

Companies in Distress:

Top 10 Questions to Ask When Requesting a Forbearance

Uncertainty in the Time of COVID-19

As a result of COVID-19, the market is experiencing unforeseen volatility and nearly every industry is feeling the impact.

Many companies are stretched thin, unable to meet financial covenants, and require modifications to credit terms and infusions of capital.

The Company Needs to Request a Forbearance: What Do I Need to Know?

Liquidity issues or other concerns may give rise to an upcoming Event of Default under a credit facility. You need to speak with your lenders to let them know that the Default may be coming, and that you would like some time or breathing room to weather the storm. Their support is very important, and it is in the best interest of all parties to negotiate acceptable accommodations.

Our lenders send a draft forbearance agreement; the terms seem aggressive.

You ask yourself, what do I need to know?



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Question 1

How Do We Convince the Lenders to Provide Breathing Room?

- Belief in value proposition
- Preserve going concern value
- Additional reporting/regular access to information
- Time for borrower to turn business around/ weather temporary external storms
- Time to conduct a sale process or broker a broad restructuring
- Maximize recoveries
- Minimize losses/lender liability claims/ preference claims

Question 2

Have We Done Our Diligence: What Kinds of Accommodations Do We Need?

- Is the stress temporary, or is there an underlying weakness in the business as a whole?
- What are the existing or potential Events of Default?
- How much time do we need, and for what (operations turnaround, litigation resolution, financing)?
- Will the Company be in a better position after a period of time for a turnaround? What will it take to get there?
- Do we need a waiver, or is a temporary forbearance sufficient?
- Can we offer any credit enhancements, additional collateral or third party guarantees?
- Would a sale process or formal restructuring or bankruptcy proceeding be advantageous?
- Will my lenders (or equity) provide additional liquidity?
- Do my credit documents permit incurrence of new debt? (Do we have unencumbered assets?)

Question 3

What Relief Will the Forbearance Provide?

- Band-aid vs. Cure: temporary forbearance of right to pursue remedies (under the controlling agreement, at law and in equity)
 - Limited to “Specified Events of Default”
 - New defaults or Forbearance Termination Event = remedy trigger
 - Forbearance vs. waiver
- Modified terms:
 - Relaxing of covenants and other default triggers
 - Interest reductions (or PIK)
- **Practice pointers:** Ask for an appropriate amount of runway and relief from covenants; avoid foot-faults; avoid long term concessions for short-term gains

Question 4

How Long Will My Lenders Forbear?

Clearly defined “Standstill Period” with explicit “Forbearance Termination Events”

Earlier to occur of:

- Date certain; or
- Specified termination events:
 - New or unspecified default
 - Breach of forbearance terms or conditions
 - Failure to achieve milestones
 - Bankruptcy events (automatic trigger)
 - Misrepresentation
 - Cross-default under other loan documents, ISDA master agreements, hedging agreements, or forbearance agreements

Question 5

What Will My Lenders Ask For in Exchange?

- Fees and improved pricing
- Credit enhancement/improved terms
- Additional collateral and/or guarantees
- Forbearance covenants

- Detailed reporting
- Information rights
- Financial advisor
- Release/indemnification
- Reps & warranties (incl. confirmation of amounts owed, liens and security interest)

Question 6

What Types of Covenants Will My Lenders Ask For?

Affirmative Covenants

- Payments of interest, principal and fees
- Detailed reporting and information access
- Compliance with budget and milestones
- Retention of FA
- Notice of adverse claims or MAE
- Timely payments to trade creditors
- Blocking director?

Negative Covenants

- Restrictions on transfers (incl. insider transactions)
- Restrictions on dividends and distributions
- Debt/lien incurrence and layering restrictions
- Prohibition on defaults in third party or related agreements

Question 7

Will We Have to Provide Additional Information Rights?

- Information is king: lenders will likely try to increase frequency of reporting, and explicit access to company employees, if not already provided for in credit documents
- 13-week budget and cash flow reconciliation (with explanations of material variances)
- Weekly/bi-weekly status update calls
- Individual right to ask questions
- Direct access to FA and high-level employees
- Board observer rights

Question 8

What Are Other Creditors Doing?

- How much support does forbearance have?
- What are the junior creditors up to?
- Is equity part of the plan?
- Trade debt?

Question 9

Do We Have Other Options?

- Do my Lenders really want to own the Company; can we play hard ball?
- Deep dive into credit documents to determine whether Company is permitted to incur additional debt/layer, whether any assets can be spun out to affiliates, or whether there are any unencumbered assets that can be monetized
- Avoid granting new security if possible
- Equity cures/cash infusions
- Chapter 11 or Chapter 7 Bankruptcy (Breathing Spell via Automatic Stay; Asset Recovery via Fraudulent Transfer and Preference Laws)
- Assignments for the Benefit of Creditors (ABCs), Receiverships or Wind-downs

Question 10

Should I Consider Bankruptcy?

- Automatic stay
- DIP financing
- 363 sales
- Avoidance actions
- Cram down

Bonus Question

What Would My Lawyers Say?

- Bridge to success
- Fiduciary duty
- Impact on value

Contact Us

Each negotiation is fact intensive, and we stand ready and able to help you think through these questions and position you for the best possible outcome.

Financial Restructuring



Michael Goldstein
Co-Chair, New York
+1 212 813 8840
mgoldstein@goodwinlaw.com



William Weintraub
Co-Chair, New York
+1 212 813 8839
wweintraub@goodwinlaw.com



Gregory Fox
Partner, New York
+1 212 459 7348
gfox@goodwinlaw.com



Howard Steel
Partner, New York
+1 212 459 7412
hsteel@goodwinlaw.com



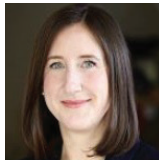
Céline Domenget Morin
Partner, Paris
+33 (0)1 85 65 7180
cdomengetmorin@goodwinlaw.com



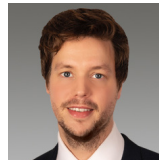
Simon Thomas
Partner, London
+44 (0) 20 7447 4860
stthomas@goodwinlaw.com



Daniel Glosband
Of Counsel, Boston
+1 617 570 1930
dglosband@goodwinlaw.com



Kizzy Jarashow
Counsel, New York
+1 212 459 7338
kjarashow@goodwinlaw.com



Harry Ghillemyn
Counsel, Luxembourg
+352 27 86 67 76
hghillemyn@goodwinlaw.com

Debt Finance



Jennifer Bralower
Chair, New York
+1 212 459 8857
jbralower@goodwinlaw.com



Anna Dodson
Partner, New York
+1 617 570 1164
adodson@goodwinlaw.com



Fred Lim
Partner, San Francisco
+1 415 733 6038
flim@goodwinlaw.com



Bruce Rader
Partner, New York
+1 212 459 8970
brader@goodwinlaw.com



Kristopher Ring
Partner, Santa Monica
+1 424 252 6364
kring@goodwinlaw.com



Milena Tantcheva
Partner, Boston
+1 617 570 1954
mtantcheva@goodwinlaw.com



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