STRUCTURED FINANCE ASSOCIATION

January 16, 2025

Via Electronic Mail: Comments@fdic.gov
James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
Attn: Comments—RIN 3064-AG07

Re: RIN 3064-AG07
Proposed Rule Regarding Recordkeeping for Custodial Accounts

Dear Mr. Assistant Executive Secretary,

The Structured Finance Association ("SFA") appreciates this opportunity to provide feedback to the Federal Deposit Insurance Corporation (the "FDIC") regarding the above-referenced proposed rule (the "Proposed Rule").[1] Once final, the Proposed Rule would, among other things, require banks holding custodial deposit accounts with transactional features that are not exempted from the rule ("Covered Custodial Accounts") to maintain records identifying the beneficial owners of those deposits, the balances attributable to each beneficial owner, and, where required records are maintained by a third party, to have direct, continuous, and unrestricted access to the records of beneficial owners, including and notwithstanding business interruption, insolvency or bankruptcy of the third-party recordkeeper. The Proposed Rule also would impose a new regulatory compliance and reporting regime with respect to Covered Custodial Accounts.

As discussed at length in the Notice of Proposed Rulemaking for the Proposed Rule (the "NPR"), the FDIC's main concern in proposing the Proposed Rule is to assure the timely availability of deposited funds (or of FDIC insurance payments in the event of a failure of an insured depository institution acting as custodian) to beneficial owners who have deposited funds that they intend to be used to conduct transactions with third parties—principally retail customers of non-bank decentralized finance platforms.[2] While other comments on the Proposed Rule may discuss the need for such a rule or various problems caused by its compliance regime, the SFA wishes to focus the FDIC's attention on the treatment of a wide variety of "custodial accounts" utilized in structured and secured financing transactions that might be deemed Covered Custodial Accounts under the Proposed Rule even though they raise none of the policy concerns cited in the NPR.

[1] FDIC, *Recordkeeping for Custodial Accounts*, 89 Fed. Reg. 80135 (Oct. 2, 2024).
[2] *See, i.e.*, 89 Fed. Reg. at 80135 (provision of "financial products and services to consumers" by IDIs through "third parties in increasingly complex relationships" has "created risks for consumers.").

This result would impose unnecessary compliance burdens and costs on financing participants without producing offsetting benefits to the public, thereby ultimately increasing the cost of credit to borrowers, including consumers whose retail credit needs are supported by the structured finance industry.

SFA is uniquely situated to comment on the potential effects that the Proposed Rule may have on the structured finance and securitization markets. As an association representing participants across the full spectrum of the structured finance and securitization markets – including lenders, securities issuers, institutional investors, financial intermediaries, credit rating agencies, law firms, accounting firms, technology firms, servicers and trustees – SFA plays a vital role in the development of market-consensus solutions that support efficient and stable markets.[3] While our members often have conflicting views and interests, our governance structure requires consensus from all stakeholder groups before SFA takes an advocacy position on legislative or regulatory matters. As such, when we do provide feedback, we do so in a manner that reflects the views of the entire market ecosystem.

I. The Proposed Rule's open-ended definition of "custodial deposit accounts with transactional features" may inappropriately capture custodial deposit accounts frequently utilized in structured and secured financing transactions.

a. Custodial Accounts are frequently employed in Structured Finance Transactions and Secured Lending Transactions.

Structured finance and secured lending transactions frequently employ one or more custodial deposit accounts to hold funds including: (a) payments among asset purchasers and asset sellers; (b) payments among lenders and borrowers; and (c) cash flows arising from various forms of receivables, such as consumer or commercial loan receivables, real or personal property lease or installment sale receivables, equipment purchase or any other form of contract receivables (such accounts that are the subject of this letter are hereinafter referred to collectively as "Custodial Structuring Accounts"). Similarly, and much like mortgage servicing or other escrow account arrangements, Custodial Structuring Accounts may also hold financing proceeds as an administrative matter pending the satisfaction of stipulated contractual conditions to disbursement of funds. Under many custodial agreements, funds may be disbursed to pay third parties to purchase assets, service debt obligations, or pay vendors of the parties to the arrangement upon direction or authorization of certain of the parties to the agreement. Such Custodial Structuring Accounts typically are maintained as "custodial accounts" to specify the parties' interests in the deposited funds (which may vary over the life of the transaction), document operational agreements as to the management and disposition of funds, and assure performance of payment and other obligations through employment of a trusted third-party custodian.

[3] SFA is a member-based, trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFA provides an inclusive network for securitization professionals to collaborate and, as industry leaders, to drive necessary changes, to be advocates for the securitization community, to share best practices and innovative ideas and to educate industry members through conferences and other programs. Further information can be found at www.structuredfinance.org.

Custodial arrangements also facilitate the creation and perfection of security interests in financing-related deposit accounts under Article 9 of the Uniform Commercial Code. For example, structured and secured financing facilities frequently employ a "deposit account control agreement" ("DACA") under which the borrower debtor (or debtors), the lender secured party (or parties, sometimes through an administrative agent) and the account bank (which may also act as custodian) agree that the depositary bank will comply with instructions originated by the secured party without the consent of the debtor, thus conferring on the secured party "control" over the deposit account, a prerequisite to "perfection" of its security interest under Article 9.[4] Sometimes a DACA will be embedded in the custodial agreement that appoints the custodian and establishes the relevant custodial deposit accounts; other times the DACA will be a separate agreement referring to the accounts created under the custodial agreement. Depending on a variety of conditions, such as the occurrence or non-occurrence of a debtor default, the debtor or creditor parties may have the right to direct the bank, as custodian and account bank, to disburse deposited funds to themselves or third parties.[5]

b. A Typical Custodial Structuring Account Employed in Structured Finance Transactions and Secured Lending Transactions Might Be Characterized as a "Custodial Deposit Account with Transactional Features" under the Proposed Rule.

The Proposed Rule broadly defines "custodial deposit account with transactional features" to include 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.[6]

The Proposed Rule further defines "beneficial owner" as "a person or entity that owns, under applicable law, an interest in the deposit held in a custodial deposit account",[7] and defines "account holder" as "the person or entity who opens or establishes a custodial deposit account with transactional features with an insured depository institution."[8]

Under a Custodial Structuring Account arrangement, both the borrower/debtor party (or parties) and the lender/creditor party (or parties) have property interests and associated rights in the funds on deposit in the custodial account under applicable law. These interests and rights (*e.g.*, the right to receive or cause the disposition of some or all of the

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[4] *See*, Uniform Commercial Code §§9-104(a)(2), 9-304. In warehouse financings structured as repurchase agreements, the "borrowing" entity acts as warehouse seller and the "lending" entity as warehouse buyer of the financed assets. The warehouse lender has the right to demand repurchase of the financed (collateral) assets at a specified date and price. Notwithstanding characterization as a sale and purchase of the collateral assets, these arrangements also contain grants of security interests in the purchased collateral assets to the lender/buyers.

[5] *See, e.g.,* https://www.newyorkfed.org/medialibrary/media/markets/CPFF_Control_Agreement.pdf.

[6] Proposed Rule, §375.2

[7] *Id.* (emphasis added).

[8] *Id.* (emphasis added).

funds on deposit in varying proportions and priorities depending on each party's interests in the transaction over time) may vary over the course of the transaction depending on the occurrence or non-occurrence of prescribed conditions.[9] If the possession of such rights causes a party to "own… an interest in the deposit", both the borrower/debtor party (or parties) and the lender/creditor party (or parties) may be deemed "beneficial owners" of commingled funds on deposit under the Proposed Rule, arguably satisfying the first two prongs of the proposed definition of "custodial account with transactional features."

Whether or not such Custodial Structuring Accounts would be deemed to have "transactional features" turns on the third prong of the definition of "custodial account with transactional features", *i.e.*, whether the beneficial owners may "authorize or direct a transfer through the account holder to a party other than the account holder or the beneficial owner".[10]

The Proposed Rule's definition of "account holder" (*i.e.*, "the person or entity who opens or establishes a custodial deposit account with transactional features with an insured depository institution")[11] is somewhat ambiguous when applied to these arrangements. Many of the relevant custodial agreements take the form of a multiparty agreement among the borrower/debtor parties, the lender/creditor parties or their agents, and the custodian, under which the custodian simply agrees with all the parties to establish certain accounts and to administer them in accordance with the agreement. While the agreements often specify account nomenclature and "titling", practices in this regard vary based on the transaction structure, legal considerations, and drafting styles of transaction parties or their counsel. For instance, some agreements specify parties as having "ownership" of the accounts, while others simply call for the accounts to be established "in the name of" one or more parties without expressly addressing ownership. The parties (if any) that may be named as the "owner" of the account in the agreement (or in the agreement's specification of account nomenclature) may include the borrower (subject to the interests of the creditors), the creditors (or their agent), or even the depositary bank, acting (perhaps in a separate capacity) for the benefit of specified parties. Accordingly, the "account holder" would vary among transactions based on transaction drafting and structural concerns.

Since (a) as noted above, the definition of "account holder," when applied to these financing arrangements, may include any of the parties to the custodial agreement, and (b) custodial deposit account funds may be disbursed "through" one or more of the parties to pay third parties at the direction or authorization of "beneficial owners," the SFA believes there is at least a risk that, without an express exemption, such Custodial Structuring Accounts may be deemed to be Covered Custodial Accounts subject to the recordkeeping requirements under the Proposed Rule.

[9] Such conditions might include, for example, shifting payment priorities among stakeholders, the attainment or non-attainment of particular financial tests, or the existence of an event of default.
[10] *Id.* (emphasis added).
[11] Proposed Rule §375.2.

II. Custodial Structuring Accounts Do Not Pose the Policy Concerns that the Proposed Rule Seeks to Address.

Custodial Structuring Accounts do not pose the policy concerns that the Proposed Rule seeks to address for several reasons:

a. The number of beneficial owners of such custodial accounts is relatively small[12]—typically numbered in single or double digits—so they do not pose the kinds of beneficial ownership tracing issues that may exist with respect to larger-scale consumer finance/payment platforms. The NPR cites no examples of structured or secured financing arrangements causing the kinds of problems that led to the FDIC issuing the Proposed Rule and SFA is unaware of any such issues affecting structured finance transaction participants, including during the 2008 Financial Crisis which constituted the ultimate "stress test" of the industry.

b. The beneficial owners of the deposited funds in Custodial Structuring Accounts are typically named parties to the custodial agreement or are identified in ancillary agreements to which the custodian bank is a party (perhaps acting in a trust or agency capacity), such that the beneficial owners would appear in the books and records of the custodian bank. Thus, the custodial bank—and the FDIC as the liquidator of a failed custodian bank—would have little or no difficulty establishing beneficial ownership of deposited funds in such accounts.

c. The beneficial owners are typically business entities and/or special purpose financing entities—and not natural persons—so they are far more likely to possess the sophistication and resources necessary to document and enforce their rights in the accounts. Indeed, these accounts are brought into existence at the direction and expense of sophisticated financial actors seeking to define and secure their interests in the assets held in those accounts. Such accounts typically contain their own mechanisms for tracing parties' interests in account assets that are tailored to the particular business purposes of each such transactional arrangement.

III. Key Recordkeeping and Internal Control Requirements of the Proposed Rule Do Not Make Sense in the Context of Custodial Accounts Maintained in Connection with Structured or Secured Financing Transactions.

Section 375.3(a) of the Proposed Rule requires the insured depository institution custodian or a qualifying third-party recordkeeper to maintain prescribed data concerning beneficial ownership in a prescribed data format and layout. Due to the above-described nature of the custodial accounts maintained in connection with structured or secured financing transactions, certain key

[12] We do not believe that beneficial owners of Covered Accounts would include structured finance or secured debt securities holders because securities transactions almost always interpose a corporate trustee, typically acting as an indenture trustee or securitized asset pool trustee, to act on behalf of securities holders with respect to such accounts. To the extent that a custodial account holds only "trust funds" related to such transactions, which may occur for some, but not all, of the accounts that are the subject of this comment letter, the accounts would be exempted from the Proposed Rule's recordkeeping requirements under Proposed Rule §375.3(d)(1).

prescribed data elements are difficult or impossible to ascertain for such accounts. As an example, the data to be kept under the Proposed Rule must include the current balance of the "beneficiary account" [13] (an undefined term that we take to mean the dollar amount of a beneficial owner's individualized fund entitlement in an account), but transaction participants' interests in these custodial account balances often are not separately quantifiable--funds in an account may be applied in variable amounts for a range of purposes and for the benefit of different transaction participants, depending on the terms and conditions of the contract and prevailing facts from time-to-time. Section 375.3(b) of the Proposed Rule requires the insured depository institution serving as custodian to maintain appropriate internal controls that include the requirement to "maintain accurate balances of custodial deposit accounts with transactional features at the beneficial ownership level", posing the same problem—there often is no balance certain ascribable to a particular beneficial owner until some set of conditions are satisfied; in other words, the deposit may be held for the collective benefit of the account holder and the beneficiaries to be applied over the life of the transaction as their agreement(s) provide.

These incongruities have a common cause: the Proposed Rule was not designed with Custodial Structuring Accounts in mind, but rather was intended to address recordkeeping and controls for accounts—in the nature of online checking/billpay accounts--used primarily by or for retail customers to fulfill their everyday payment needs.

IV. Subjecting Custodial Structuring Accounts to the Proposed Rule Would Impose Undue Compliance Costs on Financing Transactions, Ultimately Increasing the Costs of Credit.

Fees charged by custodial banks are extremely competitive and constitute a very small fraction of the total financing costs. Given the interpretive issues cited above, if the Proposed Rule is not amended to exclude unambiguously financing-related Custodial Structuring Accounts, our members believe that implementation and ongoing compliance costs will far exceed the modest estimates proffered by the FDIC in the NPR. These include significant costs for legal interpretation of complex legacy custodial contracts,[14] renegotiation of vendor contracts, and, in all likelihood, the requirement of legal opinions regarding the Proposed Rule's applicability to each new custodial arrangement. These costs likely would ultimately be passed on as a cost to the borrower in the related transaction, and it is unclear whether the FDIC contemplated or intended this result that would negatively impact borrowers.

V. Possible Solutions.

SFA believes that, if promulgated as a final rule, the Proposed Rule should be amended to exclude unambiguously custodial accounts related to structured and secured financing arrangements. SFA understands, however, that it is equally important to ensure that any such exclusion is drafted in

[13] Proposed Rule, Appendix A.

[14] SFA member corporate trust banks administer thousands of custodial accounts. Without the clarifying exclusions and exemptions suggested below, the contracts establishing those accounts would need to be analyzed and interpreted to determine whether each account is or is not covered by the Proposed Rule. Under the language of the Proposed Rule, the existence of even a single covered custodial account with transactional features would trigger the Proposed Rule's onerous recordkeeping and compliance requirements.

a way that not only addresses the issue for structured and secured financing transactions highlighted in this comment letter, but also to avoid unintentionally excluding the kinds of consumer online payment accounts that the FDIC intends to be covered by the recordkeeping requirements of the Proposed Rule. In order to help achieve these dual goals, an approach favored by our members would include two elements:

First, the Proposed Rule's scope should be narrowed to address the specific problem identified in the NPR by redefining "Custodial Account with Transactional Features" to cover only custodial accounts that hold funds owned by consumer "beneficial owners" and placed in a custodial account that allows the consumer to effect payment transactions via the relevant payment platform. Such a definition could borrow from definitions of "consumer" that have been adopted by other financial regulators. For example, the Consumer Financial Protection Bureau has defined "consumer" as "an individual who obtains or has obtained a financial product or service … to be used primarily for personal, family, or household purposes, or that individual's legal representative."[15] Amending the Proposed Rule to cover only custodial accounts holding funds owned by this type of beneficial owner would exclude from coverage custodial accounts established among commercial parties for business purposes that are substantially similar to those mortgage servicing, escrow or trust fund accounts that the FDIC has already appropriately exempted from being subject to recordkeeping requirements under the Proposed Rule.

Second, regardless of whether or not the definition of "beneficial owners" under the Proposed Rule were narrowed as suggested above, the Proposed Rule should also be amended to include a specific exemption (similar to its current exemptions for accounts holding trust deposits and accounts maintained by mortgage servicers) to exclude custodial accounts established and maintained to (a) create a lien or security interest in the custodial deposit account or (b) state and/or secure the parties' agreements as to the disposition of custodial account deposits (regardless of whether or not those agreements appear within the custodial deposit account agreement or other agreements). Adding this exemption would help ensure that structured and secured financing arrangements are excluded even if individual consumers are somehow deemed "beneficial owners" under the Proposed Rule because they have some enforceable interest in a custodial account established for a financing transaction (for example, in a financing of a portfolio of HELOC loans which contains a mechanism to fund HELOC draws). In these situations, it is highly unlikely that a consumer "beneficiary" would have an unconditional right to specific sums on deposit in the custodial account and the borrower's lender (presumably a party to the arrangement) would necessarily know the borrower's identity.

In addition, the FDIC could consider creating a *de minimis* threshold to exclude from coverage custodial accounts with a small number of beneficial owners, perhaps 100. Such a provision would provide a bright line that would accommodate virtually all business-related custodial accounts and eliminate the need for more elaborate and costly analyses of whether an account constitutes a Covered Account. At the same time, it would strictly limit the scale of any difficulties that custodial banks or the FDIC might face in tracing beneficial holdings—preventing large scale "Synapse" events.

[15] 12 CFR §1016.3(d).

Finally, SFA believes that the Proposed Rule should contain a provision, or at least some recognition in the preamble to any final rule, stating that "the insured depository institution may conclusively rely on written representations by any party to the agreement establishing the custodial deposit account in ascertaining any facts necessary to determine the applicability of any exemption pursuant to §375.3(e)." Such a provision is necessary because insured depository institutions acting as custodians are not typically in a position to make factual determinations about potential beneficial owners with whom they have no direct customer relationship. This type of clarification is similar to the ability already provided by the FDIC to insured depository institutions to satisfy the requirements for pass-through deposit insurance in multi-tiered fiduciary relationships by relying on disclosures and representations of parties at subsequent levels regarding the true beneficial owners of funds in a deposit account.[16] Without this clarification, the imposition on the custodial bank of additional diligence obligations concerning such facts could add significant costs and substantially slow the opening of such accounts and closing of financial transactions.

VI. Further Comment

We again thank the FDIC for the opportunity to submit this letter. SFA's membership stands ready to provide further input regarding this important topic and our comments in this letter. If you have any questions about this matter, please contact Frank Tallerico, Director, ABS Policy at frank.tallerico@structuredfinance.org.

Sincerely,

Frank Tallerico

Frank Tallerico
Director, ABS Policy
The Structured Finance Association

[16] *See* 12 CFR §330.5(b)(3).