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November 13, 2008

Via Email: comments@FDIC.gov

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429

Re: Comment on Interim Rule Regarding Temporary Liquidity Guarantee Program, RIN#3064-AD37

Proposal to Expedite Payment of Claims

Dear Mr. Feldman:

Davis Polk & Wardwell is an international law firm headquartered in New York. In the past several weeks, we have had numerous discussions about the FDIC's Temporary Liquidity Guarantee Program with our financial institution clients (which include U.S. bank holding companies and depository institutions as well as foreign banks that own U.S. depository institutions), capital markets participants and market-makers.

We strongly support the goals of the Temporary Liquidity Guarantee Program to preserve confidence and restore liquidity in the U.S. banking system. We believe the Interim Rule implementing the Temporary Liquidity Guarantee Program, 73 Fed. Reg. 64179, as amended November 4, 2008 (the "Interim Rule"), has addressed many of the questions financial institutions and market participants had raised about the Temporary Liquidity Guarantee Program. In this letter, we are responding to the FDIC's request for comments on the Interim Rule, in particular on ways in which the claims process for the Debt Guarantee Program

may be modified to speed payment to eligible claimants without putting at risk the funds administered by the FDIC.

During our discussions with financial institutions and market participants, we have repeatedly heard that a guarantee of payment of principal and interest when due would receive the widest acceptance. We agree that such a form of guarantee would be optimal to achieve the widest acceptance of FDIC-guaranteed debt in the market and thereby contribute to the restoration of liquidity in the funding of U.S. depository institutions and their holding companies in both the capital and interbank lending markets.

If the FDIC retains the structure of the guarantee as set forth in the Interim Rule, however, we believe the market's acceptance of that approach will be limited unless the FDIC accelerates the claims settlement process for investors along the lines outlined below. Among other factors, we understand that the FDIC's current approach would negatively impact the ratings of guaranteed debt issuances. For the Debt Guarantee Program to have its greatest impact, it is important for the guaranteed debt to receive the same AAA rating that U.S. government debt enjoys. According to guidance issued by Standard & Poor's Ratings Services ("S&P") on November 10, 2008, however, unless the current proposal is amended to provide a guarantee of timely payment of interest and principal, S&P would not rate the debt of financial institutions qualifying for the FDIC guarantees at the "AAA" level. We believe our proposal addresses S&P's concerns.

We believe that the claims process for guaranteed debt, as outlined by the Interim Rule, is unnecessarily complex and time-consuming, in particular in the context of debt securities offered by holding companies and authorized affiliates that are not themselves depository institutions, where the debt will be issued pursuant to a registration statement under the Securities Act of 1933, as amended (the "Securities Act"), or in an offering exempt from registration pursuant to Rule 144A or Regulation S under the Securities Act (each a "Capital Markets Debt Offering," and the debt issued in such an offering "Capital Markets Debt"). We suggest instead that, upon a holding company's or authorized affiliate's filing for bankruptcy, the FDIC should immediately pay the Depository Trust Company or its nominee, which will be the registered holder of the Capital Markets Debt, and rely on the FDIC's rights of subrogation under the debt guarantee to pursue its claim in the issuer's bankruptcy proceedings. In the case of Capital Markets Debt, we believe, from our experience, that there is no realistic chance that the claim of holders of Capital Markets Debt, issued in the manner described below, would be disallowed in bankruptcy.

Rationale for Proposal to Expedite the Payment of Claims

We understand that the Interim Rule's provisions on payment of claims, especially those addressing guaranteed debt issued by a U.S. bank holding company, U.S. savings and loan holding company or authorized affiliate (§ 370.12(b)(2)) (a "HoldCo" and the debt issued by a HoldCo, "HoldCo Debt"), are primarily designed to reduce the risk to FDIC-administered guarantee funds. In the case of HoldCo Debt, the Interim Rule appears designed to avoid the risk that the FDIC will make payment on a claim later disallowed or subject to reconsideration under Section 502(j) of the Bankruptcy Code in the HoldCo's bankruptcy proceeding.

The process proposed under the Interim Rule is potentially too time-consuming, especially in the case of HoldCo Debt in the form of Capital Markets Debt. Under the proposed process, the creditor's claim must first be allowed, but the normal process for allowance of claims in a bankruptcy proceeding can take up to one or two years. Second, the creditor's claim, even if allowed, must not be subject to reconsideration. But the period within which a request for reconsideration of claims in a bankruptcy proceeding may be made under Section 502(j) of the Bankruptcy Code may extend until the entire proceeding has been formally closed, which can take much longer.

As with any risk of payment delay embedded in a debt instrument, the market is likely to decide, at the time of initial issuance of the HoldCo Debt, whether to accept, and how to value and price, the risk of the payment delay that is imposed by the Interim Rule. We understand that the market will make this assessment using current worst-case assumptions about the length of the delay. As one pricing factor, investors will consider the ratings assigned to the debt by S&P and other rating agencies. As noted above, S&P has already indicated that its ratings will be negatively impacted by the lack of timeliness of payment. Anything less than certainty of prompt payment upon bankruptcy will likely have a material negative impact on the current acceptance, as well as the current pricing, of FDIC-guaranteed HoldCo Debt at the time of initial issuance. This problem is made worse by the fact that the T-Bill rate the FDIC will pay following the filing of the bankruptcy petition is likely to be significantly lower than the interest rate borne by the HoldCo Debt. Our proposal of immediate payment upon filing would reduce the amount of cash expended by the FDIC after the issuer's bankruptcy and would reduce the current risk to both acceptance and pricing caused by the potential later payment delay under the Interim Rule.

Proposal to Expedite the Payment of Claims

Features of Capital Market Debt Qualifying for Expedited Payment Process

In order to qualify for the expedited payment process described below, Capital Markets Debt would have to satisfy the following criteria, most of which are typically inherent in any Capital Markets Debt Offering:

1. Capital Markets Debt will be identified as such at issuance. The following information will be included in the issuance notification to be submitted to the FDIC via FDIC*connect*: the name of the issuer, the principal amount issued, the coupon or discount, as applicable, the currency of issue, the scheduled maturity date, identifiers such as the CUSIP number, and the name and contact details of the U.S. bank acting as indenture trustee.

2. The Capital Markets Debt will be issued in book-entry form only, represented by one or more global certificates (the "Global Certificate"), which will be deposited with The Depository Trust Company ("DTC") and registered in the name of Cede & Co. as DTC's nominee. Transfers between holders of the Capital Markets Debt are effected using book entries, and thus do not involve transfer of the Global Certificate. Capital Markets Debt will be evidenced primarily by records maintained by DTC and the indenture trustee, both of which will be independent of the issuer. Should the amount of outstanding debt represented by the Global Certificate increase, because of a reopening, or decrease, because of a partial redemption or repurchase, DTC and the indenture trustee will reflect the change by marking the Global Certificate up or down as appropriate.

3. Capital Markets Debt Offerings will be made pursuant to a disclosure document, will be conducted in accordance with the applicable liability and other provisions of the Securities Act and the anti-fraud provisions of the Securities Exchange Act of 1934, as amended, and will be accompanied by legal opinions and accountants' comfort letters.

4. A legal opinion in respect of the valid, binding and enforceable nature of the Capital Markets Debt will be issued at the closing of each Capital Markets Debt Offering. The FDIC could require that a courtesy copy of that opinion be submitted to it via FDIC*connect*.

5. In the context of FDIC-guaranteed Capital Markets Debt, issuances will involve further due diligence to ensure that the debt will be guaranteed and not exceed the issuer's limits, and will include covenants ensuring that funds in an amount sufficient to satisfy the FDIC assessment are available in the designated account for direct debit by the FDIC and restricting the use of proceeds in the manner required by the Final Rule.

The foregoing requirements for Capital Markets Debt should provide assurance to the FDIC that the conditions for the FDIC guarantee were satisfied and that the outstanding amount of Capital Markets Debt and the identity of its registered holder, DTC or its nominee, are known at all times. In particular, we submit that the available information about Capital Markets Debt issued in a Capital Markets Debt Offering provides a strong foundation for tracking and monitoring the guaranteed debt ahead of any bankruptcy proceeding, limiting the need for the FDIC to make those determinations at the time an issuer files for bankruptcy.

Expedited Payment Process

For any Capital Markets Debt that meets the foregoing criteria, we respectfully submit that the FDIC should apply the following expedited payment process under the debt guarantee:

1. The FDIC would commit in the Final Rule to make payment of the principal amount specified in the Global Certificate, and interest accrued thereon until the date of filing of the bankruptcy petition, as soon as practicable but in no event later than three business days following the bankruptcy filing.

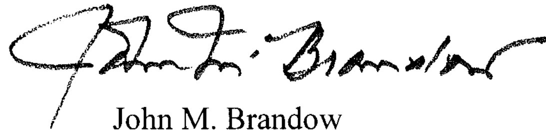
2. The Final Rule would include, as part of the guarantee, a subrogation provision typical for commercial guarantees. Because of the subrogation provision, the FDIC would by operation of law become, effective upon payment, subrogated to the rights of the holders of the Capital Markets Debt.

3. Payment under the guarantee would be made to DTC as the registered holder of the Capital Markets Debt, and would be credited to the accounts of DTC participants holding the Capital Markets Debt in accordance with established DTC procedures.

We believe that introducing this expedited payment process for Capital Market Debt would accomplish the FDIC's stated goal of speeding payment to eligible claimants without putting at risk the funds administered by the FDIC.[1]

If you would like to discuss any aspect of this proposal, please feel free to call or email either of the undersigned.

Very truly yours,



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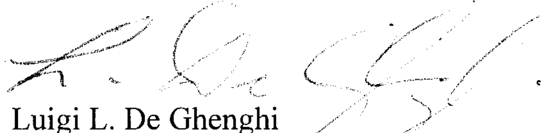

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[1] If the FDIC finds merit in this expedited approach, we see no reason why it could not be tailored to cover Capital Markets Debt issued by an insured depositary institution, as well, as an alternative to the procedures specified in the Interim Rule. For the reasons cited above, the risk of payment delays of up to 180 days in the FDIC's receivership claims process could impact the marketability and pricing of guaranteed depositary institution debt. S&P has already indicated that the risk of such a delay would negatively affect its ratings.