January 10, 2011

MEMORANDUM TO: The Board of Directors

FROM: Sandra L. Thompson
Director
Division of Supervision and
Consumer Protection

Michael H. Krimminger
Acting General Counsel

SUBJECT: Final Rule to Amend FDIC Deposit Insurance Regulations to Include IOLTAs in Temporary Unlimited Coverage for Noninterest-Bearing Transaction Accounts

RECOMMENDATION:

We recommend that the Board of Directors authorize the Executive Secretary to publish in the *Federal Register* a final rule that would amend the FDIC's deposit insurance regulations to reflect Congress's amendment to the definition of *noninterest-bearing transaction account* to include Interest on Lawyers Trust Accounts ("IOLTAs"), thereby providing such accounts with temporary unlimited deposit insurance.

DISCUSSION:

1. *Background.*

Section 343 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[1] ("Section 343") amended the deposit insurance provisions of the Federal Deposit Insurance Act ("FDI Act") (12 U.S.C. 1821(a)(1)) to provide temporary unlimited insurance coverage for noninterest-bearing transaction accounts. This temporary unlimited insurance coverage commenced on December 31, 2010, the expiration date for the Transactional Account Guarantee Program ("TAGP"), and extends until December 31, 2012. The original Section 343 definition of *noninterest-bearing transaction account* did not include NOW accounts (regardless of the interest rate paid on the account) or IOLTAs. Therefore, unlike the expiring TAGP, the statutory insurance coverage for transactional accounts did not provide for coverage for NOW Accounts or IOLTAs. To reflect this change, when the FDIC issued a final rule, in November 2010, implementing the requirements of Section 343, neither NOW accounts nor IOLTAs were within the rule's definition of *noninterest-bearing transaction account*.[2]

The November final rule also included disclosure and notice requirements as part of the implementation of Section 343. These included, among other requirements, that: (1) Insured

[1] Public Law 111-203 (July 21, 2010).
[2] See 75 Fed. Reg. 69577 (Nov. 15, 2010).

depository institutions ("IDIs") post a prescribed notice in their main office, at each branch and, if applicable, on their website that indicated that noninterest-bearing transactions accounts do not include IOLTAs and NOW accounts; and (2) IDIs then participating in the FDIC TAGP notify IOLTA and NOW account depositors that, beginning January 1, 2011, those accounts no longer will be eligible for unlimited protection but would be insured under the general deposit insurance rules.

On December 29, 2010, the President signed an act (the "December 29 Act")[3] that amended the definition of "noninterest-bearing transaction account" in Section 11(a)(1)(B)(iii) of the FDI Act. The Act replaced the Section 343 definition with one that explicitly includes IOLTAs.

2. *The Final Rule.*

Staff recommends that the Board authorize publication in the *Federal Register* of the attached final rule, which would update the Corporation's regulations to reflect the permanent increase in deposit insurance coverage:

A. *Amendment to the Definition of Noninterest-bearing Transaction Account.*

The final rule would revise the FDIC's deposit insurance rules[4] to define *noninterest-bearing transaction account* as:

> A deposit or account maintained at an insured depository institution—with respect to which interest is neither accrued nor paid; on which the depositor or account holder is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone or other electronic media transfers, or other similar items for the purpose of making payments or transfers to third parties or others; and on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal; and a trust account established by an attorney or law firm on behalf of a client, commonly known as an Interest on Lawyers Trust Account, or a functionally equivalent account, as determined by the Corporation.

This change would conform the Corporation's regulations with the revisions to the FDI Act made by the December 29 Act. This amendment to the Corporation's regulations would be effective immediately upon publication in the *Federal Register*. The applicable provisions of the December 29 Act became effective on December 31, 2010, two days after enactment.

B. *Change to IDI Disclosures to Depositors.*

The final rule would revise the prescribed notice that each depository institution offering noninterest-bearing transaction accounts must post prominently in the lobby of its main office, in each domestic branch and, if it offers Internet deposit services, on its website. The new notice

[3] Public Law 111-343 (Dec. 29, 2010).
[4] 12 C.F.R. Part 330

would explain that noninterest-bearing transaction accounts are fully insured until December 31, 2012, and that IOLTAs are included in the definition of *noninterest-bearing transaction account*.

Under the final rule, IDIs would be required to post the revised notice no later than February 28, 2011. Staff believes that this should be sufficient time to allow insured depository institutions to display the prescribed notice.

The final rule would also eliminate the November final rule's requirement that IDIs participating in the TAGP on December 31, 2010, notify IOLTA holders by mail that as of January 1, 2011, such accounts no longer will be eligible for unlimited protection.

3. *Good Cause to Forgo Notice and Comment Rulemaking*

Staff recommends that the Board make a finding of "good cause" to forgo the formal Administrative Procedure Act ("APA") requirements of notice and comment rulemaking and a 30-day delayed effective date.[5] Staff believes that a finding of good cause is warranted because seeking public comment is "unnecessary," "impracticable," and "contrary to the public interest" under these circumstances.[6]

The APA provides that federal agencies may find good cause when notice and public comment would be "impracticable, unnecessary, or contrary to the public interest."[7] Formal notice and comment procedures can be "unnecessary" when the agency is promulgating regulations that merely restate the language of a self-executing statute.[8] The provisions of Section 343 that amend the FDI Act to provide temporary unlimited deposit insurance for noninterest-bearing transaction accounts, and of the December 29 Act, further amending the FDI Act to include IOLTAs in the definition of *noninterest-bearing transaction account*, are self-executing, and it is therefore "unnecessary" to provide notice and seek public comment on rules that merely conform the language of the Corporation's regulations to this revised definition.

Additionally, staff believes that a finding of good cause is warranted because it would be "impracticable" and "contrary to the public interest" to delay revising the disclosure requirements to seek public comment on the revision. Because the amendment to the definition of *noninterest-bearing transaction account* was effective two days after enactment of the December 29 Act, it is in the public interest for the Corporation to take immediate steps to make depositors aware of this change in deposit insurance coverage. A delay in distribution of required notices and prescribed lobby disclosures would be detrimental to this goal, and therefore, complying with formal notice and comment procedures would be "impracticable" and "contrary to the public interest."

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[5] 5 U.S.C. § 553.
[6] 5 U.S.C. § 553.
[7] 5 U.S.C. § 553(b)(B).
[8] *See, e.g., Gray Panthers Advocacy Comm.* v. *Sullivan,* 936 F.2d 1284, 1290–92 (D.C. Cir. 1991) (regulations that "either restate or paraphrase the detailed requirements" of a self-executing statute do not require notice and comment); *Nat'l Customs Brokers & Forwarders Ass'n* v. *United States,* 59 F.3d 1219, 1223–24 (Fed. Cir. 1995) (notice and comment unnecessary where Congress directed agency to change regulations and public would benefit from amendments).

Finally, a finding of good cause for waiving the requirement of a 30-day delayed effective date is warranted because of the need for immediate guidance to depositors, which implementation and posting of the prescribed notice would provide. Also, a delayed effective date is unnecessary because the only provision of the final rule requiring institutions to take certain actions – *i.e.*, the change in the prescribed notice – would not be enforced until February 28, 2011.

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