

IOLTA **INTEREST ON LAWYER TRUST ACCOUNTS**

Guidelines for Lawyers and Law Firms
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South Carolina
BAR FOUNDATION
 Lawyers Sustaining Justice

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Introduction

The South Carolina Supreme Court created the Interest on Lawyer Trust Accounts program (IOLTA) to provide funds for law related public service projects and programs designed to improve the administration of justice. Before the creation of IOLTA, nominal or short-term client funds held in escrow or trust were customarily pooled and deposited into non-interest bearing checking accounts. Such funds should be deposited in special interest-bearing IOLTA checking accounts at participating financial institutions. The interest generated on IOLTA accounts, less reasonable service charges, automatically is forwarded by financial institutions to the South Carolina Bar Foundation. The Foundation uses these funds to provide grants for charitable and educational law related public service projects and programs to improve the administration of justice in South Carolina.

Along with more than 90 financial institutions in the Palmetto state that participate in IOLTA, together we are:

- Funding programs that put non-violent dads in livable wage jobs so that they can pay child support and reconnect with their children.
- Supporting non-profits that get women and their children out of abusive and life threatening situations.
- Funding initiatives that teach today's youth about the importance of being a good citizen and how they can make a positive difference in their communities.
- Educating low income citizens about their rights and responsibilities under the law.
- Fostering collaboration, communication and efficient work from those we support.
- Striving to make sure that poverty is not a barrier to justice.

Since 1987, the Foundation has awarded more than \$41 million to various legal related organizations that work on behalf of the justice community. These *Guidelines for Lawyers and Law Firms* provide details about IOLTA accounts for you to share with your colleagues. The guidelines include the following information:

- Financial institution eligibility
- Forms to be used for establishing, closing or changing your IOLTA account
- Link to the rule governing IOLTA accounts
- Frequently Asked Questions (“FAQs”)

History of IOLTA and Comments about Comparability

IOLTA programs originated in Australia and Canada during the 1960s. IOLTA programs have existed and have been administered in all fifty states and the District of Columbia since 1995.

The South Carolina Supreme Court created the IOLTA program to provide funds for law related public service projects and programs designed to improve the administration of justice. Before the creation of IOLTA, nominal or short-term client funds held in escrow or trust were customarily pooled and deposited into non-interest bearing checking accounts. Since the creation of the program, such funds are now deposited in special interest-bearing IOLTA products at eligible financial institutions. The interest generated on IOLTA accounts, less allowable service charges, is automatically forwarded by financial institutions to the South Carolina Bar Foundation. The Foundation uses these funds to provide

for charitable and educational law related public service projects and programs to improve the administration of justice in South Carolina.

In March 2005, amendments made to Rule 412 by the SC Supreme Court made participation in the SC IOLTA program mandatory for attorneys. It clarified that attorneys had to enroll all of their IOLTA-eligible funds in one or more IOLTA accounts.

On December 17, 2009, Rule 412 was amended to clarify the language regarding the interest rate to be paid on IOLTA accounts so that there is no misunderstanding about how accounts are to be treated. The Order is effective June 15, 2010. Specifically, the amendments:

- Define institutions eligible to hold IOLTA accounts as only those institutions which agree to pay IOLTA account customers the highest interest rate or dividend generally available at their own institution to similarly situated non-IOLTA customers.
- Require higher rates be paid to qualifying IOLTA accounts, but only if those rates are already available to their other customers.
- Authorizes the use of US Government money market funds and repurchase agreements collateralized with US Government securities.
- Defines allowable reasonable service charges.

The full version of the Court rule can be viewed at: <http://www.scbf.org/Rule412.asp>

The interest rate parity provisions and investment options were added to clarify how IOLTA accounts were to be treated. Since 2005, the South Carolina IOLTA rule has required interest rates on IOLTA accounts that are no less than those paid on comparable accounts. The rule was revised to include specific examples and to clarify language about the intent of the provision. More than 29 IOLTA programs in other states have adopted similar language in their rules.

The rule regulates the behavior of lawyers, as it has always done. Lawyers are required to place their IOLTA accounts at financial institutions that have been certified as eligible by the SCBF. The Supreme Court in the proper course of regulating attorneys has adopted criteria for financial institutions participating in the IOLTA program. However, participation has always been and continues to be voluntary for financial institutions.

Financial Institution Eligibility

In December 2009, the Supreme Court of South Carolina amended the IOLTA rule to require that attorneys may only place their IOLTA accounts at eligible institutions. IOLTA eligible institutions are those that pay no less on IOLTA accounts than the highest interest rate or dividend offered to non-IOLTA customers, when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications. Financial institutions have until June 15, 2010 (the effective date), to achieve compliance with the revised Rules.

Attorneys may only place their IOLTA accounts at eligible financial institutions. SCBF makes the determination as to whether a financial institution is an eligible institution. Banks will be recertified annually with lists being published at scbarfoundation.org. In the event a bank chooses not to participate, the lawyers and or law firms affected will be contacted by the Foundation.

Prime Partner Program

Across the country, many financial institutions choose to pay an interest rate or dividend higher than the minimum that is required to meet the standards of comparability. If a bank goes “above and beyond,” the bank will be recognized as a Prime Partner.

While the provisions of interest rate comparability described above determine the minimum rate that eligible financial institutions may pay on IOLTA accounts, leadership institutions in South Carolina have historically gone above and beyond the minimum requirements to insure the laudable goals of the IOLTA program are achieved.

South Carolina lawyers and law firms can reinforce their commitment to our communities by banking with IOLTA Prime Partners. Prime Partners have committed to pay an interest rate, net of allowable reasonable fees that is the higher of 1) 75% or more of the Fed Funds Target Rate; or 2) a minimum of 0.75%, on all IOLTA accounts. (NOTE: the Prime Partner rate may be adjusted periodically.)

How Financial Institutions are recognized as Prime Partners:

- *Highlighted on Eligible Institutions list as a “Prime Partner”
- *Featured prominently on South Carolina Bar Foundation Web site
- *Active link from South Carolina Bar Foundation Web site to Prime Partner’s Web site
- *Mention in statewide newsletter distributed to all licensed attorneys
- *Featured in press releases issued to local and statewide media and bar association publications
- *Letter to attorneys who open new IOLTA accounts advising them of bank’s Prime Partner status
- *Local community recognition
- *Mention in legal aid communications
- *Promoted and prominently featured at Bar Association events, including Annual Bar Meetings
- *Featured at various local & specialty bar meetings
- *Community Redevelopment Act (CRA) Letter
- *Customized publicity can be developed for individual financial institutions
- *Prime Partner certificate for financial institutions

Please contact the SCBF staff to learn more about how your financial institution can become a Prime Partner. Contact information can be found at the end of this Guidebook.

How to Comply with IOLTA

Opening a new IOLTA account is simple. Please complete these steps even if your financial institution also requires you to sign its own signature cards.

1. Complete the *Enrollment Form for Lawyers and Law Firms* (available at <http://scbarfoundation.org/forms.asp>) with all of the required information. If completing the form for a firm, attach a list of attorneys (including Bar numbers) who will use the account in the regular course of practice.
2. Take the completed form to your financial institution.
3. Distribute additional copies of the form as follows:
 - a. Give a copy to SCBF. You may fax the form to 803-779-6126, mail the form to the Foundation’s PO Box or e-mail a PDF version to iolta@scbar.org.
 - b. Keep a copy for your records.

Other points to consider when opening a new account:

1. All IOLTA accounts should be established in the name of the attorney or law firm and should be interest-bearing trust accounts.
2. Use SCBF's TIN, 23-7181552, for the IOLTA account – do not use the attorney's or law firm's TIN or Social Security number.
4. If your institution does not waive fees, then you should be aware that only allowable reasonable service charges and fees will be assessed against the IOLTA interest. Negative netting (deducting service fees in excess of the interest earned by an individual account) by the financial institution is prohibited. Non-allowable fees (wire transfers, NSF, check orders, electronic bank fees, etc.) are the responsibility of the lawyer or law firm maintaining the IOLTA account.
5. Due to SCBF's status as a tax-exempt, non-profit South Carolina corporation, all IOLTA accounts are exempt from backup withholding. Should you receive an IRS withholding letter for an IOLTA account, please call the Foundation's office immediately.

If your account status changes during the year, you should utilize the *Change of Status* form which also is available at <http://scbarfoundation.org/forms.asp>.

Fees and Service Charges

Many financial institutions have elected to waive fees and service charges for IOLTA accounts to preserve the charitable use of the interest earned on the accounts. For financial institutions that do not waive fees or service charges on IOLTA accounts, the following information details how and what fees and service charges may be assessed.

Expenses That May be Deducted from IOLTA Interest (Called "Reasonable Fees" in Rule 412 (a) (5))

If service charges are assessed, only the following fees may be deducted from the interest or dividends earned in an IOLTA account:

- Per check charges
- Per deposit charges
- Fee in lieu of a minimum balance
- Federal deposit insurance fees
- Sweep fees
- Reasonable IOLTA account administrative fee

Prior to assessing the above fees against the IOLTA interest, the financial institution should verify that the fee is no greater than what is being charged on comparable accounts, and that the fees are reasonable and customary. All other fees outside of those noted above, if assessed, are the responsibilities of the lawyer or law firm maintaining the account.

Negative interest earnings resulting from service charges which exceed interest earned are prohibited on IOLTA accounts (see section on negative netting below).

Negative Netting

Allowable IOLTA fees (see prior list) may only be charged against the interest earned on an individual account. A financial institution may not collect allowable IOLTA fees in excess of the interest earned by the account, from interest generated on other IOLTA accounts or from the account balance.

Expenses That MAY NOT be Deducted from IOLTA Interest

Only the allowable fees noted above may be charged against the IOLTA interest. All other fees if assessed by the financial institution are the responsibility of the lawyer or law firm maintaining the account. The following are examples of fees that may only be charged to the attorney or law firm, not charged to the IOLTA interest. Such fees must be brought to the attention of the lawyer or law firm by the financial institution, 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).

- Wire transfer
- Insufficient funds (NSF)
- Account Overdrafts
- Stop payment
- Account reconciliation
- Cash management fees
- Check printing

Rule 1.15: Safekeeping Property

[Rule 1.15](#) makes it clear that an attorney or firm may deposit their own funds in a client trust account for the sole purpose of paying service charges they are responsible for on that account, but only in an amount necessary for that purpose. Alternatively, an attorney or law firm may make arrangements with his or her bank to have any service charges on the trust account charged to an operating or general account.

Insufficient Funds

Under Rule 1.15(h), as revised October 1, 2005, a lawyer who maintains a trust account must file with the financial institution a written directive requiring the institution to report to the Commission on Lawyer Conduct when any properly payable instrument drawn on the account is presented for payment against insufficient funds. The Commission's address is: PO Box 12159, Columbia, SC 29211. A copy does NOT need to be sent to SCBF.

FDIC Protection

The Federal Deposit Insurance Corporation (FDIC) announced in 2008 that client funds deposited in IOLTA accounts at participating financial intuitions are eligible for unlimited deposit insurance coverage under the Transaction Account Guarantee Program (TAGP). On September 1, 2009, the FDIC extended the TAGP from December 31, 2009 until June 30, 2010. As a result, IOLTA funds held at institutions that participate in the extended TAGP will continue to be guaranteed in full by the FDIC until June 30, 2010. Financial institutions opting out of the extended coverage must display a notice to customers.

FDIC webpage link: <http://www.fdic.gov/deposit/deposits/changes.html>

Frequently Asked Questions

Q: What is the basic concept of IOLTA?

A: Clients often transfer money to an attorney to hold. When the amount is large or if the funds are to be held for a long period of time, lawyers invest those funds for the benefit of the client. But, when the funds are small or expected to be held for a short time, they cannot practically be invested to benefit the owner of the funds. The IOLTA program allows attorneys to convert these accounts into interest-bearing accounts that generate interest income. The financial institution sends the interest directly to the Foundation which distributes the funds as grants to a variety of initiatives that support the justice system.

Q: How are IOLTA eligible funds determined?

A: "Nominal" or "short-term" funds are those of a client or third party that the lawyer has determined cannot provide a positive net return to the client or third party. An attorney shall exercise good faith judgment in determining whether or not funds belong in an IOLTA account. No lawyer shall be charged with ethical impropriety based on the exercise of good faith judgment.

Q: Do all attorneys need IOLTA accounts?

A: Only attorneys that handle client trust funds that are nominal in amount or held for a short time are required to establish IOLTA accounts. Licensed attorneys in South Carolina who do not handle client trust funds are not required to establish an IOLTA account.

Q: Who qualifies for exclusion?

A: The following Bar members are excluded: lawyers who do not maintain the practice of law; those employed in a corporate capacity; those employed by local, state or federal government; law clerks, professors or members of the judiciary; retired attorneys; lawyers whose practices do not require the maintenance of trust/escrow accounts and those who do not have an office or maintain funds in depository institutions in the state. Exclusions may be noted on the annual SC Bar license fee statement.

Q: Who is exempt?

A: An IOLTA account that has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of time may, at the discretion of the Foundation, be exempted from the IOLTA program. Lawyers may also request exemption if participation would work an undue hardship or would be extremely impractical. Attorneys desiring exemption due to hardship should make their request in writing to the Bar Foundation Board of Directors. Contact the Foundation for exemption forms.

Q: Where do attorneys deposit client trust funds that do not meet the short-term or nominal fund requirements of IOLTA?

A: Client trust funds that do not meet the nominal or short-term fund requirements of an IOLTA account should be deposited in a separate demand account to earn interest for the benefit of that client. The attorney must use that client's tax ID number instead of SCBF's tax ID number.

Q: What taxpayer ID number should be used when opening an IOLTA account?

A: SCBF's TIN is 23-7181552. This is the TIN that must be used when opening an IOLTA account. The attorney's or law firm's TIN should never be used when an IOLTA account is opened.

Q: Are IOLTA accounts subject to service charges? Who pays the services charges?

A: If the financial institution assesses service charges and fees on the IOLTA account, they should be reasonable and customary. Certain reasonable fees as defined in the Rule may only be deducted from interest or dividends that are earned on IOLTA accounts; they may not be deducted from the IOLTA principal. All other fees and service charges are the responsibility of the attorney or law firm maintaining the account. The financial institution may choose to waive any and all fees on an IOLTA account.

Q: How can financial institutions assist attorneys or law firms in opening IOLTA accounts?

A: The financial institution can have on hand a copy of the *Enrollment Form for Lawyers and Law Firms*, which instructs the financial institution on how to establish an IOLTA account. The financial institution or attorney must fax or mail a copy of the completed form to the Foundation.

Q: Are there any tax consequences for the client or for the attorney?

A: There are no tax consequences for the attorney or client. Financial institutions should not issue IRS 1099 forms to anyone including the attorney, law firm nor the attorney's client.

Q: How can my financial institution become a Prime Partner?

A: Contact the SCBF staff about how your financial institution can become a Prime Partner.

Q: Would attorneys have to change to banks paying higher rates?

A: No. IOLTA comparability rule only requires a bank to pay its own IOLTA customers the highest interest rate generally paid to its own non-IOLTA customers with comparable accounts. It does not require a bank to pay rates other than that which the bank itself has established.

Q: What if a financial institution doesn't offer higher rates of interest to non-IOLTA customers with comparable accounts?

A: The bank would be in compliance with the rule as long as the bank is paying comparable rates to its IOLTA and non-IOLTA customers. The financial institution is required to do no more than pay the same rates on IOLTA accounts as it already pays on similarly situated non-IOLTA accounts. For example, most financial institutions offer non-IOLTA depositors preferred interest rates for larger balances. However, many of these same institutions do not distinguish between very small and very large balance IOLTA accounts. The rule simply requires that they now pay the large balance IOLTA account the same rate it would otherwise qualify for, were it not an IOLTA account.

Q: How will attorneys know if their financial institution an eligible IOLTA institution?

A: The SCBF will maintain a list of eligible institutions on its Web site. Institutions will be certified as eligible by SCBF upon a finding that they are in compliance with the rule and based on the documentation and ongoing reporting the institution will file with SCBF.

Q. Where are insufficient funds notices sent?

A. NSF notices should be sent to the Commission on Lawyer Conduct. Their address is PO Box 12159, Columbia, SC 29211. A copy does NOT need to be sent to SCBF.

SCBF Contact Information

For additional information or to answer questions that you may have, please visit our Web site sctbarfoundation.org or contact the Foundation's staff:

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