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# Borrowers and lenders can use TAGP as a powerful tool in developing unique financing strategies

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On October 14, 2008, the Federal Deposit Insurance Corporation (FDIC) enacted the Temporary Liquidity Guaranty Program (TLGP) in an effort to "encourage liquidity in the banking system in order to ease lending to creditworthy businesses and consumers." The Final Rule governing the TLGP, 12 C.F.R. Part 370, was adopted November 21, 2008. The TLGP has two primary components: The Debt Guarantee Program, under which the FDIC guarantees the payment of certain newly issued senior unsecured debt, and the Transaction Account Guarantee Program (TAGP), under which the FDIC guarantees, in full, certain noninterest-bearing transaction accounts, and which is the focus of this article.

Participation in the TAGP is open to all insured depository institutions. In fact, all such institutions are automatically covered under the TAGP, subject to their right to opt-out. The deadline to opt-out was December 5, 2008; the FDIC website contains a complete list of the institutions that elected to do so. If an insured depository institution did not opt-out, then all funds on deposit with the institution in a "noninterest-bearing transaction account" are guaranteed, in full, by the FDIC. This guarantee is separate from the coverage provided by the FDIC's standard deposit insurance, and will remain in effect through December 31, 2009.

The key to enjoying the unlimited guarantee is maintaining the funds in a "noninterest-bearing transaction account". A "noninterest-bearing transaction account" is a "transaction account" 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. Though "transaction account" is defined broadly, to include most all deposit accounts, compliance with the TAGP requires that each of the aforesaid requirements be satisfied. The FDIC, however, has identified two limited exceptions to the requirement that the TAGP account be noninterest-bearing: (i) IOLTA accounts and (ii) NOW accounts that have, and on which the depository has agreed to maintain, an interest rate at or below .50%.

If a participating institution should fail, the FDIC will pay claims insured under the TAGP upon determining the eligibility of the deposit and the amount that is guaranteed. Funds in a noninterest-bearing transaction account that would have been swept into an interest-bearing or other non-transaction account by the end of the banking day on which the participant failed, will not be insured. Upon payment of the claim, the FDIC will be subrogated to the rights of depositors against the institution.

The current credit crisis has resulted in commercial real estate borrowers and lenders developing unique and innovative strategies in real estate financing transactions. The TAGP should be considered by each to be a powerful tool in connection with such endeavors. For example, to facilitate access to real estate financing, the borrower may agree to deposit cash with the lender, in an amount equal to or less than the financing sought, and pledge the cash as additional collateral for the loan. By doing so, the borrower obtains access to financing which was otherwise unavailable, while the lender increases its deposits and establishes or enhances a lending relationship. Additionally, so long as the lender is an insured depository institution participating in the TAGP, and the cash is maintained in a noninterest-bearing transaction account, the cash is guaranteed in full. Although, to enjoy this guarantee, the borrower will have to forgo interest earnings on the cash deposit, the additional cash collateral will likely enable the lender to provide the financing at a lower rate of interest. As such, the borrower's interest savings could well equal or exceed any loss of interest earned. Finally, the cash pledge, coupled with the real estate collateral, would provide the lender collateral for the financing having a value far in excess of the amount of the debt. Accordingly, this could obviate the need for a payment guaranty from, or other personal recourse against, the principals of the borrower.

As intended, borrowers and lenders can use the TAGP, through at least the end of this year, to develop innovative financing strategies and thus ease lending to creditworthy borrowers. Counsel to each must ensure that the financing documentation complies, in all respects, with the requirements of the TAGP.

Jaimee Zuboff is an attorney at Halloran & Sage LLP, Hartford, Conn. She practices in the area of Real Estate and Transactional Law.