DATE:

MEMORANDUM TO: Board of Directors

FROM: Diane Ellis, Director
Division of Insurance and Research

Bret Edwards, Director
Division of Resolutions and Receiverships

Doreen Eberley, Director
Division of Risk Management Supervision

Charles Yi, General Counsel
Legal Division

SUBJECT: Final Rule Rescinding the Temporary Liquidity Guarantee Program

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Recommendation: Staff recommends that the FDIC Board approve and issue the attached final rule to rescind part 370 of the Code of Federal Regulations (part 370), which implements the Temporary Liquidity Guarantee Program (TLGP) and its component programs, the Debt Guarantee Program (DGP) and Transaction Account Guarantee Program (TAGP), and sections 330.16 and 330.1(s) of the FDIC's deposit insurance regulations, which implement the Dodd-Frank Act's extension of unlimited deposit insurance for noninterest-bearing transaction accounts. The express terms of these regulations clearly indicate that no newly issued senior unsecured debt can be guaranteed by the FDIC under the DGP and that the FDIC's guarantee of noninterest-bearing transaction accounts above the standard deposit insurance limit similarly has expired under the TAGP and the Dodd-Frank Act. These programs have ended. As such, these regulations are unnecessary, obsolete, and serve no useful purpose.

I. Introduction

In October 2008, acting in response to unprecedented disruptions to the nation's credit markets and pursuant to section 13(c)(4)(G) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. §1823(c)(4)(G), the Board of Directors of the Federal Deposit Insurance Corporation (FDIC) and the Board of Governors of the Federal Reserve System (FRB) recommended that the Secretary of the Treasury, following consultation with the President, make a determination that systemic risk existed in the nation's financial system. After the Treasury Secretary's determination of systemic risk, the FDIC was authorized to take action or to provide assistance as necessary to avoid or to mitigate the effects of the perceived risks to the financial system. Pursuant to this authority, the FDIC issued part 370 of the Code of Federal Regulations (part 370) which established the TLGP. The TLGP was composed of two distinct components: the Debt Guarantee Program (DGP) and the Transaction Account Guarantee Program (TAGP). The DGP provided a temporary FDIC guarantee for all newly issued senior unsecured debt issued by participating entities up to prescribed limits; the TAGP provided a temporary FDIC guarantee for all funds held at FDIC-insured depository institutions in noninterest-bearing transaction accounts above the existing deposit insurance limit.

From its inception, the TLGP was intended to be a time-limited program. The FDIC's initial guarantee under the DGP expired on the earlier of the maturity date of the debt or June 30, 2012, for newly issued senior unsecured debt issued through June 30, 2009, by entities that opted into the DGP. To reduce market disruption at the conclusion of the DGP and to facilitate the orderly phase-out of the program, in 2009, the FDIC extended the issuance period for senior unsecured debt through October 31, 2009, and similarly extended the FDIC's guarantee on such obligations to the earlier of the stated maturity date of the debt or December 31, 2012. Later in

2009, the FDIC established a limited six-month emergency guarantee facility, available to participating entities on an application basis. Although no entities applied to avail themselves of the FDIC's emergency guarantee facility, the FDIC would have permitted approved entities to issue FDIC-guaranteed debt through April 30, 2010, for which the FDIC's guarantee would have expired on the earlier of the stated maturity date of the debt or December 31, 2012.

Under the TAGP, the FDIC's guarantee of all noninterest-bearing transaction accounts originally was scheduled to expire on December 31, 2009. In recognition of the continuing effects of economic turmoil, the FDIC twice extended the expiration deadline for the TAGP: first, until June 30, 2010, and, later, until December 31, 2010, "unless the board, for good cause, extends the program for an additional period of time not to exceed one year." On September 30, 2010, the FDIC indicated that TAGP would not be extended beyond December 31, 2010.

Over the course of the DGP's existence, 122 entities issued TLGP debt. At its peak, the DGP guaranteed $345.8 billion of outstanding debt. The DGP guarantee on all TLGP debt that had not already matured expired on December 31, 2012. Therefore, at the end of 2012, no debt guaranteed by the DGP remained.

The FDIC collected $10.4 billion in fees and surcharges under the DGP. As of December 31, 2012, the FDIC had paid $153 million in losses resulting from six participating entities defaulting on debt issued under the DGP. The majority of these losses ($113 million) arose from banks with outstanding DGP notes that failed in 2011 and were placed into receivership.

The FDIC collected $1.2 billion in fees under the TAGP. Cumulative estimated TAGP losses on failures as of December 31, 2012, totaled $2.1 billion.

Overall, TLGP fees exceeded the losses from the program. From the inception of the TLGP, it was the FDIC's policy to recognize revenue to the Deposit Insurance Fund (DIF) for any portion of guarantee fees in excess of amounts needed to cover potential losses upon expiration of the TLGP guarantee period (December 31, 2012) or earlier. In total, $9.3 billion in TLGP fees were deposited into the DIF.

On July 21, 2010, the Dodd-Frank Act was enacted. Section 343 of the Dodd-Frank Act provided for unlimited deposit insurance for noninterest-bearing transaction accounts for two years starting December 31, 2010. This unlimited coverage for "noninterest-bearing transaction accounts" as defined in the Dodd-Frank Act was similar to, but not identical to, the protection provided for such account owners under the FDIC's TAGP. On November 15, 2010, the FDIC published a final rule in the Federal Register amending 12 CFR part 330 to implement section 343 of the Dodd-Frank Act, providing for unlimited deposit insurance for "noninterest-bearing transaction accounts" for two years starting December 31, 2010. The final rule added a new definition of noninterest-bearing transaction account to the FDIC's regulations at §330.1(r) (now §330.1(s)). The final rule also added new §330.16 to provide for full insurance coverage, regardless of the standard maximum deposit insurance limit, to noninterest-bearing transaction accounts from December 31, 2010, through December 31, 2012.

On January 27, 2011, the FDIC published a final rule in the Federal Register (1) amending the definition of "noninterest-bearing transaction account" to include IOLTA accounts; (2) requiring notice be posted regarding the scope of coverage of the Dodd-Frank Act transaction account guarantee program at the bank's main office, in branch lobbies, and on its web site; and (3) requiring that notice be provided to holders of NOW accounts that such accounts would no longer be covered.

The expiration dates for the DGP and the TAGP were stated clearly in the FDIC's TLGP regulation. Because December 31, 2010 (the expiration date of the TAGP) and December 31, 2012 (the expiration of the DGP) have passed, all of the FDIC's obligations under either component of the TLGP have expired. With the expiration of both the DGP and the TAGP, part 370 is unnecessary and obsolete.

Similarly, §330.16(a) clearly provides that the unlimited deposit insurance for noninterest-bearing transaction accounts under the Dodd-Frank Act expired on December 31, 2012. As such, §330.16 and the definition of "noninterest-bearing transaction account" at §330.1(s) are unnecessary and obsolete.

Under section 2222 of the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA"), the FDIC is required to review all of its regulations, at least once every 10 years, in order to identify any outdated or otherwise unnecessary regulations imposed on insured institutions. The FDIC completed the last comprehensive review of its regulations under EGRPRA in 2006 and has commenced the next decennial review. Rescission of part 370, §330.16, and §330.1(s) is consistent with the required regulatory response to the EGRPRA review process: to eliminate unnecessary regulations to the extent such action is appropriate.

II. <u>Overview of the Final Rule</u>

Section 553 of the Administrative Procedure Act (APA) requires the FDIC to engage in notice-and-comment rulemaking, except "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." The current situation, in which the TLGP and the Dodd-Frank Act extension of unlimited deposit insurance for noninterest-bearing transaction accounts have, by their terms, expired, is within the plain language of section 553's exception to notice-and-comment rulemaking. That is, public comment on whether to abolish these regulations is "unnecessary" because there is no useful purpose in seeking comments on whether to remove them when they have – and can have – no effect. Because their removal would not affect anyone's substantive rights, rescinding part 370, §330.16, and §330.1(s) without notice and comment satisfies the requirement that doing so be unnecessary. For similar reasons, there is good cause to dispense with the usual 30-day delayed effective date required under the APA for a final rule.

The final rule contains a description of the TLGP and the Dodd-Frank Act's provision of unlimited deposit insurance for noninterest-bearing transaction accounts and a brief statement of the reasons that notice and public comment and a delayed effective date are unnecessary. The final rule provides that the rescission and removal of the affected regulations is effective upon publication in the *Federal Register*. Additionally, the final rule explains that removal of these regulations is consistent with the FDIC's review of its regulations under EGRPRA.

IV. Conclusion

Staff recommends that the Board approve and issue the attached final rule and authorize its publication in the *Federal Register*, which would remove unnecessary and obsolete regulations from the FDIC's body of regulations.

Contacts:

DIR:	Munsell St.Clair, Chief, Banking and Regulatory Policy Section (ext. 8-8967)
DRR:	Marc Steckel, Deputy Director (571) 858-8224
Legal:	Ann Johnson Taylor, Supervisory Counsel (ext. 8-3573) Gregory Feder, Counsel (ext. 8-8724)
RMS:	Lisa Arquette, Associate Director (ext. 8-8633)