LUSE GORMAN POMERENK & SCHICK

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

5335 WISCONSIN AVENUE, N.W., SUITE 400 ■ WASHINGTON, D.C. 20015 ■ 202.274.2000 T ■ 202.362.2902 F ■ WWW.LUSELAW.COM

Volume 14, Number 9 **December 1, 2008**

Federal Deposit Insurance Corporation Approves Final Rule for Temporary Liquidity Guarantee Program

The Federal Deposit Insurance Corporation ("FDIC") recently approved a final rule implementing the Temporary Liquidity Guarantee Program ("TLGP"). The TLGP has two guarantee programs for qualifying financial institutions ("QFIs"): one that guarantees certain newly issued senior unsecured debt of insured depository institutions and most of their U.S. holding companies ("Debt Guarantee Program"), and another that guarantees noninterest-bearing transaction accounts, and certain interest-bearing accounts, at insured depository institutions ("Transaction Account Guarantee Program").

All QFIs must file with the FDIC by December 5, 2008 whether or not they intend to participate in TLGP. In other words, both participating QFIs and those opting out of the TLGP must file with the FDIC by the December 5, 2008 deadline.

Institutions electing *not* to participate in either TLGP program are required to file an Election Form through FDIC*connect* no later than 11:59 p.m. on December 5, 2008 ("Election Deadline"). *Participating* QFIs must also file an election form by the Election Deadline providing, among other information, the amount of their outstanding senior unsecured debt as of September 30, 2008. Participating QFIs must execute the Master Agreement within 5 days of filing the Election Form. QFIs that fail to file an Election Form by the Election Deadline will be considered to have opted into the TLGP, but may be unable to participate fully in the programs.

The TGLP was discussed in our Newsletter dated October 16, 2008. Since then, the FDIC has issued an interim rule and an amended interim rule on the TLGP, and both of these rules solicited comments on the program. The final rule amends the interim rules in several significant ways, including the following:

Debt Guarantee Program:

- The federal government's debt guarantee will be triggered by payment default rather than bankruptcy or receivership. This change is intended to increase the value of the debt guarantee help entities lower their funding costs.

- Short-term debt having a stated maturity of one month or less will not be included in the program. The final rule provides additional clarification as to eligible debt instruments, excluding certain CDs, revolving credit agreements, and certain "exotic or complex" funding structures such as derivatives or derivative-linked products.

- The cost to participate in the Debt Guarantee Program—originally fixed at 75 basis points on an annualized basis for all guaranteed debt—has been changed to a sliding scale fee depending on length of maturity. Fees will range from 50 basis points on debt of 180 days or less, to a maximum of 100 basis points on debt of one year or longer.

- QFIs that had no qualifying senior unsecured debt outstanding at September 30, 2008, can participate in the program up to a guarantee cap of 2% of consolidated liabilities as of September 30, 2008.

- An insured depository institution may, with written notice to the FDIC, issue debt under its guarantee limit, as well as its holding company's limit, as long as guaranteed debt issued by both entities does not exceed their combined debt limits.

Transaction Account Guarantee Program:

The final rule's most noteworthy change to the Transaction Account Guarantee Program is the inclusion of NOW accounts which pay an interest rate of 0.5% or less and interest-bearing Lawyers Trust Accounts as noninterest-bearing transaction accounts for purposes of the program. The final rule also provides more specific disclosure requirements regarding whether an institution participates in the Transaction Account Guarantee Program and the Debt Guarantee Program.

Temporary Liquidity Guarantee Program--Brief Summary of Procedures, Fees and Disclosures

Opt-Out and Opt-In Options; Filing of Election Form. From October 14, 2008 through December 5, 2008, each QFI is a participating entity in the Debt Guarantee Program and the Transaction Account Guarantee Program, unless the QFI opts out no later than 11:59 p.m., Eastern Standard Time, December 5, 2008 ("Election Deadline"). The choice to opt out of either program is irrevocable once made (except that, in the case of a merger between two QFIs, the resulting entity may revoke a prior decision to opt out). Similarly, a decision not to opt out by the Election Deadline is irrevocable.

All QFIs, regardless of whether they will participate in either program, must submit a completed FDIC Temporary Liquidity Guarantee Program Election Form though FDIC*connect* prior to the Election Deadline. QFIs must elect whether to participate or opt out of each program. Any QFI that *does not* opt out of the Debt Guarantee Program must report on its Election Form the amount of outstanding senior unsecured debt as of September 30, 2008, that is scheduled to mature on or before June 30, 2009, for purposes of determining the maximum amount of guaranteed debt under this program. QFIs that do not opt out of the Debt Guarantee Program must also attest on the Election Form that they agree to be bound by and comply with the terms of the Master Agreement for the program, which must be executed within 5 days of executing the Election Form. The Master Agreement, Election Form and instructions for completing the form are on the FDIC's website at http://www.fdic.gov/regulations/resources/TLGP/index.html. If you have any questions about completing the Election Form, please contact one of the partners of this firm listed at the end of this Newsletter.

All QFIs within a U.S. bank holding company or a savings and loan holding company structure will be bound by the decision of any entity within the structure. That is, if any one member of the holding company group opts out, all entities within the same group are also deemed to have opted out of that component of TLGP.

Participating QFIs electing to issue certain non-guaranteed senior unsecured debt before issuing the maximum amount of guaranteed debt, as discussed below, must also elect to do so through FDIC*connect* on or before the Election Deadline.

The FDIC will maintain control over eligibility in consultation with the institution's primary federal regulator. Institutions that participate in TLGP will be subject to enhanced supervisory oversight to prevent rapid growth or excessive risk-taking.

Initial Fee Assessment Dates

- No QFI will be assessed a fee for the Transaction Account Guarantee Program for the period from October 14, 2008, to November 12, 2008.

- QFIs that opt out of the Transaction Account Guarantee Program will not be assessed any fees under the program.

- QFIs that opt out of the Debt Guarantee Program will not be assessed any fees under the program.

- QFIs that do not opt out of the Debt Guarantee Program will be assessed program fees: (1) beginning on November 13, 2008, on all senior unsecured debt, other than overnight debt, issued by it on or after October 14, 2008, that was still outstanding on November 13, 2008; (2) beginning on November 13, 2008, on all senior unsecured debt, other than overnight debt, issued by it on or after November 13, 2008, and before December 6, 2008; and (3) beginning on December 6, 2008, on all senior unsecured debt issued by it on or after December 6, 2008.

Required Disclosures

- <u>*Debt Guarantee Program*</u>. All written materials relating to guaranteed debt issued by participating QFIs between December 19, 2008 and June 30, 2009 must include a specific disclosure statement provided by the FDIC. This disclosure statement must also be provided in all written materials underlying any senior unsecured debt issued between December 19, 2008 and June 30, 2009, that is not covered by the FDIC guarantee.

- <u>*Temporary Liquidity Guarantee Program.*</u> Each FDIC insured institution that offers noninterest-bearing transaction accounts must post a prominent notice in the lobby of its main office, each domestic branch, and, if it offers Internet deposit services, on its website, clearly indicating *whether or not* the entity is participating in the Transaction Account Guarantee Program. If the institution participates in the Transaction Account Guarantee Program, the notice must also state that funds held by the institution in noninterest-bearing transaction accounts are guaranteed in full by the FDIC. The FDIC has provided sample notices for institutions that are participating or not participating in the program. An institution may supplement the sample notices with explanations as to why the institution decided to participate or not to participate.

Non-Applicability of Executive Compensation and Corporate Governance Requirements. Because the TGLP is not being implemented under the Emergency Economic Stabilization Act of 2008, the executive compensation and corporate governance requirements applicable to Treasury's TARP programs do not apply to participants in the TGLP.

Summary of Debt Guarantee Program

The Debt Guarantee Program covers senior unsecured debt issued on or after October 14, 2008, and on or before June 30, 2009. The guarantee will end at 11:59 p.m. on June 30, 2012. Under the final rule, the debt guarantee will be triggered by payment default rather than bankruptcy or receivership.

Under the final rule, "senior unsecured debt" means any unsecured borrowing evidenced in writing that has a specified and fixed principal, is not by its terms subordinated to any other liability, is noncontingent and contains no embedded options, forwards, swaps, or other derivatives. Debt issued after December 5, 2008, must also have a stated maturity of more than one month. The final rule states that senior unsecured debt includes federal funds purchased, promissory notes, commercial paper, unsubordinated unsecured notes, including zero-coupon bonds ***and certificates of deposit denominated in U.S. dollars owed to an insured depository institution, credit union or foreign bank (but not CDs deposited as an agent)***.

Senior unsecured debt does not include obligations from guarantees or other contingent liabilities, debts that are paired or bundled with other securities, convertible debt, capital notes, the unsecured portion of otherwise secured debt, negotiable certificates of deposit, revolving credit agreements, structured notes, instruments that are used for trade credit, retail debt securities, and any funds regardless of form that are swept from individual, partnership, or corporate accounts held at depository institutions.

The guarantee will allow a QFI to roll over maturing senior debt into new issues backed by the FDIC. However, a QFI cannot use guaranteed debt to pay off debt that is not FDIC guaranteed. Thus, a QFI cannot pre-pay a debt to be replaced by a guaranteed debt.

The amount of debt covered by the guarantee may not exceed 125% of the senior unsecured debt that was outstanding as of September 30, 2008 and that was scheduled to mature before June 30, 2009. If a QFI that is also an insured depository institution had either no senior unsecured debt or only had federal funds purchased (as defined in the rule) outstanding on September 30, 2008, the guaranteed amount may not exceed two percent of its consolidated total liabilities as of September 30, 2008. QFIs other than an insured depository institution that had no senior unsecured debt outstanding on September 30, 2008, may seek to have some amount of debt covered by the debt guarantee program on a case-by-case basis. If an entity becomes an eligible entity after October 13, 2008, the FDIC will establish the entity's debt guarantee limit at the time of such designation. The FDIC may also make exceptions to the established guarantee limits.

A QFI that is also an insured depository institution may, with written notice to the FDIC, issue debt under its guarantee limit as well as under its holding company's limit, as long as guaranteed debt issued by both entities does not exceed their combined debt limits.

QFIs that do not opt out of the debt guarantee program on or before the Election Deadline will be assessed fees as follows:

- 50 basis points for debt with a maturity of 180 days or less;
- 75 basis points for debt with a maturity of 181-364 days; and
- 100 basis points for debt with a maturity of 365 days or greater.

For debt maturing after June 30, 2012, June 30, 2012 will be used as the maturity date.

If a participating QFI that issues guaranteed debt represents that the amount guaranteed by the FDIC exceeds its actual debt guarantee limit, the applicable assessment rate(s) for all of its outstanding guaranteed debt will be increased by 100 percent. The institution also may be subject to enforcement action, including civil money penalties.

Participating QFIs must notify the FDIC on or before the Election Deadline if they want to reserve the right to issue long term (*i.e.*, having a maturity beyond June 30, 2012), *non-guaranteed* debt. A QFI making this election must pay the FDIC a nonrefundable fee equal to 37.5 basis points times the amount of the entity's senior unsecured debt that had a maturity date on or before June 30, 2009, and was outstanding as of September 30, 2008. If the entity had no such debt outstanding as of September 30, 2008, the fee will equal 37.5 basis points times the amount of the entity's debt guarantee limit as otherwise established under the rule.

Summary of Transaction Account Guarantee Program

Under the Transaction Account Guarantee Program, the FDIC will provide unlimited insurance coverage for noninterest-bearing transaction accounts. These are mainly payment processing accounts such as payroll accounts used by businesses. The noninterest-bearing transaction account guarantee will end on December 31, 2009.

Participating QFIs will be assessed an annual fee of 10 basis points for amounts in guaranteed accounts that exceed $250,000. No additional fee will be assessed for amounts that are otherwise insured (currently, $250,000 or less). For example, no fee would be charged if a trustee places $2 million of funds in a noninterest-bearing transaction account but no beneficiary's share exceeds $250,000.

Under the final rule, "Noninterest-bearing transaction accounts" covered by the guarantee include the following: traditional checking accounts that allow for unlimited numbers of deposits and withdrawals at any time and do not pay interest; NOW accounts with an interest rate of 0.5% or less; and interest-bearing Lawyers Trust Accounts.

The unlimited coverage for such accounts under the program is in addition to and separate from the general existing FDIC coverage. For example, in the case of a customer with a $500,000 noninterest-bearing transaction account and a $250,000 certificate of deposit in a bank, the FDIC would fully insure the total of $750,000.

* * *

For further details regarding the above-described programs, please contact any of the persons listed below.

Eric Luse	■	(202) 274-2002
John J. Gorman	■	(202) 274-2001
Alan Schick	■	(202) 274-2008
Larry Spaccasi	■	(202) 274-2037
Kip Weissman	■	(202) 274-2029
Gary A. Lax	■	(202) 274-2031