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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 370

RIN 3064-AD37

Amendment of the Debt Guarantee Program To Provide for the Establishment of a Limited Six-Month Emergency Guarantee Facility

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: To ensure an orderly phase-out of the Debt Guarantee Program (DGP), a component of the Temporary Liquidity Guarantee Program (TLGP), the FDIC is establishing a limited emergency guarantee facility. For most insured depository institutions and other entities participating in the DGP, the Debt Guarantee Program will conclude on October 31, 2009, with the FDIC's guarantee expiring no later than December 31, 2012. To the extent that certain of those entities become unable to issue non-guaranteed debt to replace maturing senior unsecured debt because of market disruptions or other circumstances beyond their control, the emergency guarantee facility will be available on an application basis. In order to utilize the emergency guarantee facility, an entity must apply to, and receive prior approval from, the FDIC. If the application is approved, the FDIC will guarantee the applicant's senior unsecured debt issued on or before April 30, 2010. Debt guaranteed under the emergency guarantee facility will be subject to an annualized assessment rate equal to a minimum of 300 basis points.

DATES: The final rule becomes effective on October 23, 2009.

FOR FURTHER INFORMATION CONTACT: (For questions or comments related to applications) Lisa D. Arquette, Associate Director, Division of Supervision and Consumer Protection,

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SUPPLEMENTARY INFORMATION:

I. Background

The FDIC adopted the TLGP in October 2008 following a determination of systemic risk by the Secretary of the Treasury (after consultation with the President) that was supported by recommendations from the FDIC and the Board of Governors of the Federal Reserve System (Federal Reserve).¹ The TLGP is part of a coordinated effort by the FDIC, the U.S. Department of the Treasury (Treasury), and the Federal Reserve to address unprecedented disruptions in the credit markets and the resultant difficulty of many financial institutions to obtain funds and to make loans to creditworthy borrowers. On October 23, 2008, the FDIC's Board of Directors (Board) authorized the publication in the **Federal Register** of an interim rule that outlined the structure of the TLGP.² Designed to assist in the stabilization of the nation's financial system, the FDIC's TLGP is composed of two distinct components: The DGP and the Transaction Account Guarantee Program (TAG program). Under the DGP, the FDIC guarantees certain senior unsecured debt issued by participating

entities. Under the TAG program, the FDIC guarantees all funds held in qualifying noninterest-bearing transaction accounts at participating insured depository institutions (IDIs).³

The DGP initially permitted participating entities to issue FDIC-guaranteed senior unsecured debt until June 30, 2009, with the FDIC's guarantee for such debt to expire on the earlier of the maturity of the debt (or the conversion date, for mandatory convertible debt) or June 30, 2012.

To reduce the potential for market disruptions at the conclusion of the DGP and to begin the orderly phase-out of the program, on May 29, 2009 the Board issued a final rule that extended for four months the period during which certain participating entities could issue FDIC-guaranteed debt.⁴ All IDIs and those other participating entities that had issued FDIC-guaranteed debt on or before April 1, 2009 were permitted to participate in the extended DGP without application to the FDIC. Other participating entities that received approval from the FDIC also were permitted to participate in the extended DGP. The expiration of the guarantee period was also extended from June 30, 2012 to December 31, 2012. As a result, all such participating entities were permitted to issue FDIC-guaranteed debt through and including October 31, 2009, with the FDIC's guarantee expiring on the earliest of the debt's mandatory conversion date (for mandatory convertible debt), the stated maturity date, or December 31, 2012.

With over \$600 billion in guaranteed debt having been issued by 118 entities, the TLGP has been an important factor in restoring liquidity and confidence in the banking system. The program enabled banking organizations to meet financing needs at affordable terms during a period of system-wide turmoil. Recently, credit and liquidity conditions have become less stressed. Narrowing

¹ See Section 13(c)(4)(G) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1823(c)(4)(G). The determination of systemic risk triggered the FDIC's authority—"in its sole discretion and upon such terms and conditions as the [FDIC's] Board of Directors may prescribe—to take actions to avoid or mitigate serious adverse effects on economic conditions or financial stability." See also Section 9(a) Tenth of the FDI Act, 12 U.S.C. 1819(a) Tenth. The FDIC implemented the TLGP in response.

² 73 FR 64179 (October 29, 2008). This interim rule was finalized and a final rule was published in the **Federal Register** on November 26, 2008. 73 FR 72244 (November 26, 2008).

³ On June 23, 2009, the Board proposed two alternatives for phasing out the TAG. The first alternative provided that the TAG would expire on December 31, 2009, as required by the terms of the existing rule. The second alternative provided for a limited six-month extension to that program. Following consideration of the comments submitted in response to the two alternatives, on August 26, 2009, the Board adopted and approved for publication in the **Federal Register** a final rule providing for a six-month extension of the TAG program, through June 30, 2010. See 74 FR 45093 (September 1, 2009).

⁴ 74 FR 26521 (June 3, 2009).

spreads on both TLGP debt and non-guaranteed debt indicate that access to funding has improved. Only a few entities have issued TLGP debt during the extended DGP period, and recently several banking organizations have successfully issued non-guaranteed debt. The total amount of FDIC-guaranteed debt outstanding as of October 1, 2009 under the TLGP is \$300 billion.

Noting the evidence that the domestic credit and liquidity markets are beginning to normalize, on September 9, 2009, the Board authorized publication of a Notice of Proposed Rulemaking that proposed two alternatives for concluding the DGP.⁵

II. The Notice of Proposed Rulemaking

The Notice of Proposed Rulemaking (Proposed Rule) presented two alternatives for concluding the FDIC's guarantee of senior unsecured debt under the DGP, Alternative A and Alternative B.

A. Alternative A

Alternative A would have preserved the expiration dates for the issuance periods and for the duration of the guarantees under the DGP. Thus, all IDIs participating in the DGP and other participating entities that had either (i) issued guaranteed debt before April 1, 2009, or (ii) had not issued guaranteed debt before April 1, 2009, but had received the FDIC's permission to issue guaranteed debt through October 31, 2009 would be permitted to issue FDIC-guaranteed senior unsecured debt through October 31, 2009. The FDIC's guarantee for such debt issuances would expire no later than December 31, 2012.

B. Alternative B

Like Alternative A, Alternative B provided that the basic DGP would expire as structured under the existing regulation. However, Alternative B also proposed the establishment of a limited, six-month emergency guarantee facility upon expiration of the DGP on October 31, 2009.

The emergency guarantee facility under Alternative B was intended to address a participating entity's inability to replace maturing senior unsecured debt with non-guaranteed debt as a result of market disruptions or other circumstances beyond the control of the participating entity. Under this emergency guarantee facility, certain participating entities could apply to the FDIC for permission to issue FDIC-guaranteed debt after October 31, 2009. If the FDIC approved an entity's request,

the FDIC would guarantee the entity's senior unsecured debt issued after October 31, 2009, through and including April 30, 2010. Any such approval would be subject to such restrictions and conditions as the FDIC deemed appropriate including, but not limited to, a pledge of collateral, and limitations on executive compensation, bonuses, or the payment of dividends. Under Alternative B, the FDIC would assess a fee using an annualized assessment rate equal to at least 300 basis points on any FDIC-guaranteed debt issued by entities under the emergency guarantee facility. The FDIC would reserve the right to increase the assessment rate on a case-by-case basis, depending upon the risks presented by the issuing entity. The FDIC's guarantee of principal and interest payments for senior unsecured debt issuances approved under the emergency guarantee facility would extend through the earliest of the mandatory conversion date (for mandatory convertible debt), the stated maturity date, or December 31, 2012. Under Alternative B, all of the terms and provisions of the FDIC's guarantee under the DGP would apply to such debt except as amended by the final rule. Further, under Alternative B, there would be no effect on any conditions that the FDIC may have placed on the issuance of debt by an IDI or other entity participating in the DGP. Any IDI participating in the DGP and any other entity participating in the DGP that has issued FDIC-guaranteed debt by September 9, 2009, would be permitted to apply to use this emergency guarantee facility.

III. Summary of Comments Received

The FDIC requested comments on all aspects of the Proposed Rule. The FDIC specifically requested that commenters indicate a preference for either Alternative A or Alternative B. The FDIC also sought comments on whether, under Alternative B, eligibility for the emergency guarantee facility should be limited to participating IDIs and to those other entities that had issued FDIC-guaranteed debt on or before September 9, 2009. In response to the request, the FDIC received four (4) comments from the following: One comment (1) from an individual; one comment (1) from an industry association; and two comments (2) from two separate groups of LL.M. candidates at a law school. A summary of the comments the FDIC received follows.

The individual commenter expressed the belief that the DGP provides a valuable service and, therefore, should not be concluded as currently structured. The commenter noted that

the DGP has value as a support mechanism regardless of whether it is under-utilized.

A banking industry association commented in support of Alternative B as the most appropriate phase-out of the DGP. Specifically, the association expressed support for allowing access to the emergency guarantee facility on a limited case-by-case basis for emergency circumstances. The association also noted that domestic credit and liquidity markets have begun to normalize and the number of entities issuing debt under the DGP has decreased. The association expressed the opinion that access to the emergency guarantee facility should be limited to IDIs or other entities that have issued FDIC-guaranteed senior unsecured debt on or before September 9, 2009. The association also supported a robust participation fee and noted that such a fee could both encourage a winding down of the DGP and generate increased TLGP revenue.

The FDIC also received comment letters from two groups of law students. Both groups supported the adoption of Alternative B as the most appropriate phase-out of the DGP, and both also requested that any final rule provide the FDIC with the discretion to decrease the proposed 300 basis points assessment rate.

The FDIC is establishing the emergency guarantee facility to serve as a mechanism to phase-out the DGP, it is not intended to encourage indefinite participation. The FDIC believes that establishing a 300 basis point minimum assessment rate will provide a more effective incentive for participating entities to wean themselves off of the FDIC's guarantee program. Consequently, the FDIC has decided to retain the 300 basis point minimum assessment rate.

Regarding access to the emergency guarantee facility, one student group supported restricting access to the emergency guarantee facility as proposed in Alternative B, noting that such a restriction would both provide an adequate safeguard against dependency and ensure that the facility is available only in severe circumstances. The second student group recommended that the FDIC expand the emergency guarantee facility eligibility to all financial institutions originally eligible under the DGP. This group asserted that expanding eligibility would protect the DIF, perpetuate the objectives of the TLGP, help deserving nonparticipating institutions avoid receivership, grant the FDIC greater discretion, and result in minimal additional costs to the FDIC.

⁵ 74 FR 47489 (September 16, 2009).

As noted above, the FDIC is establishing the emergency guarantee facility to phase-out the DGP in an orderly manner. Expanding access to all entities originally eligible would be inconsistent with that goal. As a result, the FDIC believes that limiting the eligibility as provided in Alternative B is the more appropriate way to achieve the goal of the emergency guarantee facility.

The two student groups also expressed a number of additional concerns regarding the proposed Alternative B. One group recommended that a final rule adopting Alternative B should include mandatory end-use restrictions, such as limitations on executive compensation. This group also recommended that the application requirements for access to the emergency guarantee facility include a statement identifying any changes from all prior plans for the retirement of FDIC-guaranteed debt that an applicant had submitted to the FDIC under the DGP. Moreover, this group recommended requiring that applications for the emergency guarantee facility include a business plan that states clear objectives for avoiding use of the emergency guarantee facility in the future. The second group expressed concern that Alternative B includes overly-broad language when describing the types of situations that would warrant granting access to the emergency guarantee facility. The group recommended that the FDIC provide clearer guidelines and principles outlining the kind of financial challenges that can be construed as stemming from market disruption. The group also recommended that the FDIC provide greater guidance on how participation in the emergency guarantee facility would impact the participant's disclosures, raising the question of whether an applicant that has been denied access to the emergency guarantee facility must disclose the fact that it has been denied such access.

The FDIC believes that the emergency guarantee facility as designed can adequately address the concerns underlying these suggestions. In order to be effective, the emergency guarantee facility must be available to handle a variety of adverse circumstances, including some that have not yet been encountered or even foreseen. Providing too narrow a description of the circumstances when the facility would be available could limit its effectiveness. The FDIC also believes that imposing too many mandatory requirements could also be counterproductive. The FDIC needs flexibility in responding to

these situations. Since the FDIC can impose any condition it deems appropriate and can, of course, decide not to approve an entity's use of the emergency guarantee facility, the FDIC believes that it has the ability to address these concerns and the flexibility to effectively respond to unforeseen circumstances.

IV. The Final Rule

The FDIC is adopting the proposal described in Alternative B as a final rule. As discussed below, the final rule will allow the basic DGP to expire on October 31, 2009 as currently structured. However, the final rule will also establish a limited six-month emergency guarantee facility upon the expiration of the basic DGP. The FDIC believes this approach provides the most appropriate phase-out of the basic DGP.

A. Expiration of Debt Guarantee Program

Under the final rule, the DGP will expire as currently structured under existing regulation. Thus, all IDI's participating in the DGP and other participating entities that had either (i) issued guaranteed debt before April 1, 2009, or (ii) had not issued guaranteed debt before April 1, 2009, but had received FDIC's permission to issue guaranteed debt through October 31, 2009, are permitted to issue FDIC-guaranteed senior unsecured debt through October 31, 2009. The FDIC's guarantee for such debt issuances will expire no later than December 31, 2012.

B. Emergency Guarantee Facility

Additionally, the final rule establishes a limited six-month emergency guarantee facility upon the expiration of the basic DGP. The emergency guarantee facility addresses an entity's inability to replace maturing senior unsecured debt with non-guaranteed debt as a result of market disruptions or other circumstances beyond the control of the participating entity. Under the final rule, the FDIC will guarantee senior unsecured debt issued after October 31, 2009, subject to the FDIC's prior approval on a case-by-case basis, through April 30, 2010 by certain entities participating in the DGP; such guarantee will be subject to such restrictions and conditions that the FDIC deems appropriate. The duration of the FDIC's guarantee of senior unsecured debt issuances approved under the emergency guarantee facility will extend through the earliest of the mandatory conversion date (for mandatory convertible debt), the stated maturity date, or December 31, 2012. All

of the terms and provisions of the DGP that are not amended by this final rule will apply to such debt issuances. The final rule does not affect any conditions that the FDIC has placed on the issuance of debt by an IDI or other entity participating in the DGP.

Any IDI participating in the DGP and any other entity participating in the DGP that has issued FDIC-guaranteed debt by September 9, 2009, is permitted to apply to use the emergency guarantee facility.

i. Application Requirements for Participation in the Emergency Guarantee Facility

The final rule requires prior approval by the FDIC before an entity may participate in the emergency guarantee facility. Applications to participate in the emergency guarantee facility must be submitted to the Director of the Division of Supervision and Consumer Protection on or before April 30, 2010. FDIC prior approval to participate in the emergency guarantee facility will be granted on a case-by-case basis subject to such terms and conditions as the FDIC deems appropriate.

Under the final rule, participation in the emergency guarantee facility is limited. Only those eligible entities that demonstrate an inability to issue non-guaranteed debt to replace maturing senior unsecured debt as a result of market disruptions or other circumstances beyond the entity's control may apply. The final rule requires that applications to participate in the emergency guarantee facility include the following: A projection of the sources and uses of funds through December 31, 2012; a summary of the entity's contingency plans; a description of any collateral that the entity can make available to secure the entity's obligation to reimburse the FDIC for any payments made pursuant to the guarantee; a description of the plans for retirement of the FDIC-guaranteed debt; a description of the market disruptions or other circumstances beyond the entity's control that prevent the entity from replacing maturing debt with non-guaranteed debt; a description of management's efforts to mitigate the effects of such disruptions or circumstances; conclusive evidence that demonstrates the entity's inability to issue non-guaranteed debt; and any other relevant information that the FDIC deems appropriate.

ii. Participation Fee

Under the final rule, the FDIC will assess a fee equal to the amount of the debt to be guaranteed times the number of years (or portions thereof) from

issuance date through the earliest of the mandatory conversion date (for mandatory convertible debt), the stated maturity date, or December 31, 2012 times an assessment rate of at least 300 basis points on any guaranteed debt issued under the emergency guarantee facility. The FDIC reserves the right to increase the fee on a case-by-case basis, depending upon the risks presented by the issuing entity. The FDIC believes that the fee established under the final rule will provide an appropriate deterrent to applications based on other, less severe circumstances or concerns. Under the final rule, a participating entity may be required to pledge sufficient collateral to ensure the repayment of any principal and interest payments made by the FDIC under the emergency guarantee facility, subject to any other conditions and restrictions that the FDIC deems appropriate. Such conditions and restrictions may include, for example, limiting executive compensations, bonuses, or the payment of dividends.

V. Regulatory Analysis and Procedure

A. Administrative Procedure Act

The process of amending Part 370 by means of this final rule is governed by the Administrative Procedure Act (APA). Section 553(d)(3) of the APA provides that the publication of a rule shall be made not less than 30 days before its effective date, except “as otherwise provided by the agency for good cause found and published with the rule.”⁶

When it issued the interim rule and the final rule initially implementing the TLGP, the FDIC invoked this good cause exception based on the severe financial conditions that threatened the stability of the nation’s economy generally and the banking system in particular.⁷ Recently, credit and liquidity conditions have become less stressed. Narrowing spreads on both TLGP debt and non-guaranteed debt indicate that access to funding has improved. Only a few entities have issued TLGP debt during the extended DGP period, and recently several banking organizations have successfully issued non-guaranteed debt. In order to continue the orderly phase out of the basic DGP and to ensure that the creation of the emergency guarantee facility occurs at the conclusion of the basic DGP on October 31, 2009, the FDIC finds that good cause exists for an immediate effective date for the final rule.

B. Riegle Community Development and Regulatory Improvement Act

The Riegle Community Development and Regulatory Improvement Act (RCDRIA) provides that any new regulations or amendments to regulations prescribed by a Federal banking agency that impose additional reporting, disclosures, or other new requirements on IDIs shall take effect on the first day of a calendar quarter which begins on or after the date on which the regulations are published in final form, unless the agency determines, for good cause published with the rule, that the rule should become effective before such time.⁸ For the same reasons as discussed above, the FDIC finds that good cause exists for an immediate effective date for the final rule.

C. Small Business Regulator Enforcement Fairness Act

The Office of Management and Budget (OMB) has determined that this final rule is not a “major rule” within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA), 5 U.S.C. 801 *et seq.* As required by SBREFA, the FDIC will file appropriate reports with Congress and the Government Accountability Office.

D. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), the FDIC must prepare a final regulatory flexibility analysis in connection with the promulgation of a final rule,⁹ or certify that the final rule will not have a significant economic impact on a substantial number of small entities.¹⁰ For purposes of the RFA analysis or certification, financial institutions with total assets of \$175 million or less are considered to be “small entities.” For reasons discussed below, the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Currently, 4,394 IDIs participate in the DGP, of which approximately 2,120 (or approximately 48 percent) are small entities. Under the final rule, all 2,120 IDIs that would be considered small entities for purposes of this analysis are eligible to apply to access the emergency guarantee facility. As a result, the FDIC asserts that the final rule may affect a substantial number of IDIs that are small entities that participate in the DGP.

Nevertheless, the FDIC has determined that the final rule’s

economic impact on small entities will not be significant for the following reasons. The emergency guarantee facility is designed to be accessed on an emergency case-by-case basis by IDIs (and other entities that issued debt under the DGP) only if such entities are unable to replace maturing debt as a result of market disruptions or other circumstances beyond the entities’ control. Eighty-one IDIs have issued FDIC-guaranteed debt through the DGP since the program’s inception. It is unlikely that a significant number of IDIs (or other qualifying entities) would satisfy the requirements to issue FDIC-guaranteed debt during such emergency circumstances. Accordingly, the final rule will not have a significant economic impact on a substantial number of small entities.

E. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. This Final Rule implements Alternative B of the Notice of Proposed Rulemaking, which establishes an emergency guarantee facility to ensure an orderly phase-out of the debt guarantee component of the Temporary Liquidity Guarantee Program. Alternative B includes, in section 370.3(h)(viii), an application requirement for IDIs and non-IDIs wishing to access the emergency guarantee facility. In conjunction with publication of the Notice of Proposed Rulemaking, the FDIC submitted to OMB a request for clearance of the paperwork burden associated with the application requirement in Alternative B. That request is still pending.

The proposed rule document requested comment on the estimated paperwork burden. However, none of the comments received addressed the estimated paperwork burden. Therefore, the FDIC has not altered its initial burden estimates. The estimated burden for the application requirement, as set forth in the Notice of Proposed Rulemaking and Final Rule, is as follows:

Title: “Temporary Liquidity Guarantee Program—Emergency Guarantee Facility.”

OMB Number: 3064—NEW.

Estimated Number of Respondents: Application to access emergency guarantee facility submitted by IDIs—8.

Application to access emergency guarantee facility submitted by non-IDIs that issued FDIC-guaranteed debt under the DGP—4.

⁶ 5 U.S.C. 553(d)(3).

⁷ See 74 FR 26521 (June 3, 2009) and 73 FR 72244 (Nov. 26, 2008).

⁸ 12 U.S.C. 4802.

⁹ 5 U.S.C. 604.

¹⁰ 5 U.S.C. 605(b).

Frequency of Response: Application to access emergency guarantee facility submitted by IDIs—once.

Application to access emergency guarantee facility submitted by non-IDIs that issued FDIC-guaranteed debt under the DGP—once.

Affected Public: IDIs; thrift holding companies, bank and financial holding companies, and affiliates of IDIs that issued debt under the DGP.

Average Time per Response: Application to access emergency guarantee facility submitted by IDIs—4 hours.

Application to access emergency guarantee facility submitted by non-IDIs that issued FDIC-guaranteed debt under the DGP—4 hours.

Estimated Annual Burden: Application to access emergency guarantee facility submitted by IDIs—32 hours.

Application to access emergency guarantee facility submitted by non-IDIs that issued FDIC-guaranteed debt under the DGP—16 hours.

Total Annual Burden—48 hours.

Comment Request: The FDIC has an ongoing interest in public comments on its collections of information, including comments on: (1) Whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (2) the accuracy of the estimates of the burden of the information collection, including the validity of the methodologies and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments may be submitted to the FDIC by any of the following methods:

• *http://www.FDIC.gov/regulations/laws/federal/propose.html.*

• *E-mail: comments@fdic.gov.*

Include the name and number of the collection in the subject line of the message.

• *Mail:* Leneta Gregorie (202-898-3719), Counsel, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

• *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

A copy of the comment may also be submitted to the OMB Desk Officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New

Executive Office Building, Room 3208, Washington, DC 20503. All comments should refer to the "Temporary Liquidity Guarantee Program—Emergency Guarantee Facility (OMB No. 3064—New)".

F. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106-102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. In issuing the Notice of Proposed Rulemaking the FDIC requested comment on how to make the regulation easier to understand. The FDIC received one comment in response to the request. The comment supported the FDIC's use of plain language in the NPR.

G. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the Final Rule will not affect family well-being within the measure of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105-277, 112 Stat. 2681).

List of Subjects in 12 CFR Part 370

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Reporting and recordkeeping requirements, Savings associations.

■ For the reasons discussed in the preamble, the Federal Deposit Insurance Corporation amends 12 CFR part 370 as follows:

PART 370—TEMPORARY LIQUIDITY GUARANTEE PROGRAM

■ 1. The authority citation for part 370 continues to read as follows:

Authority: 12 U.S.C. 1813(l), 1813(m), 1817(i), 1818, 1819(a)(Tenth), 1820(f), 1821(a), 1821(c), 1821(d), 1823(c)(4).

■ 2. Amend § 370.2 by revising paragraph (n) to read as follows:

§ 370.2 Definitions.

* * * * *

(n) *Issuance period.*

(1) Except as provided in paragraph (n)(2) of this section, the term "issuance period" means

(i) With respect to the issuance, by a participating entity that is either an insured depository institution, an entity that has issued FDIC-guaranteed debt before April 1, 2009, or an entity that

has been approved pursuant to § 370.3(h) to issue FDIC-guaranteed debt after June 30, 2009, and on or before October 31, 2009, of:

(A) Mandatory convertible debt, the period from February 27, 2009, to and including October 31, 2009, and

(B) All other senior unsecured debt, the period from October 14, 2008, to and including October 31, 2009; and

(ii) With respect to the issuance, by any other participating entity, of

(A) Mandatory convertible debt, the period from February 27, 2009, to and including June 30, 2009, and

(B) All other senior unsecured debt, the period from October 14, 2008, to and including June 30, 2009.

(2) The "issuance period" for a participating entity that has been approved to issue FDIC-guaranteed debt pursuant to § 370.3(k) of this part is the period after October 31, 2009, and on or before April 30, 2010.

* * * * *

■ 3. Amend § 370.3 as follows:

■ a. Revise paragraph (d)(2);

■ b. Revise paragraphs (h)(1) through (h)(3), (h)(5), and (h)(6); and

■ c. Add paragraph (k), to read as follows:

§ 370.3 Debt Guarantee Program

* * * * *

(d) * * *

(2) With respect to debt that is issued on or after April 1, 2009, by a participating entity that is either an insured depository institution, a participating entity that has issued guaranteed debt before April 1, 2009, a participating entity that has been approved pursuant to § 370.3(h) to issue guaranteed debt after June 30, 2009, and on or before October 31, 2009, or a participating entity that has been approved pursuant to § 370.3(k) to issue guaranteed debt after October 31, 2009, the guarantee expires on the earliest of the mandatory conversion date (for mandatory convertible debt), the maturity date of the debt, or December 31, 2012.

* * * * *

(h) *Applications for exceptions, eligibility, and issuance of certain debt.*

(1) The following requests require written application to the FDIC and the appropriate Federal banking agency of the entity or the entity's lead affiliated insured depository institution:

(i) A request by a participating entity to establish, increase, or decrease its debt guarantee limit,

(ii) A request by an entity that becomes an eligible entity after October 13, 2008, for an increase in its presumptive debt guarantee limit of zero,

(iii) A request by a non-participating surviving entity in a merger transaction to opt in to either the debt guarantee program or the transaction account guarantee program,

(iv) A request by an affiliate of an insured depository institution to participate in the debt guarantee program,

(v) A request by a participating entity to issue FDIC-guaranteed mandatory convertible debt,

(vi) A request by a participating entity that is neither an insured depository institution nor an entity that has issued FDIC-guaranteed debt before April 1, 2009, to issue FDIC-guaranteed debt after June 30, 2009, and on or before October 31, 2009,

(vii) A request by a participating entity to issue senior unsecured non-guaranteed debt after June 30, 2009, and

(viii) A request by a participating entity to issue FDIC-guaranteed debt after October 31, 2009 under the Emergency Guarantee Facility pursuant to paragraph (k) of this section.

(2) Each letter application must describe the details of the request, provide a summary of the applicant's strategic operating plan, describe the proposed use of the debt proceeds, and

(i) With respect to an application for approval of the issuance of mandatory convertible debt, must also include:

(A) The proposed date of issuance,
(B) The total amount of the mandatory convertible debt to be issued,

(C) The mandatory conversion date,

(D) The conversion rate (i.e., the total number of shares of common stock that will result from the conversion divided by the total dollar amount of the mandatory convertible debt to be issued),

(E) Confirmation that all applications and all notices required under the Bank Holding Company Act of 1956, as amended, the Home Owners' Loan Act, as amended, or the Change in Bank Control Act, as amended, have been submitted to the applicant's appropriate Federal banking agency in connection with the proposed issuance, and

(F) Any other relevant information that the FDIC deems appropriate;

(ii) With respect to an application pursuant to paragraph (h)(1)(vi) of this section to extend the period for issuance of FDIC-guaranteed debt to and including October 31, 2009, the entity's plans for the retirement of the guaranteed debt, a description of the entity's financial history, current condition, and future prospects, and any other relevant information that the FDIC deems appropriate;

(iii) With respect to an application pursuant to paragraph (h)(1)(vii) of this

section to issue senior unsecured non-guaranteed debt, a summary of the applicant's strategic operating plan and the entity's plans for the retirement of any guaranteed debt; and

(iv) With respect to an application pursuant to paragraph (h)(1)(viii) of this section to issue FDIC-guaranteed debt under the Emergency Guarantee Facility, a projection of the sources and uses of funds through December 31, 2012, a summary of the entity's contingency plans, a description of the collateral that an entity can make available to secure the entity's obligation to reimburse the FDIC for any payments made pursuant to the guarantee, a description of the plans for retirement of the FDIC-guaranteed debt, a description of the market disruptions or other circumstances beyond the entity's control that prevent the entity from replacing maturing debt with non-guaranteed debt, a description of management's efforts to mitigate the effects of such disruptions or circumstances, conclusive evidence that demonstrates an entity's inability to issue non-guaranteed debt, and any other relevant information.

(3) In addition to any other relevant factors that the FDIC deems appropriate, the FDIC will consider the following factors in evaluating applications filed pursuant to paragraph (h) of this section:

(i) For applications pursuant to paragraphs (h)(1)(i), (h)(1)(ii), (h)(1)(iii), and (h)(1)(v) of this section: The proposed use of the proceeds; the financial condition and supervisory history of the eligible/surviving entity;

(ii) For applications pursuant to paragraph (h)(1)(iv) of this section: The proposed use of the proceeds; the extent of the financial activity of the entities within the holding company structure; the strength, from a ratings perspective of the issuer of the obligations that will be guaranteed; the size and extent of the activities of the organization;

(iii) For applications pursuant to paragraph (h)(1)(vi) of this section: The proposed use of the proceeds; the entity's plans for the retirement of the guaranteed debt, the entity's financial history, current condition, future prospects, capital, management, and the risk presented to the FDIC;

(iv) For applications pursuant to paragraph (h)(1)(vii) of this section: The entity's plans for the retirement of the guaranteed debt; and

(v) For applications pursuant to paragraph (h)(1)(viii) of this section, the applicant's strategic operating plan, the proposed use of the debt proceeds, the entity's plans for the retirement of the FDIC-guaranteed debt, the entity's

contingency plans, the nature and extent of the market disruptions or other circumstances beyond the entity's control that prevent the entity from replacing maturing debt with non-guaranteed debt, the collateral that an entity can make available to secure the entity's obligation to reimburse the FDIC for any payments made pursuant to the guarantee, management's efforts to mitigate the effects of such conditions or circumstances, the evidence that demonstrates an entity's inability to issue non-guaranteed debt, and the risk presented to the FDIC.

* * * * *

(5) The filing deadlines for certain applications are:

(i) At the same time the merger application is filed with the appropriate Federal banking agency, for an application pursuant to paragraph (h)(1)(iii) of this section (which must include a copy of the merger application);

(ii) October 31, 2009, for an application pursuant to paragraph (h)(1)(v) of this section that is filed by a participating entity that is either an insured depository institution, an entity that has issued FDIC-guaranteed debt before April 1, 2009, or an entity that has been approved pursuant to paragraph (h) of this section to issue FDIC-guaranteed debt after June 30, 2009, and on or before October 31, 2009;

(iii) June 30, 2009, for an application pursuant to paragraph (h)(1)(v) of this section that is filed by a participating entity other than an entity described in paragraph (h)(5)(ii) of this section;

(iv) June 30, 2009, for an application pursuant to paragraph (h)(1)(vi); and

(v) April 30, 2010, for applications pursuant to paragraph (h)(1)(viii).

(6) In granting its approval of an application filed pursuant to paragraph (h) of this section the FDIC may impose any conditions it deems appropriate, including without limitation, requirements that the issuer

(i) Hedge any foreign currency risk, or

(ii) Pledge collateral to secure the issuer's obligation to reimburse the FDIC for any payments made pursuant to the guarantee.

(iii) Limit executive compensation and bonuses, and/or

(iv) Limit or refrain from the payment of dividends.

* * * * *

(k) *Emergency Guarantee Facility.* In the event that a participating entity that is either an insured depository institution or an entity that has issued FDIC-guaranteed debt on or before September 9, 2009 is unable, after October 31, 2009, to issue non-

guaranteed debt to replace maturing senior unsecured debt as a result of market disruptions or other circumstances beyond the entity's control, the participating entity may, with the FDIC's prior approval under paragraph (h) of this section, issue FDIC-guaranteed debt after October 31, 2009, and on or before April 30, 2010. Any such issuance is subject to all of the terms and conditions imposed by the FDIC in its approval decision as well as all of the provisions of this part, including without limitation, the payment of the applicable assessment and compliance with the disclosure requirements.

* * * * *

- 4. Amend § 370.5 as follows:
 - a. Revise paragraph (f); and
 - b. Revise paragraph (h)(2), to read as follows:

§ 370.5 Participation.

* * * * *

(f) Except as provided in paragraphs (g), (j), and (k) of § 370.3, participating entities are not permitted to select which newly issued senior unsecured debt is guaranteed debt; all senior unsecured debt issued by a participating entity up to its debt guarantee limit must be issued and identified as FDIC-guaranteed debt as and when issued.

* * * * *

(h) * * *

(2) Each participating entity that is either an insured depository institution, an entity that has issued FDIC-guaranteed debt before April 1, 2009, an entity that has been approved pursuant to § 370.3(h) to issue FDIC-guaranteed debt after June 30, 2009, and on or before October 31, 2009, or a participating entity that has been approved pursuant to § 370.3(k) to issue FDIC-guaranteed debt after October 31, 2009, must include the following disclosure statement in all written materials provided to lenders or creditors regarding any senior unsecured debt that is issued by it during the applicable issuance period and that is guaranteed under the debt guarantee program:

*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 Web site, <http://www.fdic.gov/tlgp>. [If the debt being issued is mandatory convertible debt, add: *The expiration date of the FDIC's guarantee is the earlier of the mandatory conversion**

date or December 31, 2012]. [If the debt being issued is any other senior unsecured debt, add: *The expiration date of the FDIC's guarantee is the earlier of the maturity date of the debt or December 31, 2012.*]

* * * * *

- 5. Amend § 370.6 as follows:
 - a. Revise paragraph (d)(1); and
 - b. Add paragraph (i), to read as follows:

§ 370.6 Assessments under the Debt Guarantee Program.

* * * * *

(d) *Amount of assessments for debt within the debt guarantee limit*

(1) *Calculation of assessment.* Subject to paragraphs (d)(3) and (h) of this section, and except as provided in paragraph (i) of this section, the amount of assessment will be determined by multiplying the amount of FDIC-guaranteed debt times the term of the debt or, in the case of mandatory convertible debt, the time period from issuance to the mandatory conversion date, times an annualized assessment rate determined in accordance with the following table.

For debt with a maturity or time period to conversion date of—	The annualized assessment rate (in basis points) is—
180 days or less (excluding overnight debt)	50
181–364 days	75
365 days or greater	100

* * * * *

(i) *Assessment for debt issued under the Emergency Guarantee Facility.* The amount of the assessment for FDIC-guaranteed debt issued pursuant to § 370.3(k) of this part is equal to the amount of the debt times the term of the debt (or in the case of mandatory convertible debt, the time period to conversion) times an annualized assessment rate of 300 basis points, or such greater rate as the FDIC may determine in its decision approving such issuance.

By order of the Board of Directors.

Dated at Washington, DC, this 20th day of October 2009.

Robert E. Feldman,

Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. E9–25555 Filed 10–22–09; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 514

[Docket No. FDA–2009–N–0436]

New Animal Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Direct final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the regulations regarding new animal drug applications (NADAs). Specifically, this direct final rule is being issued to provide that NADAs shall be submitted in the described form, as appropriate for the particular submission. Currently, the regulation requires that all NADAs contain the same informational sections and does not explicitly provide the appropriate flexibility needed to address the development of all types of new animal drug products. This amendment will allow the agency to appropriately review safety and effectiveness data submitted to support the approval of new animal drug products. FDA is amending the regulations in accordance with its direct final rule procedures.

Elsewhere in this issue of the **Federal Register**, we are publishing a companion proposed rule, under FDA's usual procedure for notice-and-comment rulemaking, to provide a procedural framework to finalize the rule in the event the agency receives any significant adverse comments and withdraws this direct final rule. The companion proposed rule and this direct final rule are substantively identical.

DATES: This rule is effective March 8, 2010. Submit written comments on or before January 6, 2010. If FDA receives no significant adverse comments within the specified comment period, the agency will publish a document confirming the effective date of the final rule in the **Federal Register** within 30 days after the comment period on this direct final rule ends. If timely significant adverse comments are received, the agency will publish a document in the **Federal Register** withdrawing this direct final rule before its effective date.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2009–N–0436 by any of the following methods: *Electronic Submissions*

Submit electronic comments in the following ways: