

Good News for Real Estate Investors?

U.S. TREASURY BEGINS RELEASING DETAILS OF FINANCIAL STABILITY PLAN

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On February 25, 2009, the Treasury Department released the terms of the Capital Assistance Program (“CAP”). Treasury took the first step towards providing much-needed details of the “Financial Stability Plan” announced earlier by Treasury Secretary Geithner. For real estate investors, this is welcome news.

KEY ELEMENTS OF THE FINANCIAL STABILITY PLAN

Financial Stability Trust

Federal banking regulators will perform a comprehensive “stress test” to determine whether the 19 largest banks with assets in excess of \$100 Billion have the capital necessary to continue lending and to absorb the potential losses that could result from an even more severe decline in the economy than currently projected (including such assumptions as a 22% drop in home prices this year and unemployment topping 10% next year). According to the Treasury Department, the CAP will encourage banks who have undergone the “stress test” to access private capital markets to raise any additional capital needed, while at the same time establishing a Treasury provided “capital buffer” to help absorb losses and serve as a bridge to receiving increased private capital.

Public-Private Investment Fund

The Financial Stability Plan would establish a public-private investment



fund to remove “legacy assets” (formerly called “toxic assets”) from the financial institutions’ balance sheets. According to Treasury Secretary Geithner, this will help create a market for real estate related assets that are at the center of the current financial crisis. Essentially, the Treasury will provide a portion of the money to purchase the legacy assets from financial institutions and private investors will provide the rest of the funds. Public financing would be used to further leverage the public seed capital and the Treasury may provide debt financing to private investors for their share of the funds.

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Consumer & Business Lending Initiative

In order to unfreeze lending to consumers and businesses, a core component of the Financial Stability Plan, according to Geithner, is to broaden and expand the resources of the previously announced Term Asset-Backed Securities Loan Facility ("TALF"). The TALF is designed to generate up to \$1 Trillion of new loans. Perhaps most important for real estate investors, this new Initiative will expand the initial reach of TALF to now include commercial mortgage-backed securities (including \$1.7 Trillion of outstanding commercial and multi-family mortgages). Although the Treasury and Federal Reserve Board have not yet released the terms of a CMBS-related loan facility, the first funding for other securities under the TALF is scheduled to occur on March 25.

Housing Support and Foreclosure Prevention

As described in more detail in the guidelines for the "Making Home Affordable" program under the Homeowner Affordability and Stability Plan unveiled by the Treasury Department on March 4, the key components of the program to help up to nine million homeowners are:

- Drive down overall mortgage rates by strengthening confidence in Fannie Mae and Freddie Mac.
- \$75 Billion to prevent avoidable foreclosures of owner-occupied homes with first-lien loans up to \$729,750.
- Incentives to extinguish second-lien loans.
- Loan modification guidelines and standards for government and private programs.
- Require all Financial Stability Plan recipients to participate in foreclosure mitigation plans consistent with Treasury guidance.
- Build flexibility to enable loan modifications for a greater number of distressed borrowers.

Although some specifics regarding the Financial Stability Plan are starting to emerge, what has been disclosed is mostly skeleton with little meat on the bones. Presumably, further details will follow from the Obama administration in the coming weeks and months, including the specific actions to be taken by the various governmental agencies that will turn or attempt to turn the Financial Stability Plan into reality.

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Balloon Payments

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amount of the late charge might also be a crucial component of the analysis as a court, such as the California Court of Appeals, might be more likely to uphold a clearly drafted provision imposing a 3% late charge rather than a 10% late charge, which it might construe as an unenforceable penalty.

Borrowers and lenders should be aware that a substantial late charge on a balloon payment of principal may render the late charge unenforceable on usury grounds. Whether a late charge provision is deemed usurious depends on the usury laws of the state in which the lending institution is located, the identity of the borrower and the particular facts of the case

A borrower who anticipates being

unable to repay its loan by the maturity date should carefully review the late charge provisions of its loan documents and the applicable jurisdiction's law well ahead of the maturity date in preparation for negotiating with its lender. With pressures mounting on lenders to be fair in the current economic climate, many lenders are either reducing late charges on balloon payments or waiving them altogether and simply charging default rate interest on amounts unpaid. Nevertheless, given the potential magnitude of these late charges, borrowers must be cognizant of this issue in the context of both existing and future loans.

1. *1300 Avenue P Realty Corp. v. Stratigakis*, 186 Misc.2d 745 (N.Y. App. Term 2000).
2. *Poseidon Development, Inc. v. Woodland Lane Estates, LLC*, 152 Cal. App. 4th 1106 (Cal. Ct. App. 2007).

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