CMBS COME TO TALF

On May 1, 2009, the Federal Reserve Bank of New York ("FRBNY") announced an expansion of the Term Asset-Backed Securities Loan Facility ("TALF") to include recently issued commercial mortgage-backed pass-through securities ("CMBS") as eligible collateral. The first TALF CMBS subscription and settlement will occur in late June, with a recurring monthly subscription cycle.

Characteristics of CMBS Eligible Collateral

TALF-eligible CMBS must:

- have been issued on or after January 1, 2009;
- have a credit rating without credit enhancement in the highest long-term investment-grade rating category from an as yet unspecified number of CMBS-eligible rating agencies (as yet identified) and not have a credit rating below the highest long-term investment-grade rating category from any CMBS-eligible rating agency;
- entitle its holders to payments of principal and interest (i.e. must not be an interest-only or principal-only security) and must not be junior to other securities with claims on the same pool of underlying loans;
- be backed by fully-funded, first priority fixed-rate mortgage loans that were current in payment at the time of securitization and do not provide for interest-only payments during any part of the loan's remaining term;
- be secured by mortgages on income-generating commercial properties located in the United States that were originated on or after July 1, 2008 and that were underwritten on the basis of stabilized and recurring net operating income and property appraisals;
- be governed by pooling and servicing agreements containing certain restrictions regarding distributions of principal, control over the servicing of assets, post-securitization appraisals and improvements to underlying property; and
- not have been issued by an agency or instrumentality of the United States or a government-sponsored enterprise.

Characteristics of CMBS TALF Loans

In general, the existing terms and conditions for non-CMBS TALF issuances will apply to CMBS TALF transactions, with the following notable exceptions:

- Collateral pools should be well diversified (with possible case-by-case exceptions);
- The FRBNY may exclude certain individual underlying mortgage loans prior to the CMBS issuance, and may reject any otherwise-eligible CMBS TALF collateral based on its risk assessment. The FRBNY also expects to receive reports that enable it to monitor and evaluate its position as secured lender.
- A borrower may select either a three or five year maturity for its TALF Loan, which will bear interest at a fixed rate equal to 100 basis points over the 3-year or 5-year Libor swap rate, as applicable.
- The collateral haircut will be 15% for CMBS with an average life of five years or less (determined by the issuer in accordance with industry standard assumptions), increasing by 1% for each additional year. CMBS average life may not exceed 10 years.
- Principal received on the CMBS must be used to reduce the TALF Loan balance in proportion to the inverse of the initial haircut. For five-year TALF Loans, a portion of the CMBS interest received by the borrower in years four and five will be applied to reduce the TALF Loan balance, providing borrowers with an incentive to prepay the TALF Loan.
- A borrower may not exercise voting, consent or waiver rights under its CMBS without the FRBNY’s consent.
- The FRBNY is expected to announce details regarding TALF CMBS issuer/sponsor and auditor certification shortly.

Other TALF Expansions

In addition to the CMBS expansion, the FRBNY will now accept insurance premium finance ABS as eligible collateral under the existing TALF program. The FRBNY will also allow borrowers to select a five-year maturity for TALF Loans secured by SBA Pool Certificates, SBA Development Company Participation Certificates or ABS backed by student loans.

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Please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under “Banking and Financial Institutions,” “Capital Markets” or “Structured Finance” in the “Practices” section of our website (http://www.clearygottlieb.com) if you have any questions.

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