THE STATE OF SOUTH CAROLINA
In The Supreme Court

PETITION
South Carolina Bar Foundation

IN RE: Amendment of Rule 412, SCACR

Frank B.B. Knowlton
President, South Carolina Bar Foundation
P.O. Box 608
Columbia, SC 29202
(803) 765-0517

REQUEST

The South Carolina Bar Foundation Board of Directors respectfully requests approval of the proposed rule changes to ensure that comparable rates are paid on all IOLTA accounts.

BACKGROUND

For three years, the Board of Directors of the South Carolina Bar Foundation, Inc. (SCBF) has explored the concept of a comparable interest rate rule so that IOLTA (Interest on Lawyers Trust Accounts) accounts are treated equitably by earning interest or dividends comparable to that earned by similarly-situated non-IOLTA customers. With a goal to engage in a dialogue with banking partners, in January 2007, SCBF initiated a process to encourage banks to voluntarily provide comparable rates, primarily with the financial institutions that held large amounts on deposit. In July 2008, a second wave of negotiation was pursued with additional IOLTA financial partners. The success of the negotiation was mixed, but did generate additional revenues. As the economy declined, rates achieved through negotiation fell. In addition, IOLTA rates in general began to decline further, highlighting the discrepancy between rates paid on IOLTA accounts (particularly those with high balances) and rates paid to similarly situated non-IOLTA customers.

In March 2009, SCBF formed a committee to develop a comparable interest rule change. In the rule development process, the committee received substantial input from the Joint Technical Assistance Committee of the National Association of IOLTA Programs and the ABA Commission on IOLTA. Simultaneously, SCBF hired experienced and qualified consultants to perform a feasibility study to determine the impact an interest rate comparability rule would have in South Carolina. The study estimated that under an IOLTA interest rate comparability rule and the current economic environment, the Foundation should earn an additional $800,000 in revenues. The study also estimated that longer term impact could range from an additional $4 million per year to an additional $7 million per year – depending on the rate at which the economy recovers.

GENERAL COMMENTS

Appendix A presents the proposed rule with deletions in strikethroughs and additions in underlines. Appendix B presents the proposed changes within the context of the entire trust account rule. Appendix C includes a list of potential questions and answers that typically surround comparability rule changes.

DISCUSSION

In SCBF's 24-year history of administering the IOLTA program, it has granted more than $41 million to organizations that provide civil legal services, law related education initiatives or otherwise enhance the administration of justice. At our highest IOLTA funding capacity, 8,500 of the state's poor received legal services and 4,700 of our youth benefited from a law related education program.

Since the beginning of IOLTA, some banks have not treated IOLTA accounts in the same manner as other accounts with similar balances. In general, IOLTA accounts have been treated as a group, regardless of principal balance size. IOLTA accounts have been paid low interest rates even when their balances would have garnered non-IOLTA customers a higher yield at the same institution.

It is important to update IOLTA account interest requirements because the banking landscape has changed since those requirements were written more than 20 years ago. Today, an interest-bearing checking (NOW) account often may no longer be the best or only option for such accounts. To participate in this changed landscape, updating the IOLTA rule is necessary. The proposed changes would permit IOLTA accounts to be treated equitably so that they receive rates comparable to the rates that banks pay similarly-situated non-IOLTA customers.

The reason IOLTA comparability works speaks to the very basics of how banks price their products. Most banks will pay a premium for large balance accounts, since the fixed costs associated with maintaining the account make large balance accounts more profitable than smaller balance accounts. The widespread use of "tiered" interest rate pricing is a good example of such. Tiered interest rates increase as balances increase. This is one mechanism utilized by banks to attract and reward the large balance customer. Financial institutions also routinely offer higher yielding cash management products to their customers with higher balances, who demand more than basic checking rates for their large balances, while still maintaining safety and liquidity.

Without a rule change, IOLTA rates in South Carolina will continue to lag behind rates offered to similarly-situated non-IOLTA customers. Negotiation was attempted as a good faith effort, but the successes were not sustainable. The chart below compares South Carolina rates for the years 2005 to 2009. There is a marked difference between IOLTA rates and rates offered to similarly-situated accounts.

Key South Carolina Interest Rates 2005-2009

Average Fed Funds Rate	3.57%
Average High Yield Rate, National	2.70%
Average High Yield Rate, SC.	2.27%
Average Other Comparable Rate, SC	1.52%
Top 10 SC Banks Avg. IOLTA Rate	0.57%
All SC Banks Avg. IOLTA Rate	0.56%
Identified Comparability Gap TOP Banks	170 basis points
Identified Comparability Gap ALL Banks	96 basis points

The current IOLTA rule was amended in January 2005 to require mandatory attorney participation. Language regarding the rate to be paid on accounts was as follows:

"The rate of interest payable on any interest bearing trust account shall not be less than the rate paid by the depository institution on comparable accounts to its non-IOLTA customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility requirements, if any."

Similar language is found in most interest rate comparability rules and the intention that financial institutions pay IOLTA accounts comparable rates is clear. However, because the current rule does not also include the ability for SCBF to certify eligible institutions, product guidelines or specific authorization for higher yielding bank products, banks in South Carolina (and elsewhere) interpret the language to link IOLTA rates with NOW account rates.

It is a matter of fairness that IOLTA accounts be paid the highest interest rate or dividend generally available at a bank to its other customers when IOLTA accounts meet the same minimum balance or other qualifications. To date, 24 states have incorporated an interest rate comparability provision into their IOLTA Supreme Court rule, statute or regulation or guideline.[1] Most states that have adopted interest rate comparability have seen impressive increases in IOLTA revenue. Massachusetts, which had a January 1, 2007 implementation date, experienced an annual increase from $17 million to $32 million. The average interest rate went from just over 1 percent to an average of 2.5 percent immediately upon implementation. States which had particularly low interest rates prior to interest rate comparability had even more dramatic results. Illinois IOLTA revenue went from less than $5 million to approximately $17 million in their first year of comparability. New York IOLTA revenue increased from $15 million to $34 million the year after. At least doubling revenue was fairly typical for rule changes that became effective in 2006 through 2007.

[1] As of May 2009, these states have adopted comparability rules: Alabama, Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Maine, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Tennessee, Texas, Utah and West Virginia.

With the recent and unprecedented Federal Funds target rate cuts, interest rates have fallen to record low levels and remain near those lows as of this writing. Importantly, an interest rate comparability requirement as part of an IOLTA rule does not mean that IOLTA rates will always be high. If all of a bank's other rates are falling, IOLTA rates will fall as well. However, what comparability does accomplish, even in an ultra low rate environment, is to ensure IOLTA accounts are guaranteed fair treatment, again, compared to similar balances for other depositors. Absent such a requirement, IOLTA rates are usually among the first to be lowered in a downward trending rate environment.

The proposed rule change will predominantly affect IOLTA accounts with larger balances. These accounts often qualify for higher yield products that offer higher rates, but the current rule does not specify that IOLTA accounts can be placed in higher yield products with the necessary insurance and safety protections. IOLTA accounts with smaller balances already typically receive business checking account interest rates which are comparable to what banks pay their customers with similar account balance sizes.

To give banks flexibility and maximum choice in complying with comparability requirements, the proposed rule provides banks with a variety of choices for achieving comparability. The option of converting or establishing an IOLTA account in a higher yield product is offered in all of the states that have comparability rules. However, virtually all banks have chosen a second option provided in the proposed rule – to mirror interest rates of higher yield products. The higher yield product must be one of the options for IOLTA accounts, or consequently, IOLTA accounts would not be compared to higher yield products. In addition, because establishing and maintaining higher yield products often takes additional bank resources, the proposed rule change allows for sweep fees and an IOLTA administrative fee approved by SCBF, in addition to other permissible fees.

Comparability requirements regulate where lawyers place IOLTA accounts, but do not regulate the banking industry. Under the proposed rule change, lawyers would be required to place IOLTA accounts in eligible institutions that meet rate comparability and related IOLTA account requirements. Banks are not required to offer IOLTA accounts; doing so is completely voluntary. The proposed rule does not change this fact.

Comparability requirements do not require banks to create or offer a product for IOLTA accounts that they do not already offer their other customers. Presumably, these other products are profitable or banks would not offer them to their customers. When banks pay comparable rates, IOLTA accounts will remain profitable. Banks also profit from other relationships they have with attorneys or law firms. By paying comparable rates, banks will promote "good-will" by increasing funding for civil legal services, law related education and the administration of justice.

Comparability requirements do not compare rates among banks or set specific rates. Rather, each bank sets rates for its own customers based on factors a bank normally considers in setting rates. The proposed rule, however, notes that in setting these rates, banks may not consider the fact that an account is an IOLTA account. Comparability

simply requires that an IOLTA account receive the highest interest rate or dividend that other non-IOLTA customers receive if the IOLTA account meets the same eligibility or other requirements.

Rate comparability is important because it achieves fairness by treating IOLTA accounts comparably with other similarly situated non-IOLTA bank customers. SCBF believes that rate comparability will significantly enhance the revenue paid on IOLTA accounts thereby generating substantially more revenue for the advancement of justice in South Carolina.

WHEREFORE, the South Carolina Bar Foundation prays that the Supreme Court of South Carolina amend Rule 412, SCACR, Interest on Lawyer Trust Accounts (IOLTA).

_s/ Frank B. B. Knowlton___
Frank B.B. Knowlton
President

May 21, 2009

RULE 412
INTEREST ON LAWYER TRUST ACCOUNTS (IOLTA)

(a) Definitions. As used herein, the term:

(1) "Nominal or short-term" describes funds of a client or third person that, pursuant to section (d) below, the lawyer has determined cannot provide a positive net return to the client or third person;

(2) "Foundation" means the South Carolina Bar Foundation, Inc.;

(3) "IOLTA account" means ~~an interest bearing~~ a trust account benefiting the South Carolina Bar Foundation established in ~~a participating~~ an eligible[1] institution for the deposit of pooled nominal or short-term funds of clients or third persons. The account product may be an interest-bearing checking account; a money market account with or tied to check-writing; a sweep account which is a government money market fund or daily overnight financial institution repurchase agreement invested solely in or fully collateralized by United States government securities; or an open-end money market fund solely invested in or fully collateralized by United States government securities.[2]

(i) "Open-end money market fund" is a fund holding itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Act of 1940 and, at the time of the investment, having total assets of at least $250,000,000.

(ii) "United States government securities" are United States treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof, including obligations of Government Sponsored Enterprises.

(4) "~~Participating~~ Eligible Institution" means any bank~~, credit union~~ or savings and loan association authorized by federal or state laws to do business in South Carolina and insured by the Federal Deposit Insurance Corporation~~, the National Credit Union Share Insurance Fund,~~ or any successor insurance corporation(s) established by federal or state laws.[3]

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[1] A key component to a comparability rule is the fact that while participation by banks is voluntary, lawyers can only hold their IOLTA accounts at financial institutions that comply with IOLTA rule provisions. Use of the word "eligible" gives the Foundation the ability to certify whether or not a bank is in compliance with the provisions of the Rule. If it is not, the Foundation will contact the financial institution to confirm if it has chosen not to participate. Attorneys and/or law firms are then notified that they must move their IOLTA accounts to an eligible financial institution.

[2] Specifying the product type and safety parameters allows IOLTA accounts to receive the benefits of higher rates that are typically associated with such products.

[3] Credit unions permitted February 19, 2009 via SC Supreme Court. Per the Joint Technical Assistance Committee of NAIP and the Commission on IOLTA (TA Committee), this is a tricky issue insofar as the NCUA has said that the IOLTA account deposits that are funds of clients who are not members of a CU are not insured, so some states have deleted CUs as permissible for IOLTA accounts. However, this insurance may be there when for CUs that are officially designated as "Low-Income CUs." The TA Committee is researching this.

(5) "Reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, Federal deposit insurance fees, sweep fees and a reasonable IOLTA account administrative fee. [4]

(b) Attorney Participation.

(1) All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of the South Carolina Bar practicing law from an office or other business location within the state of South Carolina shall be deposited into one or more IOLTA accounts, except as provided in Rule 1.15 of Rule 407, South Carolina Appellate Court Rules, with respect to funds maintained other than in a bank account and as provided in section (i) below.

(2) A law firm of which the lawyer is a member may maintain the account on behalf of any or all lawyers in the firm.

(c) Depository Procedures.

(1) The IOLTA account shall be established with ~~a participating~~ an eligible institution that voluntarily choose to participate. [5] Funds deposited in each IOLTA account shall be subject to withdrawal upon request and without delay, subject only to any notice period which the institution is required or permitted to reserve by law or regulation and as provided in Rule 1.15 regarding safekeeping of client property.

(2) The rate of interest or dividends payable on any IOLTA trust account shall ~~not~~ be no less than: ~~the rate paid by the depository institution on comparable accounts to its non-IOLTA customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility requirements, if any. Higher rates offered by the institution to customers whose deposits exceed certain or quantity minima may be obtained by a lawyer or law firm on some or all of the deposited funds so long as there is no additional impairment of the right to withdraw or transfer principal. Reasonable service charges or fees may be assessed, as provided in section (h) below, only against the interest or dividends generated and not against the principal~~.

(i) the highest interest rate or dividend generally available from the institution to its non-IOLTA customers for each IOLTA account that meets the same minimum balance or other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, the institution may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers if such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and these factors do not include that the account is an IOLTA account. The institution also shall consider all product option types noted at (a)(3) for an

[4] Combination of Alabama RPC Rule 1.15 (g) & Definitions, Michigan RPC Rule 1.15 (a) (1) and Missouri Supreme Court Rule 4-1.15(b)

[5] Successful comparability rules emphasize the fact that, while participation by banks is voluntary, lawyers can only hold their IOLTA accounts in eligible financial institutions that comply with comparability.

IOLTA account offered by the financial institution to its non-IOLTA customers by either establishing the applicable product as an IOLTA account or paying the comparable interest rate or dividend on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product; or[6]

(ii) a benchmark rate determined periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for qualifying accounts in the South Carolina Bar Foundation's IOLTA program and that is net of reasonable fees. When applicable, the Foundation will express that benchmark in relation to the Federal Funds Target Rate.

(3) Eligible institutions may choose to pay rates higher than comparable rates described at (c)(2) above.

(d) Determination of Nominal or Short-Term Funds.

(1) The lawyer shall exercise good faith judgment in determining upon receipt whether the funds of a client or third person are nominal or short-term. Client or third person funds shall be deposited in a lawyer's or law firm's IOLTA account unless the funds can ~~otherwise~~ earn income for the client in excess of the costs incurred to secure such income.

In the exercise of this good faith judgment and determining whether a client's funds can earn income in excess of costs of securing that income for the benefit of the client or third person,[7] and thus provide a positive net return to the client or third person, the lawyer or law firm shall consider the following factors:

~~(A)~~ (i.) the amount of funds to be deposited;

~~(B)~~ (ii.) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

~~(C)~~ (iii.) the rates of interest or yield at financial institutions where the funds are to be deposited;

~~(D)~~ (iv.) the cost of establishing and administering non-IOLTA accounts for the ~~client's~~ benefit of the client of third person, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the ~~client's~~ benefit of the client or third person;

~~(E)~~ (v.) the capability of financial institutions, lawyers or law firms[8] to calculate and pay income to individual clients or third persons; and

~~(F)~~ (vi.) any other circumstances that affect the ability of the client's or third persons' funds to earn a net return for the client or third person.

[6] From Missouri IOLTA Rule – effective January 1, 2008
[7] Utah IOLTA Rule 14-1001(b)
[8] Utah IOLTA Rule 14-1001 (b)(5)

The lawyer or law firm shall review its IOLTA account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third person.

(2) The determination of whether a client's or third person's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with ethical impropriety based on the exercise of such good faith judgment.

(3) Notification to the client is not required nor shall the client or third person have the power to elect whether nominal or short-term funds shall be placed in the IOLTA account.

(4) The provisions of section (c) shall not relieve a lawyer or law firm from an obligation imposed by Rule 1.15 of the Rules of Professional Conduct with respect to safekeeping of client property.

(e) IOLTA Refund Procedures.

The Foundation ~~will issue refunds when interest has been remitted in error when, pursuant to subsection (d), the funds should have been placed in a non-IOLTA account for the benefit of the client. The Foundation~~ shall establish procedures for the processing of refund requests for such instances as bank or lawyer error.[9]

(f) Notice to Foundation.

Lawyers or law firms shall advise the Foundation, at Post Office Box 608, Columbia, SC 29202-0608, ~~or~~ by facsimile at (803) 779-6126, or in such other manner as the Foundation publishes in its materials is acceptable, of the establishment and closing of an IOLTA account for funds covered by this rule. Such notice shall include: the name of the institution where the IOLTA account is established; the IOLTA account number as assigned by the institution; the institution address; and the name and South Carolina Bar attorney number of the lawyer, or of each member of the South Carolina Bar in a law firm, practicing from an office or other business location within the state of South Carolina that has established the IOLTA account.

(g) Certification.

Each member shall certify annually on his annual licensure pursuant to Rule 410, South Carolina Appellate Court Rules, that the member is in compliance with the provisions of this rule or, pursuant to section (i) below, has been approved by the Foundation as exempt from the provisions of this rule.

(h) Remittance and Reporting Instructions.

[9] Many states have a procedure but do not put it in the rule to avoid lawyers thinking they don't have to make a careful judgment because they can always get a refund. Also, the proposed language allows the Foundation to establish procedures, such as making clear that service charges deducted by the bank and never received by the Foundation would not be refunded by the Foundation. Most refund procedures are internal and make the refund to the bank after bank documentation.

A lawyer or law firm depositing client funds in an IOLTA account shall direct the depository institutions to:

(1) calculate and remit interest or dividends, net of reasonable service charges or fees, if any, on the average monthly balance in the account or as otherwise computed in accordance with the institution's standard accounting practice, monthly[10] to the Foundation, which shall be the sole beneficial owner of the interest or dividends generated by the accounts;

(2) transmit monthly to the Foundation a report, listing by account the name of the lawyer or law firm for whom each remittance is made, the lawyer's or law firm's IOLTA account number as assigned by the institution, the rate and type of interest or dividend applied, the average account balance for the reporting period or the other amount from which interest or dividends are determined, the amount of each remittance, and the amount and type of any service charges or fees assessed during the remittance period, and the net amount of interest remitted for the period;

(3) transmit at least quarterly to the depositing lawyer or law firm, a report or statement ~~containing the information required in subsection (2) above~~ in accordance with normal procedures for reporting to its depositors.

~~In the event that a financial institution does not waive service charges or fees on IOLTA accounts, reasonable customary account maintenance fees may be assessed. Fees for wire transfer, insufficient funds, bad checks, stop payment, account reconciliation, negative collected balances and check printing are not considered customary account maintenance charges and may not be assessed against an IOLTA account. Such non-routine fees must be brought to the attention of the lawyer or law firm, who in turn may absorb these specific costs or pass along those fees to the client(s) being served by the transaction (in accordance with attorney/client agreements).~~

~~Negative interest earnings resulting from service charges which exceed interest earned are prohibited on IOLTA accounts. Service charges may only be imposed to the extent of interest earned on an individual account.~~

~~Participating banks shall forward the remittance report to the Foundation within 45 days of the end of the reporting period.~~

"Reasonable fees" as defined in (a) (5) may be deducted from interest or dividends on an IOLTA account provided that such charges or fees shall be calculated in accordance with an eligible institution's standard practice for non-IOLTA customers. No other fees or charges shall be assessed against the interest on an IOLTA account, but rather shall be the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account." Fees or charges in excess of the interest or dividend earned on the account for any month shall not be taken from interest or dividends earned on other IOLTA accounts

[10] Most rules say "at least quarterly" rather than "monthly."

or from the principal of the account. Eligible institutions may elect to waive any or all fees on IOLTA accounts.[11]

(i) Exempt Accounts.
The Foundation will establish procedures for a lawyer or law firm to maintain an interest-free trust account for client and third-person funds that are nominal or short-term when ~~these nominal or short-term funds~~ the lawyer's or law firm's account cannot reasonably be expected to produce or ~~have not~~ has not produced over time an interest income net of reasonable ~~participating institution~~ service charges or fees.

(j) Program Administration.
The Foundation shall, in accordance with its charter and by-laws, receive, administer, invest, disburse and separately account for all funds remitted to it through this program.

[11] Combination of Alabama RPC Rule 1.15 (g) & Definitions, Michigan RPC Rule 1.15 (a) (1) and Missouri Supreme Court Rule 4-1.15(b)

RULE 412
INTEREST ON LAWYER TRUST ACCOUNTS (IOLTA)

(a) Definitions. As used herein, the term:

(1) "Nominal or short-term" describes funds of a client or third person that, pursuant to section (d) below, the lawyer has determined cannot provide a positive net return to the client or third person;

(2) "Foundation" means the South Carolina Bar Foundation, Inc.;

(3) "IOLTA account" means a trust account benefiting the South Carolina Bar Foundation established in an eligible institution for the deposit of pooled nominal or short-term funds of clients or third persons. The account product may be an interest-bearing checking account; a money market account with or tied to check-writing; a sweep account which is a government money market fund or daily overnight financial institution repurchase agreement invested solely in or fully collateralized by United States government securities; or an open-end money market fund solely invested in or fully collateralized by United States government securities.

(i) "Open-end money market fund" is a fund holding itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Act of 1940 and, at the time of the investment, having total assets of at least $250,000,000.

(ii) "United States government securities" are United States treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof, including obligations of Government Sponsored Enterprises.

(4) "Eligible Institution" means any bank or savings and loan association authorized by federal or state laws to do business in South Carolina and insured by the Federal Deposit Insurance Corporation or any successor insurance corporation(s) established by federal or state laws.

(5) "Reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, Federal deposit insurance fees, sweep fees and a reasonable IOLTA account administrative fee.

(b) Attorney Participation.

(1) All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of the South Carolina Bar practicing law from an office or other business location within the state of South Carolina shall be deposited into one or more IOLTA accounts, except as provided in Rule 1.15 of Rule 407, South Carolina Appellate Court Rules, with respect to funds maintained other than in a bank account and as provided in section (i) below.

(2) A law firm of which the lawyer is a member may maintain the account on behalf of any or all lawyers in the firm.

(c) Depository Procedures.

(1) The IOLTA account shall be established with an eligible institution that voluntarily choose to participate. Funds deposited in each IOLTA account shall be subject to withdrawal upon request and without delay, subject only to any notice period which the institution is required or permitted to reserve by law or regulation and as provided in Rule 1.15 regarding safekeeping of client property.

(2) The rate of interest or dividends payable on any IOLTA trust account shall be no less than:

(i) the highest interest rate or dividend generally available from the institution to its non-IOLTA customers for each IOLTA account that meets the same minimum balance or other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, the institution may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers if such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and these factors do not include that the account is an IOLTA account. The institution also shall consider all product option types noted at (a)(3) for an IOLTA account offered by the financial institution to its non-IOLTA customers by either establishing the applicable product as an IOLTA account or paying the comparable interest rate or dividend on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product; or

(ii) a benchmark rate determined periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for qualifying accounts in the South Carolina Bar Foundation's IOLTA program and that is net of reasonable fees. When applicable, the Foundation will express that benchmark in relation to the Federal Funds Target Rate.

(3) Eligible institutions may choose to pay rates higher than comparable rates described at (c) (2) above.

(d) Determination of Nominal or Short-Term Funds.

(1) The lawyer shall exercise good faith judgment in determining upon receipt whether the funds of a client or third person are nominal or short-term. Client or third person funds shall be deposited in a lawyer's or law firm's IOLTA account unless the funds can earn income for the client in excess of the costs incurred to secure such income.

In the exercise of this good faith judgment and determining whether a client's funds can earn income in excess of costs of securing that income for the benefit of the client

or third person, and thus provide a positive net return to the client or third person, the lawyer or law firm shall consider the following factors:

(i.) the amount of funds to be deposited;

(ii.) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(iii.) the rates of interest or yield at financial institutions where the funds are to be deposited;

(iv.) the cost of establishing and administering non-IOLTA accounts for the benefit of the client of third person, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the benefit of the client or third person;

(v.) the capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients or third persons; and

(vi.) any other circumstances that affect the ability of the client's or third persons' funds to earn a net return for the client or third person.

The lawyer or law firm shall review its IOLTA account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third person.

(2) The determination of whether a client's or third person's funds are nominal or short-term shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with ethical impropriety based on the exercise of such good faith judgment.

(3) Notification to the client is not required nor shall the client or third person have the power to elect whether nominal or short-term funds shall be placed in the IOLTA account.

(4) The provisions of section (c) shall not relieve a lawyer or law firm from an obligation imposed by Rule 1.15 of the Rules of Professional Conduct with respect to safekeeping of client property.

(e) IOLTA Refund Procedures.

The Foundation shall establish procedures for the processing of refund requests for such instances as bank or lawyer error.

(f) Notice to Foundation.

Lawyers or law firms shall advise the Foundation, at Post Office Box 608, Columbia, SC 29202-0608, by facsimile at (803) 779-6126, or in such other manner as the Foundation publishes in its materials is acceptable, of the establishment and closing of an IOLTA account for funds covered by this rule. Such notice shall include: the name of the institution where the IOLTA account is established; the IOLTA account number as assigned by the institution; the institution address; and the name and South Carolina Bar attorney number of the lawyer, or of each member of the South Carolina Bar in a law firm, practicing from an office or other business location within the state of South Carolina that has established the IOLTA account.

(g) Certification.

Each member shall certify annually on his annual licensure pursuant to Rule 410, South Carolina Appellate Court Rules, that the member is in compliance with the provisions of this rule or, pursuant to section (i) below, has been approved by the Foundation as exempt from the provisions of this rule.

(h) Remittance and Reporting Instructions.

A lawyer or law firm depositing client funds in an IOLTA account shall direct the depository institutions to:

(1) calculate and remit interest or dividends, net of reasonable service charges or fees, if any, on the average monthly balance in the account or as otherwise computed in accordance with the institution's standard accounting practice, monthly to the Foundation, which shall be the sole beneficial owner of the interest or dividends generated by the accounts;

(2) transmit monthly to the Foundation a report, listing by account the name of the lawyer or law firm for whom each remittance is made, the lawyer's or law firm's IOLTA account number as assigned by the institution, the rate and type of interest or dividend applied, the average account balance for the reporting period or the other amount from which interest or dividends are determined, the amount of each remittance, and the amount and type of any service charges or fees assessed during the remittance period, and the net amount of interest remitted for the period;

(3) transmit at least quarterly to the depositing lawyer or law firm, a report or statement in accordance with normal procedures for reporting to its depositors.

"Reasonable fees" as defined in (a) (5) may be deducted from interest or dividends on an IOLTA account provided that such charges or fees shall be calculated in accordance with an eligible institution's standard practice for non-IOLTA customers. No other fees or charges shall be assessed against the interest on an IOLTA account, but rather shall be the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account." Fees or charges in excess of the interest or dividend earned on the account for any month shall not be taken from interest or dividends earned on other IOLTA accounts or from the principal of the account. Eligible institutions may elect to waive any or all fees on IOLTA accounts.

(i) Exempt Accounts.

The Foundation will establish procedures for a lawyer or law firm to maintain an interest-free trust account for client and third-person funds that are nominal or short-term when the lawyer's or law firm's account cannot reasonably be expected to produce or has not produced over time an interest income net of reasonable service charges or fees.

(j) Program Administration.

The Foundation shall, in accordance with its charter and by-laws, receive, administer, invest, disburse and separately account for all funds remitted to it through this program.

Appendix C

The South Carolina Bar Foundation, Inc.
Potential Questions about Proposed IOLTA Rule Change

Why do we need a comparability rule?

We want to ensure fair treatment of IOLTA accounts by banks.

An IOLTA comparability rule requires attorneys to place their IOLTA accounts in a financial institution that pays those accounts the highest interest rate or dividend generally available at that institution to other customers when IOLTA accounts meet the same minimum balance or other account qualifications, if any.

The original IOLTA rule was written in a rate environment where NOW (Negotiable Order of Withdrawal) accounts were the primary option in cash management products and when NOW accounts were receiving interest in the four and five percent range. Today there are new banking products that generally offer much higher rates to customers with qualifying balances. However, high balance IOLTA accounts continue to be paid lower NOW account rates even though other similarly situated customers receive higher rates via other cash management products.

The SC Bar Foundation (SCBF) has worked for three years to get banks to increase rates voluntarily with partial success. We successfully raised the rates of several of our top banks as well as a few of our smaller institutions. Yet, the overall statewide weighted average IOLTA rate has been in the region of 0.68 percent since January 2005. During this same time period, rates paid by financial institutions on cash management products that many large IOLTA accounts would qualify for averaged over 2 percent. In addition, we have found that negotiated rates are not binding and almost always end up being temporary.

SCBF wishes to be treated fairly by asking banks to pay the same interest or dividend on IOLTA accounts generally available to similarly situated non-IOLTA customers at the same institution. If a financial institution does not offer higher rate products to its non-IOLTA customers, it does not have to do so for IOLTA customers.

What is the expected response from the banking community?

While banks certainly will not be happy to pay higher rates, based on the experience of the IOLTA programs that have implemented comparability, they will comply. Indeed, it is difficult to make the argument that IOLTA customers should not receive the same rates that are generally provided to similarly-situated non-IOLTA customers.

Comparability regulates lawyers by requiring them to place their IOLTA accounts at financial institutions that pay interest rates on IOLTA accounts comparable to those paid to similarly-situated non-IOLTA customers. Participation in IOLTA **has always been and continues to be voluntary for financial institutions.**

Comparability does not set or compare rates among banks. Rates paid under comparability are set by each bank for its own customers and are based on all the factors a bank normally considers when it sets rates. Comparability only requires an eligible financial institution to pay interest rates or dividends comparable to those it already pays its own similarly situated non-IOLTA customers.

We think it is unlikely that banks or savings and loan associations would choose not to participate in the IOLTA program, especially as the attorney or law firm may choose to move operating and other accounts if the IOLTA account had to be moved. Across the country, we know of no bank that has ceased to offer IOLTA accounts in states that have implemented an IOLTA comparability rule. Even when banks pay comparable rates, IOLTA accounts should remain profitable, since the bank is only paying what it already pays to its other depositors. Banks also my charge fees associated with higher paying products on IOLTA accounts as they can for any other account.

Only accounts that have high balances are likely to be affected. Other states that have implemented this rule have not experienced any significant problems; South Carolina should be no different.

Banks would also have an option to choose to pay a benchmark rate that reflects overall comparability on all of its IOLTA accounts – as opposed to determining rates for individual accounts via review of all applicable products. Many financial institutions have selected this option in other states. (*See benchmark section below*.)

What is the impact of a comparability rule on attorneys and/or law firms?

Attorneys and law firms would be required to maintain their IOLTA account in banks, savings and loan associations which comply with the rule.

Comparability does not require attorneys and/or law firms to move their accounts to banks that pay the highest IOLTA rates. SCBF has always encouraged attorneys to use financial institutions that offer the most favorable rates on IOLTA, but this rule does not require them to do so.

The rule change would not require attorneys to contact their banks for higher rates. Rather, SCBF will initiate compliance activity on a bank by bank basis and will communicate directly with any affected law firms. SCBF will be responsible for ensuring implementation and monitoring compliance. Where possible, we will provide technical assistance to each financial institution to assist with implementation and ensure compliance with no or minimal burden to lawyers and/or law firms.

As it exists under the current IOLTA rule, should a bank decided to stop participating in IOLTA, SCBF would advise the affected attorneys and law firms and provide them a list of eligible institutions in their area. The proposed rule draft does not change this scenario.

With new product options for IOLTA accounts proposed, what does this mean regarding the safety of trust funds?

The rule proposes bank repurchase agreements (REPOs) for IOLTA accounts and requires that REPOs be fully collateralized by US Government Securities (as opposed to commercial bonds or other lower quality collateral). As the investment is "overnight," REPOs present a very low risk of market loss.

The rule also permits investment in money market fund products. Several safeguards include 1) limiting such funds to government money market funds and 2) limiting government money market fund eligibility to a minimum asset level of $250 million. These provisions suggest that, in the unlikely event that a money market fund loses money, the bank or brokerage firm would likely have sufficient other assets to make up any loss.

The only significant risk to client or third person trust funds would result from bank failure. However, the draft rule requires that REPOs be available for IOLTA accounts only at banks which meet the highest two capitalization categories set by federal regulators. In the event of bank failure, stated FDIC policy is that the acquiring bank(s) honor the REPO agreements of the failed bank. Or in the case of a bank liquidation, the depositor is paid the full value of the government securities by the FDIC.

In addition, IOLTA accounts must be at banks which carry federal deposit insurance. FDIC insurance is currently unlimited for IOLTA checking accounts through at least December 31, 2009 under a temporary FDIC rule. FDIC insurance may return to the $100,000 limit after 2009, which has long been accepted by states as the best available safety parameter for funds in IOLTA trust accounts.

How would the benchmark rate be established?

In lieu of a review of all account offerings, banks may choose to pay a benchmark rate which, as proposed, would be determined periodically by the Foundation. The rate would reflect the Foundation's estimate of an overall statewide comparability rate for qualifying accounts, net of reasonable fees. Current data would be used to determine the benchmark so that it is fair and based on comparable rates for South Carolina. When applicable, the Foundation will express that benchmark in relation to the Federal Funds Target Rate.

Administratively, how does comparability work?

The rule chiefly would affect only high balance accounts of which there are roughly 780 held by the largest ten IOLTA depositories. While the rule provides that these may be set up as sweep accounts, in most cases the product is not switched, but the sweep rate and fees are mirrored. Reports from other states with comparability rules indicate that virtually all banks have chosen to either mirror the higher product rate or pay the benchmark rate on the existing IOLTA checking account. In the unlikely event that a bank requires actually establishing the higher rate product, only the small number of attorneys and law firms affected would need to complete new bank forms. SCBF would

offer to obtain the needed paperwork and help the law firms complete it and submit it to the bank.

Should an eligible institution regularly pay checking accounts interest rates based on the size of the account balance ("tiered interest rates"), they would need to do so for IOLTA accounts as well. Data from other states indicates that this would likely affect a small number of accounts in South Carolina and that the required changes are not significant for financial institutions.

SCBF will use a variety of methods, including surveys, direct confirmations with banks and possibly commercially-available rate data to ensure that banks are paying the correct rates.

As with IOLTA checking accounts, the tax payer identification number on a government money market fund would be that of SCBF and would remain on the IOLTA checking account tied to a REPO. Eligible institutions could issue and mail IRS form 1099 to SCBF with a preference that they suppress them as they do now for IOLTA checking accounts.

As for the administrative impact on banks, SCBF would work directly with its existing IOLTA contacts at currently participating financial institutions to implement the new rule. Eligible institutions in many cases would not need to modify their products but would need to adjust interest payments and reporting to reflect comparable rates. Most banks have sophisticated systems that can easily accommodate these requirements, but SCBF will offer technical assistance to them as needed and possible.

Once the Court rule is approved, there would need to be a reasonable period of time for implementation. It is the goal of SCBF that no attorney or law firm has to change banks. As such, we feel that it is important to have sufficient time for an orderly transition.

How does the Court decision ensure separation of powers?

The proposed comparability rule regulates lawyers not banks. As the IOLTA proposed rule states, IOLTA is voluntary for financial institutions. Individual bank rates are based on each individual bank's own rates that have already been established under their customary rate setting procedures.