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New York Fed Announces July 16 CMBS Subscription under its Term Asset-Backed Securities Loan Facility ("TALF"); Posts Updates to Several Terms and Documents for the TALF Program Affecting CMBS as Eligible Collateral

On July 2, 2009, the Federal Reserve Bank of New York (the "New York Fed") announced July 16, 2009 as the initial subscription date for TALF loans secured by commercial mortgage-backed pass-through securities ("CMBS") issued prior to January 1, 2009 ("Legacy CMBS"). July 16, 2009 will also be the second subscription date for TALF loans secured by CMBS issued on or after January 1, 2009 ("Newly Issued CMBS"). The initial subscription date for TALF loans secured by Newly Issued CMBS was June 16, 2009, but there were no loan requests with respect to Newly Issued CMBS on that date.

Since May 19, 2009 (which is the date on which the New York Fed announced that eligible collateral for TALF loans would be expanded to include certain Legacy CMBS), the New York Fed has posted on its TALF Web site several new documents and forms that specifically relate to Newly Issued CMBS as TALF-eligible collateral, as well as numerous updates, clarifications and revisions to the following documents that affect Newly Issued CMBS, Legacy CMBS or both as TALF-eligible collateral:

(i) the Term Asset-Backed Securities Loan Facility: Terms and Conditions (the "TALF Terms and Conditions");

(ii) the Term Asset-Backed Securities Loan Facility: Frequently Asked Questions (the "TALF FAQs");

(iii) the Term Asset-Backed Securities Loan Facility (Legacy CMBS): Terms and Conditions (the "TALF (Legacy CMBS) Terms and Conditions");[1]

(iv) the Term Asset-Backed Securities Loan Facility (Legacy CMBS): Frequently Asked Questions (the "TALF (Legacy CMBS) FAQs");[2] and

(v) the Master Loan and Security Agreement (the "MLSA"), among the New York Fed, as lender, the primary dealers party thereto, each on behalf of itself and its respective applicable borrowers, and The Bank of New York Mellon, as custodian and administrator.

Set forth below is a discussion of some of the more significant actions of the New York Fed in that regard.

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[1] On July 2, 2009, the TALF (Legacy CMBS) Terms and Conditions were incorporated into the TALF Terms and Conditions, and will likely not continue to exist as a separate document.

[2] On July 2, 2009, the TALF (Legacy CMBS) FAQs were incorporated into the TALF FAQs, and will likely not continue to exist as a separate document.

AUP Reports for Newly Issued CMBS. As a condition to the disbursement of a TALF loan secured by any Newly Issued CMBS, the New York Fed has required that a nationally recognized certified public accounting firm that is registered with the Public Company Accounting Oversight Board and retained by the applicable sponsor provide to the New York Fed both (i) a report on Agreed Upon Procedures with respect to factual matters related to various TALF-eligibility criteria for the Newly Issued CMBS (the "AUP Report (TALF)"), and (ii) a copy of the report on Agreed Upon Procedures, including any supplements or updates to such report, that it delivers to the applicable sponsor and the applicable underwriter or initial purchaser in connection with the CMBS issuance (the "AUP Report (Industry)"). The AUP Report (TALF) must be furnished with respect to, and dated the date of, each preliminary offering document and supplement thereto, and each final offering document and supplement thereto. The AUP Report (Industry) must be furnished with respect to, and dated the date of, each preliminary offering document (and an update thereof must be furnished with respect to, and dated the date of, each supplement thereto), and each final offering document and supplement thereto. The New York Fed has not required delivery of an Agreed Upon Procedures report for the disbursement of a TALF loan secured by Legacy CMBS.

New Documents and Forms. In connection with the inclusion of CMBS as TALF-eligible collateral, the New York Fed has posted the following documents and forms to its TALF Web site:

(i) a form of "Certification as to TALF Eligibility for Newly Issued CMBS"[3] to be executed and delivered by the applicable issuer and sponsor, and included unsigned in the preliminary offering document and signed in the final offering document;

(ii) a form of "Indemnity Undertaking for Newly Issued CMBS"[4] to be executed and delivered (together with the certification referred to in the preceding bullet) by the applicable sponsor and, if such sponsor is a special purpose vehicle, its direct or indirect ultimate parent;

(iii) a form of the AUP Report (TALF) with respect to Newly Issued CMBS; and

(iv) a set of guidelines describing the various expectations of the New York Fed in connection with its receipt of AUP Reports (Industry) for Newly Issued CMBS under TALF.

Issuer of Newly Issued CMBS. The New York Fed has clarified that the "issuer" for purposes of the issuer certification for Newly Issued CMBS, in both public and private offerings thereof, is the legal entity that serves as the depositor in the Newly Issued CMBS issuance (presumably within the meaning of Regulation AB under the Securities Act of 1933, as amended).

Sponsor of Newly Issued CMBS. The New York Fed has clarified that the "sponsor" for purposes of the issuer certification and indemnity undertaking for Newly Issued CMBS, in both public and private offerings thereof, is the legal entity that is a sponsor of the CMBS issuance (presumably within the meaning of Regulation AB under the Securities Act of 1933, as amended) and affiliated with the depositor.

Mortgage Borrowers as TALF Borrowers. The New York Fed has stated that a CMBS will not be eligible collateral for a particular borrower if that borrower, or its affiliate, is a borrower under a mortgage loan backing such CMBS,

[3] No similar certification is currently required in connection with Legacy CMBS.

[4] No similar indemnity undertaking is currently required in connection with Legacy CMBS.

unless that mortgage loan, together with each other mortgage loan in the underlying mortgage pool made to such TALF borrower or an affiliate[5] thereof, constitutes no more than 5% of the aggregate principal balance of all the mortgage loans in the pool as of the subscription date.

Initial Collateral Monitor. The New York Fed selected Trepp, LLC ("Trepp") to serve as a collateral monitor for CMBS and may select additional such collateral monitors. According to the New York Fed, Trepp is expected to provide valuation, modeling, analytics and reporting services, along with advising on these matters, but will not establish policies or make decisions for the New York Fed, such as decisions regarding rejecting any CMBS as collateral for a TALF loan.

Allocation of Principal Remittances. The New York Fed has clarified that, unless otherwise provided in the MLSA, any remittance of principal on CMBS pledged as collateral for a TALF loan must be used immediately to reduce the principal amount of the TALF loan in proportion to the loan's original haircut, rather than the amount of the haircut in existence from time to time (*e.g.*, if the original haircut was 10% of the sum of the original TALF loan amount and the original haircut, then 90% of any remittance of principal on the pledged CMBS must immediately be repaid to the New York Fed).

Limitation on Net Carry. The New York Fed created a concept of "net carry" which, with respect to any asset-backed security ("ABS"), including CMBS, pledged to secure a TALF loan, consists of the excess of interest and any other distributions (excluding principal distributions) on the pledged ABS over TALF loan interest payable. In addition, the New York Fed has provided for limitations on net carry that will be remitted to TALF borrowers based on the original haircut rather than the amount of the haircut in existence from time to time.[6] Accordingly, for five-year TALF loans secured by CMBS, any net carry will be remitted to the TALF borrower only until such net carry equals 25% *per annum* of the original haircut amount in the first three loan years, 10% in the fourth loan year, and 5% in the fifth loan year, and the remainder of such net carry will be applied to the TALF loan principal. For a three-year TALF loan for *Legacy CMBS only*, such net carry will be remitted to the borrower in each loan year until such net carry equals 30% *per annum* of the original haircut amount, with the remainder of such net carry applied to loan principal. There is no net carry limitation for three-year TALF loans for Newly Issued CMBS.

The New York Fed has indicated that net carry (and the amount thereof to be applied to TALF loan repayment) is to be determined with the same frequency that principal and interest is remitted on the pledged CMBS (*i.e.*, monthly, quarterly or semi-annually). Further, the amount of net carry to be applied to TALF loan repayment is calculated independently of whether any net carry has been diverted to principal payments previously for the TALF loan (presumably either previously in the current year or in prior years).

The amount of net carry that is to be diverted to early TALF loan repayment in dollars is determined by the following formula:

NC - (H*Y*D/A), where:

NC is the net carry for the current period;
H is the original haircut amount in dollars;

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5 The definition of "affiliate" for purposes of this requirement is as set forth in the MLSA.

6 Thus, variations in the haircut amount over time, due to principal amortization or early TALF loan repayment for example, do not change the thresholds.

> Y is the threshold percentage beyond which net carry is diverted based on the length of time the TALF loan has been outstanding;
> D is the number of days that have passed since the last determination of net carry; and
> A is the actual days in the year.

The New York Fed has included the following example to illustrate the foregoing net carry allocations.

> A 5-year TALF loan is issued to an investor with an original haircut of $1,000,000.
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> Assume the following:
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> The ABS collateral remits principal and interest on a monthly basis. The TALF loan has been outstanding for 37 months, and 31 days have passed since the last determination of net carry. The net carry is $20,000 for the current period.
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> In this example, the amount of net carry diverted to early TALF loan repayment is $11,507 (*i.e.*, $20,000 - (1,000,000 * 10% * 31/365) = $11,507).

The determination of net carry and the calculation of the amount thereof to be diverted to principal on the TALF loan is independent of any scheduled payments required to be made on CMBS collateral that is purchased above par (as described in footnote 9 below).

Settlement. The New York Fed removed from the TALF Terms and Conditions the requirement that CMBS must be cleared through the Depository Trust Company ("DTC"). However, the TALF FAQs still references such requirement, and the MLSA still contemplates settlement through DTC.

U.S. Origination. The New York Fed has clarified that, although 95% or more of the credit exposures underlying Newly Issued CMBS must be exposures that are originated by U.S.-organized entities or institutions or U.S. branches or agencies of foreign banks, such requirement does not apply with respect to Legacy CMBS.

Redemption Options. The New York Fed has clarified that Newly Issued CMBS with a redemption option (other than pursuant to a customary clean-up call[7]) is not eligible as collateral, unless the CMBS issuer has received acceptance of such redemption option from the New York Fed. Such requirement does not, however, apply with respect to Legacy CMBS.

Administrative Fee. The New York Fed increased the administrative fee for CMBS collateral to 20 basis points of the loan amount.

Acquisition of Legacy CMBS in Secondary Market Transactions. The New York Fed has stated that TALF loans for Legacy CMBS must fund recent secondary market transactions between unaffiliated parties that are executed on an arm's length basis at prevailing market prices. The TALF borrower must represent that the transaction took place on an arm's-length basis. In order to request a TALF loan with respect to Legacy CMBS on any CMBS subscription date, the TALF borrower must have settled its purchase of the CMBS on or before

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[7] A "customary clean-up call" with respect to a sponsor and its securitization refers to a clean-up call that is exercisable by the servicer or the depositor when the remaining balance of the assets or liabilities of the issuer is not more than 10% (or a higher percentage customarily used by the sponsor in its securitizations prior to establishment of the TALF program) of the original balance of such assets or liabilities.

such subscription date and subsequent to the immediately preceding CMBS subscription date (or, in the case of the CMBS subscription date in July 2009, subsequent to July 2, 2009). The New York Fed must receive a copy of the sales confirmation[8] for the TALF borrower's purchase. Sellers and purchasers of Legacy CMBS will need to consider whether a "secondary market transaction" includes the sale of registered Legacy CMBS originally acquired by the seller while acting as an underwriter in connection with the initial public offering of such CMBS. With respect to Newly Issued CMBS, however, the New York Fed has confirmed that the TALF borrower need not own the CMBS on the subscription date (but it must inform the primary dealer by the subscription date of the CUSIP of the CMBS it intends to deliver as collateral on the loan settlement date).

TALF Loan Amounts for Legacy CMBS. The New York Fed has set the maximum size of a TALF loan secured by a Legacy CMBS at an amount (not less than zero) equal to the "applicable price" (as described below under "Pricing-Validation, Valuation and Determination") of such Legacy CMBS, less the base dollar haircut for such Legacy CMBS.[9] The base dollar haircut for each Legacy CMBS with an average life of five years or less will be 15% of par. For Legacy CMBS with average lives beyond five years, base dollar haircuts will increase by one percentage point of par for each additional year (or portion thereof) of average life beyond five years.

Pricing-Validation, Valuation and Determination. For purposes of determining the TALF loan amount, the "applicable price" of any Legacy CMBS is the least of (a) the dollar purchase price of the CMBS on the trade date (as set forth in the applicable sales confirmation), (b) the market price of the CMBS as of the subscription date (as determined by the New York Fed) and (c) the par amount of the CMBS.

The New York Fed has said that it will, with the assistance of one or more of its agents, determine the market price of a Legacy CMBS as of the subscription date on the basis of information provided by pricing services, unless that information is determined by the New York Fed and its agents not to be representative of market conditions prevailing at that time. The New York Fed has also stated that if the pricing information with respect to a Legacy CMBS is not available, or if the pricing information is determined not to be representative of market conditions, then the New York Fed, through its agents, will use reasonable efforts to secure price quotations from at least three broker-dealers, and the market price will be the arithmetic average of the broker quotations received. If the New York Fed and its agents are unable to obtain these quotations, or if it is determined that one or more of the quotations may not accurately reflect the market price of such Legacy CMBS, then the market price will be determined by the New York Fed and its agents.

In order to validate the reasonableness of the price of any secondary market transaction, the New York Fed or one of its agents will compare (a) the price reflected on the sales confirmation for the subject transaction to (b) various market data with respect to the existing market prices on the date of the subject transaction (*i.e.*, the trade date). The New York Fed has stated that it will reject a loan request with respect to a Legacy CMBS with a purchase price that does not reflect then-prevailing market prices. In connection with the foregoing, the MLSA has been modified to include several representations and warranties from the applicable TALF borrower aimed at establishing that such TALF borrower did not receive, and is not entitled to receive, any other rights, benefits or consideration for acquiring any Legacy CMBS pledged as collateral for a TALF loan.

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[8] The New York Fed has previously stated that either Rule 10b-10 confirmations or other written sales confirmations, including e-mail confirmations that contain the required pricing information and are customarily provided by many broker-dealers prior to mailing of a Rule 10b-10 confirmation, will be acceptable.

[9] For Newly Issued CMBS, the New York Fed will lend an amount equal to the lesser of par and market value of the pledged CMBS, in each case minus the haircut. Alternatively, if the pledged Newly Issued CMBS has a market value above par, the New York Fed will lend an amount equal to the market value — subject to a cap of 110% of par — minus the haircut, and the borrower will be required to periodically prepay a portion of the loan in a manner calculated to adjust for the expected reversion of market value toward par value as the CMBS matures (pursuant to a formula set forth in the TALF FAQs).

The New York Fed will utilize the services of one or more of its agents to perform a valuation of each legacy CMBS under various stress scenarios (presumably Trepp), and it may reject a TALF loan request if the requested TALF loan amount is greater than the stress valuation.

Weighted Average Life. The New York Fed has clarified that the average life of a Legacy CMBS, as well as the average life of a Newly Issued CMBS,[10] cannot be more than ten years. The New York Fed has also clarified that: (a) the weighted average life of any CMBS is based on the assumption that each underlying mortgage loan amortizes according to its amortization schedule and pays in full on its maturity date, without prepayment; and (b) the weighted average life of a Legacy CMBS will be calculated on the basis of:

(i) the current composition of the underlying mortgage pool, as reflected in recent servicer and trustee reports;

(ii) the entitlement of the Legacy CMBS to distributions (including, if applicable, its position in a time-tranched sequence of classes);

(ii) the assumption that “anticipated repayment dates” are maturity dates; and

(iv) a 0% CPR and the absence of future defaults.

For purposes of calculating the weighted average life of a Legacy CMBS, loans in default or special servicing will be considered as if they had not defaulted, and previously-modified loans will be considered according to their terms as modified.

The New York Fed has not assumed the occurrence of any defaults for purposes of calculating the weighted average life of a Legacy CMBS, as it previously suggested it might. The New York Fed’s calculation of the weighted average life of a Legacy CMBS does, however, draw into question how to treat mortgage loans that have passed the related maturity date and are in default, or have passed any related “anticipated repayment date.” Based on the assumptions above, and provided that the New York Fed does not reject the subject Legacy CMBS as collateral, it would appear appropriate to treat such mortgage loans as if they immediately repay. Ironically, this would shorten the weighted average life, and potentially reduce the base dollar haircut, for the subject Legacy CMBS.

Depletion of Credit Support May Trigger Application of Cash Flow on the CMBS to the Prepayment of the Borrower’s TALF Loan Obligations. The New York Fed has provided that in the event there is a depletion of credit support for any CMBS pledged as collateral for a TALF loan, then all cash flow received on such CMBS, while such depletion of credit support exists, must be applied to the payment of the accrued interest on and outstanding principal amount of the TALF loan. Depletion of credit support will be deemed to exist if (and for as long as) the aggregate outstanding principal balance of the classes of securities that provide credit support

[10] The New York Fed has confirmed that, with respect to a Newly Issued CMBS that is pledged subsequent to its issuance date, the following formulas will be used to calculate the weighted average life of such CMBS:

Adjusted Average Life for bullet maturities = Original Average Life - [1 X ((Upcoming TALF Loan Closing Date - Original Closing Date of Security)/360)]

Adjusted Average Life for amortizing assets = Original Average Life - [1/2 X ((Upcoming TALF Loan Closing Date - Original Closing Date of Security)/360)]

The original average life for Newly Issued CMBS, however, is the average life reported in the final offering document.

to such CMBS, minus the aggregate amount of "appraisal reduction amounts" in effect with respect to the assets that back such CMBS, is less than or equal to zero.

Rating Requirements for Legacy CMBS. The New York Fed changed the date as of which a Legacy CMBS must satisfy the TALF eligibility rating requirements from the related TALF loan closing date to the related TALF loan subscription date. If a Legacy CMBS is downgraded, or placed on review or watch for downgrade, after the subscription date for a TALF loan with respect to such Legacy CMBS, the Legacy CMBS will not lose its status as eligible collateral for the relevant loan request solely for that reason. The date as of which a Newly Issued CMBS must satisfy the TALF eligibility rating requirements remains the TALF loan closing date.

No More than One CMBS Pledged as Collateral for a Single TALF Loan. The New York Fed has decided that a TALF borrower may pledge only a single eligible CMBS (*i.e.*, eligible CMBS with the same CUSIP) as collateral for a single TALF loan.

Further Due Diligence. The New York Fed has stated that it will conduct due diligence on the major participants in CMBS transactions, including issuers, loan sellers, and sponsors of mortgage borrowers, and has reserved the right to reject any CMBS based on its assessment of fraud exposure or other risks.

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