



## UPDATE: FDIC Adopts Interim Rule on Temporary Liquidity Guarantee Program

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On October 23, 2008, the Federal Deposit Insurance Corporation (“FDIC”) adopted an interim final rule (the “Interim Rule”) establishing the Temporary Liquidity Guarantee Program (“TLG Program”). The TLG Program consists of two primary components: (i) a Transaction Account Guarantee Program (“TAG Program”), through which the FDIC will guarantee certain noninterest-bearing transaction accounts of participating depository institutions; and (ii) a Debt Guarantee Program, through which the FDIC will guarantee the payment of certain newly-issued senior unsecured debt of participating entities. The TAG program may be of special interest to bankers and their customers because of the unlimited amount of insurance coverage it provides for certain types of deposits.

### **Effective Dates**

The Interim Rule became effective on October 23, 2008, except for certain participation disclosure provisions which will become effective December 1, 2008. Coverage under the TLG Program was established by the Board of Directors of the FDIC as of October 14, 2008. The Interim Rule was officially published for comment in the Federal Register on October 29, 2008. Comments on the Interim Rule must be received by November 13, 2008, and it is likely that the FDIC will issue a final

regulation based on the Interim Rule sometime thereafter.

### **Eligibility**

The following entities are eligible to participate in the TLG Program subject to any restrictions that might be imposed by the FDIC in consultation with their primary regulator:

- FDIC-insured depository institutions
- Any U.S. bank holding company, provided that it has at least one chartered and operating insured depository institution within its holding company structure
- Any U.S. savings and loan holding company, provided that it has at least one chartered and operating insured depository institution within its holding company structure
- Other affiliates of insured depository institutions that the FDIC, after consultation with the appropriate Federal banking agency, designates as eligible entities which affiliates, by seeking and obtaining such designation, will have opted in to the Debt Guarantee Program

### **Transaction Account Guarantee Program**

Under the TAG Program, the FDIC has provided a temporary full guarantee 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 will continue through December 31, 2009.

Under the Interim Rule, a “noninterest-bearing transaction account” is 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, however, does not encompass negotiable order of withdrawal (NOW) accounts or money market deposit accounts (MMDAs).

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 applies to all such accounts held by any depositor. Thus, for example, if a consumer has a \$250,000 certificate of deposit and a noninterest-bearing checking account for \$50,000, he or she would be fully insured for \$300,000. Coverage of \$250,000 would be provided for the certificate of deposit under the FDIC’s general rules for deposit insurance coverage. Separately, full coverage of the \$50,000 checking account would be provided under the TAG Program.

The Interim 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 procedures, funds may be swept or transferred from a noninterest-bearing transaction account to another type of deposit or non-deposit account. The FDIC will treat the funds as being in the account to which the funds were transferred. An

exception will exist, however, for funds 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 will be guaranteed by the TAG Program.

Assessment Fee: No eligible entity shall pay any assessment associated with the TAG Program from October 14, 2008 to November 12, 2008. Beginning on November 13, 2008, participating entities will be assessed a fee that will be reflected on their quarterly certified statement invoices. Institutions will pay quarterly an annualized 10 basis point assessment on any deposit amounts exceeding the existing deposit insurance limit of \$250,000. This assessment shall be in addition to an institution’s risk-based assessment.

Payment of Claims. The FDIC’s obligation to make payment on the guaranteed claims of depositors arises upon the failure of a participating insured depository institution. In the event of payment by the FDIC under the TAG Program, the FDIC will be subrogated to all rights of the depositor against the institution.

#### **Debt Guarantee Program**

The Debt Guarantee Program will temporarily guarantee all newly-issued senior unsecured debt (up to prescribed limits) that is issued by participating entities on or after October 14, 2008, through and including June 30, 2009. For eligible debt issued by this date, the FDIC will provide the guarantee coverage for such debt until the earlier of the maturity date of the debt or until June 30, 2012. This final effective date for coverage is absolute. The unpaid balance of this newly-issued senior

unsecured debt will be paid by the FDIC upon the failure of the issuing institution or the filing of a bankruptcy petition with respect to the issuing holding company.

The maximum amount of debt to be issued under the Debt Guarantee Program is 125 percent of the par or face value of senior unsecured debt outstanding, excluding debt extended to affiliates, as of September 30, 2008, that is scheduled to mature on or before June 30, 2009. The FDIC will require that each participating entity calculate its outstanding senior unsecured debt as of September 30, 2008, and provide that information – even if the amount of the senior unsecured debt is zero – to the FDIC. The 125 percent limit may be adjusted for certain participating entities on a case-by-case basis.

The FDIC may determine that the entity will not be permitted to participate in the TLG Program. Termination of participation will have only a prospective effect, and the entity must notify its customers and creditors that it is no longer issuing guaranteed debt. Similarly, once an entity has reached its 125 percent limit, it may not represent that any additional debt is guaranteed by the FDIC, and must specifically disclose that such debt is not guaranteed.

Assessment Fee: No eligible entity shall pay any assessment associated with the Debt Guarantee Program from October 14, 2008 to November 12, 2008. Beginning on November 13, 2008, entities participating in the Debt Guarantee Program shall pay an assessment amount determined by multiplying the amount of eligible guaranteed debt times the term of the debt times an annualized 75 basis points. An entity that exceeds its guaranteed amount limit will be subject to a penalty assessment of 150 basis points, and may be subject to

administrative enforcement action, including the assessment of civil money penalties. A participating entity that elects to issue long term non-guaranteed debt must pay the FDIC a nonrefundable fee equal to 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.

### **Participation Requirements**

According to the Interim Rule, from October 14, 2008 through November 12, 2008, all eligible entities will be considered participating entities in both the Debt Guarantee Program and the TAG Program unless the entity opts out. If an entity chooses to opt out of either of these programs, it must inform the FDIC of its decision by 11:59pm (Eastern Standard Time) on November 12, 2008. Once made, the choice to opt out of a program is irrevocable. The FDIC will provide procedures for opting out and for making an affirmative decision to opt in (also irrevocable) using the FDIC's e-business website, *FDICconnect*.

The following disclosure provisions are effective December 1, 2008. Prior to that date, eligible entities should provide adequate disclosures relating to the substance of the following paragraphs in a commercially reasonable manner.

- If an eligible entity does not opt out of the Debt Guarantee Program, it must clearly identify, in writing and in a commercially reasonable manner, to any interested lender or creditor whether the newly issued debt it is offering is guaranteed or not.
- Each eligible entity that is an insured depository institution must post a

prominent notice in the lobby of its main office and each branch clearly indicating whether the entity is participating in the TAG Program – i.e. whether the institution has opted out or not. If the entity is participating in the TAG Program, the notice must also state that funds held in non-interest-bearing transaction accounts at the entity are insured in full by the FDIC.

These disclosures must be in simple, readily understandable text. Moreover, if the institution uses sweep arrangements or takes other actions that result in funds being transferred or reclassified to an interest-bearing account or non-transaction 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.

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