

Borrowers in Distress:

Top 10 Questions to Ask When Considering a Forbearance Request

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.

Borrowers will be stretched thin, unable to meet financial covenants, and requiring modifications to credit terms and infusions of capital.

A Forbearance Request: What Do I Need to Know?

Contract counterparty calls to let you know not to worry. They just need more time (and possibly liquidity) to weather this storm. Your support is very important. You will be paid...

You ask yourself, what do I need to know?



GOODWIN

Question 1

Why Would I Forbear from Exercising Remedies?

- Belief in value proposition
- Preserve going concern value
- Potential improvement in position/ability to influence borrower's conduct
- 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 I Done My Diligence?

- Is there a value proposition?
- Have you identified all existing defaults?
- What do the credit documents say?
- Are there weaknesses in documents that can be improved?
- Can I obtain other credit enhancements, additional collateral or third party guarantees?
- Are there related agreements (ISDA master agreement, hedging agreement) or senior/sub debt?
- Have I done a lien search? Are all my liens perfected?
- Do the documents permit value leakage?
- What are my rights in a bankruptcy scenario?

Question 3

What Are They Asking Me to Give Up?

- Right to pursue remedies (under the controlling agreement, at law and in equity)
- Specified events of default
 - New defaults or Forbearance Termination Event = remedy trigger
- Forbearance vs. waiver
- **Practice Pointer:** aim to preserve bankruptcy rights

Question 4

How Long Will I 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 Do I Get in Exchange?

- Fees and improved pricing
- Credit enhancement/improved terms
- Additional collateral and/or guarantees (but beware fraudulent transfer and preference risk)
- 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 Should I Be Seeking?

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

What Are My Information Rights?

- Information is king
- 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

Am I Getting Complete / Accurate Information?

- Reps & warranties shift risk
- Affirmation of debt and payment obligations
- Does borrower need an FA or CRO?
 - If hired by lender, fees paid by borrower
 - If hired by borrower, access rights
- Detailed, narrative variance reports
- Termination upon misrepresentation

Question 9

What Are Other Creditors Doing?

- How much support does forbearance have?
- What are the junior creditors up to?
- What does the issuer need from its senior creditors?
- Is equity part of the plan?

Question 10

What if the Borrower Files for Bankruptcy?

- Automatic stay
- Notice and disclosure
- How will it end?

Bonus Question

What Would My Lawyers Say?

- Enforceable relinquishment of rights
- 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



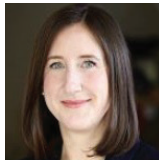
Céline Domenget Morin
Partner, Paris
+33 (0)1 85 65 7180
cdomengetmorin@goodwinlaw.com



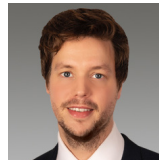
Simon Thomas
Partner, London
+44 (0) 20 7447 4860
stthomas@goodwinlaw.com



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



GOODWIN