

By E-Mail ([Comments@FDIC.gov](mailto:Comments@FDIC.gov))

November 12, 2008

Robert E. Feldman, Executive Secretary  
Federal Deposit Insurance Corporation  
550 17th Street, N.W., Washington, DC 20429

Subject: RIN # 3064-AD37; Comments on Interim FDIC Rule relating to  
Temporary Liquidity Guarantee Program (TLGP) and Interest on Lawyer  
Trust Accounts (IOLTA)

Dear Mr. Feldman:

On behalf of the Washington Council of Lawyers, we are submitting these comments on the FDIC's Interim Rule regarding the Temporary Liquidity Guarantee Program. We urge the FDIC to ensure that the program covers Interest on Lawyer Trust Accounts (IOLTA). These accounts are a critical source of funding for civil legal services for the indigent.

### **The Washington Council of Lawyers**

The Washington Council of Lawyers (WCL) is a non-profit organization of lawyers and legal workers committed to the spirit and practice of law in the public interest. Founded in 1971, the Washington Council of Lawyers is the area's only voluntary bar association dedicated exclusively to promoting *pro bono* and public interest law. WCL has been making a difference in the Washington legal community for three decades -- from lobbying to create the Legal Services Corporation in the 1970's, to reporting on federal Equal Employment Opportunity procedures in the 1980's, to surveying large D.C. firm *pro bono* programs in 1990, to establishing a death row representation project in the 1990's, and to participating in a study of federal agency *pro bono* programs in 2000.

Council members represent every sector of the Washington legal community -- lawyers and *pro bono* coordinators from large and small law firms and law schools, lawyers from public interest groups, government agencies and congressional offices, as well as law students and members of law-related professions. We are united in our conviction that the legal system must be made to serve the needs of the poor and the powerless as well as the affluent.

Our members share a common concern for the well-being of our community and the integrity of our civil and constitutional rights. Our members also work on behalf of people who have little to no voice on many public issues -- the homeless, the indigent, those charged with crimes -- and we are concerned about the integrity of their rights as well.

## **The Need for Legal Services for Low-Income and Vulnerable Client Populations**

While the American democracy is founded on the ideals of equality and fairness, those ideals are realized only to the extent that the least powerful in our society have effective means to enforce them. Courts are important, although not exclusive, guarantors of these rights, yet our judicial institutions are largely beyond the reach of most persons living in poverty. To effectively address the crisis in access to justice, there must be a continuum of services that includes brief advice and counseling, limited and full representation, access to trained and qualified legal interpreters, systemic litigation, client empowerment and policy advocacy. Substantive legal principles and procedural rules are often complex and interrelated in ways not obvious to those not trained in the law. In most cases, it is nearly impossible to negotiate the system to resolve the simplest matter without a lawyer.

A September 2003 Report of the District of Columbia Bar Foundation: “Civil Legal Services Delivery in the District of Columbia” documented the gaps in civil legal services (<http://www.dcbfoundation.org/access.html>). The report found that the network is inadequate in significant ways. First, that there are many areas of poverty law for which very limited or no services are available (e.g., consumer, public utilities, probate). Second, even in those areas in which there is a significant commitment, like housing and family law, existing programs turn away far more clients than they serve. Third, the range of advocacy strategies are limited with the greatest number of clients receiving advice and limited task assistance, with many fewer receiving full representation. Fourth, significant language and cultural barriers exist in the legal services delivery system, District agencies and the Court’s.

More recently, the DC Access to Justice Commission – a body of legal community leaders created by the D.C. Court of Appeals to ensure that low-income and other vulnerable District residents have access to the civil justice system – released a comprehensive civil legal needs report, “Justice for All? An Examination of the Civil Legal Needs of the District of Columbia’s Low-Income Community.” This October 2008 report (available at <http://www.dcaccesstojustice.org/CivilLegalNeedsReport.html>) concludes that legal services providers’ “collective budget does not come close to...what is needed to serve the District’s low-income community.

The denial of meaningful and equal justice in the District of Columbia is not a new issue. It is a problem that has plagued the District for decades. The bench, the bar and the legal services community have undertaken modest, but important steps to address the need. Throughout the 1980’s and 1990’s there has been a growth in the number of specialty programs serving specific client communities; the Court has supported efforts to facilitate self-representation and the District of Columbia Bar has invested resources in encouraging and facilitating *pro bono* efforts by private firms. Despite these efforts, a very generous *pro bono* bar and a robust and effective legal services network, meaningful access to justice remains elusive for most persons living in poverty.

A cornerstone of achieving equal and meaningful access to justice is significantly increased funding for civil legal services. While legal services programs are responsible for protecting and advancing the legal interests of more than 20% of the population, the lawyers in staffed programs make up a tiny percentage of the practicing bar. As a result, more than 90% of the need for individual representation goes unmet. The gap in availability of other legal services, including agency and legislative advocacy, community lawyering, and systemic litigations is immeasurable. Legal services funding provided through IOLTA accounts should not be jeopardized due to the consequences of the FDIC's interim rule.

### **Why Revisions to the Interim Rule are Necessary**

The unintended consequence of the TLGP is to create a situation in which client funds in excess of \$250,000, currently held in IOLTA accounts, are eligible for unlimited insurance if they are *removed* from the IOLTA account and placed in “non-interest bearing deposit transaction accounts.” We urge the FDIC to interpret or revise the interim rule so that the TLGP will provide full coverage, regardless of dollar amount, for these unique and critically important interest-bearing deposit transaction accounts because:

- IOLTA accounts are effectively the same as payroll accounts;
- While these accounts pay interest, banks do so with explicit permission of federal regulators and only pay the interest to third party non-profit IOLTA programs;
- Every state and the District of Columbia has an IOLTA program into which lawyers deposit client funds that cannot earn net interest for the client in IOLTA accounts;
- Nationally, income from IOLTA provides the second-largest source of funding for civil legal services for the poor; and
- Funding for legal services is needed now more than ever, given the economic crisis facing the nation and the tremendous increase in foreclosures and evictions. The interest earned in IOLTA accounts already is low due to the current regime of low interest rates at banks across the country. If lawyers decide to move their client funds from IOLTA accounts to other accounts, due to their fiduciary duty to protect their clients' funds and the TLGP interim rule, funding for legal aid to the poor will be even more jeopardized.

IOLTA accounts contain client funds held by a lawyer on behalf of a client that are nominal in amount or held for a short period of time that cannot earn interest for the client net of banking charges and administrative fees. Typical funds held by a lawyer on behalf of clients include such things as court filing fees, settlements, and retainers. Prior to the 1980s, lawyers placed nominal or short-term client funds in non-interest bearing checking accounts. Lawyers routinely pooled these funds in one account because it would

have been prohibitively expensive to open and maintain a separate account for each client. Under IOLTA, these same nominal or short-term funds are still pooled into one account. The only difference is that, with changes in the banking laws and the explicit permission of federal regulators, banks remit interest on these pooled accounts to a non-profit organization: the IOLTA program.

Many of our WCL members are in private practice, at both large and small firms. These attorneys are fiduciaries and want to ensure that the client funds in their care are protected. With the interim rule, those holding significant client funds may feel a responsibility to place their client funds in a non-interest bearing deposit transaction account in order to qualify for the new insurance. Yet they also are committed to legal aid to the poor and the reason why IOLTA accounts were established.

The TGLP, as currently configured, has the potential to greatly reduce the interest income received by IOLTA programs because in many states a significant portion of the IOLTA funds are generated by attorneys holding large amounts of client funds for short periods of time, such as funds held for commercial transactions and for large settlements for multiple clients prior to distribution for which IOLTA accounts act as clearing accounts. Establishing multiple accounts at various financial institutions for amounts over \$250,000 for a client is not a viable solution. Not only is it unworkable because attorneys cannot know whether a client may later deposit excess funds of their own at any of the banks chosen, it is not possible to split a large deposit which itself is only in the IOLTA account just long enough for the check to clear.

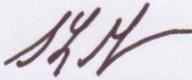
Because the interest on IOLTA accounts cannot inure to the benefit of either the client or attorney, neither lawyer account holders or the ever-changing list of clients whose funds are in IOLTA accounts have any expectation of earning interest. Instead, IOLTA accounts produce interest on the aggregate of funds that could not otherwise benefit depositors for the benefit of low-income individuals who receive free legal aid; **therefore, an IOLTA account is properly construed as a non-interest bearing transaction account for purposes of the TLGP.** Interest generated from IOLTA accounts is paid to IOLTA programs that issue grants for the provision of civil legal aid to the poor, the administration of justice, and law-related education, all of which are vital to our democratic system's guarantee of equal access to justice for all. If IOLTA accounts are not covered, millions of dollars for the provision of legal services to the poor that prevent homelessness, protect women and children from violence and help the elderly will be lost. Now is not the time to force lawyers to abandon a program that provides much needed revenue for legal aid for the poor.

The FDIC has carved out an exception in the past that applied to IOLTA. In recognition of the unique nature of IOLTA and its charitable purposes, an exception to Regulation D (prohibiting the payment of interest on demand accounts) was granted by the Federal Reserve. The FDIC was instrumental for states establishing IOLTA programs. But for that exception allowing interest, IOLTA accounts are materially similar to the non-interest bearing transaction accounts identified for the increased insurance under TLGP. As a result, the FDIC should explicitly recognize IOLTA

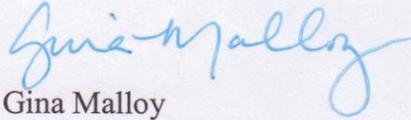
accounts as eligible for TLGP protection, or an exception should once again be made for IOLTA so that TLGP coverage is extended to it.

We urge the FDIC to construe IOLTA as non-interest bearing transaction accounts under TLGP. Alternatively, we urge the FDIC to grant an exception in the TLGP rules explicitly stating that funds in IOLTA accounts have unlimited deposit insurance coverage regardless of dollar amounts.

Sincerely,



Steven Grumm  
President, WCL Board



Gina Malloy  
Executive Director