

[6714-01-P]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 370

RIN 3064-AD37

Amendment of the Temporary Liquidity Guarantee Program to Extend the Debt Guarantee Program and to Impose Surcharges on Assessments for Certain Debt Issued on or after April 1, 2009

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: **Final Rule.**

SUMMARY: The FDIC is issuing this Final Rule to amend the Temporary Liquidity Guarantee Program (TLGP) by providing a limited extension of the Debt Guarantee Program (DGP) for insured depository institutions (IDIs) participating in the DGP. The extended DGP also applies to other participating entities; however, other participating entities that did not issue FDIC-guaranteed debt before April 1, 2009 are required to submit an application to and obtain approval from the FDIC to participate in the extended DGP. The Final Rule imposes surcharges on certain debt issued on or after April 1, 2009. Any surcharge collected will be deposited into the Deposit Insurance Fund (DIF or Fund). The Final Rule also establishes an application process whereby entities participating in the extended DGP may apply to issue non-FDIC-guaranteed debt during the extension period. The Final Rule restates without change the Interim Rule published in the Federal Register by the FDIC on March 23, 2009 (Interim Rule).¹

¹ 74 FR 12078 (March 23, 2009).

DATES: The Final Rule becomes effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION

I. Background

The FDIC adopted the TLGP in October 2008 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).² The TLGP is part of a coordinated effort by the FDIC, the U.S. Department of the Treasury (Treasury), and the Federal Reserve to address unprecedented disruptions in credit markets and the resultant inability of financial institutions to fund themselves and make loans to creditworthy borrowers.

The steps taken to stabilize the nation's financial system by the Congress, the Treasury, and the federal banking agencies have improved conditions in the U.S. credit

² 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.

Section 9(a) Tenth of the FDI Act, 12 U.S.C. 1819(a)Tenth, provides additional authority for the establishment of the TLGP.

markets. While liquidity in the financial markets has not returned to pre-crisis levels, the TLGP debt guarantee program has benefited participating IDIs, bank and certain savings and loan holding companies, and certain of their affiliates by improving their options for short-term and intermediate-term funding.

On March 17, 2009, the FDIC's Board of Directors (Board) adopted an Interim Rule that amended the TLGP by providing for a limited extension of the DGP, imposing surcharges on assessments for certain debt issued on or after April 1, 2009, and providing procedures to enable participating entities to issue certain non-guaranteed debt.³ This amendment was designed to reduce market disruption at the conclusion of the TLGP by facilitating the orderly phase-out of the DGP and encouraging participating entities to use the limited extension of the DGP to plan for a successful return to sources of non-FDIC-guaranteed funding markets.

II. The Interim Rule

On March 17, 2009, the FDIC's Board adopted an Interim Rule with request for comment that amended the TLGP by providing for a limited extension of the DGP, surcharges for certain debt issuances, and procedures for participating entities to issue certain non-guaranteed debt. The Interim Rule was published in the Federal Register on March 23, 2009. As discussed in the section that follows, commenters generally favored the Interim Rule. Accordingly, the FDIC is implementing the Interim Rule as a Final Rule without change.

III. Summary of Comments

The FDIC received two comments on the Interim Rule from groups representing the banking industry. Both commenters supported the amendments to the DGP made in the Interim Rule.

The commenters specifically endorsed the surcharges placed on certain FDIC-guaranteed debt and made applicable to all participating entities that issued FDIC-guaranteed debt after April 1, 2009. In the event of the diminution of the Deposit

³ 74 FR 12078 (March 23, 2009).

Insurance Fund (DIF) caused by TLGP losses, if any, the commenters noted that only IDIs would be required to fund a special assessment to replenish the DIF, though IDIs have not been the primary users of the program.⁴ Depositing surcharges directly into the DIF was viewed by these commenters as an appropriate recognition of the possible exposure that all IDIs, both participating and non-participating, could face in the event of a losses caused by the TLGP. The commenters also welcomed the potential for a corresponding decrease in standard assessments for IDIs that could result from the deposit of the surcharges into the DIF.

One commenter applauded the FDIC's efforts to unwind the DGP as described in the Interim Rule. The commenter favorably noted that the Interim Rule encouraged participating entities to return to the non-FDIC-guaranteed debt market by, for example, establishing procedures for issuing non-FDIC-guaranteed debt during the extended DGP and implementing the aforementioned surcharges.

Noting the changes that have occurred in the TLGP since its inception in October 2008, one commenter suggested that the FDIC provide a second opportunity for eligible entities to opt-in to the program. As the FDIC stated in the Interim Rule, the purpose of the amendments to the TLGP are to ensure an orderly phase-out of the program. Providing a second opportunity to opt-in to the DGP would be contrary to this effort. The FDIC believes that the TLGP has provided reliable and cost-efficient liquidity support to financial institutions with demonstrated funding needs. Institutions that have elected to opt-out of the TLGP are perceived as less likely to have such funding needs and, therefore, the FDIC believes that providing a second opportunity to opt-in to the DGP - as the program winds down - would be of marginal benefit to the industry.

One commenter suggested that the Interim Rule be revised to permit an IDI with capacity under its existing debt limit to transfer that capacity to its holding company so

⁴ Section 204(d) of the *Helping Families Save Their Homes Act of 2009* (Pub.L.No. 111-22), enacted on May 20, 2009, authorized the FDIC to impose a special assessment on depository institution holding companies (with the concurrence of the Secretary of the Treasury) to recover losses to the Deposit Insurance Fund arising from action taken or assistance provided with respect to an insured depository institution following a system risk determination made pursuant to section 13(c)(4)(G)(i) of the Federal Deposit Insurance Act.

that the guaranteed debt could be issued by the holding company rather than by the IDI. Under the TLGP, debt guarantee limits were based on the liquidity needs of an entity as determined by senior unsecured debt outstanding on September 30, 2008 (or 2 percent of liabilities for IDIs without any outstanding senior unsecured debt on September 30, 2008). Holding companies that regularly issued debt on behalf of its subsidiary IDIs presumably would have had such debt outstanding on September 30, 2008, and their debt guarantee limits for purposes of the TLGP would have been established accordingly. The purpose of the TLGP was not to establish a new or expanded debt market for holding companies. Instead, a primary focus of the TLGP was to encourage interbank lending. Without case-by-case analysis, the FDIC believes it would be inconsistent with the purpose of the TLGP to permit any holding company that had not previously issued debt on behalf of its subsidiary IDI to rely on its IDI's debt limit to establish or enhance its own debt issuances. The FDIC notes, however, that part 370 permits any participating entity to request an increase in its debt guarantee limit, and the FDIC will continue to consider such applications on a case-by-case basis.⁵

IV. The Final Rule

The FDIC has implemented the Interim Rule as a Final Rule without change. As discussed below, the Final Rule restates the three primary amendments to the TLGP announced in the Interim Rule: it provides for a limited extension of the DGP; imposes surcharges on assessments for certain debt issuances; and establishes procedures whereby a participating entity can apply to issue certain debt that is not guaranteed by the FDIC.

A. Extension of the Debt Guarantee Program for IDIs Participating in the TLGP

Under the version of the DGP that existed before the Interim Rule was issued, participating entities were permitted to issue senior unsecured debt until June 30, 2009. The FDIC guarantee for such this debt extended until the earlier of the maturity of the debt or June 30, 2012.

Like the Interim Rule, the Final Rule provides a limited four-month extension for the issuance of debt under the DGP and is consistent with extensions to other liquidity

⁵ 12 CFR § 370.3(h)(1)(i).

programs recently announced by the Federal Reserve.⁶ The Final Rule permits all IDIs participating in the DGP to issue FDIC-guaranteed senior unsecured debt until October 31, 2009. For debt issued on or after April 1, 2009, the Final Rule restates without change those provisions of the Interim Rule that extended the FDIC's guarantee until the earliest of the opt-out date, the maturity of the debt, the mandatory conversion date for mandatory convertible debt, or December 31, 2012.

B. Extension of the Debt Guarantee Program for Other Entities Participating in the TLGP

As with the Interim Rule, the Final Rule permits other participating entities that issued FDIC-guaranteed debt before April 1, 2009, to participate in the extended DGP without application. However, other participating entities that did not issue FDIC-guaranteed debt before April 1, 2009, are required to apply to and receive approval from the FDIC to participate in the extended DGP.⁷ The deadline for submitting an application to participate in the extended DGP continues to be June 30, 2009. The FDIC will review such applications on a case-by-case basis. Absent such application and approval, the FDIC's guarantee will expire for such entities no later than June 30, 2012.

This Final Rule will not change a participating entity's existing debt guarantee limit or affect any conditions that the FDIC may have placed on the issuance of debt by an IDI or other participating entity. In addition, the FDIC reiterates that, consistent with prudent liquidity management practices, issuance levels under the DGP should be consistent with existing funding plans and estimated liquidity needs. The chart that follows provides a summary of the relevant dates for entities that participate (and those that do not participate) in the extended DGP.

⁶ 2009 Monetary Press Release, Release Date: February 3, 2009, <http://www.federalreserve.gov/newsevents/press/monetary/20090203a.htm> (last visited February 20, 2009) (announcing four month extensions until October 2009 of six liquidity programs originally scheduled to expire in April 2009).

⁷ Unlike IDIs (for whom the FDIC has either primary or backup supervision authority) and other participating entities that issued debt before April 1, 2009 (for whom the FDIC is aware of current debt issuances and the evolving financial condition of those entities), for other participating entities that did not issue debt before April 1, 2009, the FDIC has chosen to mitigate its risk during the extension period by establishing an application process that will enable the FDIC to become more familiar with the current financial situation for these entities and with their plans for issuing debt during the extension period.

	Application Date	Issue Date	Guarantee Expiration Date
<p>IDIs currently participating in the DGP, and other participating entities that have issued FDIC-guaranteed debt before April 1, 2009</p>	<p>Not required to submit an application to participate in the extension of the DGP.</p>	<p>Senior unsecured debt may be issued no later than Oct. 31, 2009.</p>	<p>For debt issued on or after April 1, 2009, FDIC-guarantee of senior unsecured debt expires on the earliest of the mandatory conversion date for mandatory convertible debt, the stated date of maturity, or Dec. 31, 2012.</p>
<p>Other participating entities that have not issued FDIC-guaranteed debt before April 1, 2009, which have received approval to participate in the extension of the DGP</p>	<p>Application due on or before June 30, 2009.</p>	<p>With FDIC approval, senior unsecured debt may be issued no later than Oct. 31, 2009.</p>	<p>For debt issued on or after April 1, 2009, with FDIC approval, FDIC-guarantee of senior unsecured debt expires on the earliest of the mandatory conversion date for mandatory convertible debt, the stated date of maturity, or Dec.</p>

			31, 2012.
Other participating entities currently participating in the DGP, but <u>not</u> participating in the extension of the DGP	N/A	Senior unsecured debt may be issued no later than June 30, 2009.	FDIC-guarantee of senior unsecured debt expires on the earliest of the mandatory conversion date for mandatory convertible debt, the stated date of maturity, or June 30, 2012.

C. Surcharges on Assessments for Certain Debt Issued on or after April 1, 2009

As with the Interim Rule, surcharges provided for in the Final Rule will continue to be imposed on an annualized basis and apply only to FDIC-guaranteed debt with maturities (or, in the case of mandatory convertible debt, time periods to conversion) of at least one year; the assessment rates for shorter term FDIC-guaranteed debt remain unchanged, as do the rates for guaranteed debt issued before April 1, 2009.

For FDIC-guaranteed debt with maturities (or, in the case of mandatory convertible debt, time periods to conversion) of at least one year issued on or after April 1, 2009, until and including June 30, 2009, and maturing on or before June 30, 2012, the annualized surcharge on the assessments continues to be 10 basis points for IDIs and 20 basis points for other participating entities, as provided for in the Interim Rule.

Like the Interim Rule, the Final Rule also imposes an additional surcharge on assessments for FDIC-guaranteed debt issued under the extended DGP – that is, FDIC-guaranteed debt issued after June 30, 2009 and on or before October 31, 2009, or FDIC-guaranteed debt issued on or after April 1, 2009 with a maturity date after June 30, 2012.

The annualized surcharge on the assessments for IDIs is 25 basis points. For other participating entities that issued FDIC-guaranteed debt under the DGP before April 1, 2009 (and for such entities that did not issue FDIC-guaranteed debt under the DGP before April 1, 2009, but that have been approved by the FDIC to participate in the extended DGP), the annualized surcharge on assessments is 50 basis points.

The Final Rule provides that the surcharges on assessments imposed on both IDIs and other participating entities remain the same as provided for in the Interim Rule.⁸ As such, the surcharges for IDIs would remain slightly lower than those imposed on other entities participating in the DGP. The FDIC believes that this differential remains appropriate because entities other than IDIs, for which the FDIC has limited supervisory authority, present more uncertainty to the FDIC.

Unlike other TLGP fees, which are reserved for possible TLGP losses and not generally available for DIF purposes, the amount of any surcharge collected in connection with the extended DGP will be deposited into the DIF and used by the FDIC when calculating the reserve ratio of the Fund. The FDIC has every expectation that the TLGP will pay for itself and has set TLGP fees accordingly.

The surcharge provisions recognize that a relatively small portion of the industry is actively using the DGP, but all IDIs ultimately bear the risk that a systemic risk assessment might be necessary to recover any excess losses attributable to the program. The surcharge is intended to compensate the DIF members, even those that did not issue FDIC-guaranteed debt, by increasing funds deposited directly into the DIF, for bearing the risk that TLGP fees will be insufficient and that a systemic risk assessment will be levied.

The surcharges also are intended to reduce the subsidy provided by the DGP and to encourage institutions to seek funding in ways that do not involve government guarantees, so that the DGP can be unwound in an orderly fashion. The DGP extension

⁸ Recent amendments to the FDI Act provide the FDIC with additional authority to make special emergency assessments of both IDIs and depository institution holding companies (with the concurrence of the Secretary of the Treasury), if necessary. See footnote 4.

also partially addresses potential competitive disparities with similar programs in other countries. The FDIC anticipates that the amount of revenue that the surcharge produces will enable the FDIC to reduce the amount of the special assessment provided for in the Interim Rule adopted on February 27, 2009.⁹

D. Opportunity to Apply to Issue Non-Guaranteed Debt

As with the Interim Rule, the Final Rule provides that any entities participating in the extended DGP may apply to the FDIC to issue non-FDIC-guaranteed debt after June 30, 2009. If approved, such entities may issue non-guaranteed debt after June 30, 2009, with any maturity and without paying any additional fee to the FDIC.¹⁰

V. Regulatory Analysis and Procedure

A. Administrative Procedure Act

The process of amending Part 370 by means of this Final 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.” Consistent with section 553(b)(B) of the APA, in publishing the Interim Rule, the FDIC invoked the good cause exception based on the unprecedented disruption in credit markets resulting from the severe financial conditions that threaten the nation’s economy and the stability of the banking system. (Nonetheless, the FDIC solicited comments on the Interim Rule, and has fully considered the comments that were submitted.) For similar reasons, the FDIC confirms that the good cause exception, provided for in section 553(b)(B) of the APA, applies to the Final Rule.

⁹ See 74 FR 9525 (March 4, 2009).

¹⁰ Some participating entities elected to pay a fee to issue long-term non-guaranteed debt that could mature beyond June 30, 2012, pursuant to 12 CFR 370.6(f). These entities may continue to issue long-term non-guaranteed debt without additional application to the FDIC.

If those entities are eligible to participate in the extension of the TLGP, the Final Rule, like the Interim Rule, requires such entities to apply to, and obtain the prior approval of, the FDIC in order to issue non-guaranteed debt that matures before June 30, 2012. No additional fee would be payable to the FDIC in order to issue such debt.

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." For reasons that supported its invocation of the good cause exception to section 553(b)(B) of the APA, the FDIC relied upon the good cause exception to section 553(d)(3) and published the Interim Rule with an immediate effective date. For similar reasons, the FDIC invokes the good cause exception provided for in section 553(d)(3) and provides for an immediate effective date for this Final Rule.

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 IDIs 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.¹¹ For the same reasons discussed above, the FDIC finds that good cause exists for an immediate effective date for the Final Rule.

C. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget (OMB) has determined that this Final 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

¹¹ 12 U.S.C. 4802.

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 OMB control number. The Interim Rule contained two reporting requirements that revised an existing OMB-approved information collection, entitled the “Temporary Liquidity Guarantee Program (OMB No. 3064-0166). Both reporting requirements are retained in the Final Rule. Specifically, section 370.3(h)(1)(vi) requires certain participating entities that did not issue FDIC-guaranteed debt before April 1, 2009 and that wish to participate in the extended DGP to submit a written application to the FDIC. Any such application must be submitted on or before June 30, 2009. In addition, section 370.3(h)(1)(vii) requires certain participating entities that wishes to issue non-FDIC-guaranteed debt after June 30, 2009, to submit a written application to the FDIC. The estimated burden for the new applications, as set forth in the Interim and Final Rules, is as follows:

Title: Temporary Liquidity Guarantee Program.

OMB Number: 3064-0166.

Estimated Number of Respondents:

Application to issue non-guaranteed debt – 1,000.

Application by a certain participating entity that has not issued FDIC-guaranteed debt before April 1, 2009, to participate in the extended DGP—25.

Frequency of Response:

Application to issue non-guaranteed debt – once.

Application by a certain participating entity that has not issued FDIC-guaranteed debt before April 1, 2009, to participate in the extended DGP—once.

Affected Public: IDIs, thrift holding companies, bank and financial holding companies, and affiliates of IDIs.

Average time per response:

Application to issue non-guaranteed debt – 2 hours.

Application by a certain participating entity that has not issued FDIC-guaranteed debt before April 1, 2009, to participate in the extended DGP--2 hours.

Estimated Annual Burden:

Application to issue non-guaranteed debt – 2,000 hours.

Application by a certain participating entity that has not issued FDIC-guaranteed debt before April 1, 2009, to participate in the extended DGP--50 hours.

Previous annual burden – 2,201,625 hours.

Total new burden – 2,050.

Total annual burden – 2,203,675 hours.

On March 17, 2009, the FDIC requested and received approval under OMB's emergency clearance procedures to revise the Temporary Liquidity Guarantee Program information collection to incorporate the paperwork burden associated with applications to issue non-guaranteed debt and applications to participate in the extended DGP. The Interim Rule document requested comment on the paperwork burden; however, no responsive comments to this request were received. With issuance of the Final Rule, the FDIC will follow its request for OMB approval under emergency clearance procedures with a request for approval under normal clearance procedures, including an initial 60-day request, and subsequent 30-day request, for comments 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. Pending publication of the initial 60-day notice, interested parties are invited to submit written comments on the estimated burden for applications to issue non-guaranteed debt and to participate in the extended DGP by any of the following methods:

- <http://www.FDIC.gov/regulations/laws/federal/propose.html>.

- *E-mail: comments@fdic.gov*. Include the name and number of the collection in the subject line of the message.
- *Mail:* Leneta Gregorie (202-898-3719), Counsel, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 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 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 regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the 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 regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could the FDIC do to make the 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 this Final Rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency and Emergency Supplemental Appropriations Act of 1999 (Public Law 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.

Accordingly, the Interim Rule amending 12 CFR Part 370, which was published at 74 FR 12078 on March 23, 2009, is adopted as a Final Rule without change.