October 4, 2021

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

Attention: Comments RIN 3064–AF27

RE: FDIC Proposal on Simplification of Deposit Insurance Rules, RIN 3064–AF27[1]

Dear Mr. Sheesley:

The American Bankers Association,[2] Bank Policy Institute,[3] and Mortgage Bankers Association[4] (collectively, the Associations) appreciate this opportunity to comment on the proposal from the Federal Deposit Insurance Corporation (FDIC) to simplify certain deposit insurance regulations. The Associations and our members agree that the proposed amendments to 12 CFR §330.10, 13, and 7(d), for deposit accounts of revocable trusts, irrevocable trusts, and mortgage servicing, respectively, will help simplify these complex rules. However, we urge the FDIC to modify the proposal to address the concerns outlined below and to incorporate clarifications and examples that would enhance the understanding of insurance coverage by bankers and their customers.

In addition, institutions subject to the FDIC's rule 12 CFR Part 370 report that, while they support the proposed changes to the deposit insurance rules, introduction of the proposal has disrupted efforts to implement this inaugural regulation. They note challenges in deciding

---

1 FDIC, "Simplification of Deposit Insurance Rules," 86 *Federal Register* 41766, August 3, 2021 (www.govinfo.gov/content/pkg/FR-2021-08-03/pdf/2021-15732.pdf).

2 The American Bankers Association is the voice of the nation's $22.8 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard nearly $19 trillion in deposits and extend $11 trillion in loans.

3 The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

4 The Mortgage Bankers Association is the national association representing the real estate finance industry, an industry that employs more than 330,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 1,900 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

whether to continue to update data and processes based on the current rules or wait to see how and when these rules may change. To address these issues, we suggest accommodations for these institutions in light of the proposal.

Proposed Amendments for Deposit Accounts of Trusts

The FDIC proposes to make significant changes to the deposit insurance rules for informal revocable trusts[5] and formal revocable trusts in §330.10, as well as for irrevocable trusts in §330.13. The proposal would combine these two sections to create a new "trust account" category for purposes of deposit insurance calculation and would provide uniform insurance calculation rules across those two categories of trusts. The number of "eligible beneficiaries" for purposes of computing deposit insurance for such a trust would be limited to no more than five natural persons, charitable organizations, or other non-profit entities recognized under the Internal Revenue Code of 1986, as amended.[6] In the event the trust were to have more than five beneficiaries, the deposit insurance available with respect to deposits of such trust would be computed on the basis of a maximum of five without regard to the actual number of beneficiaries. Further, neither the grantor of the trust nor any person or entity that would "only obtain an interest in the deposit if one or more named beneficiaries are deceased"[7] would qualify as an "eligible beneficiary." Additionally, determination of deposit insurance coverage would require further review if a trust agreement provides that trust funds will pass into one or more new trusts upon the death of the grantor(s) (defined as "future trusts"). This review would include those named as beneficiaries of the future trust in order to determine the "eligible beneficiaries" after the grantor has died.

In a number of ways, the proposed rules would simplify the existing complex rules for revocable and irrevocable trusts. For example, there would be no need to take into account "non-contingent" interests of beneficiaries, which are often difficult to determine, nor to the status of a trust as revocable or irrevocable in determining the insurance rules applicable to such trusts.

Nonetheless, other aspects of the rules would either maintain existing complexities or create new ones. We note these concerns and suggest the following modifications to the proposal:

- *Future Trusts*. The proposed requirement to look through a "future trust" to determine "eligible beneficiaries" would make it harder for individuals to assess the amount insured in a deposit account. This provision would also add considerable burden to compliance with Part 370. ***We, therefore, urge the FDIC to treat beneficiaries in the form of trusts as another single type of "eligible beneficiary" under proposed §330.10(c)(1), as opposed to requiring additional information gathering to determine the "eligible beneficiaries" of that "future trust."***

[5] Also known as "payable-on-death" (POD) or Totten trust accounts.
[6] 12 CFR §330.10(c).
[7] FDIC, 86 *Federal Register* 41766, August 3, 2021, at page 41785.

- *Example for Multiple Beneficiaries Across Multiple Trust Accounts*: ***We suggest the following additional example be included in any final rulemaking to explain the recordkeeping requirements when there are more than five beneficiaries tied to more than one trust account established by the same individual:***[8]

  "Institutions subject to Part 370 must list beneficiaries in the participant file of an informal payable-on-death (POD) revocable trust deposit. When a trust has more than five beneficiaries, the bank is only required to record five of those beneficiaries even though the same account owner has established a deposit on behalf of a formal trust. Therefore, where the grantor has established both a POD with more than five beneficiaries and a formal trust account, the bank need only maintain the beneficiary information for the POD and not the formal trust, which qualifies for alternative recordkeeping under Part 370."

Institutional Trusts with Uninsured Depository Institutions as Grantor and Trustee

Uninsured limited purpose nationally-chartered banks, limited purpose state-chartered banks, and state-chartered trust companies often establish irrevocable trusts for purposes of collectively investing individual fiduciary accounts, issuing corporate or municipal bonds, or forming securitized investments (*e.g.*, common trust funds, collective investment funds (sometimes referred to as "collective trust funds"[9]), indenture bonds, and securitization trusts).[10] Under existing rules, these trusts would potentially fall within the scope of §330.13 for irrevocable trusts, given that they cannot rely upon §330.12, which is reserved solely for accounts where the trustee is an insured depository institution. Nonetheless, these trusts are identical in nature and purpose to institutional trusts with an insured depository institution as trustee.

Under the proposal, these institutional irrevocable trusts would potentially be limited to insurance coverage for only five "eligible beneficiaries," even though there are typically hundreds of underlying investors that are neither natural persons, charitable organizations, nor other non-profit entities (*e.g.*, for pension trusts, family trusts, foundations, endowments, and bond investors).

We therefore urge the FDIC to engage in rulemaking to amend §330.5 and in the interim to issue guidance that these institutional trusts qualify for pass-through insurance. For example, the FDIC rules would look through a collective trust fund ("CTF")[11] to the participating qualified retirement, pension, profit sharing, stock bonus or other employee benefit plans that each have a

[8] FDIC should also provide specific guidance as to how covered institutions must maintain the output file required under Part 370 for the POD and formal trust in the example above (e.g., guidance describing to what account(s) the output file for the POD and the formal trust would link).

[9] See Section 3(c)(11) of the Investment Company Act of 1940 and Section 3(a)(2) of the Securities Act of 1933.

[10] In other words, these uninsured institutions are the *grantors* of these institutional trusts.

[11] Collective trust funds are institutional trusts established for the purposes of collectively investing assets of retirement, pension, profit sharing, stock bonus or other employee benefit trusts exempt from federal income tax that the bank holds in its fiduciary capacity as agent. Some of CTFs are permitted to invest in instruments issued by banks, including time deposits and certificates of deposit, which are entitled to deposit insurance. See 12 CFR §9.18(a)(2) for a description of such trusts.

proportionate interest in the CTF's assets (including insured deposits) as investors entitled to deposit insurance under §330.14. Similarly, the FDIC would look through the common trust fund to the family or other participating trusts[12] entitled to insurance under proposed §330.10.

Proposed Amendment for Principal and Interest in Mortgage Servicing Accounts

The proposal would amend §330.7 to provide that deposit accounts maintained by a mortgage servicer in an agency, independent contractor, custodial, or fiduciary capacity would be covered by FDIC deposit insurance (up to the Standard Maximum Deposit Insurance Amount) for the cumulative balance paid into the account to satisfy principal and interest obligations to the lender, whether paid directly by the borrower or by another party. In addition, foreclosure proceeds directed to the principal and interest obligation of a mortgagor would be included in that individual's insurable balance.[13]

The Associations and our members support the proposed amendments, which would increase FDIC insurance protection for principal and interest payments on mortgages. This would in effect, provide greater security for funds in deposit accounts used for mortgage servicing, including those maintained internally by banks or processed by external mortgage servicers. The result would be more stability in such accounts during periods of turmoil, to the benefit of banks with mortgage servicing accounts, mortgage servicing companies, and investors in mortgage securities backed by mortgage principal and interest payments. This could lead to greater liquidity in mortgage security markets with positive effects on mortgage finance.

We believe that the following three categories of mortgage principal and interest payments should qualify for the proposed extended insurance coverage. ***We strongly recommend that these categories be clarified either as examples in the final rule or in some other manner.***

- ***Interest shortfall payments funded by mortgage servicers.*** Entities that securitize residential mortgages and report under the "scheduled/scheduled" or "scheduled/actual" payment methods[14] require a mortgage servicer to fund into a mortgage servicing account the interest payments through month-end and interest differences as a result of principal-only payments when a mortgage loan is refinanced or paid off prematurely. For example, if a borrower pays off a loan on the 20th of the month, the servicer is required to fund the interest for the remaining days of the month into the mortgage servicing account. These payments, termed "supplemental interest" or "post-settlement interest" in the industry, should be considered interest in a mortgage servicing account on behalf of mortgagors. A similar situation can also arise in commercial and multifamily mortgage loan securitizations where, due to certain prepayments made by a mortgagor, the mortgage servicer may be required to fund "prepayment interest shortfall" into the mortgage servicing account.

[12] Some common trust funds meet the requirements of 12 CFR 9.18(a)(2)(i) and have institutional trust participants (*e.g.*, foundations, endowments, non-US pensions).

[13] FDIC, "Simplification of Deposit Insurance Rules," 86 Federal Register 41766 at page 41788 (www.govinfo.gov/content/pkg/FR-2021-08-03/pdf/2021-15732.pdf)

[14] This includes Fannie Mae, Freddie Mac, the Ginnie Mae, and private entities.

- ***Servicer-funded buyouts and repurchases.*** A servicer of loans in the collateral pool for a mortgage security may elect or be compelled to repurchase a loan out of the pool when a defect is detected. Moreover, a servicer for mortgages in a collateral pool for a Ginnie Mae mortgage security is permitted to buy back a loan that satisfies a certain delinquency status or must buy back the loan in order to execute a loan modification to resolve a borrower's delinquency. Given the current pandemic-induced economic downturn, this population is sizable and a considerable portion of current and anticipated bondholder payments. In buying back the loan to modify, the servicer pays off the unpaid principal balance on the loan plus any interest due into the mortgage servicing account, which should constitute principal and interest in that account on behalf of the mortgagor.

- ***Federal and state programs to help distressed homeowners.*** There are several programs created or administered by federal, state and local governments to assist homeowners with mortgage payments. While many are created as emergency programs lasting for short periods, some have longer lifespans. Some such programs are created by the federal government to provide funds for the states and localities to administer. For instance, in response to difficulties resulting from the COVID-19 pandemic, Congress authorized the Homeowners Assistance Fund (HAF) under the American Rescue Plan Act of 2021 (P.L. 117-2) §3206. This program provided $9.96 million to be allocated to the states, District of Columbia, U.S. territories, tribes or tribal entities, and Department of Hawaiian Home Lands to be used to assist vulnerable homeowners with mortgage, insurance and utility payments, and other specified purposes. Several states, cities and municipalities have, in the past, instituted similar (albeit short-term, emergency) programs to help homeowners that are unable to make mortgage payments due to natural or economic disasters.[15] Part of these funds contribute to principal and interest payments.

Rule §330.7 applies deposit insurance for principal and interest balances held in custodial accounts. However, once a borrower's payment is applied and the borrower is given credit for the payment, principal and interest components are moved to the custodial account to await remittance to investors. How those funds are maintained in custodial accounts is based on investor rules. Importantly, custodial account data is generally maintained at the account, investor, or pool level and not at the loan or borrower level. This accounting difference means that the custodial deposit balance will never reconcile with individual borrower payments due to varying remittance dates, servicing advances and advance reimbursement rules, and other factors.

In this proposal, the FDIC proposes, among other things, to simplify trust rules by eliminating the beneficiary level allocation requirement. This will greatly simplify deposit insurance determinations in a bank failure given that covered institutions do not maintain information on beneficiary allocations for formal trust accounts. ***We ask the FDIC to consider simplifying the insurance calculations for mortgage servicing accounts by removing the borrower-level***

[15] Examples include the Residential Mortgage and Rental Assistance Program from the City of Warren MI (www.cityofwarren.org/how_do_i/residential-mortgage-rental-assistance), CHN Housing Partners Mortgage & Property Tax Assistance Program from Cuyahoga County, OH (https://chnhousingpartners.org/housing-and-community-services/avoid-foreclosure-eviction), and COVID-19 Emergency Housing Relief Program from Hopkinton MA (https://jgpr.net/2021/08/12/town-of-hopkinton-to-offer-covid-19-emergency-housing-relief).

allocation requirement similar to what is proposed for trust accounts. We believe this approach can offer similar benefits in terms of simplified calculations and expedited insurance calculations. Such an approach could, for instance, define the maximum deposit insurance amount available compared to the balance in the account and only insure the lesser of the two amounts. We would be happy to provide data to the FDIC to inform discussions in this regard.

Transition and Other Relief Needed for Insured Depository Institutions

While our members see the value in the proposed amendments, there is concern about the cost and time in implementing them. ***The Associations recommend that the FDIC should provide reasonable and meaningful relief for all insured institutions by allowing at least four years for a delayed effective date and related compliance for any new Part 330 rules***, giving all insured institutions time to amend internal technology systems, revise customer disclosures, and perform other necessary compliance work.

In addition, Part 370 covered institutions will need time to finish implementation of the current rule, plan appropriately in their annual budgeting windows, engage vendors for technology updates,[16] and make adjustments to the Alternative Recordkeeping (*i.e.*, Brokered Deposits Processing Guide) file intake process. As noted above, the need to decide whether to continue implementation of the current deposit insurance rules or wait to see the changes that may be forthcoming at some point in the future creates difficulties for these banks. As the FDIC is well aware, these institutions have already engaged in extensive activities, including making significant IT/infrastructure changes, staff training, and developing policies and procedures to enable deposit insurance calculations internally. These institutions will need to rework plans and make additional changes to comply with the proposed new rules. Reacting to the proposed rules, while simultaneously continuing to ensure compliance with the existing rules is problematic, especially since technology and staff budgets have already been set for next year.

To provide reasonable and meaningful relief for Part 370 covered institutions, we, therefore, urge the FDIC to:

- ***permit covered institutions to amend existing exemption requests and provide extensions for such relief given to account for changes in Part 330***;

- ***postpone Part 370 examinations on the types of deposit account impacted by the proposed rules until at least three years after each bank's first certification following the effective date of the new rules***, giving covered institutions time to focus resources on upgrading their technologies and implement any new requirements applicable to deposit accounts for trusts and mortgage servicing;

- ***limit annual certification requirements under §370.10(a) with respect to testing and corresponding chief executive officer or chief operating officer attestation to apply only for technology that has undergone material changes during the year over the period of***

[16] For example, changes to Health Savings Accounts that have REV ORC effects.

implementation of any changes in Part 330. By the time such changes would go into effect, covered institutions will have performed two years of full testing of the Part 370 technology requirements, providing baselines for each institution's capabilities, so only material changes would need to be tested. Such relief would allow the institutions to shift resources to make changes for the new rules; and

- ***waive the requirements for maintaining certain recordkeeping on grantors in the normal course of business***. Maintaining grantor information does not facilitate processing formal trust accounts in a bank failure because, lacking information on beneficiaries, these trusts would remain in the Pending File. Information on grantors would be of little or no value in resolving these accounts because grantors are not primary contacts for trusts. Instead, information on trustees would be useful, as trustees are primary contacts for trusts and bank maintain information on trustees. Covered institutions are spending considerable time and effort collecting information on "grantors" for trust deposits. Although grantor information will continue to affect the insurance determination of such deposit accounts, we urge the FDIC to provide reasonable sufficient relief as described in our September 16, 2021, letter on 12 CFR Part 370 compliance concerns.[17]

* * *

Thank you for considering our suggestions. If there are any questions, please do not hesitate to contact the undersigned.

Very truly yours,

[redacted]

Phoebe Papageorgiou
American Bankers Association

[redacted]

Dafina Stewart
Bank Policy Institute

[redacted]

Robert W. Strand
American Bankers Association

[redacted]

Fran Mordi
Mortgage Bankers Association

[17] ABA Letter to John P. Conneely, FDIC, regarding Part 370 Compliance, *available at* www.aba.com/advocacy/policy-analysis/letter-to-fdic-on-part-370-compliance.

Cc: Ryan P. Tetrick
Associate Director
Division of Complex Institution Supervision and Resolution
Federal Deposit Insurance Corporation

Teresa J. Franks
Associate Director
Operational Readiness and Assurance
Division of Complex Financial Institutions Supervision and Resolution
Federal Deposit Insurance Corporation

Cassandra T. Knighton
Acting Section Chief, Claims Administration
Division of Complex Financial Institutions Supervision and Resolution
Federal Deposit Insurance Corporation