CLEARY GOTTLIEB

NEW YORK WASHINGTON PARIS BRUSSELS LONDON MOSCOW FRANKFURT COLOGNE ROME MILAN HONG KONG BEIJING

Issuing FDIC-Guaranteed Debt under the TLGP

New York
November 25, 2008

Background

The FDIC Guarantee applies to all *Senior Unsecured Debt* identified as guaranteed by the FDIC and issued by an *Eligible Entity* from October 12, 2008 through June 30, 2009, subject to a cap. The FDIC Guarantee expires on the earlier of maturity of the debt or June 30, 2012.

- ***Nature of Guarantee.*** The FDIC's obligation to pay holders of guaranteed debt is triggered by the uncured failure of the issuer to make a timely payment of principal or interest.

- ***Senior Unsecured Debt.*** Senior Unsecured Debt means an unsecured borrowing that a) is evidenced by written agreement or trade confirm; b) has a fixed principal amount; c) is noncontingent and does not contain any embedded derivatives (no options, swaps, forwards, etc.); d) is not by its terms subordinated to any other liability; and e), after December 5, 2008, has a term of more than 30 days. Senior Unsecured Debt includes debt denominated in a foreign currency. Senior Unsecured Debt does not include retail debt securities; however, the FDIC has clarified that securities that are not marketed exclusively to retail customers, but rather are marketed more broadly, should not count as retail debt securities.

- ***Eligible Entity.*** An Eligible Entity is a) an insured depository institution; b) a U.S. bank holding company; c) certain U.S. savings and loan holding companies; or d) affiliates of insured depository institutions specifically granted eligible entity status by the FDIC upon written request by the relevant federal banking agency. FDIC-insured U.S. subsidiaries of foreign banks are Eligible Entities; however, a U.S. branch of a foreign bank is <u>not</u> an Eligible Entity, whether or not FDIC-insured.

- ***Maximum Amount.*** The maximum amount of Senior Unsecured Debt the FDIC will guarantee under the debt guarantee program for each participant is limited (subject to the alternative cap described below) to 125% of that participant's Senior Unsecured Debt outstanding as of the close of business on September 30, 2008 that is scheduled to mature on or before June 30, 2009; however, an insured depository institution that has a participating parent may issue guaranteed debt above its own cap by applying amounts its parent is otherwise permitted to issue under the debt guarantee program (but the parent may not do the same with its eligible subsidiary's limits).

- ***Alternative Cap.*** An insured depository institution that on September 30, 2008 had either no Senior Unsecured Debt, or only had "federal funds purchased" outstanding as of that date, is subject to a cap of 2% of its consolidated total liabilities as of September 30, 2008. If an entity becomes an Eligible Entity after October 13, 2008, the FDIC will establish the cap for that entity at the time of designation in consultation with its federal banking regulator.

<u>Process</u>

- ***TLGP Election Form.*** All Eligible Entities must file a TLGP Election Form through FDIC*connect* before midnight on December 5, 2008. The form must be executed by the CFO of the Eligible Entity and all supporting documentation should be retained for future inspection. All elections are irrevocable.

  - ***Opting Out.*** Eligible Entities wishing to opt out of the debt guarantee program must so indicate on their Election Form. Failure to opt out constitutes an irrevocable decision to continue participating in the TLGP. All Eligible Entities within a U.S. bank or savings and loan holding company must make the same election.

  - ***Staying In.*** For purposes of determining its cap, an Eligible Entity wishing to stay in the debt guarantee program must report the amount of Senior Unsecured Debt (including debt with maturity of 30 days or less) it had outstanding on September 30, 2008 scheduled to mature on or before June 30, 2009.

  - ***Master Agreement.*** An Eligible Entity wishing to stay in the debt guarantee program must also agree to be bound by the terms of the Master Agreement. The CFO must execute a Master Agreement and submit it to the FDIC, preferably by email to *MasterAgreement@fdic.gov*, within 5 business days from the date of the Eligible Entity's election to continue participation in the debt guarantee program. The entity also must agree to pay the fee applicable to any guaranteed debt issued on or after November 13, 2008.

    - ***Failure to Comply.*** The failure of an entity to comply with any of its obligations under the Master Agreement will not affect the FDIC's guarantee of all Senior Unsecured Debt that is then outstanding. However, the failure could result in the FDIC, after consultation with the issuer's primary federal regulator, making a determination that the entity should no longer be permitted to participate in the TLGP.

  - ***Non-guaranteed Debt Option.*** If an Eligible Entity does not opt out of the TLGP, it cannot issue Senior Unsecured Debt maturing on or prior to June 30, 2012 without the FDIC guarantee. An Eligible Entity wishing to issue non-guaranteed debt with a maturity date after June 30, 2012 must elect this option and must agree to pay a fee equal to the product of 37.5bp and the par value of Senior Unsecured Debt outstanding as of September 30, 2008. This fee is payable in six equal monthly installments over the six-month period following the election of this option.

- ***Notice of Issuance.*** Notice of issuance of guaranteed debt must be provided through FDIC*connect* on or before i) December 19, 2008 (in the case of guaranteed debt issued from October 14, 2008 through December 5, 2008) and ii) a time period to be determined by the FDIC (in the case of guaranteed debt issued after December 5, 2008). The CFO must certify that each issuance of guaranteed debt does not exceed the Eligible Entity's cap.

- ***Invoice.*** Once notice of issuance is received, an invoice will be automatically generated and posted on FDIC*connect* reflecting assessment of a fee equal to the following for all guaranteed debt issued and outstanding after November 13, 2008 and maturing in:

  - 180 days or less, excluding overnight debt (but including debt of 30 days or less maturity issued on or after October 14, 2008 and on or before December 5, 2008 that is still outstanding as of December 5, 2008): (principal)(term of debt expressed in years)(50bp);

  - 181-365 days: (principal)(term of debt expressed in years)(75bp); and

  - 365 days or longer: (principal)(term of debt expressed in years)(100bp);

  - o provided that if the Eligible Entity is a holding company or another non-insured affiliate of a depository institution and the combined assets of all insured depository institutions affiliated with the entity are less than 50% of consolidated holding company assets as of September 30, 2008, an additional 10bp will be added to the above formulas; and

  - o provided further that if the Eligible Entity has issued debt in excess of its cap that is claimed to be covered by the guarantee, the applicable fee will be increased by 100% and the entity may also be subject to enforcement action.

  - ➢ ***Account Debit.*** An amount equal to at least the applicable fee must be available in the participating entity's designated deposit account and will be debited from that account.

- ***Securities Act Registration Exemption.*** The SEC staff issued a no-action letter to the FDIC on November 24, 2008 concurring with the view that debt maturing on or before June 30, 2012 and guaranteed under the TLGP would be considered guaranteed by an instrumentality of the United States for purposes of Section 3(a)(2) of the Securities Act. Entities therefore can issue such debt without registration under the Securities Act.

  - ➢ ***Exchange Act Section 11(d)(1).*** As a government security, debt issued under the TLGP also should be exempt from Section 11(d)(1) of the Exchange Act, which generally prohibits a broker-dealer that participates in a new issuance from extending credit to customers in connection with that issuance.

- ***Required Disclosure.*** The following disclosure must be included in "all written materials" given to investors in connection with guaranteed debt issued on or after December 19, 2008 through June 30, 2009:

  This debt is guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program and is backed by the full faith and credit of the United States. The details of the FDIC guarantee are provided in the FDIC's regulations, 12 CFR Part 370, and at the FDIC's website, www.fdic.gov/tlgp. The expiration date of the FDIC's guarantee is the earlier of the maturity date of the debt or June 30, 2012.

- ***Master Agreement Requirements.*** The terms of the Master Agreement require a participating entity to do the following:

  - ➢ ***Authorization Confirmation.*** The entity must confirm that it has obtained all necessary authorizations (corporate or other) to enter into the Master Agreement.

- ***Monthly Reports.*** The entity must provide monthly reports to the FDIC relating to outstanding Senior Unsecured Debt and related matters, in a form to be specified by the FDIC.

- ***Notice of Default.*** The entity must provide notice of any default in payment of any principal or interest with respect to any indebtedness of the entity within one business day, if that default would result, or would reasonably by expected to result, in an event of default under any Senior Unsecured Debt subject to the FDIC guarantee.

- ***Governing Documents.*** The entity must include certain provisions in the governing documents (*e.g.,* by supplemental indenture) for FDIC guaranteed Senior Unsecured Debt, including:

  - identifying a Representative to make claims or take other actions on behalf of debtholders of Senior Unsecured Debt subject to the debt guarantee program;

  - authorizing the Representative to assign the Senior Unsecured Debt to the FDIC if and when the FDIC commences making guarantee payments;

  - requiring notice to the FDIC within one business day of any payment default on the Senior Unsecured Debt; and

  - requiring the express written consent of the FDIC for any amendment, modification, supplement or waiver of any provision of the Senior Unsecured Debt that relates to principal, interest, payment, default or ranking, or any other provision the amendment of which would require the consent of any or all of the debtholders.

  In addition, no governing document may contain any provision that would result in the automatic acceleration of the debt upon a default by the entity at any time during which the guarantee is in effect or during which guarantee payments are being made. Also, so long as the FDIC is making timely guarantee payments, no event of default due solely to the failure of the entity to make timely payments under the debt can give rise to acceleration.

- ***Time Limit for Claims.*** If demand for payment is not made by the holder or the Representative within 60 days of the occurrence of a payment default, the holder will be deprived of all rights and remedies with respect to the guarantee claim.

*   *   *

Please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under “Banking and Financial Institutions,” “Capital Markets” or “Structured Finance” in the “Practices” section of our website (http://www.clearygottlieb.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

PARIS
12, rue de Tilsitt
75008 Paris, France
33 1 40 74 68 00
33 1 40 74 68 88 Fax

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

MOSCOW
Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

COLOGNE
Theodor-Heuss-Ring 9
50668 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

ROME
Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

MILAN
Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

HONG KONG
Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

BEIJING
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 5879 3902 Fax