

Client Alert

Economic Crisis Response Group

FEBRUARY 2009

Fed Unveils New TALF Proposals To Jumpstart Securitization

The Federal Reserve Bank of New York (the “Federal Reserve”) continues to develop the Term Asset-Backed Securities Loan Facility (“TALF”), and aims to conduct a first-round (“TALF Version 1.0”) of lending under the facility in March.

The TALF’s objective is to provide financing for private entities to purchase asset-backed securities (“ABS”), hopefully unlocking currently frozen securitization markets. TALF 1.0 will apply only to securitization of automobile loans, credit card receivables, student loans and loans guaranteed by the Small Business Administration. On February 10, 2009, however, the Federal Reserve announced a substantial increase in the size and scope of the TALF to an aggregate of as much as \$1 trillion (creating “TALF Version 2.0”), and suggested a broader range of eligible collateral, potentially including commercial mortgage-backed securities and private-label residential mortgage-backed securities.

Borrower eligibility

To be eligible for TALF a borrower must be either:

- a U.S. company;
- a U.S. branch or agency of a foreign bank (other than a foreign central bank) that maintains reserves with a Federal Reserve Bank; or
- an investment fund that is U.S.-organized and managed by an investment manager that has its principal place of business in the United States.

Notwithstanding the foregoing, a U.S. company excludes any entity that is controlled by a foreign government or is managed by an investment manager controlled by a foreign government. “Controlled,” for these purposes, means owns, controls, or holds the power to vote 25 percent or more of a class of voting securities of the company.

Legal Framework

The operation of the TALF will be executed via the Federal Reserve’s primary dealers, which have been briefed on the facility and its operational detail. The Federal Reserve will not directly interface with borrowers. Each TALF borrower will execute a customer

agreement with its primary dealer, and the primary dealer will sign a Master Loan and Security Agreement with the Federal Reserve. Loan applications and disbursements will be effected through the primary dealers, which will also pre-screen ABS for eligibility as collateral.

Sponsors of “TALF-eligible” ABS will be required to include certain additional disclosure in the ABS offering documentation, including a signed certification indicating that (a) the ABS is TALF eligible, (b) an accounting firm retained by the sponsor has provided a certification that the ABS is TALF eligible, (c) the sponsor has agreed to comply with the executive compensation requirements of the TALF, and (d) the issuer and sponsor have executed an undertaking to the Federal Reserve indemnifying it from any losses it may suffer if such certifications are untrue. The forms of these certifications and the executive compensation requirements for ABS sponsors are going to be published by the Federal Reserve in the coming weeks.

Non-Recourse Features

TALF loans will be non-recourse to the borrower, except upon the breach of certain basic representations or warranties, including a borrower’s eligibility under the program, its right to pledge the collateral, or a borrower’s use of ineligible collateral that is not promptly substituted with eligible collateral upon notice to the borrower.

Lending rates and the haircut schedule

The Federal Reserve has released terms and conditions for the program, including a risk-sensitive schedule of haircuts. We understand from the Federal Reserve that the program will attempt to be responsive to new market conditions and that lending rates and haircuts will continually be adjusted to reflect the changing business environment.

One particular feature of the program is subject to refinement. According to the current terms and conditions, a borrower will be permitted only one fixed rate and one floating rate loan each month. We now understand from the Federal Reserve that it is considering permitting borrowers multiple loans so they may match loans to specific asset classes and may request loans through various primary dealers. Any changes will be announced in a frequently asked questions (“FAQ”) posting on the Federal Reserve website next week.

Eligible Collateral

To be eligible as collateral for TALF lending, ABS must have the following characteristics:

- have a credit rating in the highest long-term or short-term investment-grade rating category from two or more major nationally recognized statistical rating organizations (“NRSROs”) and not have a credit rating below the highest investment-grade rating category from a major NRSRO. (The Federal Reserve expects to release more information on which rating organizations qualify in a FAQ on the subject early next week.);

- in the case of small business ABS, be, or have only underlying credit exposures that are, fully guaranteed as to principal and interest by the full faith and credit of the U.S. government;
- have “all or substantially all” (meaning greater than 95 percent) of the underlying credit exposures be exposures to U.S.-domiciled obligors, and, in the case of credit card or auto loan ABS, have an expected life no greater than five years (Note: The Federal Reserve will give further guidance on the definition of “expected life” for other asset classes in the coming weeks.);
- have “all or substantially all” (meaning greater than 85 percent) of the dollar amount of credit exposures underlying the ABS must: For automobile loan ABS (except auto dealer floorplan ABS), have been originated on or after October 1, 2007; for student loan ABS, have had a first disbursement date on or after May 1, 2007; for SBA Pool Certificates and Development Company Participation Certificates, have been issued on or after January 1, 2008, regardless of the dates of the underlying loans or debentures; For all other eligible small business ABS, have SBA-guaranteed credit exposures originated on or after January 1, 2008; for credit card and auto dealer floorplan ABS, have been issued to refinance existing credit card and auto dealer floorplan ABS maturing in 2009 and have been issued in amounts no greater than the amount of the maturing ABS;
- be cleared through the Depository Trust Company and, except for SBA Pool Certificates or Development Company Participation Certificates, must be issued on or after January 1, 2009; and
- must not be backed by loans originated or securitized by the borrower or by an affiliate of the borrower; for this purpose, any company that controls, is controlled by, or is under common control with, the borrower (generally the ownership, control, or holding with power to vote 25 percent or more of a class of voting securities of the company).

Operational Considerations

Prior to each subscription date, each primary dealer will collect from prospective eligible borrowers the amount of each borrower’s loan request, the interest rate format desired by the borrower, the CUSIPs of the ABS the borrower expects to deliver and pledge to the New York Federal Reserve, and the prospectuses and/or offering documents of the ABS expected to be pledged. On the subscription date each primary dealer will be required to submit this information to the New York Federal Reserve’s custodial agent for review.

At least two business days before the loan settlement date, the custodian will send a confirmation to the primary dealer listing each borrower’s loan amount and the ABS expected to be delivered on the loan settlement date. The confirmation also will include the administrative fee and margin, if applicable, to be collected by the primary dealer and paid on the loan settlement date. Distributions of interest payments from collateral, net of

interest payable on the TALF loans, will be distributed to borrowers via the primary dealers on the 18th of each month.

Executive Compensation Requirement

This requirement applies only to sponsors of securitization, not to ABS investors or TALF borrowers. In order for ABS to be eligible collateral for a TALF loan, the sponsor of the securitization that issues the ABS (or the applicable entity specified in forthcoming TALF certification documents) must be in compliance with the executive compensation requirements of the TALF. The chief executive officer (“CEO”) or other authorized representative of the sponsor or other applicable entity must complete the executive compensation certification form (which is expected to be posted on the New York Federal Reserve’s website within a week) and submit it to the New York Federal Reserve before the sponsor or entity’s ABS can be offered as eligible collateral. In order to remain compliant with the executive compensation requirements, each sponsor or applicable entity must certify compliance on an annual basis. We understand from the Federal Reserve that it will maintain a list of all sponsors which have valid certification files.

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

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