FINANCIAL &
INTERNATIONAL
BUSINESS
ASSOCIATION

January 16, 2025

VIA E-MAIL

Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
E-mail: Comments@fdic.gov

Re: RIN 3064-AG07 - Comment Letter of the Financial and International Business Association, Inc.

Dear Sir or Madam:

On September 17, 2024, the Federal Deposit Insurance Corporation ("**FDIC**") approved for public comment a notice of proposed rulemaking to promulgate certain recordkeeping and reporting requirements for custodial deposit accounts with transactional features, and support the FDIC's ability to promptly make deposit insurance determinations in cases where an insured bank fails (the "**Proposed Rule**").[1] The Proposed Rule was published in the *Federal Register* on October 2, 2024.[2] The Financial and International Business Association, Inc. ("**FIBA**"), a not-for-profit Florida corporation, appreciates the opportunity to provide comments to the FDIC in response to the Proposed Rule. Founded in 1979, FIBA is a trade association and international center for financial excellence whose membership includes the largest financial institutions from the United States, Latin America, Europe and the Caribbean. If adopted as a final rule, the Proposed Rule would directly impact U.S. depository institution members of FIBA.

Summary of the Proposed Rule

The Proposed Rule applies to FDIC-insured depository institutions ("**IDIs**") and targets custodial accounts with transactional features, that is, deposit accounts that: (1) are established for the benefit of beneficial owners; (2) hold pooled deposits of multiple beneficial owners; and (3) are used in a manner that allows beneficial owners to authorize or direct a transfer of funds from the account to another party ("**Covered Custodial Accounts**"). The stated intent of the Proposed Rule is to aid the FDIC in making prompt deposit insurance coverage determinations and, if

[1] FDIC Press Release, FDIC Proposed Deposit Insurance Recordkeeping Rule for Banks' Third-Party Accounts (Sep. 17, 2024), https://www.fdic.gov/news/press-releases/2024/fdic-proposes-deposit-insurance-recordkeeping-rule-banks-third-party.

[2] FDIC, Recordkeeping for Custodial Accounts, 89 Fed. Reg. 80,135 (proposed Oct. 2, 2024) (to be codified at 12 C.F.R. pt. 375).

necessary, pay deposit insurance claims as soon as possible in the event of failure of an IDI holding Covered Custodial Accounts. The Proposed Rule would require IDIs to maintain beneficial ownership records of Covered Custodial Accounts in a specified data format and layout. IDIs would be required to have documented internal controls in place to maintain accurate deposit account balances and reconcile against the beneficial ownership records no less frequently than at the close of business daily, either directly or through third-party arrangements (with certain additional requirements).

IDIs that choose to maintain Covered Custodial Account records through a third-party arrangement would be subject to certain additional requirements such as:

(1) a requirement to have direct, continuous, and unrestricted access to the records of beneficial owners, including in the event of business interruption or insolvency or bankruptcy of the third party;

(2) a requirement to have continuity plans in place, including backup recordkeeping for the required beneficial ownership records; and

(3) a requirement that the IDI impose on the third party contractual requirements to conduct independent validations on a periodic basis, to verify the third party is maintaining accurate and complete records and that reconciliations are performed in accordance with the Proposed Rule.

The Proposed Rule requires IDIs to fulfill several other obligations, including completing an annual compliance certification and submitting an annual report to the FDIC. IDIs must also ensure that their records meet specific electronic file data format and structure requirements.

Comments to the Proposed Rule

By way of this letter, FIBA provides the following comments to the Proposed Rule, which FIBA believes should be addressed in the final rule that the FDIC will adopt.

1. **The FDIC should clarify the meaning of "direct, continuous, and unrestricted access" to the records of beneficial owners.**

Under the Proposed Rule, IDIs that opt to maintain required records through a third-party contractual relationship would be required to have "direct, continuous, and unrestricted access" to the records of beneficial owners. This includes access during events such as business interruptions, insolvency, or bankruptcy of the third party.

It is crucial for the FDIC to clarify in the final rule the meaning of "direct," "continuous," and "unrestricted" because these terms are susceptible to and permit multiple reasonable interpretations. For example, many IDIs can access data and records maintained by a third-party via Application Program Interfaces ("**APIs**"). "Direct" access could reasonably be interpreted as having access via an API. As currently written, the Proposed Rule can also reasonably be interpreted as requiring IDIs to have real-time, uninterrupted access to records maintained by third-

party partners, with the ability to access data at any time without interruption or limitations. In practice, many IDIs and their third-party partners lack the technology to support real-time, continuous access to records, even within their own environments. If left unchanged, this requirement could subject IDIs to significant non-compliance risks due to the limitations of existing systems or potential technological or operational disruptions. Furthermore, many IDIs would incur additional expenses if they were required to modify or upgrade their systems to enable real-time, uninterrupted access to records maintained by third-party partners.

The FDIC should align this requirement in the final rule with existing practical and technological capabilities available to IDIs and their partners, especially when continuous access is not feasible, such as during system maintenance or disaster recovery. The FDIC should consider establishing a clear requirement for daily batch reporting or data ingestion instead of continuous real-time access. This approach would better align with industry capabilities, reduce the risk of non-compliance due to technical or operational challenges and avoid imposing on IDIs the substantial costs of updating or changing systems.

2. **The FDIC should clarify the requirement for reconciliation "no less frequently than as of the close of business daily[.]"**

The Proposed Rule would require IDIs to reconcile beneficial ownership records no less frequently than daily by the close of business "with the understanding that reconciling variances due to unposted transactions and timing of transactions occurs and should be addressed based on standard banking practices."[3] The FDIC should clarify whether this reconciliation process must be completed by the end of the same business day or if such process may be finalized by close of business on the following business day. Standard banking practices for many IDIs mean conducting end-of-day processes that result in reconciliation occurring after close of business, often extending into the next business day. As such, completing reconciliation processes the next morning is a common practice and aligns with the operational rhythms of the industry.

The FDIC should also consider that a requirement of same-day reconciliation would: (a) result in increased risk of reconciliation errors or omissions because it conflicts with current standard practices for processing transactions and updating data used by many IDIs; and (b) impose significant operational burdens on many IDIs that would be required to deviate from their current standard practice and to update systems for same-day reconciliation. The final rule should clarify that "close of business" permits completing reconciliation by close of business on the next business day to align with established banking standards and industry norms.

3. **The certification requirement is not necessary for the functioning of the rule, and it is it duplicative of other reporting requirements.**

The Proposed Rule provides that an IDI holding Covered Custodial Accounts must file with the FDIC and its primary federal regulator, an annual certification of compliance, signed by an executive officer, attesting that the IDI: (a) has implemented the proposed recordkeeping

[3] 89 Fed. Reg. 80,135, 80142 (proposed Oct. 2, 2024).

requirements for Covered Custodial Accounts, and tested its implementation within the past year; and (b) is compliant with all aspects of the Proposed Rule at the time of certification.

The Proposed Rule would also require the IDI to generate and file with the FDIC and its primary federal regulator an annual report that contains: (a) a description of any material changes to information technology systems since its last report that are relevant to the IDI's compliance with the requirements of the Proposed Rule; (b) a list of account holders with Covered Custodial Accounts, the total balance of those deposits and the total number of beneficial owners; (c) the results of the IDI's periodic testing of its recordkeeping requirements; and (d) the results of the required independent validation of any records maintained by third-parties.

The certification requirement in the Proposed Rule overlaps with many IDIs' existing reporting obligations, particularly those outlined in 12 C.F.R. Part 370 of the FDIC's Rules and Regulations ("**Part 370**"). Specifically, 12 C.F.R. § 370.10 mandates that IDIs covered by that rule annually file a certification with the FDIC, which closely mirrors the requirement in the Proposed Rule. How the Proposed Rule's requirements will align with the existing Part 370 certification obligations is unclear. Our members are concerned that without such clarification the Proposed Rule could impose additional administrative burdens by subjecting IDIs to two sets of similar yet distinct requirements, potentially leading to administrative errors, redundant filings, and unnecessary compliance risks.

Additionally, certification by an executive officer is redundant and unnecessary for the Proposed Rule's effectiveness given that IDIs would already be required to submit annual reports to the FDIC detailing their compliance with the Proposed Rule and any relevant system changes.

The FDIC should consider removing the executive officer certification requirement and streamline the annual reporting process, thereby consolidating all necessary information into a single report. This approach would reduce administrative complexity while maintaining the Proposed Rule's objectives.

4. **The FDIC should consider enhancing Part 370 to strengthen IDIs' recordkeeping for Covered Custodial Accounts in lieu of adopting a final rule.**

Part 370 of the FDIC's Rules and Regulations requires "covered institutions" to implement the necessary information technology systems and recordkeeping capabilities to determine the deposit insurance coverage for each account in the case of the IDI's failure. Part 370 defines a "covered institution" to include an insured depository institution which, based on its Reports of Condition and Income, has 2 million or more deposit accounts.[4] "Account holder" under Part 370 means any person or entity with a deposit account at a covered institution, with whom the institution has a "direct legal and contractual relationship" concerning the deposit.[5]

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[4] 12 C.F.R. § 370.2(c).

[5] 12 C.F.R. § 370.2(a).

The definition of account holder under Part 370 does not extend to beneficial owners of Covered Custodial Accounts if the IDI does not have a direct and legal contractual relationship with those beneficial owners. Expanding the existing rule Part 370 to recognize as "account holders" the customers of a third-party partner of an IDI that are beneficial owners of custodial accounts would afford the protections provided under Part 370 to those individuals and entities.

Additionally, broadening the definition of "account holder" to include beneficial owners of Covered Custodial Accounts would extend coverage to other IDIs not currently subject to Part 370. Non-bank companies often deposit their customers' funds together into a single custodial account at a bank that may hold funds for the benefit of many thousands of consumers and businesses. If those "end user accounts" are tracked through subledgers and tallied as deposit accounts for purposes of meeting the 2 million deposit account threshold, additional IDIs would be subject to Part 370's recordkeeping requirements.

Expanding the scope of Part 370 would likely accomplish the same general objectives of the Proposed Rule without imposing additional administrative burdens and compliance risks of adhering to two separate but similar regulatory recordkeeping frameworks.

5. **The FDIC should coordinate with other policymakers to utilize existing regulatory tools and authorities, including the Bank Service Company Act, to enhance oversight of financial technology company recordkeeping.**

The Bank Service Company Act ("**BSCA**")[6] subjects third-party service providers that perform services for banks to regulation and examination by the federal banking agencies to the same extent as if such services were being performed by the depository institution itself.[7] The BSCA authorizes agencies such as the FDIC to engage in rulemaking to ensure effective oversight of these companies.[8] Including financial technology companies that partner with IDIs to offer Covered Custodial Accounts within the scope of the BSCA's examination authority would allow regulators to oversee financial technology company operations to ensure they meet the same standards of safety and soundness, and consumer protection as traditional banking services.

The FDIC should work with other federal banking agencies and policymakers to examine options under its existing regulatory authorities to impose the recordkeeping and other requirements contemplated in the Proposed Rule directly on financial technology companies that partner with depository institutions to offer Covered Custodial Accounts. As written, the Proposed Rule layers unnecessary expense, uncertainties, and complexities on IDIs without mitigating the specific risks posed by financial technology company partnership arrangements.

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[6] 12 U.S.C. §§ 1861-1867.

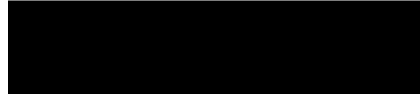
[7] 12 U.S.C. § 1867(b) and (c).

[8] 12 U.S.C. § 1867 (c) and (d).

FIBA is confident that the proposed changes discussed above would ensure that a final rule, if one is required, is in harmony with existing banking standards, strengthen the FDIC's ability to make deposit insurance determinations, and ensure entitlement to the protections afforded by Federal deposit insurance to the intended account holders.

As always, we welcome the opportunity to further discuss these points at your convenience.

Very truly yours,



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cc: James P. Sheesley, Assistant Executive Secretary
Federal Deposit Insurance Corporation