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October 31, 2008

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

Attention: Comments Re: RIN # 3064-AD37

Re: Interim Rule Regarding Temporary Liquidity Guarantee Program

Ladies and Gentlemen:

This comment is submitted on behalf of Bank of America Corporation, The Bank of New York Mellon Corporation, Citigroup Inc., The Goldman Sachs Group, Inc., JPMorgan Chase & Co., Merrill Lynch & Co., Inc., Morgan Stanley, State Street Corporation and Wells Fargo & Company (the "Banking Organizations") to comment on the Interim Rule Implementing the Temporary Liquidity Guarantee Program, 73 Fed. Reg. 64179, issued by the Federal Deposit Insurance Corporation (the "FDIC").

The Banking Organizations strongly support the FDIC's efforts through the Temporary Liquidity Guarantee Program ("TLGP") to help relieve the crisis in the credit markets and to enhance the financial institutions' access to liquidity. The Banking

Organizations have two principal suggestions, which are intended to make the TLGP even more effective and maximize participation by eligible entities:

1. Modify the guarantee provided under the Debt Guarantee Program ("Debt Program") to cover principal and interest payment obligations as they become due backed by the full faith and credit of the U.S. government; and

2. Expand the option under the Debt Program for participating entities to opt in or out of the guarantee for certain eligible issuances with a stated maturity on or prior to June 30, 2012.

In addition, the Banking Organizations make certain other suggestions and raise several questions to clarify or further improve the operation of the TLGP.

I. The FDIC Guarantee Should be an Unconditional Guarantee of Timely Payment of Principal and Interest When Due Backed by the Full Faith and Credit of the U.S. Government

Senior unsecured debt investors have different expectations from those of bank depositors and purchasers of Certificates of Deposits (CDs) traditionally protected up to the specified maximum amount by FDIC insurance.

Because investors in demand accounts can withdraw their funds at any time, they have no expectation of a fixed interest rate of return or any guaranteed duration. In addition, CD investors generally have limited expectation of liquidity. Consequently, insurance that arises upon the failure of a bank is generally sufficient for depositors, particularly in light of the FDIC practice by which insurance deposits are expeditiously paid out to depositors and holders of CDs.

Potential investors in senior unsecured guaranteed bank debt have very clear and different expectations regarding payment of their interest, as well as the timing of the return of principal[1]. Because such investors are willing to purchase debt securities with the tightest spreads, safety, liquidity and fungibility are paramount to them. These buyers want an unconditional guarantee of timely payment of interest and a promise of principal at stated maturity. A guarantee obligation that is anything less than an obligation to pay all amounts due could severely curtail the demand for these securities and might impair a bank's access to guaranteed funding.

A lesser guarantee without timely payment of interest and principal may create significant tiering among issuers, as investors may assess the underlying bank's credit quality with respect to the likelihood of bankruptcy and therefore the likelihood of administrative delay in return of principal. We are concerned that this credit tiering may

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1 This is particularly true for "rates" buyers, who make up a substantial portion of the likely buyers of guaranteed bank holding company senior unsecured debt.

ultimately result in only the highest credit quality banks having access to liquidity with term investors, thus undermining the stated goals of the program.

The FDIC guarantee provided in the interim regulations falls short of a guarantee of principal and interest when due and therefore the value attributed to it by senior unsecured debt investors is significantly less than if the guarantee were an unconditional guarantee of timely payment of principal and interest of the type customarily provided by guarantors of such obligations and of the type recently introduced under the United Kingdom's 2008 Credit Guarantee Scheme. In addition, the Banking Organizations understand that many other countries whose banks are significant borrowers in the U.S. and international markets, such as Australia, are likely to use the U.K. example as a model for their own programs. As a result, guaranteed obligations of U.S. banks are likely to be significantly less liquid and more costly than those of U.K. based banks, as well as of banks based in other countries. This leaves U.S. institutions at a disadvantage when compared to their U.K. and some other counterparts. The guarantee under the Debt Program should to be revised in several significant respects, as follows:

1. According to the FDIC Chairman's statement released October 23, 2008, "the guarantees we have made are broad and backed by the full faith and credit of the U.S. government". However, this point is not made clear in the Interim Rule. Consistent with the Chairman's statement, the final rules and the form of guarantee should expressly state that the guarantees are backed by the full faith and credit of the U.S.

government. This is essential in gaining investor confidence in the guarantee and critical to achieving the important objective of having a risk weighting of zero assigned by the Board of Governors of the Federal Reserve System or the applicable regulatory agencies for the institutions' issuances.

2. The FDIC guarantee should be modified to cover the payment of principal and interest when due, regardless of the reason for non-payment. This would eliminate delay and uncertainty in payment after a default, and potential loss of interest due to prolonged bankruptcy proceedings. The uncertainty and potential loss of interest due to delay and the non-contract rate of interest paid post-bankruptcy by the FDIC guarantee in its current form severely limits the value of the guarantee to potential buyers, and may prevent the securities from being rated AAA. The rating of an obligation guaranteed by the U.S. government that is not AAA could threaten market perception of all U.S. government debt. Modifying the guarantee as proposed would significantly reduce such risk.

3. For guaranteed debt with a maturity on or before June 30, 2012, the FDIC should cover the institution's payment obligations for principal and interest in accordance with the original terms of the debt, without requiring acceleration of such payments. This modification would help to eliminate duration uncertainty, and would be easy for investors to understand and evaluate. This form of guarantee, where the FDIC steps into the shoes of the guaranteed institution, would also enjoy the widest

acceptance among investors. However, because the FDIC's guarantee expires on June 30, 2012, there should be an acceleration provision to June 30, 2012 in the event of default for guaranteed debt that matures after that date.

The Banking Organizations are concerned that, unless the guarantee provides certainty through the modifications outlined above, investors may assign a reduced value to the guarantee and there will be insufficient investor demand for the Debt Program, and it will not be effective in furthering the TLGP's intent. As previously stated, if investors regard the guarantee as weak, they will look to institutions' underlying financial strength, thus leading to a tiered market where weaker institutions have insufficient access to liquidity.

In order for investors to have a clear understanding of the guarantee structure, the form of the guarantee should be made available, for example on the FDIC's website. There should also be a detailed and clear claims process. The Banking Organizations would be happy to assist the FDIC in developing an appropriate process.

The Banking Organizations believe that the modifications proposed above are within the FDIC's authority under Section 13(c)(4)(G). The determination of systemic risk under this section provides the FDIC with broad authority to "take other action or provide assistance under this section as necessary to avoid or mitigate such effects". For the reasons discussed above, the suggested modifications are necessary to ensure investor acceptance of and confidence in the guaranteed debt and mitigate the systemic risk in the credit markets, and are thus well within the FDIC's authority under this circumstance.

II. Participating Institutions Should have the Flexibility to Issue Senior Unsecured Debt (Other than Non-swept Federal Funds) Not Guaranteed by the FDIC, Regardless of the Stated Maturity

The Banking Organizations understand that the FDIC has imposed the limitation on the right to opt out due to concerns about both the perception of different levels of participation in the Debt Program and also the ability to track and distinguish between guaranteed and non-guaranteed debt of the participating institutions. The Banking Organizations also understand the FDIC's comment that issuing non-government guarantee debt may signal that such institutions do not need the FDIC's guarantee and are therefore in a stronger financial position than institutions that issue guaranteed debt.

However, the Banking Organizations believe these FDIC concerns will not be addressed by preventing participating institutions from opting out of the FDIC guarantee for debt with a stated maturity before June 30, 2012. Institutions should have the flexibility to issue senior unsecured debt regardless of the stated maturity for the following reasons:

1. The market will understand that the decision to issue some debt on a guaranteed basis and some on a non-guaranteed basis reflects valid economic reasons (particularly if the form guarantee is not modified as described above), relating to the cost of the guarantee versus the savings in issuing guaranteed debt as well as the willingness of certain classes of buyers to take higher risk in order to obtain higher yields.

2. The U.K. government guarantee is a precedent where institutions have the flexibility to issue both U.K. government guaranteed debt and non-government guaranteed debt, again placing U.S. banks at a competitive disadvantage when compared to their U.K. counterparts.

3. The market will continue to differentiate between the debt obligations of participating institutions (as reflected in credit spreads and trading prices) and therefore reflect the perceived credit quality of such institutions, even if all the eligible debt issued by the eligible entities of the participating institutions were to be guaranteed because there will continue to be outstanding (a) previously issued debt of eligible entities, (b) debt of ineligible entities guaranteed by participating institutions, (c) non-guaranteed structured debt of participating institutions, and (d) debt of participating institutions issued in excess of the 125% cap.

4. As the program is currently contemplated, there will be both guaranteed and non-guaranteed debt issued by the same financial institution, because certain institutions issue unsecured debt from both eligible and ineligible entities.

Concerns with the ability to track whether or not debt of a participating institution is guaranteed and the potential concern that inability might cause are valid, but limiting the ability to opt out of the FDIC guarantee for debt with a stated maturity before June 30, 2012 will not solve that problem for the reasons set forth in the preceding paragraph. The participating institutions, the Depository Trust Company, the FDIC and other market participants will in any event have to develop a way of very clearly distinguishing between guaranteed and non-guaranteed debt of the same issuer or guarantor. The Banking Organizations believe that there are many steps that can be taken to avoid confusion and permit tracking, including separate types of CUSIP numbers and other identifiers. The Banking Organizations would be happy to assist the FDIC in developing such mechanisms. The Banking Organizations also recommend listing government guaranteed senior unsecured debt on the FDIC website.

Under § 370.3(f), a participating entity may elect to have the option of issuing non-guaranteed debt with a maturity date after June 30, 2012 by paying an upfront nonrefundable fee equal to 37.5 basis points of 100% of the institution's senior unsecured debt outstanding as of September 30, 2008 with a maturity date on or before June 30, 2009. The Banking Organizations agree with the FDIC that participating entities should have some mechanism to opt in or out of guarantees on a per issuance basis but believe that this option should not be limited to debt with stated maturities after June 30, 2012. As discussed above, the Banking Organizations believe that this limitation will not achieve the FDIC's stated objectives. In addition, the Banking Organizations believe that this limitation can create additional unintended problems:

- It encourages a large concentration of debt to mature near June 30, 2012. This potentially introduces systematic refinancing risk for up to $1.5 trillion into the banking sector in approximately 3 1/2 years time.

- If the guarantee is used for bonds maturing after June 30, 2012, the "blended" risk could lead to market pricing inefficiencies.

- Some creditors are not interested in buying guaranteed debt, thus if participating institutions are limited to only guaranteed debt, their market access might actually be more limited and the cost increased, a result exactly opposite of that intended to be achieved by the Debt Program.

As an alternative, the Banking Organizations propose a mechanism that would allow for a wider variety of non-guaranteed issuances. The Banking Organizations believe that the concerns of the FDIC regarding possible adverse selection are well founded with respect to the Federal Funds market. These transactions are a widely utilized source of liquidity for many institutions. The Banking Organizations therefore propose all Federal Funds transactions, except those arising from sweeps and those conducted between affiliate banks (which should be exempt under the "loans to affiliates" exemption), be covered by the FDIC guarantee. Participating entities should, however, have the right to select which other issuances of senior unsecured debt are covered by the FDIC guarantee.

The Banking Organizations propose that, in order to obtain an ability to select which debt is covered by the FDIC guarantee (other than Federal Funds not arising from sweeps), each participating entity be permitted to independently elect to pay in the first year a non-refundable 75 basis point fee on 25% of its eligible senior unsecured debt outstanding on September 30, 2008 and maturing prior to June 30, 2009. Such fee shall be calculated on an annualized basis for the period from November 12, 2008 through June 30, 2009 and paid in equal installments on December 31, 2008, March 31, 2009 and June 30, 2009. Participating entities making this election would receive a dollar-for-dollar credit against future fees and would be permitted to issue both guaranteed and non-guaranteed debt (other than Federal Funds not arising from sweeps) without regard to maturity. If a participating entity issues guaranteed debt that requires fees in excess of this prior credited amount, it would then pay the remaining fees for such debt under the regular FDIC payment schedule at the 75 basis point annualized rate. Continuing to offer both guaranteed and non-guaranteed debt will meet investor appetite and allow credit buyers to maintain exposure to banks, smoothing the transition away from the Debt Program in 2012.

Under the Banking Organizations' proposal, participating entities that do not elect to pay this non-refundable fee would pay all fees on the regular payment schedule and not be able to opt in and out on a per issuance basis.

In addition, the Banking Organizations believe that participating entities should have at least five business days after the final rule is published to determine whether or not to elect the pre-payment option.

III. Other Suggestions

A. The Definition of Senior Unsecured Debt

The Banking Organizations propose the following modifications to the definition of "senior unsecured debt" under § 370.2. First, the current definition includes "federal funds, commercial paper, certificates of deposit standing to the credit of a bank, bank deposits in an international banking facility (IBF) of an insured depository institution, and Eurodollar deposits standing to the credit of a bank" even if they arise within the context of custodial and treasury services end of day sweeps (i.e., "sweep products"). The Banking Organizations propose that senior unsecured debt raised through actively negotiated market transactions should be included within the FDIC guarantee, but that sweep products, regardless of form (i.e., Fed Funds, commercial paper, inter-bank deposits), should be specifically excluded from the FDIC guarantee as these products may not appreciably benefit from the guarantee. Although the FDIC guarantee may improve credit risk, it does not appreciably increase the liquidity of these types of products, which are essentially "passive" investments used at the end of the business day as a cost effective cash management tool for clients. Given the fact that most clients are neither seeking nor requiring such a guarantee, imposing a 75 basis points fee on sweep products could have significant adverse unintended consequences by discouraging utilization of these unsecured instruments and encouraging migration to secured alternatives or other transactions not covered by the FDIC guarantee. Thus, significantly increasing the expense of providing this service and these types of products may lead to fewer unsecured short term investment alternatives and ultimately decrease market liquidity. Therefore, sweep products regardless of form (i.e., Federal Funds, commercial paper, inter-bank deposits) should be excluded. The Banking Organizations concur, however, that unsecured senior debt raised through actively negotiated markets should continue to benefit from the guarantee.

Second, the definition of senior unsecured debt specifically excludes "deposits in foreign currency and Eurodollar deposits that represent funds swept from individual, partnership or corporate accounts held at insured depository institutions". It is not clear to us whether public sector clients, banks and other financial institutions are covered by "corporate accounts" and thus excluded from the definition. It is also not clear to us why this provision does not exclude similar sweeps into IBF accounts. We believe it would be appropriate to exclude public sector clients, banks and other financial institutions because imposing a 75 basis point on deposit accounts for such institutions would eliminate the yield paid on these products and potentially encourage such institutions to move funds into higher yielding "unguaranteed" products, thus potentially reducing a participating entity's liquidity sources. The Banking Organizations believe that the definition of senior unsecured debt should be modified to specifically exclude accounts of public sector and financial institutions, including banks.

Third, the definition includes the requirement that the debt be "evidenced by a written agreement". This requirement may not work with respect to Federal Funds transactions and overnight/short term loan transactions with maturities ranging from overnight to one week. Such debt is issued primarily in the broker markets, in which the practice is for the documentation to include, at most, a confirmation. The Banking Organizations propose that there be a carve-out from the written agreement requirement for such products.

B. <u>Fee for Guaranteed Federal Funds</u>

Considering the current level of interest rates, the Banking Organizations believe that the 75 basis point fee is too high with respect to Federal Funds, and should be lowered. The high cost of insuring Federal Funds may lead institutions to other secured borrowing sources so that, in lieu of Federal Funds, financial institutions will, in order to mitigate their funding costs, increase their utilization of secured borrowing sources such as the Federal Reserve Discount Window, the Term Auction Facility and the FHLB advance program. Such an outcome would not achieve the FDIC's goal of improving short-term unsecured inter-bank funding markets.

C. Calculation of Maximum Amount of Guaranteed Debt and Fee

Under § 370.3(b), "the maximum amount of debt to be issued under the debt guarantee is 125 percent of the par value of the participating entity's senior unsecured debt, excluding debt extended to affiliates or institution affiliated parties, outstanding as of September 30, 2008 that was scheduled to mature on or before June 30, 2009". Under § 370.6(d), fees are assessed "by multiplying the amount of eligible guaranteed debt times the term of the debt times an annualized 75 basis points".

As currently drafted, it is unclear whether the maximum amount of debt that can be issued is based on the aggregate amount issued or on the amount outstanding. These provisions should be modified to clarify that the maximum amount is based on the amount outstanding at a given time, so that participating entities do not reach the maximum simply as a result of rolling over Federal Funds, commercial paper or other short-term debt.

In addition, the fee should be based on an average guaranteed amount outstanding over the period of time ended June 30, 2012 and paid quarterly in arrears. Note that if the fee is based on an amount outstanding it will also be necessary to specify a day count convention for calculating the fee (for example, 360, 365 or actual). It should be made clear that non-guaranteed debt issued after reaching the 125% maximum level does not subsequently end up being included inadvertently in the fee assessment by virtue of the fact that the amount outstanding during the period thereafter decreases to a level below 125%. The provisions should be modified to clarify that inclusion of a particular debt issuance in the fee calculation should be based on whether or not the guarantee was available under the 125% test as of the issuance date.

D. Protection of Investors Against Debt Exceeding Guarantee Limit

Under § 370.6(e), there is a 150 basis point penalty fee and enforcement mechanisms for debt that is represented as being "guaranteed by the FDIC" but which exceeds the guaranteed amount. In order to enhance investor confidence in the Debt Guarantee Program, the Banking Organizations propose that investors be expressly allowed to rely on the borrower's representation with respect to the availability of the guarantee for a particular debt issuance.

E. Disclosures Regarding Participation in Transactions Account Guarantee Program

Under § 370.5(h)(3), each eligible entity that is an insured depository institution must post a prominent notice in the lobby of its main office and each branch clearly indicating whether the entity is participating in the transaction account guarantee program. The FDIC should provide standard language for this purpose.

In addition, according to the Frequently Asked Questions dated October 29, 2008 on the FDIC's website, beginning December 1, 2008 any institution that uses sweep arrangements or takes other actions that result in funds being transferred or reclassified to an interest-bearing account or nontransaction account must disclose those actions to the affected customers and clearly advise them, in writing, that such actions will void the FDIC guarantee. The Banking Organizations believe this may not provide sufficient time to implement this written notice requirement in the regular monthly statement cycle, and propose moving the date from December 1, 2008 to January 1, 2009. The FDIC should also propose standard language for this purpose.

IV. Questions

In addition to the above suggestions, the Banking Organizations have included as Annex A a number of questions and other items for which we would appreciate the FDIC's confirmation.

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The Banking Organizations appreciate this opportunity to comment on the Proposals, and would be pleased to discuss any of the points made in this letter in more detail. The Banking Organizations believe that these comments are important in developing a full and robust guarantee program that is beneficial to all banking organizations. Should you have any questions, please contact H. Rodgin Cohen at (212) 558-3534 or William F. Kroener, III at (202) 956-7095.

Very truly yours,

Bill Kroener for

Sullivan & Cromwell LLP on behalf of the Banking Organizations

ANNEX A

Questions and Items for Confirmation

1. Please confirm whether the following are covered within the definition of senior unsecured debt under § 370.2(e):

    - Inflation-linked securities with a fixed principal amount;
    - Index-linked, principal protected securities;
    - Putable bonds;
    - Callable bonds;
    - Zero-coupon bonds;
    - Extendible securities;
    - Step-up coupons; and
    - Retail debt securities (debt with par value of $25 and listed on the NYSE).

2. Under the definition in § 370.2(e), senior unsecured debt may be denominated in a foreign currency. The Banking Organizations believe this should be clarified and confirmed to include foreign denominated issuances which are settled in U.S. dollars.

In addition, the rules should be clarified to provide that the FDIC's repayment under the guarantee will be made in the same currency as the underlying debt.

3. Given that guaranteed debt may be issued in a foreign currency under § 370.2(e)(2), how will the fee assessed under § 370.6 be calculated? In particular, how will the foreign exchange rate be calculated when there are exchange rate movements within a relevant period? In addition, how would the 125% maximum amount be calculated for the purposes of § 370.3(b)?

4. "Eurodollar deposits standing to the credit of a bank" are covered under § 370.2(e)(1). Does the FDIC intend to include any deposit account by another bank at any non-U.S. branch of the bank, and in particular, does this include accounts denominated in currencies other than U.S. dollars?

5. Does "depository institution regulated by a foreign banking agency" under § 370.2(e)(1) include central banks and other similar non-U.S. government entities which perform central bank functions and international financial institutions such as the IMF? We suggest that these institutions should not be included.

6. Has the FDIC had any conversations with the Depository Trust Company about identifying all guaranteed securities with a common CUSIP identifier? We think this would be helpful for issuers and investors.

7. Has the FDIC had any conversations with news agencies such as Bloomberg and Reuters about having a dedicated page for each issuer's FDIC-guaranteed securities? Similarly, we think this would be helpful for issuers and investors.

8. Will the FDIC permit banking organizations to continue to make markets in their own debt securities? We believe this should be permitted. Many banking organizations regularly make markets through their broker dealers. This involves the repurchase and sometimes cancellation, rather than resale, of outstanding debt.

9. Under § 370.2(a)(4), the FDIC has discretion to include affiliates within the scope of eligible entities that are permitted to participate in the program. Given that these entities will not appear to be eligible on the face of the regulations, how will investors be sure that such entities have been approved for participation in the program by the FDIC?

10. The restriction on how proceeds are used under § 370.3(d)(1) will be difficult to implement. How will the FDIC track which proceeds are used to prepay non-guaranteed debt?

11. How is "insider of an affiliate" defined for purposes of § 370.3(d)(6)? Does this mean employees and/or officers cannot hold guaranteed debt? Will this amount be excluded from the fee calculation?

12. The Interim Rule requires the full fee to be paid if debt is held by an affiliate or a portion of the debt is retired early, which is different from what the Banking Organizations understood would be the case. Can you confirm the FDIC's intent?

13. Under § 370.2(f), the definition of "newly issued senior unsecured debt" includes, for participating entities, debt "issued" on or before June 30, 2009. The Banking Organizations believe this should be clarified and confirmed to mean debt that has a settlement date on or before June 30, 2009.

14. Please confirm that any intercompany lending to an affiliate will not be covered by the FDIC guarantee regardless of the form (e.g., loans, securities, etc.).

15. Please confirm that lending to an affiliate will not be covered by the FDIC guarantee even if the affiliate is not consolidated for GAAP purposes.

16. Under § 370.3(f), the statement refers to the concept of "participating entity," which is also used to refer to each entity within a U.S. bank holding company or U.S. savings and loan holding company structure. Can the FDIC please confirm that the intent is for each entity within a holding company structure to have this independent option (i.e. that it is not an option elected on a holding company basis)?