**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 370**

**RIN 3064-AD37**

**Temporary Liquidity Guarantee Program**

**AGENCY:** Federal Deposit Insurance Corporation (FDIC)

**ACTION:** **Final rule.**

**SUMMARY:** The FDIC is adopting a Final Rule to implement its Temporary Liquidity Guarantee Program. The Temporary Liquidity Guarantee Program, designed to avoid or mitigate adverse effects on economic conditions or financial stability, has two primary components: the Debt Guarantee Program, by which the FDIC will guarantee the payment of certain newly-issued senior unsecured debt, and the Transaction Account Guarantee Program, by which the FDIC will guarantee certain noninterest-bearing transaction accounts.

**EFFECTIVE DATE:** The Final Rule becomes effective on [INSERT DATE THAT THE FINAL RULE IS FILED FOR PUBLIC INSPECTION AT THE FEDERAL REGISTER], except that § 370.5(h)(2), (h)(3), and (h)(4) are effective December 19, 2008.

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**SUPPLEMENTARY INFORMATION**

I. Background

On November 21, 2008, the Board of Directors (Board) of the Federal Deposit Insurance Corporation (FDIC) adopted a Final Rule relating to the Temporary Liquidity Guarantee Program (TLG Program). The TLG Program was announced by the FDIC on October 14, 2008, as an initiative to counter the current system-wide crisis in the nation's financial sector. It provided two limited guarantee programs: one that guaranteed newly-issued senior unsecured debt of insured depository institutions and most U.S. holding companies (the Debt Guarantee Program), and another that guaranteed certain noninterest-bearing transaction accounts at insured depository institutions (the Transaction Account Guarantee Program).

The FDIC's establishment of the TLG Program was preceded by a determination of systemic risk by the Secretary of the Treasury (after consultation with the President), following receipt of the written recommendation of the Board on October 13, 2008, along with a similar written recommendation of the Board of Governors of the Federal Reserve System (FRB).

The recommendations and eventual determination of systemic risk were made in accordance with section 13(c)(4)(G) to the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. § 1823(c)(4)(G). The determination of systemic risk allowed the FDIC to take certain actions to avoid or mitigate serious adverse effects on economic conditions and financial stability. The FDIC believes that the TLG Program promotes financial stability by preserving confidence in the banking system and encouraging liquidity in order to ease lending to creditworthy businesses and consumers. The FDIC anticipates that the TLG Program will favorably impact both the availability and the cost of credit. As a result, on October 23, 2008, the FDIC's Board authorized publication in the Federal Register and requested comment regarding an Interim Rule designed to implement the TLG Program. The Interim Rule with request for comments was published on October 29, 2008, and provided for a 15 day comment period.[1]

Later, the FDIC amended its Interim Rule. The Amended Interim Rule became effective on November 4, 2008, and was published in the Federal Register on November 7, 2008. It made three limited modifications to the Interim Rule. In the Amended Interim Rule, the FDIC extended the opt-out deadline for participation in the TLG Program from November 12, 2008 until December 5, 2008; extended the deadline for complying with specific disclosure requirements related to the TLG Program from December 1, 2008 until December 19, 2008; and established assessment procedures to accommodate the extended opt-out period. Additionally, in issuing the Amended Interim Rule, the FDIC requested comment on three additional questions relating to the TLG Program.

The FDIC received over 700 comments on the Interim Rule and the Amended Interim Rule and, after consideration of those comments, issues the Final Rule that follows.

## II. The Interim Rule

The Interim Rule permitted the following eligible entities to participate in the TLG Program: FDIC-insured depository institutions, any U.S. bank holding company or financial holding company, and any U.S. savings and loan holding company that either engaged only in activities permissible for financial holding companies to conduct under section (4)(k) of the Bank Holding Company Act of 1956 (BHCA) or had at least one insured depository institution subsidiary that was the subject of an application that was pending on October 13, 2008, pursuant to section 4(c)(8) of the BHCA. To be considered an "eligible entity" under the Interim Rule, both bank holding companies and savings and loan holding companies were required to have at least one chartered and operating

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[1] 73 Fed. Reg. 64179 (Oct. 29, 2008),

insured depository institution within their holding company structure The Interim Rule permitted other affiliates of insured depository institutions to participate in the program, with the permission of the FDIC, granted in its sole discretion and on a case-by-case basis, after written request and positive recommendation by the appropriate Federal banking agency. In making this determination, the FDIC would consider such factors as (1) the extent of the financial activity of the entities within the holding company structure; (2) the strength, from a ratings perspective, of the issuer of the obligations that will be guaranteed; and (3) the size and extent of the activities of the organization.

The TLG Program became effective on October 14, 2008. The Interim Rule provided that from October 14, 2008, all eligible entities would be covered under both components of the TLG Program for the first 30 days of the program unless they opted out of either component of the Program before then. Under the Interim Rule, the guarantees provided by the TLG Program under either the Debt Guarantee Program or the Transaction Account Guarantee Program would be offered at no cost to eligible entities until November 13, 2008. The Interim Rule provided that by 11:59 p.m., Eastern Standard Time (EST) on November 12, 2008, eligible entities were required to inform the FDIC whether they intended to opt-out of one or both components of the TLG Program. (The Interim Rule also permitted eligible entities to notify the FDIC before that date of their intent to participate in the program.) An eligible entity that did not opt-out of either or both programs became a participating entity in the program, according to the Interim Rule. Eligible entities that did not opt-out of the Debt Guarantee Program by the opt-out date of November 12, 2008, were not permitted to select which of their newly-issued senior unsecured debt would be guaranteed; the Interim Rule provided that all senior unsecured debt issued by a participating entity up to a limit of 125 percent of all senior unsecured debt outstanding on September 30, 2008, and maturing by June 30, 2009, would be considered guaranteed debt when issued. The Interim Rule allowed a participating entity to make a separate election and pay a nonrefundable fee to issue non-guaranteed senior unsecured debt with a maturity date after June 30, 2012, prior to reaching the 125 percent debt guarantee limit.

The Interim Rule permitted an eligible entity to opt-out of either the Debt Guarantee Program or the Transaction Account Guarantee Program or of both components of the TLG Program, but required all eligible entities within a U.S. Banking Holding Company or a U.S. Savings and Loan Holding Company structure to make the same decision regarding continued participation in each component of the TLG Program or none of the members of the holding company structure were considered eligible for participation in that component of the TLG Program.

The Interim Rule required an eligible entity's opt-out decision(s) to be made publicly available. In the Interim Rule, the FDIC committed to maintain and post on its website a list of entities that opted out of either or both components of the TLG Program. The Interim Rule required each eligible entity to make clear to relevant parties whether or not it chose to participate in either or both components of the TLG Program.

According to the Interim Rule, if an eligible entity remained in the Debt Guarantee Program of the TLG Program, it was required to clearly disclose to interested lenders and creditors, in writing and in a commercially reasonable manner, what debt it was offering and whether the debt was guaranteed under this program. Similarly, the Interim Rule provided that an eligible entity had to prominently post a notice in the lobby of its main office and at all of its branches disclosing its decision on whether to participate in, or opt-out of, the Transaction Account Guarantee Program. These disclosures were required to be provided in simple, readily understandable text, and, if the eligible entity decided to participate in the Transaction Account Guarantee Program, the Interim Rule required the notice to state that noninterest-bearing transaction accounts were fully guaranteed by the FDIC. The Interim Rule provided that if the institution used sweep arrangements or took other actions that resulted in funds in a noninterest-bearing transaction account being transferred to or reclassified as an interest-bearing account or a non-transaction account, the institution also must disclose those actions to the affected customers and clearly advise them in writing that such actions would void the transaction account guarantee. The Interim Rule required the described disclosures to be made by December 1, 2008.

A. The Debt Guarantee Program

The Debt Guarantee Program, as described in the Interim Rule, temporarily would guarantee all newly-issued senior unsecured debt up to prescribed limits issued by participating entities on or after October 14, 2008, through and including June 30, 2009. The guarantee would not extend beyond June 30, 2012. The Interim Rule explained that, as a result of this guarantee, the unpaid principal and contract interest of an entity's newly-issued senior unsecured debt would be paid by the FDIC if the issuing insured depository institution failed or if a bankruptcy petition were filed by the respective issuing holding company.

In the Interim Rule, senior unsecured debt included, without limitation, federal funds purchased, promissory notes, commercial paper, unsubordinated unsecured notes, certificates of deposit standing to the credit of a bank, bank deposits in an international banking facility (IBF) of an insured depository institution, and Eurodollar deposits standing to the credit of a bank. Senior unsecured debt was permitted to be denominated in foreign currency. For purposes of the Interim Rule, the term "bank" in the phrase "standing to the credit of a bank" meant an insured depository institution or a depository institution regulated by a foreign bank supervisory agency. To be eligible for the Debt Guarantee Program, senior unsecured debt was required to be noncontingent. Finally, the Interim Rule required senior unsecured debt to be evidenced by a written agreement, contain a specified and fixed principal amount to be paid on a date certain, and not be subordinated to another liability.

The preamble to the Interim Rule explained that the purpose of the Debt Guarantee Program was to provide liquidity to the inter-bank lending market and promote stability in the unsecured funding market and not to encourage innovative, exotic or complex funding structures or to protect lenders who make risky loans. Thus, as explained in the Interim Rule, for purposes of the Debt Guarantee Program, some instruments were excluded from the definition of senior unsecured debt. Some of these exclusions from that definition were, for example, obligations from guarantees or other contingent liabilities, derivatives, derivative-linked products, debt paired with any other security, convertible debt, capital notes, the unsecured portion of otherwise secured debt, negotiable certificates of deposit, and deposits in foreign currency and Eurodollar deposits that represent funds swept from individual, partnership or corporate accounts held at insured depository institutions. Also excluded from the definition of "senior unsecured debt" were loans from affiliates, including parents and subsidiaries, and institution-affiliated parties.

The Interim Rule explained that debt eligible for coverage under the Debt Guarantee Program had to be issued by participating entities on or before June 30, 2009. The FDIC agreed to guarantee such debt until the earlier of the maturity date of the debt or until June 30, 2012. The Interim Rule provided an absolute limit for coverage: coverage would expire at 11:59 pm EST on June 30, 2012, whether or not the liability had matured at that time. In order for the newly-issued senior unsecured debt to be guaranteed by the FDIC, the Interim Rule required the debt instrument to be clearly identified as "guaranteed by the FDIC."

As explained in the Interim Rule, absent additional action by the FDIC, the maximum amount of senior unsecured debt that could be issued pursuant to the Debt Guarantee Program was equal to 125 percent of the par or face value of senior unsecured debt outstanding as of September 30, 2008, that was scheduled to mature on or before June 30, 2009. The Interim Rule provided that the maximum guaranteed amount would be calculated for each individual participating entity within a holding company structure. In the Interim Rule, the FDIC outlined procedures that required each participating entity to calculate its outstanding senior unsecured debt as of September 30, 2008, and to provide that information – even if the amount of the senior unsecured debt was zero - to the FDIC.

The 125 percent limit described in the Interim Rule could be adjusted for participating entities if the FDIC, in consultation with any appropriate Federal banking agency, determined it was necessary. Additionally, the Interim Rule provided that, after written request and positive recommendation by the appropriate Federal banking agency, the FDIC, in its sole discretion and on a case-by-case basis, may allow an affiliate of a participating entity to take part in the Debt Guarantee Program. Factors that would be relevant to this determination are (1) the extent of the financial activity of the entities within the holding company structure; (2) the strength, from a ratings perspective, of the issuer of the obligations that will be guaranteed; and (3) the size and extent of the activities of the organization.

The Interim Rule also stated that, again, on a case-by case basis, the FDIC could authorize a participating entity to exceed the 125 percent limitation or limit its participation to less than 125 percent.

A participating entity was prohibited by the Interim Rule from representing that its debt was guaranteed by the FDIC if it did not comply with the rules governing the Debt Guarantee Program. If the issuing entity opted out of the Debt Guarantee Program, the Interim Rule provided that it could no longer represent that its newly-issued debt was guaranteed by the FDIC. Similarly, once an entity has reached its 125 percent limit, it was prohibited from representing that any additional debt was guaranteed by the FDIC, and was required to specifically disclose that such debt was not guaranteed.

After consultation with a participating entity's appropriate Federal banking agency, the Interim Rule provided that the FDIC, in its discretion, could determine that a participating entity should not be permitted to continue to participate in the TLG Program. The FDIC explained that termination of an entity's participation in the Program would have only a prospective effect, and the FDIC required the entity to notify its customers and creditors that it was no longer issuing guaranteed debt.

Under the Interim Rule, entities that chose to participate in the Debt Guarantee Program and to issue guaranteed debt had to agree to supply information requested by the FDIC, as well as to be subject to periodic FDIC on-site reviews as needed after consultation with the appropriate federal banking agency to determine compliance with the terms and requirements of the TLG Program. Participating entities also would be bound by the FDIC's decisions, in consultation with the appropriate Federal banking agency, regarding the management of the TLG Program. If an entity participated in the

Debt Guarantee Program, the Interim Rule provided that it was not exempt from complying with federal and state securities laws and with any other applicable laws.

B. The Transaction Account Guarantee Program

The Transaction Account Guarantee Program as described in the Interim Rule, provided for a temporary full guarantee by the FDIC for funds held at FDIC-insured depository institutions in noninterest-bearing transaction accounts above the existing deposit insurance limit. This coverage became effective on October 14, 2008, and would continue through December 31, 2009 (assuming that the insured depository institution does not opt-out of this component of the TLG Program).

Under the Interim Rule, a "noninterest-bearing transaction account" was defined as a transaction account with respect to which interest is neither accrued nor paid and on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal. This definition was designed to encompass traditional demand deposit checking accounts that allowed for an unlimited number of deposits and withdrawals at any time and official checks issued by an insured depository institution. The definition contained in the Interim Rule specifically did not include negotiable order of withdrawal (NOW) accounts or money market deposit accounts (MMDAs).

The Interim Rule recognized that depository institutions sometimes waive fees or provide fee-reducing credits for customers with checking accounts and stated that such account features do not prevent an account from qualifying under the Transaction Account Guarantee Program, if the account otherwise satisfies the definition.

The Interim Rule clarified that the guarantee provided for noninterest-bearing transaction accounts is in addition to and separate from the general deposit insurance coverage provided for in 12 CFR Part 330. The FDIC stated that although the unlimited coverage for noninterest-bearing transaction accounts under the TLG Program is intended primarily to apply to transaction accounts held by businesses, it also applies to all such accounts held by any depositor.

The Interim Rule included a provision relating to sweep accounts. Under this provision, the FDIC stated that it would treat funds in sweep accounts in accordance with the usual rules and procedures for determining sweep balances at a failed depository institution. Under these procedures, funds may be swept or transferred from a noninterest-bearing transaction account to another type of deposit or nondeposit account, and the FDIC stated that it would treat the funds as being in the account to which the funds were transferred. The Interim Rule provided an exception for funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings account:[2] such swept funds would be treated as being in a noninterest-bearing transaction account. As a result of this treatment, the Interim Rule provided that funds swept into a noninterest-bearing savings account would be guaranteed under the Transaction Account Guarantee Program.

C. Fees for the TLG Program

The Interim Rule provided for fees related to both components of the TLG Program. It provided that, beginning on November 13, 2008, any eligible entity that had not opted out of the Debt Guarantee Program would be assessed fees for continued coverage. According to the Interim Rule, all eligible debt issued by such entities from October 14, 2008 (and still outstanding on November 13, 2008), through June 30, 2009, would be charged an annualized fee equal to 75 basis points multiplied by the amount of debt issued, and calculated for the maturity period of that debt or June 30, 2012, whichever was earlier. (The Interim Rule explained that a deduction from this calculation would be made for the first 30 days of the program, for which no fees would be charged.) The Interim Rule further provided that if any participating entity issued eligible debt guaranteed by the Debt Guarantee Program, the participating entity's assessment would be based on the total amount of debt issued and the maturity date at

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[2] For purposes of this rule, "savings account" is a type of "savings deposit" as defined in Regulation D issued by the Board of Governors of the Federal Reserve System, 12 CFR § 204.2(d).

issuance and that if the guaranteed debt was ultimately retired before its scheduled maturity, there would be no refund of pre-paid fees.

If an eligible entity did not opt-out, the Interim Rule indicated that all newly-issued senior unsecured debt up to the maximum amount would become guaranteed as and when issued. Participating entities were prohibited from issuing guaranteed debt in excess of the maximum amount for the institution and also were prohibited from issuing non-guaranteed debt until the maximum allowable amount of guaranteed debt had been issued.

The Interim Rule permitted one exception to the prohibition against issuing non-guaranteed debt until the maximum allowable amount of guaranteed debt had been issued. A participating entity could issue non-guaranteed debt with maturities beyond June 30, 2012, at any time, in any amount, and without regard to the guarantee limit only if the entity informed the FDIC of its election to do so. This election was required to be made through FDIC*connect* on or before11:59 pm EST on November 12, 2008, and any party exercising this option was required to pay a non-refundable fee. This non-refundable fee equaled 37.5 basis points times the amount of the entity's senior unsecured debt with a maturity date on or before June 30, 2009, outstanding as of September 30, 2008.

If a participating entity nonetheless issued debt identified as "guaranteed by the FDIC" in excess of the FDIC'S limit, according to the Interim Rule, the participating entity would have its assessment rate for guaranteed debt increased to 150 basis points on all outstanding guaranteed debt. For this violation (and for other violations of the TLG Program), a participating entity and its institution-affiliated parties will be subject to enforcement actions under Section 8 of the FDI Act (12 U.S.C. 1818), including, for example, assessment of civil money penalties under section 8(i) of the FDI Act (12 U.S.C. 1818(i)), removal and prohibition orders under section 8(e) of the FDI Act (12 U.S.C. 1818(e)), and cease and desist orders under section 8(b) of the FDI Act (12 U.S.C. 1818(b)). The violation of any provision of the program by an insured depository institution also constitutes grounds for terminating the institution's deposit insurance under section 8(a)(2) of the FDI Act (12 U.S.C. 1818(a)(2)). The appropriate Federal banking agency for the participating entity will consult with the FDIC in enforcing the provisions of this part. The appropriate Federal banking agency and the FDIC also have enforcement authority under section 18(a)(4)(C) of the FDI Act (12 U.S.C. 1828(a)(4)(C)) to pursue an enforcement action if a person knowingly misrepresents that any deposit liability, obligation, certificate, or share is insured when it is not in fact insured. Moreover, a participating entity's default in the payment of any debt may be considered an unsafe or unsound practice and may result in enforcement action.

The Interim Rule recognized that much of the outstanding debt as of September 30, 2008, which was not guaranteed, would be rolled over into guaranteed debt only when the outstanding debt matured. The Interim Rule stated that the nonrefundable fee would be collected in six equal monthly installments. The Interim Rule provided that an entity electing the nonrefundable fee option also would be billed as it issued guaranteed debt under the Debt Guarantee Program, and that the amounts paid as a nonrefundable fee were to be applied to offset these bills until the nonrefundable fee was exhausted. Thereafter, according to the Interim Rule, the institution would be required to pay additional assessments on guaranteed debt as it issued the debt.

Under the Transaction Account Guarantee Program described in the Interim Rule, the FDIC committed to provide a full guarantee for deposits held at FDIC-insured institutions in noninterest-bearing transaction accounts. This coverage became effective on October 14, 2008, and would expire on December 31, 2009 (assuming the insured depository institution did not opt-out of the Transaction Account Guarantee Program). The Interim Rule provided that all insured depository institutions were automatically enrolled in the Transaction Account Guarantee Program for an initial thirty-day period (from October 14, 2008, through November 12, 2008) at no cost.

Beginning on November 13, 2008, if an insured depository institution did not opt-out of the Transaction Account Guarantee Program, it would be assessed on a quarterly basis an annualized 10 basis point assessment on balances in noninterest-bearing transaction accounts that exceed the existing deposit insurance limit of $250,000, according to the Interim Rule. In the Interim Rule, the FDIC stated its intent to collect such assessments at the same time and in the same manner as it collects an institution's quarterly deposit insurance assessments under existing part 327, although the assessments related to the Transaction Account Guarantee Program would be in addition to an institution's risk-based assessment imposed under that part.

The Interim Rule also required the FDIC to impose an emergency systemic risk assessment on insured depository institutions if the fees and assessments collected under the TLG Program proved insufficient to cover losses incurred as a result of the program. In addition, if at the conclusion of these programs there were any excess funds collected from the fees associated with the TLG Program, the Interim Rule provided that the funds would remain as part of the Deposit Insurance Fund.

D. Payment of Claims by the FDIC pursuant to the Transaction Account Guarantee Program

The Interim Rule established a process for payment and recovery of FDIC guarantees of "noninterest-bearing transaction accounts." In the Interim Rule, the FDIC stated that its obligation to make payment, as guarantor of deposits held in noninterest-bearing transaction accounts, arose upon the failure of a participating federally insured depository institution. The Interim Rule also noted that the payment and claims process for satisfying claims under the Transaction Account Guarantee Program generally would follow the procedures prescribed for deposit insurance claims pursuant to section 11(f) of the FDI Act, 12 U.S.C. §1821(f), and that the FDIC would be subrogated to the rights of depositors against the institution pursuant to section 11(g) of the FDI Act, 12 U.S.C. § 1821(g).

The FDIC stated that it would make payment to the depositor for the guaranteed amount under the Transaction Account Guarantee Program or would make such guaranteed amounts available in an account at another insured depository institution when it fulfilled its deposit insurance obligation under Part 330. The Interim Rule provided that the payment made pursuant to the Transaction Account Guarantee Program would be made as soon as possible after the FDIC, in its sole discretion, determined whether the deposit was eligible and what amount would be guaranteed. In the preamble to the Interim Rule, the FDIC stated its intent to make the entire amount of a qualifying transaction account available to the depositor on the next business day following the failure of an institution that participated in the Transaction Account Guarantee Program. If there is no acquiring institution for a transaction account guaranteed by the Transaction Account Guarantee Program, in the preamble to the Interim Rule, the FDIC also stated its intent to mail a check to the depositor for the full amount of the guaranteed account within days of the insured depository institution's failure.

The Interim Rule provided that the FDIC would be subrogated to all rights of the depositor against the institution with respect to noninterest-bearing transaction accounts guaranteed by the Transaction Account Guarantee Program, and the preamble explained that this included the right of the FDIC to receive dividends from the proceeds of the receivership estate of the institution. The preamble to the Interim Rule also explained that the FDIC, as manager of the Deposit Insurance Fund, would be entitled to receive dividends in the deposit class for that portion of the account and that the FDIC would be entitled to receive dividends from the receiver for assuming its obligation with regard to the uninsured portion of the guaranteed transactional deposit accounts.

The Interim Rule provided that claims related to noninterest-bearing transaction accounts would be paid in accordance with 12 U.S.C. 1821(f) and 12 CFR 330. The preamble to that rule provided that in paying such claims, the FDIC would rely on the books and records of the insured depository institution to establish ownership and that the FDIC could require a claimant to file a proof of claim (POC) in accordance with section 11(f)(2) of the FDI Act, 12 U.S.C. §1821(f)(2. The Interim Rule provided that the FDIC's determination of the guaranteed amount would be final and would be considered a final administrative determination subject to judicial review in accordance with Chapter

7 of Title 5.  The Interim Rule permitted a noninterest-bearing transaction account depositor to seek judicial review of the FDIC's determination on payment of the guaranteed amount in the United States district court for the federal judicial district where the principal place of business of the depository institution is located within 60 days of the date on which the FDIC's final determination is issued.

E.  Payment of Claims by the FDIC pursuant to the Debt Guarantee Program: *Insured Depository Institution Debt*

The Interim Rule indicated that, with respect to debt issued by an insured depository institution, the FDIC's obligation to make payment is triggered by the failure of a participating insured depository institution and that the FDIC would use its established receivership claims process to process guarantee requests.  The Interim Rule required claimants under the Debt Guarantee Program to present their claims within 90 days of the publication of the claims notice by the receiver for the failed institution.  In the preamble to the Interim Rule, the FDIC projected that many debtholders, particularly sellers of federal funds, would be paid on the next business day immediately following the failure of an insured depository institution, but that, in all instances, the FDIC would commit to pay claims expeditiously and strive to make payment on the business day following the establishment of the validity of the claim.  The Interim Rule also provided that the FDIC would be subrogated to the rights of any creditor paid under this aspect of the Debt Guarantee Program.

F.  Payment of Claims by the FDIC pursuant to the Debt Guarantee Program: *Holding Company Debt*

Under the Interim Rule, for senior unsecured debt of holding companies eligible for payment based on the Debt Guarantee Program, the FDIC's obligation to make payment would be triggered on the date of the filing of a bankruptcy petition involving a participating holding company.  The Interim Rule also provided that the FDIC would pay the debtholder the principal amount of the debt and contract interest to the date of the filing of the bankruptcy petition and that the FDIC would pay interest on a claim for debt until paid at the 90-day T-bill rate in effect when the bankruptcy petition was filed if payment for the claim were delayed beyond the next business day after the filing of the bankruptcy petition.

As with claims for debt issued by insured depository institutions, in the Interim Rule, the FDIC committed to expedite the claims payment process related to guaranteed debt, but the FDIC stated that it would not be required to make payment on the guaranteed amount for a debt asserted against a bankruptcy estate, unless and until the claim for the unsecured senior debt has been determined to be an allowed claim against the bankruptcy estate and such claim was not subject to reconsideration under 11 U.S.C. § 502(j).

The Interim Rule required the holder of eligible debt to file a timely claim against a participating holding company's bankruptcy estate and to submit evidence of the timely filed bankruptcy POC to the FDIC within 90 days of the published bar date of the bankruptcy proceeding. In the preamble to the Interim Rule, the FDIC explained that it could also consider the books and records of the holding company and its affiliates to determine the holder of the unsecured senior debt and the amount eligible for payment under the Debt Guarantee Program

The Interim Rule required the holder of the senior unsecured debt to assign its rights, title and interest in the unsecured senior debt to the FDIC and to transfer its allowed claim in bankruptcy to the FDIC to receive payment under the Debt Guarantee Program. The Interim Rule explained that this assignment included the right of the FDIC to receive principal and interest payments on the unsecured senior debt from the proceeds of the bankruptcy estate of the holding company. The assignment, as explained in the preamble to the Interim Rule, would entitle the FDIC to receive distributions from the liquidation or other resolution of the bankruptcy estate in accordance with 11 U.S.C. § 726 or a confirmed plan of reorganization or liquidation in accordance with 11 U.S.C. § 1129. The Interim Rule also provided that if the holder of the senior unsecured debt received any distribution from the bankruptcy estate prior to the FDIC's payment under the guarantee, the guaranteed amount paid by the FDIC would be reduced by the amount the holder received in the distribution from the bankruptcy estate.

## III. The Amended Interim Rule

The Interim Rule established an opt-out deadline of November 12, 2008, and a deadline of November 13, 2008, for submitting comments to the FDIC relating to the Interim Rule. The FDIC intended to issue a final rule only after the expiration of the comment period and consideration of comments related to the Interim Rule. In order to provide eligible entities an opportunity to review the final rule before they were required to decide whether or not to opt-out of the TLG Program, the FDIC amended its Interim Rule. The Amended Interim Rule differs from the Interim Rule in three ways: it extended the opt-out date for participation in the TLG Program from November 12, 2008, until December 5, 2008; extended the deadline for complying with specific disclosure requirements related to the TLG Program from December 1, 2008 until December 19, 2008; and established some changes to the previously announced assessment procedures to accommodate the extended opt-out period. Apart from these and other related conforming technical modifications, as well as a few grammatical changes, the Amended Interim Rule made no other modifications to the text of the Interim Rule.

When establishing December 5, 2008, as the new opt-out deadline, the FDIC amended the Interim Rule to make conforming modifications to part 370 that referred to or were based upon the previous opt-out deadline of November 12, 2008. These amendments were considered technical. As evidenced by the discussion that follows, other changes in the Amended Interim Rule that related to assessments under the Debt Guarantee Program and the Transaction Account Guarantee Program could be considered more substantive.

According to the Interim Rule, eligible entities were not required to pay any assessment associated with the Debt Guarantee Program for the period from October 14, 2008, through November 12, 2008. The Amended Interim Rule retained this provision. In addition, the Amended Interim Rule provided that if an eligible entity opted out of the

Debt Guarantee Program by the extended deadline of December 5, 2008, the entity would not be required to pay any assessment under the program.

The Interim Rule also contained notice and certification requirements for eligible entities that issue guaranteed debt under the Debt Guarantee Program for the period from October 14, 2008 through November 12, 2008, and for the period after November 12, 2008, respectively. Although the notification and certification requirements did not change in the Amended Interim Rule, the references in those sections to the former opt-out deadline of November 12, 2008, were changed to reflect the new opt-out deadline of December 5, 2008.

Regarding the initiation of assessments related to the Debt Guarantee Program, the Interim Rule provided that beginning on November 13, 2008, any eligible entity that had chosen not to opt-out of this aspect of the TLG Program would be charged assessments as provided in part 370. The Interim Rule did not distinguish between overnight debt instruments and other types of newly-issued senior unsecured debt. Although the manner of calculating assessments did not change in the Amended Interim Rule, the revisions relating to the initiation of assessments reflected two modifications. The first change reflected the newly extended opt-out deadline, and the second change differentiated between overnight debt instruments and other newly-issued senior unsecured debt and explained how assessments would be treated for overnight debt instruments as compared with other newly-issued senior unsecured debt.

The Amended Interim Rule provided that assessments would accrue, with respect to each eligible entity that did not opt-out of the Debt Guarantee Program on or before December 5, 2008: (1) beginning on November 13, 2008, on all senior unsecured debt, other than overnight debt instruments, issued by it on or after October 14, 2008, that was still outstanding on November 13, 2008; (2) beginning on November 13, 2008, on all senior unsecured debt, other than overnight debt instruments, issued by it on or after November 13, 2008, and before December 6, 2008; and (3) beginning on December 6, 2008, on all senior unsecured debt issued by it on or after December 6, 2008. According to the Amended Interim Rule, calculations related to both overnight debt instruments and other newly-issued unsecured debt continue to be made in accordance with the Interim Rule.

According to the Interim Rule, eligible entities were not required to pay an assessment associated with the Transaction Account Guarantee Program from the period from October 14, 2008, through November 12, 2008. To this, the Amended Interim Rule added that if an eligible entity opted out of the Transaction Account Guarantee Program by the extended opt-out deadline of December 5, 2008, then it would not be responsible for paying any assessment under the program.

Regarding the initiation of assessments for the Transaction Account Guarantee Program, the Interim Rule provided that for the period beginning on November 13, 2008, and continuing through December 31, 2009, any eligible entity that did not notify the FDIC that it had opted out of this component would be charged an assessment for its participation in the Transaction Account Guarantee Program. The Amended Interim Rule reflected the newly-extended opt-out date. The Amended Interim Rule provided that beginning on November 13, 2008, an eligible entity that had not opted out of the Transaction Account Guarantee Program on or before December 5, 2008, would be required to pay the FDIC assessments on all deposit amounts in noninterest-bearing transaction accounts. The Amended Interim Rule also indicated that calculations related to the amount of assessments for the Transaction Account Guarantee Program would continue to be made in accordance with the Interim Rule.

## IV. Comments on the Interim Rule and the Amended Interim Rule

The FDIC received over [700] comments on the Interim Rule and the Amended Interim Rule

The FDIC invited general comments on all aspects of the Interim Rule and sought comments from the public for suggestions as to its implementation. In addition, the FDIC raised specific questions regarding the possibility of more expeditious processing of claims under the Debt Guarantee Program: whether coverage for certain NOW accounts should be provided under the Transaction Account Guarantee Program; whether the disclosures required in the Interim Rule were beneficial in light of the potential costs in providing them; and the general administrative cost of the Interim Rule. In the Amended Interim Rule, the FDIC sought comment on three additional areas of interest: suggested rates for short-term borrowings versus longer term borrowings; the possibility of combining holding company and bank debt (without exceeding their combined guaranteed debt limit); and suggestions for establishing a guaranteed debt limit for those institutions that had no senior unsecured debt outstanding as of September 30, 2008.

Some of the comments received by the FDIC were equally applicable to both components of the TLG Program; others related specifically to either the Transaction Account Guarantee Program or the Debt Guarantee Program. A summary of the collective comments received in response to the Interim Rule and the Amended Interim Rule (as well as the FDIC's response to those comments) follows.

General Comments regarding the TLG Program

The FDIC received a number of comments that expressed general support of the FDIC's efforts to establish and implement the TLG Program. These commenters stated their belief that the TLG Program could help ease the strains in the credit markets, improve the access of financial institutions to liquidity, mitigate systemic risks in the financial system, and preserve public confidence in banks and other financial institutions.

However, the FDIC also received some comments from community bankers stating that, while they appreciate the efforts being made to strengthen confidence in the banking system, they have not been experiencing capital or liquidity problems and, therefore, do not see the need for the TLG Program and, in fact, consider the TLG Program's potential to raise their cost of funds detrimental. In particular, the commenters raised the possibility that if they choose to opt-out of the Debt Guarantee Program they may have to pay more for correspondent banking services and may be stigmatized. As discussed below, the Final Rule excludes short-term senior unsecured debt with a maturity of thirty days or less from the Debt Guarantee Program, which should ease the concerns of these commenters, since the comments raised questions primarily about overnight funding.

One commenter observed that the Debt Guarantee Program may pose adverse selection risks where only weak institutions participate in the Debt Guarantee Program and strong institutions opt-out. While acknowledging the concerns raised by the commenter, the FDIC is confident that the benefits of the program, coupled with the revisions made to the Final Rule in response to industry comments will ensure that the majority of strong institutions will participate. In addition, working with the other primary federal regulators, the FDIC's supervisory staff will also closely monitor and limit, as appropriate, use by weaker institutions.

A banking trade association emphasized the FDIC's need to retain flexibility to adjust the program and quickly correct problems. In the commenter's view, this flexibility would include both the flexibility to change the elements of the guarantee (including debt covered, pricing, and terms) and the ability of banks to participate or not in the program. The FDIC believes that the changes it is making in the rule and the discretion it retains in implementing the rule are the most appropriate means of addressing these concerns.

*Competitive issues and potential effects on other entities*

A number of commenters indicated that differences between the FDIC's Debt Guarantee Program and the debt guarantee programs in other countries could create competitive disparities. These commenters specifically recommended that the FDIC emphasize that its guarantee is backed by the full faith and credit of the federal government and that the FDIC revise the program to guarantee timely payment of principal and interest. The FDIC agrees with these comments and has revised the nature of the guarantee to cover timely payment of principal and interest as discussed below. Also, the disclosure required by the Final Rule for debt issued under the Debt Guarantee

Program includes the statement that the debt is backed by the full faith and credit of the United States.

A comment from one of the regulators of a Government Sponsored Enterprise (GSE) and an insurer of that GSE's bonds warned of potential disruptions, dislocations, and investor confusion in the debt markets due to the FDIC's debt guarantee that may disadvantage the GSEs. These two commenters neither supported nor opposed the Amended Interim Rule and noted that these potential unintended consequences are mitigated by the fact that the program is temporary. The FDIC agrees that this temporary program should not significantly affect the GSE debt markets. In addition, this program has the potential to lower the funding costs of most of the major mortgage originators, which may have a beneficial impact on mortgage availability and costs.

One commenter noted that the Debt Guarantee Program will reduce secured borrowing and harm the earnings of Federal Home Loan Banks, which are owned by insured institutions. In the FDIC's view, Federal Home Loan Banks function well under ordinary circumstances, when market failures have not prevented healthy institutions from borrowing on an unsecured basis. The Debt Guarantee Program is a time-limited program intended to restore normal functioning to the market; and, therefore, it should not materially affect the Federal Home Loan Banks.

*Extending the opt-out deadline.*

The FDIC also received several comments requesting that the opt-out deadline established in the Interim Rule be extended until the Final Rule was announced to permit eligible entities sufficient time to review the Final Rule and make a more informed decision regarding their participation in the TLG Program. Recognizing these concerns, in its Amended Interim Rule, the FDIC extended the opt-out deadline from November 12, 2008 until December 5, 2008, and made corresponding changes to other dates affected by the revised opt-out deadline.

*Systemic risk assessment.*

A few commenters raised the issue of the systemic risk assessment. The Amended Interim Rule provides that, if the assessments for the TLG Program are insufficient to cover the expenses related to the program, an emergency special assessment will be made on all insured depository institutions. While acknowledging that section 13(c)(4)(G)(ii) of the FDI Act, 12 U.S.C. 1823(c)(4)(G)(ii), requires the FDIC to levy a systemic risk assessment against all insured depository institutions, the commenters suggested that such an assessment be levied against all entities that participate in the TLG Program, not against those insured depository institutions that opt-out. Another trade association commenter requested that the FDIC levy a special assessment to entities owned by holding companies with significant non-bank subsidiaries in proportion to program losses generated by such entities. Absent legislative changes, however, the FDIC has no authority to alter the statutory requirements of the systemic risk assessment provision and must levy the assessment on all insured depository institutions (and only insured depository institutions), in accordance with the statute.

The Board of Governors of the Federal Reserve System (Federal Reserve Board), as primary supervisor of bank holding companies (BHCs), strongly supports including BHCs in the TLG Program. Indeed, Federal Reserve Board staff has warned that not including BHCs "would pose significant risks to individual insured depository institutions (IDIs) and the banking system as a whole."[3] The rationale for guaranteeing holding company debt is to promote liquidity in the banking industry, since bank and thrift holding companies, rather than banks and thrifts themselves, issue most senior unsecured debt in many holding company structures. The holding companies, in turn, provide liquidity to their bank and thrift subsidiaries. The FDIC expects its Debt Guarantee Program to yield more revenue than costs. Further, the FDIC is modifying the fee structure for the Debt Guarantee Program to impose modestly higher fees on holding

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3 Memorandum dated November 19, 2008, to FDIC Chairman Sheila C. Bair from Federal Reserve Board Staff at page 1.

companies whose insured depository institutions present less than 50 percent of consolidated assets. Guaranteeing BHC debt is not without risks to the Deposit Insurance Fund (DIF), though the Federal Reserve Board has provided strong assurances that they will use all supervisory powers available to them to minimize these risks.[4] The Office of Comptroller of the Currency and the Office of Thrift Supervision have made similar assurances. For these reasons and based on its own analysis of the risks presented, the FDIC believes the risks are acceptable and anticipates that revenue collected for the guarantee under the Debt Guarantee Program will be sufficient to cover the costs. Any surplus funds will be put in the DIF to ease pressure on premiums paid by depository institutions.

*Cost and benefit*.

In the Interim Rule, the FDIC asked whether the collection of information was necessary for the proper performance of the FDIC's duties and whether the information sought had practical utility. Further, the FDIC asked whether its burden estimates were accurate and whether the assumptions that supported its burden calculation were valid. Commenters were asked to address ways to enhance the quality and clarity of the information collected and to provide suggestions for minimizing the burden of affected parties in providing the requested information to the FDIC. Although the FDIC received no comments that were specifically responsive to these questions, the FDIC continues to believe that the TLG Program will enhance financial stability and will preserve confidence in the banking system without placing undue restrictions on participating entities or those who may someday seek payment under the Program's debt or transaction account guarantees, particularly in light of the changes made to the claims and payment processes in the Final Rule.

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[4] Letter dated November 19, 2008, to FDIC Chairman Sheila C. Bair from Chairman of the Board of Governors of the Federal Reserve System Ben S. Bernanke.

Comments Related to the Scope of the Debt Guarantee Program

In the Amended Interim Rule, the FDIC sought comment as to whether the FDIC should charge different guarantee fees for federal funds or other short-term borrowings as compared to longer term debt instruments. In addition, the FDIC sought suggestions for establishing the differentiating criteria for the types of borrowings and for the actual rates that should be paid for each type. The FDIC received a substantial number of comments regarding these issues and regarding definitions applicable to the Debt Guarantee Program.

*Federal funds and other short-term instruments*.

The FDIC received a large number of comments urging either the exclusion of federal funds and similar overnight instruments from the Debt Guarantee Program or the reduction in the annualized 75 basis point guarantee fee for overnight borrowings from annualized 75 basis points to 10 or 25 basis points. Several commenters suggested that the Debt Guarantee Program should cover federal funds on an unlimited basis, but at a significantly lower fee.

The commenters indicated that the level of fees called for in the Amended Interim Rule is prohibitively expensive for short-term maturity instruments, such as federal funds, given the low prevailing effective rate for federal funds. These commenters felt that the proposed fee structure could lead many eligible institutions that would otherwise participate in the program to opt-out of the Debt Guarantee Program altogether or to shift from federal funds to secured short-term borrowings from sources such as the Federal Reserve discount window, the Federal Reserve's Term Auction Facility (TAF), or Federal Home Loan Banks. Other commenters and market participants have also expressed the view that various federal programs have contributed to improved liquidity in the short-term funding market and, therefore, the FDIC's guarantee of debt with very short-term maturities, such as overnight federal funds, is no longer necessary or desirable in light of the costs that would be associated with such guarantees.

Based on these comments, in the Final Rule, the FDIC has revised the definition of guaranteed senior unsecured debt to exclude debt with a stated maturity of thirty days or less. The FDIC acknowledges that the 75 basis point guarantee fee may be too high for short-term money market instruments such as overnight federal funds or Eurodollars in relation to prevailing overnight interest rates. Furthermore, recent market data from the Federal Reserve Board and market participants suggest less significant disruption in short-term money markets, particularly as the Federal Reserve Board lowers short-term interest rates and actively provides liquidity. Many entities that are eligible to participate in the TLG Program have, in fact, shortened their funding maturities considerably as they continue to experience difficulties obtaining longer-term unsecured debt, with much of the recently issued debt either being secured or having a maturity of 30 days or less. The FDIC believes that the Debt Guarantee Program should help institutions to obtain stable, longer-term sources of funding where liquidity is currently most lacking.

*Fees.*

As discussed above, several commenters stated that fees for short-term instruments were too high. One trade association urged the FDIC to adopt a risk-based pricing model for the Debt Guarantee Program with guarantee fees ranging from under 10 basis points to no more than 50 basis points depending on a bank's CAMELS rating and the term of the borrowings and that small bank and thrift holding companies should be assessed a fee based on the CAMELS ratings for the companies' financial institution subsidiaries. Other commenters suggested that the FDIC develop a sliding scale for fees based on the maturity of the instruments, especially for very short-term instruments like federal funds. As discussed in more detail below, the Final Rule adopts a sliding rate scale based on an instrument's maturity. Rates for shorter term debt (180 days or less, excluding overnight debt) are less than 75 basis points; rates for longer term debt (365 days or greater) are slightly higher.

A banking trade association urged the FDIC to exclude holding companies with significant non-bank subsidiaries from the Debt Guarantee Program on the grounds that community banks and other insured depository institutions would be forced to pay for losses on these guarantees through a special assessment on FDIC-insured institutions only. In the alternative, the association asked the FDIC to develop a methodology for these entities to pay a special assessment for their proportional share of any Program losses. The FDIC believes that it is essential to allow some holding companies to participate in the Debt Guarantee Program to provide liquidity to the inter-bank lending market and promote stability in the unsecured funding market. As discussed earlier, the FDIC does not have the statutory authority to levy a special assessment on non-depository institutions. However, the FDIC has decided to increase the Debt Guarantee Program fees by 10 basis points for holding companies where affiliated insured depository institutions constitute less than half of holding company consolidated assets.

The Interim Rule required each participating entity in the Debt Guarantee Program to take necessary action to allow the FDIC to debit it assessments from the entity's designated deposit account as provided for in section 327(a)(2). The Interim Rule required funds to be available in the designated account for direct debit by the FDIC on the first business day after the invoice is posted on FDIC*connect*. One commenter asked how a holding company could minimize the risk of violating section 23A of the Federal Reserve Act, assuming that the holding company intended to deposit funds in its affiliated insured depository institution's ACH account for the FDIC's direct debit of both the holding company's assessment and the bank's assessment. To avoid violations of 23A of the Federal Reserve Act, the FDIC expects participating holding companies to fund its affiliated insured depository institution's ACH account in advance of the FDIC's direct debit of the assessments.

*Requirement of a written agreement.*

The Amended Interim Rule defines senior unsecured debt in part as unsecured borrowing that is evidenced by a written agreement. The FDIC received several comments that urged the FDIC to make an exception for this requirement for federal funds. Several commenters also noted that certain types of short-term debt, such as overnight transactions or transactions with maturities of one week or less, typically are not evidenced by a written agreement. As noted above, in the Final Rule the FDIC has excluded obligations with a stated maturity of thirty days or less from the definition of senior unsecured debt. The FDIC anticipates that this action will satisfy those with concerns regarding written agreements applicable to federal funds and other short-term debt. Also, the FDIC has clarified in the Final Rule that trade confirmations are a sufficient form of written agreement to establish eligibility as a senior unsecured debt for purposes of the Debt Guarantee Program.

*Full faith and credit.*

Several commenters sought confirmation that the guarantees provided by the FDIC under the Debt Guarantee Program were backed by the full faith and credit of the United States. The FDIC has concluded that the FDIC's guarantee of qualifying debt under the Debt Guarantee Program is subject to the full faith and credit of the United States pursuant to section 15(d) of the FDI Act, 12 U.S.C. 1825(d). Under both the Amended Interim Rule and the Final Rule adopted by the FDIC, the principal amount and term to or date of maturity of conforming debt instruments – citing the FDIC guarantee on their face – will effectively be incorporated by reference into the FDIC's debt guarantee, and the provisions of section 15(d) are therefore satisfied.

*Establishing guarantee cap for institutions with no or limited senior unsecured debt.*

The Amended Interim Rule established September 30, 2008, as the threshold date by which the limit for eligible debt coverage for a participating entity is calculated. On that date, if a participating entity has no senior unsecured debt, it can still seek to have some amount of debt covered by the Debt Guarantee Program in an amount to be determined by the FDIC on a case-by-case basis following discussion with the appropriate Federal banking agency. In the Amended Interim Rule, the FDIC asked whether it should establish an alternative method for establishing a guarantee cap for such institutions and, if so, what the alternative method should be.

A number of commenters expressed concern that the Debt Guarantee Program could have an unintended negative impact on eligible institutions with little or no federal funds purchased and outstanding on the threshold date of September 30, 2008. In particular, these commenters expressed concern that liquidity available on an unsecured basis prior to establishment of the Debt Guarantee Program would no longer be available to them as lenders and would give preference to guaranteed borrowers. Several commenters recommended that the FDIC remedy these concerns by defining the cap as the greater of (1) 125% of senior unsecured debt outstanding on September 30, 2008 and maturing on or before June 30, 2009, or (2) either 100% of the federal funds accommodations lines available to the institution as of September 30, 2008, or a percentage of total assets or total liabilities outstanding on September 30, 2008. Others suggested that the guarantee cap should be calculated based on the highest amount of senior unsecured debt outstanding during 2008, the average amount of senior unsecured debt outstanding during 2008, the average amount of senior unsecured debt outstanding during the third quarter of 2008, varying percentages of total assets and total liabilities as of September 30, 2008, and fixed dollar amounts.

The FDIC has established an alternative method for establishing a guarantee cap for insured depository institutions that either had no senior unsecured debt outstanding or only had federal funds purchased as of September 30, 2008, but that would like to participate in the Debt Guarantee Program. The FDIC has determined that the debt guarantee limit for such an eligible insured depository institution will be two percent of the participating entity's consolidated total liabilities as of September 30, 2008, as set forth in the Final Rule.

For institutions that had senior unsecured debt other than federal funds outstanding as of the threshold date of September 30, 2008, the debt guarantee limit is determined using a definition of senior unsecured debt inclusive of debt obligations with maturities of thirty days or less that also meet the remaining requirements of § 370.2(e). Such obligations are excluded from the definition of senior unsecured debt after December 5, 2008 in the Final Rule.

*Clarification of eligible instruments.*

Several commenters asked the FDIC to clarify whether certain instruments are covered within the definition of senior unsecured debt contained in the Amended Interim Rule. Specifically, these commenters asked whether senior unsecured debt includes inflation-linked securities with a fixed principal amount, index-linked principal protected securities, putable bonds, callable bonds, zero-coupon bonds, extendible securities, step-up coupons and retail debt securities. A trade association urged the FDIC to include principal-protected structured notes in the definition of eligible senior unsecured debt. This commenter argues that such products are analogous to indexed certificates of deposit that qualify for deposit insurance coverage.

The purpose of the Debt Guarantee Program is not to promote innovative, exotic or complex funding structures, but to provide liquidity to the inter-bank lending market. According to the Amended Interim Rule, senior unsecured debt specifically excludes any debt instruments that are either derivatives or derivative-linked products. Most of the instruments mentioned by the commenters are derivative-linked products, structured notes[5], or instruments with embedded options. The FDIC continues to believe that such instruments expose the FDIC to undue risk without materially enhancing liquidity in the inter-bank lending market. The Final Rule further clarifies the definition of senior unsecured debt to exclude any debts that are paired or bundled with other securities, regardless of whether the target investor is institutional or retail, structured notes, securities with embedded options, retail debt securities, and obligations used for trade credit (*e.g.*, letters of credit or banker's acceptances).

One commenter asked for clarification regarding whether preferred debt issued under the TARP CPP would be subject to guarantee fees under the TLG Program.

[5] As defined in the Call Report instructions for schedule RC-B, "structured notes" includes, but are not limited to (1) floating rate debt securities whose payment of interest is based upon a single variable index of a Constant Maturity Treasury (CMT) rate or a Cost of Funds Index (COFI) or changes in the Consumer Price Index (CPI), (2) step-up bonds, (3) index amortizing notes, (4) dual index notes, (5) de-leveraged bonds, (6) range bonds, and (7) inverse floaters.

Another commenter suggested that the FDIC should guarantee structured products or convertible debt securities used to redeem preferred stock issued under the TARP CPP. Senior preferred stock issued under the TARP CPP is considered equity, and does not meet the definition of senior unsecured debt under the Final Rule. Furthermore, as noted in the TARP CCP's term sheet, senior preferred stock issued under the TARP CPP can only be redeemed with the proceeds from the sale of Tier 1 qualifying perpetual preferred stock or common stock for cash.[6]

*Negotiable certificates of deposit (CDs), term Eurodollars, brokered deposits.*

Several commenters suggested including all negotiable (wholesale) certificates of deposit and term Eurodollars owed to corporate lenders as eligible guaranteed instruments under the Debt Guarantee Program. The commenters argue that such instruments, whether they are sold to a bank or a non-bank, are vital sources of liquidity to the industry. Another commenter suggested including brokered deposits as an essential eligible instrument. The FDIC believes that extending the guarantee to inter-bank certificates of deposits, Eurodollar deposits and international banking facility (IBF) deposits owed to a bank are consistent with the objective of promoting liquidity in the inter-bank lending market. The FDIC does not believe it is necessary to extend the guarantee further to deposit instruments sold to non-bank entities since negotiable certificates of deposit and brokered deposits are currently insured up to $250,000.

*Revolving credit agreements.*

One commenter argues that the guarantee should cover 364-day revolving credit agreements that are entered into and fully drawn down at least once before June 30, 2009, should be included in the definition of senior unsecured debt under the Debt Guarantee Program and that the FDIC's guarantee of such agreements should remain in place through June 30, 2012. The commenter stated that lending banks have recently been

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6 http://www.ustreas.gov/press/releases/reports/termsheet.pdf

unwilling to enter into credit agreements on an unsecured basis for longer than 364 days and that an FDIC guarantee of such agreements would alleviate this issue.

Although the FDIC understands the concerns raised by the commenter, the FDIC does not believe that extending the guarantee to cover revolving credit lines, where the line is often drawn on infrequently and often on a short-term basis, is the most effective way to encourage inter-bank lending, which is primary objective of the Debt Guarantee Program. The FDIC also believes that revolving credit lines are not consistent with certain eligibility requirements applied to other types of eligible senior unsecured debts as defined in § 370.2(e). Specifically, since the total outstanding amount of such lines can fluctuate on a daily basis, revolving credit agreements are not consistent with the requirement in § 370.2(e) that senior unsecured debts have a fixed principal amount. Also, the inclusion of 364-day revolving credit agreements appears inconsistent with the FDIC decision to exclude short-term funding instruments from the definition of senior unsecured debt, since amounts drawn under such credit facilities may be outstanding for significantly shorter periods of time than the stated 364-day maturity of the credit facilities (that is, thirty days or less). The FDIC believes that the Final Rule provides sufficient support to bank lending markets across a broad spectrum of instruments and maturity structures and affords eligible institutions with a large range of funding alternatives.

The FDIC has also received several comments that suggest that the FDIC guarantee under the Debt Guarantee Program should cover lines of credit extended to bank holding companies, either unsecured or secured by bank stock, to provide additional liquidity and capital to the subsidiary bank. One commenter argued that at the time of default, such debts, even if secured by bank stock, are effectively unsecured since, generally, no market would exist for the collateral or the collateral would have no value, making lines of credit secured by bank stock essentially unsecured. The FDIC guarantee does not cover any portion of secured debt issuances.

Under the Amended Interim Rule and the Final Rule, the guarantee does not extend to debts issued to affiliates, which includes an insured depository institution's parent company, or any secured debt. The FDIC does not believe that providing guarantees to debts issued to affiliates is an effective means of promoting inter-bank lending. The FDIC notes that many other types of collateral, in addition to bank stock, may have limited marketability or little to no value upon default.

*Long-term debt instruments.*

Some commenters asked the FDIC to consider guaranteeing senior unsecured debt for up to five, seven, or ten years. The commenters noted that the typical investor base of debt with maturities up to three years are not actively purchasing term notes issued from financial institutions and that "real money investors" such as pension funds, insurance companies and traditional money managers are more active in the longer-term debt market. However, a comment from a GSE warned that the Debt Guarantee Program may have the unintended effect of eroding confidence in senior unsecured debt of financial institutions, including Farm Credit System banks that do not qualify for the guarantee. The commenter urged the FDIC not to extend either the issuance deadline beyond June 30, 2009 or the guarantee termination date beyond June 30, 2012. The commenter also asked that the FDIC monitor the effects of the TLG Program on financial institutions that are not covered by the program.

Under the Final Rule, as under the Amended Interim Rule, the FDIC will guarantee all senior unsecured debt issued by a participating institution that meets the definition in §370.2(e) until the maturity date or June 30, 2012, whichever comes first. The FDIC believes that various federal programs, including the TLG program, should help improve liquidity in the inter-bank lending market and the unsecured term debt market prior to the expiration of the guarantee program. The intent of the Debt Guarantee Program is to establish a temporary guarantee of senior unsecured debt to help improve liquidity to inter-bank and unsecured term debt markets. The FDIC does not believe it is generally necessary to extend guarantees to longer term debts to achieve this objective.

*Coverage of sweeps.*

Several comments urged the FDIC to modify the definition of senior unsecured debt to exclude all sweep products, regardless of form, e.g., federal funds, commercial paper or inter-bank deposits. Another commenter also urged the FDIC to modify the definition to exclude funds swept from accounts of public sector clients, banks, and other financial institutions. In addition, the commenter urged the FDIC to exclude similar sweeps into IBF accounts. The commenters argued that sweep products, regardless of form or type of originating account, are passive investments used for cash management and that the FDIC guarantee of these products would not increase liquidity. Rather, the commenters argued that the effect of the annualized 75 basis point guarantee fee would encourage investors to migrate to other products.

The FDIC agrees that the guarantee fee described in the Amended Interim Rule would be onerous for such products. In addition, the FDIC does not believe the guarantee of such products serves the intended purpose of improving liquidity in the inter-bank lending market. The Final Rule revises the definition of senior unsecured debt to exclude any obligation with a maturity of 30 days or less, including all overnight sweep products. This revised definition would exclude all (or almost all) sweep products.

*Debt denominated in foreign currency.*

Under the Amended Interim Rule, senior unsecured debt eligible for the guarantee may be denominated in foreign currency. A commenter asked whether the debt denominated in foreign currency includes foreign denominated debt issuances which are settled in U.S. dollars. The Final Rule clarifies that, except for deposits, senior unsecured debt may be denominated in a foreign currency as long as the other eligibility requirements set forth in the definition are met. Debt issued in foreign currency, but settled in U.S dollars, may have embedded foreign exchange forwards or swap contracts that create an added dimension of risk similar to structured notes. Accordingly, the Final Rule requires debt to be settled in the same currency in which it is denominated at issuance to be considered an eligible senior unsecured debt under the Debt Guarantee Program.

*Deposits at a foreign branch of the bank.*

The definition of senior unsecured debt contained in the Amended Interim Rule includes Eurodollar deposits standing to the credit of a bank. A commenter asked for clarification as to whether the guarantee extends to a deposit account of another bank at any foreign branch[7] of the bank, including accounts denominated in currencies other than U.S. dollars since the Amended Interim Rule did not expressly address those deposits.

The Final Rule clarifies that senior unsecured debt includes U.S. dollar denominated inter-bank deposits with a stated maturity of greater than 30 days, certificates of deposit (other than negotiable certificates of deposit) owed to an insured depository institution or a foreign bank, U.S. dollar denominated deposits in an IBF of an insured depository institution that are owed to an insured depository institution or a foreign bank, and U.S. dollar denominated deposits on the books and records of foreign branches of U.S. depository institutions that are owed to an insured depository institution or a foreign bank. The term "foreign bank" does not include a foreign central bank or other similar non-U.S. government entity that performs central bank functions or a quasi-governmental international financial institution, such as the International Monetary Fund (IMF) or the World Bank. Under the Final Rule, senior unsecured debt does not include deposits denominated in a foreign currency and deposits at foreign branches of U.S. depository institutions other than inter-bank deposits that are denominated in U.S. dollars. Also, under the Final Rule, the phrase "owed to an insured depository institution or a

[7] Section 3(o) of the FDI Act defines "foreign bank" as "any office or place of business located outside the United States, its territories, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Virgin Islands, at which banking operations are conducted."

foreign bank" means owed to an insured depository institution or a foreign bank solely in its own capacity and not as agent.

*Definition of a foreign bank.*

A commenter also asked whether a "depository institution regulated by a foreign bank agency" includes central banks, other similar non-U.S. government entities that perform central bank functions, and international financial institutions such as the IMF. For the purposes of both the Amended Interim Rule and the Final Rule, the term "foreign bank" in the phrase "owed to an insured depository institution, an insured credit union or a foreign bank" means a depository institution, whether insured by the FDIC in the U.S. or regulated by a foreign bank supervisory agency. Central banks or international financial institutions such as IMF do not meet that definition.

One commenter questioned why under §370.2(e) of the Amended Interim Rule "senior unsecured debt" is defined as including U.S. dollar denominated certificates of deposit standing to the credit of (owed to) an insured institution or a foreign bank but that a certificate of deposit owed to a credit union was not covered. The commenter argued that credit unions should be given the same consideration as that given to foreign banks. The FDIC agrees that credit unions insured by the National Credit Union Administration (NCUA) should be treated similarly and has provided for this in the Final Rule.

*Definition of an insured depository institution.*

A commenter requested explanation for the exclusion of an insured branch of a foreign bank from the definition of Insured Depository Institution for the purposes of the Debt Guarantee Program. The commenter expressed concern that excluding insured branches placed them at a potentially serious competitive disadvantage relative to other insured institutions. The FDIC intended for the Debt Guarantee Program to be available to insured depository institutions and other eligible entities that are headquartered in the United States. The FDIC did not intend to guarantee debt issued by foreign entities, including domestic branches of foreign banks or foreign subsidiaries of eligible U.S. entities. Foreign entities may be eligible for similar debt guarantee programs available in the countries in which they are domiciled.

*Eligibility of a debt without a CUSIP identifier*.

One commenter recommended that only debt that can be issued with an identifier from the Committee on Uniform Security Identification Procedures (CUSIP) should be eligible under the Debt Guarantee Program. This commenter argued that such a requirement would reduce potential market confusion about when an institution has exceeded the debt guarantee limit.

With the modifications made by the Final Rule, the FDIC believes that its action in excluding short-term maturity funding, such as overnight federal funds, from eligibility will substantially reduce the volume of transactions covered by the Debt Guarantee Program that are not issued with CUSIP identifiers. Nevertheless, the FDIC does not desire to discourage issuance of other types of eligible unsecured debt that may not be issued with CUSIP identifiers. The FDIC believes that the disclosures required under § 370.5(h)(2) of the Final Rule will offset any potential for market confusion about which debt issuances are guaranteed.

*Calculating debt limits*.

A few commenters requested that the FDIC clarify whether the maximum amount of debt that can be issued under the Debt Guarantee Program is based on the aggregate amount issued or on the amount outstanding at a particular time. The FDIC calculates the maximum amount of debt based on the amount of debt outstanding at a given time, as defined in § 370.3(b)(1), not on the cumulative amount of debt issued under the Debt Guarantee Program.

Several commenters requested clarification about the calculation of the 125 percent debt guarantee limit. In particular, commenters asked whether the baseline measure was senior unsecured debt outstanding at the close of business on September 30, 2008, or the highest amount outstanding throughout September 30, 2008. The Final Rule clarifies that the measure is based on senior unsecured debt outstanding at the close of business on September 30, 2008.

The FDIC has the authority to increase or decrease the cap on a case-by-case basis. In considering requests to increase the cap, the FDIC will evaluate the extent to which the applicant demonstrates the funding will be used to provide or reduce the costs of safe and sound lending in areas currently showing credit contraction (*e.g*. mortgage lending, consumer credit and small business lending.)

As discussed earlier, senior unsecured debt, except for deposits, may be denominated in a foreign currency as long as the other eligibility requirements are met. For purposes of determining compliance with an institution's guarantee limit, the Final Rule provides that debt issued in a foreign currency will be converted into U.S. dollars using the exchange rate in effect on the settlement date (that is, the date that the debt is funded).

*Issuance of non-guaranteed debt.*

Under the Amended Interim Rule, a participating entity may only issue non-guaranteed debt under one of two circumstances: (1) once an entity has reached the debt guarantee limit, it can issue debt that is not guaranteed by the FDIC, but the entity must specifically disclose that the debt is not guaranteed; and (2) if a participating entity elects the option and pays the required fee, it may issue non-guaranteed senior unsecured debt with a maturity date beyond June 30, 2012, without regard to the debt guarantee limit. Several commenters recommended that the FDIC allow participating entities the flexibility to issue senior unsecured debt (excepting, in the view of some commenters, non-swept federal funds) that is not guaranteed by the FDIC, regardless of maturity or whether the entity has reached the debt guarantee limit. Commenters argued, among other things, that: (1) the market will understand that the decision whether to issue guaranteed or non-guaranteed debt will depend on costs and an investor's yield requirements and not necessarily on the perceived strength or weakness of the issuer; (2) the debt guarantee program in the United Kingdom (U.K.) allows institutions the flexibility to choose whether to issue guaranteed or non-guaranteed debt; (3) the market will continue to differentiate the debt of participating entities through prices and credit spreads on debt issued before October 14, 2008, debt guaranteed by participating entities and non-guaranteed debt of affiliates of participating entities, and debt issued in excess of the debt guarantee limit; (4) allowing institutions the flexibility to choose whether to issue guaranteed or non-guaranteed debt will keep an institution's overall cost of funds down while weaker institutions will have to pay more for unsecured funding, thereby maintaining market discipline; (5) institutions will likely reach their debt guarantee limit quickly and will find themselves in the same position that they were in before implementation of the Debt Guarantee Program, since they will then have to issue non-guaranteed debt, while the FDIC's risk will have increased by the amount of the guaranteed debt; (6) systemic risk will increase because healthy banks will effectively be guaranteeing, not only insured deposits at weak banks, but their unsecured debt as well; (7) the restriction on issuing non-guaranteed debt may force healthy banks out of the Debt Guarantee Program, weakening the program itself and putting the banks that opt-out of the program at a competitive disadvantage compared to weaker banks that have guaranteed debt; (8) allowing institutions the flexibility to choose whether to issue guaranteed or non-guaranteed debt would act as a mechanism both to check the pricing of the guarantee as well as to provide for an exit strategy as the financial crisis abates and the value of the guarantee disappears; and (9) capital injections under the Troubled Asset Relief Program (TARP) and improvements in market conditions have made the Debt Guarantee Program as originally contemplated unnecessary unless more flexibility is allowed to issue non-guaranteed debt. In particular, some short-term debt instruments, such as fed funds or commercial paper, may not need a guarantee given their shorter maturity and current degree of market functioning.

Despite these arguments, the FDIC has decided, for several reasons, not to alter the rules governing an entity's authority to issue non-guaranteed senior unsecured debt. First, and most importantly, limiting a participating entity's ability to issue non-guaranteed debt reduces the risk of adverse selection—the risk that the participating entity will issue only the riskiest debt with the guarantee. Second, on balance, the Debt Guarantee Program should reduce systemic risk by restoring liquidity to otherwise healthy institutions. Third, particularly with the revised fee schedule, the FDIC believes that the benefits of the Debt Guarantee Program are such that most healthy institutions will elect to remain in the program. Fourth, the TLG Program was created as a complement to the TARP. These two programs are partly responsible for any improvements that have occurred in the market. However, it is the FDIC's observation that many insured institutions' ability to borrow for a longer term is still impaired. Fifth, the Debt Guarantee Program will allow more institutions to borrow when they could not otherwise. Sixth, limiting a participating entity's ability to issue non-guaranteed debt reduces the possibility of confusion over whether debt is, or is not, guaranteed. Seventh, the U.K. debt guarantee program is different in many of its essential features from the TLG Program, including its scope, its pricing, and the number of entities whose debt is covered (i.e. eight versus roughly 15,000); therefore, its features are useful to understand, but do not necessarily provide a compelling analogy. Eighth, while the FDIC acknowledges that the Debt Guarantee Program may give some benefits to weaker institutions - an inevitable result of any guarantee program - it will give benefits to many stronger institutions, as well, that have been unable to borrow longer term because of market dislocations. Moreover, bank supervision should ensure that weaker institutions are not able to issue unwarranted amounts of guaranteed senior unsecured debt

While the FDIC has not altered the rules governing an entity's authority to issue non-guaranteed senior unsecured debt, the Final Rule revises the definition of senior unsecured debt to exclude any obligation with a stated maturity of thirty days or less, as discussed above.

*Risk weights for capital purposes*.

Several commenters suggested lowering risk weights on FDIC-guaranteed investments for risk-weighted asset and capital purposes. Some indicated that, since the guarantee is presumed to be backed by the full faith and credit of the United States, a zero risk weight should be considered as is the case with other full U.S. government guarantees and similar to practices in other jurisdictions – the U.K., Canada, Denmark, Ireland, France, Sweden and Australia. This being the case, the commenter indicated that a risk weighting of 20 percent could pose competitive disadvantages in terms of attracting capital.

Taking into account the arguments noted, consistent with the current risk-based capital treatment for FDIC-insured deposits, the federal banking agencies (the FDIC, the Office of Thrift Supervision, the Office of the Comptroller of the Currency and the Board of Governors of the Federal Reserve System) have decided to apply a 20 percent risk weight to debt that is guaranteed by the FDIC.[8] This risk-based capital treatment will apply to FDIC-guaranteed debt that is issued either by participating insured depository institutions or by other participating entities, including bank and thrift holding companies. The 20 percent weight will continue to apply to certificate of deposits (CD) investments owed to a bank that are included in the definition of senior unsecured debt contained in the Final Rule. The FDIC considers the 20 percent risk weighting to be appropriate given its consistency with the risk-based capital treatment for FDIC-insured deposits. Furthermore, reducing the risk weighting for FDIC-guaranteed debt would be inconsistent with the need for insured depository institutions to maintain strong capital bases. In addition, given the temporary nature of the TLG Program, the 20 percent risk weighting is not anticipated to have a significant long-term effect. In short, the Debt Guarantee Program is intended to minimize the foreseen risks of these instruments from a credit perspective, thereby encouraging their use and acceptance and promoting liquidity in the markets. FDIC-guaranteed debt is not intended to lower capital standards or free capital in the banking system.

[8] Appendix A to 12 CFR 325, "Statement of Policy on Risk-Based Capital."

*Combining holding company and bank guaranteed debt.*

The FDIC asked whether banks should be allowed to issue guaranteed debt in an amount equal to the bank's cap plus its holding company's(ies') cap as long as the total amount of guaranteed debt payable by the FDIC did not exceed the entities' combined cap. The FDIC sought comment on what procedures should be put into place to manage this process. (Although the question originally posed concerned banks and their holding companies, the question raised and the comments received apply equally to all insured depository institutions.) Several commenters responded to this question; all strongly supported allowing an insured depository institution to combine its debt guarantee limit with its parent holding company(ies) and to issue guaranteed debt up to their combined debt guarantee limit.

In part as a result of these comments, the FDIC has made some changes in the Final Rule with respect to aggregating the debt limits for an insured depository institution and its parent holding company(ies). The Final Rule permits a participating insured depository institution to issue debt under its debt guarantee limit, as well as its holding company's debt guarantee limit or holding companies' combined debt limit, if appropriate. A participating insured depository institution may issue guaranteed debt in an amount equal to the institution's limit plus its holding company's(ies') limit, so long as the total guaranteed debt issued by the insured depository institution and its holding company(ies) does not exceed their combined debt guarantee limits. The holding company's(ies') debt guarantee limit will be reduced to the extent that its subsidiary insured depository institution increases its limit. Allowing consolidated entities to decide whether an insured depository institution should issue debt rather than its parent does not increase the FDIC's liability for the debt and provides participating entities additional flexibility to obtain funding.

*Use of guaranteed debt proceeds.*

Several comments stated that the FDIC should provide specific guidance on whether participating entities may exchange guaranteed debt for outstanding non-guaranteed senior unsecured debt. Both the Amended Interim Rule and the Final Rule state that an issuer cannot issue and identify debt as guaranteed by the FDIC if the proceeds are used to prepay debt that is not FDIC-guaranteed.

*Treatment of debt guarantee limits and opt-out status in the event of a merger*.

One commenter noted that, due to the current turmoil in the financial system, a number of financial institutions are in the process of acquiring other financial institutions. The commenter further asked for clarification of how such a merger during the guarantee period would affect the surviving entity's debt guarantee limit. The FDIC intends to treat the debt guarantee limit of the surviving entity of a merger between eligible entities as equal to the combined debt guarantee limits of both entities calculated on a pro forma basis as of the close of business September 30, 2008, absent action by the FDIC after consultation with the surviving entity and its appropriate federal banking agency. If the acquiring entity previously opted-out of the Debt Guarantee Program, it will have a one-time option to opt-in by filing an application with the FDIC.

Comments Related to the Scope of the Transaction Account Guarantee Program

Noting that negotiable order of withdrawal (NOW) accounts were excepted from the scope of the definition of "noninterest-bearing transaction accounts" in the Interim Rule, the FDIC specifically sought comment as to whether that definition should be broadened to include coverage for NOW accounts held by sole proprietorships, non-profit religious, philanthropic, charitable organizations and the like, or governmental units for the deposit of public funds, assuming that the interest paid for such modifications would be de minimis. The public offered comments on these and other topics related to the scope of the Transaction Account Guarantee Program, as discussed below.

The FDIC received approximately 500 comments on the Transaction Account Guarantee Program, including a large number of form letters. One commenter felt that the Transaction Account Guarantee Program simply was unwarranted because depositors were not interested in unlimited deposit insurance coverage and would be unwilling to pay for expanded coverage for transaction accounts. Most of the commenters argued that the full guarantee should be extended to certain interest-bearing accounts, including the following: (1) Interest on Lawyers Trust Accounts (IOLTAs); (2) accounts owned by the government or accounts with public funds; and (3) negotiable order of withdrawal accounts (NOW accounts). Each of these types of accounts is discussed in turn below.

*IOLTAs*.

An IOLTA is an interest-bearing account maintained by a lawyer or law firm for clients. The interest from these accounts is not paid to the law firm or its clients, but rather is used to support law-related public service programs, such as providing legal aid to the poor.

Over 500 of the comments received by the FDIC objected to the exclusion of IOLTAs from the Transaction Account Guarantee Program. Those who commented on IOLTAs included the American Bar Association, state bar associations, industry groups, and law firms. According to commenters, IOLTAs are clearing accounts serving the transactional needs of attorneys and are used for payment of court filing fees, escrow funds, retainers, and the like. Generally, commenters recommended that the FDIC either construe IOLTAs as noninterest-bearing transaction accounts eligible for coverage under the Transaction Account Guarantee Program, or that the FDIC grant an exception to explicitly provide coverage to IOLTAs under the program.

Some parties argued that the exclusion of IOLTAs from the program creates an unintended dilemma for lawyers. Either a lawyer can keep the clients' funds in the IOLTA (with limited insurance coverage), or the lawyer can transfer these funds to a noninterest-bearing transaction account in order to take advantage of the full protection provided by the Transaction Account Guarantee Program. Some lawyers might decide that their fiduciary responsibility with respect to their clients' funds mandates the transfer of the funds to a fully protected noninterest-bearing transaction account. Such a transfer would adversely affect funding for law-related public service programs that rely heavily on the interest from IOLTAs and could result in the loss of legal services to low-income populations.

Also, some of these commenters argued that an IOLTA should not be viewed as an interest-bearing account because the interest does not inure to the benefit of either the lawyer or the client. In addition, some commenters argued that IOLTAs are similar to noninterest-bearing transaction accounts such as corporate payroll accounts, one of the types of accounts that the Transaction Account Guarantee Program is designed to guarantee. They mentioned that IOLTAs are exempt from the prohibition on the payment of interest on demand accounts, and but for this exemption, IOLTAs would be similar to noninterest-bearing accounts covered by the Transaction Account Guarantee Program. See 12 CFR Part 204.

*Public Fund Accounts.*

A number of commenters recommended that full protection under the Transaction Account Guarantee Program be extended to interest-bearing accounts owned by the government or accounts that contained public funds. In support of this position, the commenters argued that full protection for such accounts would enable insured depository institutions not to pledge collateral for the uninsured portion of the account inasmuch as no portion would be uninsured. If the bank were not required to pledge collateral, the bank's liquidity would be increased.

*NOW Accounts.*

The law provides that certain depositors are eligible to hold "negotiable order of withdrawal" or NOW accounts. Though these accounts may be interest-bearing, the account is similar to a demand deposit account in that the depositor is permitted to make withdrawals by negotiable or transferable instruments. *See* 12 U.S.C. 1832. In fact, a NOW account is defined as a type of "transaction account" for reserve requirement purposes. *See* 12 CFR 204.2(e)(2). One commenter argued that a NOW account, being a transaction account and also being an account with limited interest, should be protected under the Transaction Account Guarantee Program.

In all of the comments summarized above (involving IOLTAs, public fund accounts, and NOW accounts), the argument was made that the FDIC should extend the full protection under the Transaction Account Guarantee Program to certain types of interest-bearing accounts. Other commenters recommended that the Transaction Account Guarantee Program be expanded to cover all NOW accounts, regardless of the class of owner or the amount of interest paid.

In general, for purposes of the Transaction Account Guarantee Program, the FDIC wishes to maintain the distinction between (1) noninterest-bearing accounts and (2) interest-bearing accounts. As discussed below, however, the FDIC has decided to create certain exceptions.

First, the FDIC has decided to create an exception for IOLTAs. As noted by the commenters, the interest on IOLTAs does not inure to the benefit of either the law firm or the clients. Thus, from the perspective of the law firm and the clients, the account produces the same economic result as a noninterest-bearing transaction account. For this reason, the FDIC has amended the definition of "noninterest-bearing transaction account" to include IOLTAs. In providing protection to IOLTAs, the FDIC also includes attorney trust accounts designated as "IOLAs" or "IOTAs" (as such accounts are designated in some states). The FDIC will treat all such accounts as IOLTAs for purposes of the Transaction Account Guarantee Program.

Second, the FDIC has decided to create an exception for NOW accounts with interest rates no higher than 0.50%. With such a rate, the NOW account will be similar to a noninterest-bearing transaction account. Therefore, the account will be protected under the Transaction Account Guarantee Program. This change should provide stability to payment processing accounts structured as NOW accounts, without creating risks of destabilizing money market mutual funds or allowing weaker institutions to attract deposits in these ownership categories through higher interest rates.

Another exception was created through the Interim Rule. This exception, applicable to certain types of sweep accounts, is discussed below.

*Sweep accounts*.

Several commenters addressed the FDIC's treatment of sweep accounts in the Transaction Account Guarantee Program. Several commenters supported the FDIC's decision to provide a temporary full guarantee of balances resulting from certain deposit reclassification programs. These commenters also pointed out that some sweep programs involve time deposits, rather than savings accounts. Accordingly, several of the commenters recommended that the FDIC extend the temporary full guarantee under the Transaction Account Guarantee Program to include other types of deposit reclassification programs, such as those that involve time deposits. A few commenters further suggested that instead of expanding coverage to include transfers to time deposits as well as savings deposits, the FDIC should instead provide unlimited deposit guarantees of all noninterest-bearing deposits. A few commenters also requested that the FDIC provide temporary full guarantees of all noninterest-bearing transaction accounts regardless of the type of deposit reclassification program used. One commenter suggested that the exception for funds swept to noninterest-bearing savings accounts be extended to include funds swept from noninterest-bearing transaction accounts to noninterest-bearing money market deposit accounts.

The Final Rule provides that the FDIC will treat funds in sweep accounts in accordance with the usual rules and procedures for determining sweep balances at a failed depository institution. Under these rules, and for purposes of the Transaction Account Guarantee Program, the FDIC will treat funds swept or transferred from a noninterest-bearing transaction account to another type of deposit or nondeposit account as being in the account to which the funds were transferred. Under the Transaction

Account Guarantee Program, an exception will exist for deposit reclassification programs where funds are swept from a noninterest-bearing transaction account to a noninterest-bearing savings account. Such swept funds will be treated as being in a noninterest-bearing transaction account. As a result of this treatment, funds swept into a noninterest-bearing savings account as part of a bank's reclassification program will be guaranteed by the Transaction Account Guarantee Program. Some commenters requested guidance as to the meaning of "savings account." The FDIC does not intend to create a special definition of "savings account" for purposes of the Transaction Account Guarantee Program. For purposes of the Final Rule, a "savings account" is considered a type of "savings deposit" as defined in Regulation D issued by the Board of Governors of the Federal Reserve System, 12 CFR § 204.2(d), and the sweep programs at issue typically are established for purposes of Regulation D.

Some commenters requested guidance as to the meaning of the word "sweep" or the meaning of "swept funds." These commenters argue that these terms do not clearly capture all of the technical meanings under which some programs operate. As such, they argue, requiring banks to suspend such programs in order to ensure coverage by the Transaction Account Guarantee Program could introduce unnecessary operational challenges. For purposes of this rule, funds are "swept" from a noninterest-bearing transaction account to a noninterest-bearing savings account if the funds are transferred from one account to another. Also, a "sweep" occurs if the noninterest-bearing transaction account is reclassified as a noninterest-bearing savings account. In the latter case, the "sweep" is the reclassification of the account.

*Assessments.*

In regard to the 10 basis point assessment that will be imposed on participating entities that do not opt-out of the Transaction Account Guarantee Program, one commenter requested clarification as to how this assessment would be calculated. Consistent with the Amended Interim Rule, the Final Rule provides that the 10 basis points will be imposed on any deposit amounts in noninterest-bearing transaction accounts, as defined in the Final Rule, that exceed the existing deposit insurance limit of $250,000. Another commenter mistakenly thought that the FDIC would be requiring all participating institutions to perform an insurance determination at the depositor level in order to calculate its supplemental insurance premium due. The commenters concerns are unfounded; institutions only will be required to report separately the amount of noninterest-bearing transaction accounts over $250,000, but they will have the option to exclude certain amounts as determined and documented by the institution.

One commenter also suggested that the premiums assessed for the Transaction Account Guarantee Program should be based on the quarterly average balances of such accounts rather than on the quarter-end balances. While it is true that these deposit products typically have more volatile daily balances, the additional cost and reporting burden associated with such a requirement do not seem appropriate given the temporary nature of the guarantee program.

Finally, with regard to the Transaction Account Guarantee Program, the Final Rule contains a technical change from the provisions of the Amended Interim Rule. Where the Amended Interim Rule provided that funds in noninterest-bearing transaction accounts would be "insured in full," the Final Rule indicates that funds in such accounts are "guaranteed in full."

Disclosures

The Interim Rule provided for a number of disclosures relative to both the Debt Guarantee Program and the Transaction Account Guarantee Program. The FDIC sought comments specific to the disclosures related to the Debt Guarantee Program. The FDIC's goal in requiring disclosures was to foster creditor confidence in the Program; the FDIC asked whether there were alternative, less burdensome means to achieve this goal and whether the creditor confidence provided by the disclosures outweighed the burden on participating entities in providing them.

Although the FDIC specifically requested comment on the disclosure requirements of the Debt Guarantee Program, the FDIC received comments on disclosures relating to both components of the TLG Program, with specific comments on disclosures for sweep accounts. Comments were also provided on the FDIC's stated intent to publish a list of entities that have opted out of either or both components of the program. Several commenters requested that the FDIC provide more standardized language for the required disclosures.

Some commenters requested that the deadline for compliance with the disclosure requirements be extended from December 1, 2008, to a later date. As provided in the Amended Interim Rule, the deadline for compliance with the disclosure requirements has been extended until December 19, 2008, a date that the FDIC continues to believe is reasonable

*FDIC's publication of participation in the TLG Program.*

A number of bankers who commented on the Amended Interim Rule expressed the view that the FDIC's website publication of institutions that are not participating in the TLG Program will, as one banker put it, "cast a shadow" on such institutions as not having full FDIC insurance and will result in a marketing disadvantage for those institutions. One of the bankers noted that this result would be unfair to institutions that had no liquidity issues. The FDIC continues to believe it is important that both lenders and depositors be able to ascertain, from one central source (the FDIC's website), whether entities eligible to participate in the TLG Program are participating in either or both components of the Program. The FDIC further believes that any customer confusion that might otherwise disadvantage some institutions could be addressed in customer disclosures provided by the institutions.

*Disclosure requirements for Debt Guarantee Program.*

The FDIC received several comments on the Interim Rule and the Amended Interim Rule that strongly encouraged the FDIC to impose standard, uniform disclosures for all applicable debt issuance announcements and disclosure documents. One commenter maintained that such standard disclosures are critical for the "uniformity of the product" affecting the "universal access of banks and equality of pricing among banks." Several commenters also asked the FDIC to state affirmatively that the TLG Program is backed by the "full faith and credit" of the United States.

The FDIC has responded to the concerns raised by the commenters seeking uniform disclosures in the Final Rule by prescribing specific disclosure statements to be used in written materials underlying debt issued on or after December 19, 2008, through June 30, 2009, that is covered by the Debt Guarantee Program. Similarly, the FDIC has prescribed a written statement to be used on all senior unsecured debt issued by participating entities during that time period that is not covered under the Debt Guarantee Program.

*Disclosure requirements for Transaction Account Guarantee Program.*

A number of commenters, including financial institutions and trade associations, objected to the requirement that a depository institution post a notice in the lobby of its main office and in each branch indicating whether it has chosen to participate in the Transaction Account Guarantee Program. In general, the financial institutions that commented on this matter felt that disclosing such a matter would be counterproductive to the intent of stabilizing the economy. In addition, some financial institutions believe that as a result of the required notice, an institution that declined to participate in the program would likely see depositors redirect their funds to an institution that has chosen to participate. Accordingly, commenters believe that the notice requirement would negatively affect those institutions that chose not to participate in the Transaction Account Guarantee Program. Community banks argued that, due to the notice requirement, small, healthy, community institutions would feel pressured into participating in the Transaction Account Guarantee Program, and could end up financing the costs of the economic crisis, which they viewed as having been created primarily by large institutions that undertook risky business plans.

The Massachusetts Bankers Association also objected to the provision in the Interim Rule that stated that the FDIC would make publicly available the list of institutions that choose to opt-out of the Transaction Account Guarantee Program. Currently, all excess deposits of Massachusetts state-chartered savings and cooperative banks are fully insured by one of two State funds. Such banks with excess coverage have already paid assessments to one of the two Massachusetts deposit insurance funds, and may not believe it is worth the financial cost to remain in the Transaction Account Guarantee Program. The commenter believes that the disclosure requirements will put banks in Massachusetts that choose to opt-out at a significant disadvantage for the reasons stated above. The commenter suggests that the FDIC include an explanatory statement on any opt-out list published by the FDIC that certain institutions, identified on the list, have their deposits fully insured by state funds. In addition, requiring institutions to post notices at each branch could lead to consumer confusion and uncertainty regarding the safety of their deposits.

One bank noted that it does not offer noninterest-bearing transaction accounts; thus, it would be meaningless and potentially confusing to customers for the bank to provide a notice that the bank is not participating in the Transaction Account Guarantee Program. The FDIC agrees with this comment and has thus modified the transaction account guarantee disclosure requirement to indicate that it applies only to insured depository institutions that offer noninterest-bearing transaction accounts, as that term is defined in the Final Rule.

The FDIC believes it is essential for all insured depository institutions that offer noninterest-bearing transaction accounts to comply with the disclosure requirements in the Final Rule to ensure that all depositors of FDIC-insured depository institutions are aware of the federal protection afforded in connection with their deposits. The Final Rule, however, does not prohibit an institution from supplementing the FDIC's disclosure requirements by providing additional information to its customers, including an explanation as to why the institution has opted out of the Transaction Account Guarantee

Program. For example, Massachusetts banks that opt-out may wish to remind consumers of the additional coverage already available to them.

One commenter asked if the requirement to post a notice in an insured depository institution's lobby and branches extended to loan production offices. The key criteria for a proposed facility to qualify as a branch is accepting deposits, paying checks, or lending money pursuant to section 3(o) of the FDI Act. In most instances, loan production offices are involved with authorized loan origination, loan approval, and loan closing activities. If this is the case, the loan production office would not be considered a branch, and the lobby notice requirement related to the Transaction Account Guarantee Program would not apply.

Several commenters suggested that the FDIC provide a sample disclosure notice to serve as a safe harbor for complying with the disclosure requirements for the Transaction Account Guarantee Program. In response to those comments, the Final Rule includes safe harbor sample notices for institutions participating in the Transaction Account Guarantee Program and for those that choose not to.

A group of bankers who commented on the Interim Rule suggested that online disclosure requirements should be required for institutions that offer Internet deposit services. They noted that, because an increasing number of depositors interact with their depository institutions only through on-line banking services, in order to provide effective notice to depositors about whether an institution is participating in the Transaction Account Guarantee Program, the FDIC should require website disclosure. The FDIC agrees with that observation, as reflected in the Final Rule.

The FDIC received several comments regarding disclosure requirements related to sweep accounts. The Amended Interim Rule required that, if an institution used sweep arrangements or took other actions that resulted in funds being transferred or reclassified to an interest-bearing account or nontransaction account, the institution was required to disclose those actions to the affected customers and clearly advise them, in writing, that such actions would void the FDIC's guarantee. Commenters requested that the FDIC clarify how this requirement applies when an institution offers a product where funds are swept from a noninterest-bearing transaction account to a noninterest-bearing savings account. Since funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings account are guaranteed under the Transaction Account Guarantee Program, the FDIC has modified the sweep-account disclosure requirement to clarify that the disclosure requirement applies only when funds in a noninterest-bearing transaction account are swept, transferred or reclassified so that they no longer are eligible for the guarantee provided under the Transaction Account Guarantee Program.

A law firm commenting on behalf of several large banks and other financial organizations suggested that the FDIC provide a standard disclosure statement for the sweep account disclosure requirement. Although requiring standard disclosure language might be helpful to the industry, the FDIC notes that sweep products differ significantly throughout the industry. Sweep products include other deposit accounts, repurchase agreements, Eurodollar accounts at affiliated foreign branches, international banking facilities, and money market funds. Given the complexity and diversity of these and other sweep products, the FDIC believes it is preferable for institutions to fashion their own disclosure statement to fit the applicable sweep product, as long as the disclosure statement complies with the requirements in the Final Rule that the disclosures be accurate, clear, and in writing.

The same law firm also requested that the effective date for the sweep-account disclosure requirement be postponed until January 1, 2009, to provide sufficient time for institutions to implement the notice requirement in their regular monthly statement cycle. The FDIC notes that the disclosure requirements in the Amended Interim Rule have been in effect since October 23, 2008. Also, the FDIC has extended the effective date of the disclosure requirements in the Final Rule until December 19, 2008. Accordingly, especially in light of the exigencies that have triggered the need for the TLG Program, the FDIC believes the industry has sufficient time to prepare to implement by December 19 2008, the sweep account (and the other) disclosure requirements in the Final Rule.

*Payment of claims.*

In the Interim Rule, the FDIC sought suggestions for modifying the claims process associated with the Debt Guarantee Program so that claimants could be paid more quickly without exposing the FDIC to undue risk. In response, the FDIC received comments from a number of commenters who advocated changing the Debt Guarantee Program to provide for an unconditional guarantee by the FDIC that payment be made as principal and interest becomes due and payable. At least two of these commenters suggested that, for debt maturing after June 30, 2012, guarantee payments made according to the contracted schedule might have to cease as of June 30, 2012, and a final guarantee payment would need to be made because the Debt Guarantee Program expires at that time. According to many of the commenters, if the FDIC fails to make payment to a holder of debt as soon as its issuer defaults on a payment, the demand for debt under the FDIC's Debt Guarantee Program could be severely curtailed. The investors most likely to purchase FDIC-guaranteed debt, such as fund managers and central banks, are particularly focused on ensuring timely receipt of scheduled payments of principal and interest, with minimal credit risk exposure. By and large, the commenters believe that the Debt Guarantee Program, as structured under the Amended Interim Rule, does not sufficiently meet the investment criteria of these investors.

Some of the commenters stated that the Amended Interim Rule, as currently structured, will only benefit the largest and most creditworthy financial institutions, namely those with an established investment grade credit rating. One commenter suggested that amending the regulation in a manner that provides for a standard credit rating will allow many more financial institutions to readily access the debt markets and, in so doing, will enhance the flow of capital from investors to financial institutions without bias to the size of the issuing institution.

Several commenters suggested that the Debt Guarantee Program should mirror the Credit Guarantee Scheme established in the U.K., which unconditionally and irrevocably guarantees timely payment as principal and interest become due and payable, without delay other than any applicable grace period. Some commenters recommended that the FDIC consider adopting the U.K. program's feature that the guarantee be effective immediately upon a payment default. They also pointed out that a relatively attractive aspect of this program is the continued payment at the contract rate of interest. Three of these commenters cautioned that disparity between the Debt Guarantee Program and the U.K.'s scheme could result in the guaranteed obligations of U.S. banks being less liquid and more costly, and therefore less attractive to investors. This would put U.S. banks at a competitive disadvantage compared to financial institutions issuing debt under the U.K.'s Credit Guarantee Scheme.

The FDIC recognizes the commenters' concerns with the Debt Guarantee Program as currently drafted and has determined to substantially enhance the timeliness of payment under the guarantee. By these revisions, the FDIC intends to increase the likelihood that FDIC-guaranteed debt issuances by participating institutions attain the highest ratings for that class of investment which will help ensure that FDIC-guaranteed debt instruments are widely accepted within the investment community. The FDIC also acknowledges the efficacy of certain elements of the structure of the guarantee program implemented in the U.K. Although the FDIC is declining to adopt the U.K. scheme, certain of the changes provided for in the Final Rule parallel aspects of the U.K. program, and the FDIC expects that the Final Rule will enable U.S. financial institution debt guaranteed by the FDIC to maintain a sufficient level of competitiveness in the international markets.

V. The Final Rule

After considering the comments submitted on various aspects of the Interim Rule and the Amended Interim Rule, the FDIC has adopted a Final Rule. While there are a number of limited or technical changes that cause the Final Rule to differ from the Amended Interim Rule, the Final Rule differs substantively from the Amended Interim Rule by:

- Revising the definition of senior unsecured debt;

- Providing an alternative means for establishing a guarantee cap for insured depository institutions that either had no senior unsecured debt outstanding or only had federal funds purchased as of September 30, 2008;
- Combining debt guarantee limits of a participating insured depository institution and its parent holding company(ies);
- Approving trade confirmations as a sufficient form of written agreement for senior unsecured debt;
- Recognizing IOLTAs as a type of noninterest-bearing transaction account for purposes of the Transaction Account Guarantee Program;
- Recognizing NOW accounts with low interest rates as a type of noninterest-bearing transaction account for purposes of the Transaction Account Guarantee Program;
- Prescribing more specific disclosures for both components of the TLG Program;
- Guaranteeing the timely payment of principal and interest following payment default; and
- Revising the fee structure for the Debt Guarantee Program.

A discussion of these revisions follows.

Senior unsecured debt

*Debt with maturity of thirty days or less.*

The FDIC received a large number of comments that requested that the FDIC remove federal funds and other short-term debt from the definition of senior unsecured debt. The commenters questioned the fees charged by the Debt Guarantee Program in light of similar market costs and noted that other recently announced or implemented federal programs had contributed to improved conditions in the markets. The FDIC responded to those comments by revising the definition of senior unsecured debt to exclude any obligation with a stated maturity of thirty days or less. The FDIC believes that the Debt Guarantee Program should help institutions to obtain stable, longer term sources of funding where liquidity is most lacking.

The guarantee on any guaranteed senior unsecured debt instrument issued prior to December 6, 2008, with a stated maturity of thirty days or less will expire on the earlier of: (1) the date the issuer opts out (if it does), or (2) the maturity date of the instrument.

*Specific debt instruments included or excluded from coverage*.

The FDIC continues to receive questions regarding whether certain specific instruments would be eligible for coverage under the Debt Guarantee Program. In the Final Rule the FDIC provides additional clarification through a modified list of non-inclusive examples of instruments that would be (or would not be) considered senior unsecured debt for purposes of the Debt Guarantee Program. The revisions reinforce the FDIC's previous statements that the Debt Guarantee Program is not designed to encourage the development of or to promote innovative or complex sources of funding, but to enhance the liquidity of the inter-bank lending market and senior unsecured bank debt funding.

The Final Rule provides, in order to differentiate common floating-rate debt from structured notes, that senior unsecured debt may pay either a fixed or floating interest rate based on a commonly-used reference rate with a fixed amount of scheduled principal payments. The Final Rule further provides that the term "commonly-used reference rate" includes a single index of a Treasury bill rate, the prime rate, and LIBOR.

The Final Rule also provides that, if the debt meets the other qualifying factors contained in the rule, senior unsecured debt may include, for example, the following debt: federal funds; promissory notes; commercial paper; unsubordinated unsecured notes, including zero-coupon bonds; U.S. dollar denominated certificates of deposit owed to an insured depository institution, an insured credit union as defined in the Federal Credit Union Act, or a foreign bank; U.S. dollar denominated deposits in an IBF of an insured depository institution owed to an insured depository institution or a foreign bank; and U.S. dollar denominated deposits on the books and records of foreign branches of U.S. insured depository institutions that are owed to an insured depository institution or a foreign bank. The term "foreign bank" does not include a foreign central bank or other similar foreign government entity that performs central bank functions or a quasi-governmental international financial institution such as the IMF or the World Bank. The phrase "owed to an insured depository institution, an insured credit union as defined in the Federal Credit Union Act or a foreign bank" means owed to an insured depository institution, an insured credit union, or a foreign bank in its own capacity and not as agent.

The Final Rule states that senior unsecured debt excludes, for example, any obligation with a stated maturity of "one month";[9] obligations from guarantees or other contingent liabilities; derivatives; derivative-linked products; debts that are paired or bundled with other securities; convertible debt; capital notes; the unsecured portion of otherwise secured debt; negotiable certificates of deposit; deposits denominated in a foreign currency or other foreign deposits (except those otherwise permitted in the rule, as explained in the preceding paragraph); revolving credit agreements; structured notes; instruments that are used for trade credit; retail debt securities; and any funds regardless of form that are swept from individual, partnership, or corporate accounts held at depository institutions. Also excluded are loans from affiliates, including parents and subsidiaries, and institution affiliated parties.

Alternative method for establishing debt cap for entities with no unsecured debt

In the Amended Interim Rule, the FDIC asked whether it should provide a means for an eligible entity to participate in the Debt Guarantee Program even if the entity had no senior unsecured debt as of the threshold date of September 30, 2008. Previously, this determination and the extent of the entity's guaranteed debt limit was made by the FDIC on a case-by-case basis. The FDIC sought suggestions for alternative means of making this determination. The Final Rule provides that if a participating entity that is an insured depository institution had either no senior unsecured debt as of September 30, 2008, or

[9] This recognizes that certain instruments have stated maturities of "one month," but have a term of up to 35 days because of weekends, holidays, and calendar issues.

only federal funds purchased, its debt guarantee limit is two percent of its consolidated total liabilities as of September 30, 2008. In specifying the amount of guaranteed debt that may be issued by an insured depository institution, the FDIC anticipates that the large number of insured depository institutions that reported no senior unsecured debt (as that term has been redefined in the Final Rule) as of September 30, 2008, will be able to make their opt-out decisions with more certainty and begin to issue debt without delay. If a participating entity other than an insured depository institution had no senior unsecured debt as of September 30, 2008, it may make a request to the FDIC to have some amount of debt covered by the Debt Guarantee Program. The FDIC, after consultation with the appropriate Federal banking agency, will decide whether, and to what extent, such requests will be granted on a case-by-case basis.

Combining debt guarantee limits of a participating insured depository institution and its parent holding company

The Final Rule provides additional flexibility to some participating entities by permitting a participating insured depository institution to issue debt under its debt guarantee limit as well as its holding company's(ies's) debt guarantee limit(s). With proper written notice both to the FDIC and to its parent holding company(ies), a participating insured depository institution may issue guaranteed debt in an amount equal to the institution's limit plus its holding company's(ies') limit(s), so long as the total guaranteed debt issued by the insured depository institution and its holding company(ies) does not exceed their combined debt guarantee limit.

Trade confirmations as a sufficient written agreement

The Amended Interim Rule required senior unsecured debt to be evidenced by a written agreement. Commenters raised concerns that written agreements were uncommon in transactions involving debt such as federal funds or other short-term borrowings. Although the decision of the FDIC to exclude borrowings of thirty days or less from the definition of senior unsecured debt in the Final Rule should largely eliminate this concern, the Final Rule provides that senior unsecured debt (that otherwise meets the requirements of the rule) can be evidenced by either a written agreement or an industry-accepted trade confirmation. This clarification was made in an effort to encompass all relevant forms of unsecured debt without placing unnecessary burdens on the issuing parties.

IOLTAs as a type of noninterest-bearing transaction account for purposes of the Transaction Account Guarantee Program

For purposes of the Transaction Account Guarantee Program, in the Amended Interim Rule, the FDIC had defined a "noninterest-bearing transaction account" as a transaction account as defined in 12 CFR 204.2 that is (i) maintained at an insured depository institution; (ii) with respect to which interest is neither accrued nor paid; and (iii) on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal." 12 CFR 370.2(h)(1). In the Amended Interim Rule, a noninterest-bearing transaction account did not include, for example, a negotiable order of withdrawal account (NOW account) or a money market deposit account (MMDA), as those accounts are defined in 12 CFR 204.2.

Many of the comments received by the FDIC regarding the Transaction Account Guarantee Program sought to have the FDIC's transaction account guarantee extend to cover Interest on Lawyers Trust Accounts (IOLTAs). As explained previously, IOLTAs are interest-bearing accounts maintained by an attorney or a law firm for its clients. The interest from IOLTAs typically funds law-related public service programs. The interest does not inure to the benefit of the law firm or the clients; for this reason, from the perspective of the law firm and the clients, the account is the economic equivalent of a noninterest-bearing transaction account. Accordingly, in the Final Rule the FDIC has provided that the term "noninterest-bearing transaction account" shall include IOLTAs (or IOLAs, or IOTAs). As a result, assuming that the other requirements of the Transaction Account Guarantee Program are met by a participating entity and irrespective of the standard maximum deposit insurance amount defined in 12 CFR Part 330, IOLTAs will be guaranteed by the FDIC in full as noninterest-bearing transaction accounts.

NOW accounts with low interest rates as a type of noninterest-bearing transaction account for purposes of the Transaction Account Guarantee Program

As discussed above, some commenters argued that the Transaction Account Guarantee Program should be extended to protect funds in NOW accounts. They noted that when the interest rate is low, such an account is similar to a noninterest-bearing transaction account. Accordingly, in the Final Rule, the FDIC has provided that NOW accounts with interest rates no higher than 0.50% are considered noninterest-bearing transaction accounts. The interest rate must not exceed 0.50% at any time prior to the expiration date of the program. If an insured depository institution that currently offers NOW accounts at interest rates above 0.50% readjusts the interest rate on such accounts to a rate no higher than 0.50% before January 1, 2009, and commits to maintain the adjusted rate until December 31, 2009, the affected NOW accounts will be considered noninterest-bearing transaction accounts for purposes of the Final Rule.

Disclosures

*In general.*

As explained in detail below, the Final Rule imposes disclosure requirements in connection with each of the components of the TLG Program. The purpose of the required disclosures is to ensure that depositors and applicable lenders and creditors are informed of the participation of eligible entities in the Debt Guarantee Program and/or the Transaction Account Guarantee Program. To this same end, the FDIC will maintain and post on its website a list of entities that have opted out of either or both components of the TLG Program.

*Publication of participation in the TLG Program on the FDIC's website.*

As under the Amended Interim Rule, under the Final Rule, the FDIC will publish: (1) a list of the eligible entities that have opted out of the Debt Guarantee Program, and (2) a list of the eligible entities that have opted out of the Transaction Account Guarantee

Program. (In Financial Institution Letter 125-2008, dated November 3, 2008, the FDIC provided details of the opt-out and opt-in procedures of the TLG Program.)

*Disclosures under the Debt Guarantee Program.*

Under the Final Rule, if an eligible institution is participating in the Debt Guarantee Program, it must include the following disclosure statement in all written materials underlying any senior unsecured debt it issues on or after December 19, 2008, through June 30, 2009, that is covered under the Debt Guarantee Program:

> *This debt is guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program and is backed by the full faith and credit of the United States. The details of the FDIC guarantee are provided in the FDIC's regulations, 12 CFR Part 370, and at the FDIC's website, www.fdic.gov/tlgp. The expiration date of the FDIC's guarantee is the earlier of the maturity date of the debt or June 30, 2012.*

Similarly, if an eligible institution is participating in the Debt Guarantee Program, it must include the following disclosure statement in all written materials underlying any senior unsecured debt it issues on or after December 19, 2008, through June 30, 2009, that is not covered under the Debt Guarantee Program:

> *This debt is not guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program.*

These specific disclosure requirements differ from the general requirements imposed under the Amended Interim Rule.

*Disclosures under the Transaction Account Guarantee Program.*

Under the Final Rule, each insured depository institution that offers noninterest-bearing transaction accounts must post a prominent notice in the lobby of its main office, each domestic branch, and, if it offers Internet deposit services, on its website clearly indicating whether or not the entity is participating in the Transaction Account Guarantee Program. Because IOLTAs and low-interest NOW accounts are considered noninterest-bearing transaction accounts under the Final Rule, institutions that offer these accounts must comply with this notice requirement. If the institution is participating in the Transaction Account Guarantee Program, the notice must also state that funds held in noninterest-bearing transaction accounts at the institution are guaranteed in full by the FDIC. These disclosures are the same as those required under the Amended Interim Rule, except that they include a website notice requirement for institutions that offer Internet deposit services and clarify that the guarantee provided by the Transaction Account Guarantee program is separate from the FDIC's general deposit insurance rules.

Like the Amended Interim Rule, the Final Rule requires that the disclosures be provided in simple, readily understandable text. In response to the request of commenters, the Final Rule includes the following sample notices for: (1) institutions participating in the Transaction Account Guarantee Program and (2) those not participating in it:

<u>For Participating Institutions</u>
*[Institution Name] is participating in the FDIC's Transaction Account Guarantee Program. Under that program, through December 31, 2009, all noninterest-bearing transaction accounts are fully guaranteed by the FDIC for the entire amount in the account. Coverage under the Transaction Account Guarantee Program is in addition to and separate from the coverage available under the FDIC's general deposit insurance rules.*

<u>For Non-Participating Institutions</u>
*[Institution Name] has chosen <u>not</u> to participate in the FDIC's Transaction Account Guarantee Program. Customers of [Institution Name] with noninterest-bearing transaction accounts will continue to be insured through December 31, 2009 for up to $250,000 under the FDIC's general deposit insurance rules.*

In order to alert depositors to the federal protection offered their deposits, the FDIC requires disclosures to be made by all insured depository institutions that offer noninterest-bearing transaction accounts, as provided in the Final Rule. If an institution chooses to supplement information contained in the FDIC's sample disclosures with an explanation as to why it may have opted out of the Transaction Account Guarantee Program, for example, the Final Rule does not prohibit such disclosures.

Similarly, a participating institution should disclose to depositors special situations where the coverage provided under the Transaction Account Guarantee Program may or may not be available. An example is where an institution issues official checks drawn on another insured depository institution. If that other institution is participating in the Transaction Account Guarantee Program, then the payee of the official check would be fully covered. If the other institution is not a participating institution, then whether the payee is insured for the amount of the official check would be based on the FDIC's general deposit insurance rules. The institution that provides such official checks to its customers must disclose this information to those customers.

The Amended Interim Rule required that, if an institution uses sweep arrangements or takes other actions that result in funds being transferred or reclassified to an interest-bearing account or nontransaction account, the institution must disclose those actions to the affected customers and clearly advise them, in writing, that such actions will void the FDIC's guarantee. In the Final Rule, the FDIC clarifies its previous sweep disclosure requirement by specifying that the disclosure requirement applies only when funds in a noninterest-bearing transaction account are swept, transferred or reclassified so that they no longer are eligible for the full guarantee provided under the Transaction Account Guarantee Program. Because of the diverse and complex nature of sweep instruments, the FDIC does not adopt a standard sweep disclosure in the Final Rule. Nevertheless, in fashioning its disclosure statement applicable to a specific sweep product, the Final Rule obliges participating entities to make the disclosures applicable to their sweep products accurately, clearly, and in writing.

Payment of claims following payment default

The Final Rule makes no changes to the Amended Interim Rule regarding the payment of claims under the Transaction Account Guarantee Program. However, after considering the comments relevant to the payment of claims under the Debt Guarantee Program, the FDIC has significantly altered the Amended Interim Rule with respect to the method by which the FDIC will satisfy its guarantee obligation on debt issued by institutions and holding companies. These changes are designed to provide assurances to the holders of guaranteed debt that they will continue to receive timely payments following payment default, as defined in section 370.12(b)(1). The changes nonetheless allow FDIC to continue to obtain sufficient information necessary to make payment to the appropriate party in the proper amount. The fundamental changes made in the claims section of the Final Rule (12 CFR 370.12) relate to: (1) the trigger for the payment obligation; (2) the methods by which the guarantee obligation may be satisfied; and (3) a requirement for participating entities to agree to certain initial undertakings in order to participate in the Debt Guarantee Program.

The FDIC's payment obligation under the Debt Guarantee Program for eligible senior unsecured debt will be triggered by a payment default. The Amended Interim Rule envisioned a different claims period for bank debt and holding company debt because the guarantee was to be triggered by the different insolvency events for the different types of entities: receivership for an insured depository institution and bankruptcy for a holding company. By adopting a guarantee obligation triggered by a payment default, there is now no reason to provide distinct processes for insured depository institutions and holding companies.

The second major change regarding payment of claims in the Final Rule concerns the methodology by which the FDIC will satisfy the guarantee obligation. The Final Rule now provides that the FDIC will continue to make scheduled interest and principal payments under the terms of the debt instrument through its maturity. The FDIC will become subrogated to the rights of any debtholder against the issuer, including in respect of any insolvency proceeding, to the extent of the payments made under the guarantee.

For debt issuances whose final maturities extend beyond June 30, 2012, at any time thereafter, the FDIC may elect to make a payment in full of all the outstanding principal and interest under the debt issuance. The Final Regulation indicates that the FDIC generally will consider the failure of an insured depository institution to make a payment on its outstanding debt such that the FDIC is required to make payment under the guarantee as grounds for the appointment of the FDIC as conservator or receiver of such insured depository institution.

As a result of the comments received on the Amended Interim Rule, the FDIC has established new claims filing procedures. The Final Rule provides for a process under which a claim may be filed with the FDIC by an authorized representative, as established by the issuer, of all the debtholders under a particular issuance. The Final Rule requires the participating entities to file with the FDIC a form which allows the issuer to establish a designated representative as part of its election under Part 370. The representative must demonstrate its capacity to act on behalf of the debtholders, and must submit the information set forth in the rule. The FDIC expects that by working through an authorized representative of a class of bondholders it can significantly expedite its response to a claim for payment and reduce its administrative costs.

Alternatively, an individual claimant under an issuance for which an authorized representative has not been designated, or who chooses not to be represented by the designated authorized representative, may also file with the FDIC and submit a proof of claim with the required information. Under both procedures, the FDIC undertakes to make the required payment upon receipt of a conforming proof of claim.

The FDIC will require specific information to be filed with any claim under the program. Such specific information must include evidence that a payment default has occurred under the terms of the debt instrument and that the claimant is the actual owner of the FDIC-guaranteed debt obligation or is authorized to act on behalf of the owner. In addition, the FDIC must receive an assignment of the debtholders' rights in the debt, as well as any claims in any insolvency proceeding arising in connection with ownership of FDIC-guaranteed debt. This assignment must cover all distributions on the debt from the proceeds of the receivership or bankruptcy estate of the issuer, as appropriate.

The Final Rule also varies from the Amended Interim Rule in that it addresses certain specific legal implications of an entity's participation in the Debt Guarantee Program. The Final Rule provides that any participating entity acknowledges by its participation in this program that it will become indebted to the FDIC for any payments the FDIC may make in satisfaction of its guarantee obligation or the satisfaction of the guarantee obligations of any affiliate. The issuer of guaranteed debt will be unconditionally liable to the FDIC for repayment of amounts expended under the guarantee. Further, in the event that a participating entity is placed into receivership or bankruptcy after the FDIC has made payment on its guarantee, the FDIC will be a bona fide creditor in those proceedings. Finally, the Final Rule requires participating entities to execute and file with the FDIC as part of its notification of participation in the Debt Guarantee Program a "Master Agreement." Under this document, the participating entity: (1) acknowledges and agrees to the establishment of a debt owed to the FDIC for any payment made in satisfaction of the FDIC's guarantee of a debt issuance by the participating entity and agrees to honor immediately the FDIC's demand for payment on that debt; (2) arranges for the assignment to the FDIC by the holder of any guaranteed debt issued by the participating entity of all rights and interests in respect of that debt upon payment to the holder by the FDIC under the guarantee and for the debtholders to release the FDIC of any further liability under the Debt Guarantee Program with respect to the particular issuance of debt; and (3) provides for the issuer to elect to designate an authorized representative of the bondholders for purposes of making a claim on the guarantee.

Fee structure for the Debt Guarantee Program

As discussed earlier, the Final Rule revises the definition of senior unsecured debt to exclude debt with a stated maturity of 30 days or less and guarantees the timely payment of principal and interest, rather than guaranteeing payment following the bankruptcy or receivership of the issuer. These changes and a recognition of the effect of the guarantee on an entity's cost of issuing debt necessitate revision of the assessment rate for the Debt Guarantee Program. Assessment rates under the Debt Guarantee Program are as follows:

| For debt with a maturity of: | The annualized assessment rate (in basis points) is: |
|---|---|
| 180 days or less (excluding overnight debt) | 50 |
| 181-364 days | 75 |
| 365 days or greater | 100 |

The assessment rates for shorter term debt are lower than the 75 basis point rate under the Interim Rule and those for longer term debt are somewhat higher. The rates in the Final Rule recognize that a 75 basis point rate generally makes the guarantee uneconomical for shorter term debt and significantly understates its value for longer term debt. (Charges under the U.K.'s debt guarantee program for longer term debt have thus far ranged from approximately 110 basis points to 160 basis points.) The FDIC believes that the rates provided for in the Final Rule appropriately reflect the value of the guarantee and the market value of guaranteed debt.

*Initiation of assessments.*

No assessments will be imposed on those eligible entities that opt out of the Debt Guarantee Program on or before December 5, 2008. Assessments accrue beginning on November 13, 2008, with respect to each eligible entity that does not opt out of the Debt Guarantee Program on or before December 5, 2008, on all senior unsecured debt (except for overnight debt) issued by it on or after October 14, 2008, and on or before December 5, 2008, that is still outstanding on that date. Beginning on December 6, 2008, assessments accrue on all senior unsecured debt with a maturity of greater than 30 days issued by it on or after December 6, 2008.

*Special rate for certain holding companies and other non-insured depository institution affiliates.*

As discussed earlier, the rates set forth above will be increased by 10 basis points for senior unsecured debt issued by a holding company or another non-insured depository institution affiliate that becomes an eligible and participating entity, where, as of September 30, 2008, or as of the date of eligibility, the assets of the holding company's combined insured depository institution subsidiaries constitute less than 50 percent of consolidated holding company assets.

*Consequences of exceeding the debt guarantee limit.*

Finally, the Interim Rule provided that if a participating entity issued debt identified as "guaranteed by the FDIC" in excess of the FDIC'S limit, the participating entity would have its assessment rate guaranteed debt increased to 150 basis points on all outstanding guaranteed debt. The 150 basis points referenced in the Interim Rule represented an amount double the annualized 75 basis point assessment rate provided for in the Interim Rule. In the Final Rule, the FDIC removed the flat rate of an annualized 75 basis points, and replaced it with variable annualized assessment rates reflecting the length of the maturity of the debt. In the Final Rule, the FDIC made corresponding changes to the rates that will be charged in the event that the participating entity exceeds its debt guarantee limit. If that happens, the assessment rate charged to the participating entity for all of its guaranteed debt will be an amount that is double the annualized assessment rate otherwise applicable to the maturity of the debt issued, unless the FDIC, for good cause shown, imposes a smaller increase.

In addition, if an entity represents that the debt that it issues is guaranteed by the FDIC when it is not, or otherwise violates any provision of the TLG Program, the entity may be subject to any of the enforcement mechanisms set forth in the Final Rule.

## VI. Regulatory Analysis and Procedure

### A. Administrative Procedure Act

Pursuant to section 553(b)(B) of the Administrative Procedure Act (APA), notice and comment are not required prior to the issuance of a substantive rule if an agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. In addition, section 553(d)(3) of the APA provides that an agency, for good cause found and published with the rule, does not have to comply with the requirement that a substantive rule be published not less than 30 days before its effective date. When it issued both the Interim Rule and the Amended Interim Rule related to the TLG Program, the FDIC invoked these good cause exceptions based on the severe financial conditions that threatened the stability of the nation's economy generally and the banking system in particular; the serious adverse effects on economic conditions and financial stability that would have resulted from any delay of the effective date of the Interim Rule; and the fact that the TLG became effective on October 14, 2008.

For these same reasons, the FDIC invokes the APA's good cause exceptions with respect to the Final Rule.

### B. Community Development and Regulatory Improvement Act

The Riegle Community Development and Regulatory Improvement Act requires that any new regulations and amendments to regulation prescribed by a Federal banking agency that imposes additional reporting, disclosures, or other new requirements on insured depository institutions take effect on the first day of a calendar quarter which begins on or after the day the regulations are published in final form, unless the agency determines, for good cause published with the regulations, that the regulation should become effective before such time. 12 U.S.C. 4802(b)(1)(A). The FDIC invoked this good cause exception in issuing both the Interim Rule and the Amended Interim Rule related to the TLG Program due to the severe financial conditions that threatened the stability of the nation's economy generally and the banking system in particular; the serious adverse effects on economic conditions and financial stability that would have resulted from any delay of the effective date of the Interim Rule; and the fact that the TLG Program had been in effect since October 14, 2008. For the same reasons, the FDIC invokes the good cause exception of 12 U.S.C. 4802(b)(1)(A) with respect to the Final Rule.

C. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the Final Rule is not a "major rule" within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA) Pub. L. No. 110-28 (1996). As required by law, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the Final Rule may be reviewed.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires an agency to prepare a final regulatory flexibility analysis when an agency promulgates a final rule under section 553 of the APA, after being required by that section to publish a general notice of proposed rulemaking. Because the FDIC has invoked the good cause exception provided for in section 553(b)(B) of the APA, with respect to the Final Rule, the RFA's requirement to prepare a final regulatory flexibility analysis does not apply.

E. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the information collections contained in the Interim Rule issued by the Board on October 23, 2008, were submitted to and approved by the Office of Management and Budget (OMB) under emergency clearance procedures and assigned OMB Control No. 3064-0166 (expiring on April 30, 2009), entitled "Temporary Liquidity Guarantee Program."

The Final Rule makes some changes that add burden to the existing collection. Specifically, sections 370.3(h)(1)(A), (B), (C), and (D) address various applications for exceptions and eligibility with respect to the Debt Guarantee component of the TLG Program. The FDIC will submit a request for review and approval of this revision to its TLG Program information collection under the emergency processing procedures in OMB regulation, 5 CFR 1320.13. The proposed burden estimate for the applications is as follows:

*Title:* Temporary Liquidity Guarantee Program.

*OMB Number:* N3064-0166.

*Estimated Number of Respondents:*

Request for increase in debt guarantee limit—1,000.

Request for increase in presumptive debt guarantee limit—100.

Request to opt-in to debt guarantee program—100.

Request by affiliate to participate in debt guarantee program—50.

*Affected Public:* FDIC-insured depository institutions, thrift holding companies, bank and financial holding companies.

*Frequency of Response:*

Request for increase in debt guarantee limit—1.

Request for increase in presumptive debt guarantee limit—once

Request to opt-in to debt guarantee program—once.

Request by affiliate to participate in debt guarantee program—once.

*Affected Public:* FDIC-insured depository institutions, thrift holding companies, bank and financial holding companies.

*Average time per response:*

Request for increase in debt guarantee limit—2 hours.

Request for increase in presumptive debt guarantee limit—2 hours.

Request to opt-in to debt guarantee program—1 hour.

Request by affiliate to participate in debt guarantee program—2 hours.

*Estimated Annual Burden:*

Request for increase in debt guarantee limit—2,000 hours.

Request for increase in presumptive debt guarantee limit—200 hours.

Request to opt-in to debt guarantee program—100 hours.

Request by affiliate to participate in debt guarantee program—100 hours.

Previous annual burden – 2,199,100
Total additional annual burden—2,400
Total annual burden – 2,201,500 hours.

The FDIC expects to request approval by December 2, 2008. The FDIC and the other banking agencies are also submitting to OMB under emergency clearance procedures certain revisions to be made in response to the TLG Program to the following currently approved information collections: Consolidated Reports of Condition and Income (Call Report) [OMB No. 3064-0052 (FDIC), OMB No. 7100-0036 (Board of Governors of the Federal Reserve System), OMB No. 1557-0081 (Office of the Comptroller of the Currency)], Thrift Financial Report (TFR) [OMB No. 1550-0023 (Office of Thrift Supervision), and Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks [OMB No, 7100-0032 (Board of Governors of the Federal Reserve System)]. The Final Rule makes some changes that affect the collections of information outlined in the Interim Rule and may affect the estimated burden set forth in the request for emergency clearance request for OMB No. 3064-0166. However, the FDIC plans, within the next 30 days, to follow its emergency request with a request under normal clearance procedures in accordance with the provisions of OMB regulation 5 CFR 1320.10. Similarly, if the agencies obtain OMB approval of their emergency request pertaining to revisions to the currently approved information collections identified above, the FDIC and the other banking agencies plan to proceed with a request under normal clearance procedures. In accordance with normal clearance procedures, public comment will be invited for an initial 60-day comment period and a subsequent 30-day comment period on : (1) whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (2) the accuracy of the estimates of the burden of the information collection, including the validity of the methodologies and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and (5) estimates of capital or start up costs, and costs of operation, maintenance and purchase of services to provide the information. In the interim, interested parties are invited to submit written comments by any of the following methods. All comments should refer to the name and number of the collection:

- *http://www.FDIC.gov/regulations/laws/federal/propose.html*.
- *E-mail*: comments@fdic.gov. Include the name and number of the collection in the subject line of the message.
- *Mail*: Leneta Gregorie (202.898.3719), Counsel, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery*: Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

A copy of the comments may also be submitted to the OMB Desk Officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

List of subjects in 12 CFR Part 370:

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Reporting and record keeping requirements, Savings associations

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation revises part 370 of title 12 of the Code of Federal Regulations to read as follows:

**PART 370 --TEMPORARY LIQUIDITY GUARANTEE PROGRAM**

Sec.



Authority: 12 U.S.C. U.S.C. 1813(l), 1813(m), 1817(i),1818, 1819(a)(Tenth); 1820(f), 1821(a); 1821(c); 1821(d); 1823(c)(4).

**§ 370.1 Scope.**

This part sets forth the eligibility criteria, limitations, procedures, requirements, and other provisions related to participation in the FDIC's temporary liquidity guarantee program.

**§ 370.2 Definitions**.

As used in this part, the terms listed in this section are defined as indicated below. Other terms used in this part that are defined in the Federal Deposit Insurance Act (FDI Act) have the meanings given them in the FDI Act except as otherwise provided herein.

(a) *Eligible entity.*

(1) The term "eligible entity" means any of the following:

(i) An insured depository institution;

(ii) A U.S. bank holding company, provided that it controls, directly or indirectly, at least one subsidiary that is a chartered and operating insured depository institution;

(iii) A U.S. savings and loan holding company, provided that it controls, directly or indirectly, at least one subsidiary that is a chartered and operating insured depository institution; or

(iv) Any other affiliates of an insured depository institution that the FDIC, in its sole discretion and on a case-by-case basis, after written request and positive recommendation by the appropriate Federal banking agency, designates as an eligible entity; such affiliate, by seeking and obtaining such designation, also becomes a participating entity in the debt guarantee program.

(b) *Insured Depository Institution.* The term "insured depository institution" means an insured depository institution as defined in section 3(c)(2) of the FDI Act, 12 U.S.C. 1813(c)(2), except that it does not include an "insured branch" of a foreign bank as defined in section 3(s)(3) of the FDI Act, 12 U.S.C. 1813(s)(3), for purposes of the debt guarantee program.

(c) *U.S. Bank Holding Company.* The term "U.S. Bank Holding Company" means a "bank holding company" as defined in section 2(a) of the Bank Holding Company

Act of 1956 ("BHCA"), 12 U.S.C. 1841(a), that is organized under the laws of any State or the District of Columbia.

(d) *U.S. Savings and Loan Holding Company.* The term "U.S. Savings and Loan Holding Company" means a "savings and loan holding company" as defined in section 10(a)(1)(D) of the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. 1467a(a)(1)(D), that is organized under the laws of any State or the District of Columbia and either:

  (1) Engages only in activities that are permissible for financial holding companies under section 4(k) of the BHCA, 12 U.S.C. §1843(k), or

  (2) Has at least one insured depository institution subsidiary that is the subject of an application under section 4(c)(8) of the BHCA, 12 U.S.C. 1843(c)(8), that was pending on October 13, 2008.

(e) *Senior Unsecured Debt*.

  (1) The term "senior unsecured debt" means

    (i) For the period from October 13, 2008 through December 5, 2008, unsecured borrowing that:

    (A) Is evidenced by a written agreement or trade confirmation;

    (B) Has a specified and fixed principal amount;

    (C) Is noncontingent and contains no embedded options, forwards, swaps, or other derivatives; and

    (D) Is not, by its terms, subordinated to any other liability; and

    (ii) After December 5, 2008, unsecured borrowing that satisfies the criteria listed in paragraphs (e)(1)(i)(A) through (e)(1)(i)(D) of this section and that has a stated maturity of more than 30 days.

  (2) Senior unsecured debt may pay either a fixed or floating interest rate based on a commonly-used reference rate with a fixed amount of scheduled principal payments. The term "commonly-used reference rate" includes a single index of a Treasury bill rate, the prime rate, and LIBOR.

  (3) Senior unsecured debt may include, for example, the following debt, provided it meets the requirements of paragraph (e)(1) of this section: federal funds purchased, promissory notes, commercial paper, unsubordinated unsecured

notes, including zero-coupon bonds, U.S. dollar denominated certificates of deposit owed to an insured depository institution, an insured credit union as defined in the Federal Credit Union Act, or a foreign bank, U.S. dollar denominated deposits in an international banking facility (IBF) of an insured depository institution owed to an insured depository institution or a foreign bank, and U.S. dollar denominated deposits on the books and records of foreign branches of U.S. insured depository institutions that are owed to an insured depository institution or a foreign bank. The term "foreign bank" does not include a foreign central bank or other similar foreign government entity that performs central bank functions or a quasi-governmental international financial institution such as the International Monetary Fund or the World Bank. References to debt owed to an insured depository institution, an insured credit union, or a foreign bank mean owed to the institution solely in its own capacity and not as agent.

(4) Senior unsecured debt, except deposits, may be denominated in foreign currency.

(5) Senior unsecured debt excludes, for example, any obligation that has a stated maturity of "one month"[1], obligations from guarantees or other contingent liabilities, derivatives, derivative-linked products, debts that are paired or bundled with other securities, convertible debt, capital notes, the unsecured portion of otherwise secured debt, negotiable certificates of deposit, deposits denominated in a foreign currency or other foreign deposits (except as allowed under paragraph (e)(3) of this section), revolving credit agreements, structured notes, instruments that are used for trade credit, retail debt securities, and any funds regardless of form that are swept from individual, partnership, or corporate accounts held at depository institutions. Also excluded are loans from affiliates, including parents and subsidiaries, and institution-affiliated parties.

[1] This recognizes that certain instruments have stated maturities of "one month," but have a term of up to 35 days because of weekends, holidays, and calendar issues.

(f) *Newly issued senior unsecured debt.* (1) The term "newly issued senior unsecured debt" means senior unsecured debt issued by a participating entity on or after October 14, 2008, and on or before:

(i) The date the entity opts out, for an eligible entity that opts out of the debt guarantee program; or

(ii) June 30, 2009, for an entity that does not opt out of the debt guarantee program.

(2) The term "newly issued senior unsecured debt" includes, without limitation, senior unsecured debt

(i) that matures on or after October 13, 2008 and on or before June 30, 2009, and is renewed during that period, or

(ii) that is issued during that period pursuant to a shelf registration, regardless of the date of creation of the shelf registration.

(g) *Participating entity*. The term "participating entity" means with respect to each of the debt guarantee program and the transaction account guarantee program,

(1) An eligible entity that became an eligible entity on or before December 5, 2008 and that has not opted out, or

(2) An entity that becomes an eligible entity after December 5, 2008, and that the FDIC has allowed to participate in the program.

(h) *Noninterest-bearing transaction account.* (1) The term "noninterest-bearing transaction account" means a transaction account as defined in 12 CFR 204.2 that is

(i) Maintained at an insured depository institution;

(ii) With respect to which interest is neither accrued nor paid; and

(iii) On which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal.

(2) A noninterest-bearing transaction account does not include, for example, an interest-bearing money market deposit account (MMDA) as those accounts are defined in 12 CFR 204.2.

(3) Notwithstanding paragraphs (h)(1) and (h)(2) of this section, for purposes of the transaction account guarantee program, a noninterest-bearing transaction account includes:

(i) Accounts commonly known as Interest on Lawyers Trust Accounts (IOLTAs) (or functionally equivalent accounts); and

(ii) Negotiable order of withdrawal accounts (NOW accounts) with interest rates no higher than 0.50 percent if the insured depository institution at which the account is held has committed to maintain the interest rate at or below 0.50 percent.

(4) Notwithstanding paragraph (h)(3) of this section, a NOW account with an interest rate above 0.50 percent as of November 21, 2008, may be treated as a noninterest-bearing transaction account for purposes of this part, if the insured depository institution at which the account is held reduces the interest rate on that account to 0.50 percent or lower before January 1, 2009, and commits to maintain that interest rate at no more than 0.50 percent at all times through December 31, 2009.

(i) *FDIC-guaranteed debt.* The term "FDIC-guaranteed debt" means newly issued senior unsecured debt issued by a participating entity that meets the requirements of this part for debt that is guaranteed under the debt guarantee program, and is identified pursuant to § 370.5(h) as guaranteed by the FDIC.

(j) *Debt guarantee program.* The term "debt guarantee program" refers to the FDIC's guarantee program for newly issued senior unsecured debt as described in this part.

(k) *Transaction account guarantee program.* The term "transaction account guarantee program" refers to the FDIC's guarantee program for funds in noninterest-bearing transaction accounts as described in this part.

(l) *Temporary liquidity guarantee program.* The term "temporary liquidity guarantee program" includes both the debt guarantee program and the transaction account guarantee program.

**§ 370.3 Debt Guarantee Program**.

(a) Upon the uncured failure of a participating entity to make a timely payment of principal or interest as required under an FDIC-guaranteed debt instrument, the FDIC will pay the unpaid principal and/or interest, in accordance with § 370.12 and subject to the other provisions of this part.   .

(b) _Debt guarantee limit_.

(1) Except as provided in paragraphs (b)(2) through (b)(6) of this section , the maximum amount of outstanding debt that is guaranteed under the debt guarantee program for each participating entity at any time is limited to 125 percent of the par value of the participating entity's senior unsecured debt, as that term is defined in § 370.2(e)(1)(i), that was outstanding as of the close of business September 30, 2008 and that was scheduled to mature on or before June 30, 2009.

(2) If a participating entity that is an insured depository institution had either no senior unsecured debt as that term is defined in § 370.2(e)(1)(i), or only had federal funds purchased, outstanding on September 30, 2008, its debt guarantee limit is two percent of its consolidated total liabilities as of September 30, 2008. For the purposes of this paragraph (b)(2) of this section, the term "federal funds purchased" means:

(i) For insured depository institutions that file Reports of Condition and Income, unsecured "federal funds purchased" as that term is used in defining "Federal Funds Transactions" in the Glossary of the FFIEC Reports of Condition and Income Instructions, and

(ii) For insured depository institutions that file Thrift Financial Reports, "Federal Funds" as that term is defined in the Glossary of the 2008 Thrift Financial Report Instruction Manual.

(3) If a participating entity, other than an insured depository institution, had no senior unsecured debt as that term is defined in § 370.2(e)(1)(i) outstanding on September 30, 2008, the entity may seek to have some amount of debt covered by the debt guarantee program. The FDIC, after consultation with the appropriate Federal banking agency, will decide, on a case-by-case basis, whether such a request will be granted and, if granted, what the entity's debt guarantee limit will be.

(4) If an entity becomes an eligible entity after October 13, 2008, the FDIC will establish the entity's debt guarantee limit at the time of such designation.

(5) If an affiliate of a participating entity is designated as an eligible entity by the FDIC after a written request and positive recommendation by the appropriate Federal banking agency (or if the affiliate has no appropriate Federal banking agency, a written request and positive recommendation by the appropriate Federal banking agency of the affiliated insured depository institution), the FDIC will establish the entity's debt guarantee limit at the time of such designation.

(6) The FDIC may make exceptions to an entity's debt guarantee limit. For example, the FDIC may allow a participating entity to exceed the limit determined in paragraph (b)(1) or (b)(2) of this section, reduce the limit below the amount determined in paragraph (b)(1) or (b)(2) of this section, and/or impose other limits or requirements after consultation with the entity's appropriate Federal banking agency.

(7) If a participating entity issues debt identified as guaranteed under the debt guarantee program that exceeds its debt guarantee limit, it will be subject to assessment increases and enforcement action as provided in § 370.6(e).

(8) A participating entity that is both an insured depository institution and a direct or indirect subsidiary of a parent participating entity may, absent direction by the FDIC to the contrary, increase its debt guarantee limit above the limit determined in accordance with paragraphs (b)(1) through (b)(6) of this section, provided that:

(i) The amount of the increase does not exceed the debt guarantee limit(s) of one or more of its parent participating entities;

(ii) The insured depository institution provides prior written notice to the FDIC and to each such parent participating entity of the amount of the increase, the name of each contributing parent participating entity, and the starting and ending dates of the increase; and

(iii) For so long as the institution's debt guarantee limit is increased by such amount, the debt guarantee limit of each contributing parent participating entity is reduced by an amount corresponding to the amount of its contribution to the amount of the increase.

(9) The debt guarantee limit of the surviving entity of a merger between or among eligible entities is equal to the sum of the debt guarantee limits of the merging eligible entities calculated on a pro forma basis as of the close of business September 30, 2008, absent action by the FDIC after consultation with the surviving entity and its appropriate Federal banking agency.

(10) For purposes of determining the amount of guaranteed debt outstanding under paragraph (b)(1) of this section, debt issued in a foreign currency will be converted into U.S. dollars using the exchange rate in effect on the date that the debt is funded.

(c) *Calculation and reporting responsibility.* Participating entities are responsible for calculating and reporting to the FDIC the amount of senior unsecured as defined in § 370.2(e)(1)(i) as of September 30, 2008.

(1) Each participating entity shall calculate the amount of its senior unsecured debt outstanding as of the close of business September 30, 2008 that was scheduled to mature on or before June 30, 2009.

(2) Each participating entity shall report the calculated amount to the FDIC, even if such amount is zero, in an approved format via FDIC*connect* no later than December 5, 2008.

(3) In each subsequent report to the FDIC concerning debt issuances or balances outstanding, each participating entity shall state whether it has issued debt identified as FDIC-guaranteed debt that exceeded its debt guarantee limit at any time since the previous reporting period.

(4) The Chief Financial Officer (CFO) or equivalent of each participating entity shall certify the accuracy of the information reported in each report submitted pursuant to this section.

(d) *Duration of Guarantee*.

For guaranteed debt issued on or before June 30, 2009, the guarantee expires on the earliest of the date of the entity's opt-out, if any, the maturity of the debt, or June 30, 2012.

(e) Debt cannot be issued and identified as guaranteed by the FDIC if:

(1) The proceeds are used to prepay debt that is not FDIC-guaranteed;

(2) The issuing entity has previously opted out of the debt guarantee program, except as provided in § 370.5(d);

(3) The issuing entity has had its participation in the debt guarantee program terminated by the FDIC;

(4) The issuing entity has exceeded its debt guarantee limit for issuing guaranteed debt as specified in paragraph (b) of this section,

(5) The debt is owed to an affiliate, an institution-affiliated party, insider of the participating entity, or an insider of an affiliate or

(6) The debt does not otherwise meet the requirements of this part for FDIC guaranteed debt.

(f) The FDIC's agreement to include a participating entity's senior unsecured debt in the debt guarantee program does not exempt the entity from complying with any applicable law including, without limitation, Securities and Exchange Commission registration or disclosure requirements.

(g) *Long term non-guaranteed debt option.* On or before 11:59 p.m., Eastern Standard Time, December 5, 2008 a participating entity may also notify the FDIC that it has elected to issue senior unsecured non-guaranteed debt with maturities beyond June 30, 2012, at any time, in any amount, and without regard to the guarantee limit. By making this election the participating entity agrees to pay to the FDIC the nonrefundable fee as provided in § 370.6(f).

(h) *Applications for exceptions and eligibility.*

(1) The following requests require written application to the FDIC and the appropriate Federal banking agency of the entity or the entity's lead affiliated insured depository institution:

(i) A request by a participating entity to establish or increase its debt guarantee limit,

(ii) A request by an entity that becomes an eligible entity after October 13, 2008, for an increase in its presumptive debt guarantee limit of zero,

(iii) A request by a non-participating surviving entity in a merger transaction to opt in to either the debt guarantee program or the transaction account guarantee program, and

(iv) A request by an affiliate of an insured depository institution to participate in the debt guarantee program.

(2) The letter application should describe the details of the request, provide a summary of the applicant's strategic operating plan, and describe the proposed use of the debt proceeds.

(3) The factors to be considered by the FDIC in evaluating applications filed pursuant to paragraphs (h)(1)(i) through (h)(1)(iii) of this section include: the financial condition and supervisory history of the eligible/surviving entity. The factors to be considered by the FDIC in evaluating applications filed pursuant to paragraph (h)(1)(iv) of this section include: the extent of the financial activity of the entities within the holding company structure; the strength, from a ratings perspective of the issuer of the obligations that will be guaranteed; and the size and extent of the activities of the organization. The FDIC may consider any other relevant factors and may impose any conditions it deems appropriate in granting approval of applications filed pursuant to this paragraph.

(4) Applications required under this paragraph must be in letter form and addressed to the Director, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429. Applications made pursuant to paragraph (h)(1)(iii) of this section should be filed with the FDIC at the time the merger application is filed with the appropriate Federal banking agency and should incorporate a copy of the merger application therein.

(5) The effective date of approvals granted by the FDIC under this paragraph will be the date of the FDIC's approval letter or, in the case of requests filed pursuant to paragraph (h)(1)(iii) of this section , the effective date of the merger.

(i) The ability of a participating entity to issue guaranteed debt under the debt guarantee program expires on the earlier of the date of the entity's opt-out, if any, or June 30, 2009.

**§ 370.4 Transaction Account Guarantee Program.**

(a) In addition to the coverage afforded to depositors under 12 CFR Part 330, a depositor's funds in a noninterest-bearing transaction account maintained at a participating entity that is an insured depository institution are guaranteed in full (irrespective of the standard maximum deposit insurance amount defined in 12 CFR 330.1(n)) from October 14, 2008 through the earlier of:

(1) The date of opt-out, if the entity opts out, or

(2) December 31, 2009.

(b) In determining whether funds are in a noninterest-bearing transaction account for purposes of this section, the FDIC will apply its normal rules and procedures under § 360.8 (12 CFR 360.8) for determining account balances at a failed insured depository institution. Under these procedures, funds may be swept or transferred from a noninterest-bearing transaction account to another type of deposit or nondeposit account. Unless the funds are in a noninterest-bearing transaction account after the completion of a sweep under § 360.8, the funds will not be guaranteed under the transaction account guarantee program.

(c) Notwithstanding paragraph (b) of this section, in the case of funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings deposit account, the FDIC will treat the swept funds as being in a noninterest-bearing transaction account. As a result of this treatment, the funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings account, as defined in 12 CFR 204.2(d), will be guaranteed under the transaction account guarantee program.

**§ 370.5 Participation.**

(a) *Initial period.* All eligible entities are covered under the temporary liquidity guarantee program for the period from October 14, 2008 through December 5, 2008, unless they opt out on or before 11:59 p.m., Eastern Standard Time, December 5, 2008 in which case the coverage ends on the date of the opt-out.

(b) The issuance of FDIC-guaranteed debt subject to the protections of the debt guarantee program is an affirmative action by a participating entity that constitutes its agreement to be:

(1) Bound by the terms and conditions of the program, including without limitation, assessments and the terms of Master Agreement as required herein;

(2) Subject to, and to comply with, any FDIC request to provide information relevant to participation in the debt guarantee program and to be subject to FDIC on-site reviews as needed, after consultation with the appropriate Federal banking agency, to determine compliance with the terms and requirements of the debt guarantee program; and

(3) Bound by the FDIC's decisions, in consultation with the appropriate Federal banking agency, regarding the management of the temporary liquidity guarantee program.

(c) *Opt-out and opt-in options.* From October 14, 2008 through December 5, 2008, each eligible entity is a participating entity in both the debt guarantee program and the transaction account guarantee program, unless the entity opts out. No later than 11:59 p.m., Eastern Standard Time, December 5, 2008, each eligible entity must inform the FDIC if it desires to opt out of the debt guarantee program or the transaction account guarantee program, or both. Failure to opt out by 11:59 p.m., Eastern Standard Time, December 5, 2008 constitutes a decision to continue in the program after that date. Prior to December 5, 2008 an eligible entity may opt in to either or both programs by informing the FDIC that it will not opt out of either or both programs.

(d) An eligible entity may elect to opt out of either the debt guarantee program or the transaction account guarantee program or both. The choice to opt out, once made, is irrevocable, except that, in the case of a merger between two eligible entities, the resulting institution will have a one-time option to revoke a prior decision to opt-out. This option must be requested by application to the FDIC in accordance with §370.3(h). Similarly, the choice to affirmatively opt in, as provided in paragraph (c) of this section, once made, is irrevocable.

(e) All eligible entities that are affiliates of a U.S. bank holding company or that are affiliates of an eligible entity that is a U.S. savings and loan holding company must make the same decision regarding continued participation in each guarantee program; failure to do so constitutes an opt out by all members of the group.

(f) Except as provided in § 370.3(g), participating entities are not permitted to select which newly issued senior unsecured debt is guaranteed debt; all senior unsecured debt issued by a participating entity up to its debt guarantee limit must be issued and identified as FDIC-guaranteed debt as and when issued.

(g) *Procedures for opting out.* The FDIC will provide procedures for opting out and for making an affirmative decision to opt in using FDIC's secure e-business website, FDIC*connect*. Entities that are not insured depository institutions will select and solely use an affiliated insured depository institution to submit their opt-out election or their affirmative decision to opt in.

(h) *Disclosures regarding participation in the temporary liquidity guarantee program*.

(1) The FDIC will publish on its website:

(i) A list of the eligible entities that have opted out of the debt guarantee program, and

(ii) A list of the eligible entities that have opted out of the transaction account guarantee program.

(2) Each eligible entity that does not opt out of the debt guarantee program must include the following disclosure statement in all written materials provided to lenders or creditors regarding any senior unsecured debt issued by it on or after December 19, 2008 through June 30, 2009 that is guaranteed under the debt guarantee program:

*This debt is guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program and is backed by the full faith and credit of the United States. The details of the FDIC guarantee are provided in the FDIC's regulations, 12 CFR Part 370, and at the FDIC's website, www.fdic.gov/tlgp. The expiration date of the FDIC's guarantee is the earlier of the maturity date of the debt or June 30, 2012.*

(3) Each eligible entity that does not opt out of the debt guarantee program must include the following disclosure statement in all written materials provided to

lenders or creditors regarding any senior unsecured debt issued by it on or after December 19, 2008 through June 30, 2009 that is *not* guaranteed under the debt guarantee program:

*This debt is <u>not</u> guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program.*

(4) Each insured depository institution that offers noninterest-bearing transaction accounts must post a prominent notice in the lobby of its main office, each domestic branch and, if it offers Internet deposit services, on its website clearly indicating whether the institution is participating in the transaction account guarantee program. If the institution is participating in the transaction account guarantee program, the notice must state that funds held in noninterest-bearing transactions accounts at the entity are guaranteed in full by the FDIC.

(i) These disclosures must be provided in simple, readily understandable text. Sample disclosures are as follows:

<u>For Participating Institutions</u>

*[Institution Name] is participating in the FDIC's Transaction Account Guarantee Program. Under that program, through December 31, 2009, all noninterest-bearing transaction accounts are fully guaranteed by the FDIC for the entire amount in the account. Coverage under the Transaction Account Guarantee Program is in addition to and separate from the coverage available under the FDIC's general deposit insurance rules.*

<u>For Non-Participating Institutions</u>

*[Institution Name] has chosen <u>not</u> to participate in the FDIC's Transaction Account Guarantee Program. Customers of [Institution Name] with noninterest-bearing transaction accounts will continue to be insured through December 31, 2009 for up to $250,000 under the FDIC's general deposit insurance rules.*

(ii) If the institution uses sweep arrangements or takes other actions that result in funds being transferred or reclassified to an account that is not guaranteed under the transaction account guarantee program, for example, an interest-bearing account, the institution must disclose those actions to the affected customers and clearly advise them, in writing, that such actions will void the FDIC's guarantee with respect to the swept, transferred, or reclassified funds.

(5) *Effective date for paragraphs (h)(2), (h)(3) and (h)(4) of this section*. Paragraphs (h)(2), (h)(3) and (h)(4) of this section are effective December 19, 2008. Prior to that date, eligible entities should provide adequate disclosures of the substance of paragraphs (h)(2), (h)(3) and (h)(4) of this section in a commercially reasonable manner.

(i) Participation By New Eligible Entities And Continued Eligibility. The FDIC will determine eligibility in consultation with the eligible entity's appropriate Federal banking agency.

(1) Participation by an entity that is organized after October 13, 2008 or that becomes an entity described § 370.2(a) after October 13, 2008 will be: with respect to the transaction account guarantee program, effective on the date of the entity's opt-in as described in §370.2(g)(2), and with respect to the debt guarantee program, considered by the FDIC on a case-by-case basis in consultation with the entity's appropriate Federal banking agency.

(2) An eligible entity that is not an insured depository institution will cease to be eligible to participate in the debt guarantee program once it is no longer affiliated with a chartered and operating insured depository institution.

**§ 370.6 Assessments under the Debt Guarantee Program**.

(a) Waiver of assessment for certain initial periods. No eligible entity shall pay any assessment associated with the debt guarantee program for the period from October 14, 2008 through November 12, 2008. An eligible entity that opts out of the program on or before December 5, 2008 will not pay any assessment under the program.

(b) Notice to the FDIC. No guaranteed debt shall be issued by a participating entity under the FDIC's debt guarantee program unless notice of the issuance of such debt and payment of associated assessments is provided to the FDIC as required by this section and, for guaranteed debt issued after November 21, 2008, the participating entity agrees to be bound by the terms of the Master Agreement, as set forth on the FDIC's website.

(1) Any eligible entity that does not opt out of the debt guarantee program on or before December 5, 2008, as provided in § 370.5, and that issues any guaranteed debt during the period from October 14, 2008 through December 5, 2008 which is still outstanding on December 5, 2008, shall notify the FDIC of that issuance via the FDIC's e-business website FDIC*connect* on or before December 19, 2008, and the entity's Chief Financial Officer or equivalent shall certify that the issuances identified as FDIC-guaranteed debt outstanding at each point of time did not exceed the debt guarantee limit as set forth in § 370.3

(2) Each participating entity that issues guaranteed debt after December 5, 2008, shall notify the FDIC of that issuance via the FDIC's e-business website FDIC*connect* within the time period specified by the FDIC. The eligible entity's Chief Financial Officer or equivalent shall certify that the issuance of guaranteed debt does not exceed the debt guarantee limit as set forth in § 370.3.

(3) The FDIC will provide procedures governing notice to the FDIC and certification of guaranteed amount limits for purposes of this section.

(c) *Initiation of assessments*. Assessments, calculated in accordance with paragraph (d) of this section, will accrue, with respect to each eligible entity that does not opt out of the debt guarantee program on or before December 5, 2008:

(1) Beginning on November 13, 2008, on all senior unsecured debt, as defined in § 370.2(e)(1)(i) (except for overnight debt), issued by it on or after October 14, 2008, and on or before December 5, 2008, that is still outstanding on December 5, 2008; and

(2) Beginning on December 6, 2008, on all senior unsecured debt, as defined in § 370.2(e)(1)(ii), issued by it on or after December 6, 2008.

(d) *Amount of assessments for debt within the debt guarantee limit*

(1) *Calculation of assessment*. Except as provided in paragraph (d)(3) of this section, the amount of assessment will be determined by multiplying the

amount of FDIC-guaranteed debt times the term of the debt (expressed in years) times an annualized assessment rate determined in accordance with the following table.

| For debt with a maturity of | The annualized assessment rate (in basis points) is |
|---|---|
| 180 days or less (excluding overnight debt) | 50 |
| 181-364 days | 75 |
| 365 days or greater | 100 |

(2) If the debt matures after June 30, 2012, June 30, 2012 will be used as the maturity date.

(3) The amount of assessment for an eligible entity, other than an insured depository institution, that controls, directly or indirectly, or is otherwise affiliated with, at least one insured depository institution will be determined by multiplying the amount of FDIC-guaranteed debt times the term of the debt (expressed in years) times an annualized assessment rate determined in accordance with the rates set forth in the table in paragraph (d)(1) of this section, except that each such rate shall be increased by 10 basis points, if the combined assets of all insured depository institutions affiliated with such entity constitute less than 50 percent of consolidated holding company assets. The comparison of assets for purposes of this paragraph shall be determined as of September 30, 2008, except that in the case of an entity that becomes an eligible entity after October 13, 2008, the comparison of assets shall be determined as of the date that it becomes an eligible entity

(4) *Assessment invoicing.* Once the participating entity provides notice as required in paragraphs (b)(1) and (b)(2) of this section, the invoice for the appropriate fee will be automatically generated and posted on *FDICconnect* for the account associated with the participating entity, and the time limits for providing payment in paragraph (g) of this section will apply.

(5) *No assessment reduction for early retirement of guaranteed debt.* A participating entity's assessment shall not be reduced if guaranteed debt is retired prior to its scheduled maturity date.

(e) *Increased assessments for debt exceeding the debt guarantee limit.* Any participating entity that issues guaranteed debt represented as being guaranteed by the FDIC exceeding its debt guarantee limit as set forth in § 370.3(b) shall have its applicable assessment rate(s) for all outstanding guaranteed debt increased by 100 percent for purposes of the calculations in paragraph (d)(1) of this section. The FDIC may reduce the assessments under this paragraph upon a showing of good cause by the entity. In addition, any entity making such a misrepresentation may also be subject to enforcement action under 12 U.S.C. 1818, as further described in § 370.11.

(f) *Long term non-guaranteed debt fee.* Each participating entity that elects to issue long term non-guaranteed debt pursuant to § 370.3(g) must pay the FDIC a nonrefundable fee equal to 37.5 basis points times the amount of the entity's senior unsecured debt, as defined in § 370.2(e)(1)(i), that had a maturity date on or before June 30, 2009, and was outstanding as of September 30, 2008. If the entity had no such debt outstanding as of September 30, 2008, the fee will equal 37.5 basis points times the amount of the entity's debt guarantee limit established under §370.3(b).

(1) The nonrefundable fee will be collected in six equal monthly installments.

(2) An entity electing the nonrefundable fee option will also be billed as it issues guaranteed debt under the debt guarantee program, and the amounts paid as a nonrefundable fee under this paragraph will be applied to offset these bills until the nonrefundable fee is exhausted.

(3) Thereafter, the institution will have to pay additional assessments on guaranteed debt as it issues the debt, as otherwise required by this section.

(g) *Collection of assessments-- ACH Debit.*

(1) Each participating entity shall take all actions necessary to allow the Corporation to debit assessments from the participating entity's designated deposit account as provided for in § 327.3(a)(2). The assessment payments of a participating entity that is not an insured depository institution shall be debited from the designated

account of the affiliated insured depository institution it selected for FDIC*connect* access under § 370.5(g).

(2) Each participating entity shall ensure that funds in an amount at least equal to the amount of the assessment are available in the designated account for direct debit by the Corporation on the first business day after posting of the invoice on FDIC*connect*. A participating entity that is not an insured depository institution shall provide the necessary funds for payment of its assessments.

(3) Failure to take all necessary action or to provide funding to allow the Corporation to debit assessments shall be deemed to constitute nonpayment of the assessment, and such failure by any participating entity will be subject to the penalties for failure to timely pay assessments as provided for at § 308.132(c)(3)(v).

**§ 370.7 Assessment for the Transaction Account Guarantee program**

(a) *Waiver of assessment for certain initial periods*. No eligible entity shall pay any assessment associated with the transaction account guarantee program for the period from October 14, 2008, through November 12, 2008. An eligible entity that opts out of the program on or before December 5, 2008 will not pay any assessment under the program.

(b) *Initiation of assessments*. Beginning on November 13, 2008 each eligible entity that does not opt out of the transaction account guarantee program on or before December 5, 2008 will be required to pay the FDIC assessments on all deposit amounts in noninterest-bearing transaction accounts calculated in accordance with paragraph (c) of this section

(c) *Amount of assessment.* Any eligible entity that does not opt out of the transaction account guarantee program shall pay quarterly an annualized 10 basis point assessment on any deposit amounts exceeding the existing deposit insurance limit of $250,000, as reported on its quarterly Consolidated Reports of Condition and Income, Thrift Financial Report, or Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks in any noninterest-bearing transaction accounts (as defined in § 370.2(h)), including any such amounts swept from a noninterest bearing transaction account into an noninterest bearing savings deposit account as provided in

§ 370.4(c). This assessment shall be in addition to an institution's risk-based assessment imposed under Part 327.

(d) *Collection of assessment.* Assessments for the transaction account guarantee program shall be collected along with a participating entity's quarterly deposit insurance payment as provided in § 327.3, and subject to penalties for failure to timely pay assessments as referenced in § 308.132(c)(3)(v).

**§ 370.8 Systemic Risk Emergency Special Assessment to Recover Loss.**

To the extent that the assessments provided under § 370.6 or § 370.7 are insufficient to cover any loss or expenses arising from the temporary liquidity guarantee program, the Corporation shall impose an emergency special assessment on insured depository institutions as provided under 12 U.S.C. 1823(c)(4)(G)(ii) of the FDI Act.

**§ 370.9 Recordkeeping requirements**.

The FDIC will establish procedures, require reports, and require participating entities to provide and preserve any information needed for the operation of this program.

**§ 370.10 Oversight.**

(a) Participating entities are subject to the FDIC's oversight regarding compliance with the terms of the temporary liquidity guarantee program.

(b) A participating entity's default in the payment of any debt may be considered an unsafe or unsound practice and may result in enforcement action as described in § 370.11.

(c) In general, with respect to a participating entity that is an insured depository institution, the FDIC shall consider the existence of conditions which rise to an obligation to pay on its guarantee as providing grounds for the appointment of the FDIC as conservator or receiver under Section 11(c)(5)(C) and (F) of the Federal Deposit Insurance Act, 12 U.S.C 1821(c)(5)(C) and (F).

(d) By issuing guaranteed debt, all participating entities agree, for the duration of the temporary liquidity guarantee program, to be subject to the FDIC's authority to determine compliance with the provisions and requirements of the program.

**§ 370.11 Enforcement Mechanisms**.

(a) *Termination of Participation*. If the FDIC, in its discretion, after consultation with the participating entity's appropriate Federal banking agency, determines that the participating entity should no longer be permitted to continue to participate in the temporary liquidity guarantee program, the FDIC will inform the entity that it will no longer be provided the protections of the temporary liquidity guarantee program.

(1) Termination of participation in the temporary liquidity guarantee program will solely have prospective effect. All previously issued guaranteed debt will continue to be guaranteed as set forth in this part.

(2) The FDIC will work with the participating entity and its appropriate Federal banking agency to assure that the entity notifies its counterparties or creditors that subsequent debt issuances are not covered by the temporary liquidity guarantee program.

(b) *Enforcement Actions.* Violating any provision of the temporary liquidity guarantee program constitutes a violation of a regulation and may subject the participating entity and its institution-affiliated parties to enforcement actions under Section 8 of the FDI Act (12 U.S.C. 1818), including, for example, assessment of civil money penalties under section 8(i) of the FDI Act (12 U.S.C. 1818(i)), removal and prohibition orders under section 8(e) of the FDI Act (12 U.S.C. 1818(e)), and cease and desist orders under section 8(b) of the FDI Act (12 U.S.C. 1818(b)). The violation of any provision of the program by an insured depository institution also constitutes grounds for terminating the institution's deposit insurance under section 8(a)(2) of the FDI Act (12 U.S.C. 1818(a)(2)). The appropriate Federal banking agency for the participating entity will consult with the FDIC in enforcing the provisions of this part. The appropriate Federal banking agency and the FDIC also have enforcement authority under section 18(a)(4)(C) of the FDI Act (12 U.S.C. 1828(a)(4)(C)) to pursue an enforcement action if a person knowingly misrepresents that any deposit liability, obligation, certificate, or share is insured when it is not in fact insured.

**§ 370.12  Payment on the Guarantee.**

(a) *Claims for Deposits in Noninterest-bearing Transaction Accounts*.

(1) *In general*. The FDIC will pay the guaranteed claims of depositors for funds in a noninterest-bearing transaction account in an insured depository institution that is a participating entity as soon as possible upon the failure of the entity.  Unless otherwise provided for in this paragraph (a), the guaranteed claims of depositors who hold noninterest-bearing transaction deposit accounts in such entities will be paid in accordance with 12 U.S.C. 1821(f) and 12 C.F.R. parts 330 and 370.

(2) *Subrogation rights of FDIC*.  Upon payment of such claims, the FDIC will be subrogated to the claims of depositors in accordance with 12 U.S.C. 1821(g).

(3) *Review of final determination*. The final determination of the amount guaranteed shall be considered a final agency action of the FDIC reviewable in accordance with Chapter 7 of Title 5, by the United States district court for the federal judicial district where the principal place of business of the depository institution is located. Any request for review of the final determination shall be filed with the appropriate district court not later than sixty (60) days of the date on which the final determination is issued.

(b) *Payments on Guaranteed Debt of participating entities in default*..

(1) *In general*.  The FDIC's obligation to pay holders of FDIC-guaranteed debt issued by a participating entity shall arise upon the uncured failure of such entity to make a timely payment of principal or interest as required under the debt instrument (a "payment default").

(2) *Method of payment*.  Upon the occurrence of a payment default, the FDIC shall satisfy its guarantee obligation by  making scheduled payments of principal and interest pursuant to the terms of the debt instrument through maturity (without regard to default or penalty

provisions) . The FDIC may in its discretion, at any time after June 30, 2012, elect to make a final payment of all outstanding principal and interest due under a guaranteed debt instrument whose maturity extends beyond that date. In such case, the FDIC shall not be liable for any prepayment penalty.

(3) *Demand for payment; proofs of claim*.

(i) *Payment through authorized representative*. Except as provided in paragraph (b)(3)(ii), a demand for payment on the guaranteed amount shall be made on behalf of all holders of debt subject to a payment default that is made by a duly authorized representative of such debtholders if the issuer shall have elected to provide for one in the Master Agreement submitted pursuant § 370.6(b). Such demand must be accompanied by a proof of claim, which shall include evidence, to the extent not previously provided in the Master Agreement, in form and content satisfactory to the FDIC, of: the representative's financial and organizational capacity to act as representative; the representative's exclusive authority to act on behalf each and every debtholder and its fiduciary responsibility to the debtholder when acting as such, as established by the terms of the debt instrument; the occurrence of a payment default; and the authority to make an assignment of each debtholder's right, title, and interest in the FDIC-guaranteed debt to the FDIC and to effect the transfer to the FDIC of each debtholder's claim in any insolvency proceeding. This assignment shall include the right of the FDIC to receive any and all distributions on the debt from the proceeds of the receivership or bankruptcy estate. If any holder of the FDIC-guaranteed debt has received any distribution from the receivership or bankruptcy estate prior to the FDIC's payment under the guarantee, the guaranteed amount paid by the FDIC shall be reduced by the amount the holder has received in the distribution from the receivership or bankruptcy estate. All such demands must be made within 60 days of the occurrence of the payment default upon which the demand is based. Upon receipt of a conforming proof of claim, if timely filed, the FDIC will make a payment of the amount guaranteed.

(ii) *Individual debtholders*: Individual debtholders who are not represented by an authorized representative provided for in a Master Agreement submitted pursuant to § 370.6(b), or who elect not to be represented by such authorized representative, may make demand for payment of the guaranteed amount upon the FDIC. The FDIC may reject a demand made by a person who the FDIC determines has not opted out of representation by an authorized representative. In order to be considered for payment, such demand must be accompanied by a proof of claim, which shall include evidence in form and content satisfactory to the FDIC of: the occurrence of a payment default; and the claimant's ownership of the FDIC-guaranteed debt obligation. The demand also must be accompanied by an assignment, in form and content satisfactory to the FDIC, of the debtholder's rights, title, and interest in the FDIC-guaranteed debt to the FDIC and the transfer to the FDIC of the debtholder's claim in any insolvency proceeding. This assignment shall include the right of the FDIC to receive any and all distributions on the debt from the proceeds of the receivership or bankruptcy estate. If any holder of the FDIC-guaranteed debt has received any distribution from the receivership or bankruptcy estate prior to the FDIC's payment under the guarantee, the guaranteed amount paid by the FDIC shall be reduced by the amount the holder has received in the distribution from the receivership or bankruptcy estate. All such demands must be made within 60 days of the occurrence of the payment default upon which the demand is based. Upon receipt of a conforming proof of claim, if timely filed, the FDIC will make a payment of the amount guaranteed.

(iii) Any demand under this subsection shall be made in writing and directed to the Director, Division of Resolutions and Receiverships, Federal Deposit Insurance Corporation, Washington, DC., and must include all supporting evidence as set forth in the previous subsections, and shall certify to the accuracy thereof.

(iv) *Demand period*. Failure of the holder of the FDIC-guaranteed debt or an authorized representative to make demand for payment within sixty (60) days of the occurrence of payment default will deprive the holder of the FDIC-guaranteed debt of all further rights and remedies with respect to the guarantee claim.

(4) *Subrogation*. Upon payment under either method under paragraph (b)(2) of this section, the FDIC will be subrogated to the rights of any debtholder against the issuer, including in respect of any insolvency proceeding, to the extent of the payments made under the guarantee.

(5) *Release and satisfaction*. Payment under paragraph (b)(2) of this section shall constitute, to the extent of payments made, satisfaction of all FDIC obligations under the debt guarantee program with respect to that debtholder or holders. Acceptance of any such payments shall constitute a release of any liability of the FDIC under the debt guarantee program with respect to those payments. Each participating entity agrees and acknowledges that it shall be indebted to the FDIC for any payments made under these provisions (including amounts paid to a participating entity in return for its assumption of a guaranteed debt issuance) and shall honor immediately a demand by the FDIC for reimbursement therefore. A participating entity's undertakings in this regard shall be evidenced and governed by the "Master Agreement" it shall execute and submit, in connection with its election pursuant to § 370.6(b) to participate in the Debt Guarantee Program.

(6) *Final determination; review of final determination* The FDIC's determination under this paragraph shall be a final administrative determination subject to judicial review. The holder of FDIC-guaranteed debt shall have the right to seek judicial review of the

FDIC's final determination in the United States District Court for the District of Columbia or the United State District Court for the federal district where the issuer's principal place of business was located. Failure of the holder of the FDIC-guaranteed debt to seek such judicial review within sixty (60) days of the date of the rendering of the final determination will deprive the holder of the FDIC-guaranteed debt of all further rights and remedies with respect to the guarantee claim.

By order of the Board of Directors.

Dated at Washington, DC, this 21st day of November, 2008.

FEDERAL DEPOSIT INSURANCE CORPORATION

Robert E. Feldman,
Executive Secretary