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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 370

RIN XXXX-XXX

Amendment of the Temporary Liquidity Guarantee Program to Extend the Transaction Account Guarantee Program with Opportunity to Opt-Out

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Interim Rule with request for comments.

SUMMARY: The FDIC is issuing this Interim Rule to amend the Transaction Account Guarantee (TAG) component of the Temporary Liquidity Guarantee Program (TLGP) by providing an 6-month extension of the TAG program for insured depository institutions (IDIs) currently participating in the TAG program, with the possibility of an additional 12-month extension of the program without further rulemaking, upon a determination by the FDIC's Board of Directors (Board) that continuing economic difficulties warrant a continued extension. By virtue of this Interim Rule, the TAG program will be extended through December 31, 2010, with the possibility of an additional 12-month extension

through December 31, 2011. In addition, while the Interim Rule presents no changes in the amount of the assessment for an IDI's continued participation in the TAG, it modifies the assessment basis for calculating the current risk-based assessments to one based on average daily balances in the TAG-related accounts. Further, the Interim Rule requires IDIs participating in the TAG program that offer NOW accounts covered by the program to reduce the interest rate on such accounts to a rate no higher than 0.25 percent and to commit to maintain that rate for the duration of the TAG extension in order for those NOW accounts to remain eligible for the FDIC's continued guarantee.

DATES: The Interim Rule becomes effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments on the Interim Rule must be received by the FDIC no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments on the Interim Rule, by any of the following methods:

- Agency Web Site: http://www.FDIC.gov/regulations/laws/federal/notices.html. Follow instructions for submitting comments on the Agency Web Site.
- E-mail: Comments@FDIC.gov. Include RIN # [XXXX-XXXX] on the subject line of the message.
- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, N.W., 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 a.m. and 5 p.m.

Instructions: All comments received will be posted generally without change to http://www.fdic.gov/regulations/laws/federal/final.html, including any personal information provided.

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SUPPLEMENTARY INFORMATION

I. Background

In October 2008, the FDIC adopted the TLGP following a determination of systemic risk by the Secretary of the Treasury (after consultation with the President) that was supported by recommendations from the FDIC and the Board of Governors of the

Federal Reserve System (Federal Reserve).[1] The TLGP is part of an ongoing and coordinated effort by the FDIC, the U.S. Department of the Treasury, and the Federal Reserve to address unprecedented disruptions in the financial markets and preserve confidence in the American economy.

The FDIC's October 2008 interim rule provided the blueprint for the TLGP.[2] The TLGP comprises two distinct components: the Debt Guarantee Program (DGP), pursuant to which the FDIC guarantees certain senior unsecured debt issued by entities participating in the TLGP; and the TAG program, pursuant to which the FDIC guarantees all funds held at participating IDIs (beyond the standard maximum deposit insurance limit) in qualifying noninterest-bearing transaction accounts.

The DGP addressed the acute needs of banks to obtain funding by permitting participating entities to issue FDIC-guaranteed senior unsecured debt until June 30, 2009, with the FDIC's guarantee for such debt to expire on the earlier of the maturity or conversion of the debt (for mandatory convertible debt) or June 30, 2012.[3] In order to reduce market disruption at the conclusion of the DGP and to facilitate the orderly phase-out of the program, the FDIC's Board, in March 2009, adopted another interim rule that, among other things, provided for a limited four-month extension for the issuance of senior unsecured debt under the DGP.[4] At the same time, the FDIC extended the expiration of the guarantee period from June 30, 2012, until December 31, 2012.[5] The

1 See Section 13(c)(4)(G) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1823(c)(4)(G). The determination of systemic risk authorized the FDIC to take actions to avoid or mitigate serious adverse effects on economic conditions or financial stability, and the FDIC implemented the TLGP in response.

2 73 FR 64179 (Oct. 29, 2008). This Interim Rule was followed by a Final Rule, published in the *Federal Register* on November 26, 2008. 73 FR 72244 (Nov. 26, 2008).

3 *Id*. at 64181-64182.

4 74 FR 12078 (Mar. 23, 2009). This Interim Rule was finalized and a Final Rule was published in the *Federal Register* on June 3, 2009. 74 FR 26521 (June 3, 2009).

5 74 FR 12078, 12080.

DGP component of the TLGP has served a vital role in helping to restore market-based liquidity and confidence in the financial market.[6]

The TAG component of the TLGP was developed, in part, to address concerns that a large number of account holders might withdraw their uninsured account balances from IDIs due to then-prevailing economic uncertainties. Such withdrawals could have further destabilized financial markets and impaired the funding structure of smaller banks that rely on deposits as a primary source of funding while also negatively affecting other institutions that had relationships with these banks.[7] In designing the TAG program, the FDIC sought to improve public confidence and to encourage depositors to maintain their transaction account balances at IDIs participating in the TAG program.

In response to comments received by the FDIC following publication of the October 2008 interim rule, the FDIC expanded the TAG program to cover, among other accounts, "negotiable order of withdrawal," or NOW accounts, with interest rates no higher than 0.50 percent if the IDI offering the account committed to maintain that interest rate through December 31, 2009.[8] If an IDI offering NOW accounts with an interest rate in excess of 0.50 percent committed to reduce the rate to 0.50 percent or less by January 1, 2009, and to maintain that rate for the duration of the program, its NOW account would be considered eligible for the FDIC's TAG guarantee.[9]

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6 On September 16, 2009, the FDIC published for comment alternative proposals for winding down the DGP component of the TLGP. Ultimately, the FDIC issued a final rule terminating the DGP as of October 31, 2009, and establishing a limited, six-month emergency guarantee facility. 74 FR 54743 (Oct. 23, 2009).

7 73 FR 64182-64183.

8 73 FR 72244, 72262 (Nov. 26, 2008).

9 *Id*.

The TAG program was originally set to expire on December 31, 2009.[10] The FDIC recognized that the TAG program was contributing significantly to improvements in the financial sector, but also noted that many parts of the country were still suffering from the effects of economic turmoil. As a result, on August 26, 2009, following a public notice and comment period,[11] the FDIC issued a final rule that extended the TAG program through June 30, 2010.[12]

The initial TAG extension included an increased assessment rate designed to offset the potential losses associated with the FDIC's guarantee. Prior to the extension, the fee for participating IDIs was a flat rate of 0.10 percent annually on all amounts in eligible TAG accounts not covered by regular deposit insurance. Beginning on January 1, 2010, the fee for continued participation in the TAG was raised and the basis changed to reflect an IDI's risk profile, ranging from 15 basis points to up to 25 basis points. The rule provided participating IDIs with a second opportunity to opt out of the TAG program.[13] The initial TAG extension also required participating IDIs to extend their commitment to maintain interest rates on NOW account at no higher than 0.50 percent during the extended TAG program.[14]

In extending the TAG program through June 30, 2010, the FDIC reiterated its belief that the country was experiencing overall improved economic conditions and that it had made progress toward a stable, fully functioning financial marketplace.[15] Yet the FDIC cautioned that this progress could be impeded or even undone by terminating the

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10 73 FR 64179, 64182 (Oct. 29, 2008).
11 74 FR 31217 (June 30, 2009).
12 74 FR 45093 (Sept. 1, 2009).
13 *Id.*
14 74 FR 45098.
15 74 FR 45095.

TAG program too quickly. As such, the FDIC deemed its initial extension of the TAG an appropriate step to a gradual phase out the program.[16]

II. Rationale for Extending the TAG Program

Since its inception, the TAG program has been an important source of stability for many banks with large transaction account balances. Currently, nearly 6,400 insured depository institutions, representing approximately 80 percent of all IDIs, continue to participate in the TAG program and to benefit from the guarantee provided by the FDIC. These institutions held an estimated $340 billion of deposits in accounts currently subject to the FDIC's guarantee as of the end of 2009. Of these, $266 billion represented amounts above the insured deposit limit and guaranteed by the FDIC through its TAG program. Among the current participants in the program, the average TAG account size was about $1.15 million. About 550 institutions relied on TAG accounts to fund 10 percent or more of their assets. In this challenging banking environment, smaller IDIs have continued to find the TAG program especially beneficial.

While the immediate financial crisis that led to the creation of the TLGP in October 2008 has abated, it was followed by an intensification of the recession that began in late 2007 and which continues to pressure local communities across the country. At the same time, the financial distress that emerged in 2008 has spread from large, systemically important banks to banks of all sizes, particularly in regions suffering from ongoing economic turmoil.

Since the establishment of the TLGP, there have been 187 bank and thrift failures, and the number of "problem" institutions has increased to 702, representing $403 billion in total assets, as of year-end 2009. Weaknesses facing community banks have

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16 *Id*.

intensified as the lingering consequences of the 2008 financial crisis and the recession place continued pressure on earnings and asset quality. In 2009, community banks experienced an aggregate $104 million loss, their first annual loss on record. Community banks increased their provisions for loan and lease losses to $5.1 billion during the fourth quarter of 2009, the highest level on record. The effects of the financial crisis and recession are expected to persist for some time, especially as the magnitude of economic distress facing local markets places continued pressure on asset quality and earnings, with the potential for undermining the stability of the banking organizations that serve these markets.

Although the condition of IDIs as a whole has deteriorated since the establishment of the TLGP, the TAG program has lessened some of their distress by enabling them to retain longstanding customer transaction relationships, such as payroll accounts from municipalities and small businesses. These deposits have significantly improved the funding situation of IDIs and allowed them to continue making investments in the communities they serve. Over 70 percent of industry assets were funded by deposits as of fourth quarter 2009, up from 65 percent a year ago. This increased reliance on deposit funding highlights the importance of the TAG program.

Based on these economic factors, the FDIC has concluded that allowing the TAG to expire on June 30, 2010, could negatively affect the banking system at a time when many IDIs continue to experience stressful economic and financial conditions. The FDIC is concerned that allowing the TAG program to expire in the current environment could cause a number of community banks to experience deposit withdrawals from their large transaction accounts and risk needless liquidity failures. To the extent IDIs are able to replace these deposits with brokered deposits or secured borrowings, their overall liquidity risk profile would increase going forward. However, the loss of longstanding large depositor relationships would negatively affect IDIs' deposit franchise values to an acquirer in the event of a failure, thus increasing the FDIC's resolution costs.

By extending the TAG program beyond its current program termination date of June 30, 2010, the FDIC seeks to maintain stability for IDIs and to promote a continuing and sustainable economic recovery throughout the country. Specifically, the FDIC anticipates that its extended guarantee of noninterest-bearing transaction accounts may provide participating institutions with a continued stable funding source. Moreover, recognizing the gap between funding costs of large and small banks,[17] the FDIC believes that a continuation of its TAG program will help maintain community banks' ability to compete for and secure low-cost large deposits, thereby preserving deposit franchise value and supporting the rebuilding of earnings and capital.

In providing for a six-month extension of the TAG program and for an additional 12-month extension without further rulemaking, if the Board concludes that such extension is warranted, the FDIC endeavors to avoid liquidity failures that may be indirectly precipitated by deposit migrations potentially caused by letting the TAG program expire on June 30, 2010. In most cases, liquidity failures are more costly for the FDIC to resolve as there is little time to market the institution. This leads to fewer and less informed bidders who will reduce the value of their proposals to compensate for the uncertainty in the transaction. Bidders are more reluctant to enter into transactions that

[17] At year-end 2007, the average cost of interest-bearing domestic deposits at banks with over $100 billion in total assets was 35 basis points lower than at banks with under $1 billion in total assts. At the end of the second quarter 2008, this difference increased to 64 basis points. By year-end 2009, the spread was 107 basis points.

transfer high-risk assets without having the time to conduct due diligence; this will result in more assets being retained by the FDIC, as receiver for failed IDIs. In addition, the loss of large balance transaction accounts that may leave the IDIs in the absence of the TAG program extension will reduce franchise values and make it more difficult for all-deposit resolution transactions to satisfy the least cost test. Finally, the diminution of deposit franchises may lead to more deposit payouts, which are expensive and consume large amounts of FDIC resources. For these reasons, extending the TAG is mission-critical for the FDIC, as steward of the DIF.

As the effects of the financial crisis and the recession continue to unfold, the FDIC remains committed to its primary goal of promoting confidence and stability in the banking system. The TAG program provides businesses and other large depositors with complete assurance that qualifying noninterest-bearing transaction accounts are fully guaranteed in participating IDIs. This, in turn, contributes to a more stable operating environment in which business activities may continue to normalize.

Moreover, the FDIC has received support from some industry participants for extending the program. These stakeholders have commented that the TAG program has had a positive and stabilizing effect on the banking industry and public confidence; terminating the program on June 30, 2010, would be premature given the delicate state of the nation's financial recovery. They further note that the TAG program benefits small businesses by guaranteeing payroll accounts and increasing the amount of funding available to make loans. Community banks are key providers of credit to small businesses, which have historically made significant contributions to new job growth and the overall strengthening of the economy. Thus, community bankers argue that extending the TAG program would provide them with an important source of liquidity necessary to continue providing credit to small businesses and creditworthy borrowers.

II. Authority to Extend TAG Program

The amendment to the TAG provided under the Interim Rule is based on the authority for the establishment of the TLGP, including the determination of systemic risk made in October 2008, pursuant to section 13(c)(4)(G) of the FDI Act.[18] A systemic risk determination authorizes the FDIC to not only take actions necessary at that time to avoid or mitigate serious adverse effects on economic conditions or financial stability, but also to continue to take such action as necessary in the future where the economic conditions and threats to financial stability that first gave rise to the determination persist or have shifted to adversely affect other sections of the banking industry.[19] The extension of the TAG component of the TLGP provided for in this Interim Rule represents a continuation of the previously authorized action by the FDIC to mitigate the continuing adverse effects, discussed in the preceding section, from the financial crisis and the recession by providing additional stable funding for IDIs.

III. The Interim Rule

A. Extension of the TAG Program for Participating IDIs

The TAG program currently expires on June 30, 2010. This Interim Rule extends the termination of the TAG program for six months, through December 31, 2010, with the possibility of an additional 12-month extension, through December 31, 2011, without further rulemaking, at the discretion of the Board upon a finding of a continuing need for

[18] 12 U.S.C. 1823(c)(4)(G).
[19] *See id.*; *see also Senior Unsecured Creditors' Comm. of First Republic Bank Corp. v. F.D.I.C.*, 749 F. Supp. 758, 768 (N.D. Tex. 1990).

the TAG program. If the Board determines that an additional 12-month extension of the TAG program is warranted, an announcement to that effect will be made by the FDIC no later than October 29, 2010. The FDIC believes that extending the TAG program will assist participating IDIs in successfully weathering the nation's continuing financial distress and in ensuring a more sustainable economic recovery.

B. No Increased Fee for Continued Participation in the Extended TAG Program

Under the current rule, the TAG program provides for a tiered-pricing assessment, ranging from 15 to 25 basis points based on an institution's deposit insurance assessment risk category. The FDIC believes that maintaining the current tiered pricing for the TAG program will enable most participating IDIs to remain in the program, thereby providing a greater positive stimulus to the nation's economic recovery. The FDIC believes that increasing the assessment for participating IDIs at this time would frustrate the overall goal of the extension of the TAG program and could further pressure the liquidity posture of participating IDIs.

Although costs from the TAG program will have exceeded revenues collected under the program through June 30, 2010, no increase in fees is being proposed for the extension of the TAG program under this Interim Rule. The FDIC estimates that projected revenues from assessments under a six-month extension in the TAG program could cover projected costs for the duration of the extension, but will more likely show a small loss under reasonable assumptions regarding continued participation in the program. In making our estimates, the FDIC expects that some IDIs will opt out of the TAG program and that participating IDIs will maintain, but not significantly increase, the amount of deposits in transaction accounts that are subject to the FDIC's guarantee.

This Interim Rule provides that the Board may determine that an additional extension of the TAG through December 31, 2011, may be warranted without further rulemaking. FDIC estimates for this period assume some improvement in the outlook for the banking industry and consequently indicate that projected revenues could cover, and possibly exceed, projected costs without a change in fee structure. As above, FDIC estimates were made using reasonable assumptions regarding continued participation in the program. However, projections beyond six months are always more problematic.

While the FDIC made reasonable assumptions regarding the costs that could be incurred during the 6-month extension and during a possible additional 12-month extension, under more severe, yet plausible, assumptions net losses under the TAG program could be greater. However, the FDIC does not believe that the losses would be so extreme under either extension as to cause the TLGP overall to experience a net loss. In fact, the FDIC believes it is reasonable to expect that the 6-month extension provided in this Interim Rule will result in only a slight loss and that if an additional 12-month extension is ultimately adopted, the TAG program for the two extension periods would be revenue neutral. Regardless of the ultimate duration of the program and even under the most severe loss estimates, the FDIC expects the TLGP will remain a profitable program. Accordingly, the Interim Rule does not increase the current tiered-assessment structure.

To prevent unanticipated risks to the DIF, the FDIC reminds participating IDIs to exercise prudent marketing of TAG accounts that qualify for the FDIC's guarantee and to continue to exercise risk-management principles applicable to an IDI's existing business plan. Because of the temporary nature of the TAG program, participating IDIs should not use the extension period to aggressively market or grow their TAG-related accounts.

C. Change in Basis for Reporting for Assessment Purposes

Participating IDIs currently report the total dollar amount and the total number of TAG-qualifying noninterest-bearing transaction accounts as of the end of the calendar quarter. By the very nature of these transaction accounts, the account balances are volatile, fluctuating greatly on any given day due to the operational nature of the deposits, such as for payrolls, and withdrawals made by typical business customers. Currently, the TAG total amounts and accounts are reported on the IDI's Report of Condition or Thrift Report.

In order to monitor and assess fees based upon the ongoing risk exposure of the DIF, the Interim Rule provides that IDIs that do not opt out of the TAG program under the mechanism described in Paragraph E, below, will be required to report their TAG amounts as average daily balance amounts. Under the Interim Rule, beginning with the September 30, 2010, report date for the Report of Condition or Thrift Financial Report, the total dollar amount of TAG-qualifying accounts and the total number of accounts must be reported as an average daily balance. This will cover the period from July 1 through September 30, 2010. The amounts to be reported as daily averages are the total dollar amount of the noninterest-bearing transactions accounts, as defined in 12 C.F.R. 370.2(h), of more than $250,000 for each calendar day during the quarter divided by the number of calendar days in the quarter. For days that an office of the reporting institution is closed (e.g., Saturdays, Sundays, or holidays), the amounts outstanding from the previous business day would be used. The total number of accounts to be reported should be calculated on the same basis. Documentation supporting the amounts used in the calculation of the average daily balance amounts must be retained and be readily available upon request by the FDIC or the IDI's primary Federal regulator. In addition, all IDIs that do not opt of the TAG program must establish procedures to gather the necessary daily data beginning July 1, 2010.

As indicated previously, the dollar amounts of TAG-related accounts are sizeable, and many institutions rely significantly on these accounts as a funding source. However, the FDIC notes that these balances are often held in a relatively small number of individual accounts. The FDIC further notes that certain institutions with total assets of more than $1 billion, all de novo IDIs, and some other IDIs already report their regular deposit insurance assessment balances based on an average daily balance basis and currently have in place the systems to report their TAG-qualifying account balances on an average daily basis. All other institutions report their deposit insurance assessment base on a quarter-end basis. However, of those institutions that use quarter-end reporting, fewer than 1,000 institutions report more than 25 TAG-qualifying accounts.

Given the limited number of these accounts that would be included in an IDI's average daily balance reporting base and the larger number of IDIs that currently use average daily balances reporting, the FDIC does not believe that this change in assessment base would create a significant administrative burden on IDIs that do not currently employ average daily balance reporting.

D. Treatment of NOW Accounts

Currently, the TAG program provides for an FDIC guarantee of NOW accounts with interest rates no higher than 0.50 percent at participating IDIs that have committed to maintain that rate for the duration of the program. At the inception of the TAG program, 0.50 percent was viewed as a low rate of interest and, as such, a NOW account paying no more than this rate would be substantially similar to a noninterest bearing transaction account. Under the November 2008 Final Rule for the TLGP, these accounts were included in the TAG program to provide stability to payment processing accounts structured as NOW accounts, without creating the risk of destabilizing money market mutual finds or allowing weaker institutions to attract deposits in these ownership categories through offering higher interest rates.

However, the prevailing nationwide average rates for regular interest-bearing checking accounts now range from 0.12 percent to 0.16 percent for most accounts, and from 0.26 percent to 0.29 percent for premium interest bearing accounts held by municipalities, school districts, and other typical large transaction account holders.[20] In order to align NOW accounts covered by the TAG program with current market rates and to ensure the program is not used inappropriately by institutions to attract interest-rate-sensitive deposits to fund risk activities, the Interim Rule reduces the interest rate on NOW accounts eligible for the FDIC's guarantee from a maximum of 0.50 percent to a maximum of 0.25 percent. The Interim Rule also requires participating IDIs to commit to maintain the interest rate at or below 0.25 percent after June 30, 2010, and through December 31, 2010, or December 31, 2011, if the Board further extends the TAG program.

The Interim Rule does not prescribe specific disclosures related to NOW accounts. Participating IDIs are reminded, however, that contractual terms governing individual deposit accounts, as well as provisions of the Truth in Savings Act,[21] may

[20] FDIC analysis of data provided by RateWatch.
[21] 12 U.S.C. 4301, *et seq.*

require disclosures to consumers regarding modifications of interest rates on applicable NOW accounts. Moreover, if an IDI offers both TAG-qualifying and non-qualifying NOW accounts, appropriate disclosures should be provided in order to avoid consumer confusion.

E. Opportunity to Opt Out of the Extended TAG Program

The Interim Rule imposes certain regulatory modifications to the existing TAG program. Some IDIs currently participating in the TAG may feel that their existing financial condition or future business plans would be best served by discontinuing their involvement in the TAG program. For these reasons, the Interim Rule provides IDIs currently participating in the TAG program with a one-time, irrevocable opportunity to opt out of this TAG extension. A participating IDI's decision to remain in the extended TAG program obligates it to remain in the program through December 31, 2010, or for an additional 12 months if the Board further extends the TAG program. An IDI that wishes to opt out of the TAG extension must provide the FDIC with notice of its intent to opt out by April 30, 2010 by submitting an e-mail with the subject line "TLGP Election Form Opt Out Requested – Cert No. XXXXX" to optout@fdic.gov. The e-mail must include the following information: name of the IDI; FDIC certificate number; city, state, and zip code for the IDI; contact name and contact information (telephone number and e-mail address); a concise statement that the IDI would like to opt out of the TAG program effective July 1, 2010; and confirmation that, no later than May 20, 2010, the IDI will post a notice in the lobby of its main office, each domestic branch, and if it offers Internet deposit services, on its website, clearly indicating that funds held in noninterest-bearing transaction accounts that are in excess of the standard maximum deposit insurance amount will not be guaranteed under the TAG program after June 30, 2010.

Once this information has been received and processed, FDIC staff will contact the IDI to confirm the IDI's opt out decision.

F. Disclosure Requirements

Current Disclosure Requirements

Regulations governing the existing TAG program contain certain disclosure requirements. Among other things, each IDI that offers noninterest-bearing transaction accounts is required to post a prominent notice in the lobby of its main office, in each domestic branch and, if it offers Internet deposit services, on its website clearly indicating whether the institution is participating in the TAG program.[22] If an IDI is participating in the TAG program, the notice must state that funds held in noninterest-bearing transaction accounts at the institution are guaranteed in full by the FDIC. Although existing regulations do not require specific language to appear in disclosures regarding the TAG program, the notices must be provided in simple, readily understandable text.

Disclosure Requirements for IDIs Participating in the Extended TAG Program

Under the Interim Rule, participating IDIs that do not opt out of the extended TAG program will be required to amend these disclosures on or before May 20, 2010. The Interim Rule requires IDIs that choose to remain in the TAG program to update their disclosures to reference December 31, 2010, as the termination date for this extension of the TAG program. Further disclosures may be required if the Board determines that the TAG program should be extended through December 31, 2011.

[22] 12 C.F.R. 370.5(h)(5).

Disclosure Requirements for IDIs Opting Out of the Extended TAG Program

On or before May 20, 2010, participating IDIs that opt out of the extended TAG program will be required to update their disclosures to inform customers and depositors that, beginning on July 1, 2010, they will no longer participate in the TAG program and the deposits in noninterest-bearing transaction accounts will no longer be guaranteed in full by the FDIC.

IV. Request for Comments

The FDIC requests comments on all aspects of the Interim Rule and solicits suggestions regarding its implementation, especially as to the change in reporting basis for assessment purposes.

V. Regulatory Analysis and Procedure

A. Regulatory Flexibility Act

The process of amending Part 370 by means of this Interim Rule is governed by the Administrative Procedure Act (APA). Pursuant to section 553(b)(B) of the APA, general notice and opportunity for public comment are not required with respect to a rule making when an agency for good cause finds that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Similarly, section 553(d)(3) of the APA provides that the publication of a rule shall be made not less than 30 days before its effective date, except "… (3) as otherwise provided by the agency for good cause found and published with the rule."

Consistent with section 553(b)(B) of the APA, the FDIC finds that good cause exists for a finding that general notice and opportunity for public comment are impracticable and contrary to the public interest. The TLGP was announced by the FDIC on October 14, 2008, as an initiative to counter the system-wide crisis in the nation's financial sector, and involved a determination of systemic risk by the Secretary of the Treasury after consultation with the President. The systemic risk determination allowed the FDIC to take certain actions to avoid or mitigate serious adverse effects on economic conditions and financial stability. The purpose of the TLGP is to promote financial stability by preserving confidence in the banking system and facilitating the flow of liquidity to creditworthy businesses and consumers, favorably affecting both the availability and cost of credit. Immediate issuance of this Interim Rule furthers the public interest by extending the time period of the TAG program to promote continued stability in the banking system through guaranteeing large uninsured transaction account balances in order to provide participating IDIs with continued sources of funding to meet their liquidity needs. For these same reasons, the FDIC finds good cause to publish this Interim Rule with an immediate effective date.[23]

Although general notice and opportunity for public comment are not required prior to the effective date, the FDIC invites comments on all aspects of the Interim Rule, which the FDIC may revise if necessary or appropriate in light of the comments received.

B. Riegle Community Development and Regulatory Improvement Act

The Riegle Community Development and Regulatory Improvement Act provides that any new regulations or amendments to regulations prescribed by a Federal banking agency that impose additional reporting, disclosures, or other new requirements on insured depository institutions shall take effect on the first day of a calendar quarter

[23] 5 U.S.C. 553(d)(3).

which begins on or after the date on which the regulations are published in final form, unless the agency determines, for good cause published with the rule, that the rule should become effective before such time.[24] For the same reasons discussed above, the FDIC finds that good cause exists for an immediate effective date for the Interim Rule.

C. Small Business Regulatory Enforcement Fairness Act—NOT FINAL

[The Office of Management and Budget (OMB) has previously determined that the Interim Rule is not a "major rule" within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA), 5 U.S.C. § 801 *et seq.*. As required by SBREFA, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the Interim Rule may be reviewed.]

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (Pub. L. No. 96-354, Sept. 19, 1980) (RFA) applies only to rules for which an agency publishes a general notice of proposed rule making pursuant to 5 U.S.C. 553(b). As discussed above, consistent with section 553(b)(B) of the APA, the FDIC has determined for good cause that general notice and opportunity for public comment would be impracticable and contrary to the public interest. Therefore, the RFA, pursuant to 5 U.S.C. 601(2), does not apply.

E. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), an agency may not conduct or sponsor, and a person is not required to respond to, a

[24] 12 U.S.C. 4802.

collection of information unless it displays a currently valid OMB control number. This Interim Rule contains reporting and disclosure requirements that revise an existing OMB-approved information collection, entitled the "Transaction Account Guarantee Program Extension (OMB No. 3064-0170). These revisions were submitted to OMB under emergency clearance procedures, with a request for clearance by April 15, 2010. The use of emergency clearance procedures is necessary because the Interim Rule extends the existing TAG Program beyond its current June 30, 2010, termination date. Extension of the program requires institutions wishing to opt-out of the extension to do so by April 30, 2010, in addition to certain disclosures by institutions opting out of the program and those opting to participate in the extension.

More specifically, sections 370.5(c)(3) and (g)(3) provide a mechanism for currently participating institutions to request authorization to opt out of the TAG program, effective July 1, 2010. In addition, section 370.5(h)(5) requires program participants to update notices posted in the lobby of their main offices and domestic branches and, if applicable, on their web sites, to reflect the current TAG expiration date.

Although Section 370.7(c)(5) requires that a new data element on average daily balances in noninterest-bearing transaction accounts be incorporated into the Consolidated Report of Income and Condition (CALL Report) filed by program extension participants, the reporting requirement will not be implemented until the quarterly report filed for the period July 1, 2010, to September 30, 2010. This change to the CALL Report will be the subject of a separate notice under the Paperwork Reduction Act.

The estimated burden for the opt-out and disclosure requirements, as set forth in the Interim Rule, is as follows:

Title: Temporary Liquidity Guarantee Program.

OMB Number: 3064-0166.

Affected public: Insured depository institutions.

Estimated Number of Respondents:

Opt out of TAG program extension/disclosure – 2113.

Updated Disclosures By Participants to Amend Termination Date – 6340.

Frequency of Response:

Opt out of TAG program extension/disclosure – once.

Updated Disclosures By Participants to Amend Termination Date – once.

Average time per response:

Opt out of TAG program extension/disclosure – 1 hour.

Updated Disclosures By Participants to Amend Termination Date – 1 hour.

Estimated Annual Burden:

Opt out of TAG program extension/disclosure – 2113 hours.

Updated Disclosures By Participants to Amend Termination Date – 6340 hours.

Current annual burden – 7,109 hours.

Total new burden – 8,453 hours.

Total annual burden – 15,562 hours.

If the FDIC obtains OMB approval of its emergency clearance request, it will be followed by a request for clearance under normal procedures in accordance with the provisions of OMB regulation 5 CFR 1320.10. 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. Interested parties are invited to submit written comments on the estimated burden for information collections associated with the TAG program extension by any of the following methods:

- http://www.FDIC.gov/regulations/laws/federalpropose.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 a.m. and 5 p.m.

A copy of the comment 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. All comments should refer to the name and number of the collection.

F. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106-102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC invites your comments on how to make this proposed regulation easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the proposed regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?

- Would a different format (grouping and order of sections, use of headings, paragraphing) make the proposed regulation easier to understand? If so, what changes to the format would make the proposed regulation easier to understand?
- What else could the FDIC do to make the proposed regulation easier to understand?

G. The Treasury and General Government Appropriations Act, 1999 – Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the interim rule will not affect family well-being within the measure of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681).

List of Subjects in 12 CFR Part 370

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Reporting and recordkeeping requirements, Savings associations.

For the reasons discussed in the preamble, the Federal Deposit Insurance Corporation amends part 370 of chapter III of Title 12 of the Code of Federal Regulations as follows:

PART 370—TEMPORARY LIQUIDITY GUARANTEE PROGRAM

1. The authority citation for part 370 continues to read as follows:

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

2. Amend section 370.2 as follows:

    a. Revise paragraph (g),

    b. Revise paragraphs (h)(3) and (h)(4), and

c. Add paragraph (o), to read as follows:

§ 370.2 Definitions.

* * * * *

(g) _Participating entity_. (1) Except as provided in paragraphs (g)(2) and (g)(3) of this section, the term "participating entity" means with respect to each of the debt guarantee program and the transaction account guarantee program,

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

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

(2) A participating entity that opted out of the transaction account guarantee program in accordance with § 370.5(c)(2) ceased to be a participating entity in the transaction account guarantee program effective on January 1, 2010.

(3) A participating entity that opts out of the transaction account guarantee program in accordance with § 370.5(c)(23) ceases to be a participating entity in the transaction account guarantee program effective on July 1, 2010.

* * * * *

(h) _Noninterest-bearing transaction account_.

* * * * *

(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

(A) no higher than 0.50 percent through June 30, 2010, if the insured depository institution at which the account is held has committed to maintain the interest rate at or below 0.50 percent. through June 30, 2010; and

(B) no higher than 0.25 percent after June 30, 2010, if the insured depository institution at which the account is held has committed to maintain the interest rate at or below 0.25 percent after June 30, 2010 through the TAG expiration date.

(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

(i) through June 30, 2010, if the insured depository institution at which the account is held reduced the interest rate on that account to 0.50 percent or lower before January 1, 2009, and committed to maintain that interest rate at no more than 0.50 percent through June 30, 2010; and

(ii) after June 30, 2010 through the TAG expiration date, if the insured depository institution at which the account is held reduces the interest rate on that account to 0.25 percent or lower before July 1, 2010, and commits to maintain that interest rate at no more than 0.25 percent through the TAG expiration date.

* * * * *

(o) <u>TAG expiration date.</u> The term "TAG expiration date" means December 31, 2010 unless the Board of Directors of the FDIC (the "Board"), for good cause, extends the transaction account guarantee program for an additional year in which case the term "TAG expiration date" means December 31, 2011. Good cause exists if the Board finds that the economic conditions and circumstances that led to the establishment of the transaction account guarantee program are likely to continue beyond December 31, 2010 and that extending the transaction account guarantee program for an additional year will help mitigate or resolve those conditions and circumstances. If the Board decides to extend the transaction account guarantee program to December 31, 2011, it will do so without further rulemaking; however, the FDIC will publish notice of any extension no later than October 29, 2010.

3. Amend section 370.4 by revising paragraph (a) to read as follows:

§ 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:

(1) The date of opt-out, in the case of an entity that opted out prior to December 5, 2008;

(2) December 31, 2009, in the case of an entity that opted out effective on January 1, 2010; or

(3) June 30, 2010, in the case of an entity that opts out of the transaction account guarantee program effective on July 1, 2010; or

(4) The TAG expiration date, in the case of an entity that does not opt out.

* * * * *

4. Amend section 370.5 as follows:

a. Add paragraph (c)(3),

b. Revise paragraph (g)(1),

c. Add paragraph (g)(3), and

d. Revise paragraph (h)(5), to read as follows:

§ 370.5 Participation.

(c) <u>*Opt-out and opt-in options.*</u>

(1) * * *

(2) * * *

(3) Any insured depository institution that is participating in the transaction account guarantee program may request authorization to opt out of such program effective on July 1, 2010. Any such election to opt-out must be made in accordance with the procedures set forth in paragraph (g)(3) of this section. If the FDIC grants the request, the opt out is irrevocable.

*   *   *   *   *

(g) *Procedures for opting out.*

(1) Except as provided in paragraphs (g)(2) and (g)(3) of this section, 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.

(2) *   *   *

(3) Pursuant to paragraph (c)(3) of this section a participating entity may request authorization to opt out of the transaction account guarantee program effective on July 1, 2010 by submitting to the FDIC on or before 11:59 p.m., Eastern Daylight Saving Time, on April 30, 2010 an email conveying the entity's request to opt out. The subject line of the email must include: "TLGP Request to Opt Out – Cert. No. __________ ." The email must be addressed to optout@fdic.gov and must include the following:

(i) Institution Name;

(ii) FDIC Certificate number;

(iii) City, State, ZIP;

(iv) Name, Telephone Number and Email Address of a Contact Person;

(v) A statement that the institution is requesting authorization to opt out of the transaction account guarantee program effective July 1, 2010; and

(vi) Confirmation that no later than May 20, 2010 the institution will post a prominent notice in the lobby of its main office and each domestic branch and, if it offers Internet deposit services, on its website clearly indicating that after June 30, 2010, funds held in noninterest-bearing transaction accounts will no longer be guaranteed in full under the Transaction Account Guarantee Program, but will be insured up to $250,000 under the FDIC's general deposit insurance rules.

*   *   *   *   *

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

*   *   *   *   *

(5) 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. Participating entities must update their disclosures to reflect the current TAG expiration date, including any extension pursuant to § 370.2(o) or, if applicable, any decision to opt-out.

(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 [June 30, 2010, December 31, 2010, or December 31, 2011, whichever is applicable], 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 Participating Institutions that Elect to Opt-out of the Extended Transaction Account Guaranty Program Effective on July 1, 2010</u>

Beginning July 1, 2010 [Institution Name] will no longer participate in the FDIC's Transaction Account Guarantee Program. Thus, after June 30, 2010, funds held in noninterest-bearing transaction accounts will no longer be guaranteed in full under the Transaction Account Guarantee Program, but will be insured up to $250,000 under the FDIC's general deposit insurance rules.

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

[Institution Name] has chosen not to participate in the FDIC's Transaction Account Guarantee Program. Customers of [Institution Name] with noninterest-bearing transaction accounts will continue to be insured 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. Amend section 370.7 by revising paragraphs (b) and (c) to read as follows:

§ 370.7 Assessment for the Transaction Account Guarantee 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.*

(1) Except as provided in paragraphs (c)(2) and (c)(3) of this section 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 (each, a "Call Report") 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).

(2) For the period after December 31, 2009 through and including June 30, 2010, each participating entity that does not opt out of the transaction account guarantee program in accordance with § 370.5(c)(2) shall pay quarterly a fee based upon its Risk Category rating. The amount of the fee for each such entity is equal to the annualized, TAG assessment rate for the entity multiplied by the amount of the deposits held in noninterest-bearing transaction accounts (as defined in § 370.2(h) and including any amounts swept from a noninterest bearing transaction account into an noninterest bearing savings deposit account as provided in § 370.4(c)) that exceed the existing deposit insurance limit of $250,000, as reported on the entity's most recent quarterly Call Report.

(3) Beginning on July 1, 2010, each participating entity that does not opt out of the transaction account guarantee program shall pay quarterly a fee based upon its Risk Category rating. The amount of the fee for each such entity is equal to the annualized, TAG assessment rate for the entity multiplied by the aggregate amount of the deposits held in noninterest-bearing transaction accounts (as defined in § 370.2(h) and including any amounts swept from a noninterest bearing transaction account into an noninterest bearing savings deposit account as provided in § 370.4(c)) that exceed the existing deposit insurance limit of $250,000, calculated based upon the average daily balances in such accounts as reported on the entity's most recent quarterly Call Report.

(4) The annualized TAG assessment rates are as follows:

(i) 15 basis points, for the portion of each quarter in which the entity is assigned to Risk Category I;

(ii) 20 basis points, for the portion of each quarter in which the entity is assigned to Risk Category II; and

(iii) 25 basis points, for the portion of each quarter in which the entity is assigned to either Risk Category III or Risk Category IV.

(5) The amount to be reported for each noninterest-bearing transaction account as the average daily balance is the total dollar amount held in such account that exceeds $250,000 for each calendar day during the quarter divided by the number of calendar days in the quarter. For those days that an office of the reporting institution is closed (e.g., Saturdays, Sundays, or holidays), the amounts outstanding from the previous business day should be used. The total number of accounts to be reported should be calculated on the same basis. Documentation supporting the amounts used in the calculation of the average daily balance amounts must be retained and be readily available upon request by the FDIC or the institution's primary Federal regulator. In addition, all institutions that do not opt of the transaction account guarantee program must establish procedures to gather the necessary daily data beginning July 1, 2010.

(6) An entity's Risk Category is determined in accordance with the FDIC's risk-based premium system described in 12 CFR Part 327. The assessments provided in this paragraph (c) shall be in addition to an institution's risk-based assessment imposed under Part 327.

* * * * *

By order of the Board of Directors.

Dated at Washington, DC, this [13th] day of April, 2010.

FEDERAL DEPOSIT INSURANCE CORPORATION

Robert E. Feldman,

Executive Secretary

(SEAL)