 2.2. Budget; Use of Proceeds**.

…….

(d) If at any time the unpaid costs, both direct and indirect costs and calculated on a line item by line item basis, necessary to complete the development of the Land and the construction of the Improvements exceed the undisbursed balance of the Loan or of any line item in the Budget, as determined by Lender in the reasonable exercise of its discretion, Borrower shall provide from sources other than the Loan the funds necessary: **(i)** to pay the total costs or the costs of the line item in the Budget which exceed the amount budgeted, as the case may be, **and (ii) to ensure that the Loan will not constitute a high volatility commercial real estate (HVCRE) exposure pursuant to Part 217 of Chapter II of title 12 of the Code of Federal Regulations.** Borrower shall deposit with Lender from time to time, within ten (10) days of Lender’s request, such amounts as are required by the immediately preceding sentence (the “**Equity Deposit**”). In making advances under this Agreement, Lender shall draw first upon the Equity Deposit until such sums are exhausted, and then upon the proceeds of the Loan.

If for any reason you are not using the most recent versions of the SunTrust CRE form loan agreements to document a loan that finances **acquisition, development and/or construction** of real property (and if none of the exclusions from HVCRE classification set forth in clauses (i) – (iii) of the first paragraph of this bulletin apply), please make sure that provisions substantially the same as the foregoing limitations on distributions provision and loan balancing/borrower deposit provision are incorporated into your loan documents.

We appreciate your attention to this matter and your continued assistance. If you have any questions concerning this bulletin, please contact SunTrust internal counsel Jennifer Rentenbach at (404) 532.0166 or Jennifer.Rentenbach@SunTrust.com.

1. Loans that are classified as HVCRE will have higher pricing than loans that are not classified as HVCRE due to the increased capital SunTrust is required to maintain for HVCRE exposures (150% of the capital SunTrust would be required to maintain if the exposure were not classified as HVCRE).

   [↑](#footnote-ref-1)
2. The requirements would apply, however, if the purpose of the loan is to finance repositioning or rehabilitation or a bridge loan for same. [↑](#footnote-ref-2)
3. *Note to drafter*: use FDICIA LTV limits here (the FDICIA LTV limits are incorporated into the HVCRE rule). [↑](#footnote-ref-3)