

**H. Thomas Wells, Jr.**  
President

**AMERICAN BAR ASSOCIATION**

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November 13, 2008

Robert E. Feldman  
Executive Secretary  
Attention: Comments  
Federal Deposit Insurance Corporation  
550 17th Street, N.W.  
Washington, D.C. 20429

Re: RIN # 3064-AD37  
Comments on IOLTA and the Temporary Liquidity Guarantee Program

Dear Mr. Feldman:

On behalf of the American Bar Association, which represents more than 400,000 members nationwide, I am writing to urge that the FDIC include Interest on Lawyers' Trust Accounts (IOLTA) within the unlimited insurance coverage of the Temporary Liquidity Guarantee Program (TLGP). IOLTA programs exist in all 50 states, the District of Columbia, and the U.S. Virgin Islands and provide critically needed funding for civil legal aid for the poor and the administration of justice.

IOLTA should be included in the unlimited insurance coverage because:

- IOLTA operate as the type of transaction accounts identified for coverage under the TLGP's Transaction Account Guarantee (TAG) Program.
- While these accounts pay interest, financial institutions do so based upon explicit permission of federal regulators, and they only pay the interest to a third-party non-profit IOLTA program.
- Failure to include IOLTA within the unlimited insurance coverage could cause lawyers to move their IOLTA from smaller local banks to national banks that they view as having more financial stability, or to foreign banks that offer unlimited account insurance.
- IOLTA programs are currently the second largest funding source for the provision of free civil legal services to the poor; excluding IOLTA from unlimited insurance coverage will cause millions of dollars in funding to be lost at a time when those services are critically needed, especially given the increase in foreclosures and evictions.

Interest on Lawyers' Trust 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 and cannot earn

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interest for the client net of banking charges and administrative fees. IOLTA are used by lawyers as payment-processing accounts to disburse settlements, fees for court filings, or funds for transactions such as the transfer of real estate.

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.

With the advent of NOW accounts, interest could be earned on certain consumer checking accounts, but it was not clear if lawyers' pooled accounts containing nominal or short-term client funds with the interest paid to a third-party non-profit organization (IOLTA program) could qualify for such accounts. Through letters issued to individual IOLTA programs, the Federal Reserve System Board determined that NOW accounts may be used for IOLTA programs under the test established by the Consumer Checking Account Equity Act of 1980 -- that the interest is paid to a non-profit organization operated for "religious, philanthropic, charitable, educational, or other similar purposes" or to a governmental entity. The FDIC adopted the same reasoning when IOLTA programs asked the agency whether lawyers could maintain client trust fund accounts in NOW accounts in FDIC-insured state banks that were not members of the Federal Reserve System.

IOLTA programs were created by state supreme courts and legislatures throughout the United States, the District of Columbia, and the Virgin Islands. In 37 jurisdictions (see attached listing), lawyers are *required* to place in IOLTA those client funds that are nominal in amount or held for a short time and that cannot earn net interest for the client. In 2007, over \$240 million in grants were distributed by IOLTA programs nationwide to provide free civil legal services to the poor and to fund improvements in the administration of justice.

Given the important role that these state-based programs play in funding access to justice, the federal government should not take any steps that might undermine IOLTA. However, an unintended consequence of the TLGP is to create a situation in which total client funds held in a financial institution in excess of \$250,000, including those currently held in IOLTA, are eligible for unlimited insurance if they are *removed* from the IOLTA and placed in "non-interest bearing deposit transaction accounts."

Attorneys are fiduciaries and must give the client funds in their care appropriate protection. Those holding significant client funds for a short time are in a quandary whether to continue to use their IOLTA or to place their client funds in a non-interest bearing deposit transaction account to qualify for the new unlimited insurance. Alternatively, lawyers will consider whether to move their IOLTA from their current financial institution to one that they perceive as among those that are most financially stable, or to a foreign bank that offers unlimited account insurance.

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While some have suggested that another alternative is for lawyers to establish multiple accounts at various financial institutions when depositing amounts over \$250,000 for a client, this 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 practical to split a large deposit that itself is only in the IOLTA just long enough for the check to clear.

The TGLP, as currently configured, has the potential to greatly reduce the interest income received by IOLTA programs because a significant portion of the IOLTA funds are often generated by attorneys holding large amounts of client funds for very short periods of time, such as funds to be disbursed for real estate transactions and large settlements to be paid out to multiple persons. To the extent that the lawyer decides to place those funds in a non-interest bearing account, critically needed funding for the provision of legal services to the poor will be lost – services that prevent homelessness, protect women and children from violence and help the elderly.

Countless numbers of low-income persons in need of free legal aid have been helped through IOLTA funding. In Texas and Louisiana, for example, the devastating hurricanes of the last few years that resulted in loss of property, displacement of families, widespread consumer frauds, and added pressures on families have put a strain on free legal services in those states. It simply would not have been possible for the legal aid providers in those states to meet these monumental challenges without the funding made available through their IOLTA programs. Given the current economic circumstances that prompted the TLGP, there is no doubt that the need for IOLTA-funded free legal services across the country has been heightened, especially through the foreclosure crisis affecting low-income homeowners, seniors in danger of losing their long-time homes and renters whose landlords face foreclosure. This is not the time for the federal government to cause a decrease in this critical funding source.

The FDIC created the TLGP to strengthen confidence and encourage liquidity in the banking system by, among other things, providing full coverage of *non-interest bearing deposit transaction accounts (such as payroll accounts used by businesses)* regardless of dollar amount. IOLTA are similar to payroll processing accounts because payments are processed through these accounts, with funds often held just long enough for the check to clear. Because the interest on IOLTA cannot inure to the benefit of either the client or attorney, neither lawyer account holders nor the ever-changing list of clients whose funds are in IOLTA have any expectation of earning interest. Instead, IOLTA 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, IOLTA are properly construed as non-interest bearing transaction accounts for purposes of the TLGP.

Alternatively, the FDIC should create an exception for IOLTA and include them within the unlimited insurance coverage of the TLGP. As discussed above, the Federal Reserve and the FDIC have in the past recognized the unique, charitable nature of IOLTA by

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providing authority for those accounts to be established as NOW accounts. IOLTA serve an important public purpose and millions of dollars in funding for free civil legal services could be lost if IOLTA do not receive full insurance coverage. In addition, failure to include IOLTA in this coverage could cause lawyers to move their IOLTA from smaller, local banks to banks considered "too big to fail" or to foreign banks, thereby defeating an important purpose of the TLGP.

For the reasons stated above, the ABA respectfully requests that the FDIC include IOLTA in the full insurance coverage available under the TLGP. We appreciate your consideration and are available to answer any questions or provide additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "H. Thomas Wells, Jr.", written in a cursive style.

H. Thomas Wells, Jr.  
President

Attachment: Status of IOLTA Programs

### MANDATORY

*Alabama*  
*Arizona*  
**Arkansas**  
*California (L)*  
**Colorado**  
**Connecticut (L)**  
**Florida**  
*Georgia*  
**Hawaii**  
**Illinois**  
*Indiana*  
*Iowa*  
**Louisiana**  
*Maine*  
**Maryland (L)**  
**Massachusetts**  
*Michigan*  
*Minnesota*  
*Missouri*  
*Mississippi*  
*Montana*  
*Nevada*  
*New Jersey*  
**New York (L)**  
*North Carolina*  
*North Dakota*  
*Ohio (L)*  
**Oklahoma**  
**Oregon**  
*Pennsylvania*  
*South Carolina*  
**Texas**  
*Utah*  
**Vermont**  
*Washington*  
**West Virginia**  
*Wisconsin*

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### OPT-OUT

**Alaska**  
*Delaware*  
**District of Columbia**  
**Idaho**  
**Kansas**  
**Kentucky**  
**Nebraska**  
**New Hampshire**  
**New Mexico\***  
*Rhode Island*  
**Tennessee**  
**Virginia**  
**Wyoming**

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### VOLUNTARY

*South Dakota*  
*Virgin Islands*

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### Notes:

\* As of January 1, 2009, New Mexico will become the 38<sup>th</sup> mandatory IOLTA state.

States in **Bold** converted from voluntary status.

States in *italics* converted from opt-out status.

(L) denotes programs created by state legislature (state statute). All other programs were created by state Supreme Court order.