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Exigent Circumstances: Section 13(3) of the Federal Reserve Act and Federal Emergency Lending Programs

TODD H. EVESON*

I. INTRODUCTION AND OVERVIEW

Section 13(3) of the Federal Reserve Act authorizes Federal Reserve Banks, in “unusual and exigent circumstances” and upon the affirmative vote of at least five members of the Federal Reserve Board of Governors, to discount notes, drafts, and bills of exchange for participants in liquidity facilities or other credit programs.¹ This article will present a brief history of Section 13(3) of the Federal Reserve Act and examine selected instances during which its powers have been invoked. It will also compare and contrast two of the most significant emergency funding programs of the modern era: the TARP Capital Purchase Program of 2008 (“TARP CPP”)² and the Paycheck Protection Program of 2020 (“PPP”).³ Neither TARP CPP nor PPP was implemented under Section 13(3) authority (nor, for various reasons, could they have been). Both programs were, however, launched in close coordination with Section 13(3) facilities established by the Federal Reserve that were designed to support and complement them as part of an integrated emergency response solution.

II. HISTORY OF SECTION 13(3) OF THE FEDERAL RESERVE ACT

The Federal Reserve Act⁴ created the nation’s first true central bank,⁵ established the member bank system, and, along with the National

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1. See 12 U.S.C. §343(3) (2018).

2. The Capital Purchase Program was an element of the Troubled Asset Relief Program (“TARP”) and promulgated under the authority of the Emergency Economic Stabilization Act of 2008. 12 U.S.C. §5201, et seq.

3. The Paycheck Protection Program was promulgated under the authority of Title I of the Coronavirus Aid, Relief and Economic Security Act of 2020. Pub. L. No. 116-136, 134 Stat. 281, 286–94 (2020) (to be codified in scattered sections of 15 U.S.C.).

4. Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913).

5. More precisely, it created a decentralized central bank consisting of 12 member banks. See *History of the Federal Reserve*, FED. RES. EDUC.,

Bank Act of 1864⁶ and the Bank Act of 1933,⁷ has served as the foundation for much of the federal regulation of banking and financial services in the United States.⁸ The original goal of the Federal Reserve Act was “to make certain that there will always be an available supply of money and credit in the country with which to meet unusual banking requirements.”⁹ It set out to accomplish this goal by providing a new, more efficient, and centralized source of liquidity for banks.¹⁰ More pointedly, it was intended to prevent the need for private bailouts by the

<https://www.federalreserveeducation.org/about-the-fed/history> [https://perma.cc/J7TT-VQAS].

6. Ch. 106, 13 Stat. 99, 101 (codified as amended at 12 U.S.C. § 38); *see also* LISSA L. BROOME & JERRY W. MARKHAM, REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES 22–23 (4th ed. 2011); JONATHAN R. MACEY & GEOFFREY P. MILLER, BANKING LAW AND REGULATION 10–11 (2d ed. 1997).

7. Pub. L. No. 73-66, 48 STAT. 162 (1933); *see also* BROOME & MARKHAM, *supra* note 6, at 38, 42–44; MACEY & MILLER, *supra* note 6, at 21–24. More commonly referred to as the Glass-Steagall Act and the Federal Deposit Insurance Act, the Banking Act of 1933 created the “firewall” between commercial banking and investment banking that was eventually removed by the Gramm-Leach-Bliley Act of 1999, and it also established the Federal Deposit Insurance Corporation. The conversation on federal deposit insurance had been a long-running one, spanning almost 50 years and approximately 150 different proposals over the years. *See* MATTHEW P. FINK, THE UNLIKELY REFORMER: CARTER GLASS AND FINANCIAL REGULATION 105–106 (2019).

Not to be confused with the Glass-Steagall Act of 1933, it was the Glass-Steagall Act of 1932 that amended the Federal Reserve Act by adding Section 10B, “giving the Federal Reserve Board temporary emergency authority to allow advances to member banks secured by satisfactory collateral at a penalty rate of interest in cases where the borrowing bank had exhausted its eligible assets.” *See* Parinitha Sastry, *The Political Origins of Section 13(3) of the Federal Reserve Act*, FED. RES. BANK N.Y. POL’Y REV., Sept. 2018, at 1; Arthur Long, *Revised Section 13(3) of the Federal Reserve Act*, ABA BUS. L. TODAY 1 (Mar. 22, 2019), <https://businesslawtoday.org/2019/03/revised-section-133-federal-reserve-act/> [https://perma.cc/N55A-QHX6]. The Federal Reserve was authorized to exercise authority under Section 10B only in “exceptional and exigent circumstances.” *See* Glass-Steagall Act of 1932, Pub. L. No 72-44, § 2, 47 Stat. 56 (adding section 10B to the Federal Reserve Act). In that respect, it was an emergency power that could only be invoked during “exigent circumstances” and therefore similar to the soon-to-follow Section 13(3). Section 13(3), however, was to be even more broad in terms of the emergency powers it would vest in the Federal Reserve, because it would not be limited to member banks and would, instead, include essentially any entity in the private sector. *See infra* notes 33–40 and accompanying text.

8. *See* Saule T. Omarova, *The Dodd-Frank Act: A New Deal for a New Age*, 15 N.C. BANKING INST. 83, 84 (2011); William C. Handorf et al, *An Examination of the Factors Influencing the Enactment of Banking Legislation and Regulation: Evidence from Fifty Years of Banking Laws and Twenty-Five Years of Regulation*, 24 N.C. BANKING INST. 93 (2020).

9. *See* O. M. W. Sprague, *The Federal Reserve Act of 1913*, 28 Q. J. ECON. 213, 213 (1914); Ben S. Bernanke, *A Century of US Central Banking: Goals, Frame, Accountability*, 27 J. ECON. PERSP., Fall 2013, at 3, 4 stating that the new Federal Reserve was intended to provide an “elastic” currency “by providing liquidity as needed to individual member banks through the discount window,” but it was not necessarily envisioned as a “lender of last resort”).

10. *See id.*

likes of J.P. Morgan, as had occurred during the 1907 panic.¹¹ In order to create a central bank that could provide for a liquidity buffer and a more elastic national currency, the principal architect of the Federal Reserve Act, Representative Carter Glass,¹² conceived of a “decentralized system of regional reserve banks under the supervision of the Comptroller of the Currency.”¹³ President Woodrow Wilson favored a different governance structure, with oversight by an independent board rather than the Comptroller, and urged the establishment of an “altruistic Federal Reserve Board at Washington to supervise the proposed system.”¹⁴ Though Glass continued to advocate for the inclusion of three private sector bankers on a nine-member Federal Reserve Board,¹⁵ he eventually came around to President Wilson’s preference for a seven-member board composed entirely of public sector appointees.¹⁶

11. See RON CHERNOW, *THE HOUSE OF MORGAN* 128 (1990). During the panic of 1907, Morgan “functioned as America’s central bank. Within two weeks’ time, he saved several trust companies and a leading brokerage house, bailed out New York City, and rescued the Stock Exchange.” *Id.* at 122. Morgan had saved the day, but one lesson drawn from the panic was that depending on “rescues by corpulent old tycoons” was a less than ideal approach. *Id.* at 128. In addition to Morgan acting as a walking central bank, another interesting aspect of the 1907 panic was that it illustrated the extent to which the financial system, even in 1907, was already very interconnected. The panic spread from trust companies and brokerage houses, which were more highly leveraged and not as tightly regulated as commercial banks, across Wall Street, and through the entire domestic financial system. See ROGER LOWENSTEIN, *AMERICA’S BANK: THE EPIC STRUGGLE TO CREATE THE FEDERAL RESERVE* 62 (2015).

12. Glass was a Representative, and later Senator, from the Commonwealth of Virginia who served on the House Committee on Banking and Currency. FINK, *supra* note 7, at 14. In February of 1912, he was appointed to chair a subcommittee tasked with drafting legislation to create a reserve bank. *Id.* at 27. He was the principal architect of what would eventually become the Federal Reserve Act of 1913. *Id.* at 30–46; see also LOWENSTEIN, *supra* note 11, at 128.

13. FINK, *supra* note 7, at 27. See also Sprague, *supra* note 9, at 220. Glass’s model used a decentralized network of reserve banks because he believed such a system “could better be expected to minister to the immediate financial and commercial requirements of their respective territories.” FINK, *supra* note 7, at 30; see also CARTER GLASS, *AN ADVENTURE IN CONSTRUCTIVE FINANCE* 68 (1927). It is very possible that Glass’s preference for a decentralized central bank was influenced by his political leanings as a Virginia Democrat and son of a Civil War veteran who was an officer in Gen. Robert E. Lee’s Confederate Army of Northern Virginia.

14. FINK, *supra* note 7, at 35; see also LOWENSTEIN, *supra* note 11, at 182 (stating that President Wilson also referred to this centralized oversight body as a “capstone”).

15. J.P. Morgan also favored private sector representation on the Federal Reserve Board, though in his vision of a central bank, the entire bank would be a private sector enterprise modeled on the Bank of England. See CHERNOW, *supra* note 11, at 129. This view was not universally held on Wall Street, however. The investment banker Paul Warburg stated that in his view, “it would be better not to open the door for the criticism that private interest might enjoy undue favoritism with the central bank.” LOWENSTEIN, *supra* note 11, at 122.

16. See FINK, *supra* note 7, at 40–41.

The proposed Federal Reserve Act encountered strong opposition from many private sector bankers, both sides of the aisle in Congress, and the press.¹⁷ The Democrat-controlled House passed the bill in September of 1913. In the Senate, however, it encountered bi-partisan opposition, a competing bill, and even eight weeks of public hearings on banking and currency.¹⁸ Eventually, with strong support from President Wilson, Glass, Secretary of State William Jennings Bryan, and others, the Federal Reserve Act was signed into law on December 23, 1913.¹⁹

A. *The Federal Reserve Act as Originally Conceived*

In addition to serving as a central bank,²⁰ the Federal Reserve was originally conceived as a true “bankers bank.” In other words, its outstanding shares were owned by other banks and it could lend only to other banks. More precisely, it could extend credit only to *member banks* through the discount window.²¹ Under the original Federal Reserve Act, direct lending to non-bank enterprises in the private sector was not within the scope of the Federal Reserve’s authority. In fact, there was no authority for advances of any kind,²² not even to member banks. The

17. *Id.* at 42–46; see also LOWENSTEIN, *supra* note 11, at 214 (describing criticism of the proposed Federal Reserve Act bill by newspapers of the time).

18. See FINK, *supra* note 7, at 47–50; LOWENSTEIN, *supra* note 11, at 231.

19. Sprague, *supra* note 9, at 213.

20. Or, more precisely, a network of central banks, the Federal Reserve Banks. *Id.* Observers of the time termed this network of Reserve Banks a “most striking divergence from European example” and a “really novel plan of a system of regional banks in place of a single central bank.” *Id.* This was not the most remarkable provision in the original Federal Reserve Act, however. The statute also included a provision that required national banks to purchase stock in their regional reserve bank and required them to deposit their reserve funds there. See FINK, *supra* note 7, at 34. The new law even went so far as to provide for automatic charter forfeiture for any national bank that did not opt into the new Federal Reserve system. See Sprague, *supra* note 9, at 221.

21. This process is little changed today. Member banks can apply for access to the discount window as an additional source of liquidity, pledging eligible collateral against borrowings. This provides a reliable source of funding to go along with deposits, correspondent bank credit facilities, Federal Home Loan Bank advances and capital instruments. See *Discount Window Lending*, FED. RES. BD., <https://www.federalreserve.gov/regreform/discount-window.htm> [<https://perma.cc/JYX3-WPYP>].

22. Today, Federal Reserve Banks are authorized to make loans (i.e., to advance funds to borrowers through the discount window or otherwise).

Federal Reserve was only authorized to discount²³ eligible collateral from member banks, and the universe of eligible collateral was limited.²⁴

B. Expansion of Lending Powers

All of this began to change in late 1929 and into the early 1930s, and, as is so often the case, a crisis provided the impetus for change. In 1929, the crisis at hand was the Great Depression.²⁵ The stock market crashed in October of 1929, and the panic and bank runs that began in 1930²⁶ only worsened in 1931. Over 500 banks suspended operations in October of 1931 alone,²⁷ and by the following year, a quarter of all banks in the nation had failed.²⁸ President Herbert Hoover advocated for a broadening of the Federal Reserve's lending powers to help meet the liquidity crisis.²⁹ He was not alone. Prevailing public opinion of the time supported greater involvement by the Federal Reserve in combating the crisis and stepping in as a "nationwide lender of last resort."³⁰ Once

23. As distinct from an advance, which involves subsequent payments of principal and interest, discounting eligible collateral such as a note, involves purchasing it at a discount to its eventual full value at maturity in a transaction that is intended to be self-liquidating (with recourse against the seller in the event the maker of the note defaults).

24. See Federal Reserve Act, Pub. L. No. 63-43, § 13(2), 38 Stat. 251 (1913); HOWARD H. HACKLEY, LENDING FUNCTIONS OF THE FEDERAL RESERVE BANKS: A HISTORY 27–42 (1973). Eligible collateral consisted of so-called "real bills" and certain types of obligations issued by the United States Treasury. See Walker F. Todd, *FDICIA's Emergency Liquidity Provisions*, FED. RES. BANK CLEV., July 1, 1993, at 18. "Real bills" are notes, drafts and bills of exchange arising out of bona fide commercial transactions and having remaining maturities of 90 days or less. *Id.*; see also Sastry, *supra* note 7, at 5 (explaining that "real bills" can be broadly defined as "short-term, 'self-liquidating' instruments used to finance a step in the process of converting raw materials to final sales").

25. See Long, *supra* note 7.

26. The largest bank failure in the nation's over 160-year history occurred in December of 1930, when the Bank of the United States was closed by the New York Superintendent of Banks. See Christopher Gray, *Streetscapes: The Bank of the United States in the Bronx; The First Domino in the Depression*, N.Y. TIMES (Aug. 18, 1991), <https://www.nytimes.com/1991/08/18/realestate/streetscapes-bank-united-states-bronx-first-domino-depression.html> [<https://perma.cc/P3Q7-7HRJ>]; see also Anthony Patrick O'Brien & Paul B. Trescott, *The Failure of the Bank of United States, 1930*, 24 J. MONEY, CREDIT & BANKING 384–99 (1992).

27. See Sastry, *supra* note 7, at 14.

28. See BROOME & MARKHAM, *supra* note 6, at 38.

29. President Herbert Hoover, Statement on Financial and Economic Problems (Oct. 4, 1931), <https://www.presidency.ucsb.edu/documents/statement-financial-and-economic-problems> [<https://perma.cc/PZU8-G2LW>]; see also Sastry, *supra* note 7, at 14; Todd, *supra* note 24, at 17.

30. See *Federal Reserve History – The Banking Acts of 1932*, FED. RES. HIST., https://www.federalreservehistory.org/essays/banking_acts_of_1932 [<https://perma.cc/FLG4-9DG6>]; see also, Todd *supra* note 24, at 17.

again, Carter Glass, now a United States Senator, would take a central role in crafting the legislative response.³¹ During 1932, Glass worked to implement a whole series of banking bills, including the law that would come to be known as the Glass-Steagall Act.³²

An amendment to Section 13 of the Federal Reserve Act that was tucked into a highway appropriations bill was among the banking legislation enacted in 1932.³³ Almost twenty years after the Federal Reserve Act was originally enacted, the Emergency Relief and Construction Act of 1932³⁴ significantly expanded the scope of the Federal Reserve's emergency lending powers by adding Section 13(3) to the Federal Reserve Act.³⁵ With the addition of these new powers, which became effective on July 21, 1932, the Federal Reserve had statutory authority to discount eligible notes, drafts and bills of exchange not just for Reserve Banks, but also for "any individual, partnership or corporation."³⁶ Thus, the universe of eligible borrowers was greatly expanded from that permitted under the original Federal Reserve Act, but lending was still only by discount and advances were not permitted. The new law provided that this lending authority could only be exercised in "unusual and exigent circumstances,"³⁷ upon an affirmative vote of at least five of the seven members of the Federal Reserve Board.³⁸ Further, the lending Reserve Bank was required to obtain evidence that the nondepository institution borrower was unable to obtain credit from other banking institutions,³⁹ and the extension of credit was required to be secured to the satisfaction of the lending Reserve Bank.⁴⁰

31. See FINK, *supra* note 7, at 111–117; see also RIXEY SMITH & NORMAN BEASLEY, CARTER GLASS: A BIOGRAPHY 357 (1939).

32. *Id.*

33. See Sastry *supra* note 7, at 20.

34. Pub. L. No. 72-2, 47 Stat. 709 (1932).

35. *Id.* § 210, 47 Stat. at 715; see also David Fettig, *The History of a Powerful Paragraph*, FED. RES. BANK MINNEAPOLIS (June 1, 2008), <https://www.minneapolisfed.org/article/2008/the-history-of-a-powerful-paragraph> [<https://perma.cc/7FXJ-ZTFD>]; see also Long, *supra* note 7; Sastry *supra* note 7, at 20.

36. 12 U.S.C. § 343(3) (2018). While we might reasonably conclude that "partnership" would have included limited liability companies, had they existed at the time, the term "corporation" did not include trusts or nonmember banks.

37. 12 U.S.C. § 343(3). Here, the drafters of Section 13(3) chose a slightly different standard from the "exceptional and exigent" standard used in Section 10B of the Federal Reserve Act. We might conclude that exigent circumstances that are "unusual" occur slightly more often than those that are "exceptional," though there is no case law establishing any distinction between the two standards. See *infra* note 91.

38. 12 U.S.C. § 343(3); see also Long *supra* note 7, at 1.

39. See 12 C.F.R. § 201.4(d)(8) (2020); Extensions of Credit by Federal Reserve Banks, 80 Fed. Reg. 78959 (Dec. 18, 2015).

40. See Extensions of Credit by Federal Reserve Banks, 80 Fed. Reg. at 78959. Specifically, the extension of credit was required to be endorsed or otherwise secured to the

While many observers and industry participants associate Section 13(3) with the emergency measures taken during the 2008 Financial Crisis, the first Section 13(3) loans were made in the 1930s during the period of “unusual and exigent circumstances” brought about by the Great Depression.⁴¹ In just the first four years following the enactment of Section 13(3), Federal Reserve Banks made over 120 loans to private sector firms in a variety of non-financial industries, including farming, manufacturing, and even a brewery.⁴² All of these loans were fairly small, however, and none exceeded \$300,000 in original principal amount.⁴³

In contrast, there was very little Section 13(3) activity between 1937 and 2008, though the Federal Reserve Board did “activate” Section 13(3) authority on a handful of isolated occasions without actually extending credit.⁴⁴ The most interesting cases during this period were those instances when the Federal Reserve *declined* to provide credit to prospective borrowers, including the City of New York and the Federal Deposit Insurance Corporation.⁴⁵ Notwithstanding this long period of dormancy, Section 13(3) was further amended by the Federal Deposit Insurance Corporation Improvement Act of 1991, which removed the limitation that collateral be of a type already eligible to secure lending transactions by Federal Reserve Banks (i.e., rediscounted commercial

satisfaction of the lending reserve bank, with eligible collateral limited to “real bills” and certain Treasury obligations “of the kinds and maturities made eligible for discount for member banks under the provisions of the [Federal Reserve] Act.” See Todd, *supra* note 24, at 18; see, 12 CFR 201.4(d)(6).

41. See Fettig, *supra* note 35, at 1; Alexander Mehra, *Legal Authority in Unusual and Exigent Circumstances: The Federal Reserve and The Financial Crisis*, 13 U. PA. J. BUS. L. 221, 233 (2010).

42. See Mehra, *supra* note 41, at 233; see also David Fettig, *Lender of More than Last Resort*, FED. RES. BANK MINNEAPOLIS (Dec. 1, 2002), <https://www.minneapolisfed.org/article/2002/lender-of-more-than-last-resort> [<https://perma.cc/2R52-YRCL>].

43. See Mehra, *supra* note 41, at 233; Todd, *supra* note 24, at 18. \$300,000 in the late 1930s is equivalent to approximately \$2.4 million in 2021 dollars.

44. See Todd, *supra* note 24, at 18.

45. *Id.* The Federal Reserve declined to extend credit to the City of New York in 1975, though the United States Treasury eventually stepped in as a lender of last resort for the City. *Id.* The Federal Reserve similarly declined to exercise powers under Section 13(3) to make loans to Lockheed Corporation (then known as the Lockheed Aircraft Company) in 1971 and to the Chrysler Corporation in 1979. *Id.* In 1991, the Federal Reserve “refused to make a \$25 billion loan to the Bank Insurance Fund of the Federal Deposit Insurance Corporation, despite requests by the Treasury and the Chairman of the Corporation.” *Id.*; see also Fettig *supra* note 35 at 1.

loans in accordance with the “real bills” doctrine),⁴⁶ and replaced it with a more broad requirement that collateral consist of security satisfactory to the lending Reserve Bank or any satisfactory assets (i.e., securities, financial instruments or any other collateral deemed satisfactory by the applicable Reserve Bank).⁴⁷ In other words, collateral was no longer required to consist of cash or self-liquidating near-cash equivalents. This amendment was prescient, and it allowed Section 13(3) to be a more flexible and, therefore, useful tool during the 2008 Financial Crisis.

C. *Credit and Liquidity Facilities During the 2008 Financial Crisis*

After a lengthy hiatus, the Federal Reserve exercised emergency lending authority under Section 13(3) of the Federal Reserve Act again during the 2008 Financial Crisis.⁴⁸ In a period of approximately nine months, Section 13(3) saw far more use than it had during the preceding seventy years. Like the battleships U.S.S. *Iowa*, U.S.S. *Missouri*, U.S.S. *New Jersey*, and U.S.S. *Wisconsin*, which were commissioned during World War II and deactivated in the 1950s, only to be deployed again decades later when the Navy again found itself in need of their massive firepower during the first Gulf War,⁴⁹ Section 13(3) of the Federal Reserve Act proved itself to be “a powerful weapon in the U.S. government’s arsenal.”⁵⁰ Section 13(3) had lain more or less dormant for decades, but the government needed every weapon at its disposal during the financial crisis, and Section 13(3) was reactivated and pressed into service.

The Federal Reserve emergency credit and liquidity facilities authorized during the 2008 Financial Crisis are listed in chronological order in the table below.

46. See Long, *supra* note 7; *Section 13 – Powers of Federal Reserve Banks*, FED. RES. BD., <https://www.federalreserve.gov/aboutthefed/section13.htm> [<https://perma.cc/EJ6Q-GZH7>]; Todd, *supra* note 24, at 19.

47. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 473, 105 Stat. 2236, 2386 (codified at 12 U.S.C. § 343 (2018)) (amending section 13(c) of the Federal Reserve Act); see also HACKLEY, *supra* note 24, at 109–112; Todd, *supra* note 24, at 20.

48. See Sastry, *supra* note 7, at 3; see also Christian A. Johnson, *From Fire Hose to Garden Hose: Section 13(3) of the Federal Reserve Act*, 50 LOY. U. CHI. L. J. 715 (2020) (describing the Federal Reserve’s “injection of extraordinary levels of liquidity into a failing economic and financial system” during 2008).

49. See DAVID MILLER AND CHRIS MILLER, *MODERN NAVAL COMBAT* 108 (1986); THE ENCYCLOPEDIA OF WORLD SEA POWER 80 (1988); *History*, BATTLESHIP MO. MEMORIAL, <https://www.ussmissouri.org/learn-the-history> [<https://perma.cc/DD2N-6VRZ#>] (last visited Oct. 18, 2020).

50. See Long, *supra* note 7.

Section 13(3) Facilities and Direct Assistance Authorized in 2008⁵¹

Announcement Date	Facilities and Direct Assistance	Primary Participants or Beneficiaries
March 11	Term Securities Lending Facility (TSLF)	Primary dealers
March 14	Federal Reserve Bank of New York bridge loan of \$12.9 billion to Bear Stearns via JPMorgan Chase	Bear Stearns, JPMorgan Chase
March 16	\$30 billion nonrecourse loan to JPMorgan Chase secured by Bear Stearns' assets	JP Morgan Chase
March 16	Primary Dealer Credit Facility (PDCF)	Primary dealers
March 24	Federal Reserve Bank of New York senior loan of \$29 billion to the Maiden Lane LLC vehicle (ML)	Maiden Lane LLC, Bear Stearns
September 16	Federal Reserve Bank of New York revolving credit facility of up to \$85 billion for the American Insurance Group (AIG)	AIG
September 19	Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility (AMLF)	U.S. depository institutions and U.S. bank holding companies (parent companies or U.S.

51. See Sastry, *supra* note 7, at 3 (table reproduced with the author's permission).

Announcement Date	Facilities and Direct Assistance	Primary Participants or Beneficiaries
		broker-dealer affiliates) and U.S. branches and agencies of foreign banks
September 21	Federal Reserve Bank of New York loan to London-based broker-dealer subsidiaries of Goldman Sachs, Morgan Stanley, and Merrill Lynch	London-based subsidiaries of Goldman Sachs, Morgan Stanley, and Merrill Lynch
October 7	Commercial Paper Funding Facility (CPFF)	U.S. commercial paper issuers
October 8	Arrangement allowing the Federal Reserve Bank of New York to borrow up to \$37.8 billion in securities from certain subsidiaries of AIG	Certain U.S. insurance subsidiaries of AIG
October 21	Money Market Investor Funding Facility (MMIFF)	U.S. money market mutual funds
November 10	Federal Reserve Bank of New York loan of up to \$22.5 billion to Maiden Lane II LLC in support of AIG (MLII)	Maiden Lane II LLC, AIG

Announcement Date	Facilities and Direct Assistance	Primary Participants or Beneficiaries
November 10	Federal Reserve Bank of New York loan of up to \$30 billion to Maiden Lane III LLC in support of AIG (MLIII)	Maiden Lane III LLC, AIG
November 23	Federal Reserve commitment to provide a nonrecourse loan to Citigroup	Citigroup
November 23	Federal Reserve Bank of New York loan to London-based broker-dealer subsidiary of Citigroup	London-based subsidiary of Citigroup
November 25	Term Asset Backed Securities Loan Facility (TALF)	“All U.S. persons with eligible collateral”

The facilities established by the Federal Reserve during 2008 can be divided into two general categories: (1) broad-based programs available to an entire class of participants, and (2) “one-shot” facilities specially tailored for and made available to a single borrower.⁵² It is also worth noting that some of the borrower entities in the latter group were actually special purpose vehicles organized by the Federal Reserve specifically for use in connection with an extension of credit under

52. CONG. RESEARCH SERVICE, R44185, FEDERAL RESERVE: EMERGENCY LENDING 10 (2020), <https://fas.org/sgp/crs/misc/R44185.pdf> [<https://perma.cc/UL8J-E4RZ>].

Section 13(3).⁵³ For example, the Maiden Lane facilities⁵⁴ involved special purpose vehicles organized in connection with credit facilities designed for Bear Stearns and AIG.⁵⁵ This innovation, wherein the government created the Section 13(3) borrower, allowed Section 13(3) to be used in an entirely novel way.⁵⁶ It was an elegant approach, and also a highly effective one. The first Maiden Lane facility, which was authorized in connection with the acquisition of Bear Stearns by J.P. Morgan Chase & Co., ultimately returned a \$2.5 billion profit for taxpayers.⁵⁷ More importantly, the Federal Reserve's use of Section 13(3) during the 2008 Financial Crisis helped successfully restore financial stability.⁵⁸

D. Amendment of Section 13(3) by the Dodd-Frank Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") was enacted in reaction—or, depending on one's perspective, overreaction—to the events of the 2008 Financial Crisis.⁵⁹ Effective July 21, 2010, Section 716 of the Dodd-Frank Act modified the Federal Reserve's authority to provide emergency facilities

53. While it is the case that the law surrounding entities such as limited liability companies and statutory trusts did not develop until decades after Section 13(3)'s advent, the Federal Reserve's role in engineering this new approach for Section 13(3) transactions still must not be overlooked, nor should the fact that Congress essentially ratified the special purpose vehicle counterparty approach for Section 13(3) transactions when Dodd-Frank was enacted. The author gratefully acknowledges insights and perspective shared by Thomas C. Baxter, Jr., former General Counsel of the Federal Reserve Bank of New York. E-mail from Thomas C. Baxter, to author (Jan. 26, 2021, 1:03 PM EST) (on file with author). Mr. Baxter's views are his own and do not reflect those of the Federal Reserve Board of Governors or any Federal Reserve Bank.

54. The Maiden Lane limited liability companies were named for one of the streets that borders the Federal Reserve Bank of New York's block in lower Manhattan.

55. See HENRY M. PAULSON, JR., *ON THE BRINK* 116, 393 (2010).

56. If the special purpose vehicle approach increased Section 13(3)'s flexibility (or, rather, allowed existing flexibility to be more fully realized), it arguably also allowed for better compartmentalization and enhanced transparency in connection with Section 13(3) transactions. See Email from Thomas C. Baxter, *supra* note 53.

57. See *Maiden Lane Transactions*, FED. RES. BANK N.Y., <https://www.newyorkfed.org/markets/maidenlane> [https://perma.cc/ND5G-KWPY]; Michael S. Derby, *New York Fed Says It Wound Down Crisis Bailout Facility With \$2.5 Billion Profit*, WALL ST. J. (Sept. 18, 2018), <https://www.wsj.com/articles/new-york-fed-says-it-wound-down-crisis-bailout-facility-with-2-5-billion-profit-1537299809> [https://perma.cc/QD7L-FEJG].

58. See Long, *supra* note 7; Johnson, *supra* note 48, at 716 (stating that the Federal Reserve's use of Section 13(3) emergency lending authority during the Financial Crisis was an unparalleled success).

59. See Lissa L. Broome, *The Dodd-Frank Act: Tarp Bailout Backlash and Too Big to Fail*, 15 N.C. BANKING INST. 69 (2011).

for nondepository institutions under Section 13(3) of the Federal Reserve Act.⁶⁰

Several of the amendments to Section 13(3) were designed to place new checks and controls on the Federal Reserve's emergency lending powers. As amended by the Dodd-Frank Act, any Section 13(3) emergency lending program or facility must be for the purpose of providing liquidity to the financial system, not to aid a failing borrower.⁶¹ Specifically, the Dodd-Frank Act provided that no Section 13(3) program or facility could be structured to remove assets from the balance sheet of a single and specific company, and that no program or facility could be established for the purpose of assisting a single and specific company to avoid bankruptcy, resolution under Title II of the Dodd-Frank Act, or any other federal or state insolvency proceeding.⁶² Effective January 1, 2016, Regulation A of the Federal Reserve Board of Governors was also amended to further supplement amended Section 13(3) by providing that the prohibition on lending to insolvent firms would include any borrower unable to pay undisputed debts as they become due during the ninety days prior to borrowing.⁶³ Regulation A also broadened the Section 13(3) definition of "insolvency" to include any borrower deemed by the Federal Reserve Board or lending Reserve Bank to be insolvent.⁶⁴ Certifications by the borrower's chief executive officer (or other authorized officer) that the borrower is not insolvent were also instituted.⁶⁵

The Dodd-Frank Act also required that all Section 13(3) programs and facilities allow for broad-based eligibility.⁶⁶ The Federal Reserve press release announcing the amendment of Regulation A of the Federal Reserve Board of Governors clarifies that "broad-based eligibility" refers to a program or facility in which at least five entities would be eligible to participate and which is "not designed for the purpose of aiding any number of failing firms."⁶⁷

60. Extensions of Credit by Federal Reserve Banks, 80 *Fed. Reg.* 78959 (Dec. 18, 2015).

61. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. No. 111-203, § 1101(a), 124 Stat. 1376, 2113 (2010) (codified at 12 U.S.C. § 343 (2018)).

62. *Id.* Here, Congress drew a policy line between the newly established resolution authority under Title II of Dodd-Frank and Section 13(3) emergency lending authority, and Section 13(3) was amended to remove an overlap. See Email from Thomas C. Baxter, *supra* note 53.

63. See 12 C.F.R. § 201.4(d)(5) (2020).

64. *Id.*

65. See 12 C.F.R. § 201.4(d)(5)(iv)(A).

66. Dodd-Frank Act § 1101(a), 124 Stat. at 2113 (codified at 12 U.S.C. § 343); see also 12 C.F.R. § 201.4(d)(4).

67. Press Release, Fed. Reserve Bd., Federal Reserve Board Approves Final Rule Specifying Its Procedures for Emergency Lending Under Section 13(3) of the Federal Reserve

In addition to these new requirements for eligibility and broad access, the Dodd-Frank Act also modified the collateral requirements for emergency loans again, this time instituting a requirement that collateral be sufficient to protect taxpayers from losses.⁶⁸ New requirements governing the approval, implementation, and duration of Section 13(3) facilities were also added.⁶⁹ Among the new requirements imposed by the Dodd-Frank Act was a prohibition on the establishment of any Section 13(3) facility without approval of the Secretary of the Treasury and new requirements that Section 13(3) programs and facilities be reevaluated every six months and terminated in a “timely and orderly fashion.”⁷⁰

III. THE FINANCIAL CRISIS AND TARP CPP

It is not unusual for a liquidity crisis to be a material factor contributing to the failure of a financial institution.⁷¹ Central bankers can attempt to manage liquidity levels within the financial system through monetary policy and liquidity programs, including Section 13(3) facilities. The various liquidity programs established under Section 13(3) authority in 2008 helped keep the interconnected financial system from seizing during a systemic liquidity crisis, but the 2008 Financial Crisis was not just a liquidity crisis. It was also an asset quality crisis, a capital crisis, and a crisis of confidence.⁷² During 2008 and for several years

Act (Nov. 30, 2015), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20151130a.htm> [https://perma.cc/ND38-HV8L].

68. Dodd-Frank Act § 1101(a), 124 Stat. at 2113 (codified at 12 U.S.C. § 343); *see also* 12 C.F.R. § 201.4(d)(6).

69. Dodd-Frank Act § 1101(a), 124 Stat. at 2113 (codified at 12 U.S.C. § 343).

70. *Id.*

71. A “bank run” is the classic example of a liquidity crisis. “During booming economic environments it is easy to take for granted the availability of abundant liquidity. During periods of economic downturn, however, liquidity can quickly be elevated to the most important CAMELS component, as it is critical to the continued solvency of a distressed financial institution. A bank may have good asset quality, strong earnings, and adequate capital, but if it is unable to maintain sufficient liquidity, it runs the risk of failure. And the speed at which liquidity can evaporate makes effective risk analysis particularly relevant to bank regulators.” *See Liquidity Analysis: Decades of Change*, FED. DEPOSIT INS. CORP.: SUPERVISORY INSIGHTS, https://www.fdic.gov/regulations/examinations/supervisory/insights/siwin07/article01_liquidity.html [https://perma.cc/8M7C-S5DY] (last updated Dec. 7, 2007); John C. Dugan, *Addressing the Fundamental Banking Policy Problem of Runs*, 22 N.C. BANKING INST. 11 (2018).

72. During the second half of 2008, well established, normally efficient financial markets saw their liquidity “evaporate” almost overnight, valuations of financial instruments and commercial real estate plummeted, money market funds experienced extreme redemption

thereafter, the banking system was stressed to a point that additional capital was necessary in order to stabilize, and ultimately save, many financial institutions.⁷³ Furthermore, capital simply was not available in the regular public or private markets during that time.⁷⁴

While Section 13(3) is an extremely powerful and flexible tool and “unusual and exigent” circumstances unquestionably existed during the 2008 Financial Crisis, Section 13(3) does not authorize direct investment in equity securities issued by financial institutions or any other private sector firm.⁷⁵ It simply was not the right tool to augment the regulatory capital of financial institutions because that was never what Section 13(3) was designed to do. A different statute was necessary. The Emergency Economic Stabilization Act of 2008⁷⁶ provided the necessary statutory authority⁷⁷ for the United States Treasury to invest directly in equity securities issued by banks and bank holding companies through the TARP CPP.⁷⁸

pressure, bank and bank holding company capital ratios sank to dangerously low levels, and overnight borrowing rates and bond yields were highly elevated. There was panic in the air.

73. See PAULSON, *supra* note 55, at 365 (stating “our banking system was massively undercapitalized”).

74. *Id.* at 345.

75. *Id.* at 229 (stating that it was the Federal Reserve’s view that it could make a loan to save AIG, whereas it could not extend credit to Lehman Brothers, because with AIG “we were dealing with a liquidity, not a capital, problem”).

76. Emergency Economic Stabilization Act, Pub. L. No. 110-343, tit. I, 122 Stat. 3765 (2008).

77. *Id.*; see also Lissa L. Broome, *Extraordinary Government Intervention to Bolster Bank Balance Sheets*, 13 N.C. BANKING INST. 137, 139–40 (2009) (noting that the United States Treasury’s statutory authority under the Emergency Economic Stabilization Act to purchase preferred stock in financial institutions was “somewhat convoluted”).

78. The Capital Purchase Program was designed to enhance regulatory capital and save the U.S. banking system, but it was also designed to increase the availability of credit to private sector borrowers. As then Secretary of the Treasury Paulson stated in public remarks on October 20, 2008:

While many banks have suffered significant losses during this period of market turmoil, many others have plenty of capital to get through this period, but are not positioned to lend as widely as is necessary to support our economy. This program is designed to attract broad participation by healthy institutions and to do so in a way that attracts private capital to them as well. Our purpose is to increase confidence in our banks and increase the confidence of our banks, so that they will deploy, not hoard, their capital. And we expect them to do so, as increased confidence will lead to increased lending. This increased lending will benefit the U.S. economy and the American people.

Paulson Sees “Efficient Process” to Take Bank Stakes, WALL ST. J. (Oct. 20, 2008), <https://www.wsj.com/articles/BL-REB-2169> [<https://perma.cc/ZB6C-A3MD>]; see also PAULSON, *supra* note 55, at 372 (describing a press conference by Secretary Paulson).

The TARP CPP involved the issuance and sale of non-voting, perpetual preferred stock by qualifying financial institutions⁷⁹ directly to the United States Treasury.⁸⁰ Perpetual preferred stock issued in the TARP CPP program had an initial yield of 5%, which stepped up to 9% on the fifth anniversary of issuance.⁸¹ TARP CPP preferred stock was redeemable, at the issuer's option, on or after the third anniversary of issuance.⁸² In addition, participating issuers were required to issue common stock warrants to the United States Treasury; comply with restrictions on executive compensation and common stock dividends; and fulfill ongoing reporting requirements.⁸³

In total, the TARP CPP disbursed an aggregate of \$204.9 billion for investment into 707 financial institutions.⁸⁴ These investments yielded a total profit of over \$16 billion for the program.⁸⁵ By any standard, TARP CPP was a success.⁸⁶ It was a profitable investment for American taxpayers and without it, there would have been many more bank failures—not to mention the potential for systemic failure of the entire U.S. banking system. Practically speaking, TARP CPP helped to preserve a population of banks that would prove to be a crucial national resource during the next crisis.

79. See FED. DEPOSIT INS. CORP. ET AL., APPLICATION GUIDELINES FOR TARP CAPITAL PURCHASE PROGRAM (2008), <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/bank-investment-programs/cap/Documents/application-guidelines.pdf> [<https://perma.cc/P77T-7SAA>] (providing that qualifying institutions were bank holding companies, financial holding companies, insured depository institutions and savings and loan holding companies that engaged solely or predominately in activities permissible for financial holding companies under relevant law, which were established and operating in the United States, not controlled by a foreign bank or company, and which were approved by the United States Treasury following referral of an application filed with their primary federal regulator).

80. U.S. DEP'T OF THE TREASURY, TARP CAPITAL PURCHASE PROGRAM SENIOR PREFERRED STOCK AND WARRANTS (2009), <https://www.treasury.gov/press-center/press-releases/Documents/document5hp1207.pdf> [<https://perma.cc/5YBX-J3EX>]; see also, Broome, *supra* note 77 at 141 (describing the material terms of equity investments under TARP CPP).

81. U.S. DEP'T OF THE TREASURY, *supra* note 80.

82. *Id.*

83. *Id.*

84. See *TARP Investment Program Transaction Reports*, U.S. DEP'T OF THE TREASURY, <https://www.treasury.gov/initiatives/financial-stability/reports/Pages/TARP-Investment-Program-Transaction-Reports.aspx> [<https://perma.cc/2D9B-JEWH>] (providing a compilation of reports with "transaction level-detail of all TARP programs except housing programs"); see also PAULSON, *supra* note 55, at 382.

85. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-524, REPORT TO CONGRESSIONAL COMMITTEES: TROUBLED ASSET RELIEF PROGRAM 5 (2016), <https://www.gao.gov/assets/680/676954.pdf> [<https://perma.cc/Q5RT-FDVW>].

86. See Broome, *supra* note 59 at 72.

IV. THE COVID-19 PANDEMIC AND PPP

The COVID-19 pandemic and its resulting effect on the American economy and workforce demanded a new source of small business credit that could be deployed very rapidly. PPP loans were designed to get funds into the hands of small businesses to provide for the continued payment of wages and to dampen the shock of an impending unemployment crisis. To the casual observer, it may appear that TARP CPP and PPP have much in common, but the similarity is only skin deep owing to the fact that the two programs were designed to respond to entirely different types of emergencies.

PPP involved government-guaranteed loans with the potential for 100% loan forgiveness. TARP CPP, on the other hand, involved equity investments, not debt,⁸⁷ and contemplated eventual redemption at par plus accrued but unpaid dividends. While PPP provided for payment deferral, TARP CPP required regular, quarterly dividend payments. TARP CPP was available only to qualifying financial institutions subject to approval by banking regulators and an investment committee within the United States Treasury.⁸⁸ PPP, on the other hand, was broadly available to almost any small business, so long as the business could certify that the funds were necessary to support ongoing operations.⁸⁹ TARP CPP was the creation of an entirely new statute, while PPP was technically an expansion of the existing Small Business Act Section 7(a) lending program. Even the scale and granularity of the two programs were in stark contrast. TARP CPP entailed approximately 700 transactions involving an aggregate amount of approximately \$205 billion, while PPP involved over 5.2 million transactions and

87. In limited circumstances, usually, institutions that had made elections to be taxed under Subchapter S of the Internal Revenue Code and which could therefore have only one class of equity issued and outstanding, the Treasury purchased debt securities. See U.S. DEP'T OF THE TREASURY, TARP CAPITAL PURCHASE PROGRAM (SUBCHAPTER S CORPORATIONS) (2009), <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/bank-investment-programs/cap/Documents/scorp-term-sheet.pdf> [<https://perma.cc/AQ75-FC3B>]. The Emergency Capital Investment Program was a program implemented during 2020 for minority depository institutions ("MDIs") and community development financial institutions ("CDFIs"), which was very similar to TARP CPP. See *Emergency Capital Investment Program*, U.S. DEP'T TREASURY, <https://home.treasury.gov/policy-issues/cares/emergency-capital-investment-program> [<https://perma.cc/4B5G-R3P2>].

88. See PAULSON, *supra* note 55, at 382.

89. See Paycheck Protection Program Borrower Application Form Revised January 8, 2021, <https://www.sba.gov/sites/default/files/2021-01/PPP%20Borrower%20Application%20Form%20%28revised%201.8.2021%29-508.pdf> [<https://perma.cc/WP3M-YYXJ>].

approximately \$525 billion.⁹⁰ These differences are indicative of the fact that the 2008 Financial Crisis and the COVID-19 Pandemic had entirely different origins, presented fundamentally different sets of problems, and required different policy tools.

One thing PPP and TARP CPP did have in common, however, was that neither could have been implemented under authority of the Federal Reserve Act. PPP was an emergency lending program and not a capital program, and 2020 was undoubtedly a year characterized by “unusual and exigent circumstances.”⁹¹ As such, PPP was technically closer to being within the scope of Section 13(3) of the Federal Reserve Act than was TARP CPP, though PPP loans were unsecured and many were probably made to borrowers that would have been deemed to be insolvent under Regulation A standards. The sheer number of PPP borrowers would also have presented logistical impediments to launching a program like PPP under Section 13(3). Practically speaking, it would have been impossible for the Federal Reserve Banks to review and process over 5 million PPP loans in a matter of just a few months. The scale and timing for PPP’s deployment demanded a far larger network of lenders to underwrite and administer the extension of business credit. Working through the thousands of private sector commercial banks and other small business lenders across the nation was the only possibility.⁹² The very banking system that had been supported and preserved by TARP CPP less than a dozen years before was precisely the national resource that was necessary for the rapid implementation of PPP.⁹³ As

90. See *PPP Data*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program/ppp-data> [<https://perma.cc/6CSR-US2H>] (providing data as of January 31, 2021).

91. The Federal Reserve’s current framework for monitoring financial stability is central to assessments of whether “unusual and exigent circumstances” exist at any given point in time. The financial stability monitoring framework uses data from the Federal Reserve’s Division of Research and Statistics, Division of Supervision, Regulation & Credit (including data pulled from quarterly reports filed by domestic financial institutions and also real time data gathered by the Large Institution Supervision Coordinating Committee (LISCC)), academics and other sources to monitor trends and vulnerabilities affecting American households and businesses. This data generally falls into four broad categories: (i) valuation data and analysis of asset prices relative to economic fundamentals or historical norms; (ii) borrowing levels of businesses and households; (iii) leverage within the financial sector (i.e., an assessment of whether regulatory capital ratios are commensurate with the risk profiles of financial institutions); and (iv) funding and liquidity within the financial sector. See FED. RESERVE BD., FINANCIAL STABILITY REPORT 7–8 (2020), <https://www.federalreserve.gov/publications/files/financial-stability-report-20201109.pdf> [<https://perma.cc/B4YH-HC7Q>].

92. See *id.* at 12 (stating that small community banks accounted for 50% of aggregate PPP proceeds advanced and 90% of active PPP borrowers).

93. It is questionable whether a nation like Canada, with only a couple dozen domestic banks, could ever have deployed a program like PPP.

Justice Brennan succinctly stated in *United States v. Philadelphia National Bank*, “thus it is that banks are the chief source of the country's short-term business credit.”⁹⁴

In addition to the challenge of rapid implementation on a massive scale, the fact that PPP loans needed to be extended to many borrowers with little or no collateral to pledge meant that Section 7(a) of the Small Business Act⁹⁵ was better suited for the job than Section 13(3) of the Federal Reserve Act. Section 13(3), even as amended by FDICIA, would have imposed collateral requirements that few small businesses would have been able to meet and certainly not small businesses that were required by the terms of PPP to certify that the loan was necessary in order to support their ongoing operations.

If the Small Business Act and the nation's existing commercial banking system provided the necessary infrastructure for processing and originating PPP loans and if an SBA-administered forgiveness process and government guarantee helped address the problem of underwriting them, the problem of actually *funding* over half a trillion dollars' worth of PPP loans still loomed. For this challenge, Section 13(3) of the Federal Reserve Act was the perfect tool, and the Federal Reserve was poised to provide emergency liquidity by implementing the Paycheck Protection Program Lending Facility on April 9, 2020.⁹⁶ The Paycheck Protection Program Lending Facility was designed to provide liquidity to participating PPP lenders⁹⁷ so that the program could operate as intended. The facility permitted lenders to pledge SBA guaranteed PPP loans and receive low-cost, non-recourse funding equal to 100% of the principal amount of the pledged loans for the duration of the pledged loans.⁹⁸ This funding, together with the zero-risk weight assigned to PPP loans for regulatory capital purposes,⁹⁹ allowed PPP to function far more efficiently. While PPP was not itself a Section 13(3) facility, it could

94. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 326 (1963).

95. See 15 U.S.C. § 636(a) (2018).

96. FED. RESERVE BANK OF N.Y., FEDERAL RESERVE 13(3) FACILITIES ANNOUNCED DURING COVID-19 PANDEMIC (2020), https://www.newyorkfed.org/medialibrary/media/research/blog/2020/LSE_2020_COVID-fed-response_fleming [<https://perma.cc/JK5D-3JAR>]. The Main Street Lending Program Facilities were also rolled out under Section 13(3) authority on April 9, 2020. *Id.*

97. Including nonbank lenders, such that Section 13(3) provided the required statutory authority.

98. See FED. RESERVE BD., PAYCHECK PROTECTION PROGRAM LIQUIDITY FACILITY TERM SHEET (2020), <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200430b1.pdf> [<https://perma.cc/5BW2-YLRH>].

99. See *id.*

never have functioned as it did without Section 13(3) liquidity support for participating lenders.

In addition to the Paycheck Protection Program Lending Facility, there were twelve other Section 13(3) facilities established by the Federal Reserve Board of Governors during 2020. These programs are listed in the table below.

**Federal Reserve 13(3) Facilities Announced during COVID-19
Pandemic¹⁰⁰**

Facility	Date Announced	Purpose
(CPFF)	March 17, 2020	Enhance the liquidity of the commercial paper market by providing a liquidity backstop to U.S. issuers of commercial paper
(PDCF)	March 17, 2020	Provide funding to primary dealers to support market liquidity and functioning and facilitate credit availability to businesses and households
(MMLF)	March 18, 2020	Assist money market funds in meeting demands for redemptions by households and other investors, enhancing credit provision to the broader economy
(PMCCF)	March 23, 2020	Support credit to large employers so that they are better able to maintain business operations and capacity
(SMCCF)	March 23, 2020	Support credit to large employers by providing liquidity for outstanding corporate bonds

100. FED. RESERVE BANK OF N.Y., *supra* note 96.

Facility	Date Announced	Purpose
(TALF)	March 23, 2020	Enable issuance of asset-backed securities backed by student loans, auto loans, credit card loans, loans guaranteed by the Small Business Administration, and certain other assets to support the flow of credit to consumers and businesses
(MSNLF) & (MSELF)	April 9, 2020	Enhance support for small and mid-sized business through loans to companies employing up to 10,000 workers or with less than \$2.5 billion in revenues
(MLF)	April 9, 2020	Purchase short term notes from state and local governments to help them better manage cash flow pressures
(PPPLF)	April 9, 2020	Supply liquidity to participating financial institutions to bolster the effectiveness of the Small Business Administration's Paycheck Protection Program

The speed with which these 2020 Section 13(3) facilities were deployed—with nine announced between March 17, 2020 and April 9, 2020—would seem to allay fears that the Dodd-Frank amendments to Section 13(3) might impede the Federal Reserve's ability to respond swiftly in the face of a crisis. As Federal Reserve Chair Jerome Powell noted in a speech on May 13, 2020, the Federal Reserve acted with “unprecedented speed and force.”¹⁰¹

101. Jerome H. Powell, Chair, Fed. Reserve Bd., Speech at the Peterson Institute for International Economics (May 13, 2020), <https://www.federalreserve.gov/newsevents/speech/powell20200513a.htm> [https://perma.cc/ZGT9-UFXG].

A. *Order of Announcement*

The order in which these facilities were announced during 2020 is noteworthy. Those facilities that were most critical to restoring and maintaining market functioning and systemic liquidity appear to have been announced first, followed by facilities designed to support corporate credit and issuance of asset-backed securities, which were in turn followed by facilities intended to support municipalities and non-profits and provide liquidity to PPP lenders and Main Street Lending Program lenders. Facilities announced later in the sequence served purposes that were no less important than the first facilities announced in mid-March and were still oriented toward maintaining market functioning, but they could afford to trail those facilities designed to address vulnerabilities that could become systemically dangerous within days, or even hours, as opposed to weeks. Furthermore, the first three Section 13(3) facilities announced in 2020 were very similar to facilities announced during 2008.¹⁰² Having an existing 2008 blueprint to work from undoubtedly sped up the implementation timeline for these facilities, and it would also be fair to assume that experience during the 2008 Financial Crisis informed views on those facilities that should be rolled out first.

B. *“Announcement Effect”*

There is another interesting aspect to the announcements of various Section 13(3) facilities during 2020, which is that a facility can have the effect of improving market functioning and restoring liquidity, even in situations where the facility has not yet been used or ultimately sees only limited usage. Federal Reserve Board Chair Powell referred to this as “announcement effect” in his remarks before the House Committee on Financial Services on September 22, 2020.¹⁰³ The Municipal Liquidity Facility, announced on April 9, 2020, demonstrates

102. The first three Section 13(3) facilities announced during 2020 were the Commercial Paper Funding Facility (CPFF), the Money Market Mutual Fund Liquidity Facility (MMLF), and the Primary Dealer Credit Facility (PDCF). See FED. RESERVE BD., *supra* note 91, at 13.

103. *Coronavirus Aid, Relief, and Economic Security Act: Testimony Before the H. Comm. on Financial Services*, 116th Cong. 9 (2020) (statement of Federal Reserve Board of Governors Chair Jerome H. Powell); see also Hannah Lang, *Cheat Sheet: 8 Ways Fed is Using Emergency Powers to Counter Pandemic*, AM. BANKER (May 4, 2020), <https://www.americanbanker.com/list/cheat-sheet-8-ways-fed-is-using-emergency-powers-to-counter-pandemic> [<https://perma.cc/GB7E-FAUB>] (“The ultimate demand for these facilities is quite difficult to predict because there is this announcement effect that it really gets the market functioning again.”).

the phenomenon. Prior to its announcement, the market for municipal securities was experiencing unusual illiquidity and pricing pressure as a result of the pandemic, with aggregate issuances during the second half of March running at a fraction of normal volume.¹⁰⁴ Only two issues of municipal securities were actually purchased by the Municipal Liquidity Facility during its first six months of operation,¹⁰⁵ but during that period, market liquidity and volume were restored with over \$250 billion in new municipal bonds issued to private sector investors.¹⁰⁶ Further, the improvement in market liquidity was almost immediate, despite the fact that the first purchase actually executed by the facility did not occur until two months after the facility was announced.¹⁰⁷ This demonstrates the extent to which the announcement and continued existence of a Section 13(3) facility backstop can have profound effects on financial stability and market functioning that go well beyond its direct market activity.¹⁰⁸ “Announcement effect” is a phenomenon, of course, only because of the Federal Reserve’s track record of speed, skill and success in implementing Section 13(3) facilities.

C. *Facility Leverage and Reserve Bank Operation*

Two additional items of note with respect to the Section 13(3) facilities announced during 2020 are the equity component of each

104. See FED. RESERVE BD., *supra* note 91, at 11; see also Marco Cipriani et al., *Municipal Debt Markets and the COVID-19 Pandemic*, FED. RES. BANK N.Y.: LIBERTY STREET ECONOMICS (June 29, 2020), <https://libertystreeteconomics.newyorkfed.org/2020/06/municipal-debt-markets-and-the-covid-19-pandemic.html> [<https://perma.cc/3U93-55UF>] (stating that during March of 2020, the market for municipal securities was “severely stressed” and issuance of municipal securities “dried up”).

105. During 2020, the State of Illinois issued and sold bonds having an aggregate face amount of \$3.2 billion to the Municipal Liquidity Facility and the New York Metropolitan Transportation Authority issued and sold \$3.348 billion. See *Municipal Liquidity Facility*, FED. RES. BD., <https://www.federalreserve.gov/monetarypolicy/muni.htm> [<https://perma.cc/N3WH-DC8H>] (providing a compilation of MLF transaction-specific disclosures).

106. See FED. RESERVE BD., *supra* note 91, at 13.

107. See Cipriani et al., *supra* note 104.

108. See *Coronavirus Aid, Relief, and Economic Security Act: Testimony Before the H. Comm. on Financial Services*, 116th Cong. 9 (2020) (statement of Federal Reserve Board of Governors Chair Jerome H. Powell) (stating that even municipal issuers without direct access to the Municipal Liquidity Facility have still benefited from a more efficient municipal securities market); see also Cipriani et al., *supra* note 104 (stating that conditions in municipal markets improved in part due to not just the implementation of the Municipal Liquidity Facility but also to its announcement).

facility and the particular Reserve Bank acting as lender for each. Many of the 2020 facilities included an equity commitment from the United States Treasury comprising 10% of the total facility. This leverage ratio is not mandated by Section 13(3) or the Dodd-Frank Act, and is instead ultimately a function of the risk assessments for various asset classes and the requirement that extensions of credit be “secured to the satisfaction” of the Reserve Bank lender. For example, the Municipal Liquidity Facility had a higher leverage ratio with Treasury contributing \$35 billion towards the aggregate maximum facility of \$500 billion, whereas the Main Street Lending Program Facility had a lower leverage ratio with Treasury contributing \$75 billion towards an aggregate maximum facility of \$600 billion. Turning to the Reserve Banks, it has been interesting to note which Reserve Banks operate particular Section 13(3) facilities. The Federal Reserve Bank of New York has served as lender with many of the 2020 facilities, owing to its prior experience with Section 13(3) facilities during the 2008 Financial Crisis, its direct relationships with primary dealers, and the fact that it is Treasury’s fiscal agent and holder of Treasury’s general account. The Federal Reserve Bank of Boston has served as lender for the Money Market Mutual Fund Liquidity Facility owing to its expertise with money market funds, and all twelve Reserve Banks are serving as Paycheck Protection Program Liquidity Facility lenders to provide liquidity to downstream lenders extending PPP small business loans in their respective districts.¹⁰⁹

D. Proposed Amendment of Section 13(3)

In the course of Congressional debate of various stimulus bills, and specifically, the bill passed by Congress and signed into law during the last week of 2020, there was a proposal in the United States Senate to amend the Federal Reserve’s lending authority under Section 13(3) of the Federal Reserve Act.¹¹⁰ While there was some partisan disagreement as

109. See FED. RESERVE BD., PERIODIC REPORT: UPDATE ON OUTSTANDING LENDING FACILITIES AUTHORIZED BY THE BOARD UNDER SECTION 13(3) OF THE FEDERAL RESERVE ACT (2020) (available at <https://www.federalreserve.gov/publications/files/pdcf-mmlef-cpff-pmccf-smccf-talf-mlf-ppplf-msnlf-mself-msplf-nonlf-noelf-12-11-20.pdf>) [<https://perma.cc/D6ZB-K8E7>]. Various of the Reserve Banks have developed expertise in certain markets and sectors. For example, the Federal Reserve Bank of Atlanta has developed expertise in housing and real estate finance, the Federal Reserve Bank of Chicago has particular expertise with central counterparties, and the Federal Reserve Bank of San Francisco has depth with matters pertaining to community development financial institutions (CDFIs) and fintech.

110. See Rachel Siegel, *Debate over Fed’s Powers Prove Stumbling Block to Stimulus Talks*, WASH. POST (Dec. 18, 2020),

to whether the proposal would abridge the Federal Reserve's emergency lending powers or simply affect Section 13(3) facilities that had been implemented during the COVID-19 pandemic,¹¹¹ Section 13(3) was ultimately left untouched.¹¹²

V. CONCLUSION

The enactment of Section 13(3) of the Federal Reserve Act and its subsequent expansion have given the Federal Reserve a powerful tool to support systemic liquidity and restore market functioning during times of stress. The Federal Reserve has, in turn, used this power judiciously. While the Dodd-Frank Act altered to some degree the manner in which Section 13(3) facilities were permitted to be designed and implemented, the Dodd-Frank amendments appear not to have adversely affected the speed with which Section 13(3) powers may be brought to bear during a crisis. A proposal to modify and cut back the Federal Reserve's longstanding emergency lending powers under Section 13(3) of the Federal Reserve Act was debated and, thankfully, abandoned during late 2020.

Interestingly, two of the most notable federal emergency funding programs of the current era were not Section 13(3) facilities. Specifically, Section 13(3) was not the right tool to augment rapidly eroding bank and bank holding capital during the height of the 2008 Financial Crisis, nor was the Federal Reserve equipped to rapidly deploy an emergency lending program on a scale sufficient to extend credit to over 5.2 million small business borrowers in a matter of just a few months, much less to borrowers that may not have met the solvency or collateral requirements for participation in a Section 13(3) facility. As a result, TARP CPP and PPP were not implemented under Section 13(3), though both programs were launched in close coordination with complementary Section 13(3) facilities as part of an integrated response.¹¹³

While there has been debate over moral hazard and whether the U.S. financial system should have been "bailed out" with the TARP

<https://www.washingtonpost.com/business/2020/12/18/stimulus-fed-facilities-toomey/>
[<https://perma.cc/2UV8-CJSC>].

111. *See id.*

112. *See* Consolidated Appropriations Act of 2021, Pub. L. No. 116-260.

113. *See* PAULSON, *supra* note 55, at 364 (stating that then President of the Federal Reserve Bank of New York Tim Geithner emphasized that "the capital and debt programs were linked: you couldn't have one without the other").

CPP,¹¹⁴ had the financial system not been recapitalized and supported, the private sector infrastructure to deploy PPP might not have been in place when it was most needed. If ever there was evidence that a strong banking industry, including a broad-based community bank segment, is a crucial national resource, then the COVID-19 pandemic has provided the answer. Similarly, Section 13(3) of the Federal Reserve Act is also an important national resource, though it is one that we all hope is not needed again anytime soon.

114. See Broome, *supra* note 59.