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

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

**Date: February 4, 2015**

**Subject: Loans Requiring Cash Management Structures**

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.

Our CRE line of business has rolled out a new operational process for handling our loans that require a cash management feature (i.e., a non-default trigger upon which property cash flow is swept to a SunTrust-controlled deposit account, with funds to be disbursed by SunTrust pursuant to an established waterfall). The new process is both more client-friendly and more protective of the bank. We have made a few updates to our loan documentation in connection with the new operational process that we want you to be aware of:

1. We have a new form control agreement, entitled “**Deposit Account Control Agreement (CRE Cash Management)**”, to be used with respect to the Collections Account (account where property rents and other revenue are required to be deposited) for these loans. This agreement is attached for reference and is in process of being uploaded to our CRE loan documentation website. This control agreement will take the place of the Restricted (Non-Blocked) Account Agreement previously used.[[1]](#footnote-1) As before, we continue to be very limited in changes we are able to make to this control agreement due to operational limitations; thus, we ask that you please consult with me prior to agreeing to any substantive changes to this form. **The new Deposit Account Control Agreement (CRE Cash Management) is not to be used in any arrangement where SunTrust is not the lender/secured party.**
2. For internal consistency purposes, we’ve changed the term “Sweep Account” to “Master Disbursement Sweep Account” in our documents (this now aligns with terminology used in internal SunTrust procedure documents).
3. Operationally, our borrower client will now never have direct access to the Collections Account. Instead, prior to a cash management trigger event, SunTrust will be obligated to sweep money daily from the Collections Account into the borrower’s Operating Account, for the borrower’s use. After a cash management trigger event occurs, money will be swept daily from the Collections Account into the Master Disbursement Sweep Account, for SunTrust to administer in accordance with the Cash Management Agreement. The new form Deposit Account Control Agreement (CRE Cash Management) reflects this operational change.
4. For construction loans, the Collections Account and Master Disbursement Sweep Account will not be opened until 75% of the loan proceeds have been advanced (and in all events prior to the final draw). This delay will avoid the client having to pay monthly lockbox fees from day one, far in advance of when any property revenue would be deposited into the Collections Account. We have updated Section 3.4 [Conditions Precedent to Final Advance] and Section 5.18(a) [Cash Management] of our form Construction Loan Agreements to reflect that these accounts will not be opened at loan closing.
5. We have made additional conforming changes to our form Cash Management Agreement to reflect our updated process.[[2]](#footnote-2)

Attached for your reference is the standard form term sheet and commitment letter language we are using for deals that contemplate a cash management feature. As always, we ask that you start with the form loan documents posted on our website for each new transaction, to ensure that you are using the most current versions of our form each time (or for deals generally conforming to a prior transaction, that you run a blackline of the prior loan agreement against our current form loan agreement to pick up form changes that should be incorporated).

Thank you for your continued partnership. Please do not hesitate to contact me with any questions.

Standard Term Sheet and Commitment Letter Language for Cash Management – SunTrust Internal Legal (February 2015):

***Bold and bracketed provisions to be evaluated for applicability on a deal by deal basis. All footnotes are for internal explanatory purposes and should not be included in a term sheet.***

***Short version:***

Cash Management: A restricted deposit account will be established **[prior to closing][at the time 75% of the loan proceeds have been advanced –*use this option for construction loans*]** through which all Project revenue will be deposited. Prior to the occurrence of a cash flow sweep trigger, and provided no event of default has occurred, funds will flow through to Borrower’s operating account. In the event of a cash flow sweep trigger, defined as the Project producing **[less than a \_\_\_ DSCR] *and/or* [less than a \_\_\_\_ Debt Yield]** on a **[quarterly or semi-annually]** basis, Lender may take control of the Project’s revenue and then distribute the funds to pay Project operating expenses and loan debt service and to fund reserves, as determined by Lender. **[Excess Project revenue may be used to repay the Loan at the Lender’s discretion.][Excess Project revenue may be held by Lender as additional collateral for the Loan.]** Upon the Project meeting a **[DSCR of \_\_\_\_\_] *and/or* [Debt Yield of\_\_\_\_\_]** for **[two][three]** consecutive testing dates, control of the Project’s revenue (including any accumulated funds) will be returned to Borrower. Borrower will remain liable at all times for all obligations to be paid, regardless of whether there are sufficient funds produced by the Project.

***Long version:***

Accounts: Borrower shall be required to establish and maintain with Lender the following non-interest bearing accounts: (i) a restricted deposit account through which Borrower will deposit all rents, receipts and payments for the Project (the “Collections Account”), along with a lockbox linked to such account, to receive checks and money orders for deposit into the Collections Account, (ii) a deposit account to serve as Borrower’s operating account for the Project (the “Operating Account”), and (iii) a restricted collateral account (the “Master Disbursement Sweep Account”;[[3]](#footnote-3) and together with the Collections Account and the Operating Account, the “Accounts”). The Accounts will be pledged as additional collateral for the Loan, and Borrower will grant Lender a UCC security interest in the Accounts. Prior to the occurrence of a Trigger Event (as defined below), and provided no event of default has occurred, funds will be transferred daily from the Collections Account to the Operating Account.

**[Debt Service] *and/or* [Debt Yield] Covenant(s):** The Project will be required to maintain **[a minimum Debt Service Coverage Ratio (“DSCR”) of \_\_\_\_\_ to 1.00] *and/or* [and a minimum Debt Yield Ratio (“DYR”) of \_\_\_\_%],** **[each]** to be tested **[semi-annually] [quarterly]**, on a trailing twelve (12) month basis as of **[June 30 and December 31] [March 31, June 30, September 30 and December 31]** of each year (each a “testing date”), commencing \_\_\_\_\_\_. Borrower will provide Lender with a covenant compliance certificate calculating the **[DSCR][DYR]** within **[thirty (30)][sixty (60)]** days of each testing date. Failure to achieve the required **[DSCR][DYR]** for any testing date will not be an event of default, but will constitute a cash flow sweep trigger event (a “Trigger Event”).

Cash Flow Sweep: Upon the occurrence of a Trigger Event, Lender shall automatically transfer all rents and other funds deposited into the Collections Account into the Master Disbursement Sweep Account. Provided no event of default has occurred,[[4]](#footnote-4) Lender shall disburse funds from the Master Disbursement Sweep Account in the following order:[[5]](#footnote-5)

1. First, either to the Operating Account for Borrower’s payment, or at Lender’s election for payment directly by Lender, of any taxes or insurance premiums due and payable related to the Property;
2. Second, either to the Operating Account for Borrower’s payment, or at Lender’s election for payment directly by Lender, of approved, budgeted third party expenses to operate the Project (less any property management fees payable to an affiliate of Borrower);[[6]](#footnote-6)
3. Third, to the payment of any costs[**(including any reasonable third party costs and costs of [Lender][Agent] to administer this cash management provision)]**[[7]](#footnote-7), indemnities, and expenses due and payable to **[Lender][Agent]**;
4. **[Fourth, to the payment of any costs, indemnities, and expenses due and payable to the Lenders – *if syndicated*]**;
5. Fifth, to the payment of any unpaid interest (including default interest) then due and payable under the Loan;
6. **[Sixth, to any payments then due under any swap agreement (if applicable)];**
7. Seventh, to the payment of any principal then due and payable under the Loan;
8. Eighth, to the payment of any other amounts required to be funded by Borrower under the Loan **[, including \_\_\_\_\_\_\_\_\_ *specify any required reserves, if applicable*];**
9. Ninth, to fund cash reserves in amounts sufficient to pay the estimated aggregate annual (y) insurance premiums on all policies of insurance required by the loan documents when such premiums are due and (z) taxes on the Property when such taxes are due;
10. Finally, any excess funds shall be held in the Master Disbursement Sweep Account as additional collateral for the Loan.

An operating budget for the Project will be submitted to Lender for approval on an annual basis.[[8]](#footnote-8) Borrower must provide evidence of payments made from funds disbursed in items 1 and 2 above as a condition to release of funds in the succeeding month. Overpayments (budget minus actual expenses) will be deducted from the succeeding month’s deposit into the Operating Account. Underpayments to the extent approved by Lender will be added to the succeeding month’s deposit into the Operating Account.

Upon Borrower meeting a DSCR of \_\_\_\_\_ to 1.00[[9]](#footnote-9) for **[two][three]** consecutive testing dates, the transfer of funds into the Master Disbursement Sweep Account will cease and any excess funds remaining in the Master Disbursement Sweep Account will be released to Borrower’s Operating Account. Borrower will remain liable at all times for all obligations to be paid per items 1-10 above, regardless of whether there are sufficient funds in the Master Disbursement Sweep Account or Borrower satisfies conditions for release.

**[In the event the Trigger Event has continued for [six] months, any funds remaining in the Collections Account or the Master Disbursement Sweep Account, after application for items 1-10 above, may be used to repay the Loan, at the Lender’s sole discretion.]**

1. We changed the title of the control agreement to minimize internal confusion, as our form Restricted Account Agreements (Blocked and Non-Blocked) will continue to be used in situations where we only hold deposits and are asked to enter into a restricted account arrangement for the benefit of the client’s third party lender. [↑](#footnote-ref-1)
2. New versions of our form Loan Agreements and Cash Management Agreement reflecting the changes mentioned herein will be posted to the website within the next several days and will reflect a last revision date of 2.04.15. [↑](#footnote-ref-2)
3. See CRE-MO-CMA-100 “Cash Managed Accounts” for procedures for proper set-up of the Collections Account, Operating Account and Master Disbursement Sweep Account. For construction loans, opening of the Collections Account and Master Disbursement Sweep Account may be delayed until 75% of the loan proceeds have been advanced. [↑](#footnote-ref-3)
4. SunTrust should not be restricted to applying funds in accordance with an established waterfall if an Event of Default (past expiration of notice and cure periods) has occurred; our rights are broader after an Event of Default (i.e., we may elect to apply all funds to reduce the debt) and will be addressed in the loan documents. [↑](#footnote-ref-4)
5. Designation and priority of items in payment waterfall should be discussed with the credit officer on a given deal. [↑](#footnote-ref-5)
6. Generally, we do not recommend that SunTrust pay taxes, insurance or operating expenses directly to vendors/suppliers due to lender liability concerns (as well as tax reporting obligations), but we do suggest retaining the option for SunTrust to elect to do so at the time (there may be individual situations where assuming the potential lender liability risk makes sense). Credit approval should be obtained before we actually exercise the option to pay any taxes, insurance or operating expenses directly. [↑](#footnote-ref-6)
7. We expect to engage a third party service provider to assist with administration of these arrangements when triggered. If this provision is negotiated out, the deal team’s cost center would be charged the third party service provider cost. Alternatively, this provision can be omitted from the term sheet prior to first providing to a borrower, and this concept addressed only in the actual Cash Management Agreement. [↑](#footnote-ref-7)
8. We suggest requiring that budgets be submitted for approval annually, prior to a cash flow sweep occurring, since the Borrower will not have much incentive to cooperate at the time a sweep is triggered. If we do not wish to spend time reviewing budgets in detail prior to a Trigger Event, the loan documents can provide for a deemed approval if we do not respond to a budget submission within a set time period, but we would at least then have a budget in hand to work from at the time a Trigger Event occurs. [↑](#footnote-ref-8)
9. Consider a higher threshold to end a sweep event, to add a cushion to prevent subsequent trip of covenant. [↑](#footnote-ref-9)