

October 31, 2008

MEMORANDUM: The Board of Directors

FROM: Steven O. App  
Deputy to the Chairman and Chief Financial Officer

Sara A. Kelsey  
General Counsel

SUBJECT: Amendment to the Interim Rule Regulating the Temporary Liquidity Guarantee Program

### **Recommendation**

Staff recommends that the Board of Directors ("Board") authorize publication of the attached Amendments to the Interim Rule with respect to the Federal Deposit Insurance Corporation's ("FDIC's") temporary liquidity guarantee program in the *Federal Register*. These Amendments would extend the opt out period to December 5, 2008; delay the compliance deadlines for certain disclosure provisions to December 19, 2008; make some adjustments to when fees would be payable; and pose some additional questions for comment by the November 13, 2008, comment deadline.

### **Background**

On October 13, 2008, the Board of the FDIC made a systemic risk recommendation, with the written concurrence of the Board of Governors of the Federal Reserve System, and the Secretary of the Treasury, after consultation with the President, determined that the systemic risk exception should be invoked in compliance with section 141 of the Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C § 1823(c)(4). In order to mitigate or avoid adverse effects on financial stability, the FDIC announced the temporary liquidity guarantee program ("TLG Program") under which the FDIC would guarantee, subject to certain limitations, all senior unsecured debt of insured depository institutions and certain holding companies issued between October 14, 2008 and June 30, 2009, with guarantees expiring not later than June 30, 2012. The FDIC also announced a transaction account guarantee program that provides a one hundred percent guarantee of noninterest-bearing transaction accounts at FDIC-insured depository institutions, until December 31, 2009.

On October 23, 2008, the Board of the FDIC adopted and authorized publication of the Interim Rule with respect to the FDIC's TLG Program. The Interim Rule was published in the *Federal Register* on October 29, 2008. The Amendments to the Interim Rule will extend the opt out deadline for the TLG Program from November 12, 2008, to December 5, 2008, and extend the deadline for compliance with the disclosure provisions of the rule



from December 1, 2008, until December 19, 2008. These extensions necessarily affect how assessments are made during the period of this extension. Thus, conforming changes to the assessment provisions have been made as well.

## **Executive Summary**

Subject to the conditions set forth in the regulation, the TLG Program consists of two basic components: a temporary guarantee of newly-issued senior unsecured debt (“debt guarantee program”) and a temporary full guarantee of funds in certain noninterest-bearing transaction accounts at FDIC-insured depository institutions (“transaction account guarantee program”).

The protections provided by these programs are extended to any eligible entity as defined in § 370.2 of the Interim Rule. As initially presented, all eligible entities would be covered under the TLG Program without cost to the entity for the first 30 days of the program, unless the entity opts out within the initial 30 day period. The previously published Interim Rule stated that on or before November 12, 2008, eligible entities must inform the FDIC whether they will opt out of the TLG Program. Staff now recommends extending the deadline to opt out of the TLG Program until December 5, 2008. Under the Interim Rule, if an entity decides to opt out by November 12, 2008, it would not be charged an assessment for participation in the TLG Program during this initial period. Under the Amendments to the Interim Rule, an eligible entity that chooses to opt out of the TLG Program by the new deadline of December 5, 2008, would not be assessed for its participation in the program. However, if an eligible entity chooses to remain in the program after December 5, 2008, the entity will be subject to assessments retroactive to November 13, 2008.

The Amendments to the Interim Rule also provide changes to the date by which all entities must be in compliance with the disclosure provisions of the regulation. Staff recommends that this deadline be extended from December 1, 2008, until December 19, 2008, to allow adequate time for implementation, particularly in light of the extended opt out date.

### **A. Extending the Opt Out Date to December 5, 2008**

The Interim Rule provides that no later than 11:59 p.m. Eastern Standard Time (EST), on November 12, 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). If an eligible entity opts out of the TLG Program, coverage under the program ends on the earlier of the date of the opt out or on November 12, 2008. According to the Interim Rule, failure to opt out by November 12, 2008, constitutes a decision on behalf an eligible entity to remain in the program. Prior to November 12, 2008, an eligible entity may also notify the FDIC that it will not opt out of (that is, that it will opt in to) either or both programs.



Staff recommends that the Board authorize publication of the Amendments to the Interim Rule to amend the opt out deadline from November 12, 2008 to December 5, 2008. The Interim Rule, published on October 29, 2008, provided a 15-day comment period that will not expire until November 13, 2008, which is past the original opt out deadline. After the comment period closes, staff must consider the comments received and craft any necessary revisions to the rule before presenting the proposed Final Rule to the Board. While this task will be addressed expeditiously, it obviously can not be completed before the original opt out date of November 12, 2008. Extending this date will allow eligible entities to fully consider the Final Rule before making a final decision regarding their participation in the TLG Program. Allowing this extra time is important since the Interim Rule provides that a participation decision, once made, is irrevocable.

Providing eligible entities this extension of time has no significant impact on the risks or costs associated with the TLG Program. The FDIC does not anticipate that a significant number of claims will be made within the 23 day extension. Additionally, the changes to the assessments discussed below demonstrate that any decrease in revenue from the extension of time would be minimal.

The opt out deadline of November 12, 2008 is referenced in many sections of the Interim Rule in describing the scope of the guarantees provided by the TLG Program. For example, the Interim Rule provides that funds held in noninterest-bearing transaction accounts at eligible entities will be guaranteed from October 14, 2008, through November 12, 2008, and that eligible entities that do not opt out on or before November 12, 2008, will not be able to select which newly issued senior unsecured debt is guaranteed debt under the debt guarantee program. The Amendments to the Interim Rule include the necessary changes to bring these sections into compliance with the decision to extend the opt out date to December 5, 2008.

#### **B. Extending the Date for Compliance with the Disclosure Provisions**

Section 370.5(h)(4) of the Interim Rule provides that compliance with the disclosure requirements regarding participation in the TLG Program must be addressed by December 1, 2008. Extension of the disclosure requirements deadline to December 19, 2008, will provide time for the Final Rule to be published, as well as time for participating entities to effect compliance with the final disclosure requirements.

#### **C. Fees Assessed During Extended Opt Out Period**

Extending the opt out date until December 5, 2008, also requires changes to the assessments that will be made under the TLG Program. Under sections 370.6(a) and 370.7(a) of the Interim Rule, eligible entities are not charged any assessments associated with the debt guarantee program or the transaction account guarantee program for the period from October 14, 2008, through November 12, 2008. With the extension of the opt out date to December 5, 2008, sections 370.6(a) and 370.7(a) of the Amendments to the Interim Rule provide that an eligible entity that opts out of the debt guarantee program or the transaction account guarantee program by December 5, 2008, will not pay



any assessment under the program. The eligible entity's coverage under the TLG Program ends at the date of the opt out.

With respect to the debt guarantee program, the Interim Rule requires an eligible entity that does not opt out of the program by November 12, 2008, and that issues guaranteed debt during the period from October 14, 2008, through November 12, 2008, that was still outstanding on November 12, 2008, to notify the FDIC and certify that the issuances that it made did not exceed the guaranteed limit. (An eligible entity that has not opted out of the debt guarantee program and that issues debt after November 12, 2008, is subject to similar notification and certification requirements.) Beginning on November 13, 2008, if an eligible entity has not opted out, the Interim Rule provides for eligible entities to be charged assessments for their participation in the debt guarantee program.

Under the Amendments to the Interim Rule, any eligible entity that has not opted out of the debt guarantee program will be assessed for continued coverage. Eligible debt issued from October 14, 2008 (and still outstanding on November 13, 2008), through June 30, 2009, will be charged an annualized amount 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 is earlier. The assessment charged will take into account that no assessment will be made during the first 30 days of the program. Participating entities will not be assessed for overnight borrowings that occur during the extended opt out period of November 13, 2008, through December 5, 2008. However, participating entities will be assessed for term debt issued during the extended opt out period beginning on November 13, 2008. These assessments will only be made if the eligible entity decides to remain in the program beyond December 5, 2008.

The extension of the opt out date until December 5, 2008, also affects the deadline to make a decision regarding the long term non-guaranteed debt option. If a participating entity wants to have the option of issuing certain long term non-guaranteed senior unsecured debt before issuing the maximum amount of guaranteed debt, it can elect to do so through *FDICconnect* on or before the new opt out date of December 5, 2008. Election of this option would require a participating entity to pay a nonrefundable fee in exchange for which it will be able to issue, at any time and without regard to the cap, non-guaranteed senior unsecured debt with a maturity date after June 30, 2012. The nonrefundable fee related to this program will not change, it simply will not be assessed until after December 5, 2008.

With respect to the transaction account guarantee program, the Interim Rule provides that, beginning on November 13, 2008, and continuing through December 31, 2009, any eligible entity that has not opted out of this component of the TLG Program will be subject to an assessment for their participation in the transaction account guarantee program. Insured depository institutions that have not opted out of the transaction account guarantee program will 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.



Under the Amendments to the Interim rule, an eligible entity that does not opt out of the transaction account guarantee program by December 5, 2008, will be assessed retroactive to November 13, 2008. The amended opt out date does not alter the cost of this program, just the date that an eligible entity can decide to participate in the program and therefore be obligated to pay the assessments.

#### **D. Additional Questions Posed in the *Federal Register***

The Amendments to the Interim Rule will also include several questions to be addressed by the end of the comment period, November 13, 2008. In addition to the questions posed in the October 29, 2008, *Federal Register* release, the FDIC is interested in soliciting information regarding the following specific questions:

1. Should the FDIC charge different premium rates for Fed Funds and/or other short-term borrowings versus longer term borrowings? If so, why, what should be the criteria for determining which borrowings qualify for which rates, and what should be the rate differential?
2. Should banks be allowed to issue guaranteed debt in an amount equal to the bank's cap plus its holding company's(ies') cap, so long as the total guaranteed debt issued by the bank and its holding company(ies) does not exceed their combined cap? If so, why, and how could this process be managed to assure, among other things, that the entities together do not exceed their combined cap?
3. Section 370.3(b) of the Interim Rule states, "If a participating entity had no senior unsecured debt 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 whether, and to what extent, such requests will be granted on a case-by-case basis." Should the FDIC establish an alternative guarantee cap, e.g., a percentage of total liabilities, or an average of outstanding senior unsecured debt over some period of time, for those eligible entities that had no or de minimis amounts of senior unsecured debt outstanding on September 30, 2008? If so, what should that alternative be, and why?