The Temporary Liquidity Guarantee Program (TLGP) and IOLTA

- On October 14, 2008, the FDIC announced the Temporary Liquidity Guarantee Program (TLGP). The purpose of the TLGP, as stated by the FDIC, is to "strengthen confidence and encourage liquidity in the banking system by guaranteeing newly issued senior unsecured debt of banks, thrifts, and certain holding companies, and *by providing full coverage of non-interest bearing deposit transaction accounts, regardless of dollar amount*." *[Emphasis added.]*

- The FDIC explained that providing full deposit insurance coverage for non-interest bearing deposit transaction accounts, regardless of dollar amount, provides insurance for "mainly payment-processing accounts, such as payroll accounts used by businesses

- Interest on Lawyers Trust Accounts (IOLTA) 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, real estate closings, settlements and retainers.

- 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.

- The Alabama Law Foundation was created by the Alabama State Bar to administer its IOLTA program. Since 1989 the foundation has awarded $13.7 million in grants. The foundation's largest grantees are the Alabama State Bar Volunteer Lawyers Program, the Mobile Bar Association Volunteer Lawyers Program, the Birmingham Volunteer Lawyers Program and Legal Services Alabama.

- Currently, IOLTA is the second largest funding source in the country for the provision of free civil legal services to the poor.

- 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.

- The TGLP, as currently announced, 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 real estate transactions and for large settlements for multiple clients prior to distribution for which IOLTA accounts act as clearing accounts.

- 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."

- Attorneys are fiduciaries and want to give the client funds in their care as much protection as possible. Those holding significant client funds are in a quandary whether to continue to use their IOLTA account, which is required by court rule or legislation in 37 states, or to place their client funds in a non-interest bearing deposit transaction account in order to qualify for the new insurance. 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.

- 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.

- Whether IOLTA accounts are "non-interest bearing deposit transaction accounts" is not explicitly addressed in the TLGP.

- 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.

- Alternatively, IOLTA was created as the result of an exception to Regulation D (prohibiting the payment of interest on demand accounts), granted by the Federal Reserve and the FDIC, due to its charitable purposes. But for that exception, IOLTA accounts are non-interest bearing transactions. As a result, an exception should once again be made for IOLTA so that TLGP coverage is extended to it.

- The TLGP will only be invoked if a bank fails, which the United States government is doing all it can to prevent by infusing billions of dollars into the banking industry. By including IOLTA within TGLP, the government can demonstrate its confidence in the banking industry and prevent the reduction of vital funding for the provision of free legal services to the poor and the administration of justice.