January 16, 2025

Mr. James P. Sheesley
Assistant Executive Secretary
Legal ESS
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Notice of Proposed Rulemaking on Recordkeeping for Custodial Accounts—RIN 3064-AG07

Dear Mr. Sheesley,

On behalf of the American Fintech Council (AFC),[1] I am submitting this comment letter in response to the Federal Deposit Insurance Corporation's (FDIC or Agency) Notice of Proposed Rulemaking Recordkeeping for Custodial Accounts (Proposed Rule).[2]

AFC's mission is to promote an innovative, transparent, inclusive, and customer-centric financial system by fostering responsible innovation in financial services and encouraging sound public policy. AFC members are at the forefront of fostering competition in consumer finance and pioneering ways to better serve underserved consumer segments and geographies. Our members are also improving access to financial services and increasing overall competition in the financial services industry by supporting the responsible growth of lending and lowering the cost of financial transactions, allowing them to help meet demand for high-quality, affordable financial products.

AFC pursues its mission by encouraging the development of sound, pragmatic public policy that establish regulatory requirements based on the relevant data on a given issue and devised in a manner that encompasses all relevant perspectives to address widespread issues in the financial services industry. In fact, AFC has been supportive of previous rulemakings that provide clarity to innovative banks and their fintech partners, such as the FDIC's recent sign and advertising rule.[3]

---

[1] American Fintech Council's (AFC) membership spans EWA providers, lenders, banks, payments providers, loan servicers, credit bureaus, and personal financial management companies.
[2] Federal Deposit Insurance Corporation, "Recordkeeping for Custodial Accounts", Fed. Reg. 89, no. 191 (Oct 2, 2024): 80135.
[3] Federal Deposit Insurance Corporation, "FDIC Official Signs and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo", Fed. Reg. 89, no. 12 (Jan. 18, 2024): 3504.

Unfortunately, the Proposed Rule and its underlying analysis lack the hallmarks of pragmatic policymaking that AFC seeks from regulators. Specifically, the Proposed Rule is ill-conceived, ill-timed, and reactionary, resulting in proposed requirements that seek to address the issues identified in an idiosyncratic event whose existence in the broader market are unsubstantiated by available research. As a result, the Proposed Rule is indicative of predetermined policymaking that harms the underpinnings of our regulatory processes.

Also, as will be further evidenced below, we believe that the leading market practices and the flexibilities available therein make the Proposed Rule a poor vehicle to attaining the goals of the Proposed Rule while also meeting strategic agency objectives to encourage financial institutions to "offer affordable checking and savings accounts and loan products that meet the needs of consumers".[4]

For these reasons, as will be further discussed below, we believe that the FDIC should consider withdrawing its Proposed Rule in favor of working with relevant industry stakeholders to encourage the furtherance of existing industry-led approaches and restore confidence in these partnerships. By focusing on refining existing structures and implementing best practices, we can ensure the long-term viability and safety of custodial accounts without stifling innovation.

I. AFC Believes that the Proposed Rule Suffers from Several Substantial Issues and Recommends FDIC Withdraw the Proposed Rule

The Proposed Rule, as written, is fraught with issues and procedural missteps that portray a poorly researched and hastily drafted piece of predetermined policymaking that implies the Agency's desire to pursue a politically expedient, as opposed to a pragmatic, regulatory path. As will be discussed further below, the multiple data limitations underlying rationale of the Proposed Rule and its impacts, the numerous exempted account types, and lack of contextual sophistication related to the Agency's broader regulatory agenda, or the market all point to the Proposed Rule having clear and distinct deficiencies and the need for the Proposed Rule to be withdrawn by the FDIC Board.

a. The Proposed Rule was Ill-Conceived and Suffers from Significant Data Issues

The Proposed Rule includes numerous statements regarding the insufficiency of available data that call into question the underlying rationale of the Proposed Rule and its cost estimates. Specifically, the FDIC noted that it lacked sufficient data to make the assessments or estimates that were core to the provisions in the Proposed Rule eight times. These data limitations related to the FDIC's estimates of

- the number of insured depository institutions that currently have or would potentially have custodial deposit accounts subject to the rule;[5]
- the number of insured depository institutions that would be excluded from the Proposed Rule due to its exemptions;[6]

[4] See, Strategic Objective 3.3. Federal Deposit Insurance Corporation, *FDIC 2022-2026 Strategic Plan: The FDIC and the Banking Industry: Perspective and Outlook*, (Last updated: Feb. 8, 2022.

[5] Ibid, "Recordkeeping for Custodial Accounts", Page 80144.

[6] Id., Page 80145.

- the labor costs for both financial institutions and fintech companies when implementing the Proposed Rule's requirements;[7] and
- the effect of the Proposed Rule on the volume and usage of covered custodial deposit accounts.[8]

By the FDIC's own admission, the Agency "lacks sufficient data on the number of [Insured Depository Institutions] IDIs and non- bank entities affected, the scope of custodial deposit accounts covered, and the current capabilities of affected IDI's data information management systems to accurately estimate the costs of the proposed rule."[9] Simply put, the FDIC lacked the sufficient data to make the assessments and estimates necessary to promulgate the Proposed Rule. Thus, the Proposed Rule should be withdrawn by the Board of the FDIC.

Practically, the lack of data creates material procedural deficiencies with the Proposed Rule under the Paperwork Reduction Act's (PRA) an agency to properly review each information collection request prior to submission to the Office of Management and Budget (OMB).[10] Under the PRA's requirements, the FDIC is required to conduct a review that includes "[a] specific, **objectively supported estimate of burden**, which shall include, in the case of an existing collection of information, an evaluation of the burden that has been imposed by such collection" (emphasis added).[11] Based on the numerous statements by the FDIC in the Proposed Rule regarding the insufficiency of available data to conduct estimates of the burdens associated with implementing the requirements in the Proposed Rule, it seems clear that the Agency did not meet the spirit or letter of the PRA's review requirements. Further, the FDIC did not follow the OMB's best practices for conducting regulatory analyses.[12] Simply put, based on the numerous data limitations at the time of the Proposed Rule's publication, the FDIC did not have sufficient data to justify the need for data collection requirements in the Proposed Rule and opted to pursue a politically expedient effort as opposed to a pragmatic approach, violating of both the PRA and OMB's best practices. Therefore, if the rule is finalized, OMB through the Office of Information and Regulatory Affairs (OIRA) should rescind their approval of the FDIC's request for a new OMB control number associated with the rulemaking on the grounds that collection of information would impose unjustified costs on the American public and that the agency has not adequately justified the need for data collection.

The ill-conceived quality of the Proposed Rule is further exemplified in the fact that the Agency severely limited its scope to a specific subset of custodial accounts with transactional features defined in the Proposed Rule, while exempting a significant number of similarly situated account types without providing adequate rationale regarding the pertinent distinctions between these account types.[13] For example, as explained in the Proposed Rule, the FDIC intends to exclude Interest on Lawyers' Trust Accounts (IOLTA Accounts), in part, because those accounts "are

---

[7] Id.
[8] Id., Page 80146.
[9] Id., Page 80147.
[10] 5 CFR § 1320.8.
[11] 5 CFR § 1320.8(a)(4).
[12] Office of Management and Budget, OMB Circular A-4, "Regulatory Analysis", (Nov. 9, 2023) *available at* https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf.
[13] Ibid, "Recordkeeping for Custodial Accounts", Pages 80141-80142.

subject to independent recordkeeping requirements under State law".[14] Moreover, the Proposed Rule intends to exclude mortgage servicers because they "are subject to recordkeeping requirements by other laws and regulations".[15] Similarly, companies that engage in licensed money transmission must comply with state laws and regulations.[16] Indeed, recordkeeping requirements for licensed money transmission are crucial for regulatory compliance.[17] While these requirements can vary by jurisdiction, they generally involve maintaining detailed records of all transactions, including the amount of money or equivalent value presented by the customer for the money transmission.[18] Additionally, licensed money transmitters must provide periodic call reports to state regulators regarding the transactions.[19]

Also, the FDIC did not perform a sufficient analysis of the regulatory landscape to understand the existing recordkeeping requirements for accounts covered under the Proposed Rule. Nonbank fintech companies' involvement with the accounts covered under the Proposed Rule is the central rationale for the Proposed Rule's promulgation. However, these nonbank entities already have significant regulatory requirements that overlap with the Proposed Rule and the accounts exempted therein. Specifically, the Proposed Rule sets forth a requirement that third parties maintaining the records be subject to an independent, annual audit.[20] However, like mortgage servicers, licensed money transmitters are subject to regular examinations by state regulators.[21] These examinations are extensive and can involve the participation of regulators across multiple jurisdictions.[22] Thus, the requirements in the Proposed Rule are already sufficiently addressed through state money transmission licensing laws. As set forth above, licensed money transmitters are subject to recordkeeping requirements at the state level and are subject to examination by state regulators. At a minimum, these overlapping regulatory requirements should have pushed the FDIC to exempt accounts associated with licensed money transmission. However, due to the ill-conceived nature of the

As noted above, the Agency's rush to issue the Proposed Rule forfeited the FDIC's opportunity to leverage the insights provided through the Bank-Fintech Arrangements RFI. In turn, this created distinct deficiencies and limitations in Proposed Rule's analyses that naturally spread to the regulatory requirements underpinned those analyses. As evidenced by the numerous statements within the Proposed Rule regarding the inconclusiveness of the assessments therein, as well as the minimal citations to broad market data, the FDIC did not have the sufficient information to draw its conclusions regarding the risks posed by industry participants. Therefore, the conclusions drawn from these analyses should be considered materially deficient. As a result, the Proposed Rule should be withdrawn by the Board of the FDIC.

---

[14] Id., 80141. The FDIC used the same logic for excluding employee benefit plans and retirement plans. *Id.* ("The FDIC believes that these accounts are subject to independent recordkeeping requirements under Federal and State laws").
[15] Id.
[16] *See, e.g.*, Conference of State Bank Supervisors, CSBS Money Transmission Modernization Act (MTMA), *available at* https://www.csbs.org/sites/default/files/2023-02/CSBS%20Money%20Transmission%20Modernization%20Act.pdf.
[17] Ibid, Pages 28-29 (detailing what records a licensee must maintain).
[18] Id.
[19] Id., Page 26.
[20] Ibid, "Recordkeeping for Custodial Accounts", 80152.
[21] *See,* Ibid, MTMA, Pages 12, 14.
[22] *See*, Conference of State Bank Supervisors, State Regulators Roll Out One Company, One Exam for Nationwide Payments Firms, *available at* https://www.csbs.org/regulators-announce-one-company-one-exam-for-payments-companies.

b. The Proposed Rule is Ill-Timed and does not Consider the Broader Regulatory Landscape

As noted above, the Proposed Rule is ill-timed. Over the past several years, bank-fintech partnerships have garnered increased attention from prudential regulators. During this time, AFC has sought to improve regulators' understanding of bank-fintech partnerships and address regulatory gaps through sound public policy. To that end, in July 2024, to address gaps in their understandings of bank-fintech partnerships and help devise a pragmatic regulatory agenda, the Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, and the FDIC issued their joint Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses (Interagency Bank-Fintech Arrangements RFI).[23] Within the Interagency Bank-Fintech Arrangements RFI, there were several questions dedicated to understanding the issues presented in the Proposed Rule.[24] Unfortunately, prior to the close of the Interagency Bank-Fintech Arrangements RFI, the FDIC decided to issue the Proposed Rule, which sought to promulgate requirements on the accounts that the Agency had requested additional information to improve their understanding.

Given the overlapping aspects of the Proposed Rule and the Interagency Bank-Fintech Arrangements RFI, as well as the numerous comments regarding data insufficiency and limitations identified in the Proposed Rule's analysis, it seems prudent to wait until the Agency has collected and assessed the information requested by the Interagency Bank-Fintech Arrangements RFI before pursuing a regulatory effort that would impact these entities in the manner that would occur if the Proposed Rule were finalized. To do the opposite reflects a predetermined policymaking mindset at the FDIC and undercuts the efforts of the Interagency Bank Fintech Arrangements RFI. In fact, this sentiment was best reflected by FDIC Vice-Chair Travis Hill, in his statement on the Proposed Rule where he noted that "I believe we should have waited to issue this proposal until first receiving comments from the [Bank-Fintech Arrangements] RFI – both because the comments we receive might help inform our policymaking, and because preempting the end of the comment period sends a message to the public that it is a waste of time to invest time and resources to provide feedback if the FDIC is going to move forward with its own predetermined policy changes anyway."[25] AFC wholeheartedly agrees with Vice-Chair Hill's sentiments and therefore respectfully requests that the Board of the FDIC withdraw the Proposed Rule.

c. The Proposed Rule is Reactionary to an Idiosyncratic Industry Event

The Proposed Rule is by its own admission reactionary in nature and could harm responsible innovation. As noted in the Proposed Rule, the FDIC pursued this rulemaking in direct response to the recent failure of the fintech company Synapse.[26] The Synapse failure represents an idiosyncratic event and does not warrant the encompassing requirements enumerated in the Proposed Rule. In principle, sound, pragmatic policymaking should respond to widespread issues

[23] Board of the Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, "Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses", Fed. Reg. 89, no. 147, (Jul. 31, 2024): 61577.
[24] Ibid, Risk and Risk Management Questions.
[25] Statement by Travis Hill, Vice-Chairman, Federal Deposit Insurance Corporation, Board of Directors, Notice of Proposed Rulemaking on Custodial Deposit Accounts with Transaction Features and Prompt Payment of Deposit Insurance to Depositors (Sep. 17, 2024).
[26] Ibid, "Recordkeeping for Custodial Accounts".

within the market in order to provide clarity and consistency where needed. To develop a rulemaking in response to the actions of one industry participant reflects an unprincipled approach to regulation at the FDIC that, if pursued as a general practice, could result in an overly prescriptive regulatory environment that chills the financial services industry and hamstrings innovation.

It is important to note that, while the issues and deficiencies identified in the Synapse failure and subsequent bankruptcy proceedings are unacceptable for industry participants seeking to offer responsible products and services through bank-fintech partnerships, these issues are not indicative of the bank-fintech model or how these partnerships serve consumers and maintain their deposited funds.

Pursuit of this type of reactionary regulatory framework is contrary to the underpinnings of the U.S. financial regulatory framework, which has typically been focused on leveraging the necessary data and depth of understanding of a given issue to make prudent conclusions and regulatory requirements. U.S. financial regulators have a long history of carefully crafting thoughtful regulations that consider the complexities of the market and the impacts they will have on it.[27] However, unfortunately, the Proposed Rule stands in stark contrast to this history. As evidenced by the numerous statements regarding insufficient data and debatable estimates made by the Agency within the Proposed Rule, the FDIC lacks the requisite data to effectively pursue a rulemaking on custodial accounts in a manner that aligns with the underpinnings of the U.S. financial regulatory history.[28]

Further, AFC believes that the Proposed Rule's reactionary quality may ultimately harm consumers, particularly those in historically underserved communities. Academic, industry, and government research, bank-fintech partnerships have been empirically shown to improve financial inclusion through improved services to historically underserved communities.[29] However, the development of an overly prescriptive regulatory framework for emerging business models, such as the bank-fintech partnership model could limit the very qualities that made the model successful in reaching consumers by making it prohibitively expensive to serve them. In addition, the prescriptive nature of the requirements in the Proposed Rule combined with the lengthy bureaucratic process required to adapt them to the ever-changing market could further hinder additional innovation within responsible bank-fintech in the custodial deposits space.

---

[27] Tabor, Nicholas K., Katherine E. Di Lucido, and Jeffery Y. Zhang, *A Brief History of the U.S. Regulatory Perimeter*, Finance and Economics Discussion Series 2021-051. Washington: Board of Governors of the Federal Reserve System, (2021).

[28] Ibid, "Recordkeeping for Custodial Accounts".

[29] Chernoff, Alan and Julapa Jagtiani, *The Role of Bank-Fintech Partnerships in Creating a More Inclusive Banking System*, WP 23-21, Federal Reserve Bank of Philadelphia, (Oct. 2023) *available at* https://www.philadelphiafed.org/the-economy/banking-and-financial-markets/the-role-of-bank-fintech-partnerships-in-creating-a-more-inclusive-banking-system; Dolson, Erik and Julapa Jagtiani, *Which Lenders Are More Likely to Reach Out to Underserved Consumers: Banks versus Fintechs versus Other Nonbanks?*, WP 21-17, Federal Reserve Bank of Philadelphia, (Apr. 2021), *available at* https://www.philadelphiafed.org/consumer-finance/which-lenders-are-more-likely-to-reach-out-to-underserved-consumers; Lung, Harrison, *Why financial inclusion is the key to a thriving digital economy*, World Economic Forum, (Jul. 29, 2024), *available at* https://www.weforum.org/agenda/2024/07/why-financial-inclusion-is-the-key-to-a-thriving-digital-economy/; and Salman, Sabry, *The role of banks in FinTech partnerships*, Barclays Investment Bank, (Sep. 18, 2023) *available at* https://www.ib.barclays/our-insights/3-point-perspective/the-role-of-banks-in-fintech-partnerships.html.

II. AFC Believes that FDIC Should Engage with Industry to Attain the Principles of the Proposed Rule while Encouraging Innovation

While AFC agrees with the principles of the Proposed Rule—namely the importance of ensuring that recordkeeping of customer funds held in custodial accounts is transparent, accurate, and readily available, as well as that that customer funds are promptly and easily made available we believe that the prescriptive nature of its requirements; burdensome, and at times, duplicative reporting requirements; and bureaucratic process required for significant adaptations of the Proposed Rule's requirements to changing market practices make a legislative rulemaking a poor vehicle for attaining the principles underpinning the Proposed Rule, as well as the long-term goals of the agency to "offer affordable checking and savings accounts and loan products that meet the needs of consumers".[30] Instead, we believe that industry is better suited to ensure the aforementioned principles are met while encouraging the innovation needed for the industry to attain the checking and savings account goals put forward by the FDIC.

Again, AFC agrees with the principles of the Proposed Rule. Namely, the importance of ensuring that recordkeeping of customer funds held in custodial accounts is transparent, accurate, and readily available, as well as that that customer funds are promptly and easily made available. To that end, AFC members and other responsible industry participants have already established clear deposit account ledger processes for the funds they have custody of as part of a bank-fintech partnership that allows prompt payment of deposits. As we noted in our recent response to the Interagency Bank-Fintech Arrangements RFI, there are a number of leading practices that AFC advocates for in responsible bank-fintech partnerships.[31] Among the leading practices are those focused on ensuring prudent data management and transfer processes, which ensure efficient and transparent conveyance of data between banks and their fintech partners. Thus, while we appreciate the FDIC's initiative, and while it may be well intentioned, the Proposed Rule is not necessary.

Also, as noted above, given the existing industry efforts and state regulatory requirements, the requirements enumerated in the Proposed Rule appear unnecessarily duplicative and burdensome. If finalized, the Proposed Rule would establish prescriptive requirements to financial institutions providing custodial accounts with transactional features, possibly making these accounts prohibitively expensive to offer. In turn, this could harm the ability of responsible bank-fintech partnerships to effectively serve consumers, particularly those who have been historically underserved. However, by encouraging existing industry-led efforts, the FDIC can avoid such a chilling effect.

In addition, from a procedural standpoint, AFC believes that industry-led efforts have the flexibility and agility to adapt to market changes in a manner that is not afforded to the requirements in the Proposed Rule due to the lengthy, bureaucratic, and at times political processes associated with legislative rulemakings. Thus, we believe that industry-led efforts are

---

[30] Ibid, Federal Deposit Insurance Corporation Strategic Plan 2022-2026.
[31] American Fintech Council, "Advocacy Letter on Interagency Bank-Fintech Arrangements RFI", (Oct. 30, 2024), *available at* https://www.fintechcouncil.org/advocacy/federal-advocacy-letter-on-interagency-bank-fintech-arrangements-rfi.
.

better positioned to manage the leading practices in custodial account recordkeeping to ensure that consumers remain protected and effectively served.

*   *   *

We respect the efforts that the FDIC put into the Proposed Rule. However, as discussed, we believe that the Proposed Rule the Proposed Rule and its underlying analysis lack the hallmarks of pragmatic policymaking that AFC seeks from regulators. Also, while we agree with the principles of the Proposed Rule, we believe that the market is better suited to solve the issues presented by the Proposed Rule. As noted above, AFC strongly advocates for the withdrawal of the Proposed Rule by the Board of the FDIC. To continue to pursue this rulemaking at this time would be imprudent. We thank you for your consideration of our comments.

Sincerely,

Ian P. Moloney
SVP, Head of Policy and Regulatory Affairs
American Fintech Council