MORRISON | FOERSTER

555 WEST FIFTH STREET
LOS ANGELES
CALIFORNIA 90013-1024

TELEPHONE: 213.892.5200
FACSIMILE: 213.892.5454

WWW.MOFO.COM

MORRISON & FOERSTER LLP
NEW YORK, SAN FRANCISCO,
LOS ANGELES, PALO ALTO,
SAN DIEGO, WASHINGTON, D.C.
NORTHERN VIRGINIA, DENVER,
SACRAMENTO, WALNUT CREEK
TOKYO, LONDON, BRUSSELS,
BEIJING, SHANGHAI, HONG KONG

August 31, 2010

Writer's Direct Contact
213.892.5289
MGillett@mofo.com

By Electronic Delivery to regs.comments@federalreserve.gov

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Community Reinvestment Act Regulation Hearings: Docket No. R-1386

This comment letter is submitted by Morrison & Foerster LLP on behalf of the Legal Services Trust Fund Commission of The State Bar of California (the "Commission"),[i] in response to the notice of Community Reinvestment Act Regulation Hearings and Request for Comments ("Request for Comments")[1] issued by the Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation and Office of Thrift Supervision (collectively, the "Agencies") to receive comments on whether and how the Agencies should revise their Community Reinvestment Act regulations (the "CRA Regulations") to better serve the goals of the Community Reinvestment Act ("CRA"). The Commission appreciates the opportunity to comment on this important matter.

Need for Clarification of Treatment of IOLTA Program Payments

The California State Bar and State Legislature have established a program through which interest earned on certain lawyers' trust accounts at depository institutions is paid by the institutions to the Legal Services Trust Fund Program of The State Bar and distributed to fund legal services organizations that serve the poor.[2] This program is called the "Interest on Lawyers' Trust Accounts" program, or IOLTA[3]. In enacting this program in 1981, the Legislature stated, "It is the purpose of this article to expand the availability and improve the

[1] *See* 75 Fed. Reg. 35686 (June 23, 2010).
[2] *See* Cal. Bus. & Prof. Code § 6210 *et seq.*
[3] IOLTA programs exist in all 50 states and the District of Columbia, but vary in whether they were created by court rule or legislative statute, are mandatory or voluntary for attorneys, and whether or not there are rate comparability or other related requirements incorporated into their governing rules or regulations.

quality of existing free legal services in civil matters to indigent persons, and to initiate new programs that will provide services to them."[4]

In 2008, the California IOLTA statute was amended to require that attorneys only hold IOLTA accounts at participating banks and other depository institutions that pay a rate of interest that is no less than the rate paid by the institution on "comparable" non-IOLTA accounts.[5] Unfortunately, the "comparable rate" has decreased dramatically in the past two years as interest rates have fallen and have stayed low given the current economy. Because of the important public purpose of these IOLTA funds, the Legal Services Trust Fund Program encourages depository institutions to pay higher than "comparable" rates on IOLTA accounts to maximize the institutions' investments in low-income communities.

If a depository institution were to make a cash grant to any of the legal aid organizations that currently receive IOLTA funds, that institution would receive "investment credit" for that grant. Today, however, a depository institution that pays an interest rate above the statutory minimum "comparable rate" or waives service fees that would otherwise be applied against the interest earned on IOLTA accounts in order to support legal services for the indigent, cannot be certain that its examiners will give it "investment test" credit for these efforts. This uncertainty would be eliminated if the Agencies issue a Q&A in the Interagency Questions and Answers confirming that depository institutions will receive "investment test" credit for payments to IOLTA programs to the extent such payments exceed any statutory or court established minimum. A specific proposal is set forth below, followed by a discussion of the reasons supporting the proposal.

Proposed Q&A in the Interagency Questions and Answers

The Commission requests that the Agencies issue a Q&A in the Interagency Questions and Answers to confirm to depository institutions that they will receive "investment test" credit for payments to IOLTA programs to the extent such payments exceed any statutory or court-mandated minimum requirement. Although there are several locations and possible formulations that could be used to effect this result, the Commission suggests as one example that a new Q&A could be inserted as § --12(g)(2)—2, as follows:

> *"§ --.12(g)(2)--2: If an institution accepts Interest On Lawyers' Trust Account ("IOLTA") deposits, will the institution receive credit as a qualified investment for the amount of interest paid to organizations providing legal services to indigent and*

[4] Cal. Bus. & Prof. Code § 6210.
[5] *See* Cal. Bus. & Prof. Code § 6212(b).

low-income persons through the IOLTA program to the extent the amount paid exceeds what it would otherwise be required to pay under statutes, rules or regulations established for the IOLTA program?

A2. Yes. All states now have programs that encourage or require lawyers to deposit certain client trust funds in an interest-bearing account at a depository institution and for the depository institution to pay the interest to a state IOLTA program that funds organizations assisting people in need. The recipient organizations qualify as "community development" organizations so long as the funds are primarily used to assist persons who generally fall within the definition of "low- or moderate-income," even if the program uses an eligibility definition or income threshold that differs from the definition of "low- or moderate-income" under the CRA regulations. For example, a program that targets persons who are "indigent," and generally defines that term to mean someone whose income is 125% or less than the federal poverty level, would qualify. If funds for such programs are distributed and used to provide such services on a statewide basis, then so long as the program covers an area that is larger than, but includes, the institution's assessment area(s), the institution will receive credit. The amount of "investment test" credit received by the institution would be the difference between the amount actually paid to the program by the institution and the minimum amount the institution is otherwise required to pay under statutes, rules or regulations established for the program. Additionally, if the institution waives fees that it could otherwise charge, then the waiver of fees would increase the total interest paid and be included in the amount of the institution's "qualified investment."

The following three points are offered in support of this proposal:

An IOLTA Program Should Qualify as a "Qualified Investment" if it Serves Indigent Persons Who Fall Within the CRA Guidelines For "Low- and Moderate-Income" Individuals and Communities.

IOLTA programs generally "primarily benefit" "low- or moderate-income individuals." The terms "low-income" and "moderate-income" are defined in the CRA regulations as less than 50% or 80%, respectively, of the area median income.[6] Area median income of California Metropolitan Statistical Areas (MSAs), as reported by Fannie Mae for 2009, ranged from $50,400 (Merced County) to $102,500 (San Jose-Sunnyvale-Santa Clara).[7] Thus, if 80

[6] 12 C.F.R. § 228.12(m).
[7] See https://www.efanniemae.com/sf/refmaterials/hudmedinc/hudincomeresults.jsp?STATE=CA.

percent of area median income is considered "moderate-income," then the range of eligible families in California would be from $40,320 to $82,000.

The California IOLTA statute requires that interest on IOLTA accounts be remitted to the State Bar, which is required to distribute such funds "for the provision of civil legal services to indigent persons."[8] The term "indigent person" is generally defined for these purposes as someone whose income is 125% or less than the federal poverty level.[9] For programs that deliver services primarily through volunteer attorneys, the income threshold is slightly higher at 75% or less of the maximum levels of income for lower income households as defined in the California Health and Safety Code.[10] Both of these income thresholds are significantly lower than the CRA income thresholds: For 2009, the federal poverty guideline for the contiguous 48 states and the District of Columbia for individuals was $10,830, and for a family of four was $22,050, well within the CRA criteria.[11] Using the threshold of 75% of household income for lower income households as defined in the California Health and Safety Code, and using Merced as an example, an indigent person would have an annual income of less than $23,437, or less than $33,487 for a family of four, again well within the CRA criteria.

The IOLTA statute also provides that clients who are eligible for Supplemental Security Income, or free services under the Older Americans Act or Developmentally Disabled Assistance Act, are eligible for IOLTA program assistance without regard to income restrictions.[12] Persons eligible for Supplemental Security Income by definition meet IOLTA income requirements. The vast majority of other persons that meet statutory guidelines do not seek assistance from legal aid unless they are low-income, either because the legal aid organizations prioritize services that meet the needs of low-income people, or because they would seek private counsel, *e.g.*, a person of affluence would not likely seek legal aid to obtain a conservatorship for her mother. Thus, although a small fraction of individuals and families might qualify as "indigent" under the IOLTA statute who would not be "low- or

---

[8] Cal. Bus. & Prof. Code §§ 6212(e) and 6216.

[9] "(d) "Indigent person" means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project that provides free services of attorneys in private practice without compensation, "indigent person" also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses." Cal. Bus. & Prof. Code § 6213(d).

[10] *Id.*

[11] http://aspe.hhs.gov/poverty/09poverty.shtml.

[12] Cal. Bus. & Prof. Code § 6213(d).

moderate-income" under the CRA regulations, both the IOLTA statute and the CRA regulations are *primarily targeting* the same groups of people, and only a tiny percentage of the clients served under the IOLTA statutes may be above CRA income eligibility guidelines.

Legal aid organizations are tax-exempt non-profit organizations that provide free civil legal services for disadvantaged individuals and families to preserve affordable housing, provide access to healthcare and benefits, protect families from violence, build economic stability and more. Because the California IOLTA statute directs that funds be allocated throughout the State among all 58 counties, contributing through the IOLTA program enables depository institutions to assist not just the urban centers in California but the remote rural areas that may otherwise be underserved.

The Interagency Questions and Answers recognize that a clearly defined program that benefits *primarily* low- or moderate-income persons qualifies even if it is provided by an entity that offers other programs that serve individuals of all income levels.[13] Under the same reasoning, the IOLTA program qualifies as a "qualifying investment" if it "primarily benefits" "low- or moderate-income individuals" even if it also benefits some individuals who might not qualify as "low- or moderate-income."

Payment of Interest at a Rate Above the Required Minimum Should be Considered a "Grant" and a "Qualifying Investment" for Purposes of the "Investment Test."

As noted above, in California a depository institution that accepts IOLTA accounts is required by the IOLTA statute to pay a rate of interest on the account that is no less than the rate paid by the institution on "comparable" non-IOLTA accounts, as follows:

> "the rate of interest or dividends payable on any IOLTA account shall not be less than the interest rate or dividends generally paid by the eligible institution to nonattorney customers on accounts of the same type meeting the same minimum balance and other eligibility requirements as the IOLTA account."[14]

The statute does not set any floor for the "comparable rate," require an institution to pay more than the "comparable rate" or require an institution to waive any service fees that would otherwise apply to the IOLTA account. The Trust Fund Program at The State Bar monitors bank compliance with this requirement.

---

[13] See Q&A 12(g)(2)-1, 75 Fed. Reg. 11642 (March 11, 2010).
[14] Cal. Bus. & Prof. Code § 6212(b).

The CRA regulations do not define the term "grant" or provide examples of qualifying "grants." Most institutions make grants by writing checks to qualifying organizations. In the case of IOLTA accounts, if a depository institution were to pay $1 million above the comparable rate on its IOLTA accounts, it would have the same effect as if the depository institution paid the comparable rate and made an outright cash grant of $1 million to the qualifying organization. Since the legal services program and the depository institution are in the same economic position in both cases, it is appropriate to treat them the same for purposes of the CRA regulations. Any interest paid by the depository institution above the "comparable rate" is akin to a "grant" by the depository institution to the legal services program and should be treated as a "qualifying investment."

Waiver of Service Fees on IOLTA Accounts Should Be Considered a "Grant" and a "Qualifying Investment" for Purposes of the "Investment Test" or, Alternatively, Should Qualify for Credit Under the "Service Test."

Using the same example as above, when a depository institution pays an interest rate above the "comparable rate" on its IOLTA accounts and also waives the comparable service fees for IOLTA accounts, then the remitted net IOLTA account interest of $1 million (above what it would pay if it paid the "comparable rate" and charged allowable fees), has the same economic effect as a $1 million cash grant. In other words, if waiving service fees of $100,000 results in net interest paid being increased by $100,000, then the waiver of service fees should be treated the same as a cash grant of $100,000. Since the legal services program and the depository institution are in the same economic position in both cases, they should be treated the same for purposes of the CRA regulations. Both interest paid by the depository institution above the "comparable rate" and waiver of service fees should qualify for credit as a "grant" under the "investment test." Alternatively, depository institutions should receive "service test" credit for waiving fees on IOLTA accounts.

If you have any questions regarding these comments, please contact me, at (213) 892-5289.

Best regards,

Mark T. Gillett

---

[i] Disclaimer: This position is only that of the Legal Services Trust Fund Commission, which is comprised of attorney and public members appointed by the Board of Governors and the Judicial Council to administer the Legal Services Trust Fund Program at the State Bar of California. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.