

**[6714-01-P]**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 370**

**RIN 3064-AD37**

**Modification of Temporary Liquidity Guarantee Program**

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

**ACTION:** **Interim Rule with request for comments.**

**SUMMARY:** The FDIC is issuing this Interim Rule to make a minor modification to the Temporary Liquidity Guarantee Program (TLGP) to include certain issuances of mandatory convertible debt (MCD) under the TLGP debt guarantee program

**DATES:** The Interim Rule becomes effective on [INSERT DATE THAT THE INTERIM RULE IS FILED FOR PUBLIC INSPECTION AT THE FEDERAL REGISTER]. Comments on the Interim Rule must be received by [INSERT DATE THAT IS 15 DAYS FROM THE DATE THAT THE RULE IS PUBLISHED 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](mailto:Comments@FDIC.gov). Include RIN # 3064-AD37 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 17<sup>th</sup> 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/propose.html>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:**

Munsell St. Clair, Chief, Bank and Regulatory Policy Section, Division of Insurance and Research, (202) 898-8967 or [mstclair@fdic.gov](mailto:mstclair@fdic.gov); Robert C. Fick, Counsel, Legal Division, (202) 898-8962 or [rfick@fdic.gov](mailto:rfick@fdic.gov); A. Ann Johnson, Counsel, Legal Division (202) 898- 3573 or [aajohnson@fdic.gov](mailto:aajohnson@fdic.gov); Mark L. Handzlik, Attorney, Legal Division, (202) 898-3990 or [mhandzlik@fdic.gov](mailto:mhandzlik@fdic.gov); Gail Patelunas, Deputy Director, Division of Resolutions and Receiverships, (202) 898-6779 or [gpatelunas@fdic.gov](mailto:gpatelunas@fdic.gov); *(for questions or comments related to MCD applications):* [Lisa D Arquette, Associate Director, Division of Supervision and Consumer Protection, \(202\) 898-8633 or \[larquette@fdic.gov\]\(mailto:larquette@fdic.gov\)](#); or Donna Saulnier, Manager, Assessment Policy Section, Division of Finance, (703) 562-6167 or [dsaulnier@fdic.gov](mailto:dsaulnier@fdic.gov).

## **SUPPLEMENTARY INFORMATION**

### **I. Background**

In October 2008 the FDIC adopted the TLGP as part of a coordinated effort by the FDIC, the U.S. Department of the Treasury, and the Board of Governors of the Federal Reserve System (Federal Reserve) to address unprecedented disruptions in credit markets and the resultant effects on the ability of financial institutions to fund themselves and to make loans to creditworthy borrowers. The TLGP and other programs have had favorable effects, but experience has indicated that further improvements to the TLGP can be made. In this Interim Rule, the FDIC is making a very narrow targeted improvement to the TLGP.

By extending its guarantee to certain new issues of mandatory convertible debt, the FDIC will offer more flexibility for entities currently participating in the debt guarantee program. Specifically, the FDIC's guarantee of certain mandatory convertible debt will give issuing entities more flexibility to obtain funding from investors that may have a longer-term investment horizon. At the same time, including certain mandatory convertible debt under the TLGP program will reduce the amount of FDIC-guaranteed debt likely to require rollover in mid-2012 by providing a built-in "exit strategy" of having the debt convert to common stock rather than being rolled over.<sup>1</sup>

### **II. The Interim Rule**

#### Amendment to allow FDIC guarantees of mandatory convertible debt

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<sup>1</sup> This extension of the TLGP is supported by the rationale for establishing the existing TLGP and is consistent with the determination of systemic risk made on October 14, 2008, pursuant to 12 U.S.C. section 1823(c)(4)(G), by the Secretary of the Treasury (after consultation with the President) following receipt of the written recommendation dated October 13, 2008, of the FDIC's Board of Directors (Board) and the similar written recommendation of the Federal Reserve.

As currently written, the TLGP regulation, at Section 370.2(e)(5), precludes an FDIC guarantee for any “convertible debt.” The FDIC has decided to amend the regulation to allow eligible entities to apply to have the FDIC guarantee newly issued senior unsecured debt with a feature that mandates conversion of the debt into common shares of the issuing entity at a specified date no later than the expiration date of the FDIC’s guarantee. No FDIC-guaranteed mandatory convertible debt may be issued without the FDIC’s prior written approval.

The intent of the mandatory convertible debt amendment to the TLGP is to give eligible entities additional flexibility to obtain funding from investors with longer-term investment horizons. Further, MCD issuances could reduce the concentration of FDIC-guaranteed debt maturing in mid-2012, which debt might otherwise have to be rolled into new debt.

To be eligible for the FDIC’s guarantee, MCD must meet the definition of senior unsecured debt in Section 370.2(e) of the final rule; must be newly issued on or after February 27, 2009; and must provide in the debt instrument for the mandatory conversion of the debt into common shares of the issuing entity on a specified date that is on or before June 30, 2012 (unless the issuing entity fails to timely make any payment required under the debt instrument, or merges or consolidates with any other entity and is not the surviving or resulting entity.) In addition, the proposed Interim Rule provides for a number of disclosures relative to the MCD aspect of the TLGP.

This amendment will not result in a change to an eligible entity’s existing debt guarantee cap.

The Interim Rule requires a participating entity to file a written application with the FDIC and its appropriate Federal banking agency, and to obtain the FDIC's prior written approval, before issuing MCD.

Like other applications described in the TLGP, an eligible entity that wishes to issue MCD must include the details of the request, a summary of the applicant's strategic operating plan, and a description of the proposed use of the debt proceeds. In addition, an application to issue FDIC-guaranteed MCD must include the proposed date of issuance, the amount of MCD to be issued, the mandatory conversion date, and the conversion rate (as described in Section 370.3(h)). Finally, since the issuance of debt that will convert into stock could raise control issues, an applicant seeking to issue FDIC-guaranteed MCD must provide confirmation that the applicant has submitted to its appropriate Federal banking agency all applications and all notices required under the Bank Holding Company Act of 1956, as amended, the Home Owners' Loan Act, as amended, or the Change in Bank Control Act, as amended in order to issue the debt.

The amount of the assessment fee for the FDIC's guarantee of MCD will be based on the time period from issuance of the MCD until its mandatory conversion date.

### **III. Request for Comments**

The FDIC invites comments on all aspects of the MCD feature of the TLGP as described in the Interim Rule and seeks suggestions for its implementation.

### **IV. Regulatory Analysis and Procedure**

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##### **A. Administrative Procedure 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 was preceded by 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 encouraging liquidity in order to ease lending to creditworthy businesses and consumers, favorably impacting both the availability and cost of credit. This Interim Rule is a modification of the TLGP and permits the FDIC to guarantee senior debt that converts into common stock. Immediate issuance of this Interim Rule furthers the public interest by addressing unprecedented disruption in credit markets. For these same reasons, the FDIC finds good

cause to publish this Interim Rule with an immediate effective date. See 5 U.S.C. 553(d)(3).

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 (RCDRIA) 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 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.<sup>2</sup> 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

[The Office of Management and Budget 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.]

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<sup>2</sup> 12 U.S.C. 4802.

#### D. Regulatory Flexibility Act

The Regulatory Flexibility Act (Pub. L. 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 collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. This Interim Rule establishes an application requirement for institutions wishing to issue FDIC-guaranteed mandatory convertible debt. This new collection of information would modify the FDIC's existing collection of information entitled, "Temporary Liquidity Guarantee Program" (OMB Control No. 3064-0166). Specifically, sections 370.3(h)(1)(v) and 370.3(h)(2) contain the new collection of information that was submitted to OMB under emergency clearance procedures, with a request for clearance by February 27, 2009. The use of emergency clearance procedures is necessary because of the sudden, unanticipated systemic risks posed to the nation's financial system by recent economic conditions and because public harm is reasonably likely to result if liquidity is not restored to financial markets. This new collection of

information is necessary for implementation of the FDIC guarantee of mandatory convertible debt under the Debt Guarantee component of the TLG program.

The proposed burden estimate for the application to issue FDIC-guaranteed mandatory convertible debt is as follows:

*Title:* Temporary Liquidity Guarantee Program.

*OMB Number:* 3064-0166.

*Frequency of Response:* 5

*Estimated Number of Respondents:* 25

*Average Time for Response:* 1 hour

*Estimated Annual Burden:* 125 hours

*Previous Annual Burden:* 2,201,500 hours

*Total New Burden:* 2,201,625 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; 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](mailto: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 17<sup>th</sup> Street, NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17<sup>th</sup> 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.

#### **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 stated in the preamble, the Federal Deposit Insurance Corporation amends part 370 of chapter III of Title 12 of the Code of Federal Regulations to read as follows:

**PART 370—TEMPORARY LIQUIDITY GUARANTEE PROGRAM**

1. The authority citation for part 370 shall continue 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. In part 370, amend section 370.2 as follows:

a. Add a new paragraph (e)(1)(iii);

b. Revise the first sentence of paragraph (e)(3) and the first sentence of paragraph (e)(5); and

c. Add new paragraph (m), as follows:

**§ 370.2 Definitions.**

\* \* \* \* \*

(e) Senior Unsecured Debt.

(1) \* \* \*

(iii) After February 27, 2009, unsecured borrowing that satisfies the criteria listed in paragraphs (e)(1)(i)(A) through (e)(1)(i)(D) of this section, that has a stated maturity of more than 30 days, and that includes, without limitation, mandatory convertible debt.

\* \* \* \* \*

(3) Senior unsecured debt may include, for example, the following debt, provided it meets the requirements of paragraph (e)(1) of this section: mandatory convertible debt as described in paragraph (m) 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. \* \* \*

\* \* \* \* \*

(5) Senior unsecured debt excludes, for example, any obligation that has a stated maturity of “one month”<sup>3</sup>, obligations from guarantees or other contingent liabilities, derivatives, derivative-linked products, debts that are paired or bundled with other securities, convertible debt other than mandatory convertible debt described in paragraph (m) of this section, 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.

\* \* \* \* \*

(m) Mandatory convertible debt. The term “mandatory convertible debt” means senior unsecured debt that is required by the terms of the debt instrument to convert into common shares of the issuing entity on a fixed and specified date, on or before June 30, 2012 , unless the issuing entity

- (1) Fails to timely make any payment required under the debt instrument, or
- (2) Merges or consolidates with any other entity and is not the surviving or resulting entity.

3. In part 370, amend section 370.3 as follows:

- a. Revise paragraph (b)(1) and (d);
- b. In paragraph (h):
  - i. Revise the heading for paragraph (h)
  - ii. Add new paragraph (h)(1)(v),
  - iv. Revise paragraph (h)(2) in its entirety;
  - v. Revise the first sentence of paragraph (h)(3); and
  - vi. Add a new sentence at the end of paragraph (h)(4); as follows:

### **§ 370.3 Debt Guarantee Program**

\* \* \* \* \*

(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) (excluding mandatory convertible debt), that was outstanding as of the close of business September 30, 2008 and that was scheduled to mature on or before June 30, 2009.

\* \* \* \* \*

(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 mandatory conversion date for mandatory convertible debt, the maturity of the debt, or June 30, 2012.

\* \* \* \* \*

(h) Applications for exceptions, eligibility, and issuance of certain debt.

(1) \* \* \*

(v) A request by a participating entity to issue FDIC-guaranteed mandatory convertible debt.

(2) Each letter application must describe the details of the request, provide a summary of the applicant's strategic operating plan, describe the proposed use of the debt proceeds, and in the case of an application for approval of the issuance of

(i) Mandatory convertible debt, must also include:

(A) the proposed date of issuance;

(B) the total amount of the mandatory convertible debt to be issued;

(C) the mandatory conversion date,

(D) the conversion rate (i.e., the total number of shares of common stock that will result from the conversion divided by the total dollar amount of the mandatory convertible debt to be issued),

(E) confirmation that all applications and all notices required under the Bank Holding Company Act of 1956, as amended, the Home Owners' Loan Act, as amended, or the Change in Bank Control Act, as amended, have been submitted to the applicant's appropriate Federal banking agency in connection with the proposed issuance; and

(F) any other relevant information that the FDIC deems appropriate.

(3) The factors to be considered by the FDIC in evaluating applications filed pursuant to paragraphs (h)(1)(i) through (h)(1)(iii) and (h)(1)(v) of this section

include: the financial condition and supervisory history of the eligible/surviving entity. \* \* \*

(4) \* \* \* Applications made pursuant to paragraph (h)(1)(v) of this section must be filed with the FDIC no later than June 30, 2009.

\* \* \* \* \*

4. In part 370, amend section 370.5 as follows:

a. At the end of paragraph (h)(2), remove the last italicized sentence and add in its place two new sentences; and

b. Add new paragraph (j) as follows:

**§ 370.5 Participation**

\* \* \* \* \*

(h) \* \* \*

(2) \* \* \* [If the debt being issued is mandatory convertible debt, add: The expiration date of the FDIC's guarantee is the earlier of the mandatory conversion date or June 30, 2012]. [If the debt being issued is any other senior unsecured debt, add: The expiration date of the FDIC's guarantee is the earlier of the maturity date of the debt or June 30, 2012.]

\* \* \* \* \*

(j) No mandatory convertible debt may be issued without obtaining the FDIC's prior written approval.

5. In part 370, amend section 370.6 as follows:

a. Revise paragraphs (d)(1) (including the embedded table) and (d)(5)

b. Revise the first sentence of (d)(3), as follows:

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

\* \* \* \* \*

(d) \* \* \*

(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 or, in the case of mandatory convertible debt, the time period from issuance to the mandatory conversion date, times an annualized assessment rate determined in accordance with the following table.

For debt with a maturity or time period to conversion date 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

\* \* \*

(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 or, in the case of mandatory convertible debt, the time period from issuance to the mandatory conversion date, 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. \* \* \*

(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 or conversion date.

\* \* \* \* \*

6. In part 370, amend section 370.12 to add a new sentence immediately after the first sentence in paragraph (b)(2); as follows:

**§ 370.12 Payment on the Guarantee**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \* For purposes of mandatory convertible debt, principal payment shall be limited to amounts paid by holders under the issuance. \* \* \*

\* \* \* \* \*