*Via Electronic Submission*

January 16, 2025

Federal Deposit Insurance Corporation
Attn: James P. Sheesley
Assistant Executive Secretary
RIN 3064-AG07
550 17th Street, N.W.
Washington, D.C. 20429

**FTA Comment Letter re: the FDIC's Request for Comment on its Notice of Proposed Rulemaking for Custodial Deposit Accounts (Docket No. RIN 3064-AG07)**

The Financial Technology Association ("FTA") appreciates the opportunity to respond to the Federal Deposit Insurance Corporation's ("FDIC") Notice of Proposed Rulemaking (the "Proposal") regarding custodial deposit accounts.[1] FTA is a trade association representing industry leaders shaping the future of finance. We champion the power of technology-centered financial services and advocate for the modernization of financial regulation to support inclusion and responsible innovation.

We appreciate and support the FDIC's objectives to ensure that custodial deposit accounts are subject to robust financial controls and recordkeeping practices and to mitigate potential risks to depositors from the financial distress of third-parties such as fintech companies. We also appreciate and support the FDIC promulgating a rule that formalizes requirements for financial controls and recordkeeping only when a custodial deposit account is deployed to provide for pass-through deposit insurance to a number of depositors with ownership interests in the account. An account used for this purpose directly implicates the deposit insurance coverage complications analyzed in the Proposal, whereas other custodial deposit accounts that are not used for this purpose do not present the same complications to the FDIC in making deposit insurance determinations.

If the FDIC moves forward with finalizing the Proposal, we urge it to consider in a data-driven manner:

- The diversity of arrangements that make use of custodial deposit accounts and the need to circumscribe the Proposal so that it only applies to such accounts if they are used to provide for pass-through deposit insurance to multiple depositors;

- The complexity of information systems and technologies for securely sharing information among insured depository institutions ("IDIs"), fintech companies, and service providers, and the importance of developing compliance requirements that are clear, effective, and

[1] *See* Federal Deposit Insurance Corporation, Proposed Rule, Recordkeeping for Custodial Accounts, 89 Fed. Reg. 80135 (Oct. 2, 2024).

operationally feasible and giving IDIs adequate time to implement controls to comply with the requirements; and

- The need for FDIC regulations to support, and not unduly limit, innovation and efficiency in financial services.

Taking these principles into account would help to ensure that any final rule issued by the FDIC appropriately balances the integral role that custodial deposit accounts play in many traditional and emerging banking and payments services with the need to protect depositors and ensure accurate deposit insurance coverage.

To the extent the FDIC decides to pursue a regulation that applies to all custodial deposit accounts, including those that are not established to provide for pass-through deposit insurance coverage, we believe the FDIC would be well-served in collecting additional data and other information from the public regarding the uses of custodial deposit accounts and the challenges in imposing broad recordkeeping requirements on all of the IDIs and other parties involved in administering such accounts. If the FDIC decides to promulgate a regulation with this breadth, the agency also should revisit its analysis of the Federal Deposit Insurance Act provisions that provide the legal basis for the regulation since, among other reasons, computation of deposit insurance coverage is generally straightforward with custodial deposit accounts that do not provide for pass-through deposit insurance. This analysis should include an evaluation of the FDIC's statutory authority for the regulation as well as a detailed analysis of the costs and benefits of the regulation, both of which are not addressed in the Proposal.[2]

This letter provides specific comments on aspects of the Proposal that should be modified or clarified in order to achieve the FDIC's stated objective of augmenting the accuracy and integrity of deposit account records.

## 1. The Proposal Should be Revised so that it Applies Only to Custodial Deposit Accounts Structured to be Eligible for FDIC Pass-through Insurance

The Proposal makes clear the importance of recordkeeping to the FDIC as it makes deposit insurance determinations in the event of an IDI's failure:

[2] The Costs and Benefits sections of the Proposal's preamble admits that the FDIC lacks sufficient data on the number of affected IDIs and non-bank entities, the scope of accounts covered, and the capabilities of affected IDIs' data information systems to accurately estimate the costs of the Proposal. *See* Proposal at 80145. This lack of specificity and data from the Proposal's analysis of its costs and benefits is alarming and inconsistent with the Office of Management and Budget's guidance to federal agencies for regulatory analyses. *See* OMB Circular No. A-4 (Nov. 9, 2023). There is no evidence that the FDIC used available data or scientific tools in estimating the Proposal's costs. The FDIC's cost-benefit analysis is rendered even more deficient because of the lack of clarity regarding the Proposal's scope and substantive requirements, as detailed in section I of this letter. This lack of clarity exacerbates the procedural deficiencies in using the hypothetical cost amounts in the Proposal because it renders them even less reliable and not based on the actual costs of compliance with the Proposal's substantive requirements.

> "Custodial deposit account records are critical when the FDIC makes deposit insurance determinations following the failure of an IDI that has custodial deposit account records. The FDIC generally relies upon a failed IDI's records to determine deposit insurance coverage, but in certain circumstances, the FDIC's regulations also provide for consideration of records of parties other than the failed IDI if such records are maintained in good faith and in the regular course of business. The events described above highlight substantial risks with respect to the FDIC fulfilling its statutory mandate to maintain public confidence in the banking system by ensuring the prompt and accurate payment of deposit insurance in the case of an IDI's failure. Specifically, if an IDI fails, and it has an arrangement with a third party where custodial deposit account recordkeeping is inadequate or unreliable, such a situation would impede the FDIC's ability to promptly make deposit insurance determinations for an IDI holding custodial deposit accounts, and if necessary, pay claims to depositors. The FDIC's mission is rooted in maintaining public confidence in the banking system, which heavily relies on the prompt and accurate payment of insured deposits. Any inaccuracies or discrepancies in the relevant records can delay a deposit insurance determination, leaving depositors in a state of uncertainty during a critical time."[3]

The need to accurately track ownership in an IDI's deposits is core to the FDIC's mission to maintain stability and public confidence in the U.S. financial system by insuring deposits, examining and supervising financial institutions for safety and soundness and consumer protection, making large and complex financial institutions resolvable, and managing receiverships.[4] Without the ability to make accurate and timely determinations about deposit insurance, the FDIC cannot provide for deposit insurance as required in the Federal Deposit Insurance Act, ascertain whether large and complex institutions are resolvable by the FDIC in the event of insolvency, or act effectively as receiver.

Accordingly, one of the key drivers of the Proposal is the FDIC's need to make accurate and timely deposit insurance determinations.[5] The Proposal implicitly assumes that custodial deposit

[3] *See* Proposal at 80136.

[4] *See* FDIC Mission, Vision, and Values, available at https://www.fdic.gov/strategic-plans/fdic-mission-vision-and-values.

[5] The FDIC also substantiates the need for the Proposal by referring to recent events that have "exposed potential risks to current beneficial owners, including consumers, of deposits at IDIs, even in the absence of the failure of an IDI." Proposal at 80136. FDIC Director Jonathan McKernan, in a separate statement issued at the time the Proposal was approved by the FDIC Board of Directors, questioned whether these needs were appropriate bases for the Proposal since they are not directly tied to the statutes cited as authority for the Proposal. See Statement by Jonathan McKernan, Director, FDIC Board of Directors, on Proposed

accounts within the Proposal's scope present challenges in making these determinations because pass-through deposit insurance serves to complicate the FDIC's work in identifying funds owned by depositors who may be entitled to insurance on this basis.[6]

However, not all custodial deposit accounts present these challenges because not all accounts established by an account holder for the benefit of multiple beneficial owners are structured to provide pass-through deposit insurance. Accounts may be established instead by an account holder for the benefit of beneficial owners simply to provide clarity that deposits in the account should not form part of the bankruptcy estate of the account holder. Indeed, this is a well-established practice by several types of financial institutions, including broker-dealers, money transmitters, and certain payment and settlement networks.

A broker-dealer is required by SEC Rule 15c3-3 to establish an account to hold customer cash separate and apart from the broker-dealer's cash.[7] SEC Rule 15c3-3 is intended to, among other things, prohibit use of a broker-dealer's customer funds except for designated purposes and to protect customer assets through clear demarcation of customer versus broker-dealer property. The rule also is intended to facilitate the liquidation of an insolvent broker-dealer.[8] Funds held in such an account typically are not held in the name of a specific customer and instead are pooled across all customers. In the event of a broker-dealer's insolvency, which is governed by a separate federal law and regulatory framework,[9] pooled cash is distributed ratably to all customers to the extent of their net equity claims against the broker-dealer. Accordingly, these accounts are not structured to be eligible for FDIC pass-through insurance.[10] Nevertheless, these accounts would be subject to the Proposal's requirements except for the fact that they may be covered by an exemption in the Proposal for accounts established by or on behalf of securities broker-dealers.

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Recordkeeping for Custodial Accounts (Sept. 17, 2024), *available at* https://www.fdic.gov/news/speeches/2024/statement-jonathan-mckernan-director-fdic-board-directors-proposed-recordkeeping.

[6] *See* Proposal at 80137 (describing the FDIC's statutory obligations to make deposit insurance available on a pass-through basis as well as to pay deposit insurance "as soon as possible," while acknowledging that relationships between IDIs and third-parties in custodial deposit account arrangements add to the FDIC's operational challenges when an IDI fails, "in particular when the FDIC is required to make deposit insurance determinations.").

[7] 17 C.F.R. § 240.15c3-3.

[8] *See, e.g.*, Securities and Exchange Commission, Broker-Dealers: Maintenance of Certain Basic Reserves, 37 Fed. Reg. 25224 (Nov. 1972).

[9] *See* Securities Investor Protection Act, Pub. L. No. 91-598 (Dec. 30, 1970).

[10] *See also* FDIC, 12 C.F.R. Part 370 Recordkeeping for Timely Deposit Insurance Determination, Frequently Asked Questions, Q: Pass-through Coverage for 15c3-3 accounts (last updated Jul. 18, 2023) ("Where funds are not owned by particular clients of the broker-dealer, pass-through insurance would not apply. Our understanding is that the funds in the special reserve bank accounts maintained under SEC Rule 15c3-3 generally are not attributable to particular clients."), *available at* https://www.fdic.gov/banker-resource-center/12-cfr-part-370-recordkeeping-timely-deposit-insurance-determination.

It also is a common and best practice for money transmitters to hold such customer funds in accounts that are not structured to be eligible for FDIC pass-through insurance, but that are titled to reflect their customers' beneficial ownership of such funds, thus potentially bringing these accounts within the scope of the Proposal. However, customer funds held in this manner also often count towards the reserves or permissible investments that money transmitters are required by law to hold. For example, the California Financial Code provides that funds in accounts held for the benefit of a money transmitter's customer may count towards the money transmitter's required reserves and permissible investments, even though there is a general requirement that the money transmitter "own" such reserves.[11] In the event of a money transmitter's insolvency, all such required reserves, which may include both deposits and other specified high quality, liquid assets, would be deemed under state law to be held in trust for the benefit of its customers and not necessarily owned by individual customers.[12] Therefore, the accounts are not created to provide for pass-through deposit insurance, are titled in such a way as to provide clarity that deposits in the account should not form part of the bankruptcy estate of the account holder, yet these accounts appear to be within the scope of the Proposal since, unlike accounts established by or on behalf of broker-dealers, there is no exemption that would cover these accounts.

While broker-dealers and money transmitters can and, in some cases, do establish custodial deposit accounts wherein funds are owned by particular customers, their customer asset protection regimes generally operate by treating customer assets as fungible bulk cash held on behalf of all customers. These regimes mandate the use of an account to segregate customer funds from proprietary funds in order to protect the beneficial owners from the insolvency of the account holder. They do not exist as a means for pass-through deposit insurance.

In addition, certain payment and settlement networks make use of omnibus accounts for various purposes. Such accounts may be used to hold funds beneficially owned by consumers but pledged as collateral in support of payment and settlement activities or as reserves for merchant acquiring activities. These accounts, which are mandated by network rules that apply to the network's bank members, potentially may be subject to the Proposal even though they are not created for pass-through deposit insurance purposes.

For these reasons, the definition of "custodial deposit account with transactional features" should be limited to those custodial deposit accounts that are structured specifically to provide for pass-through FDIC deposit insurance. Alternatively, the FDIC could add one or more exemptions to the regulation to cover deposit accounts that are not established for pass-through deposit insurance purposes, to harmonize the principles for determining the accounts that should be exempt from the substantive requirements as including accounts for broker-dealers, money transmitters, and payment networks.

If the final rule's scope is not limited in this way, it will be critical for the FDIC to revisit its legal analysis of the statutory framework that forms the foundation for the rule because the Proposal would impose sweeping and substantial compliance obligations on many different types of deposit

[11] *See* Cal. Fin. Code § 2084(a)(1)(B).

[12] *See, e.g.*, Cal. Fin. Code § 2081(c).

accounts, most of which do not present any challenges for the FDIC in making timely deposit insurance coverage determinations. FDIC Director Jonathan McKernan, in a separate statement issued alongside the Proposal, questioned whether the Proposal exceeds the FDIC's statutory authorities, and the FDIC staff should disclose its statutory analysis to respond to the Director's question and to demonstrate that the Proposal is firmly rooted in the federal statutes that authorize the FDIC to promulgate rules.[13]

### 2. The Proposal's Definitions Should be Sharpened to Make Clear the Accounts that Would be Covered by the Substantive Requirements

The Proposal's requirements apply to a "custodial deposit account with transactional features" which means a "deposit account: (1) established for the benefit of beneficial owners; (2) in which the deposits of multiple beneficial owners are commingled; and (3) through which beneficial owner(s) may authorize or direct a transfer through the account holder from the custodial deposit account to a party other than the account holder or beneficial owner."[14] The term "beneficial owner" means "a person or entity that owns, under applicable law, an interest in the deposit held in a custodial deposit account."[15] The term "account holder" means the person or entity who opens or establishes a custodial deposit account with transactional features with an insured depository institution.[16] The term "deposit" has the same meaning as the term "deposit" under section 3(l) of the Federal Deposit Insurance Act (12 U.S.C. § 1813(l)).[17]

These definitions, read together, raise several questions about the intended scope of the Proposal.

First, the Proposal applies to a deposit account that is "established for the benefit of" a person that owns an interest in the account, but it is unclear from the Proposal when an account would be established for the benefit of such a person, except for an FBO account, for which it can be reasonably inferred. It also is unclear when a person would own an interest in the deposit, except for a person who owns funds held in the account, and the Proposal does not specify the applicable law to analyze to inform this determination. The Proposal should be revised to clearly specify the

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[13] *See* Statement of FDIC Director Jonathan McKernan on Proposed Recordkeeping for Custodial Accounts, Question #1 (Sept. 17, 2024) ("The proposal's substantive requirements are grounded in (i) the FDIC's responsibility to pay deposit insurance claims "as soon as possible" in the event of the failure of an IDI and (ii) the statutory prohibition on IDI's entering into a written or oral contract with any person to provide goods, products, or services to or for the benefit of the IDI if the performance of that contract would adversely affect the safety or soundness of the IDI. Are there aspects of the proposal that go beyond these statutory authorities? In finalizing the proposal, to what extent can or should the FDIC look to achieving policy objectives—such as depositor- or consumer-protection benefits—beyond those related directly to those statutory authorities, such as seeking to reduce risk to deposit owners in the absence of the failure of an IDI or if the account holder is not providing goods, products, or services to or for the benefit of the IDI?").

[14] Proposed 12 C.F.R. § 375.2.

[15] Proposed 12 C.F.R. § 375.2.

[16] Proposed 12 C.F.R. § 375.2.

[17] Proposed 12 C.F.R. § 375.2.

meanings of these terms – "established for the benefit of" and "own an interest in the deposit" – because they are essential for identifying accounts that would be subject to the Proposal's substantive requirements.

Second, deposits of beneficial owners may be held in the same custodial account, albeit in sub-accounts, and their deposits are not necessarily "commingled" as contemplated in the definition of the term "custodial deposit account with transactional features." The FDIC should revise the Proposal to explain when deposit funds are commingled given the many different types of omnibus accounts and account structures.

Third, the Proposal is ambiguous in defining when "from the custodial deposit account" condition is satisfied when evaluating the "transactional features" prong, which considers in-scope an account "through which beneficial owner(s) may authorize or direct a transfer through the account holder from the custodial deposit account to a party other than the account holder or beneficial owner."[18] Customers of broker-dealers and money transmitters generally have no capacity to authorize or direct a transfer specifically from custodial accounts as contemplated in the transactional features prong. Instead, they may authorize or direct transfers from accounts provided to them by broker-dealers and money transmitters – these accounts are not bank accounts. Broker-dealers and money transmitters may then, in accordance with customer instructions, direct an IDI to transfer funds to a third party.[19] The scope of the Proposal should be clarified so that it applies only to deposit arrangements whereby the beneficial owners are entitled to direct or authorize transfers from the custodial deposit account to the IDI, directly or through the account holder.

### 3. The Proposal's Third-Party Reliance Provisions Should be Re-Drafted to Rationalize and Clarify When an IDI May Rely on a Third-Party to Maintain Records in Compliance with the Proposal's Substantive Requirements

Section 375.3 of the Proposal requires records of beneficial ownership for each custodial deposit account that is in scope of the Proposal to be maintained in the format and layout in Appendix A

[18] Proposed 12 C.F.R. § 375.2. This prong is similar to but not the same as the "transactional features" definition in the FDIC's Part 370 recordkeeping regime. *See* 12 C.F.R. § 370.2(j).

[19] This scenario is not covered by footnote 24 of the Proposal ("The proposed rule's definition is not limited to situations where the transfer takes place directly from the custodial account. If, for example, funds are routinely accomplished by transferring funds from the custodial account to another account, and the transfers to third parties are made from the second account, the FDIC believes the first account would fall within the proposed rule's scope."). With these brokerage and money transmitter accounts, the beneficial owner has no authority to direct or authorize transfers from the custodial deposit account held by the IDI. Under these arrangements, IDIs generally operate as service providers to the nonbank financial institution that, in turn, operate as service providers to end-customers; the IDI's depository services are not offered "through" the non-bank financial institution to end-customers. These arrangements are distinct from those in which the nonbank financial institution does not maintain necessary regulatory licenses or authorizations to provide financial services to end-customers and instead acts as a third-party service provider to the IDI, distributing the IDI's services to end-customers.

of the Proposal by either the IDI or through a third-party. In order for the records to be maintained by the IDI in compliance with the Proposal, the IDI must adopt internal controls appropriate to its size and the nature, scope, and risk of its activities that include "(1) *maintaining accurate balances of custodial deposit accounts with transactional features at the beneficial ownership level; and (2) conducting reconciliations against the beneficial ownership records no less frequently than at the close of business daily*."[20]

If the requirement in section 375.3 is satisfied by records maintained through a third-party, the IDI must "(1) have direct, continuous, and unrestricted access to the records in the data format specified in appendix A to this part, maintained by the third party, including in the event of business interruption, insolvency, or bankruptcy of the third party; (2) have continuity plans, including backup recordkeeping, and technical capabilities to ensure compliance with this section; and (3) *implement appropriate internal controls to: (i) accurately determine the respective beneficial ownership interests associated with custodial deposit accounts with transactional features; and (ii) conduct reconciliations against the beneficial ownership records no less frequently than as of the close of business daily.*"[21] The IDI also must enter into a contract with the third-party that satisfies certain substantive requirements.[22]

Whether or not the IDI maintains the records itself or through a third-party, the IDI must implement internal controls to accurately determine the interests in the custodial deposit account at the beneficial owner level and must conduct reconciliations of beneficial ownership records as of the close of business on a daily basis.[23] By applying the same substantive requirements regardless of whether the records are held directly by the IDI or through a third-party, the FDIC provides no meaningful benefit or accommodation to holding records through a third-party and in reliance on the third-party's recordkeeping systems, thereby incentivizing IDIs to hold the records directly. If this result is intended by the FDIC, the FDIC should explain its rationale for disallowing a common industry practice in relying on third-parties; if it is not intended, the Proposal should be redrafted to provide for meaningful differentiation in the internal controls requirement for records held directly by the IDI versus records held through a third-party, while still augmenting the recordkeeping requirements in accordance with the Proposal's objective. For example, these provisions could be clarified to require the IDI to require the third-parties to maintain internal controls and, potentially, to retain backup capabilities. The provisions also could be revised to leverage the recordkeeping requirements that apply under Part 370 so that information required to be provided within 24 hours of an IDI's insolvency must be made available by the third-party to

[20] Proposed 12 C.F.R. § 375.3(b)(1)&(2) (emphasis added).

[21] Proposed 12 C.F.R. § 375.3(c)(1)-(3) (emphasis added).

[22] Proposed 12 C.F.R. § 375.3(c)(4).

[23] As an alternative to daily beneficial owner-level reconciliation by an IDI using the third-party option, a more feasible alternative is for the IDI to conduct "header-level" reconciliation. This reconciliation could entail the third-party reporting to the IDI, on a daily basis, the aggregate amount that should be in the custodial account based on the third-party's records. The IDI could check that aggregate amount against the total balance of the account. This kind of reconciliation would help ensure that material shortfalls do not exist between customer claims and actual deposits.

the IDI in the form and format prescribed in Part 370.[24] Doing so would harmonize the deposit account recordkeeping requirements that apply to IDIs and their third-parties.

### 4. The Proposal Should Exempt Accounts Held by State-Licensed Money Transmitters

The Proposal exempts from its substantive requirements accounts held in various scenarios, including accounts holding trust deposits; accounts established by securities brokers; accounts maintained by real estate brokers, real estate agents, and title companies; and accounts maintained by a mortgage servicer. The rationales for these exemptions vary and include that accounts held for these types of entities are subject to an independent recordkeeping requirement (e.g., the recordkeeping requirements that apply under federal and/or state laws to broker-dealers and investment advisers or to attorney trust accounts),[25] and/or that there are characteristics of the accounts that make them unlikely to present difficulties to the FDIC in making deposit insurance determinations (e.g., funds held in accounts to be transferred as part of a deposit placement network).

Many of these same rationales apply to an account opened for a money transmitter. Money transmitters are subject to recordkeeping requirements under state law. For example, money transmitters licensed by the California Department of Financial Protection and Innovation ("CalDFPI") are required to maintain (1) a record of each payment instrument or stored value obligation sold, (2) a general ledger posted at least monthly containing all asset, liability, capital, income, and expense accounts, (3) bank statements and bank reconciliation records, (4) records of outstanding payment instruments and stored value obligations, (5) records of each payment instrument and stored-value obligation paid within the three-year period, (6) a list of the last known names and addresses of all of the licensee's agents and their branch offices, and (7) any other records reasonably required by order or regulation of the CalDFPI.[26] State banking agencies periodically examine licensed money transmitters to determine whether they are in compliance with applicable laws and regulations, including these requirements, and are authorized to take enforcement action for non-compliance.[27]

Compliance with the Proposal's recordkeeping requirements would be unnecessary in light of the recordkeeping requirements that apply to a licensed money transmitter account holder, which were established for the specific purpose of mitigating risk to consumers from licensed money transmission and were tailored to this specific business model.

There also are characteristics of accounts held for money transmitters that make them unlikely to present difficulties in making deposit insurance determinations. As set forth above, many of the omnibus accounts used by money transmitters are not established for purposes of obtaining pass-through deposit insurance. In addition, funds transferred to such accounts are for specific purposes contemplated by the transferor, thus making more clear the ownership of the funds by either the

[24] *See* 12 C.F.R. Part 370.

[25] Proposal at 80142.

[26] *See* Cal. Fin. Code § 2124.

[27] *See, e.g.*, Cal. Fin. Code §§ 2120; 2148.

transferor or the recipient, and the funds are held in the account for only a short duration, thus making it less likely that the FDIC will need to make a deposit insurance determination about them. Finally, it bears noting that the technology company that declared bankruptcy and served as a central part of the impetus for the Proposal was not a regulated money transmitter.

**5. The Proposal Should be Revised to Make Clear That an IDI Does Not Need to Maintain Information that is Continuously Updated in Real-Time**

The Proposal would require an IDI, if records about beneficial owners' interests in the custodial deposit account are maintained through a third-party, to have "direct, continuous, and unrestricted access to the records in the data format specified in appendix A…."[28] Appendix A includes data fields for the current balance and accrued interest in the account. It is not realistic or operationally feasible for the information in these fields to be updated on a continuous, real-time basis. The FDIC should revise the Proposal's requirement to have "direct, continuous, and unrestricted access" to these data fields to make clear that the FDIC does not expect these fields to be updated on a continuous, real-time basis.

**6. The Proposal Should Ensure that Continuity Plans Required for Third-Party Approaches to Maintenance of Records Are Feasible**

Section 375.3(c)(2) of the Proposal requires an IDI that relies on a third-party to maintain the requisite records to "have continuity plans, including backup recordkeeping, and technical capabilities to ensure compliance" with the Proposal's substantive requirements. The Proposal's preamble comments on this requirement as follows:

> "When developing a contingency plan, an IDI may consider elements such as (1) storing copies of prior daily or weekly account balances and beneficial ownership balances internally at the IDI, or at another location independent of the third party; (2) establishing legal authority and technological capability for the IDI to access daily transaction records associated with the custodial deposit account directly from payment networks, processors, or service providers used by the third party; and (3) maintaining at the IDI sufficient trained staff, technical systems, and other resources to process transaction records necessary for the IDI to reconcile and establish accurate records for ownership interests in the custodial deposit account, in the event the third party is disrupted."[29]

Many of these elements will be impractical and unworkable for third-parties that have developed their own proprietary technologies and systems of record for processing transactions. For these third-parties, it will not be possible to enable an IDI to access daily transaction records, which are generated and stored only in proprietary systems accessible and intelligible by employees of the third-party. The FDIC should modify the Proposal to state specifically that the contingency plan

[28] Proposed 12 C.F.R. § 375.3(c)(1).

[29] Proposal at 80142, 80143.

requirement is limited to a plan to maintain access to daily end-user balance reporting and account-level reconciliation. There should be no implication that an IDI will be able to step into the shoes of the third-party and access the third-party's systems and information directly.

### 7. The FDIC Should Allow for an Adequate Compliance Period

Currently, the Proposal does not contemplate that there will be a compliance or implementation period for the substantive requirements once the Proposal is finalized. If the Proposal is finalized as proposed, IDIs and third-parties will require a substantial period of time to develop the technologies, operational processes, compliance programs, industry standards, and other infrastructure in order to comply with the internal controls and recordkeeping requirements, especially to enable third-parties to maintain records required under the Proposal. The FDIC should allow for a compliance period of at least two years in light of the substantial infrastructure build-out that will be necessary for compliance. Provided that the FDIC makes the change requested in this letter to tailor the scope of the final rule so that it applies only to custodial deposit accounts that provide for pass-through deposit insurance, the compliance period required for the final rule could be shorter than two years.

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We appreciate the FDIC's consideration of the comments in this letter. Tailoring the Proposal so that it applies to custodial deposit accounts designed to provide for pass-through deposit insurance will help to ensure the Proposal achieves the FDIC's objectives in ensuring custodial deposit accounts are subject to robust and effective financial controls and recordkeeping practices, mitigating risks to depositors, but not imposing requirements that stifle innovation and efficiency in providing innovative products to consumers.[30] If you have any questions, please contact me at penny@ftassociation.org.

Sincerely,

Penny Lee
President and Chief Executive Officer
Financial Technology Association

[30] For information describing the benefits to consumers from bank-fintech partnerships, please see the comment letter that the Financial Technology Association submitted in response to the federal banking agencies' Request for Information on such partnerships. *See* FTA Comment Letter re: Request for Information on Bank-Fintech Arrangements Involving Banking Products and Services Distributed to Consumers and Businesses, Docket ID OCC-2024-0014; Docket No. OP-1836; RIN 3064-ZA43, pp. 2-9 (Oct. 30, 2024).