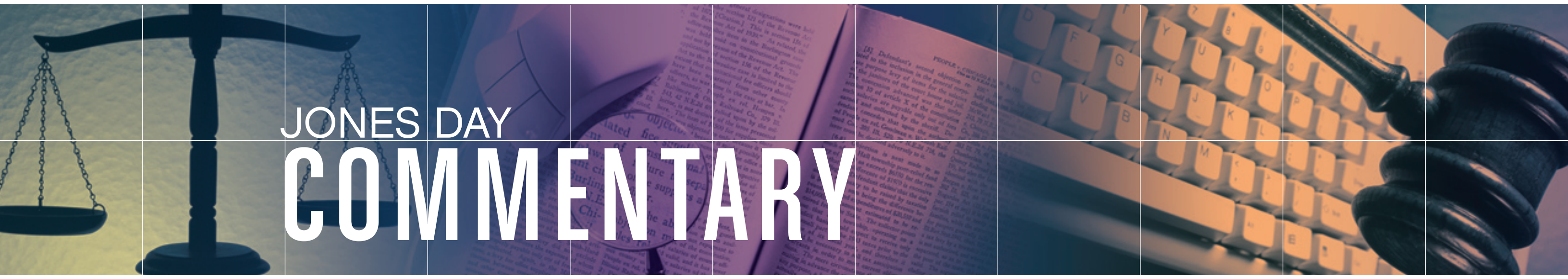
OCTOBER 30, 2008



THE FDIC TEMPORARY LIQUIDITY GUARANTEE PROGRAM: OPPORTUNITIES TO ENHANCE LIQUIDITY AND FUNDING

The FDIC and the Secretary of the Treasury, after consultation with the President, have determined that systemic risk exists in the financial system, and on October 14, the FDIC announced (the "Announcement") a "Temporary Liquidity Guarantee Program" (the "TLG"), and the Treasury announced its TARP Capital Purchase Program ("CPP"). Following four public conference calls on the TLG, the FDIC issued an interim final rule (the "Interim Rule") on October 23 as Part 370 to the FDIC's regulations. The Interim Rule remains subject to a 15-day comment period ending November 13, and the terms of the Program may change. Further changes would not be surprising.

The TLG consists of two parts:

- A temporary guarantee (the "Debt Guarantee") of newly issued unsecured senior eligible debt issued by eligible entities (the "Debt Guarantee Program"); and
- A temporary guarantee (the "Transaction Account Guarantee") of noninterest-bearing transaction accounts maintained at eligible FDIC-insured depository institutions (the "Transaction Account Guarantee Program").

The TLG is intended to "preserve confidence and encourage liquidity in the banking system to ease lending to creditworthy" customers. The FDIC does not seek to encourage "innovative, exotic or complex funding structures or to protect lenders who make high risk loans in hopes of high returns."

These Programs provide greater liquidity and funding opportunities, and they are complementary to the CPP. The Programs require immediate evaluation.

ELIGIBLE ENTITIES

The FDIC will control the initial and continued eligibility for the TLG in consultation with each entity's primary federal regulator. "Eligible Entities" include

FDIC-insured U.S. depository institutions and their eligible U.S. holding companies, *provided* thrift holding company activities are limited to those permitted to financial holding companies under Section 4(k) of the Bank Holding Company Act of 1956, as amended. All U.S. branches of foreign banks are excluded. Affiliates of Eligible Entities may apply for participation in the Debt Guarantee Program. The FDIC may approve such affiliate upon the positive recommendation of the entity's appropriate federal banking agency, and then such affiliate's eligible debt would be covered by the FDIC's Debt Guarantee.

OPTING OUT

Eligible Entities automatically are covered under both Programs at no cost from October 14, 2008, to November 12, 2008. An Eligible Entity may opt out of the Debt Guarantee Program, the Transaction Account Guarantee Program, or both, provided it acts on or before 11:59 p.m. EST on November 12, 2008. Failure to opt out will result in continued coverage and the imposition of assessments under each Program. If an Eligible Entity elects to opt out prior to November 12, then coverage will terminate on the date it informs the FDIC of its decision to opt out. The decision to remain in either Program or to opt out of either, however, is irrevocable and final. Apparently, Eligible Entities also may opt out of the Debt Guarantee Program for future participation after November 12, 2008.

All Eligible Entities within a U.S. bank holding company group must make the same decision regarding participation in each Program. If one Eligible Entity opts out of a Program, all members of its holding company group will be deemed to have opted out of that same Program.

DISCLOSURES

The FDIC will publish lists of organizations that opt out of the TLG, in whole or in part. Each participant in the Debt Guarantee Program must disclose in writing to any interested lender or debt purchaser whether the offered debt is FDIC-guaranteed, and disclose on the instruments that the debt is "guaranteed by the FDIC." Additionally, each insured depository institution must post a prominent notice in the lobby of its main office and each branch on or before December 1, 2008, that clearly indicates whether it has opted out of the Transaction Account Guarantee Program. Any notice by a participant in the Transaction Account Guarantee Program must state that the bank is participating in the Transaction Account Guarantee Program and that funds held in noninterest-bearing transaction accounts are fully insured by the FDIC. If an institution reclassifies or transfers funds from accounts eligible for the Transaction Account Guarantee, whether by sweep arrangements or otherwise, into ineligible accounts, then the institution must notify affected customers and advise them in writing that the Transaction Account Guarantee no longer applies.

THE DEBT GUARANTEE PROGRAM

The Debt Guarantee covers a limited amount of senior unsecured debt issued by an Eligible Entity during the period from October 14, 2008, to June 30, 2009. This is helpful to banks, and may be especially helpful to bank holding companies whose liquidity has been adversely affected by losses at their bank subsidiaries that have reduced the amounts available for dividends from the banks to their parent holding companies. In order to take advantage of the Debt Guarantee Program, the bank holding company must have had outstanding unsecured senior debt as of September 30, 2008.

The FDIC's Debt Guarantee will only cover debt that:

- Is unsecured;
- Is evidenced by a written agreement;
- Has a fixed and specified principal amount to be paid on demand or on a certain date;
- Is noncontingent; and
- Is not subordinated by its terms to any other liability.

Examples of debt that may qualify include federal funds purchased, commercial paper, unsubordinated unsecured notes, certificates of deposit and Eurodollar deposits standing to the credit of a bank (including regulated foreign depository institutions), and bank deposits in an international banking facility of an FDIC-insured institution. Such debt may be denominated in either U.S. dollars or foreign currencies.

The Interim Rule eliminated certain debt from the Announcement and states that the following obligations of Eligible Entities are *not* covered by the FDIC's Debt Guarantee:

- Guarantees or other contingent liabilities;
- Derivatives and derivative-linked products;
- Debt paired with any other security;
- Convertible debt;
- Capital notes;
- Negotiable certificates of deposit; and
- Amounts swept from individual, partnership, or corporate accounts at FDIC-insured institutions into deposits denominated in foreign currencies and Eurodollar deposits.

In contrast to the Announcement, the Interim Rule provides that the Debt Guarantee does *not* apply to the unsecured portion of secured debt issued by Eligible Entities. For example, the unsecured portion of a repurchase agreement will not be covered by the Debt Guarantee. Loans by Eligible Entities to their affiliates also are excluded.

The FDIC's Debt Guarantee contains additional conditions. The debt must be "newly issued" to qualify for the Debt Guarantee. "Newly issued" debt must be issued from October 14, 2008, to the earlier of June 30, 2009, or the date the Eligible Entity opts out of the Debt Guarantee Program, and may not be used to prepay existing debt that is not FDIC-guaranteed.

The Debt Guarantee should be backed by the full faith and credit of the United States under Section 15(d) of the Federal Deposit Insurance Act (the "FDI Act"). Accordingly, any such debt should have a zero risk weight when held by another bank or bank holding company.

THE DEBT GUARANTEE PROGRAM CAP

The Debt Guarantee is limited to newly issued senior unsecured debt in an aggregate principal amount up to 125 percent of the aggregate par value of each Eligible Entity's outstanding senior unsecured debt as of September 30, 2008, that is scheduled to mature on or before June 30, 2009 (the "Cap"). An Eligible Entity may not include debt extended to affiliates or institution-affiliated parties in determining the Cap. Committed, but undrawn, unsecured federal fund borrowing lines are not included in determining the Cap.

Each participating entity must calculate, report, and certify its Cap (even if zero) to the FDIC via FDIC*connect* no later than November 12, 2008. The Cap will eliminate the Debt Guarantee Program's coverage for Eligible Entities that did not have any senior unsecured indebtedness outstanding as of September 30, 2008. Such Eligible Entities may apply to the FDIC to have some debt covered by the Debt Guarantee Program, but the Interim Rule does not specify how these applications will be considered or how the Debt Guarantee Cap will be determined in such cases. The FDIC is not obligated to grant any such request. Finally, the FDIC has reserved the right to make further exceptions or otherwise restrict or limit the Cap for certain Eligible Entities, and to impose other requirements.

A participating Eligible Entity may issue guaranteed debt until June 30, 2009, unless a participating institution opts out earlier. After then, the Debt Guarantee is no longer available for new debt issuances, although the Debt Guarantee will continue to cover eligible outstanding debt until the earlier of June 30, 2012, or such debt's maturity. A participant generally may not select which newly issued Eligible Debt is guaranteed debt, and all eligible senior unsecured debt issued from October 14, 2008, to June 30, 2009, will be guaranteed in an amount up to the Cap. Eligible debt can be issued without the Debt Guarantee only after the Cap has been reached, unless the eligible entity selects the "Nonrefundable Fee Option," and pays a nonrefundable fee of 37.5 basis points of all senior unsecured debt outstanding (exclusive of debt owed to affiliates) on September 30 that matures before June 30, 2009.

THE TRANSACTION ACCOUNT GUARANTEE PROGRAM

The FDIC's Transaction Account Guarantee covers 100 percent of the funds in noninterest-bearing transaction deposit accounts where the depository institution does not reserve any right to require advance notice of withdrawals maintained at, and funds represented by official checks issued by, participating Eligible Entities that are FDIC members. This coverage is in addition to the up to $250,000 of FDIC insurance coverage available from October 3, 2008, through December 31, 2009, under Section 136 of the Emergency Economic Stabilization Act of 2008 ("EESA"). The Transaction Account Guarantee is intended to stem withdrawals of funds from corporate payroll and similar accounts that often exceed the $250,000 insured limit.

The FDIC's Transaction Account Guarantee covers funds swept from noninterest-bearing transaction deposit accounts into noninterest-bearing savings accounts. Otherwise, the FDIC will apply its recently adopted rules to determine coverage of accounts with sweep features. All other accounts will remain subject to the FDIC's normal insurance levels, including certificates of deposit, MMDA and NOW accounts, and other interest-bearing accounts. The Interim Rule seeks comment on whether NOW accounts should be included under the Transaction Account Guarantee Program. The Transaction Account Guarantee Program continues until the earlier of December 31, 2009, or the date the Eligible Entity opts out.

Deposit arrangements that provide for credits for eligible deposits against charges otherwise collected by the depository institution, including interest on loans, will be covered by the Transaction Account Guarantee, and must continue to comply with Federal Reserve Regulations D and Q.

FEES

Beginning November 13, 2008, all participating Eligible Entities must pay special assessments to the FDIC to cover the costs associated with the TLG. Under the Debt Guarantee Program, participants must pay an assessment equal to 75 basis points per annum *times* all eligible guaranteed debt issued from October 14, 2008, *times* the term of the debt (June 30, 2012, will be used for all debt maturing thereafter). The assessment will not be reduced or refunded if the guaranteed debt is prepaid. No fee should be due if an Eligible Entity with a zero Cap does not opt out of the Debt Guarantee Program.

If a participant issues debt exceeding its Cap and misrepresents that such debt has been guaranteed under the Debt Guarantee Program, then it must pay the FDIC an increased assessment rate of 150 basis points for all outstanding guaranteed debt, not just the debt exceeding the Cap, and may be subject to regulatory enforcement actions.

All participants in the Transaction Account Guarantee Program will pay an assessment of 10 basis points per annum on all deposit amounts exceeding $250,000 held in noninterest-bearing transaction accounts, including amounts held in covered sweep accounts. This assessment will be based upon deposit amounts reflected on a bank's quarterly Call Reports or TFRs and will be collected with the FDIC's quarterly deposit insurance assessments.

The TLG is expected to pay for itself. If the assessments collected under the TLG are insufficient to cover its cost, then an additional special assessment will be collected from all FDIC members, including nonparticipating FDIC-insured institutions. Any excess assessments will be deposited into the FDIC's Deposit Insurance Fund and will not be refundable.

ADMINISTRATION, ENFORCEMENT, AND CLAIMS

The issue of debt subject to the Debt Guarantee requires the participating entity to:

- Be bound by the Debt Guarantee Program and to pay the FDIC assessments;
- Comply with FDIC requests for information about participation in the Debt Guarantee Program;
- Permit FDIC on-site reviews and oversight with respect to compliance with the TLG;
- Comply with FDIC decisions regarding the TLG; and
- Maintain appropriate books and records.

The Debt Guarantee will be effective only upon notice to the FDIC of the issuance of eligible debt certified by the issuer's CFO, and the payment of the appropriate assessments to the FDIC. Failure to timely pay TLG assessments will result in the same penalties as a failure to timely pay FDIC insurance assessments, and could result in the loss of the Debt Guarantee.

The FDIC, after consultation with a participant's appropriate federal banking agency, may terminate a participant's future participation in the TLG. Participation by eligible holding companies and their FDIC-approved affiliates will terminate upon such holding companies' no longer having an operating FDIC member subsidiary. Upon termination, the affected entity must notify its customers and lenders of such termination.

Violations of the TLG regulations are subject to the enforcement powers of the FDIC and each participant's appropriate federal banking agency under Section 8 of the FDI Act, including civil money penalties, and the enhanced enforcement authorities provided by Section 126 of EESA. These are in addition to penalty assessment rates applicable to debt misrepresented as covered by the Debt Guarantee.

Lastly, the FDIC regulations contain procedures for making claims for payment of the TLG guarantees upon the failure of FDIC-insured institutions, and upon the bankruptcy of holding companies and their affiliates that are participants in the Debt Guarantee Program.

OPPORTUNITIES

The Interim Rule offers opportunities for banks and thrifts and their U.S. parent holding companies. Participants in the Debt Guarantee Program will have their eligible debt guaranteed by the FDIC, which should improve their access to, and pricing of debt in, the capital markets. The Transaction Account Guarantee Program will help preserve and promote low-cost transaction deposits that often are attributable to a bank's most valuable customer relationships. Those who do not participate in the TLG may be at a competitive disadvantage, especially compared to those who participate in the Transaction Account Guarantee Program and use it as a competitive weapon. Deposits are prime determinants of the values of banking organizations.

Where Eligible Entities have no availability under the Cap, it does not appear advisable to opt out of the Debt Guarantee Program owing to the negative implications of being shown as a nonparticipant. There are no fees payable under the Debt Guarantee Program if no debt is subject to the Debt Guarantee. Opting out of the Debt Guarantee Program is irrevocable. In contrast, those with a zero or low Cap and that remain in the Debt Guarantee Program may be able to participate, if this Program changes or if the FDIC grants a special cap to that entity or its eligible affiliates.

Other considerations include:

- The Transaction Account Guarantee Program should be attractive to all banks.
- Various depositors may find the Transaction Account Guarantee Program more important than interest in today's environment, especially where deposit credits are used by the depository institution to absorb such depositors' bank fees or reduce the interest costs on their loans from the bank.
- The TLG should considerably help parent bank holding companies that rely upon commercial paper and medium-term notes, and their depository institution subsidiaries that issue senior unsecured bank notes.
- The TLG is in addition to the Federal Reserve's Commercial Paper Funding Facility or "CPFF," and other commercial paper programs, and the respective costs and terms of the TLG and the CPFF should be considered. For example, if a bank holding company participates in the Debt Guarantee Program and reaches the Cap, it may want to issue unsecured commercial paper pursuant to the CPFF, since the Debt Guarantee Program would not cover such commercial paper.
- This action should help unfreeze the inter-bank lending market and reduce the cost of such lending and improve availability for those who were borrowers in this market on September 30, 2008, or who obtain relief from the FDIC's Cap. The zero risk weighting of obligations covered by the TLG should further reduce the cost of inter-bank lending.
- Securities and bank disclosures will need to be carefully made and monitored.
- The Debt Guarantee Program generally does not apply to instruments that are capital for bank regulatory purposes.
- Other recent FDIC actions to expand insurance coverage on mortgage servicing accounts and simplify the treatment of FDIC insurance coverage of revocable trusts, as well as FDIC pass-through insurance coverage, remain important and should be considered in structuring deposits and maintaining deposit relationships.

A number of implementation issues remain, including the combined effect of the Debt Guarantee and the proposed changes to the FDIC's deposit insurance assessment scheme. In the current environment, the TLG and other recent regulatory changes offer financial institutions considerable opportunities to design attractive debt and deposit offerings. Where the TLG does not fit a particular circumstance or where changes are desirable, we suggest approaching the FDIC and seeking clarification or relief, especially during the comment period on the Interim Rule.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Chip MacDonald
1.404.581.8622
cmacdonald@jonesday.com

Christopher M. Kelly
1.216.586.1238
1.212.326.3438
ckelly@jonesday.com

Kevyn D. Orr
1.202.879.5560
korr@jonesday.com

Brett P. Barragate
1.216.586.7205
1.212.326.3446
bpbarragate@jonesday.com

The authors would like to thank Sean Evans and Ning Zhang for their assistance on this Commentary.