October 1, 2009

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BY REGISTERED POST & EMAIL

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
comments@FDIC.gov
RIN # 3064-AD37

Re: Notice of Proposed Rulemaking: Expiration of the Issuance Period for the Debt Guarantee Program; Establishment of Emergency Guarantee Facility

Ladies and Gentlemen:

The undersigned graduate students of the Boston University School of Law LL.M. Program at the Morin Center for Banking and Financial Law[1] ("Morin Center LL.M. Students") appreciate the opportunity to comment on the recent Notice of Proposed Rulemaking, identified as RIN 3064-AD37 ("Notice")[2] issued by the Federal Deposit Insurance Corporation ("FDIC"). The Notice presents two alternatives for phasing out the Debt Guarantee Program ("DGP"), a component of the Temporary Liquidity Guarantee Program ("TLGP"). The Morin Center LL.M. Students endorse the FDIC's adoption of Alternative B with some minor modifications to the approval process.

This action is being proposed as part of the unwinding of several programs that were hastily put into place in 2008. The objective of the DGP was to counter the systemic risks caused by the unprecedented disruptions in credit markets and the resultant difficulty faced by many financial institutions in obtaining funds and making loans to creditworthy borrowers. Under the first alternative ("Alternative A"), the DGP would conclude as provided in the current regulation. Thus, insured depository institutions ("IDIs") and certain other participating entities would be permitted to issue FDIC-guaranteed debt no

[1] The Morin Center for Banking and Financial Law was founded in 1978 to develop research and educational programs in the areas of law governing and relating to banking and financial services. The Morin Center's mission is to provide, within Boston University School of Law, an organization for encouraging, managing and recognizing education and research in the field of banking and financial services law. The Morin Center reflects the international aspects of financial services in its work, seeks to marry academic excellence with practical application, and fosters a community of scholarship and dialog on legal issues critical to the financial community.

[2] 74 Fed. Reg. 47489 (September 16, 2009).

later than October 31, 2009, with the FDIC's guarantee for such debt expiring no later than December 21, 2012.

Under the second alternative ("Alternative B"), the DGP would effectively expire as provided in the current regulation. However, the FDIC proposes to establish and make available on a limited, case-by-case basis, a six month emergency guarantee facility ("Emergency Facility"). This Emergency Facility is available to IDIs and certain other entities that issued FDIC-guaranteed senior unsecured debt on or before September 9, 2009. Upon application, and with prior approval of the FDIC, an applicant would be permitted to issue FDIC-guaranteed senior unsecured debt during the period between November 1, 2009 and April 30, 2010, subject to any other restrictions and conditions deemed appropriate by the FDIC.

The Morin Center LL.M. Students endorse the FDIC's adoption of Alternative B because it: (1) will continue to provide market stability; (2) is in line with FDIC policy objectives; (3) provides safeguards against dependency; and (4) presents no adverse cost implications.

1. Why Alternative B?

While there is speculation that the recession is likely now over, the domestic credit and liquidity markets have not yet normalized. With this understanding, it is our view that a qualified extension of the DGP will enhance the recovery process for the following reasons:

(a) The Emergency Facility will continue to provide market stability.

The DGP has played a pivotal role in mitigating a crisis in the financial services industry. The guarantee facilitated capital formation and in doing so it prevented the collapse of many IDIs and other entities that were facing a credit crunch. By extending the guarantee for an additional six months, the Emergency Facility will continue to promote confidence in the banking system by securing investments. Furthermore, the extension will allow for a more prudent and gradual winding down of this program.

(b) The Emergency Facility is in line with FDIC policy objectives.

Alternative B is consistent with the FDIC's approach of phasing out liquidity programs because it restricts access to the program while extending deadlines for a short period of time. Access to the Emergency Facility is limited to entities that currently participate in the DGP. Moreover, access will be further restricted to those entities that issued FDIC-guaranteed debt under the DGP prior to September 9, 2009. While Alternative B provides an extension of FDIC protection to these DGP participants, it does so only on a case-by-case basis once a determination is made on the entity's inability to issue non-guaranteed debt to replace maturing senior unsecured debt as a result of market disruptions or other circumstances beyond the entity's control.

(c) The Emergency Facility provides safeguards against dependency.

Alternative B provides for stricter eligibility criteria, increased participation fees, and a higher standard limiting the circumstances in which the Emergency Facility will be made available.

These steps will ensure that the Emergency Facility will only be used in the most severe cases (i.e., in cases where an entity is actually incapable of issuing non-guaranteed debt when its guaranteed debt matures). The proposal, as written, is a costly alternative to those participating IDIs and other entities seeking to utilize the Emergency Facility as a means of generating capital. These elements provide a level of security that ensures that the Emergency Facility will not be used as a crutch by current entities.

Looking at the DGP on a broader scheme, participation in the program has decreased due to various reasons, including market forces. The number of entities covered, as well as the amount of guaranteed debt, have both been declining steadily since reaching their respective highs of 101 issuers and $346 billion in outstanding debt in May of this year. With this information in mind, we find it more prudent to see that participants eventually stop relying on the DGP as a result of it no longer being necessary, rather than it no longer being available due to premature termination.

(d) The Emergency Facility presents no adverse cost implications.

The FDIC has collected more than $9 billion in fees from entities that have issued guaranteed debt under the DGP. Almost $600 million of the fees collected have been appropriated to replenish the deposit insurance fund maintained by the FDIC. The implementation of the Emergency Facility, with the increased participation fee provision, will not financially burden the FDIC. Indeed, the program could generate further revenues for the FDIC.

(e) Alternative A does not provide adequate time for winding down of the DPG.

Alternative A does not provide sufficient time for participating entities to adjust to a regulatory environment where they will no longer have access to a debt guarantee facility. Some participating entities may not have sufficient time to find alternative means to replace the support they have received from the DGP. This sudden regulatory change has potential to negatively affect the status of these entities.

More importantly, Alternative A does not reflect the safety and soundness principle underlying the banking practice. The objective of Alternative B is to provide additional protection to those IDIs and other participating entities that are in dire need by making the Emergency Facility available for an additional six months. By allowing this additional time, Alternative B is in line with safe and sound banking principles because it provides a “safety-net” for the entities that are in financial danger. It also provides for a more gradual and well-structured conclusion to the DGP.

2. Whether eligibility for the Emergency Facility should be limited?

The Morin Center LL.M. Students find that if Alternative B is adopted, eligibility criteria should be restricted to ensure the Emergency Facility is available only to IDIs and certain other participating entities that have been and continue to be adversely affected by the financial crisis. It is important to

recall in terms of the background note accompanying the publication of the TLGP[3] that the program was announced "*as an initiative to counter the current system-wide crisis in the nation's financial sector*" and that "*[t]he determination of systemic risk allowed the FDIC to take certain actions to avoid or mitigate serious adverse effects on economic conditions and financial stability*". Consequently, any extension of the Emergency Facility to entities other than (i) IDIs participating in the DGP, and (ii) other entities that have issued FDIC-guaranteed debt by September 9, 2009, would contravene the original objectives of the TLGP in general and the DGP in particular.

3. Whether collection of information is necessary?

The collection of information mandated by Alternative B is necessary and will ensure that entities seeking to take advantage of the Emergency Facility merit such protection. While some of the information so collected may have already been submitted to the FDIC in the past, requiring applicants to further disclose their most current financial situation will be crucial to the FDIC's decision in granting or withholding the Emergency Facility to the applicant.

4. Proposed modifications to Alternative B

We propose the following modifications to Alternative B for the FDIC's consideration:

(a) Mandatory end-use restrictions

The final rule should provide for end-use restrictions. Specifically, limitations on executive compensation, bonuses and payment of dividends should be mandatory, not discretionary, for entities wishing to use the Emergency Facility.

(b) Flexibility in adjusting participation fee

The final rule should grant the FDIC the ability to increase, as well as decrease, the participation fee on a case-by-case basis. In certain situations it may become necessary to charge a lower participation fee (or a deferred fee) to prevent the applicant from failing.

(c) Statement differentiating prior plans

The final rule should require that applicants submit a statement identifying any changes from all prior plans for the retirement of FDIC-guaranteed debt submitted to the FDIC under the DGP.

(d) Roadmap for the future

Alternative B provides that applicants will be required to submit a description of the plans for the retirement of FDIC-guaranteed debt. In addition, the final rule should also require that applicants submit a business plan that includes clear objectives detailing the actions the entity will take so that it does not require another similar emergency program in the future. A realistic demonstration of how the entity intends to wean itself off the guarantee must be included.

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[3] See 73 Fed. Reg. 72244 (November 26, 2008).

5. Comments on use of plain language

In response to the query on compliance with Section 722 of the Gramm-Leach-Bliley Act of 1999, we confirm that the proposed rule and its requirements are clearly stated.

We appreciate the opportunity to share our comments with the FDIC on the Notice, and we would welcome the opportunity to provide any additional information to support the final rule based on Alternative B. We also look forward to working with the FDIC as broad reforms to the regulatory environment progress. Any questions about our comments should be directed to any of the undersigned at 617-353-3023 or morincenterll.m.students@gmail.com.

Sincerely,

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LL.M. Candidates

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