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News Bulletin

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TLGP's Latest Amendments: Issuance and Guarantee Extensions, Expanded Ability to Issue non-Guaranteed Debt and New Fees

On March 17, 2009, the Federal Deposit Insurance Corporation (FDIC) Board of Directors approved the most recent in a series of interim rules to amend the successful Temporary Liquidity Guarantee Program (TLGP). The amendments are available exclusively to currently participating entities, and include:

- Last date to issue FDIC-guaranteed debt extended from June 30, 2009 to October 31, 2009
- FDIC guarantee expiration date extended from June 30, 2012 to December 31, 2012
- Upon approved application, the ability to issue non-guaranteed debt of any maturity
- Starting April 1, 2009, the assessment of additional surcharges for the issuance of debt

We discuss each of these amendments below.

For links to the publicly available information regarding the programs and for more information about the government intervention efforts in response to the financial crisis, please see our Client Alerts and resources at Financial Crisis Legal Updates and News.

Background

The Debt Guarantee Program ("DGP" or "Program") was launched as part of the TLGP on October 14, 2008. By December 5, 2008 any eligible entities not interested in becoming participating entities were required to opt out. None of the subsequent amendments to the TLGP, including those announced March 17, permit an entity that has opted out to reenter the program.

Under the Program, senior unsecured debt newly-issued by participating entities receives a guarantee of timely payment of interest and principal by the FDIC. Since the Program's launch on October 14, 2008, over two-thirds of public debt maturing by June 30, 2012 issued by banking organizations had an FDIC guarantee. Given the widespread use of the DGP and the limited amount of non-guaranteed debt issued by financial institutions, the FDIC seeks an orderly transition from the issuance of FDIC-guaranteed debt to traditional funding. Extension of the issuance date and maturity date, as well as expansion of the non-guaranteed debt issuance program, addresses this goal.

The new surcharges to the TLGP address two FDIC concerns. The first is the current shortfall in the deposit insurance fund (DIF). The second is the disparity between the perceived benefits of participation in the TLGP by holding companies, and the current inability of the FDIC to assess holding companies for fees to replenish the DIF or losses under the TLGP.

Amendments to the TLGP's Debt Guarantee Program

The proposed amendments will become effective upon publication of the interim rule in the Federal Register. The rule will be subject to a 15-day comment period. We expect only minor changes from the interim rule described here.

The amendments do not alter the current issuance cap for participating entities. Under the Program, participating entities can issue an amount of guaranteed debt equal to 125% of their senior unsecured debt outstanding on September 30, 2008 that was scheduled to mature by June 30, 2009.

Eligible Entities for Extended DGP

Participating entities in the DGP may be eligible to utilize the extended issuance period and the extended guarantee period ("extended DGP"). The extended DGP is available to the following:

- All insured depository institutions (IDIs) that are DGP participating entities
- DGP participating entities, other than IDIs, that have issued FDIC-guaranteed debt prior to April 1, 2009
- DGP participating entities, other than IDIs, that haven't issued FDIC-guaranteed debt before April 1, 2009, upon FDIC approval of an application

A non-IDI participating entity that has not issued FDIC-guaranteed debt before April 1, 2009 may, but is not required to, apply for approval to participate in the extended DGP.

The application to participate in the extended DGP will require disclosure to the FDIC of the same information currently required in other TLGP applications: summary of the applicant's strategic operating plan, proposed use of debt proceeds, plans for retiring any FDIC-guaranteed debt, financial history, current condition and future prospects, potential risk to the FDIC and any other information requested by the FDIC. The FDIC indicates that approval may be conditional, including conditioned on a requirement to pledge collateral to the FDIC. The collateral would be held by the FDIC as security against the applicant's obligation to repay the FDIC for any payments made under the guarantee. If the FDIC previously imposed limits or conditions on a participating entity, those remain in effect under the amendments.

Applications are due by June 30, 2009.

Extension of Issuance Period

The DGP permits new issuance of FDIC-guaranteed debt through June 30, 2009. Participating entities in the extended DGP can issue FDIC-guaranteed debt through October 31, 2009.

A non-IDI participating entity that either (1) doesn't apply for extended DGP approval, or (2) has an application denied, may issue FDIC-guaranteed debt through June 30, 2009.

The FDIC notes that this extension aligns the termination of this program with the final effective date of numerous Federal Reserve Board (Federal Reserve) programs. While the Federal Reserve has left open the option of further extending its programs, Federal Reserve programs are authorized under standing authority of Section 13(3) of the Federal Reserve Act, whereas the TLGP was authorized under a systemic risk exception to its statutory authority, requiring involvement of the Secretary of the Treasury, the President and the Federal Reserve. In approving the interim rule for the extended DGP, the FDIC concluded that the interim rule was necessary to further enhance the TLGP. Additional extensions may require reassessment of the October 13, 2008 systemic risk finding.

Extension of Guarantee Period

The DGP previously permitted issuance of FDIC-guaranteed debt, with the guarantee expiring on the earliest to occur of: maturity of the debt, mandatory conversion of the debt or June 30, 2012. For entities participating in the extended DGP, the guarantee on FDIC-guaranteed debt will expire on the earliest to occur of: maturity of the debt, mandatory conversion of the debt or December 31, 2012.

A non-IDI participating entity that either (1) doesn't apply for extended DGP approval, or (2) has an application denied, may issue FDIC-guaranteed debt with the duration of the guarantee determined under the prior rule.

New Surcharges

New surcharges apply to all DGP participants, and are as follows:

	Insured Depository Institutions	Non-Insured Depository Institutions
FDIC-guaranteed debt issued prior to April 1, 2009	No surcharge	No surcharge
FDIC-guaranteed debt issued from April 1, 2009 through June 30, 2009, and maturing on or before June 30, 2012:		
that matures, or mandatorily converts, less than one year from issuance	No surcharge	No surcharge
that matures, or mandatorily converts, one year or more from issuance	10 basis points	20 basis points
FDIC-guaranteed debt issued after June 30, 2009 and on or before October 31, 2009	25 basis points	50 basis points
FDIC-guaranteed debt issued on or after April 1, 2009 with a maturity date after June 30, 2012	25 basis points	50 basis points

Issuance of Non-Guaranteed Debt

All DGP participating entities are eligible to apply for the new non-guaranteed debt program.

Under the original Program, a participating entity could issue non-guaranteed debt only (1) after FDIC-guaranteed debt had been issued up to the issuance cap or (2) through participation in the long-term non-guaranteed debt program. By December 5, 2008, participating entities were required to notify the FDIC of their election to participate in the long-term non-guaranteed debt program. The long-term non-guaranteed debt program granted participating entities, for a fee, the ability to issue debt on a non-guaranteed basis, provided it matured after June 30, 2012.

Participating entities accepted into the new non-guaranteed program will be able to issue non-guaranteed debt of any maturity after June 30, 2009. The issuance is not conditioned on the participating entity having issued FDIC-guaranteed debt up to its issuance cap.

There will be no cost for participating in the new non-guaranteed debt program.

Although the FDIC received many comments at the time the TLGP was initially launched to permit unrestricted ability to issue non-guaranteed debt, it declined to do so. At the FDIC board meeting on March 17, 2009, staff and Board members noted the current goal of facilitating a transition from reliance on the FDIC guarantee to more normalized liquidity transactions. They discussed their earlier concerns regarding adverse selection undermining efforts to stabilize the banking and credit markets, specifically institutions obtaining the perceived benefit of Program participation without paying any assessment for the issuance of non-guaranteed debt. The adverse selection concerns have been superseded by efforts to transition from perceived reliance on FDIC-guaranteed debt.

Fees and Assessments

As discussed above, the amended Program is accompanied by new surcharges for the issuance of FDIC-guaranteed debt after April 1, 2009 if that debt has a maturity (or conversion date) of one year or longer, or is issued under the extended DGP. Income from these surcharges will be deposited in the DIF.

Other fees and assessments collected under the TLGP are segregated from the DIF and held to cover any losses under the TLGP. If these segregated amounts exceed TLGP losses, they will be deposited in the DIF. If the fees and assessments collected under the TLGP are insufficient to cover the cost of the program, the FDIC will impose an emergency special assessment on insured depository institutions. All financial institutions whose deposits are insured by the FDIC will be subject to any special assessment, irrespective of their participation in the TLGP. Many community banks and banks not owned by holding companies expressed concern during the initial rulemaking comment process that upon a shortfall, insured depository institutions would bear a disproportionate burden because holding companies would not be subject to the special assessment.

The FDIC has taken a series of actions as a result of concerns regarding the inequity of the TLGP fee system. First, the FDIC created a surcharge for certain holding companies participating in the DGP. More recently, the FDIC has sought legislative changes to the emergency special assessment provisions of the Federal Deposit Insurance Act, seeking assessment authority over holding companies.

At the same time, the DIF is experiencing a low reserve rate. On February 27, 2009, the FDIC approved an interim rule to impose a special emergency assessment of 20 basis points on all IDIs. The banking industry responded with concerns that the proposed assessments would impede lending activity. In proposing the amendments to the DGP, the FDIC noted three goals. The first was to enhance equity between the participating institutions (those paying the surcharge) and the IDIs (those paying for any shortfall in the program). The second is to replenish the DIF, and potentially reduce the amount of the proposed emergency special assessment announced on February 27, 2009. Finally, the surcharge is intended to wean participating institutions from the DGP by reducing the subsidy currently provided by the FDIC in the form of lower cost of funds.

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