News Bulletin

February 19, 2009

FDIC to Extend TLGP; FDIC-guaranteed Debt Exempt from SEC and OCC Registration

On February 10, 2009, the FDIC announced plans to extend the Temporary Liquidity Guarantee Program's Debt Guarantee Program final debt issuance date from June 30, 2009 to October 31, 2009. Details and updated rules from the FDIC are expected shortly.

As described in our Client Alert "FDIC Approves Temporary Liquidity Guarantee Program Final Rule," FDIC-guaranteed debt issued with a maturity no later than June 30, 2012, is exempt from the registration requirements of the Securities Act of 1933 (Securities Act). Recently, the Office of the Comptroller of the Currency (OCC) has confirmed that the exemption from Securities and Exchange Commission (SEC) registration based on the FDIC guarantee exempts FDIC-guaranteed debt from the registration requirements of Part 16 of the OCC's regulations.[1] As described in more detail below, national banks regulated by the OCC may wish to review their current debt programs to maximize their borrowing flexibility.

The TLGP was established on October 14, 2008 by the FDIC in a coordinated effort with the Federal Reserve Board and the U.S. Department of the Treasury (Treasury) to unfreeze inter-bank lending, encourage lending more broadly and enhance confidence in the banking system. Please see our coverage of these coordinated efforts and the current financial crisis at Financial Crisis Legal Updates and News.

Temporary Liquidity Guaranty Program (TLGP)

The TLGP consists of two programs, one to guarantee newly issued, senior unsecured debt (Debt Guarantee Program) and the second to insure the full balance in noninterest-bearing transaction accounts (Transaction Account Guarantee Program). Eligible entities were required to notify the FDIC by December 5, 2008 of their decision to opt-out of either or both programs, and a list of entities that opted out is available on the FDIC's TLGP website at www.fdic.gov/tlgp. The Debt Guarantee Program provides an FDIC guarantee for qualifying senior unsecured debt issued by participating entities.

Program Extension

On February 10, 2009, in connection with the release of the Financial Stability Plan by Treasury, the FDIC announced its intention to extend the TLGP to October 31, 2009. The Debt Guarantee Program currently provides FDIC-guaranteed debt can be issued through June 30, 2009.[2] It is anticipated that the FDIC Board will act quickly to approve rulemaking amending the current TLGP rules and extending the provisions of the Debt Guarantee Program.

Currently, a participating entity's ability to issue guaranteed debt under the Debt Guarantee Program is capped at 125% of the par value of that institution's outstanding senior unsecured debt as of September 30, 2008 that was

[1] OCC Interpretive Letter No. 1108 (January 26, 2009), available at http://www.occ.treas.gov/interp/jan09/int1108.pdf.
[2] The Transaction Account Guarantee Program currently covers eligible deposits through December 31, 2009.

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scheduled to mature by June 30, 2009. If a participating entity that is an insured depository institution did not have any senior unsecured debt (other than federal funds) outstanding on September 30, 2009, its issuance cap is 2% of total outstanding liabilities. Some institutions must apply to the FDIC to determine their issuance cap, including: (1) a participating entity, other than an insured depository institution, that did not have any senior unsecured debt (other than federal funds) outstanding on September 30, 2009, (2) an institution that becomes an eligible entity upon application to the FDIC and (3) an institution that becomes an eligible entity after October 13, 2008.

When launched, the program was designed to protect an eligible entity's ability to refinance outstanding debt by enhancing the debt with a government guarantee. The program was authorized under the FDIC's authority to prevent systemic risk. As required by statute, Treasury, after consultation with the President and the Federal Reserve Board, made a comparable systemic risk determination. Following the bankruptcy of Lehman Brothers and the events of September 2008, credit markets froze and inter-bank lending crept to a near-standstill. Addressing the need to provide near-term liquidity for certain financial institutions, the Debt Guarantee Program was designed solely to provide for the refinancing of debt maturing near-term. The duration of the program was limited to a brief window intended to rebuild confidence in the banking system without creating a long-term safety net for eligible financial institutions. We believe that numerous factors, including the continued weakness of the banking sector and the overall economy, continued reports of diminished lending levels and the limited success of some other government programs influenced the FDIC's decision to extend the Debt Guarantee Program.

By extending the program, the TLGP will be providing participating entities the opportunity to refinance maturing debt over a longer period. As a result of the extension, the issuance cap may similarly be adjusted to the amount of senior unsecured debt outstanding as of September 30, 2008, maturing no later than October 31, 2009. This would align the issuance limit with the period over which the debt could be issued.

When available, the FDIC will publish additional information on its TLGP website at www.fdic.gov/tlgp.

Securities and Exchange Commission Exemption

On November 24, 2008, in response to a request by the FDIC, the staff of the SEC issued a letter confirming that certain FDIC-guaranteed debt issued under the Debt Guarantee Program is exempt from registration under the Securities Act.[3] Under the FDIC's TLGP rule, FDIC-guaranteed debt issued under the Debt Guarantee Program is backed by the full faith and credit of the United States and the FDIC provides a guarantee of timely payment of interest and principal. The guarantee, however, only extends through June 30, 2012; debt issued with longer maturities loses the benefit of the guarantee after that date. The SEC letter confirms that FDIC-guaranteed debt maturing no later than June 30, 2012 is debt "guaranteed by an instrumentality of the United States." Section 3(a)(2) of the Securities Act exempts from the Securities Act registration requirements a security that is guaranteed by an instrumentality of the United States.

Office of the Comptroller of the Currency Exemption

Section 3(a)(2) contains a number of exemptions from SEC registration, including an exemption from registration for bank securities. Because banks are subject to the substantive regulation of banking regulators, they were exempted from the registration requirements of the securities laws. The OCC, however, has an alternate registration requirement for the national banks it regulates, at 12 C.F.R. 16 (Part 16). Part 16.5 provides an exemption from the OCC registration requirements if a security is exempt from the SEC's registration requirement. To qualify for the Part 16.5 exemption from OCC registration, the exemption from SEC registration

[3] Letter dated November 24, 2008 from the Office of Chief Counsel of the Division of Corporation Finance re: Debt Guarantee Program component of the Temporary Liquidity Guarantee Program of the Federal Deposit Insurance Corporation Incoming letter dated November 24, 2008 is available at http://www.sec.gov/divisions/corpfin/cf-noaction/2008/fdic112408.htm.

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must be based on an SEC exemption "other than section 3(a)(2) (exemption for bank securities) and section 3(a)(11) (exemption for intrastate offerings)."

In its Interpretive Letter, the OCC confirmed that an SEC exemption based on part of Section 3(a)(2), other than the bank securities exemption, would exempt a security from the registration requirements of Part 16. The SEC exemption from registration available for FDIC-guaranteed debt is based on the Section 3(a)(2) exemption for securities guaranteed by an instrumentality of the United States; a provision other than the bank securities exemption. As a result, FDIC-guaranteed debt issued under the Debt Guarantee Program that matures no later than June 30, 2012, and is therefore considered guaranteed by an instrumentality of the United States, is also exempt from the registration requirements of the OCC.

National banks, in reliance on the Interpretive Letter, may issue FDIC-guaranteed debt, maturing no later than June 30, 2012, exempt from the registration requirements of both the SEC and the OCC.

Conclusion

The issuance market for FDIC-guaranteed debt has been active since the final rules were released in November 2008. In many cases issuers are utilizing existing debt programs, modified slightly to include required FDIC disclosures and TLGP descriptions. In light of the extension of the program, bank issuers and national banks may wish to consider enhancing current programs to issue SEC-exempt and, for national banks, OCC-exempt debt, with more flexible terms than would be permitted absent the FDIC guarantee.

Additionally, potentially eligible entities that were not automatically covered by the TLGP and have considered applying to the FDIC for "participating entity" status may, given the expected extension of the program, wish to re-evaluate the benefits of seeking qualification to issue FDIC-guaranteed debt.

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