June 16, 2009

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: Petition – South Carolina Bar Foundation – Amendment of Rule 412, SCACR

Dear Mr. Shearouse:

Thank you for providing the South Carolina Bankers Association ("Association") the Request for Written Comments and Notice of Public Hearing on the South Carolina Bar Foundation's above Petition. The Association received the Petition from the South Carolina Bar Foundation on May 22, 2009 and from the Court on May 29, 2009. Upon receiving the Court's Request For Comments, communication was initiated to representatives of the South Carolina Bar Foundation ("Foundation") and representatives of each organization (collectively "Organizations") met to discuss this matter on June 10, 2009. The Association would like to express its appreciation to the Foundation for the open and direct assistance it provided in this meeting. At the conclusion of an informative session, all representatives agreed to an accelerated communication process and sharing of information and documentation in an effort to further address questions, comments and concerns either Organization may have concerning this matter. A follow-up conversation was held on June 12, 2009 and the Organizations have established a joint committee to continue and complete this discussion process.

We would request the following be considered as to the proposed revisions to Rule 412:

1. "IOLTA account" Definition.

A. Types of Accounts – Various bank account products are restricted and limited pursuant to federal statutes and regulations, such as to the number of monthly withdrawals. Non-business accounts may be managed by the customer so no more than the regulatory mandated number of withdrawals will be made; however on a business account (IOLTA account), such limitation on the number of withdrawals would not be possible. For purposes of clarification, the Rule should reference "interest-bearing business purpose transaction accounts" so all will be focused on the applicable type of accounts. This issue is also critical to the comparability

issue – apples need to be compared to apples, not tomatoes. There are questions from the bankers as to which types of accounts would be acceptable as IOLTA accounts and also for comparability purposes. Representatives of the Foundation confirmed they are familiar with these requirements and distinctions and indicated they have worked with banks to make sure all were focusing on the correct, allowable accounts. The Foundation representatives indicated they would review their materials and consider these comments. Another example of this would be a temporary promotional priced product – this rate/account would not be available or comparable to an IOLTA account.

B. Sweep Or Money Market Accounts – Invested in Us Government Securities. The sweep account and the government invested securities account referenced in the IOLTA account definition involves funds being transferred from a bank to a third party and therefore the funds in question are not on deposit with the bank. There are transfer fees and collateralization fees included in this process. The Association inquired as to whether these types of fees would fall within the "reasonable fees" definition and Foundation representatives indicated they considered those collateralization fees to be included in the reference to "sweep fees" in the definition for reasonable fees. It would provide guidance to the Association members if this type of clarification could also be included in guidelines or question and answer provisions that the Foundation offers.

Also, in connection with the issue of government securities, we would note two points for consideration:

(1) The Foundation's Potential Questions at top of page 3, correctly states these overnight accounts "present a very low risk of market loss." The issue is that there is risk of loss (no matter how small) and the Association would request that the Rule provide whether this risk falls upon the attorney selecting this account, the Foundation who will receive the earnings, or the client. Addressing this issue at this time will assist who ever will have this minimal risk.

(2) Definition of United States government securities. The Association suggests the interpretation of this definition be tied to a federal statutory or regulatory definition so as to provide ongoing guidance. Also,

Government Sponsored Enterprises appears as a capitalized term; however there does not appear to be a definition. Freddie Mac and Fannie Mae may be considered as Government Sponsored Enterprises.

2. "**Reasonable fees**" **Definition.**

A. The term "reasonable fees" does not accurately reflect the described category of fees. The definition identifies those fees allowed by the Foundation to be deducted/paid from the earnings. The Association has not heard anyone say other fees – wire transfer, online banking, etc., -- aren't reasonable given the service provided – just that they are not "allowable" for IOLTA deduction purposes. This term should be changed to "allowable fees." The Organizations' representatives reviewed in detail those fees included in "reasonable fees" and the various types of other fees that are commonly assessed to business accounts, such as wire transfer fees, remote deposit (electronic/immediate deposit services -- processed from attorney's place of business), stop payment fees, cash management services fees (on-line access and banking, positive pay and other electronic services that have been developed over the past few years that provide important "immediate" management information and monitoring), imaging and check printing. When a bank identifies a rate to pay on the types of accounts identified in the "IOLTA account" definition or on non-IOLTA accounts as set forth in proposed section (c)(2)(ii), it is determined with significant importance/value placed on the account paying for services used in connection with the account (wire transfer, online banking, etc.). The Association feels strongly that the concept of comparability needs to include rate and allowable fees for corresponding product features – one cannot be fairly determined without the other. Each Organization provided their reasons to allow or not allow these additional fees to be charged against the earnings of an IOLTA account. Each Organization has committed to continue to discuss these items.

B. In addition there was discussion as to the amount and method of determining the newly identified "reasonable IOLTA account administrative fee." The Foundation representative shared a proposed dollar amount. The Association inquires as to whether the initial dollar amount could be placed in the Rule or guidelines, realizing it may be subject to future change with or without the involvement of South Carolina Supreme Court. The Association feels that additional information as to this account administrative fee would be extremely helpful in educating lenders

and attorneys as to the meaning of this provision, whether that information is in the Rule or guidelines.

3. Depository Procedures.

A. Subsection 1 - Reference is made to "subject to withdrawal upon request and without delay." The proposed language appears to address traditional Uniform Commercial Code and federal provisions that may apply to general account administration. However, it is uncertain as to whether this language would also exclude accounts with limited access from the comparability provisions referenced in the Rule. There was helpful discussion at the Organizations' meeting on this point and the Association feels some of the points discussed would be helpful to attorneys and bankers if placed in guidelines or Q&A's offered by the Foundation.

B. Subsection 1 also references Rule 1.15 regarding safekeeping of client property. The Organizations discussed Rule 1.15 Subsection (c) which allows an attorney to place funds belonging to the attorney in the trust account for the purpose of covering service charges. This discussion was helpful to the banks in elaborating on the important responsibilities and safeguards placed on an attorney's accounting/management to strictly control, protect and segregate a client's funds from the attorney's funds, and what charges and fees would need to be taken from the attorneys funds and not subject to use by anyone other than for the client's direct benefit.

C. Subsection 2. (1) Highest Rate – Generally Available – Reference is to the highest interest rate or dividend generally available from the institution to its non-IOLTA customers for each account that meets the same minimum balance or the eligibility qualifications if any. The Association is uncertain as to the meaning of and the interrelationship of "highest," "generally available" and "other eligibility qualifications." In following the concept of "comparability" as to rates, the interpretation of these terms are extremely important to bankers and lawyers understanding the rate to be determined by this paragraph. In order for a non IOLTA account to have wire transfer capability and online banking access, an eligibility requirement would be to pay a reasonable fee for corresponding product features. Without including the availability/cost of these corresponding product features it would not be a "comparable account" nor would it meet the eligibility qualifications. In simpler terms, we should be comparing apples to apples.

Also, this subsection states the institution may consider other factors customarily considered by the institution when setting interest rates. On non IOLTA accounts this would mean if the customer had other relationships with the financial institution the non IOLTA account may receive a rate of 3X, with reasonable charges for corresponding product features. However, if the non IOLTA account had no other relationships with the financial institution, the rate may be X, with reasonable charges for corresponding product features.

Financial institutions price commercial accounts based on the entire relationship, not on a per product basis. A better definition of a comparable account would be "interest-bearing business-purpose transaction account" so as to exclude consumer and other non-comparable accounts. Again, some of the bankers concerns would be addressed with more comment on these issues, in guidelines or question and answer materials.

D. Section 2. (11) Benchmark Rate - Subsection (c)(ii) references a "benchmark rate determined periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for qualifying accounts." The ambiguity of this provision and the fact that it is set by an involved party as opposed to a market recognized independent rate has created questions for the Association. In reviewing the process of other states, it appears many states have no index and rely only on the general comparability language (c2i), while most of the states identified in the Petition identify a specific index and an applicable percentage, with the commonly used index being the federal funds rate - which is the rate by which banks borrow funds from the federal government. The Association feels it is important to have an independently determined specific index/rate so it will be known not only to bankers but also to attorneys in connection with planning and management purposes.

The Foundation has identified a few states that have a benchmark rate, not to be less than a stated minimum rate. The Petition stresses the desire that IOLTA accounts be paid comparable rates of non-IOLTA accounts and bases the "comparability" approach on non-IOLTA accounts. However, the Foundation may choose, if given the authority, to insert a rate floor on IOLTA accounts that is not offered to non-IOLTA accounts.

An additional concern is if the Rule is going to allow a rate to change, by action other than the South Carolina Supreme Court, then there are questions as to prior notice of a change, the frequency of the change, and

the criteria for making the change. The Association feels this topic is worthy of additional discussion and further comparison as to how other states have handled these matters.

4. **IOLTA Refund Procedure** - The Association had numerous questions concerning this provision and the Foundation representatives provided helpful discussion and offered to provide the forms that are used.

5. **Exempt Accounts** - The Association was not familiar with the process for determining exempt accounts and this was explained by the Foundation representatives. It will help for the banks and their attorney customers to understand this process so that if accounts are maintained for sole practitioners or law firms that have small trust account balances and the IOLTA process appears to be an administrative burden and expense for the small account, then the attorney can be referred to the Foundation for exemption consideration.

6. **Account Administration** - From the discussion, it appears that many law firms have multiple IOLTA accounts at different banks. At some of these banks, they may have operating accounts and do other business; however at others the attorney/law firm may only maintain the IOLTA account. This is not uncommon in connection with an attorney/law firm providing some business to various institutions in an effort to develop a business relationship with the institutions. A concern expressed by the Association is that if there is going to be a predetermined benchmark rate or established comparability rate, then some of the fees currently being waived by lenders will be assessed to the attorney/law firm. This will be a bank by bank decision based on their relationship with each attorney/law firm. The issues this creates for the bankers and attorneys are that there does not currently appear to be an ability to separately track and bill these additional charges, or debit the charges to other accounts in the institution or the IOLTA account. Section (b)(1) needs to more clearly state that the intended calculation of "allowable fees" will be deducted from the interest earned and the other fees charged to the account will be the responsibility of the account holder (attorney). The bankers understand Rule 1.15 allows the attorney to maintain attorney/law firm dollars in the IOLTA account to pay service charges. However even with that ability, it creates accounting/tracking challenges that would need to be addressed by the attorney/law firm or the bank as a servicer to the attorney/law firm. The Organizations' discussion indicated there were three parts of an IOLTA account with these being (1) client dollars which could not be used for any expense/charges; (2) earnings (net allowable fees) that belong to the South Carolina Bar Foundation; and (3) attorney/law firm funds that would be available for service/management charges of the accounts. There is not currently sufficient programming/accounting procedures

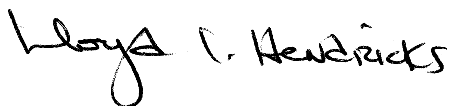
within the banks or the law firms to efficiently, accurately and adequately monitor an account on these three categories. The Association believes with additional discussion between the Organizations and input from attorneys, these issues can be clarified so that banks and attorneys/law firms will better understand these options and implement the necessary accounting procedures or programming. The Foundation has always expressed a willingness to communicate with banks and attorneys/law firms on these issues and has indicated a desire to continue/increase that communication on these points.

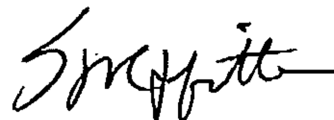
7. **Availability of Data -** The Petition provides a great deal of summary data in connection with historical numbers, other states' IOLTA rates and procedures, and South Carolina rate history. The rules of the other states are public record and are available for everyone's review. However, the data presented to the Supreme Court is not public record and is only available to the Foundation. The Association does not gather or accumulate this information from the banks because it would not want it to be perceived as sharing of account structure/information for industry agreement purposes. The Association has requested this data from the Foundation (with the identity of any banks or attorneys/law firms redacted) so it will better understand the information presented to the South Carolina Supreme Court. In currently reviewing this data, the Association does not understand or agree with the historical rate presentation.

The Association appreciates the willingness of the Foundation to engage in the immediate dialogue that has occurred in the month of June, 2009, and the open and transparent manner in which the discussions are being conducted. The Association anticipates the Organizations will continue this process to address questions and comments, either by way of revisions to the proposed Rule and/or guidelines or other question/answer sheets or communications flowing from the Foundation to the South Carolina attorneys and proposed financial institutions.

Again, the South Carolina Bankers Association appreciates this opportunity to provide comments as to the Petition.

Sincerely yours,





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