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AMERICAN BAR ASSOCIATION

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Sheila C. Bair
Chair, Federal Deposit Insurance Corporation
550 17th Street, NW
Room 6028
Washington, D.C. 20429

Subject: Clarification/Exception Needed to Temporary Liquidity Guarantee Program (TLGP) to Protect Lawyer Trust Accounts

Dear Chairman Bair:

On behalf of the President of the American Bar Association, I am writing to alert you to a gap in the coverage of the recently announced Temporary Liquidity Guarantee Program (TLGP). We have been told that this program, as announced, does not cover Interest on Lawyer Trust Accounts (IOLTA). We request your immediate action to 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;
- Thirty-Seven (37) states require lawyers to deposit client funds that cannot earn net interest for the client in IOLTA accounts; and
- Now is not the time to force lawyers to abandon a program that provides much needed revenue for legal aid for the poor, especially now with increase in foreclosures and evictions.

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, real estate closings, 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.

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.

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 real estate 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, especially now with the increase in foreclosures and evictions.

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.

We appreciate your consideration and we are available to answer any questions or provide additional information.

Sincerely,

Thomas M. Susman

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