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### OCC Interpretative Letter: FDIC-Guaranteed Senior Unsecured Debt under the Temporary Liquidity Guarantee Program

United States: Department of the Treasury: Office of the Comptroller of the Currency (OCC)

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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

January 26, 2009

**Interpretive Letter #1108**  
**January 2009**  
**12 CFR 16.5**

**Subject:** FDIC-Guaranteed Senior Unsecured Debt under the Temporary Liquidity  
Guarantee Program

Dear [ ]:

This responds to your letter dated December 24, 2008 requesting that the Office of the Comptroller of the Currency (“OCC”) consider the applicability of 12 C.F.R. §16.5 (“Section 16.5”) to FDIC-guaranteed senior unsecured debt (“Eligible Debt”) issued by a national bank under the Debt Guarantee Program of the Temporary Liquidity Guarantee Program (“TLGP”).

For the reasons discussed below, we conclude that the exemption from registration under Section 16.5(a) is applicable to Eligible Debt that matures on or before June 30, 2012, the expiration date of the FDIC’s guarantee under the TLGP Debt Guarantee Program. The exemption provided by Section 16.5(a) would not apply to Eligible Debt with a maturity that extends beyond June 30, 2012.

### **Background**

The FDIC adopted a final rule implementing its TLGP, effective November 21, 2008.<sup>1</sup> The TLGP provides two limited guarantee programs: (1) the Debt Guarantee Program, which temporarily guarantees newly-issued senior unsecured debt of participating insured depository institutions and U.S. holding companies up to prescribed limits<sup>2</sup> and (2) the Transaction Account Guarantee Program, which temporarily and fully guarantees certain noninterest-bearing transaction accounts at participating insured depository institutions. After the TLGP became

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<sup>1</sup> See Temporary Liquidity Guarantee Program, 73 Fed. Reg. 72244 (Nov. 26, 2008).

<sup>2</sup> *Id.* at 72245-2246. The final rule prescribes that the maximum amount of senior unsecured debt that could be issued pursuant to the Debt Guarantee Program equals 125 percent of the par or face value of senior unsecured debt outstanding as of September 30, 2008, that was scheduled to mature on or before June 30, 2009. The FDIC may, on a case-by-case basis, authorize a participating entity to exceed the 125 percent limitation or limit its participation to less than 125 percent.

effective on October 14, 2008, all eligible entities were automatically covered under both components of the TLGP at no cost for the first 30 days of the program unless they opted out of either component before then. Eligible entities were required to inform the FDIC whether they intended to opt-out of one or both components of the TLGP by December 5, 2008.

The final rule states that the FDIC will guarantee the unpaid principal and interest of Eligible Debt issued between October 14, 2008 and July 1, 2009 by participating entities under the Debt Guarantee Program. Moreover, the disclosure required for debt issued under the Debt Guarantee Program includes the statement that the debt is backed by the full faith and credit of the United States pursuant to section 15(d) of the Federal Deposit Insurance Act.<sup>3</sup> Eligible Debt will be protected to maturity or June 30, 2012, whichever is earlier. In no event would the guarantee extend beyond June 30, 2012.<sup>4</sup> This leads to the possibility that some Eligible Debt will carry the FDIC guarantee for its entire tenor and other Eligible Debt will be protected only for a portion of its tenor.

Staff of the Securities and Exchange Commission (“SEC”) has confirmed to the FDIC that Eligible Debt that carries the FDIC guarantee for its entire tenor, *i.e.*, Eligible Debt with a maturity date of June 30, 2012 or earlier, is exempt from registration under the Securities Act of 1933 (“Securities Act”) because the debt is “guaranteed by an instrumentality of the United States for purposes of Section 3(a)(2) of the Securities Act of 1933.”<sup>5</sup>

## Discussion

OCC regulations generally require that a national bank register its securities with the OCC.<sup>6</sup> Section 16.5(a) exempts securities from registration under Part 16 when those securities are exempt from registration under section 3 of the Securities Act but only by reason of an exemption “other than section 3(a)(2) (exemption for bank-issued securities) and section 3(a)(11) of the Securities Act (exemption for intrastate offerings)...” In addition to “bank-issued securities,” section 3(a)(2) of the Securities Act also exempts from registration other categories of securities, including securities guaranteed by the United States.

Section 16.5(a) does not deny an exemption from registration under Part 16 for all categories of securities that are exempt from registration under section 3(a)(2) of the Securities Act. Rather, as is made clear from the express parenthetical reference in the regulation, Section 16.5(a) denies an exemption under Part 16 to those securities that are exempt from Securities Act registration under section 3(a)(2) solely because they are securities that are “issued or guaranteed by any bank.” If a security issued by a national bank qualifies for an exemption from Securities Act

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<sup>3</sup> *Id.* at 72250. *See also* 12 USC §1825(d).

<sup>4</sup> *See Id.* at 72245. The time limit for protection is absolute. Protection coverage will expire at 11:59 p.m. EST on June 30, 2012 regardless of whether the liability had matured at that time.

<sup>5</sup> *See* Letter of the Office of Chief Counsel of the Division of Corporation Finance dated November 24, 2008 (“SEC Letter”), at <http://www.sec.gov/divisions/corpfin/cf-noaction/2008/fdic112408.htm>.

<sup>6</sup> 12 C.F.R. §16.3(a).

registration under section 3(a)(2) other than as a bank-issued or guaranteed security, Section 16.5(a) exempts that security from registration under Part 16. Thus, Section 16.5(a) exempts from the Part 16 registration requirements those bank issued securities that are “guaranteed by the United States.”

The Section 16.5(a) registration exemption applies to Eligible Debt as long as the issuing bank has not opted-out of the TLGP and the debt matures on or before the expiration of the FDIC guarantee. The FDIC has announced that Eligible Debt will be backed by the full faith and credit of the U.S. Government. Further, staff of the SEC has confirmed that Eligible Debt that matures on or prior to the expiration of the guarantee is exempt from registration because it is “guaranteed by an instrumentality of the United States for purposes of Section 3(a)(2) of the Securities Act of 1933.” Eligible Debt is exempt from SEC registration by reason of an exemption other than the exemption for bank issued securities in section 3(a)(2) and therefore is exempt from registration under Part 16 pursuant to the terms of Section 16.5(a).

Conversely, the Section 16.5(a) exemption does not apply to Eligible Debt with a maturity that extends beyond the expiration of the FDIC guarantee. Such a security is not considered “guaranteed by an instrumentality of the United States” because the U.S. Government does not fully guarantee payment of all interest and principal of the debt obligation for the life of the security. Similarly, the SEC Letter limits the exemption from registration under section 3(a)(2) to Eligible Debt that matures on or before the guarantee expires on June 30, 2012. As a result, Eligible Debt that matures after the FDIC guarantee’s expiration must register with the OCC under Part 16 unless another exemption from registration is available.

If you have any questions concerning this letter, please contact Yuna Peng, Senior Attorney, at (202) 874-5210.

Sincerely,

*signed*

Julie L. Williams  
First Senior Deputy Comptroller and Chief Counsel