

to meet the credit needs of the communities served by the bank in the host state, and that the bank's statewide loan-to-deposit ratio is less than 50 percent of the host state loan-to-deposit ratio, the FDIC:

(1) May order that a bank's covered interstate branch or branches be closed unless the bank provides reasonable assurances to the satisfaction of the FDIC, after an opportunity for public comment, that the bank has an acceptable plan under which the bank will reasonably help to meet the credit needs of the communities served by the bank in the host state; and

(2) Will not permit the bank to open a new branch in the host state that would be considered to be a covered interstate branch unless the bank provides reasonable assurances to the satisfaction of the FDIC, after an opportunity for public comment, that the bank will reasonably help to meet the credit needs of the community that the new branch will serve.

(b) *Notice prior to closure of a covered interstate branch.* Before exercising the FDIC's authority to order the bank to close a covered interstate branch, the FDIC will issue to the bank a notice of the FDIC's intent to order the closure and will schedule a hearing within 60 days of issuing the notice.

(c) *Hearing.* The FDIC will conduct a hearing scheduled under paragraph (b) of this section in accordance with the provisions of 12 U.S.C. 1818(h) and 12 CFR part 308.

PART 370—TEMPORARY LIQUIDITY GUARANTEE PROGRAM

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§370.1 Scope.

This part sets forth the eligibility criteria, limitations, procedures, requirements, and other provisions related to participation in the FDIC's temporary liquidity guarantee program.

§370.2 Definitions.

As used in this part, the terms listed in this section are defined as indicated below. Other terms used in this part that are defined in the Federal Deposit Insurance Act (FDI Act) have the meanings given them in the FDI Act except as otherwise provided herein.

(a) *Eligible entity.* (1) The term "eligible entity" means any of the following:

(i) An insured depository institution;

(ii) A U.S. bank holding company, provided that it controls, directly or indirectly, at least one subsidiary that is a chartered and operating insured depository institution;

(iii) A U.S. savings and loan holding company, provided that it controls, directly or indirectly, at least one subsidiary that is a chartered and operating insured depository institution; or

(iv) Any other affiliates of an insured depository institution that the FDIC, in its sole discretion and on a case-by-case basis, after written request and positive recommendation by the appropriate Federal banking agency, designates as an eligible entity; such affiliate, by seeking and obtaining such designation, also becomes a participating entity in the debt guarantee program.

(b) *Insured Depository Institution.* The term "insured depository institution" means an insured depository institution as defined in section 3(c)(2) of the FDI Act, 12 U.S.C. 1813(c)(2), except that it does not include an "insured branch" of a foreign bank as defined in section 3(s)(3) of the FDI Act, 12 U.S.C. 1813(s)(3), for purposes of the debt guarantee program.

(c) *U.S. Bank Holding Company.* The term "U.S. Bank Holding Company" means a "bank holding company" as

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defined in section 2(a) of the Bank Holding Company Act of 1956 (“BHCA”), 12 U.S.C. 1841(a), that is organized under the laws of any State or the District of Columbia.

(d) *U.S. Savings and Loan Holding Company.* The term “U.S. Savings and Loan Holding Company” means a “savings and loan holding company” as defined in section 10(a)(1)(D) of the Home Owners’ Loan Act of 1933 (“HOLA”), 12 U.S.C. 1467a(a)(1)(D), that is organized under the laws of any State or the District of Columbia and either:

(1) Engages only in activities that are permissible for financial holding companies under section 4(k) of the BHCA, 12 U.S.C. 1843(k), or

(2) Has at least one insured depository institution subsidiary that is the subject of an application under section 4(c)(8) of the BHCA, 12 U.S.C. 1843(c)(8), that was pending on October 13, 2008.

(e) *Senior Unsecured Debt.* (1) The term “senior unsecured debt” means

(i) For the period from October 13, 2008 through December 5, 2008, unsecured borrowing that:

(A) Is evidenced by a written agreement or trade confirmation;

(B) Has a specified and fixed principal amount;

(C) Is noncontingent and contains no embedded options, forwards, swaps, or other derivatives; and

(D) Is not, by its terms, subordinated to any other liability; and

(ii) After December 5, 2008, unsecured borrowing that satisfies the criteria listed in paragraphs (e)(1)(i)(A) through (e)(1)(i)(D) of this section and that has a stated maturity of more than 30 days.

(iii) After February 27, 2009, unsecured borrowing that satisfies the criteria listed in paragraphs (e)(1)(i)(A) through (e)(1)(i)(D) of this section, that has a stated maturity of more than 30 days, and that includes, without limitation, mandatory convertible debt.

(2) Senior unsecured debt may pay either a fixed or floating interest rate based on a commonly-used reference rate with a fixed amount of scheduled principal payments. The term “commonly-used reference rate” includes a single index of a Treasury bill rate, the prime rate, and LIBOR.

(3) Senior unsecured debt may include, for example, the following debt, provided it meets the requirements of paragraph (e)(1) of this section: mandatory convertible debt as described in paragraph (m) of this section, federal funds purchased, promissory notes, commercial paper, unsubordinated unsecured notes, including zero-coupon bonds, U.S. dollar denominated certificates of deposit owed to an insured depository institution, an insured credit union as defined in the Federal Credit Union Act, or a foreign bank, U.S. dollar denominated deposits in an international banking facility (IBF) of an insured depository institution owed to an insured depository institution or a foreign bank, and U.S. dollar denominated deposits on the books and records of foreign branches of U.S. insured depository institutions that are owed to an insured depository institution or a foreign bank. The term “foreign bank” does not include a foreign central bank or other similar foreign government entity that performs central bank functions or a quasi-governmental international financial institution such as the International Monetary Fund or the World Bank. References to debt owed to an insured depository institution, an insured credit union, or a foreign bank mean owed to the institution solely in its own capacity and not as agent.

(4) Senior unsecured debt, except deposits, may be denominated in foreign currency.

(5) Senior unsecured debt excludes, for example, any obligation that has a stated maturity of “one month”¹ obligations from guarantees or other contingent liabilities, derivatives, derivative-linked products, debts that are paired or bundled with other securities, convertible debt other than mandatory convertible debt described in paragraph (m) of this section, capital notes, the unsecured portion of otherwise secured debt, negotiable certificates of deposit, deposits denominated in a foreign currency or other foreign deposits (except as allowed under paragraph (e)(3) of

¹This recognizes that certain instruments have stated maturities of “one month,” but have a term of up to 35 days because of weekends, holidays, and calendar issues.

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this section), 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. Also excluded are loans from affiliates, including parents and subsidiaries, and institution-affiliated parties.

(f) *Newly issued senior unsecured debt.*

(1) The term “newly issued senior unsecured debt” means :

(i) With respect to a participating entity that opted out of the debt guarantee program, senior unsecured debt that is issued on or after October 14, 2008, and on or before the date the entity opted out; and

(ii) With respect to a participating entity that has not opted out of the debt guarantee program, senior unsecured debt that is issued during the issuance period.

(2) The term “newly issued senior unsecured debt” includes, without limitation, senior unsecured debt

(i) That matures and is renewed during the issuance period; or

(ii) That is issued during such period pursuant to a shelf registration, regardless of the date of creation of the shelf registration.

(g) *Participating entity.* (1) Except as provided in paragraphs (g)(2) and (g)(3) of this section, the term “participating entity” means with respect to each of the debt guarantee program and the transaction account guarantee program,

(i) An eligible entity that became an eligible entity on or before December 5, 2008 and that has not opted out, or

(ii) An entity that becomes an eligible entity after December 5, 2008, and that the FDIC has allowed to participate in the program, except.

(2) A participating entity that opted out of the transaction account guarantee program in accordance with § 370.5(c)(2) ceased to be a participating entity in the transaction account guarantee program effective on January 1, 2010.

(3) A participating entity that opts out of the transaction account guarantee program in accordance with § 370.5(c)(2) ceases to be a participating

entity in the transaction account guarantee program effective on July 1, 2010.

(h) *Noninterest-bearing transaction account.* (1) The term “noninterest-bearing transaction account” means a transaction account as defined in 12 CFR 204.2 that is

(i) Maintained at an insured depository institution;

(ii) With respect to which interest is neither accrued nor paid; and

(iii) On which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal.

(2) A noninterest-bearing transaction account does not include, for example, an interest-bearing money market deposit account (MMDA) as those accounts are defined in 12 CFR 204.2.

(3) Notwithstanding paragraphs (h)(1) and (h)(2) of this section, for purposes of the transaction account guarantee program, a noninterest-bearing transaction account includes:

(i) Accounts commonly known as Interest on Lawyers Trust Accounts (IOLTAs) (or functionally equivalent accounts); and

(ii) Negotiable order of withdrawal accounts (NOW accounts) with interest rates:

(A) No higher than 0.50 percent through June 30, 2010, if the insured depository institution at which the account is held has committed to maintain the interest rate at or below 0.50 percent through June 30, 2010; and

(B) No higher than 0.25 percent after June 30, 2010, if the insured depository institution at which the account is held has committed to maintain the interest rate at or below 0.25 percent after June 30, 2010 through the TAG expiration date.

(4) Notwithstanding paragraph (h)(3) of this section, a NOW account with an interest rate above 0.50 percent as of November 21, 2008, may be treated as a noninterest-bearing transaction account for purposes of this part:

(i) Through June 30, 2010, if the insured depository institution at which the account is held reduced the interest rate on that account to 0.50 percent or lower before January 1, 2009, and committed to maintain that interest rate at no more than 0.50 percent through June 30, 2010; and

(ii) After June 30, 2010 through the TAG expiration date, if the insured depository institution at which the account is held reduces the interest rate on that account to 0.25 percent or lower before July 1, 2010, and commits to maintain that interest rate at no more than 0.25 percent through the TAG expiration date.

(i) *FDIC-guaranteed debt.* The term “FDIC-guaranteed debt” means newly issued senior unsecured debt issued by a participating entity that meets the requirements of this part for debt that is guaranteed under the debt guarantee program, and is identified pursuant to § 370.5(h) as guaranteed by the FDIC.

(j) *Debt guarantee program.* The term “debt guarantee program” refers to the FDIC’s guarantee program for newly issued senior unsecured debt as described in this part.

(k) *Transaction account guarantee program.* The term “transaction account guarantee program” refers to the FDIC’s guarantee program for funds in noninterest-bearing transaction accounts as described in this part.

(l) *Temporary liquidity guarantee program.* The term “temporary liquidity guarantee program” includes both the debt guarantee program and the transaction account guarantee program.

(m) *Mandatory convertible debt.* The term “mandatory convertible debt” means senior unsecured debt that is required by the terms of the debt instrument to convert into common shares of the issuing entity on a fixed and specified date, on or before the expiration of the guarantee, unless the issuing entity:

(1) Fails to timely make any payment required under the debt instrument, or

(2) Merges or consolidates with any other entity and is not the surviving or resulting entity.

(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.

(o) *TAG expiration date.* The term “TAG expiration date” means December 31, 2010 unless the Board of Directors of the FDIC (the “Board”), for good cause, extends the transaction account guarantee program beyond December 31, 2010 for an additional period of time not to exceed one year, in which case the term “TAG expiration date” means the last day of such additional period of time. Good cause exists if the Board finds that the economic conditions and circumstances that led to the establishment of the transaction account guarantee program are likely to continue beyond December 31, 2010 and that extending the transaction account guarantee program for an additional period of time will help mitigate or resolve those conditions and circumstances. If the Board decides to extend the transaction account guarantee program beyond December 31, 2010 for an additional period of time, it will do so without further rulemaking; however, the FDIC will publish notice of any extension no later than October 29, 2010. Participating entities must update the disclosures required by § 370.5(h)(5), as necessary, to reflect the current TAG expiration date, including any extension of such date.

[73 FR 72266, Nov. 26, 2008, as amended at 74 FR 9524, Mar. 4, 2009; 74 FR 12082, Mar. 23, 2009; 74 FR 45098, Sept. 1, 2009; 74 FR 54747, Oct. 23, 2009; 75 FR 20263, Apr. 19, 2010; 75 FR 36510, June 28, 2010]

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(a) Upon the uncured failure of a participating entity to make a timely payment of principal or interest as required under an FDIC-guaranteed debt instrument, the FDIC will pay the unpaid principal and/or interest, in accordance with § 370.12 and subject to the other provisions of this part.

(b) *Debt guarantee limit.*(1) Except as provided in paragraphs (b)(2) through (b)(6) of this section, the maximum amount of outstanding debt that is guaranteed under the debt guarantee program for each participating entity at any time is limited to 125 percent of the par value of the participating entity's senior unsecured debt, as that term is defined in § 370.2(e)(1)(i) (excluding mandatory convertible debt), that was outstanding as of the close of business September 30, 2008 and that was scheduled to mature on or before June 30, 2009.

(2) If a participating entity that is an insured depository institution had either no senior unsecured debt as that term is defined in § 370.2(e)(1)(i), or only had federal funds purchased, outstanding on September 30, 2008, its debt guarantee limit is two percent of its consolidated total liabilities as of September 30, 2008. For the purposes of this paragraph (b)(2) of this section, the term "federal funds purchased" means:

(i) For insured depository institutions that file Reports of Condition and Income, unsecured "federal funds purchased" as that term is used in defining "Federal Funds Transactions" in the Glossary of the FFIEC Reports of Condition and Income Instructions, and

(ii) For insured depository institutions that file Thrift Financial Reports, "Federal Funds" as that term is defined in the Glossary of the 2008 Thrift Financial Report Instruction Manual.

(3) If a participating entity, other than an insured depository institution, had no senior unsecured debt as that term is defined in § 370.2(e)(1)(i) outstanding on September 30, 2008, the entity may seek to have some amount of debt covered by the debt guarantee program. The FDIC, after consultation with the appropriate Federal banking agency, will decide, on a case-by-case

basis, whether such a request will be granted and, if granted, what the entity's debt guarantee limit will be.

(4) 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.

(5) If an affiliate of a participating entity is designated as an eligible entity by the FDIC after a written request and positive recommendation by the appropriate Federal banking agency (or if the affiliate has no appropriate Federal banking agency, a written request and positive recommendation by the appropriate Federal banking agency of the affiliated insured depository institution), the FDIC will establish the entity's debt guarantee limit at the time of such designation.

(6) The FDIC may make exceptions to an entity's debt guarantee limit. For example, the FDIC may allow a participating entity to exceed the limit determined in paragraph (b)(1) or (b)(2) of this section, reduce the limit below the amount determined in paragraph (b)(1) or (b)(2) of this section, and/or impose other limits or requirements after consultation with the entity's appropriate Federal banking agency.

(7) If a participating entity issues debt identified as guaranteed under the debt guarantee program that exceeds its debt guarantee limit, it will be subject to assessment increases and enforcement action as provided in § 370.6(e).

(8) A participating entity that is both an insured depository institution and a direct or indirect subsidiary of a parent participating entity may, absent direction by the FDIC to the contrary, increase its debt guarantee limit above the limit determined in accordance with paragraphs (b)(1) through (b)(6) of this section, provided that:

(i) The amount of the increase does not exceed the debt guarantee limit(s) of one or more of its parent participating entities;

(ii) The insured depository institution provides prior written notice to the FDIC and to each such parent participating entity of the amount of the increase, the name of each contributing parent participating entity, and

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the starting and ending dates of the increase; and

(iii) For so long as the institution's debt guarantee limit is increased by such amount, the debt guarantee limit of each contributing parent participating entity is reduced by an amount corresponding to the amount of its contribution to the amount of the increase.

(9) The debt guarantee limit of the surviving entity of a merger between or among eligible entities is equal to the sum of the debt guarantee limits of the merging eligible entities calculated on a pro forma basis as of the close of business September 30, 2008, absent action by the FDIC after consultation with the surviving entity and its appropriate Federal banking agency.

(10) For purposes of determining the amount of guaranteed debt outstanding under paragraph (b)(1) of this section, debt issued in a foreign currency will be converted into U.S. dollars using the exchange rate in effect on the date that the debt is funded.

(c) *Calculation and reporting responsibility.* Participating entities are responsible for calculating and reporting to the FDIC the amount of senior unsecured debt as defined in §370.2(e)(1)(i) as of September 30, 2008.

(1) Each participating entity shall calculate the amount of its senior unsecured debt outstanding as of the close of business September 30, 2008, that was scheduled to mature on or before June 30, 2009.

(2) Each participating entity shall report the calculated amount to the FDIC, even if such amount is zero, in an approved format via FDICconnect no later than December 5, 2008.

(3) In each subsequent report to the FDIC concerning debt issuances or balances outstanding, each participating entity shall state whether it has issued debt identified as FDIC-guaranteed debt that exceeded its debt guarantee limit at any time since the previous reporting period.

(4) The Chief Financial Officer (CFO) or equivalent of each participating entity shall certify the accuracy of the information reported in each report submitted pursuant to this section.

(d) *Expiration of Guarantee.* (1) With respect to debt that is issued before

April 1, 2009 by any participating entity, the guarantee expires on the earliest of the mandatory conversion date for mandatory convertible debt, the maturity date of the debt, or June 30, 2012.

(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.

(3) With respect to guaranteed debt that is issued on or after April 1, 2009 by a participating entity other than an entity described in paragraph (d)(2) of this section, the guarantee expires on the earliest of the mandatory conversion date for mandatory convertible debt, the maturity date of the debt, or on June 30, 2012.

(e) Debt cannot be issued and identified as guaranteed by the FDIC if:

(1) The proceeds are used to prepay debt that is not FDIC-guaranteed;

(2) The issuing entity has previously opted out of the debt guarantee program, except as provided in §370.5(d);

(3) The issuing entity has had its participation in the debt guarantee program terminated by the FDIC or is not a participating entity;

(4) The issuing entity has exceeded its debt guarantee limit for issuing guaranteed debt as specified in paragraph (b) of this section,

(5) The debt is owed to an affiliate, an institution-affiliated party, insider of the participating entity, or an insider of an affiliate or

(6) The debt does not otherwise meet the requirements of this part for FDIC guaranteed debt.

(f) The FDIC's agreement to include a participating entity's senior unsecured debt in the debt guarantee program

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does not exempt the entity from complying with any applicable law including, without limitation, Securities and Exchange Commission registration or disclosure requirements.

(g) *Long term non-guaranteed debt option.* On or before 11:59 p.m., Eastern Standard Time, December 5, 2008, a participating entity may also notify the FDIC that it has elected to issue senior unsecured non-guaranteed debt with maturities beyond June 30, 2012, at any time, in any amount, and without regard to the guarantee limit. By making this election the participating entity agrees to pay to the FDIC the nonrefundable fee as provided in § 370.6(f).

(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

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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.

(4) Applications required under this part must be in letter form and addressed to the Director, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

(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

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

(i) *Time limits on issuance of guaranteed debt.* (1) 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, may issue FDIC-guaranteed debt under the debt guarantee program through and including October 31, 2009.

(2) A participating entity other than an entity described in paragraph (i)(1) of this section may issue FDIC-guaranteed debt under the debt guarantee program through and including June 30, 2009.

(j) *Issuance of non-guaranteed debt after June 30, 2009.* (1) After obtaining the FDIC's prior written approval to issue non-guaranteed debt pursuant to paragraph (h)(1) of this section, any participating entity that has elected pursuant to paragraph (g) of this section to issue senior unsecured non-guaranteed debt with maturities after June 30, 2012 and that has paid the fee provided in §370.6(f), may issue after June 30, 2009 senior unsecured non-guaranteed debt in any amount with maturities on or before June 30, 2012. A participating entity that has both made the election provided by paragraph (g) of this section and paid the fee provided by §370.6(f) does not need the FDIC's approval to issue senior unsecured non-guaranteed debt that matures after June 30, 2012.

(2) After obtaining the FDIC's prior written approval to issue non-guaranteed debt pursuant to paragraph (h)(1) of this section, any participating entity, other than an entity described in paragraph (j)(1) of this section, may issue after June 30, 2009 senior unsecured non-guaranteed debt in any amount with any maturity.

(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.

[73 FR 72266, Nov. 26, 2008, as amended at 74 FR 9524, Mar. 4, 2009; 74 FR 12083, Mar. 23, 2009; 74 FR 54747, Oct. 23, 2009]

§ 370.4 Transaction Account Guarantee Program.

(a) In addition to the coverage afforded to depositors under 12 CFR Part 330, a depositor's funds in a non-interest-bearing transaction account maintained at a participating entity that is an insured depository institution are guaranteed in full (irrespective of the standard maximum deposit insurance amount defined in 12 CFR 330.1(n)) from October 14, 2008 through:

(1) The date of opt-out, in the case of an entity that opted out prior to December 5, 2008;

(2) December 31, 2009, in the case of an entity that opted out effective on January 1, 2010; or

(3) June 30, 2010, in the case of an entity that opts out of the transaction account guarantee program effective on July 1, 2010; or

(4) The TAG expiration date, in the case of an entity that does not opt out.

(b) In determining whether funds are in a noninterest-bearing transaction account for purposes of this section, the FDIC will apply its normal rules and procedures under §360.8 (12 CFR 360.8) for determining account balances at a failed insured depository institution. Under these procedures, funds may be swept or transferred from a noninterest-bearing transaction account to another type of deposit or nondeposit account. Unless the funds are in a noninterest-bearing transaction account after the completion of a sweep under §360.8, the funds will not

be guaranteed under the transaction account guarantee program.

(c) Notwithstanding paragraph (b) of this section, in the case of funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings deposit account, the FDIC will treat the swept funds as being in a noninterest-bearing transaction account. As a result of this treatment, the funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings account, as defined in 12 CFR 204.2(d), will be guaranteed under the transaction account guarantee program.

[73 FR 72266, Nov. 26, 2008, as amended at 74 FR 45098, Sept. 1, 2009; 75 FR 20264, Apr. 19, 2010]

§ 370.5 Participation.

(a) *Initial period.* All eligible entities are covered under the temporary liquidity guarantee program for the period from October 14, 2008, through December 5, 2008, unless they opt out on or before 11:59 p.m., Eastern Standard Time, December 5, 2008, in which case the coverage ends on the date of the opt-out.

(b) The issuance of FDIC-guaranteed debt subject to the protections of the debt guarantee program is an affirmative action by a participating entity that constitutes its agreement to be:

(1) Bound by the terms and conditions of the program, including without limitation, assessments and the terms of the Master Agreement as set forth on the FDIC's Web site;

(2) Subject to, and to comply with, any FDIC request to provide information relevant to participation in the debt guarantee program and to be subject to FDIC on-site reviews as needed, after consultation with the appropriate Federal banking agency, to determine compliance with the terms and requirements of the debt guarantee program; and

(3) Bound by the FDIC's decisions, in consultation with the appropriate Federal banking agency, regarding the management of the temporary liquidity guarantee program.

(c) *Opt-out and opt-in options.* (1) From October 14, 2008 through December 5, 2008, each eligible entity is a participating entity in both the debt guar-

antee program and the transaction account guarantee program, unless the entity opts out. No later than 11:59 p.m., Eastern Standard Time, December 5, 2008, each eligible entity must inform the FDIC if it desires to opt out of the debt guarantee program or the transaction account guarantee program, or both. Failure to opt out by 11:59 p.m., Eastern Standard Time, December 5, 2008 constitutes a decision to continue in the program after that date. Prior to December 5, 2008 an eligible entity may opt in to either or both programs by informing the FDIC that it will not opt out of either or both programs.

(2) Any insured depository institution that is participating in the transaction account guarantee program may elect to opt out of such program effective on January 1, 2010. Any such election to opt-out must be made in accordance with the procedures set forth in paragraph (g)(2) of this section. An election to opt out once made is irrevocable.

(3) Any insured depository institution that is participating in the transaction account guarantee program may request authorization to opt out of such program effective on July 1, 2010. Any such election to opt-out must be made in accordance with the procedures set forth in paragraph (g)(3) of this section. If the FDIC grants the request, the opt out is irrevocable.

(d) An eligible entity may elect to opt out of either the debt guarantee program or the transaction account guarantee program or both. The choice to opt out, once made, is irrevocable, except that, in the case of a merger between two eligible entities, the resulting institution will have a one-time option to revoke a prior decision to opt-out. This option must be requested by application to the FDIC in accordance with § 370.3(h). Similarly, the choice to affirmatively opt in, as provided in paragraph (c) of this section, once made, is irrevocable.

(e) All eligible entities that are affiliates of a U.S. bank holding company or that are affiliates of an eligible entity that is a U.S. savings and loan holding company must make the same decision regarding continued participation in each guarantee program; failure to do

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so constitutes an opt out by all members of the group.

(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.

(g) *Procedures for opting out.* (1) Except as provided in paragraphs (g)(2) and (g)(3) of this section, the FDIC will provide procedures for opting out and for making an affirmative decision to opt in using FDIC’s secure e-business Web site, FDICconnect. Entities that are not insured depository institutions will select and solely use an affiliated insured depository institution to submit their opt-out election or their affirmative decision to opt in.

(2) Pursuant to paragraph (c)(2) of this section a participating entity may opt out of the transaction account guarantee program effective on January 1, 2010 by submitting to the FDIC on or before 11:59 p.m., Eastern Standard Time, on November 2, 2009 an email conveying the entity’s election to opt out. The subject line of the email must include: “TLGP Election to Opt Out—Cert. No. _____.” The email must be addressed to *dcas@fdic.gov* and must include the following:

- (i) Institution Name;
- (ii) FDIC Certificate number;
- (iii) City, State, ZIP;
- (iv) Name, Telephone Number and Email Address of a Contact Person;
- (v) A statement that the institution is opting out of the transaction account guarantee program effective January 1, 2010; and

(vi) Confirmation that no later than November 16, 2009 the institution will post a prominent notice in the lobby of its main office and each domestic branch and, if it offers Internet deposit services, on its website clearly indicating that after December 31, 2009, funds held in noninterest-bearing transaction accounts will no longer be guaranteed in full under the Transaction Account Guarantee Program, but will be insured up to \$250,000 under the FDIC’s general deposit insurance rules.

(3) Pursuant to paragraph (c)(3) of this section a participating entity may request authorization to opt out of the transaction account guarantee program effective on July 1, 2010 by submitting to the FDIC on or before 11:59 p.m., Eastern Daylight Saving Time, on April 30, 2010 an e-mail conveying the entity’s request to opt out. The subject line of the e-mail must include: “TLGP Request to Opt Out—Cert. No. _____.” The e-mail must be addressed to *optout@fdic.gov* and must include the following:

- (i) Institution Name;
- (ii) FDIC Certificate number;
- (iii) City, State, ZIP;
- (iv) Name, Telephone Number and Email Address of a Contact Person;
- (v) A statement that the institution is requesting authorization to opt out of the transaction account guarantee program effective July 1, 2010; and
- (vi) Confirmation that no later than May 20, 2010 the institution will post a prominent notice in the lobby of its main office and each domestic branch and, if it offers Internet deposit services, on its Web site clearly indicating that after June 30, 2010, funds held in noninterest-bearing transaction accounts will no longer be guaranteed in full under the Transaction Account Guarantee Program, but will be insured up to \$250,000 under the FDIC’s general deposit insurance rules.

(h) *Disclosures regarding participation in the temporary liquidity guarantee program.* (1) The FDIC will publish on its Web site:

- (i) A list of the eligible entities that have opted out of the debt guarantee program, and
- (ii) A list of the eligible entities that have opted out of the transaction account guarantee program.

(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

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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.]

(3) Each participating entity other than an entity described in paragraph (h)(2) of this section 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 June 30, 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 June 30, 2012.]

(4) Each participating entity must include the following disclosure statement in all written materials provided to lenders or creditors regarding any senior unsecured debt issued by it during the applicable issuance period that is not guaranteed under the debt guarantee program:

This debt is not guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program.

(5) Each insured depository 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 Web site clearly indicating whether the institution is participating in the transaction account guarantee program. If the institution is participating in the transaction account guarantee program, the notice must state that funds held in noninterest-bearing transactions accounts at the entity are guaranteed in full by the FDIC. Participating entities must update their disclosures to reflect the current TAG expiration date, including any extension pursuant to §370.2(o) or, if applicable, any decision to opt-out.

(1) These disclosures must be provided in simple, readily understandable text. Sample disclosures are as follows:

For Participating Institutions

[Institution Name] is participating in the FDIC's Transaction Account Guarantee Program. Under that program, through [June 30, 2010, December 31, 2010, or such other date established by the Board as the TAG expiration date pursuant to §370.2(o), whichever is applicable], all noninterest-bearing transaction accounts are fully guaranteed by the FDIC for the entire amount in the account. Coverage under the Transaction Account Guarantee Program is in addition to and separate from the coverage available under the FDIC's general deposit insurance rules.

For Participating Institutions That Elect To Opt-Out of the Extended Transaction Account Guaranty Program Effective on July 1, 2010

Beginning July 1, 2010 [Institution Name] will no longer participate in the FDIC's Transaction Account Guarantee Program. Thus, after June 30, 2010, funds held in noninterest-bearing transaction accounts will no longer be guaranteed in full under the Transaction Account Guarantee Program, but will be insured up to \$250,000 under the FDIC's general deposit insurance rules.

For Non-Participating Institutions

[Institution Name] has chosen not to participate in the FDIC's Transaction Account Guarantee Program. Customers of [Institution Name] with noninterest-bearing transaction accounts will continue to be insured for up to \$250,000 under the FDIC's general deposit insurance rules.

(ii) If the institution uses sweep arrangements or takes other actions that result in funds being transferred or reclassified to an account that is not guaranteed under the transaction account guarantee program, for example, an interest-bearing account, the institution must disclose those actions to the

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affected customers and clearly advise them, in writing, that such actions will void the FDIC's guarantee with respect to the swept, transferred, or reclassified funds.

(i) *Participation By New Eligible Entities And Continued Eligibility.* The FDIC will determine eligibility in consultation with the eligible entity's appropriate Federal banking agency.

(1) Participation by an entity that is organized after October 13, 2008 or that becomes an entity described § 370.2(a) after October 13, 2008 will be: with respect to the transaction account guarantee program, effective on the date of the entity's opt-in as described in § 370.2(g)(2), and with respect to the debt guarantee program, considered by the FDIC on a case-by-case basis in consultation with the entity's appropriate Federal banking agency.

(2) An eligible entity that is not an insured depository institution will cease to be eligible to participate in the debt guarantee program once it is no longer affiliated with a chartered and operating insured depository institution.

(j) No mandatory convertible debt may be issued without obtaining the FDIC's prior written approval.

[73 FR 72266, Nov. 26, 2008, as amended at 74 FR 9525, Mar. 4, 2009; 74 FR 12084, Mar. 23, 2009; 74 FR 45099, Sept. 1, 2009; 74 FR 54749, Oct. 23, 2009; 75 FR 20264, Apr. 19, 2010; 75 FR 36510, June 28, 2010]

§ 370.6 Assessments under the Debt Guarantee Program.

(a) *Waiver of assessment for certain initial periods.* No eligible entity shall pay any assessment associated with the debt guarantee program for the period from October 14, 2008 through November 12, 2008. An eligible entity that opts out of the program on or before December 5, 2008 will not pay any assessment under the program.

(b) *Notice to the FDIC.* No guaranteed debt shall be issued by a participating entity under the FDIC's debt guarantee program unless notice of the issuance of such debt and payment of associated assessments is provided to the FDIC as required by this section and, for guaranteed debt issued after November 21, 2008, the participating entity agrees to be bound by the terms of the Master Agreement, as set forth on the FDIC's Web site.

(1) Any eligible entity that does not opt out of the debt guarantee program on or before December 5, 2008, as provided in § 370.5, and that issues any guaranteed debt during the period from October 14, 2008 through December 5, 2008 which is still outstanding on December 5, 2008, shall notify the FDIC of that issuance via the FDIC's e-business Web site *FDICconnect* on or before December 19, 2008, and the entity's Chief Financial Officer or equivalent shall certify that the issuances identified as FDIC-guaranteed debt outstanding at each point of time did not exceed the debt guarantee limit as set forth in § 370.3

(2) Each participating entity that issues guaranteed debt after December 5, 2008, shall notify the FDIC of that issuance via the FDIC's e-business Web site *FDICconnect* within the time period specified by the FDIC. The eligible entity's Chief Financial Officer or equivalent shall certify that the issuance of guaranteed debt does not exceed the debt guarantee limit as set forth in § 370.3.

(3) The FDIC will provide procedures governing notice to the FDIC and certification of guaranteed amount limits for purposes of this section.

(c) *Initiation of assessments.* Assessments, calculated in accordance with paragraph (d) of this section, will accrue, with respect to each eligible entity that does not opt out of the debt guarantee program on or before December 5, 2008:

(1) Beginning on November 13, 2008, on all senior unsecured debt, as defined in § 370.2(e)(1)(i) (except for overnight debt), issued by it on or after October 14, 2008, and on or before December 5, 2008, that is still outstanding on December 5, 2008; and

(2) Beginning on December 6, 2008, on all senior unsecured debt, as defined in paragraphs (e)(1)(ii) or (e)(1)(iii) of § 370.2, issued by it on or after December 6, 2008.

(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

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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

(2) If the debt being issued has a maturity date that occurs after the expiration date of the guarantee, the expiration date of the guarantee instead of the maturity date will be used to calculate the assessment.

(3) The amount of assessment for a participating entity, other than an insured depository institution, that controls, directly or indirectly, or is otherwise affiliated with, at least one insured depository institution 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 rates set forth in the table in paragraph (d)(1) of this section, except that each such rate shall be increased by 10 basis points, if the combined assets of all insured depository institutions affiliated with such entity constitute less than 50 percent of consolidated holding company assets. The comparison of assets for purposes of this paragraph shall be determined as of September 30, 2008, except that in the case of an entity that becomes an eligible entity after October 13, 2008, the comparison of assets shall be determined as of the date that it becomes an eligible entity.

(4) *Assessment Invoicing.* As soon as the participating entity provides notice as required in paragraph (b) of this section, the invoice for the appropriate fee will be automatically generated and posted on *FDICconnect* for the account associated with the participating entity, and the time limits for providing payment in paragraph (g) of this section will apply.

(5) *No assessment reduction for early retirement of guaranteed debt.* A participating entity’s assessment shall not be reduced if guaranteed debt is retired prior to its scheduled maturity date or conversion date.

(e) *Increased assessments for debt exceeding the debt guarantee limit.* Any participating entity that issues guaranteed debt represented as being guaranteed by the FDIC exceeding its debt guarantee limit as set forth in §370.3(b) shall have its applicable assessment rate(s) for all outstanding guaranteed debt increased by 100 percent for purposes of the calculations in paragraph (d)(1) of this section. The FDIC may reduce the assessments under this paragraph upon a showing of good cause by the entity. In addition, any entity making such a misrepresentation may also be subject to enforcement action under 12 U.S.C. 1818, as further described in §370.11.

(f) *Long term non-guaranteed debt fee.* Each participating entity that elects to issue long term non-guaranteed debt pursuant to §370.3(g) must pay the FDIC a nonrefundable fee equal to 37.5 basis points times the amount of the entity’s senior unsecured debt, as defined in §370.2(e)(1)(i), 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 established under §370.3(b).

(1) The nonrefundable fee will be collected in six equal monthly installments.

(2) An entity electing the nonrefundable fee option will also be billed as it issues guaranteed debt under the debt guarantee program, and the amounts paid as a nonrefundable fee under this paragraph will be applied to offset these bills until the nonrefundable fee is exhausted.

(3) Thereafter, the institution will have to pay additional assessments on guaranteed debt as it issues the debt, as otherwise required by this section.

(g) *Collection of assessments—ACH Debit.* (1) Each participating entity shall take all actions necessary to allow the Corporation to debit assessments from the participating entity’s

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designated deposit account as provided for in § 327.3(a)(2). The assessment payments of a participating entity that is not an insured depository institution shall be debited from the designated account of the affiliated insured depository institution it selected for FDICconnect access under § 370.5(g).

(2) Each participating entity shall ensure that funds in an amount at least equal to the amount of the assessment are available in the designated account for direct debit by the Corporation on the first business day after posting of the invoice on FDICconnect. A participating entity that is not an insured depository institution shall provide the necessary funds for payment of its assessments.

(3) Failure to take all necessary action or to provide funding to allow the Corporation to debit assessments shall be deemed to constitute nonpayment of the assessment, and such failure by any participating entity will be subject to the penalties for failure to timely pay assessments as provided for at § 308.132(c)(3)(v).

(4) For purposes of this paragraph (g) of this section, assessments shall include all applicable surcharges imposed pursuant to paragraph (h) of this section.

(h) *Surcharges on assessments.* (1) For FDIC-guaranteed debt that has a time period to conversion (in the case of mandatory convertible debt) or a maturity of one year or more, that is issued on or after April 1, 2009 and on or before June 30, 2009, and that matures or converts on or before June 30, 2012, the assessment rate provided in the table in paragraph (d)(1) of this section shall be increased by:

(i) 10 basis points for such debt that is issued by a participating entity that is an insured depository institution, and

(ii) 20 basis points for such debt that is issued by any other participating entity.

(2) For FDIC-guaranteed debt that has a time period to conversion (in the case of mandatory convertible debt) or a maturity of one year or more, and that is either issued on or after April 1, 2009 with a maturity or conversion date after June 30, 2012, or issued after June 30, 2009, the assessment rate provided

in the table in paragraph (d)(1) of this section shall be increased by

(i) 25 basis points for such debt that is issued by a participating entity that is an insured depository institution, and

(ii) 50 basis points for such debt that is issued by any other participating entity.

(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.

[73 FR 72266, Nov. 26, 2008, as amended at 74 FR 9525, Mar. 4, 2009; 74 FR 12085, Mar. 23, 2009; 74 FR 54749, Oct. 23, 2009]

§ 370.7 Assessment for the Transaction Account Guarantee Program.

(a) *Waiver of assessment for certain initial periods.* No eligible entity shall pay any assessment associated with the transaction account guarantee program for the period from October 14, 2008, through November 12, 2008. An eligible entity that opts out of the program on or before December 5, 2008 will not pay any assessment under the program.

(b) *Initiation of assessments.* Beginning on November 13, 2008 each eligible entity that does not opt out of the transaction account guarantee program on or before December 5, 2008 will be required to pay the FDIC assessments on all deposit amounts in noninterest-bearing transaction accounts calculated in accordance with paragraph (c) of this section.

(c) *Amount of assessment.* (1) Except as provided in paragraphs (c)(2) and (c)(3) of this section any eligible entity that does not opt out of the transaction account guarantee program shall pay quarterly an annualized 10 basis point assessment on any deposit amounts exceeding the existing deposit insurance limit of \$250,000, as reported on its quarterly Consolidated Reports of Condition and Income, Thrift Financial

Report, or Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (each, a “Call Report”) in any noninterest-bearing transaction accounts (as defined in §370.2(h)), including any such amounts swept from a noninterest-bearing transaction account into a noninterest-bearing savings deposit account as provided in §370.4(c).

(2) For the period after December 31, 2009 through and including June 30, 2010, each participating entity that does not opt out of the transaction account guarantee program in accordance with §370.5(c)(2) shall pay quarterly a fee based upon its Risk Category rating. The amount of the fee for each such entity is equal to the annualized, TAG assessment rate for the entity multiplied by the amount of the deposits held in noninterest-bearing transaction accounts (as defined in §370.2(h) and including any amounts swept from a noninterest-bearing transaction account into a noninterest-bearing savings deposit account as provided in §370.4(c)) that exceed the existing deposit insurance limit of \$250,000, as reported on the entity’s most recent quarterly Call Report.

(3) Beginning on July 1, 2010, each participating entity that does not opt out of the transaction account guarantee program shall pay quarterly a fee based upon its Risk Category rating. The amount of the fee for each such entity is equal to the annualized, TAG assessment rate for the entity multiplied by the aggregate amount of the deposits held in noninterest-bearing transaction accounts (as defined in §370.2(h) and including any amounts swept from a noninterest-bearing transaction account into a noninterest-bearing savings deposit account as provided in §370.4(c)) that exceed the existing deposit insurance limit of \$250,000, calculated based upon the average daily balances in such accounts as reported on the entity’s most recent quarterly Call Report.

(4) The annualized TAG assessment rates are as follows:

(i) 15 basis points, for the portion of each quarter in which the entity is assigned to Risk Category I;

(ii) 20 basis points, for the portion of each quarter in which the entity is assigned to Risk Category II; and

(iii) 25 basis points, for the portion of each quarter in which the entity is assigned to either Risk Category III or Risk Category IV.

(5) The amount to be reported for each noninterest-bearing transaction account as the average daily balance is the total dollar amount held in such account that exceeds \$250,000 for each calendar day during the quarter divided by the number of calendar days in the quarter. For those days that an office of the reporting institution is closed (e.g., Saturdays, Sundays, or holidays), the amounts outstanding from the previous business day should be used. The total number of accounts to be reported should be calculated on the same basis. Documentation supporting the amounts used in the calculation of the average daily balance amounts must be retained and be readily available upon request by the FDIC or the institution’s primary Federal regulator. In addition, all institutions that do not opt of the transaction account guarantee program must establish procedures to gather the necessary daily data beginning July 1, 2010.

(6) An entity’s Risk Category is determined in accordance with the FDIC’s risk-based premium system described in 12 CFR part 327. The assessments provided in this paragraph (c) shall be in addition to an institution’s risk-based assessment imposed under Part 327.

(d) *Collection of assessment.* Assessments for the transaction account guarantee program shall be collected along with a participating entity’s quarterly deposit insurance payment as provided in §327.3, and subject to penalties for failure to timely pay assessments as referenced in §308.132(c)(3)(v).

[73 FR 72266, Nov. 26, 2008, as amended at 74 FR 45099, Sept. 1, 2009; 75 FR 20265, Apr. 19, 2010]

§370.8 Systemic risk emergency special assessment to recover loss.

To the extent that the assessments provided under §370.6 or §370.7, other than the surcharges provided in §370.6(h), are insufficient to cover any

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loss or expenses arising from the temporary liquidity guarantee program, the Corporation shall impose an emergency special assessment on insured depository institutions as provided under 12 U.S.C. 1823(c)(4)(G)(ii) of the FDI Act.

[74 FR 12085, Mar. 23, 2009]

§ 370.9 Recordkeeping requirements.

The FDIC will establish procedures, require reports, and require participating entities to provide and preserve any information needed for the operation and supervision of this program.

[74 FR 12085, Mar. 23, 2009]

§ 370.10 Oversight.

(a) Participating entities are subject to the FDIC's oversight regarding compliance with the terms of the temporary liquidity guarantee program.

(b) A participating entity's default in the payment of any debt may be considered an unsafe or unsound practice and may result in enforcement action as described in § 370.11.

(c) In general, with respect to a participating entity that is an insured depository institution, the FDIC shall consider the existence of conditions which rise to an obligation to pay on its guarantee as providing grounds for the appointment of the FDIC as conservator or receiver under Section 11(c)(5)(C) and (F) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(c)(5)(C) and (F).

(d) By issuing guaranteed debt, all participating entities agree, for the duration of the temporary liquidity guarantee program, to be subject to the FDIC's authority to determine compliance with the provisions and requirements of the program.

§ 370.11 Enforcement mechanisms.

(a) *Termination of Participation.* If the FDIC, in its discretion, after consultation with the participating entity's appropriate Federal banking agency, determines that the participating entity should no longer be permitted to continue to participate in the temporary liquidity guarantee program, the FDIC will inform the entity that it will no longer be provided the protections of

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the temporary liquidity guarantee program.

(1) Termination of participation in the temporary liquidity guarantee program will solely have prospective effect. All previously issued guaranteed debt will continue to be guaranteed as set forth in this part.

(2) The FDIC will work with the participating entity and its appropriate Federal banking agency to assure that the entity notifies its counterparties or creditors that subsequent debt issuances are not covered by the temporary liquidity guarantee program.

(b) *Enforcement Actions.* Violating any provision of the temporary liquidity guarantee program constitutes a violation of a regulation and may subject the participating entity and its institution-affiliated parties to enforcement actions under Section 8 of the FDI Act (12 U.S.C. 1818), including, for example, assessment of civil money penalties under section 8(i) of the FDI Act (12 U.S.C. 1818(i)), removal and prohibition orders under section 8(e) of the FDI Act (12 U.S.C. 1818(e)), and cease and desist orders under section 8(b) of the FDI Act (12 U.S.C. 1818(b)). The violation of any provision of the program by an insured depository institution also constitutes grounds for terminating the institution's deposit insurance under section 8(a)(2) of the FDI Act (12 U.S.C. 1818(a)(2)). The appropriate Federal banking agency for the participating entity will consult with the FDIC in enforcing the provisions of this part. The appropriate Federal banking agency and the FDIC also have enforcement authority under section 18(a)(4)(C) of the FDI Act (12 U.S.C. 1828(a)(4)(C)) to pursue an enforcement action if a person knowingly misrepresents that any deposit liability, obligation, certificate, or share is insured when it is not in fact insured.

§ 370.12 Payment on the guarantee.

(a) *Claims for Deposits in Noninterest-bearing Transaction Accounts.* (1) *In general.* The FDIC will pay the guaranteed claims of depositors for funds in a non-interest-bearing transaction account in an insured depository institution that

is a participating entity as soon as possible upon the failure of the entity. Unless otherwise provided for in this paragraph (a), the guaranteed claims of depositors who hold noninterest-bearing transaction deposit accounts in such entities will be paid in accordance with 12 U.S.C. 1821(f) and 12 CFR parts 330 and 370.

(2) *Subrogation rights of FDIC.* Upon payment of such claims, the FDIC will be subrogated to the claims of depositors in accordance with 12 U.S.C. 1821(g).

(3) *Review of final determination.* The final determination of the amount guaranteed shall be considered a final agency action of the FDIC reviewable in accordance with Chapter 7 of Title 5, by the United States district court for the federal judicial district where the principal place of business of the depository institution is located. Any request for review of the final determination shall be filed with the appropriate district court not later than sixty (60) days of the date on which the final determination is issued.

(b) *Payments on Guaranteed Debt of participating entities in default—(1) In general.* The FDIC's obligation to pay holders of FDIC-guaranteed debt issued by a participating entity shall arise upon the uncured failure of such entity to make a timely payment of principal or interest as required under the debt instrument (a "payment default").

(2) *Method of payment.* Upon the occurrence of a payment default, the FDIC shall satisfy its guarantee obligation by making scheduled payments of principal and interest pursuant to the terms of the debt instrument through maturity, or in the case of mandatory convertible debt, through the mandatory conversion date (without regard to default or penalty provisions). Any principal payment on mandatory convertible debt shall be limited to amounts paid by holders under the issuance. The FDIC may in its discretion, at any time after the expiration of the guarantee period, elect to make a final payment of all outstanding principal and interest due under a guaranteed debt instrument whose maturity extends beyond that date. In such case, the FDIC shall not be liable for any prepayment penalty.

(3) *Demand for payment; proofs of claim—(i) Payment through authorized representative.* Except as provided in paragraph (b)(3)(ii) of this section, a demand for payment on the guaranteed amount shall be made on behalf of all holders of debt subject to a payment default that is made by a duly authorized representative of such debtholders if the issuer shall have elected to provide for one in the Master Agreement submitted pursuant §370.6(b). Such demand must be accompanied by a proof of claim, which shall include evidence, to the extent not previously provided in the Master Agreement, in form and content satisfactory to the FDIC, of : the representative's financial and organizational capacity to act as representative; the representative's exclusive authority to act on behalf each and every debtholder and its fiduciary responsibility to the debtholder when acting as such, as established by the terms of the debt instrument; the occurrence of a payment default; and the authority to make an assignment of each debtholder's right, title, and interest in the FDIC-guaranteed debt to the FDIC and to effect the transfer to the FDIC of each debtholder's claim in any insolvency proceeding. This assignment shall include the right of the FDIC to receive any and all distributions on the debt from the proceeds of the receivership or bankruptcy estate. If any holder of the FDIC-guaranteed debt has received any distribution from the receivership or bankruptcy estate prior to the FDIC's payment under the guarantee, the guaranteed amount paid by the FDIC shall be reduced by the amount the holder has received in the distribution from the receivership or bankruptcy estate. All such demands must be made within 60 days of the occurrence of the payment default upon which the demand is based. Upon receipt of a conforming proof of claim, if timely filed, the FDIC will make a payment of the amount guaranteed.

(ii) *Individual debtholders:* Individual debtholders who are not represented by an authorized representative provided for in a Master Agreement submitted pursuant to §370.6(b), or who elect not to be represented by such authorized representative, may make demand for payment of the guaranteed amount

upon the FDIC. The FDIC may reject a demand made by a person who the FDIC determines has not opted out of representation by an authorized representative. In order to be considered for payment, such demand must be accompanied by a proof of claim, which shall include evidence in form and content satisfactory to the FDIC of: the occurrence of a payment default; and the claimant's ownership of the FDIC-guaranteed debt obligation. The demand also must be accompanied by an assignment, in form and content satisfactory to the FDIC, of the debtholder's rights, title, and interest in the FDIC-guaranteed debt to the FDIC and the transfer to the FDIC of the debtholder's claim in any insolvency proceeding. This assignment shall include the right of the FDIC to receive any and all distributions on the debt from the proceeds of the receivership or bankruptcy estate. If any holder of the FDIC-guaranteed debt has received any distribution from the receivership or bankruptcy estate prior to the FDIC's payment under the guarantee, the guaranteed amount paid by the FDIC shall be reduced by the amount the holder has received in the distribution from the receivership or bankruptcy estate. All such demands must be made within 60 days of the occurrence of the payment default upon which the demand is based. Upon receipt of a conforming proof of claim, if timely filed, the FDIC will make a payment of the amount guaranteed.

(iii) Any demand under this subsection shall be made in writing and directed to the Director, Division of Resolutions and Receiverships, Federal Deposit Insurance Corporation, Washington, DC., and must include all supporting evidence as set forth in the previous subsections, and shall certify to the accuracy thereof

(iv) *Demand period.* Failure of the holder of the FDIC-guaranteed debt or an authorized representative to make demand for payment within sixty (60) days of the occurrence of payment default will deprive the holder of the FDIC-guaranteed debt of all further rights and remedies with respect to the guarantee claim.

(4) *Subrogation.* Upon payment under either method under paragraph (b)(2) of

this section, the FDIC will be subrogated to the rights of any debtholder against the issuer, including in respect of any insolvency proceeding, to the extent of the payments made under the guarantee.

(5) *Release and satisfaction.* Payment under paragraph (b)(2) of this section shall constitute, to the extent of payments made, satisfaction of all FDIC obligations under the debt guarantee program with respect to that debtholder or holders. Acceptance of any such payments shall constitute a release of any liability of the FDIC under the debt guarantee program with respect to those payments. Each participating entity agrees and acknowledges that it shall be indebted to the FDIC for any payments made under these provisions (including amounts paid to a participating entity in return for its assumption of a guaranteed debt issuance) and shall honor immediately a demand by the FDIC for reimbursement therefore. A participating entity's undertakings in this regard shall be evidenced and governed by the "Master Agreement" it shall execute and submit, in connection with its election pursuant to §370.6(b) to participate in the Debt Guarantee Program.

(6) *Final determination; review of final determination.* The FDIC's determination under this paragraph shall be a final administrative determination subject to judicial review. The holder of FDIC-guaranteed debt shall have the right to seek judicial review of the FDIC's final determination in the United States District Court for the District of Columbia or the United States District Court for the federal district where the issuer's principal place of business was located. Failure of the holder of the FDIC-guaranteed debt to seek such judicial review within sixty (60) days of the date of the rendering of the final determination will deprive the holder of the FDIC-guaranteed debt of all further rights and remedies with respect to the guarantee claim.

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