Proskauer

TALF Program Update: Master Loan and Security Agreement and Updated FAQs

November 3, 2020

Originally published June 10, 2020. Last updated on November 3, 2020.

On October 22, 2020, the Federal Reserve Bank of New York ("New York Fed") released an amended form of Master Loan and Security Agreement (the "MLSA"), which governs loans issued under its Term Asset-Backed Loan Facility ("TALF"). The amendments will be effective as of November 5, 2020. The New York Fed also updated its Frequently Asked Questions ("FAQs") on October 22, 2020 to reflect the changes made to the MLSA, and further updated the FAQs on November 2, 2020. These amendments include, among other things, a provision creating certain cross-defaults with TALF loans made before or after November 5, 2020, additional recourse provisions and a provision allowing the New York Fed to defer scheduled interest deficiencies. Together, the MLSA, the FAQs, and the previously released TALF Term Sheet constitute the current terms and conditions for the TALF program.

As noted in our prior alerts, the TALF program provides a funding backstop for eligible asset-backed securities ("ABS") issued on or after March 23, 2020. Under TALF, the New York Fed, operating through a special purpose vehicle (the "SPV"), makes loans to eligible borrowers secured by eligible ABS collateral. The Department of the Treasury made an equity investment of $10 billion in the SPV, using funds appropriated under Title IV of the CARES Act. On July 27, 2020, the New York Fed extended the expiration date of the TALF program from September 30, 2020 to December 31, 2020.

The first subscription date for TALF loans was June 17, 2020, and the first loan closing date was June 25, 2020. Subsequent subscription dates (each a "loan subscription date") occur approximately twice per month on dates announced by the New York Fed. The latest subscription date announced by the New York Fed is December 10, 2020 with a scheduled closing date of December 21, 2020. The initial benchmark rates are set by the New York Fed one business day prior to a loan subscription date.

The following summarizes some of the key terms and conditions of the MLSA, as amended, and program clarifications provided in the updated FAQs. For more information about the TALF program generally, see our previous client alerts here and here. You can view the full FAQs, including all updates, here, the MLSA, as amended, here and the TALF Term Sheet here. Additional documents and forms with respect to the TALF program are included on the New York Fed's TALF website here.

FAQs: Matters Relating To TALF Loans

Many of the updated FAQs reflect terms and conditions outlined in the MLSA, while others provide guidance about how to apply those terms and conditions. Key additions to the FAQs in the recent updates include the following:

Borrower and Collateral Restrictions

- A U.S. business with any Material Investor (defined below) that is a foreign government is not eligible to borrow under the TALF. The updated FAQs clarify that a sovereign wealth fund is considered a foreign government for this purpose.
- "Material Investor" is defined as a person who owns, directly or indirectly, an interest in any class of securities of a borrower that is greater than or equal to a 10% interest in such outstanding class of securities. The updated FAQs provide that borrowers and TALF Agents may rely on filings under Section 13 of the Securities Exchange Act of 1934 or the customer due diligence requirements under FinCEN rules (31 FR 1010.230), as applicable.
- For purposes of identifying a Material Investor, the updated FAQs include the following example of "indirect" ownership: If A owns 70% of B, and B owns 40% of the borrower, then B is a Material Investor (with 40% direct ownership in the borrower), and A is a Material Investor (with 28% of indirect ownership in the borrower).
- An eligible borrower may request multiple loans through multiple TALF Agents (as defined below), but a borrower may pledge only a single eligible ABS as collateral for any single loan (subject to certain exceptions for Small Business Administration ("SBA") loans).[1]
- Collateral substitution during the term of the TALF loan is not permitted; however, if the collateral supporting a TALF loan is sold, the borrower may transfer and assign its TALF loan to another eligible borrower in accordance with the MLSA and with the prior consent of the New York Fed. The borrower must deliver to the New York Fed an Assignment and Assumption Agreement (in the form prescribed by the MLSA),

and the collateral must remain eligible. No assignments will be consented to after December 31, 2020, unless extended by the Board of the Federal Reserve or the Treasury.

- ABS previously pledged as collateral for a TALF loan that have been released from the lien of the TALF loan, and continue to be eligible collateral, may be pledged for future TALF loans. Issuers of such ABS will not be required to resubmit data that had been previously submitted.
- The FAQs previously specified that eligible ABS issued by an existing master trust (established before March 23, 2020) to refinance existing ABS maturing prior to the TALF Termination Date (December 31, 2020) could be issued up to three months in advance of maturity of the refinanced ABS. The updated FAQs eliminate the three-month restriction and provide that the ABS being refinanced must have a maturity date on or after January 1, 2020.

The updated FAQs confirm that the compensation, stock repurchase, and capital distribution restrictions in Section 4003(c)(3)(A)(ii) of the CARES Act do not apply to borrowers in the TALF.

The TALF Term Sheet states that eligible collateral must have the highest available credit rating from at least two eligible nationally recognized statistical rating organizations ("NRSROs") and cannot have a credit rating below the highest investment-grade rating category from an eligible NRSRO. The previous FAQs identified only three eligible NRSROs: Fitch Ratings, Inc., Moody's Investors Service, Inc., and S&P Global Ratings. The updated FAQs provide additional flexibility, expanding the list of eligible NRSROs to include DBRS, Inc. and Kroll Bond Rating Agency, Inc. but only to the extent the collateral also has a qualifying rating from Fitch Ratings, Inc., Moody's Investors Service, Inc., or S&P Global Ratings.

Collateral Purchases

The updated FAQs outline procedures for borrowing under the TALF when the borrower does not own the collateral on the date of the subscription (referred to as "New Acquisition Collateral"), allowing eligible borrowers to use a TALF loan to purchase the necessary collateral on the loan closing date. Generally:

- The borrower must identify the counterparty expected to deliver the newly-issued ABS to be pledged as collateral at the time of the loan subscription and must inform the TALF Agent by the subscription date of the CUSIP of the ABS it intends to deliver

as collateral on the loan settlement date.

- The borrower must remit the margin (*e.*, the amount of the haircut) to its TALF Agent.
- If the TALF Agent is not the delivering counterparty, the TALF Agent will forward the margin to the TALF SPV's account at the TALF Custodian in order for the issuer to receive the full purchase price of the security issue. The delivering counterparty will deliver the ABS collateral to the Custodian against payment.

Neither the FAQs nor the MLSA specify when the borrower must remit the margin to its TALF Agent. Under the MLSA, the margin amount for any New Acquisition Collateral will be included in the confirmation notice provided by the Custodian to the TALF Agent two business days before the scheduled loan closing date, and the TALF Agent is required to deliver the margin prior to 8:30 a.m. on the loan closing date.

In addition to pledging New Acquisition Collateral, borrowers may pledge as collateral any eligible ABS purchased in primary or secondary market transactions up to 30 days before the TALF loan subscription date, as long as the ABS purchase transaction has a settlement date on or before the desired TALF loan subscription date. The proceeds of such purchase must be at least $1 million and the transaction must be conducted on an arm's-length basis, avoiding any financing, hedging or similar economic arrangements.

Eligible ABS

The ABS asset classes that qualify as eligible collateral are identified in the TALF Term Sheet as follows (with additional details for each asset class provided previously in the FAQs):

(1) Auto loans and leases;

(2) Student loans;

(3) Credit card receivables (both consumer and corporate);

(4) Equipment loans and leases;

(5) Floorplan loans;

(6) Premium finance loans for property and casualty insurance;

(7) Certain small business loans that are guaranteed by the Small Business Administration;

(8) Leveraged loans; and

(9) Commercial mortgages.

The updated FAQs provide further clarifications on ABS eligibility. Among other things, the updated FAQs provide:

- ABS tranches that are junior to any other security backed by the same pool of assets, are ineligible, even if they are triple-A rated;
- Interest-only or principal-only collateral is ineligible, as the ABS must entitle their holders to payments of both principal and interest; and
- ABS issued or sponsored by entities that received support under section 4003(b)(1)-(3) of the CARES Act (*e.*, air carriers and related businesses, cargo air carriers, and businesses critical to maintaining national security) is not eligible collateral.

Eligible ABS issued before May 22, 2020 generally will not be required to comply with the changes and requirements of the updated FAQs.

The updated FAQs specify additional requirements that apply to newly-issued ABS:

- An issuer must price a newly-issued ABS (other than SBA ABS) no earlier than two business days prior to a loan subscription date and no later than the loan subscription date for the ABS to be included as collateral on that subscription date.
- If an issuer prices a newly-issued ABS (other than SBA ABS) earlier than two business days prior to a subscription date, loan requests with respect to such ABS may only be submitted on subsequent subscription dates and such ABS will be subject to the New York Fed's price validation process described under "Pricing and Loan Amount" below.
- A newly-issued ABS will not be eligible collateral unless an issuer submits all documents required to be delivered with respect to such ABS within the time frames specified in the FAQs for the subscription date immediately following pricing of the ABS (whether or not the issuer expects any borrowers to submit loan requests on such subscription date).

Sponsors or issuers of proposed ABS collateral must provide to the New York Fed, no later than three weeks in advance of the TALF subscription date that immediately follows the pricing of the ABS, all data on the ABS or its underlying exposures that the issuer has provided to any rating agency.[2] Among other things, such data includes information provided by the sponsor or issuer to a rating agency relating to (i) the underlying assets of the ABS, including information relating to its historical performance and the relevant characteristics of the collateral relating to eligibility criteria, (ii) the structure of the ABS, including any term sheets, cash flow projections, structural diagrams or draft offering documents provided to the NRSROs, and (iii) the issuer, sponsor, servicer, or originators.

Loan Terms

Various loan terms were clarified in the updated FAQs. For example:

- A borrower must request a minimum principal amount of $5 million for each loan, and there is no maximum. Each TALF loan will have a three-year maturity and must be repaid upon maturity, even if the underlying collateral matures on a later date. The $5 million minimum is reflected in the MLSA, but not the TALF Term Sheet.
- The borrower is responsible for all interest and principal payments on a TALF loan. If the borrower does not make these payments, the New York Fed will enforce its rights to the collateral and the borrower will forfeit its haircut amount.
- At any time, the borrower may surrender all collateral securing its TALF loan to Lender in full satisfaction of its obligations under the loan, subject to certain recourse provisions described below under “Recourse Provisions.”

Pricing and Loan Amount

Generally, the TALF loan amount will be equal to the market value of the pledged collateral minus a discount, or “haircut,” and the amount of the haircut will depend on the asset class and average life of eligible ABS that serves as collateral for the loan. The FAQs express this calculation of the loan amount as (i) the base value minus (ii) the base dollar haircut, and further clarify how to determine these values.

For ABS issued on or after March 23, 2020 and purchased no more than 30 days before the proposed subscription date, base value is equal to the least of: (i) the dollar purchase price on the applicable trade date, (ii) the market value as of the loan subscription date, and (iii) a value based on the New York Fed's review. Other than SBA ABS, the base value cannot be greater than par. Any ABS with a base value less than par is not eligible for a TALF loan. The base dollar haircut is a percentage of the par value, as provided in the haircut schedule included in the TALF Term Sheet and the FAQs.

For example, assuming a private student loan ABS with a par value of 100, a seven-year weighted average life, and a base dollar haircut of 14 percent of par:

- If the base value is 75 percent of par, the loan amount is 61 (75-14) and the collateral haircut is 19 percent (14/75) of the applicable price.
- If the base value is 50 percent of par, the loan amount is 36 (50-14) and the collateral haircut is 28 percent (14/50) of the applicable price.
- If the base value is 12 percent of par, the collateral is not eligible for TALF.

A similar formula is provided for CMBS.

The New York Fed will review existing market conditions and may either modify the value of the pledged collateral (which would affect the loan amount) or reject a TALF loan request that does not reflect then-prevailing market conditions, and may reject a TALF loan request if the requested loan amount is greater than a stress valuation.[3]

Additionally, the New York Fed will validate the reasonableness of the price of ABS purchased prior to the TALF loan settlement date. The price reflected on the sales confirmation for a purchase will be compared to various market data sources as of the date of such transaction. The New York Fed may review existing market conditions and may determine a different price or (in rare cases) reject a TALF loan request that does not reflect then-prevailing market conditions.

Collateral Review

As anticipated, the updated FAQs provide additional transparency – and also a degree of uncertainty – about procedures the New York Fed will use to evaluate the eligibility of ABS provided as collateral for a TALF loan. The FAQs make clear that the New York Fed can exercise discretion in evaluating collateral, even if the ABS meets the collateral eligibility criteria. In making such determination, the New York Fed may consider, among other factors, the credit quality, transparency, and simplicity of structure, creating some doubt about qualifying for a TALF loan. The FAQs provide that the New York Fed retains sole discretion to reject ABS for any reason.

The FAQs also signal that the New York Fed will consider the economic interests that borrowers or their affiliates may have in the assets underlying the eligible ABS.[4] The New York Fed will not fund a TALF loan if, in its judgment, a potential borrower is motivated to request a TALF loan due to the borrower's "direct or indirect economic interest in the underlying loans or leases, or products or services relating to such loans or leases, in the pool underlying the ABS, and such economic interest would impact the incentive of such borrower to independently assess the risk of investment in such ABS."

TALF Agents

An eligible borrower must be a customer of a TALF Agent. The following is a complete list of TALF Agents as of October 30, 2020. The New York Fed will consider expanding the pool of TALF Agents to include a wider range of entities in the coming months.

Barclays Capital Inc.

BNP Paribas Securities Corp.

BofA Securities, Inc.

Cantor Fitzgerald & Co.

Credit Suisse AG, New York Branch

Goldman Sachs & Co. LLC

J.P. Morgan Securities LLC

Mizuho Securities USA LLC

Morgan Stanley & Co. LLC

Nomura Securities International, Inc.

RBC Capital Markets, LLC

Societe Generale, New York Branch

TD Securities (USA) LLC

Wells Fargo Securities, LLC

Master Loan and Security Agreement (MLSA)

The MLSA is the governing instrument for all TALF loans. Parties to the MLSA will be TALF II, LLC, the special purpose vehicle established to make TALF loans as "Lender," The Bank of New York Mellon as Administrator and Custodian, and the TALF Agents, individually and on behalf of their applicable TALF borrowers. A borrower becomes party to the MLSA pursuant to a Customer Agreement with a TALF Agent. The MLSA includes an Appendix that sets forth provisions that must be included in the Customer Agreement. Nevertheless, the terms of the Customer Agreement will need to be agreed to by the TALF borrower and the TALF Agent, and could take time to negotiate.

Loan Documentation

The MLSA identifies the documents that the TALF Agent and other parties must provide in connection with a TALF loan request and settlement. Some of the key documents include

- **A completed loan request form**. The TALF Agent must deliver the loan request form to Lender on the loan subscription date. In accordance with instructions furnished by the Custodian, the form must provide certain data about the borrower and the collateral, such as borrower type (*g.*, hedge fund, mutual fund, REIT,

pension fund, other corporation) and collateral CUSIP.

- **Preliminary or final prospectus**, offering memorandum or other comparable offering materials, relating to the eligible ABS. Offering materials are not required for SBA pool certificates. The TALF Agent must deliver the offering materials to Lender on the loan subscription date, to the extent then available.
- **Auditor Attestation.** With respect to eligible ABS other than CLOs, Lender and the New York Fed must receive an auditor attestation in the form provided by the New York Fed. "Auditor Attestation" means a signed report from a nationally recognized independent accounting firm that is registered with the Public Company Accounting Oversight Board, addressed to Lender and New York Fed and delivered to Lender and New York Fed by such accounting firm.
- **Agreed Upon Procedures (AUP) Reports**. For eligible ABS that are CLOs, Lender and the New York Fed must receive an AUP Report (Industry) and an AUP Report (TALF), both as defined in the MLSA, from a nationally recognized independent accounting firm that is registered with the Public Company Accounting Oversight Board. The AUP Report (TALF) must be in the form provided by the New York Fed.
- **Issuer and Sponsor Certification and Sponsor Indemnity.** The eligible ABS issuer and sponsor must provide a certification and the sponsor must provide an indemnity (as described below) addressed to Lender and the New York Fed.

The MLSA and FAQs specify the following deadlines for providing the auditor attestation, AUP Reports, issuer and sponsor certification, and sponsor indemnity:

- With respect to ABS collateral that is issued on or after March 23, 2020 and before May 22, 2020 (other than SBA collateral), Lender and the New York Fed must have received the auditor attestation, AUP Reports, issuer and sponsor certification and sponsor indemnity documentation by no later than 3:00 p.m. on June 30, 2020.

However, earlier deadlines apply with respect to loan requests for the June 17, 2020 subscription date, as described below.

- With respect to ABS collateral that is issued on or after May 22, 2020 (other than SBA Collateral), Lender and New York Fed must have received the AUP Reports or the auditor attestation no later than the date the related Form ABS-15G is filed with the Securities and Exchange Commission pursuant to Rule 15Ga-2[5]. The indemnity must be received on the same day and the issuer and sponsor certification must be included in the offering documents.
- **Sales Confirmation.** The TALF Agent must deliver a sales confirmation with respect to each item of collateral not later than the fifth business day prior to the

loan closing date. At that time, the TALF Agent may submit a revised loan request reflecting any reductions in the amount of New Acquisition Collateral borrowers expect to be able to deliver on the loan closing date as a result of the actual allocations of such New Acquisition Collateral.

- **Final prospectus or final offering memorandum.** Not later than the third business day prior to the loan closing date, the TALF Agent must deliver to Lender and the New York Fed the final prospectus or final offering memorandum (or other final offering materials) relating to the collateral.

The updated FAQs provide further clarification with respect to loan requests for the June 17, 2020 subscription date, where the ABS collateral is issued on or after March 23, 2020 and before May 22, 2020 (other than SBA collateral). For such requests, the issuer must submit the CUSIP number of ABS expected to be pledged and a copy of the final prospectus or offering document to the New York Fed no later than 3:00 p.m. on June 11, 2020. In addition, the issuer must provide, auditor attestation or an AUP Report, issuer and sponsor certification, and sponsor indemnity undertaking to the New York Fed no later than 3:00 p.m. on June 15, 2020.

The FAQs specify that the issuer or sponsor must submit to the New York Fed the final credit rating letters from each eligible rating agency that provides ratings for newly-issued ABS no later than 10 a.m. (New York time) on the applicable loan closing date.

Payments on ABS Collateral

The MLSA addresses the application of payments of principal and interest received on the ABS collateral during the term of a TALF loan. Interest payments on the ABS collateral generally will be applied to interest payments due on the borrower's TALF loan first, with any excess transferred to a disbursement account of the TALF Agent for distribution to the borrower at the borrower's request. For principal payments on the loans underlying the ABS collateral, an amount equal to the principal paid multiplied by the applicable haircut percentage will be transferred to the disbursement account of the TALF Agent for distribution to the borrower, and the balance will be transferred to Lender to repay the principal amount of the TALF loan.

The MLSA provides that, notwithstanding the foregoing, if certain defaults or other events occur with respect to collateral, certain payments of principal and interest on that collateral will be made to Lender prior to any distributions to the borrower.

Representations and Warranties

The MLSA includes customary representations and warranties applicable to the borrower, the TALF Agent, the Administrator, and the Custodian. Certain additional borrower representations are more specific to the TALF program, including:

- Borrower is an "eligible borrower," based on the applicable criteria, at the time the TALF loan is made;
- Borrower has disclosed to its TALF Agent each Material Investor and Control Person [6] of such borrower, and thereafter has notified its TALF Agent of any change to its Material Investors;
- All collateral securing the TALF loan is "eligible collateral" at the time the loan is made;
- Additional special representations relating to each item of collateral; and
- Borrower is (i) unable to secure adequate credit accommodations from other banking institutions as of the date the loan is made; (ii) not insolvent, (iii) not a "covered entity" as defined in section 4019(a)(2) of the CARES Act, and (iv) a "U.S. company" for purposes of the TALF program.

All borrower representations and warranties will be deemed to be continuing so long as it has any obligation outstanding under the TALF loan.

The TALF Agent also is required to represent and warrant that at the time a loan is made to a borrower, such borrower is an "eligible borrower" and all the collateral securing such loan is "eligible collateral." As a result, the TALF Agent will have to conduct due diligence to ensure compliance with this representation and warranty. Due diligence procedures for the TALF Agent are specified by the New York Fed.

Borrower Certifications

Prior to the date that the TALF Agent submits its first TALF loan request on behalf of the borrower, the borrower must deliver certifications to the TALF Agent certifying that (i) the borrower is unable to secure adequate credit accommodations from other banking institutions, (ii) the borrower is not insolvent, and (iii) borrower is not a "covered entity" as defined in Section 4019(a)(2) of the CARES Act. Section 4019(b) of the CARES Act prohibits covered entities (*i.e.*, entities in which certain government officials and some of their immediate family members have a "controlling interest") from participating in government programs such as the TALF. For a list of the government officials covered by this restriction, see here. The TALF loan will be immediately due and payable if any of these certifications is inaccurate in any material respect as of the date made.

The updated FAQs shed additional light on the requirement for a TALF borrower to certify that it is unable to secure "adequate credit accommodations" from other banking institutions. In making this certification, a borrower may rely on unusual economic conditions in the sector of an ABS market intended to be addressed by the TALF. Such unusual economic conditions include ABS spreads in the primary or secondary ABS markets that are elevated relative to normal market conditions for the sector that borrower is seeking to use as collateral.

Covenants

The MLSA includes certain covenants, which generally are not more extensive than those found in a typical loan agreement. One covenant that that should be noted is that the borrower is prohibited from exercising any voting or consent rights with respect to any of the collateral without the consent of Lender. The MLSA also includes a covenant that borrower will notify its TALF Agent or Lender if any information in its certification has changed and of any change in its Material Investors.

Issuer and Sponsor Certification and Indemnification Agreements

The issuer and the sponsor[7] of the ABS collateral are required to provide certain certifications in the form prescribed by the New York Fed. The certifications must be included in the offering documents for newly-issued ABS. For ABS issued on or after March 23, 2020 and before May 22, 2020, a signed certification must be delivered to Lender and the New York Fed, along with a signed sponsor indemnity undertaking and a copy of the prospectus or offering memorandum. Such certifications include:

- the ABS meet the requirements of eligible collateral;
- an undertaking to make a public announcement if any of the statements made in the certification as to eligibility were untrue when made or become untrue;
- an agreement to provide Lender with data provided to rating agencies (as described above); and
- a representation that the offering documents taken as a whole together with any information provided to rating agencies do not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading.

The sponsor must indemnify Lender and the New York Fed and their directors, officers, employees, agents, advisors, and successors and assignees for damages in connection with any falsity of the representations and warranties in the certification.

Collateral Enforcement Events

Under the MLSA, Collateral Enforcement Events are the equivalent to events of default under a traditional loan agreement. Collateral Enforcement Events include (i) failure to make payments under the TALF loan when due, (ii) breaches of obligations under the MLSA, (iii) inaccuracies of representations and warranties made in connection with the TALF loan agreement, (iv) the MLSA or the security interests granted under the MLSA cease to be enforceable, (v) insolvency of borrower, and (vi) if any event of default arises under any indenture or other agreement governing the terms of any of the borrower's collateral as a result of the insolvency of the issuer of such collateral. Some of the Collateral Enforcement Events are subject to specified cure periods.

UPDATE: If the scheduled interest accrual on the pledged ABS is less than the interest payment on the TALF loan, then the deficiency, which is defined as a Scheduled Interest Deficiency, must be paid within a 30-day grace period. Under the amended MLSA, the New York Fed has discretion to defer payment of the Scheduled Interest Deficiency to a subsequent payment date.

Upon the occurrence of and during the continuance of a Collateral Enforcement Event (after the expiration of any applicable cure period), Lender can declare the outstanding principal amount of a loan plus all accrued and unpaid interest thereon to be due and payable. The MLSA provides that amounts due under the TALF loan will become immediately due and payable upon the occurrence of certain Collateral Enforcement Events, including, among others, inaccuracy in the representation and warranty that Borrower is (i) unable to secure adequate credit accommodations from other banking institutions as of the date the loan is made, (ii) not insolvent, (iii) not a "covered entity" as defined in section 4019(a)(2) of the CARES Act, and (iv) a "U.S. company" for purposes of the TALF program. In addition, as is typical for loans secured by ABS collateral, Lender can (i) take possession of any collateral securing the borrower's loans that is not already in Custodian's possession, (ii) instruct Custodian to liquidate collateral securing such borrower's loans and apply the proceeds to such borrower's obligations, (iii) exercise the exclusive right, to the extent permitted by applicable law, to vote, to give consents, ratifications, and waivers, and to take any other action with respect to any collateral, and (iv) exercise any and all rights and remedies as a secured creditor pursuant to, and in accordance with, Article 9 of the UCC.

UPDATE: The amended MLSA includes a provision under which all TALF loans to a borrower may be cross-accelerated and immediately due and payable upon the occurrence of certain Collateral Enforcement Events, whether those loans were made before or after the relevant event. At the Lender's option, all TALF loans of a borrower (whether made before or after November 5, 2020) may be accelerated upon the occurrence of a Collateral Enforcement Event resulting from (a) any inaccuracy of the representations and warranties with respect to (i) no untrue statements or material omissions in the loan agreement and other documents, and (ii) disclosure of Material Investors and Control Persons of the Borrower, or (b) a breach by such Borrower of its covenants regarding (i) delivery of certificates with respect to inadequate credit facilities, solvency, and conflicts of interest, and (ii) its obligation to provide notification of any changes to those certificates and any change in its Material Investors. Any pledge of collateral, request for a TALF loan or incurrence of any additional obligations under the MLSA after November 5, 2020 will constitute borrower's agreement to the cross-default and full recourse provisions (described below) of the amended MLSA.

Recourse Provisions

While TALF loans generally are non-recourse to the borrower, the MLSA provides for full recourse of a borrower's obligations with respect to a TALF loan under the following circumstances: (i) if the borrower at any time is not an eligible borrower, (ii) inaccuracies in certain representations and warranties made by the borrower, (iii) borrower's failure to reimburse or repay Lender for any payments on collateral that are credited to the borrower erroneously, and (iv) borrower's failure to deliver a Collateral Surrender and Acceptance Notice (as defined in the MLSA) on or before the loan's maturity date. The MLSA defines "obligations" to include (i) outstanding principal and interest on a loan, (ii) any expenses Lender, Administrator, Custodian, or their respective designees may incur to enforce the MLSA against the borrower or enforce Lender's security interest in collateral securing the loan or collect such expenses, and (iii) all other amounts payable by the borrower under the MLSA.

UPDATE: Effective November 5, 2020, obligations that are subject to the cross-acceleration provisions in the amended MLSA (as described above) also become full recourse to the borrower.

What's Next?

The MLSA, the TALF Term Sheet, and the FAQs establish very detailed terms and conditions for TALF loans and numerous requirements applicable to borrowers, TALF Agents, issuers and sponsors of eligible ABS, and the collateral itself. TALF borrowers must make representations and warranties prescribed by the MLSA and deliver certificates regarding certain requirements under the TALF program that relate to the borrower as well as the ABS collateral. Moreover, the TALF program requires issuers, sponsors, borrowers and TALF Agents to deliver required documentation by specific deadlines. Potential TALF borrowers must carefully consider all of the applicable requirements or risk not qualifying for a TALF loan or experiencing delay until a later subscription period. In addition, the New York Fed retains discretion to adjust the value of pledged collateral, reject pledged collateral for any reason, and reject a loan request that does not reflect then-prevailing market conditions, leaving potential borrowers with some uncertainty about their ability to obtain a TALF loan.

Although the TALF program is currently operational, the New York Fed could provide further clarifications and adjustments to the program based on industry input and experience in the first subscription period – such as possibly expanding the asset classes that qualify as eligible ABS or naming additional TALF Agents. We will continue to monitor developments in this area to provide further updates as needed.

* * * *

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

[1] The FAQs note a number of provisions that allow additional flexibility for SBA loans, including provisions applicable to the date of issuance of the underlying ABS, a reduced haircut increase for additional years of average life, no requirement for credit ratings, permitting market value greater than par (up to a cap of 105%), certain of the provisions applicable to the required documentation, and the provision applicable to pledging only a single eligible ABS as collateral for a single TALF loan.

[2] For ABS issued on or after March 23, 2020 and before May 22, 2020, such data is required to be furnished by 3:00 p.m. on June 30, 2020, or by June 15, 2020 for any loan requests for the June 17, 2020 subscription date.

[3] The FAQs state that the New York Fed may retain agents to perform valuations under various stress scenarios.

[4] The FAQs previously clarified that ABS will not be eligible collateral if the TALF borrower or its affiliates originated or securitized the underlying credit exposures, are borrowers on the underlying credit exposures, or manufacture, produce, or sell products financed by the underlying credit exposures.

[5] SEC Rules require the issuer or underwriter of ABS to furnish to the SEC a Form ABS-15G containing the findings and conclusions of any third party due diligence report at least five business days prior to the first sale in the ABS offering.

[6] “Control Person” includes persons who directly or indirectly control the borrower’s general business and management of borrower’s participation in the TALF program, whether through ownership of voting securities, by contract, or otherwise.

[7] The sponsor is defined as the entity that organizes and initiates an ABS transaction by selling or transferring assets, either directly or indirectly, including through an affiliate, to the issuing entity and, for CLOs, is the collateral manager. If the sponsor is a special purpose vehicle, the sponsor’s direct or indirect ultimate parent must also execute this certification.

Related Professionals

- **Jeffrey A. Horwitz**
  Partner
- **Yuval Tal**
  Partner
- **Susan R. Goldfarb**
  Special Finance Counsel