

## New York Fed Announces CMBS as Eligible Collateral for TALF Loans

On May 1, 2009, the Federal Reserve Bank of New York (New York Fed) announced that eligible collateral for loans under its Term Asset-Backed Securities Loan Facility (TALF)<sup>1</sup> will be expanded to include U.S. dollar-denominated, cash (*i.e.*, not synthetic) commercial mortgage-backed pass-through securities (CMBS), commencing with an initial subscription date in late June 2009.<sup>2</sup> TALF-eligible CMBS must be issued on or after January 1, 2009 and must satisfy certain other required conditions as of its date of issuance or as of the date of the subject TALF loan, as applicable. As described below, those required conditions are expected to relate to: the characteristics of the assets underlying the CMBS; the terms and conditions of the documents governing the issuance of the CMBS and the servicing of the underlying assets; and the current ratings, payment terms, issuer and manner of settlement of the CMBS.<sup>3</sup>

### Underlying Assets

**General.** In order to qualify as eligible collateral for a TALF loan, a CMBS must evidence an interest in a trust fund consisting of commercial mortgage loans satisfying the criteria described under “Qualifying Mortgage Loans” below, and not other CMBS, other securities or interest rate swap or cap instruments or other hedging instruments.

**Qualifying Mortgage Loans.** Each mortgage loan underlying a CMBS pledged as collateral for a TALF loan:

- must be fully funded and current in payment at the time of securitization;
- must bear a fixed rate of interest;
- must provide for constant payments of principal and interest and may not provide for interest-only payments during any part of its remaining term;

---

<sup>1</sup> Pursuant to TALF, which commenced operations on March 17, 2009, the New York Fed has provided non-recourse loans to investors in various types of asset-backed securities, provided that such investors qualify as “eligible borrowers.”

<sup>2</sup> According to the TALF (CMBS) FAQs (defined below), the subscription and settlement cycle for CMBS will occur in the latter part of each month, whereas the cycle for non-CMBS ABS TALF asset classes and premium finance ABS will remain at the beginning of the month.

<sup>3</sup> Details relating to TALF-eligible CMBS are set forth in the following publications available on the New York Fed’s TALF web-site ([www.newyorkfed.org/markets/talf.html](http://www.newyorkfed.org/markets/talf.html)): (i) Term Asset-Backed Securities Loan Facility (CMBS): Terms and Conditions (TALF (CMBS) Terms and Conditions); and (ii) Term Asset-Backed Securities Loan Facility (CMBS): Frequently Asked Questions (TALF (CMBS) FAQs).

MAY 12, 2009

- must be secured by a mortgage or similar instrument that creates a first priority lien on a fee or leasehold interest in one or more income producing commercial properties located in the United States or one of its territories;<sup>4</sup>
- must have been originated on or after July 1, 2008;<sup>5</sup> and
- must have been underwritten or re-underwritten recently prior to the issuance of the CMBS, generally on the basis of then-current in-place, stabilized and recurring net operating income and then-current property appraisals.

**Participations and Other Ownership Interests in Mortgage Loans.** A participation or other ownership interest in a mortgage loan satisfying the criteria described under “Qualifying Mortgage Loans” above will itself be considered a mortgage loan and not a CMBS or other security if, following a loan default, such participation or other ownership interest is, with respect to right of payment of principal and interest, senior to or *pari passu* with all other participations and other interests in the same mortgage loan. The New York Fed has not specified how principal collections on the underlying mortgage loan may be allocated to multiple mortgage participations or other loan interests prior to a loan default, other than requiring that an underlying mortgage loan provide for constant payments of principal and interest. It remains a question, therefore, whether the New York Fed would permit a participation or other interest held outside the securitization trust to hyper-amortize relative to the trust interest prior to a default, and then become *pro rata* pay as to principal and interest post-default.

**Diversity of Collateral Pool.** The New York Fed has stated in the TALF (CMBS) Terms and Conditions that it “expects collateral pools to be diversified with respect to loan size, geography, property type, borrower sponsorship and other characteristics, but will consider CMBS backed by nondiversified collateral on a case-by-case basis.” However, it has not yet offered any guidance as to what constitutes diversity in this context. Accordingly, it remains unclear as to what specified concentrations of any of the foregoing characteristics in a given pool will render such pool not sufficiently diverse.

**New York Fed Rejection Rights; Collateral Monitor.** According to the TALF (CMBS) Terms and Conditions, “[t]he New York Fed will engage a collateral monitor and will reserve the right, until the issuance of the CMBS, to exclude specific loans from each pool. In addition, the New York Fed will retain the right to reject any CMBS as TALF loan collateral based on its risk assessment.” This right on the part of the New York Fed’s appointed collateral monitor would seem to conflict with the right historically afforded to the purchaser of subordinate securities in a typical CMBS transaction (the b-piece buyer). The sponsors and underwriters of a CMBS securitization typically enter into a bid letter agreement with the b-piece buyer whereby such entity has the right to reject collateral not complying with certain agreed upon parameters (which may be broad and largely at the discretion of the b-piece buyer) at any time prior to pricing of the subject CMBS. It remains to be seen what the b-piece buyers’ obligations, with respect to purchasing the agreed upon subordinate CMBS and maintaining the agreed upon pricing, will be if the New York Fed appointed collateral monitor rejects collateral that such bond buyer was relying on being part of the collateral pool. In addition, it would be problematic if the New York Fed-

---

<sup>4</sup> In addition, as required by the Term Asset-Backed Securities Loan Facility: Frequently Asked Questions (TALF FAQs), all or substantially all (defined as at least 95% of the dollar amount) of the mortgage loans underlying the CMBS must be made to U.S. domiciled obligors.

<sup>5</sup> This origination date requirement appears to apply to “all” of the underlying mortgage loans in a given securitization, rather than to “all or substantially all” (which has been deemed by the New York Fed in most instances to be 85%), as is the standard for other TALF-eligible underlying credit exposures, such as equipment loans, auto loans, credit card receivables and servicer advances.

appointed collateral monitor rejected loans from a pool during the period after pricing of the CMBS and prior to issuance. CMBS underwriters and placement agents would be in a position of potentially failing on trades with committed purchasers of subordinate CMBS, unless disclosure of this kick-out right of the New York Fed was deemed sufficient to forestall the risk of any material misstatements prior to pricing.

**Disclosure and Indemnity.** As with any TALF-eligible collateral, the issuer and sponsor of CMBS must include in the related prospectus or other related offering document a signed certification indicating, among other things, that the CMBS is TALF eligible, and that the offering document does not, in general, contain any untrue statements of a material fact or omissions to state a material fact necessary to make the statements in the offering document not misleading. According to the TALF (CMBS) FAQs, the exact framework for the issuer/sponsor certification and a corresponding auditor certification was, as of May 1, 2009, still being developed. In addition, the sponsor — or, if the sponsor is a special purpose vehicle, the sponsor's direct or indirect ultimate parent — must indemnify the New York Fed from any losses it may suffer if such certifications are untrue. In light of the greater number of underlying asset requirements for CMBS, in addition to the greater complexity of such underlying assets, as compared to most other types of TALF-eligible collateral, it would appear that CMBS issuers and sponsors may be exposed to greater TALF-related risks — both to investors under applicable securities laws and to the New York Fed under the indemnity thereto — than issuers and sponsors of other TALF-eligible collateral.

**Split Loan Structures.** The New York Fed has not yet expressed its views on the inclusion of promissory notes from a split loan structure in a TALF-eligible CMBS trust. A “split loan structure” involves two or more promissory notes that are collectively secured by the same mortgage instrument encumbering the same property. The New York Fed's pronounced underlying mortgage loan criteria may not be readily applicable when a split loan structure is involved. For example, only first priority mortgage loans can back TALF-eligible CMBS. However, in a split loan structure, all of the related promissory notes would constitute first priority mortgage loans secured by the same first lien mortgage, but one or more such notes may be contractually senior in right of payment to one or more other such notes pursuant to a co-lender, intercreditor or other similar arrangement. By analogy to the participation structure, and in light of the economic similarity between the split loan structure and the participation structure, a promissory note from a split loan structure satisfying the criteria described under “Qualifying Mortgage Loans” above should be acceptable for inclusion in a TALF-eligible CMBS transaction if, following a loan default, the subject promissory note is, with respect to right of payment of principal and interest, senior to or *pari passu* with all other promissory notes comprising the same split loan structure.

The New York Fed has stated that only fully funded mortgage loans can back TALF-eligible CMBS. However, in the case of a split loan structure, the future funding obligation could be evidenced by a promissory note outside of the subject securitization trust. Depending on the purpose of the future funding (*i.e.*, not to fund construction or major renovations) and assuming that the related real property collateral is generating stabilized cash flow, the New York Fed might not object to such an arrangement. In that vein, some thought will need to be given to whether it will be acceptable to include a promissory note from a split loan structure (or a participation or other interest in a mortgage loan where the remaining interests are held outside the securitization trust) in a TALF-eligible CMBS transaction if such split loan structure (or mortgage loan) would not have been able to have been included in its entirety, but the mortgage loan was rendered compliant by attaching the offending characteristic to the promissory note or other interest that is to be held outside the securitization trust.

Providing for related promissory notes, participations and other loan interests to be held outside of the securitization trust that issues TALF-eligible CMBS would permit a borrower and lender to more highly leverage a given commercial property, and would provide the framework for inclusion of solely the investment grade-

MAY 12, 2009

rated portion of the related senior mortgage loan into such securitization trust to back the issuance of investment grade-rated securities, including the TALF-eligible CMBS. Issues of control would have to be resolved given that it is unclear whether and to what extent the New York Fed will permit any outside the trust control or joint control over servicing actions (such as foreclosures and workouts) either before or after an appraisal reduction or other control trigger event.

**Single-Asset Securitizations.** It remains a question whether single-asset securitizations, either involving a single borrower and multiple properties or multiple borrowers and several cross-collateralized properties, would ultimately be deemed an acceptable structure for the TALF CMBS program. Although such structures would clearly conflict with the New York Fed's professed initial desire to have diversity in borrower sponsorship, they might be the easiest to engineer and securitize for TALF purposes given the current dearth of securitizable mortgage loans and the TALF requirements that the loan origination and the CMBS issuance be relatively recent. Creating eligible mortgage loans might require some re-engineering/modifications at the mortgage loan level, in addition to modifications of applicable participation, co-lender, intercreditor or similar agreements to facilitate the creation of AAA-rated CMBS that is TALF-eligible. In addition, investors and the New York Fed may find it easier to assess risk associated with and evaluate securitizations consisting of one asset or a few assets. The New York Fed has stated that it will consider CMBS backed by non-diversified collateral on a case-by-case basis.

**Exclusion of Certain Underlying Assets.** Based on a literal reading of the TALF (CMBS) Terms and Conditions, TALF-eligible CMBS cannot evidence an interest in a trust fund that includes other CMBS, other securities or interest rate swap or cap instruments or other hedging instruments, even if such items are intended to support solely CMBS that will not be pledged as collateral for a TALF loan. Until the New York Fed offers further guidance, an issuer of TALF-eligible CMBS that also wants to issue, for example, floating rate CMBS ultimately backed by the same fixed-rate collateral pool through the use of an interest rate swap contract, may want to consider using a second trust fund (*i.e.*, effect a resecuritization of the subject CMBS).

**Loan Underwriting.** The New York Fed will not accept as eligible TALF collateral CMBS backed by floating rate loans, construction loans or loans secured by properties that are being "repositioned" and do not have a stabilized cash flow. In addition, the New York Fed expects loans backing TALF-eligible CMBS to provide for some amortization each month for the remaining term of the mortgage loan thereby reducing, to some extent, the refinance risk at maturity of mortgage loans that provide for material interest-only payments for all or part of the remaining loan term.<sup>6</sup> The foregoing seems to echo the complaints of investors that many mortgage loans included in CMBS transactions during the years leading up to the securitization meltdown had been underwritten based on pro forma numbers, aggressive assumptions regarding future property performance and excessive interest-only payments during some or all of the loan term. At this time the New York Fed has not prescribed specific underwriting parameters that would be applicable to commercial mortgage loans, e.g. maximum amortization terms, maximum loan-to-value ratios, or minimum debt service coverage ratios. Further, the New York Fed has not provided any guidance as to the degree of consideration that can be afforded to various aspects of commercial properties that have historically been factored into the underwriting process, including: the treatment of reserves, master leases, operating leases and executory leases, the utilization of projected or estimated fees and expenses (including management fees, utilities, repairs and maintenance, and taxes and insurance) in underwriting, and the making of certain assumptions regarding vacancies, leasing and other relevant matters. There is also a question as to how related debt held outside the subject securitization trust will factor into the calculation of debt service coverage ratio, loan-to-value ratios and other similar calculations.

---

<sup>6</sup> Note, however, that an underlying mortgage loan can provide for an interest-only period that has expired prior to the issuance of the TALF-eligible CMBS, as the amortization requirement applies only to its remaining term.

## Governing Documents

**Required Provisions.** According to the TALF (CMBS) Terms and Conditions, “[t]he pooling and servicing agreement and other agreements governing the issuance of TALF-eligible CMBS and the servicing of its assets must contain provisions to the following effects:

- If the class of the CMBS is one of two or more time-tranched classes of the same distribution priority, distributions of principal must be made on a *pro rata* basis to all such classes once the credit support is reduced to zero as a result of both actual realized losses and ‘appraisal reduction amounts.’
- Control over the servicing of the assets, whether through approval, consultation or servicer appointment rights, must not be held by investors in a subordinate class of CMBS once the principal balance of that class is reduced to less than 25% of its initial principal balance as a result of both actual realized losses and ‘appraisal reduction amounts.’
- A post-securitization property appraisal may not be recognized for any purpose under such agreements if the appraisal was obtained at the demand or request of any person other than the servicer for the related mortgage loan or the trustee.
- The mortgage loan seller must represent that, upon the origination of each underlying mortgage loan, the improvements at each related property were in material compliance with applicable law.”

In addition, the New York Fed has stated in the TALF (CMBS) Terms and Conditions that it “expects the agreements governing the issuance of each CMBS and the servicing of its assets, and the terms and conditions of its underlying loans, to permit, and to provide in effect for, reporting that is sufficient to enable the New York Fed to monitor and evaluate its position as secured lender.” One would anticipate that the Commercial Mortgage Securitization Association’s (CMSA’s) standardized investor reporting package would be acceptable for this purpose but specific guidance has not yet been provided.

**Appraisal Reduction Amounts.** An “appraisal reduction amount” is an estimate of the amount, if any, by which a mortgage loan is undercollateralized, based upon, among other things, a recent valuation of the related real estate collateral, as reduced by a haircut generally equal to 10% of such valuation. Appraisal reduction amounts have commonly been used in shifting control or triggering a change in payment terms in a split loan structure involving multiple promissory notes secured by the same mortgage instrument(s) encumbering the same real estate collateral or in a single-loan participation structure. The New York Fed is now seeking to extend these concepts to CMBS transactions involving a diversified loan pool. In addition, holders of subordinate promissory notes and subordinate participations have generally been permitted to obtain or request the servicer to obtain a new appraisal to challenge the calculation of an appraisal reduction amount, a practice the New York Fed has stated will render the CMBS ineligible. The New York Fed’s positions regarding the use of appraisal reduction amounts in triggering a shift in control and the prohibition of holders of subordinate CMBS from obtaining new appraisals to challenge appraisal reduction amounts will act as a disincentive to the acquisition of subordinate CMBS. The inability of issuers to sell subordinate CMBS may well offset any benefits that TALF provides to issuers in the sale of TALF-eligible CMBS.

The New York Fed has not yet specified how an appraisal reduction amount is to be calculated. This may offer CMBS issuers some flexibility, particularly as regards the haircut to be applied to the real estate valuation. In addition, it is a common practice for the holders of subordinate promissory notes and participations to retain control rights by offsetting appraisal reduction amounts through the posting of additional collateral, such as cash and/or letters of credit, with the securitization trustee. However, given the New York Fed’s aversion to the

inclusion of securities in the trust fund and, as described below, the use of guarantees to support ratings on TALF-eligible CMBS, it is possible that the New York Fed would not allow appraisal reduction amounts to be so offset at all or, if it does permit the posting of additional collateral, it may permit offsets solely with cash or U.S. Treasury securities.

**A Single Representation.** The New York Fed has thus far required only a single representation by the mortgage loan seller that the improvements at each related property were in material compliance with applicable law. CMBS transactions have typically included forty or more loan-level representations. Even taking into account the various loan-level representations that may be implicated in the issuer/sponsor certification that any particular CMBS is TALF eligible, it is somewhat surprising that the New York Fed has focused on this single representation.

### **Additional CMBS Terms**

**Required Characteristics.** In order to qualify as eligible collateral for a TALF loan, a CMBS:

- must, as of the TALF loan closing date, have a credit rating in the highest long-term investment grade rating category from the required number of TALF CMBS-eligible rating agencies and may not have a credit rating below the highest investment-grade rating category for any TALF CMBS-eligible rating agency;<sup>7</sup>
- must entitle its holders to payments of principal and interest (that is, must not be an interest-only or principal-only security);
- must bear interest at a pass-through rate that is fixed or based on the weighted average of the underlying fixed mortgage rates;
- must not be junior to other securities with claims on the same pool of loans;
- may not be issued by an agency or instrumentality of the United States or a government-sponsored enterprise; and
- must be cleared through the Depository Trust Company.

**No IOs or POs.** The New York Fed has stated that the pledged CMBS must entitle its holders to payments of principal and interest. However, it has not addressed whether CMBS will be TALF-eligible if it consists of multiple components or if it provides for disproportionate payments of interest relative to principal or vice versa. For example, certain CMBS can be structured to be a combination of (i) an interest-only security that accrues interest on a notional principal balance that is unrelated to its principal amount and (ii) a principal-only security. Alternatively, the CMBS can have a principal amount on which a nominal amount of interest accrues at a minimal pass-through rate or nominal principal amount on which interest accrues at an extremely high pass-through rate. Being too aggressive in structuring could result in rejection of the resulting CMBS as collateral for a TALF loan.

<sup>7</sup>

The required ratings may not be based on the benefit of a third-party guarantee and may not have been placed, as of the TALF loan closing date, on review or watch for downgrade by any TALF CMBS-eligible rating agency. In addition, according to the TALF (CMBS) FAQs, a list of TALF CMBS-eligible rating agencies will be released, and the required number of TALF CMBS-eligible rating agencies from which TALF-eligible CMBS must obtain a rating will be specified, prior to the initial CMBS subscription date. As is the case with other types of TALF-eligible ABS, subsequent downgrades of the required ratings on TALF-eligible CMBS will have no effect on existing TALF loans.

**No Subordinate Securities are TALF-Eligible.** Only AAA-rated senior CMBS can be TALF-eligible. Accordingly, issuers will still be faced with marketing the somewhat illiquid subordinate CMBS without any outside financial assistance. This subordinate CMBS will likely command high yields, driving up the cost to mortgage borrowers of such financing. Furthermore, because credit support levels are likely to be higher in the current economic environment, issuers should expect proportionately more subordinate CMBS to market. It therefore remains to be seen as how beneficial TALF is to the CMBS market.

#### **Loan Terms, Haircuts and Other Conditions**

**Loan Terms.** Each TALF loan secured by a CMBS will have a three-year maturity or, unlike TALF loans secured by other TALF-eligible collateral, a five-year maturity, at the election of the borrower. A three-year TALF loan will bear interest at a fixed rate *per annum* equal to 100 basis points over the 3-year LIBOR swap rate. A five-year TALF loan is expected to bear interest at a fixed rate per annum equal to 100 basis points over the 5-year LIBOR swap rate.

**Collateral Haircuts and Average Lives.** The collateral haircut for each TALF-eligible CMBS with an average life of five years or less will be 15%. For TALF-eligible CMBS with average lives beyond five years, collateral haircuts will increase by one percentage point for each additional year of average life beyond five years. No TALF-eligible CMBS may have an average life beyond ten years.

The average life of a TALF-eligible CMBS will be the remainder of the original weighted average life determined by its issuer employing industry-standard assumptions.

**Repayment of TALF Loans.** Any remittance of principal on pledged CMBS must be used immediately to reduce the principal amount of the related TALF loan in proportion to the TALF advance rate. For example, if the TALF advance rate was 85%, 85% of any remittance of principal on the pledged CMBS must immediately be repaid to the New York Fed. In addition, for a five-year TALF loan, the excess, in any TALF loan year, of pledged CMBS interest distributions over TALF loan interest payable will be remitted to the TALF borrower only until such excess equals 25% (10% in the fourth loan year and 5% in the fifth loan year) of the haircut amount, and the remainder of such excess will be applied to TALF loan principal.

**Surrender of Voting Rights.** A TALF borrower must agree not to exercise or refrain from exercising any voting, consent or waiver rights under a pledged CMBS without the consent of the New York Fed.

**General Terms and Conditions of the TALF Program.** The general terms and conditions of the TALF program would also apply to TALF loans that are secured by CMBS, except as otherwise described above in this memorandum.

#### **Issuer/Sponsor/Originator Restriction**

The TALF FAQs provides that eligible collateral for a particular TALF borrower (including CMBS collateral) may not be backed by loans originated by or securitized by such borrower or an affiliate of such borrower.<sup>8</sup> Other TALF pronouncements, such as the general form of "Certification as to TALF Eligibility" that is required to be

---

<sup>8</sup> The TALF FAQs defines "affiliate of the borrower" to mean "... any company that controls, is controlled by, or is under common control with the borrower. For this purpose, a person or company controls a company if, among other things, it (1) owns, controls, or holds with power to vote 25 percent or more of a class of voting securities of the company; or (2) consolidates the company for financial reporting purposes."

MAY 12, 2009

included in the related offering document in order for securities to be TALF-eligible, expand the restriction to TALF borrowers also not being sponsors or affiliates of sponsors. Such pronouncement provides that the issuer and sponsor of the subject CMBS must include in the related prospectus or other related offering document a signed certification indicating that "... purchasers of the securities offered hereby that are affiliates of either the originators of assets that are securitized in this offering or the issuer or sponsor of this offering will not be able to use these securities as TALF collateral."

#### **Ability to Reserve TALF Funding Capacity**

The New York Fed has stated that it may permit interested issuers, through a process to be determined, to reserve prospective funding of TALF loans collateralized by newly issued CMBS. The New York Fed expects that each potential issuer that applies for and is awarded such a reservation will be required to pay a monthly reservation fee, calculated as a fraction of the amount reserved for every month that such reservation is outstanding, until the CMBS is issued. Of course, any funding of a TALF loan in connection with such a reservation will be subject to satisfaction of all of the requirements of the TALF program relating to eligible collateral and eligible borrowers. No reservation will extend beyond the last CMBS subscription. If the New York Fed implements this reservation program, details of the process will be announced shortly.

#### **Legacy TALF**

As indicated in the Legacy Securities Public-Private Investment Funds (PPIFs) Additional Frequently Asked Questions (PPIF Additional FAQs), the Treasury will be expanding TALF to allow the use of "legacy" assets as collateral for TALF-eligible CMBS. Such program has been termed "Legacy TALF" and is anticipated to be a Federal Reserve lending program with a set of terms, conditions and eligibility requirements separate from the other government sponsored programs currently in effect. The Treasury stated in the PPIF Additional FAQs that Legacy TALF would be widely available to investors who meet Federal Reserve eligibility standards regardless of whether or not they participate in the Legacy Securities Public-Private Investment Program (PPIP). In other words, a qualified investor participating in Legacy TALF would be subject to the same terms and conditions as a Legacy Securities PPIP investor participating in Legacy TALF.

In the event that, as part of Legacy TALF, CMBS issued prior to January 1, 2009 becomes eligible to be financed through a TALF program, we would note that the eligibility requirements for both the legacy CMBS and the underlying mortgage loans would have to be materially different from those set forth above in this memorandum. Most legacy CMBS would not comply with many of the requirements proposed for new issue CMBS in the TALF (CMBS) Terms and Conditions and the TALF (CMBS) FAQs. For example, CMBS issued prior to January 1, 2009 and underlying mortgage loans originated prior to July 1, 2008 would, in many cases, be noncompliant with the criteria set forth for new issue TALF CMBS in several respects, including the following:

- mortgage loans underlying legacy CMBS frequently do not provide for constant payments of principal and interest and many instead provide for interest-only payments during all or some part of their remaining term;
- mortgage loans underlying legacy CMBS may not have been underwritten or re-underwritten shortly prior to the issuance of the CMBS on the basis of then-current in-place, stabilized and recurring net operating income;
- if a class of legacy CMBS is one of two or more time-tranched classes of the same distribution priority, distributions of principal to such time-tranched classes are generally made on a *pro rata* basis based *solely* on actual realized losses, without regard to "appraisal reduction amounts";



MAY 12, 2009

- in many legacy CMBS transactions, control over the servicing of the assets shifts from the subordinate CMBS class based *solely* on actual realized losses and not based on appraisal reduction amounts;<sup>9</sup> and
- frequently the holder of a related participation or promissory note held outside the trust in a legacy CMBS transaction would possess the right to obtain an appraisal for the purpose of challenging an appraisal reduction amount or other relevant appraisal related trigger.

**For more information please contact the following:**

Janet Barbieri

Tel: 212.836.7506

Email: jbarbieri@kayescholer.com

William Cullen

Tel: 212.836.7511

Email: wcullen@kayescholer.com

Daniel Hartnett

Tel: 312.583.2380

Email: dhartnett@kayescholer.com

Henry Morriello

Tel: 212.836.7170

Email: hmorriello@kayescholer.com

---

<sup>9</sup> However, in the event control resides with a holder of a related promissory note or participation owned outside of the trust, then *both* appraisal reductions and realized losses would generally trigger a change in control from such outside the trust interest holder to the subordinate class of CMBS, which subordinate class of CMBS would then retain control until such class is reduced to 25% of its initial balance based solely on actual realized losses.

**Chicago Office**

+1 312.583.2300

**Frankfurt Office**

+49.69.25494.0

**London Office**

+44.20.7105.0500

**Los Angeles Office**

+1 310.788.1000

**New York Office**

+1 212.836.8000

**Shanghai Office**

+86.21.2208.3600

**Washington, DC Office**

+1 202.682.3500

**West Palm Beach Office**

+1 561.802.3230