

Client Alert

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New York Federal Reserve Publishes Updated FAQs for the 2020 Term Asset-Backed Securities Loan Facility (TALF)

Since the 2020 Term Asset-Backed Securities Loan Facility (TALF) was announced in March, the requirement that, as a condition to obtaining a TALF loan, a TALF borrower certify as to its inability to secure adequate credit accommodations from other banking institutions has caused some consternation among potential participants in the TALF program. On June 15, 2020, the Federal Reserve Bank of New York (New York Fed) released updated Frequently Asked Questions (FAQs) relating to the TALF, which FAQs provide new guidance regarding the certification; however, uncertainties remain regarding the intended scope of the certification and the basis on which TALF borrowers may provide it.

Since the initial announcement of the [TALF](#) on March 23, 2020, the terms of the TALF program have undergone several revisions and clarifications. The complete terms and conditions were released on May 12, 2020, and previous FAQs were published on May 12, May 20, May 26 and June 8. The New York Fed also has released certain key documents and forms, including the Master Loan and Security Agreement (MLSA), borrower certification forms, loan request form and instructions, issuer and sponsor certification forms, auditor attestation form and a list of TALF Agents. For current versions of the term sheet, the FAQs and the program documents and forms, please visit [the 2020 TALF website](#).

Borrower Certification Requirement

Each borrower of a TALF loan will be required to certify, among other things, that it is unable to secure “adequate credit accommodations” from other banking institutions. The plain language of this certification implies that a TALF borrower must make efforts to obtain credit from “banking institutions” other than the TALF program. However, the certification does not indicate what degree of efforts are sufficient. Nor is it obvious why financing from lenders who are not “banking institutions” would not constitute “adequate credit accommodations.” Furthermore, the certification requirement could make the TALF available to an ABS investor who is unable to secure credit due to its own poor credit while making the TALF unavailable to a highly creditworthy investor in the same ABS bond who is otherwise able to secure credit. It is not obvious how that result furthers the goals of the TALF program.

The structure and purposes of TALF have further contributed to the confusion surrounding the certification. According to the TALF term sheet, the program seeks to “help meet the credit needs of consumers and businesses by facilitating the issuance of asset backed securities (“ABS”) and improving the market conditions for ABS more generally.” However, the TALF does not make loans directly to such consumers and businesses, nor does it make loans directly to (or purchase ABS from) the issuers of ABS backed by loans to those consumers and businesses; rather, the TALF provides financing to private investors purchasing such ABS. The consumers and businesses who are unable to obtain adequate credit accommodations, and whom the TALF seeks to help, are not the ones making the required certification under TALF.

The New York Fed has published several rounds of FAQs seeking to clarify the scope of and basis for making the certification. The most recent FAQs state that:

“[T]he Board authorized the establishment of the TALF in response to severe dislocations in the ABS markets. Under the Board’s Regulation A, the New York Fed must obtain evidence that participants in the TALF are unable to secure adequate credit accommodations from other banking institutions. While these are not the only factors on which a TALF participant may rely in making this certification, a TALF participant may rely on one or more of the following factors: (i) unusual economic conditions in a sector of the ABS market or ABS markets intended to be addressed by the TALF, such as spreads in the primary or secondary ABS markets that are elevated relative to normal market conditions for the sector that the borrower is seeking to use as collateral for a TALF loan, or (ii) elevated rates or haircuts in the financing market (e.g., repo market) relevant for the collateral that the borrower is seeking to use for a TALF loan. Lack of adequate credit does not mean that no credit is available. Credit may be available, but inadequate in its amount, price, or terms.”

The above FAQ may be intended to say that if there are unusual economic conditions or elevated spreads or haircuts in the relevant sector or market, then adequate credit accommodations will be deemed unavailable. However, as written, the language leaves open the possibility that there could be unusual economic conditions or elevated rates or haircuts in the relevant market and still be adequate credit available to the borrower. In that regard, a question would remain as to what standard a TALF borrower should use to determine that credit is “inadequate in its amount, price or terms.” Note also, that a new certification is required for each TALF loan that a borrower requests and, presumably, would necessitate additional analysis and diligence based on the state of the relevant market, and the availability of credit accommodations, at such time. Further, the form of the certification contained in the MLSA (and in at least some TALF agent customer agreements) is not qualified by reference to the FAQ guidance.

The credit accommodations certification is new in the 2020 TALF program and was not a requirement of the original TALF program established in the wake of the 2008 financial crisis. The requirement stems from Section 13(3) of the Federal Reserve Act pursuant to which the TALF program was created. Section 13(3) requires that the Federal Reserve “obtain evidence that such participant in any program or facility with broad-based eligibility is unable to secure adequate credit accommodations from other banking institutions.” However, Section 13(3) does not specify what constitutes such evidence. In 2015, the Federal Reserve amended Regulation A to implement certain sections of the Dodd-Frank Act, and added that the evidence of a borrower’s inability to secure adequate credit accommodations may be based on “a written certification from the person or from the chief executive officer or other authorized officer of the entity at the time the person or entity initially borrows under the program or facility.” Since then, the Federal Reserve has set forth a similar certification requirement for a number of COVID-19 crisis facilities, including the TALF, the Paycheck Protection Program Liquidity Facility, the Commercial Paper Funding Facility, the Primary Market Corporate Credit Facility, the Secondary Market Corporate Credit Facility and the Municipal Liquidity Facility.¹

Of these other programs, perhaps the Paycheck Protection Program Liquidity Facility (PPPLF) is the most similar to the TALF relative to the borrower certification. The PPPLF makes loans available to makers and purchasers of Paycheck Protection Loans. But the borrowers that the PPPLF seeks to help find credit accommodations are ultimately not such makers and purchasers of PPP loans, but rather they are the

¹ We note that the borrower certification under TALF could impose significant legal and reputational risk in the event that a borrower’s certification (or the supporting evidence) is subsequently deemed to be untrue or insufficient. Private relators and the Department of Justice may file civil suits under the False Claims Act (FCA) against borrowers. Civil penalties in FCA cases typically include potential treble actual damages and per-claim civil monetary penalties (currently \$11,665-\$23,331 per claim). A successful qui tam relator is also entitled to a percentage of the proceeds of the action (15-25 percent if the government intervenes; 25-30 percent if not) and expenses, attorneys’ fees and costs. The Department of Justice may also pursue criminal prosecutions under various statutes.

underlying small business borrowers of those PPP loans. This is similar to the way in which the TALF makes loans to investors so that they will buy ABS backed by loans to consumers and businesses struggling to secure credit accommodations. In the FAQs for the PPPLF, the Federal reserve states (*emphasis added*):

“For a PPPLF participant to comply with the requirement for certifying that it lacks adequate credit accommodations from other banking institutions, the PPPLF participant may rely on current economic or market conditions, including conditions related to the availability and price of credit available to small businesses in light of the COVID-19 pandemic. A PPPLF participant is not required to certify that credit is unavailable. Rather, the PPPLF participant can rely on the fact that credit is not available at prices or on conditions that are consistent with the purposes of the PPPLF or with normal market conditions. *In particular, a PPPLF participant may rely on the fact that the Board of Governors authorized the establishment of the PPPLF to improve the ability of PPP lenders to obtain reasonably priced long-term financing for PPP Loans. A PPPLF participant may also rely on aspects of the PPPLF program to determine that funding from the PPPLF is more “adequate,” including, for example, beneficial capital treatment for PPP loans pledged to the PPPLF.*”

This FAQ under the PPPLF perhaps provides more clarity for PPPLF borrowers than the guidance that the New York Fed has thus far provided with respect to TALF. If the New York Fed were to provide similar guidance in the TALF FAQs, that could make the TALF more accessible to borrowers; however, the language of the latest TALF FAQs likely reflects that the New York Fed does not intend for the TALF to be available to support ABS sectors that are functioning normally. As such, it would still be helpful if the New York Fed would clarify that if unusual economic conditions or elevated spreads or haircuts exist in the relevant sector or market, then adequate credit accommodations will be deemed unavailable.

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