

Client Alert

Economic Crisis Response Group

MARCH 2009

[Economic Crisis
Response Group](#)[Financial Services](#)[Executive
Compensation](#)Edited by
Charles E. Dropkin

Federal Reserve Modifies TALF Terms; Extends Subscription Deadline

Deadline for Subscription Applications Extended Through March 19, 2009. On March 13, 2009, the Federal Reserve Bank of New York (“New York Fed”) extended the first application deadline for subscriptions to the Term Asset-Backed Securities Loan Facility (TALF) to Thursday, March 19, 2009 at 5 p.m. ET. The New York Fed began accepting subscription applications on March 17, 2009. The extension was requested by market participants to allow borrowers more time to complete the required documentation. Lending rates on TALF loans will be set on March 19, 2009 at 8 a.m. ET and the settlement date remains March 25, 2009. The dates for the April subscription and settlement remain unchanged.

For prior TALF client alerts please see:

[Further TALF Clarification \(March 11, 2009\)](#)

[Further TALF Developments \(March 4, 2009\)](#)

[Fed Unveils New TALF Proposals to Jumpstart Securitization \(February 13, 2009\)](#)

Revised and Updated Master Loan and Security Agreement Released. On March 11, 2009, the New York Fed released a revised Master Loan and Security Agreement (MLSA), which reflects changes made in response to ongoing negotiations between borrowers, primary dealers and the New York Fed. Changes from the prior version, released on March 3, include:

- *Five Business Day Grace Period for Certain Collateral Enforcement Events:* The revised MLSA provides for a five business day grace period (1) to remedy any failure by the borrower to perform or observe any of its obligations or agreements under the lending agreement or (2) to remove any encumbrance upon eligible collateral securing any of such borrower’s loans.
- *Elimination of Substitute Collateral Requirement:* The revised MLSA does not require a borrower to provide substitute collateral or prepay an underlying loan if the collateral securing a TALF loan is found to be, or becomes, ineligible.

- *Borrower's Representations as to Eligible Collateral:* The borrower's eligible collateral representation (that the collateral is Eligible Collateral under TALF) is now qualified by the borrower's knowledge, based on the review of the Offering Materials. This area remains potentially troublesome to borrowers, since the borrower is in effect required to "bring down" representations on the ABS from the applicable cut-off date to the date of the loan. The revised standards for borrower representations (knowledge based on the Offering Materials) may alleviate this concern, but additional guidance from the New York Fed could be helpful. Breach of this representation remains a recourse trigger to the borrower.
- *Elimination of Auditor Attestation Requirement for SBA Collateral:* The revised MLSA no longer requires a borrower to submit the standard form of Auditor Attestation and Indemnity Undertaking for SBA Collateral or Development Company Participation Certificates; rather, an SBA Collateral Undertaking must be delivered (other than with respect to Development Company Participation Certificates).
- *Refund of Administrative Fee:* The revised MLSA confirms that if a loan fails to close, the haircut amount, other closing amounts and, if all closing conditions (including delivery of the collateral) had been satisfied, the administrative fee will be refunded.
- *Eliminates Accrual of Interest on Interest Shortfalls:* The revised MLSA no longer provides for the accrual of interest on Monthly Interest Shortfall Amounts (i.e. where cash receipts from the collateral are insufficient to pay TALF loan interest).
- *Clarification of Borrower's Representation of Eligibility:* The revised MLSA clarifies that the borrower makes an Eligible Borrower representation each time it receives a loan, the accuracy of which is determined on the basis of the eligibility criteria in effect on the date such loan is made.
- *Limits Lender's Inspection Rights:* The revised MLSA clarifies that the Lender's inspection rights with respect to a borrower relate to only that borrower's loan, collateral and obligations under the MLSA.

Updated TALF FAQs Released. On Tuesday, March 17, 2009, the New York Fed released a revised set of [frequently-asked-questions \("FAQs"\)](#) related to the Term Asset-Backed Securities Loan Facility ("TALF"). The revisions are intended to provide additional clarity for the Federal Reserve's funding commitment, the responsibilities of primary dealers and their eligibility to borrow under TALF, terms applicable to variable funding notes and limitations on hedging transactions.

Funding Commitment. To enhance the certainty of TALF financing, New York Fed compliance will conduct a pre-certification review of prospective TALF borrowers in advance of the subscription date upon the request of a primary dealer.

Eligible Primary Dealers. If a borrower is deemed ineligible between the subscription date and the settlement date, the primary dealer is eligible to borrow under the TALF facility or under the Primary Dealer Credit Facility (PDCF) using the underwritten securities as

collateral subject to the existing terms and conditions for PDCF borrowing. A primary dealer is eligible to borrow under TALF provided that: (1) the amount borrowed is equal to the loan amount requested by the ineligible borrower and (2) the borrowing is not used for a transaction underwritten by the primary dealer and does not contain assets originated by the primary dealer, its affiliates, or any entities under its direct or indirect control. The primary dealer must indicate its intent to borrow upon receipt of a “Primary Dealer Receiving Notice” confirmation two days prior to settlement date.

Reasonable Care of a Primary Dealer. Primary dealers must exercise reasonable care in confirming the accuracy of the representations as to eligibility collateral. “Reasonable care” includes the review of relevant offering materials (including certifications) and independently confirming that the ratings currently applicable to the collateral (other than SBA collateral) meet the eligibility criteria.

Additional Responsibilities of Primary Dealers Acting as Underwriters. Primary dealers generally do not have responsibility for the accuracy of disclosure contained in the offering materials. The MLSA, however, imposes additional responsibilities on primary dealers acting as underwriters. Under the MLSA, a primary dealer acting as underwriter for an ABS issue will make representations as to the accuracy and completeness of the information contained in the offering materials. The goal is to impose a disclosure duty coextensive with the underwriter’s legal obligations under the federal securities laws.

Hedging; Loss Protection. A primary dealer will not be permitted to enter into any transaction with a borrower that is designed to hedge against losses specific to securities purchased with TALF financing. This prohibition does not extend to effecting hedging transactions on a borrower’s broader portfolio, which may include securities purchased with TALF loans. A primary dealer can enter into a hedging agreement with an ABS trust on market terms and conditions if it is intended solely to create a synthetic floating rate security based off of the underlying fixed rate receivables.

Issuers, sponsors and their affiliates cannot enter into a hedging transaction with a borrower to hedge an investor’s losses on ABS purchased by the borrower with TALF financing and securitized by such issuer or sponsor.

Variable Funding Notes. The updated FAQs also address various questions with respect to the treatment of variable funding notes with commitment termination dates in 2009 in the calculation of the amount of an issuer’s credit card or auto dealer floorplan ABS maturing in 2009.

Proskauer's Economic Crisis Response Group includes lawyers with extensive experience representing private and public companies, institutional investors, financial services companies, private equity and hedge funds, lenders, commercial banks and individuals in the complex and interrelated areas impacted by the current financial situation. Our multidisciplinary group brings together the talents of our business and transactional lawyers with our litigation capabilities, particularly as they pertain to acquiring, managing or disposing of distressed assets, issues concerning investments in financial services companies, complex financial instruments and transactions, including structured finance products, as well as a broad range of other areas such as corporate governance and defense, insurance coverage, reductions in force and other employment and benefit-related issues, securities regulation, and bankruptcy and restructuring matters.

If you have any questions regarding the matters discussed in this Client Alert, please contact any of the lawyers listed below:

Charles E. Dropkin

212.969.3535 – cdropkin@proskauer.com

James P. Gerkis

212.969.3135 – jgerkis@proskauer.com

Jeffrey A. Horwitz

212.969.3229 – jhorwitz@proskauer.com

Bruce L. Lieb

212.969.3320 – blieb@proskauer.com

David A. Picon

212.969.3974 – dpicon@proskauer.com

Stephen L. Ratner

212.969.3290 – sratner@proskauer.com

D. Eric Remensperger

310.284.4590 – eremensperger@proskauer.com

David W. Tegeler

617.526.9795 – dtegeler@proskauer.com

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

BOCA RATON | BOSTON | CHICAGO | HONG KONG | LONDON | LOS ANGELES | NEWARK | NEW ORLEANS | NEW YORK | PARIS | SÃO PAULO | WASHINGTON, D.C.

www.proskauer.com

© 2009 PROSKAUER ROSE LLP. All Rights Reserved. Attorney Advertising.