The Dirt on TALF—The Expansion of TALF to Commercial Mortgage-Backed Securities

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The Federal Reserve Bank of New York's Term Asset-Backed Securities Loan Facility, or TALF, began making loans in March 2009 with the stated goal of ensuring that credit continues to flow to households and businesses by providing non-recourse financing to borrowers owning eligible non-mortgage asset-backed securities.[1] The scope of TALF has recently been expanded to provide non-recourse financing for owners of commercial mortgage-backed securities[2]

The ongoing financial crisis has witnessed a significant decline in the new issuance of, and secondary market for, asset-backed securities including securities backed by auto loans, credit loans and student loans (''ABS'').[3] Sales of securities backed by auto loans, credit cards and student loans plunged 42 percent in 2008.[4] As a response to this collapse, in November 2008, the Federal Reserve Board established the Term Asset-Backed Securities Loan Facility (''TALF'').[5] TALF was initially designed to provide $200 billion in non-recourse financing by the Federal Reserve Bank of New York (''FRBNY'') to eligible borrowers owning eligible ABS. On February 10, 2009, the Treasury announced that, under the Financial Stability Plan, TALF would be expanded to provide up to $1 trillion in financing.[6]

At the same time, the new issuance of, and secondary market for, commercial mortgage-backed securities (''CMBS'') has likewise been decimated. In fact, sales of CMBS plummeted to $12.2 billion last year, compared with a record $237 billion in 2007, and as of mid-June no new CMBS has been issued this year.[7] In response, on May 1, 2009, the FRBNY announced that, beginning in June 2009, certain CMBS would be eligible for TALF funding.[8] As discussed below, eligible CMBS will be required to have a high credit rating and will include both newly-issued CMBS and securities that were issued prior to January 1, 2009. However, there is a short time limit to this program as the FRBNY will cease making TALF loans on December 31, 2009, unless the program is extended by the Board of Governors.[9]

General Requirements

While the TALF program has established some distinct requirements for CMBS loans that are different or in addition to the requirements for ABS loans, much of the over-arching structure of the program applies across both asset classes. Such general requirements are discussed below.

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Eligible Borrowers

In all cases, each eligible borrower must, for the duration of the TALF loan, be (1) a company organized in the United States that conducts significant operations or activities in the United States, (2) an investment fund organized in the United States and managed by an investment manager with its principal place of business in the United States, (3) a U.S. insured depository institution or (4) a qualifying branch or agency of a foreign bank. A borrower's eligibility is determined based on the eligibility criteria effective at the time the TALF loan is made. Also, for purposes of borrower eligibility, an investment fund is a pooled investment vehicle, a private equity fund, a mutual fund or other vehicle that invests primarily or exclusively in eligible collateral and borrows under the TALF. An eligible borrower may be a newly-formed company and may have a non-U.S. parent company, but in the case of any entity of the type described in clause (1) or (2), it may not be controlled by, or managed by an investment manager that is controlled by, a foreign government.[10]

For purposes of determining a borrower's eligibility, the FRBNY has said that it will consider an entity to be controlled by a foreign government if, among other things, a foreign government owns, controls, or holds the power to vote 25 percent or more of a class of voting securities, or total equity, of such entity.[11] If a borrower fails to meet the eligibility criteria at any time it has a TALF loan outstanding, the FRBNY will have full recourse against the borrower for such loan, and the interest rate on the loan will increase by 200 basis points.[12] Given such consequences for failing to maintain eligibility, borrowers, and investors in borrower entities, will want to take steps to ensure that the eligibility criteria will be met continuously during the relevant period.

Pre-Certification

The FRBNY has developed a pre-certification process for a subset of potential TALF borrowers that are ''top-tier'' U.S. financial entities. For this purpose, financial entities are limited to U.S.-based depository institutions, U.S. branches or agencies of foreign banks, U.S. public pension funds, U.S. university or college endowment funds, U.S.-based hedge funds, U.S.-based private equity firms, U.S.-based mutual funds and U.S. insurance companies. The process is designed to enhance certainty of receiving TALF funds for such entities, although the FRBNY reserves the right to withhold funding in exceptional cases, even for those entities that are pre-certified. A request for pre-certification may be made by a primary dealer if it believes that a potential borrower qualifies for pre-certification. To be pre-certified, a potential borrower must satisfy certain conditions including completion of know-your-customer procedures with the primary dealer and qualification as an industry leader or ranking among the largest entities or operators in a field.[13] Pre-certification will remain valid through December 31, 2009. Potential borrowers who are not eligible for pre-certification may still receive TALF funds.[14]

Primary Dealers

To borrow under the TALF program, an eligible borrower must maintain a relationship with a primary dealer. As of July 8, 2009, approved primary dealers for the TALF program are: BNP Paribas Securities Corp., Banc of America Securities, LLC, Barclays Capital, Inc., Cantor Fitzgerald & Co., Citigroup Global Markets, Inc., Credit Suisse Securities (USA), LLC, Daiwa Securities America, Inc., Deutsche Bank Securities, Inc., Goldman, Sachs & Co., HSBC Securities (USA), Inc., Jefferies & Company, Inc., J.P. Morgan Securities, Inc., Mizuho Securities USA, Inc., Morgan Stanley & Co., Inc., RBC Capital Markets Corp., RBS Securities, Inc., and UBS Securities, LLC.[15] Primary dealers act as agents for eligible borrowers requesting loans under TALF and enter into a Master Loan and Security Agreement (''Master Agreement'') with the FRBNY on such borrowers' behalf. All lender-borrower transactions relating to TALF loans, including payments, must be handled through the primary dealer representing the borrower. Borrowers should be aware that they will bear the risk of insolvency of the primary dealer for any funds held on their behalf by a primary dealer. A borrower may work through more than one primary dealer, so long as all aspects of each individual TALF loan are handled by a single primary dealer. Each primary dealer has its own form of Customer Agreement which will be negotiated and executed by a TALF borrower on a case-by-case basis.[16] Such Customer Agreement may include additional provisions not included in the Master Agreement and unique to each primary dealer. For a TALF borrower that is a newly created special purpose vehicle, a primary dealer may require a guarantee of the borrower's obligations under such primary dealer's Customer Agreement (i.e. not the Master Agreement) from another entity.

Disclosures

All borrowers across asset classes are subject to certain disclosure obligations. Under a Master Agreement, to the extent related to its loans, collateral and other obligations under the TALF documents, a borrower must provide any reports or statements that the FRBNY reasonably requests and permit the FRBNY's designees to visit the borrower, audit and inspect the borrower's financial records, make extracts and copies of such records and discuss the borrower's affairs, finances and condition with the borrower's officers, directors, employees and accountants. It should be noted that the FRBNY's inquiries could relate to the borrower's eligibility, which may include information on the direct and indirect owners of the borrower.[17]

Borrower Equity and Loan Term

Eligible borrowers may borrow TALF loans based on the lesser of the par or market value of the collateral

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pledged minus an applicable margin or ''haircut percentage'' based on the asset class and the expected life of the collateral. A discussion of the ''haircut percentage,'' including an example calculation, is found below in the overview of legacy CMBS Loan Terms.

The FRBNY has published CMBS (and non-CMBS) margin schedules in the Governing Documents[18] of the TALF loan program.[19] CMBS margins range from 15-20 percent, and non-CMBS margins range, generally, from five to 16 percent, with increases for ABS with average lives beyond five years. Each TALF loan must be at least $10 million in principal amount, but there is no maximum requested amount. In general, a borrower may pledge TALF-eligible collateral in its portfolio, or it may purchase TALF-eligible collateral contemporaneously with borrowing TALF funds. Three year maturities apply to auto loans, credit card loans, equipment loans, floorplan loans, servicing advance receivables, and insurance premium finance loans. Three or five year maturities, at the borrower's election, apply to student loans, Small Business Administration (''SBA'') pool certificates, SBA development company participation certificates and CMBS. Substitutions of pledged collateral will not be permitted.[20]

Allocation of Collateral Payments and Satisfaction

Payments of interest in respect of the collateral will be applied first to pay interest on the TALF loan and then applied to amortize principal on the TALF loan or to the borrower. To the extent that interest received in respect of the collateral exceeds the interest due on the loan, the difference will be remitted to the primary dealer for the account of the borrower; provided, however, in the case of five-year TALF loans, excess interest will be remitted to the borrower subject to certain caps, with the remainder applied to the TALF loan principal. In the first three years of a TALF loan, excess interest remitted to the borrower will be capped at 25 percent of the haircut amount paid upon subscription, which cap is reduced to 10 percent in the fourth year and five percent in the fifth year.[21]

Principal payments in respect of the collateral will be prorated on the basis of the loan-to-value percentage applicable to the particular loan (e.g., if the applicable haircut percentage for the pledged collateral is five percent, then five percent of the principal payment will be disbursed to the borrower and the remainder to FRBNY); provided, however, if interest expense on a TALF loan for that month is greater than interest received on the underlying assets, the borrower's portion of any principal payment may be used to cover the interest expense deficiency.[22]

If the payments on the collateral are insufficient to pay the debt service requirements on the loan and the borrower does not make up the shortfall, the lender will have the right to foreclose on the collateral after a 30-day grace period. In the event that the proceeds of the foreclosure are sufficient to pay all of the obligations owing to the lender in respect of the loan, the remaining amount will be remitted to the primary dealer for the account of the borrower.[23]

If the collateral does not mature at or before the maturity date of the loan, the borrower will have the right at TALF loan maturity either to repay the loan in full and recover the collateral or to arrange for the sale of the collateral at a price sufficient to repay the loan in full and recover any difference between the sale proceeds and the loan obligation. If it turns out that the value of the collateral is insufficient at the maturity of the loan to pay the loan in full, the borrower either may surrender to the lender all of the borrower's interest in the collateral in full satisfaction of the loan (excluding any recourse obligations) or may assume full recourse liability for the loan.[24]

Prepayment

A borrower may prepay its TALF loans without premium at any time other than a window of time beginning on the 15th of each month and continuing for three business days thereafter. The borrower must deliver a prepayment notice to the FRBNY through the applicable primary dealer at least four days prior to prepayment, and the applicable Customer Agreement may impose additional timing requirements.[25]

Transfer of Loans

A borrower will be permitted to transfer all of its obligations under a loan and the associated collateral only with the consent of the FRBNY. It is unclear, however, whether a partial transfer of collateral and the related loan amount could be effected. The FRBNY may withhold or delay consent in its sole discretion and will not consent to any such transfers after December 31, 2009, unless that date is extended, provided, however, that the Master Agreement states that such consent may be given after the termination of the TALF program if unusual or exigent circumstances exist in the financial markets.[26]

Recourse

The FRBNY (or its transferee) will have full recourse against a borrower: (1) for all obligations with respect to a loan, if the borrower fails to be an eligible borrower at any time the loan is outstanding, based on the eligibility criteria in effect when the loan is made; (2) to the extent that obligations with respect to a loan arose from the inaccuracy of certain representations, including representations about the eligibility of the borrower, the eligibility of the collateral (to the borrower's knowledge based on its review of the offering materials), the enforceability of the loan documents against the borrower, authorization of the applicable primary dealer and the absence of adverse claims or liens on the collateral; (3) for the amortization of premium on loans where the value assigned to the collateral exceeds its par amount; (4) for all obligations with respect to a loan not paid in full at maturity, unless the borrower exercises its right to surrender collateral at maturity in satisfaction of the loan in accordance with the Master Agreement; and (5) to the extent that any interest or principal payments on the underlying collateral are erroneously credited to the borrower's account and later reversed. In addition, during any period that a TALF loan is with recourse (other than recourse liability for amortization payments described in item 3 above), an additional 200 basis points of interest will accrue.[27]

Loan Mechanics

The mechanics of a typical TALF borrowing operation will proceed in the following manner, except that TALF loans secured by legacy CMBS will not include a new issuance of securities in connection with the borrowing. First, the FRBNY publishes the subscription date on the TALF Website.[28] Second, eligible borrowers request, through one or more primary dealers, one or more fixed-rate or floating-rate loans per month in a minimum amount of $10 million per loan and up to the value of the pledged underlying securities minus the applicable margin. For underlying securities issuances to occur contemporaneously with a TALF borrowing, the borrower identifies the counterparty that will deliver the underlying securities on the loan settlement date. Third, the primary dealers collect the eligible borrowers' requested loan amounts, interest rate elections and the CUSIPs and offering documents for the eligible underlying securities to be delivered and pledged as security for the loans (the offering documents submitted on the subscription date may be preliminary, but the final offering documents must be delivered to The Bank of New York Mellon (''BNYM'') at least four days prior to the settlement date). On the subscription date, each primary dealer submits such information to the FRBNY, which provides such information to its custodial agent, BNYM. Once submitted, a borrower's request may be adjusted only to reflect a reduction in its allocation of an underlying securities issue. Fourth, by 5:00 p.m. on the fourth business day (or in the case of a loan to be secured by legacy CMBS, the fifth business day) prior to the loan settlement date, each primary dealer delivers to BNYM sales confirmations for any collateral to be acquired by the borrower contemporaneously with the loan settlement date and final offering documents, if not previously provided. If a borrower's allocation of a securities issue has been reduced, the applicable primary dealer may submit a revised loan request to reflect such reduction. Fifth, by 5:00 p.m. on the third business day prior to the loan settlement date, BNYM delivers schedules to the primary dealers of the collateral expected to be delivered, including the value thereof and the applicable haircut amount. Sixth, two business days before the loan settlement date, BNYM sends confirmations to the primary dealers with the borrowers' loan amounts, the interest rate applicable thereto, the collateral to be accepted, as well as the administrative fees and margins payable on the settlement date. Seventh, in the case of legacy CMBS or previously acquired ABS, on the settlement date, the primary dealer delivers the collateral and any administrative fees to a settlement account at BNYM — the loan amount should then be remitted to the borrower. In the case where the underlying securities are being newly issued on the settlement date, the borrower remits payment of the margin and administrative fees through the primary dealer to the custodian's settlement account, which, with the addition of the loan amount, is used to fund the acquisition of the securities. Note that if the primary dealer is also the counterparty for the delivery of the newly issued securities, the primary dealer may settle the security issue and deliver the collateral and payments to the custodian. In general, if a borrower fails to deliver pledged underlying securities reflected in its loan request, that portion of the loan attributable to such underlying securities is cancelled. In such cases, the borrower may not receive a refund of any portion of the administrative fee. Finally, within one business day following the loan settlement date, BNYM sends final confirmations to the primary dealers reflecting the loans disbursed and collateral accepted.[29]

Guidelines for Newly-Issued CMBS

The aforementioned expansion of the TALF loan program to include CMBS collateral will adhere to most of the general TALF requirements, with some exceptions and requirements applicable solely to newly-issued CMBS.

Eligible Collateral

Eligible newly-issued CMBS collateral for TALF loans, at the time the TALF loan is made, must be non-synthetic CMBS issued on or after January 1, 2009, meeting the following criteria: (1) rated in the highest long-term investment-grade rating category from at least two TALF CMBS-eligible rating agencies (''CMBS Rating Agencies'')[30] and not rated below the highest investment-grade rating category by any CMBS Rating Agency; (2) applicable credit ratings may not be based on a third-party guarantee; (3) none of the CMBS may be on review or watch for downgrade by a CMBS Rating Agency; (4) the CMBS issuer may not be an agency or instrumentality of the United States or a government-sponsored enterprise; (5) the CMBS must not have an average life of more than ten years; (6) the CMBS must not have a redemption option (other than pursuant to a customary clean-up call) unless the FRBNY has accepted such redemption option; and (7) the agreements governing the issuance of the CMBS must contain certain additional provisions, as set forth in the TALF Governing Documents.[31]

Underlying Loans

The TALF Governing Documents also set forth the following criteria relating to the mortgage loans underlying the newly-issued CMBS assets: (1) CMBS

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must represent trust fund interests in fully-funded, first priority mortgage loans originated on or after July 1, 2008, and currently in payment; (2) at least 95 percent of the underlying mortgage loans must have been originated by entities or institutions organized in the United States or by U.S. branches or agencies of foreign banks; (3) the properties securing the underlying mortgage loans must be income-generating commercial properties located in the United States (including its territories); (4) the underlying mortgage loans must be fixed-rate loans and may not permit interest-only or principal-only payments during their remaining terms; and (5) the underlying mortgage loans must have been underwritten or re-underwritten close in time to the securitization, generally on the basis of then-current in-place, stabilized and recurring net operating income and then-current property appraisals.[32]

Additional Terms

In addition, the FRBNY requires TALF borrowers to agree not to exercise any voting, consent or waiver rights with respect to pledged CMBS without its consent.[33] Furthermore, 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 the CMBS unless that loan, and each other mortgage loan in the CMBS mortgage pool made to such TALF borrower or an affiliate of such TALF borrower, together constitute no more than five percent of the aggregate principal balance of the mortgage loans in the pool as of the subscription date.[34]

The FRBNY has adopted several risk-mitigating provisions for newly issued CMBS that are to be included in the TALF program. A collateral manager engaged by the FRBNY will review loans to be pooled, and the FRBNY may exclude specific loans from a pool. In addition, the FRBNY may reject any CMBS from eligibility as collateral based on a risk assessment. The FRBNY has stated that it expects agreements associated with the issuance and servicing of CMBS collateral to provide for reporting sufficient for the FRBNY to perform its monitoring function.[35] Sponsors of newly-issued CMBS will be required to have a nationally recognized certified public accounting firm registered with the Public Company Accounting Oversight Board provide assurance that the CMBS is TALF-eligible.[36]

Guidelines for Legacy CMBS

As previously mentioned, the FRBNY recently announced that, beginning on July 16, funds from TALF may be used to finance the acquisition of certain CMBS issued before January 1, 2009 (''legacy CMBS'').[37] The subscription and settlement cycle for all CMBS will occur in the latter part of each month, whereas the cycle for non-CMBS TALF asset classes will remain in the first half of the month. The FRBNY's goal is that this expansion of TALF will create a market for legacy CMBS and stimulate the extension of new credit by easing balance sheet pressures on banks and other financial institutions currently holding CMBS.[38]

Eligible Collateral

To qualify as legacy CMBS eligible under TALF, each CMBS must meet certain criteria, including issuance before January 1, 2009, a current credit rating in the highest long-term investment-grade rating category from two qualifying rating agencies, and 95 percent of the principal balance of the legacy CMBS loans must be secured by interests in properties located in the U.S. Also, each legacy CMBS must evidence an interest in a trust fund consisting of fully-funded mortgage loans and generally not other CMBS, other securities or interest rate swap or cap instruments or other hedging instruments, and qualifying legacy CMBS must not have been junior to other securities with claims on the same pool of loans.[39] A TALF borrower cannot exercise any voting, consent or waiver rights under a legacy CMBS without the FRBNY's consent.[40]

Loan Terms

The maximum size of a TALF loan secured by a legacy CMBS will be the lesser of the dollar purchase price on the trade date or the market price of the legacy CMBS on the subscription date minus a required equity contribution from the borrower equal to a minimum of 15 percent of par. Required equity from borrowers increases by one percentage point of par for each year of average life of the legacy CMBS beyond five years. For example, assuming a legacy CMBS with a par value of 100 and a seven-year weighted average life, with a required equity contribution of 17 percent of par, then: (1) if the applicable price is 75 percent of par, the loan amount is 58 (75-17) and the required equity from the borrower is 23 percent (17/75) of the applicable price; and (2) if the applicable price is 50 percent of par, the loan amount is 33 (50-17) and the required equity contribution from the borrower is 34 percent (17/50) of the applicable price.[41] Similar to other TALF loans the minimum loan amount under TALF for legacy CMBS generally is $10 million.[42] Each TALF loan secured by a legacy CMBS will have a three or five-year maturity at the election of the borrower.[43] Three-year TALF loans will bear interest at a fixed annual rate equal to 100 basis points over the three-year Libor swap rate. Five-year TALF loans will bear interest at a fixed annual rate equal to 100 basis points over the five-year Libor swap rate.[44] Any remittance of principal on the legacy CMBS must be used immediately to reduce the principal amount of the TALF loan in proportion to the equity contributed by the borrower.[45]

Pricing

TALF loans for legacy CMBS will be required to fund recent secondary transactions between unaffiliated parties that are executed at an arm's length basis

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at prevailing market prices.[46] A sales confirmation for the borrower's purchase must be submitted to the FRBNY.[47] During the process to validate the purchase price, the FRBNY will compare the price reflected on the sales confirmation with existing market prices on the transaction date. A loan request for legacy CMBS with a purchase price that does not reflect then-prevailing market prices will be rejected.

For purposes of determining the loan amount, the applicable price of the CMBS will be the lesser of the purchase price on the trade date or the market price as of the loan subscription date. The FRBNY, with assistance from one or more of its agents, will look at pricing services in order to obtain a prevailing market price. If that information is not available, the FRBNY will use the average price of estimates given by three broker-dealers. If these estimates are unobtainable, the FRBNY may determine the market price itself. Also, the FRBNY will use one or more of its agents to value the legacy CMBS under a stress scenario and reserves the right to reject an application if the requested loan amount is greater than a stress valuation.[48]

So that acquisition prices reflect arm's-length transactions, for the initial July 16, 2009 subscription, the trade date for the borrower's agreement to purchase the legacy CMBS must be after July 2, 2009. Going forward, the transaction must occur after the prior month's legacy CMBS subscription date and settle before the current month's subscription date.[49]

Additional Considerations

In assessing the risk to the FRBNY as lender, the FRBNY has engaged a collateral monitor and will pay attention to myriad factors to determine the quality of the underlying CMBS mortgage pool including anticipated performance of the pool under stress. The collateral monitor will also assist the New York Fed by providing valuation, modeling, analytics and reporting, as well as advising on these matters. The FRBNY will retain the right to reject any legacy CMBS as TALF loan collateral based on the FRBNY's risk assessment. In general, the established terms and underwriting requirements of the TALF program are expected to apply to legacy CMBS loans unless specifically stated otherwise.[50]

Finally, it must be noted that the FRBNY may limit the volume of TALF loans secured by legacy CMBS, and is considering whether to allocate such volume via an auction or other procedure for legacy CMBS.[51]

Areas of Continuing Uncertainty

Whether the expanded TALF program will ultimately achieve its goal to prime the pump of the CMBS market is yet to be determined. In its first and second subscription periods under the TALF program in June and July, no loans were issued in connection with newly issued CMBS. However, approximately $669 million in legacy CMBS TALF loans were requested at the July 16th subscription period.[52] For perspective, the ABS side of TALF has achieved relative success — ABS loans under TALF total approximately $33.9 billion since the initial subscription period in March of 2009 with a monthly peak of $11.5 billion in June. In any event, as the FRBNY implements TALF there continues to be a tension between the often inconsistent objectives of attracting investors and minimizing any potential burden on the U.S. taxpayer.[53] This tension is a theme that runs through some important issues affecting the TALF program. Some remaining areas of uncertainty on how the TALF program will apply with respect to CMBS are discussed below.

First, there is some doubt as to how long the TALF program will last. The Governing Documents say that the FRBNY will cease making TALF loans on December 31, 2009, unless the program is extended by the Board of Governors.[54] However, the fact that the initial non-CMBS TALF loans took a few months to achieve significant loan request numbers, coupled with the continued lack of new issuances in the CMBS market, leads some observers to believe that the Board of Governors will need to extend the TALF program if it is to have any real effect in the commercial real estate market.

Secondly, because of the fact that the Treasury is involved in the TALF program, there is some concern that the TARP executive compensation restrictions will apply to TALF participants. The FRBNY has said in the TALF Governing Documents that ''[g]iven the goals of the TALF and the desire to encourage market participants to stimulate credit formation and utilize the facility, the restrictions will not be applied to TALF sponsors, underwriters, and borrowers as a result of their participation in TALF.''[55] Investors may also have general concerns about the FRBNY's ability to change the terms of the program, even retroactively. As, William C. Dudley, President and Chief Executive of the FRBNY, acknowledged, fears of private investors will inevitably lead to an underutilization of TALF and, in turn, could chill participation in the program. But Dudley stands by the FRBNY's assertion that these fears are misplaced.[56]

A third issue of concern is attempting to understand how recent, and future, downgrades of CMBS will affect TALF. That is, if all of the legacy CMBS are downgraded below TALF eligibility levels, what affect will that have on the program's future? This issue is especially relevant in light of the fact that Standard & Poor's announced on June 26, 2009 that they have refined their CMBS rating criteria which will likely lead to the downgrading of many legacy CMBS. Although the FRBNY has been silent on this potential issue as of the submission deadline for this publication, some commentators have envisioned that TALF will need to adapt in order to remain effective. Some have speculated that the FRBNY will lower the eligibility thresholds to include legacy CMBS which were previously AAA-rated, or, in the alternative, that the TALF

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would accept restructured CMBS.[57] Also, some have speculated that the FRBNY will provide a list of eligible CMBS collateral rather than a standard, which critics say would undermine the TALF's goal to stimulate a bona fide market for the CMBS — i.e. investors will only buy CMBS because it is on the list.[58]

The significant question implicated by the issues identified above is will enough private investors participate to allow TALF to achieve its CMBS goals? If the roll-out of the non-CMBS TALF loans in the Spring of 2009 is any indicator, the CMBS program will require time to gather momentum. The commercial real estate credit market currently must overcome obstacles not faced — or not faced as directly — by other credit markets, such as downgraded ratings of CMBS, decreasing valuations of underlying properties, and direct pressure on operating income resulting from the overall financial crisis. The next few months should provide an answer to this question and give insight into what course FRBNY, utilizing the TALF program, might follow to try to revive the CMBS market.

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[1] William C. Dudley, ''A Preliminary Assessment of the TALF'', http://www.newyorkfed.org/newsevents/speeches/2009/dud090604.html, June 4, 2009.

[2] Due to the fact that the FRBNY has been constantly updating the Governing Documents, it is important to note that all information is current up to July 8, 2009.

[3] Board of Governor's of the Federal Reserve System, ''Press Release,'' http://www.federalreserve.gov/newsevents/press/monetary/20090519b.htm (May 19, 2009).

[4] Sarah Mulholland, ''Harley-Davidson, Bank of America Market Debt for Fed's TALF,'' Bloomber.com, http://www.bloomberg.com/apps/news?pid=20601208&sid=aUsbBHbz8mPQ (July 6, 2009).

[5] Board of Governor's of the Federal Reserve System, ''Press Release,'' http://www.federalreserve.gov/newsevents/press/monetary/20081125a.htm (November 25, 2008).

[6] Board of Governor's of the Federal Reserve System, ''Press Release,'' http://www.federalreserve.gov/newsevents/press/monetary/20090210b.htm (February 10, 2009).

[7] Scott Lanman, ''Fed's Commercial Real Estate Aid May Have Few Deals for Start,'' Bloomberg.com, http://www.bloomberg.com/apps/news?pid=email_en&sid=anQhJYJAs3qA (June 16, 2009).

[8] Board of Governor's of the Federal Reserve System, ''Press Release,'' http://www.federalreserve.gov/newsevents/press/monetary/20090501a.htm (May 1, 2009).

[9] TALF: Frequently Asked Questions (effective July 2, 2009).

[10] TALF: Terms and Conditions (effective July 2, 2009).

[11] TALF: Frequently Asked Questions (effective July 2, 2009).

[12] Sections 4.1 and 17.1, Master Loan and Security Agreement (Revised as of July 2, 2009)

[13] TALF Pre-Certification Process, http://www.newyorkfed.org/markets/TALF_PreCertification_Process.pdf.

[14] TALF Pre-Certification Process, http://www.newyorkfed.org/markets/TALF_PreCertification_Process.pdf

[15] Primary Dealers List, http://www.ny.frb.org/markets/pridealers_current.html (July 8, 2009).

[16] TALF: Frequently Asked Questions (effective July 2, 2009).

[17] Section 11, Master Loan and Security Agreement (Revised as of July 2, 2009).

[18] The Governing Documents include the Master Loan and Security Agreement, TALF: Frequently Asked Questions, TALF: Terms and Conditions, TALF (Legacy CMBS): Frequently Asked Questions, TALF (Legacy CMBS): Terms and Conditions and all other documents found at http://www.newyorkfed.org/markets/talf_docs.html.

[19] TALF: Frequently Asked Questions (effective July 2, 2009).

[20] TALF: Frequently Asked Questions (effective July 2, 2009).

[21] Section 4.3, Master Loan and Security Agreement (Revised as of July 2, 2009).

[22] Section 5, Master Loan and Security Agreement (Revised as of July 2, 2009).

[23] TALF: Frequently Asked Questions (effective July 2, 2009).

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[26] Section 19, Master Loan and Security Agreement (Revised as of July 2, 2009).

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[30] FRBNY recognizes DBRS, Inc., Fitch Ratings, Moody's Investors Service, Realpoint LLC and Standard & Poor's as CMBS Ratings Agencies.

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[55] TALF: Frequently Asked Questions (effective July 2, 2009).

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