Trustly

Trustly, Inc.
555 El Camino Real
San Carlos, CA 94070

January 16, 2025

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

Submitted via electronic mail to Comments@fdic.gov.

Re: Notice of Proposed Rulemaking on Recordkeeping for Custodial Accounts – Docket No. RIN 3064–AG07.

Dear FDIC staff,

Trustly, Inc. ("Trustly") appreciates the opportunity to provide comments in response to the Federal Deposit Insurance Corporation's ("FDIC") Notice of Proposed Rulemaking ("NPRM") on recordkeeping for custodial accounts.[1] We support the FDIC's goals of the rulemaking and wish to offer comments to help educate policy makers on the difference between bank-owned and -controlled custodial accounts and those custodial accounts owned and controlled by regulated entities such as money transmitters.

We also offer comments in support for the NPRM's focus on accounts with "transactional features" that allow end users to withdraw their funds from and/or deposit their funds to a covered account. We believe this rightfully focuses bank and FDIC staff on accounts that could cause the most consumer confusion and harm, versus accounts that serve a non-depository commercial function such as those used for merchant payment processing activities.

We conclude our comments by requesting that the FDIC formally recognize three other account types as outside of the rule — (1) merchant payment acceptance accounts, (2) custodial accounts structured to not provide pass-through insurance and (3) FBO accounts used by traditional money transmitters.

Comments on Definition of Custodial Accounts with Transactional Features

We appreciate the FDIC's nuance in crafting the definitions of custodial accounts with transactional features. We believe these definitions will help rightfully focus bank and FDIC resources on accounts that function as substitutes for demand deposit and NOW accounts. These

[1] Trustly is a global leader in open-banking powered payments and now regularly processes more than $100 billion annually in non-card payments across our European and North American markets. Trustly, on behalf of its merchants, is also one of the largest Real Time Payments ("RTP") originators and accounts for approximately ten percent of all RTP volume on a quarterly basis.

substitute accounts carry the highest complexity for the Corporation and paying claims from the DIF, as well as highest risk of consumer confusion and harm.

Related to this, our interpretation of the NPRM is that merchant payment processing accounts would not be subject to a reconciliation requirement as these accounts are used solely by the merchant for receiving the proceeds of commercial transactions and not used for additional transactions to third parties. We believe this is the right approach, as these accounts are not meant to hold funds longterm, nor serve as substitutes for deposit or transactional accounts. As a result, these accounts should not introduce extra complexity in the event of a bank resolution or payment of FDIC insurance claims. This view also aligns with the approach the NPRM takes to transactional accounts used by real estate professionals, which the proposal deems exempt due to how the accounts "hold an owner's funds for a limited period of time for the purposes of completing a specific . . . transaction."

We also wish to provide two points of feedback on how the NPRM's definitions should be further tailored in a potential final rule.

First, the NRPM's definitions do not properly distinguish between custodial accounts that are meant to qualify for pass-through insurance vs. those that are not. The NPRM notes that the FDIC's legal authority to require daily reconciliation of accounts comes from the FDI Act, and specifically stems from the FDIC's obligation to pay insurance claims under the Act. The NPRM states that the reconciliation requirement is lawful as it creates the records required to pay claims. However, this justification does not hold true in the event that the custodial funds are not meant to qualify for pass-through insurance. We believe a final rule needs to state that it does not apply to custodial accounts where the bank and program manager have expressly disclaimed any FDIC pass-through insurance to sub-account holders via the program terms of service.

Second, the NRPM's definitions do not properly distinguish between custodial accounts held and controlled by the bank, versus custodial accounts held and controlled by other licensed financial services providers such as money services businesses and money transmitters. Licensed financial services providers such as MSBs have their own regulatory structures, which serve to create independent customer relationships that do not involve sharing the customer or creating a pass-through account with the bank.

While we appreciate that the reference to "deposit" is meant to limit the application of the rule, we are concerned that without additional commentary the "deposit" definition found at 12 U.S.C. 1813(*l*) coupled with the broad custodial account concepts could be read to ensnare FBO accounts held by money services businesses. We believe the FDIC should clarify MSB FBO accounts are not subject to the reconciliation requirements in any potential final rule. We believe a clarification is warranted as the FDIC provides such clarification and formal exemption for funds held directly by broker dealers.

In making such a clarification, the FDIC could point to any of the following rationales:

- From a KYC perspective, the customer of the MSB is not on a defacto basis viewed as a customer of the bank. As a result, neither FinCEN nor the banking agencies require the bank to diligence or perform other AML activities on the MSB's customers where such customers are not entering into a pass-through insurance relationship. Because these MSB customers are not opening accounts at the bank or attempting to qualify for pass-through insurance, their funds and the funds in the accounts are beyond the legal scope of the FDI Act used to justify the proposed reconciliation requirement.

- Money transmission services and related FBO accounts are often structured to exclude pass-through insurance claims. As discussed above, such accounts are outside of the legal scope of the FDI Act used to justify the NPRM. As such, they should not be subject to a final reconciliation rule.

- Money transmission FBOs that are structured to exclude pass-through insurance are used for short-term transactional services. Funds flow quickly through the account and are meant to reach their recipient in short order. Quirks in the U.S. payment system, from the noisy settlement data in ACH transactions to cash settlement through MSB agents can complicate daily reconciliation, making the data less than useful for banks that hold MSB FBO accounts.

- Customers of traditional money transmission services are not at risk of loss of funds,[2] as states require a dollar-for-dollar collateralization of custodial funds, and limit permissible investments to stable obligations such as U.S. Treasury bonds.

- Money transmission customers may seek redress from state regulators. Part of the issues experienced by Synapse customers stemmed from the lack of a consumer-focused regulator with clear enforcement authority over Synapse. Licensed money transmitters must answer to their state regulators with respect to any consumer complaints, with states expecting the licensee to provide redress when a customer has been financially harmed.

- Money transmitters are independently regulated by state financial regulators. As part of this regulation, state examiners will require MSBs to regularly report their transactional volumes and financial conditions. State examiners also require MSBs to produce transaction-level data during supervisory exams. The examiners will then review this data to make sure it reconciles to the periodic reporting provided by the MSBs. We would note that the examination process makes the recordkeeping required of licensed money transmitters more robust than the requirements for other accounts like IOLTA and

[2] We recognize that certain entities in the crypto space are licensed as money transmitters. We would not consider them "traditional" money transmission services, as their business models are not structured for a quick exchange of funds between businesses or consumers but instead designed to facilitate the purchase and holding of alternative assets such as Bitcoin.

mortgage-related accounts that currently enjoy exemptions in the NPRM. If these accounts are exempt due to the existence of other, independent recordkeeping requirements, MSB accounts should also be exempt.

- Piercing through the MSB and making it share daily reconciled MSB customer data with bank partners infringes on the dual state-federal regulatory system and exposes the FDIC and any final rule to litigation from CSBS and the state regulators. CSBS litigation recently curtailed a promising national payments charter offering from the OCC. We would hate to see an improperly tailored reconciliation rule be similarly challenged by state regulators.

We note that in addressing these issues in a potential final rule, the FDIC need not fully release state-regulated or other-regulated entities from the scope of the rule. For example, we understand that while Synapse used a broker dealer entity to move customer funds between banks, it did so by opening deposit and deposit equivalent accounts at FDIC-insured banks. Further, we understand that consumers and small businesses were made to believe their funds were FDIC insured. In these cases, we believe that requiring reconciliation of the deposit accounts would be subject to the NPRM and a potential final rule. Similarly, we are aware of several consumer-facing money transmitters that offer FDIC-insurance on various debit card and savings products marketed through the money transmitter's website and mobile phone application. Because these offerings are true deposit accounts — even if deposits are placed by the money transmitter and even if the funds are held in a custodial account — they would be within the scope of a final rule that also excluded traditional MSB FBO accounts.

Comments on Exemptions

Should the FDIC not take the approach that uninsured deposits or traditional MSB FBO accounts fall outside of the final rule's definitions, we would encourage the rulemaking team to exempt such custodial accounts via formal exemption in a potential final rule. The rationale for exempting MSB FBO accounts would be the same as the exemptions for broker dealers, IOLTA accounts, employee benefit plans, mortgage servicing accounts and property owner security deposits. Just like these entities and professions, MSBs are subject to independent recordkeeping obligations by state regulators. Similarly, MSB FBO accounts are like the accounts covered by the NPRM's exemption for real estate brokers and title companies, as MSB FBO accounts also generally "hold an owner's funds for a limited period of time for the purposes of completing a specific . . . transaction."

Additionally, should the FDIC disagree with our interpretation of merchant payment acceptance accounts falling outside of the NPRM, we respectfully request such accounts be given a formal exemption. As stated above, merchant payment accounts are not used for transactional purposes so they are similar to several of the other account types granted an exemption under the NPRM.

*　　*　　*　　*

Trustly appreciates the FDIC's commitments to reducing the complexity of potential bank resolutions and enhancing customer protection through the NPRM. To achieve these goals, the NPRM seeks to distinguish between accounts that have their own independent recordkeeping obligations and those that lack any formal oversight or regulation. Additionally, the NPRM seeks to distinguish between accounts used for day-to-day transactional activities — like DDA and NOW substitutes — and those that are involved in less frequent transactions.

In this regard, Trustly respectfully requests that the FDIC recognize three other account types as outside of the rule. One would be merchant payment acceptance accounts, which do not meet the "transactional" prong of the NPRM's definitions. Another would be custodial accounts that are purposefully structured to not provide pass-through insurance. A third would be FBO accounts used by traditional money transmitters. All three account types align with the tailoring of the proposed definitions and exemptions provided to other account types under the NPRM.

Thank you for the opportunity to provide these comments. Should you have any questions or wish to discuss our comments further, please feel free to contact myself and Matt Faso.

Sincerely,

[redacted]

Matt Janiga

matthew.janiga@trustly.com