May 13, 2019

Robert E. Feldman, Executive Secretary Federal Deposit Insurance Corporation
550 17th Street NW, Washington, DC 20429

Attention: Comments

RE: Notice of Proposed Rulemaking: Recordkeeping for Timely Deposit Insurance Determination, 12 CFR §370, RIN 3064–AF03[1]

Dear Mr. Feldman:

The American Bankers Association, The Bank Policy Institute, and the Consumer Bankers Association (collectively, the Associations)[2] are pleased to submit this response to the Notice of Proposed Rulemaking (Proposal) from the Federal Deposit Insurance Corporation (FDIC) to revise 12 CFR §370, "recordkeeping for timely deposit insurance determination" (Part 370).[3] We support the intent of the Proposal – to clarify its requirements, better align the burdens of the rule with its benefits, and make technical corrections – consistent with the purpose of Part 370 – to allow the FDIC to resolve expeditiously a failing institution with a large number of deposit accounts.[4]

After consulting with representatives from all of the institutions currently subject to Part 370 (covered institutions or CIs),[5] the Associations support most of the proposed amendments. However, some changes and additions to these amendments would better align Part 370 with the stated aim of the Proposal: to reduce the compliance burden on CIs,[6] in recognition that adherence to the rule will continue to impose immense expense and burden on CIs. We recommend that amendments to Part 370 should –

- retain the current language in §370.4(b)(2)(iii) so that CIs are required to maintain only the "pending reason" code for certain trust deposit accounts;

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[1] FDIC, Notice of Proposed Rulemaking: Recordkeeping for Timely Deposit Insurance Determination (12 CFR §370), 84 *Federal Register* 14814, April 11, 2019 (www.govinfo.gov/content/pkg/FR-2019-04-11/pdf/2019-06713.pdf).

[2] Descriptions of the Associations are provided in the Appendix.

[3] The current rule is posted to www.fdic.gov/regulations/laws/rules/2000-9200.html.

[4] Proposal, page 14814.

[5] Rule 12 CFR §370 requires a bank with at least two million deposit accounts to maintain complete and accurate depositor records and also develop capabilities in its information technology system to the point that the FDIC could use it to make prompt deposit insurance determinations, should the bank fail.

[6] Proposal, page 14814.

- eliminate the requirement to maintain unique identifiers for grantors of trusts under §370.4(b)(2)(ii);

- exempt clearing deposit accounts from Part 370 treatment;

- authorize for omnibus settlement deposit accounts and American Depository Receipts (ADRs) the same treatment as for "official items" under §370.4(c);

- not require under §370.4(d)(1) or elsewhere in Part 370 information technology (IT) system capability to restrict access to credit balances on loans or on equivalent deposit balances for the corresponding loan customers;

- set a cutoff threshold under proposed §370.4(d)(2)(i) below which credit balances on open-end loans would not be required in the credit balance files;

- allow the same treatment under §370.5(b)(1) for all mortgage servicing deposit accounts, regardless of whether they are maintained at a CI by the CI itself or by an external servicer;

- confirm that "transactional features" does not apply to deposit accounts maintained with a CI by a broker-dealer for its customers under a program that permits them to transfer funds in connection with their securities accounts, as long as such transfers are not permitted directly from the deposit accounts and debits in the securities accounts resulting from such transfers may be satisfied by transfers from their deposit accounts at the CI to separate deposit accounts of the broker-dealer at the CI or elsewhere;

- provide for "qualified certification" under §370.10(a)(1) where areas of noncompliance have been identified and recognized by the FDIC;

- permit under §370.10(d) at least 18 months to return to compliance with Part 370 after enactment of a law that leaves CIs non-compliant, and under §370.10(e) at least two years to return to compliance after an acquisition or merger; and

- make the government ID field in the Output files optional to include when available (*e.g.*, for CS Gov ID in the Customer File and Output Files Structure in Appendix B).

Additionally, the Associations urge the FDIC to consider the optional, focused approach to compliance with Part 370 that is outlined at the end of this letter.

These recommendations and analysis of the Proposal follow.

1. Voluntary Compliance with 12 CFR §370

As proposed, under new §370.2(d)(3), a non-CI bank would be authorized to comply voluntarily with Part 370, and thereafter not be subject to §360.9, after it submits the reports provided for under §370.10(a).[7]

The Associations note that a bank might voluntarily submit to compliance with Part 370 if an affiliated bank is subject to the rule and the holding company finds it efficient to comply across the organization. Otherwise, a bank might elect to comply so that it can have and make available to deposit customers precise values for insured balances that are calculated through a process confirmed by FDIC review. We therefore support this modification to Part 370.

2. Alternative Recordkeeping Requirements for Certain Trust Accounts

Under the Proposal, the FDIC would eliminate §370.4(a)(1)(iv) and thereby permit "alternative recordkeeping" for irrevocable trust deposit accounts for which a CI acts as trustee and are insured pursuant to 12 CFR §330.12 (DIT accounts).[8] In other words, the bank would not need to provide a unique identifier for beneficiaries entitled to deposit insurance, nor for the grantor if the account does not have transactional features. In addition, §370.4(b)(2)(iii) would be amended to require CIs to maintain for certain trust deposits records corresponding "right and capacity" codes, eliminating the requirement to record "pending reason" codes.[9]

The Associations support the amendment to permit "alternative recordkeeping" for DIT accounts. We understand that most banks maintain significant information on trusts for which they act as trustee, including information on grantors and beneficiaries. However, this information, especially for beneficiaries, may not be complete at all times due to changes in beneficiary status that may affect deposit insurance coverage. Ultimately, the decision about the insurance status of a particular trust will likely be determined with individualized review of the beneficiaries and other facts and circumstances, a process that the "alternative recordkeeping" provision facilitates.

With respect to the proposed changes in §370.4(b)(2)(iii), we respectfully request that the current language be retained so that a CI would need to maintain only "pending reason" codes for certain trust deposit accounts. Provisions in the trust agreement may alter the "right and capacity" of a trust without the bank's knowledge, especially when it is not trustee. For example, the bank may not be informed that a revocable trust has turned irrevocable. However, the bank will know the reason why it does not have current information on all beneficiaries, and therefore would be able to record the "pending reason" code.

The Proposal seeks comment on the practice and ability of CIs to obtain grantor information on trusts for which the bank is not trustee. Although the grantor's name may have been recorded in the trust certification or other documentation when the account was opened, a unique identifier, such as

[7] Proposal, page 14816.
[8] Proposal, page 14821.
[9] Proposal, page 14821.

a Social Security number, may not have been required or obtained. Further, whatever identifying information for the grantor was obtained is likely recorded on a records system other than that for deposits, such as a paper file.

The Associations recognize that deposit insurance calculations for trust deposit accounts cannot be completed without both grantor and beneficiary information. However, banks do not need to store this information, as it is obtained during resolution of a bank along with the beneficiary information required for deposit insurance calculations.

Moreover, because CIs are not required to maintain beneficiary information under "alternative recordkeeping," the recording of grantor information alone is of no benefit. Requiring CIs to obtain and input grantor information that they do not and are not otherwise required to maintain would essentially duplicate much of the post-closing process of contacting trustees to identify beneficiaries, yet still would not allow CIs to achieve the Part 370 goal of being able to complete deposit insurance calculations.

For these reasons, the Associations request elimination of the requirement to maintain unique identifiers for grantors of trusts under §370.4(b)(2)(ii).

3. Recommended Treatments under 12 CFR §370 for Settlement Deposit Accounts

Current §370.4(c) on "recordkeeping requirements for official items" requires that –

> A covered institution must maintain in its deposit account records the information needed for its information technology system to meet the requirements set forth in §370.3 with respect to accounts held in the name of the covered institution from which withdrawals are made to honor a payment instrument issued by the covered institution, such as a certified check, loan disbursement check, interest check, traveler's check, expense check, official check, cashier's check, money order, or any similar payment instrument that the FDIC identifies in guidance issued to covered institutions in connection with this part. *To the extent that the covered institution does not have such information, it need only maintain in its deposit account records for those accounts the corresponding "pending reason" code in data field 2 of the pending file format set forth in Appendix B (and need not maintain "right and capacity" codes).* (Emphasis added)

The Associations urge that settlement deposit accounts be afforded the same treatment as "official items" under §370.4(c). A settlement account operates in a fashion similar to that of the paper-based payment instruments cited in §370.4(c), where funds are withdrawn from a customer's account then held in an internal account "in process" and co-mingled with other-like funds until the bank can send them to a receiving bank. For example, when a customer initiates an inter-bank person-to-person transaction through online banking, the funds are debited from the customer's ledger balance and placed in a settlement account. For risk reasons, some banks place outgoing funds in a settlement account for more than a day before remitting them to a receiving bank. Should the bank fail, clawing back allotments from these omnibus accounts would take time and require manual intervention, posing the same difficulties in resolution as for "official items."

Another example of settlement deposit accounts that warrant §370.4(c) treatment akin to "official items" is omnibus accounts held by CIs in connection with their business as ADR depositories. An ADR is a negotiable certificate issued by a U.S. bank and traded on a U.S. exchange that represents a specified number of shares in the stock of a foreign issuer. An ADR depositary bank (DR Bank), among other things, distributes ADR dividends and other cash to purchasers of ADRs using a process involving intermediaries. The DR Bank receives payment of cash distributions on the foreign shares underlying the ADRs from the foreign share issuer (the DR Bank's client), converts that cash to U.S. dollars, and begins the process of distributing the payments to ADR holders. U.S. dollars are deposited in a deposit account at the DR Bank (the Deposit Account) for a short period of time, typically three-to-five business days, before the DR Bank begins distributing this cash. On the ADR payment date, the DR Bank distributes U.S. dollars to ADR holders of record as reflected on an ADR share register.

Most ADR investors hold their ADRs through brokers, custodians, or other intermediaries. These "street" positions are reflected in aggregate on the ADR share register as an omnibus position of CEDE and Co, the nominee name of the Depository Trust Company (DTC). The DR Bank does not know each DTC participant. Although DR Banks could obtain a list of direct DTC participants from DTC (at cost), those DTC participants are brokers, custodians, banks, and intermediaries only, and are not the ultimate beneficial owners of the ADR dividends, and those DTC participants and intermediaries may be unable or unwilling to disclose their clients (who in some cases are the ultimate beneficial owners of the ADR dividends) to the DR Bank. Therefore, identifying the ultimate beneficial owner due the dollars temporarily held in a deposit account at the DR Bank is not feasible. This presents a situation similar to that of accounts held at a bank to honor "official items" or settlement accounts, and we believe that the approach outlined in §370.4(c) is similarly appropriate for ADR accounts.

The account types described above are examples of settlement deposit accounts for which, to the extent the CIs does not have the information needed to meet the requirements of §370.3, it should be permitted to maintain in its deposit account records for those accounts only the corresponding "pending reason" code data field 2 of the pending file format. Similar "official items" treatment should be authorized for other types of settlement accounts that serve a range of payment and remittance functions at the CIs.

4. Recommended Treatments under 12 CFR §370 for Clearing Balances

A clearing account at a bank involves funds held in an internal account on the general ledger system or system of record that represent transactions and balances that require reconciliation or manual review before they can be allocated to accounts. In other words, these funds are in clearing accounts because errors have occurred or they are otherwise in-process such that the proper customers and account assignments have not yet been confirmed.

The Associations recommended that these accounts be excluded from Part 370 processing; they should instead be treated as "in-process" transactions and allowed to post and settle business as usual, mirroring treatment for other in-process transactions initiated prior to close-of-business and

awaiting settlement when a bank is placed in resolution. Deposit insurance calculations cannot be performed for balances that have not yet been assigned to customers. CI bankers advise that cascading complications could occur if clearing balances were treated as any other deposit account so that holds were placed following collapse of the bank; this would forestall reconciliation of accounts and delay distribution of funds to insured depositors.

5. Recordkeeping Requirements for Deposits from Loan Credit Balances

As proposed, a new paragraph §370.4(d) would address deposits that consist of credit balances on loans.[10] New §370.4(d)(1) would require that a CI's IT system be capable of restricting, as of the close-of-business on any day, access to either loan credit balances or else an equal amount in the deposit balance for every deposit customer that also has a loan credit balance. New §370.4(d)(2)(i) would require that a CI's IT system be able to generate a file for loan credit balances in the format of Appendix C. For credit balances on open-end loans (revolving credit lines), the file would have to be producible within 24 hours of the CI being taken into resolution.

Treating credit balances on loan accounts as deposits to integrate into Part 370 processing has troubled CIs from the outset. They do not see the proposed §370.4(d), taken as a whole, as a positive solution. However, the Associations recognize the desirability of incorporating the file production aspect of the Proposal into the rule, as described below.

The key point remains that loan credit balances are almost always far smaller than the SMDIA and, depending on the institution, loan customers do not overlap significantly with deposit customers. Where either or both of these conditions are present, which is the case at almost all CIs, loan credit balances are likely to have a minimal impact on deposit insurance calculations. By contrast, developing capabilities to be able to include these amounts in the deposit insurance calculations would be an involved and expensive undertaking.

"Option A," where CIs would develop systems capable of restricting access to loan credit balances, seems like overkill for so minor an impact on deposit insurance determinations. Asking CIs to configure multiple deposit systems for insignificant balances would mean significant cost and complexity. Moreover, restricting access to loan overpayments for all credit customers would frustrate many whose deposits, if any, plus credit balances are below the SMDIA. Particularly troubling with respect to credit card accounts, the intricate systems banking firms have developed to protect customers do not distinguish between debit and credit balances. It is not clear how these processes could be adjusted to make such distinctions and place holds on credit balances. It is not as if the bank could simply take a snapshot of credit card accounts to identify credit balances as of close-of-business when the issuing bank fails; a cardholder may have incurred transactions earlier in the day that will enter the system for processing later. Therefore, to employ "Option A," a CI may have to freeze all credit card accounts for which there are credit balances. This would cause major problems for a significant number of consumers who rely on credit card transactions for daily purchases, frustrating the FDIC's goal of smooth transition for depositors.

[10] Proposal, page 14823.

Moreover, CIs face major challenges to link loan credit balances to customers' deposit accounts because certain information, such as ownership rights and capacities, is not gathered systemically for loan products and in most cases does not align with information for deposit products.[11] Further, integrating deposit systems with loan systems across multiple lines of business would be very difficult. For these reasons, CIs would not be interested in "Option B" to develop systems capable of computing, then restricting, deposit balances associated with loan credit balances.

As to the proposed requirement under §370.4(d)(2)(i) for capacity to produce an Appendix-C-compatible file on open-end loan credit balances within 24 hours of the CI being placed into resolution, representatives from the CIs report that such files could be produced, but with much difficulty due to differences in data inconsistencies and capture between loan and deposit systems. The Associations recommend that any requirement to match customer information between deposit and loan systems apply only for large credit balances, for which the pairing could be performed manually.

In sum, to support accurate deposit insurance determinations and also limit the operational cost of integrating loan credit balances into Part 370 processing, consistent with the Proposal's overall purpose, the Associations suggest adjustments to §370.4(d) as proposed:

- For credit balances on open- or closed-end loans, IT systems should not be required to be capable of imposing restrictions on loan credit balances or on equivalent deposit balances for the loan customers as under proposed §370.4(d)(1).

  For loan accounts with credit balances for which there are associated deposit accounts, a CI can provide a list of combined balances for each ORC. For those that exceed the SMDIA, the FDIC would be able to adjust insured-versus-uninsured balances to make sure that only truly insured amounts are paid out.

- A cutoff size should be established under proposed §370.4(d)(2)(i) below which credit balances on open-end loans would not be required in the credit balance files.[12]

6. Deposit Accounts with Pass-Through Insurance Converge and Transactional Features

For a deposit account for which records of the relationship and interests of the beneficial owners are not maintained by the CI, and the account has "transactional features," the Proposal would amend §370.5(a) to require the CI to "take steps reasonably calculated to ensure that the account holder will provide to the FDIC the information needed for the CI's information technology system to calculate deposit insurance coverage … within 24 hours after the appointment of the FDIC as

[11] Overpayments typically result from customer oversights and are refunded upon request, promptly spent down, or ultimately must be refunded within six months (Federal Reserve Regulation Z §1026.11(a)(3)). Large overpayments often indicate scams, fraud, or money laundering and are investigated.

[12] The Associations suggest that §370.4(d)(2)(i) specify the cutoff for reporting open-end loan credit balance information at "$50,000 below the SMDIA."

receiver."[13] At a minimum, "steps reasonably calculated" would have to include[14] –

- contractual arrangements that obligate the account holder to deliver all the information needed for deposit insurance determination to the FDIC in a format compatible with the CI's IT system immediately upon the CI being taken into resolution; and
- disclosure to the account holder that delay in delivery of information to the FDIC, or submission in a format incompatible with the CI's IT system, could result in delayed access to deposits.

The current §370.5(c) provides that a "CI's failure to provide the certification required … shall be deemed not to constitute a violation … if the FDIC has granted the CI relief …" This would be deleted as no longer necessary.

CIs appreciate the proposed changes that apply to pass-through accounts for which a CI does not maintain the information needed for deposit insurance calculations. The proposed changes, which would eliminate the current requirement for CIs to certify to what their accountholders will do, would streamline the process for CIs to build compliant solutions without sacrificing Part 370's overall objectives.

Rather than directing CIs to attest to what pass-through accountholders will do, the proposed amendment takes a pragmatic approach to require instead that a CI take reasonable steps to ensure that holders of pass-through accounts with transactional features will provide the information to complete the deposit insurance calculation when needed. It specifies that contract language with such accountholders must require them to deliver that information in timely fashion and disclosure that any interruption in doing so could delay access to account funds.

These enumerated requirements are sufficient to achieve the FDIC's overall objectives. Deposit agreements will be amended to expressly inform pass-through accountholders of the information they need to maintain, and the format in which they need to maintain it, for timely resolution of their accounts. Most pass-through accountholders will likely update their systems to comply with these requirements, to avoid any delay in accessing the account balances due to non-compliance.

As a practical matter, the proposed changes to §370.5 recognize the reality of pass-through accounts. Simply put, up-to-the-minute balance information for beneficial owners of these accounts is not available to CIs, so accountholders must bear some responsibility for their resolution. As stated in the proposed amendment, a CI can take steps that are reasonably calculated to ensure participation by pass-through accountholders, but beyond that the accountholders themselves must be part of the solution.[15]

There has been discussion of distinguishing pass-through accounts with transactional features from other types of pass-through accounts. One of the benefits of the proposed amendment is that a CI

[13] Proposal, page 14819.
[14] Proposal, page 14819.
[15] Proposal, page 14819.

can streamline compliance, if it chooses to do so, by treating all pass-through account holders the same. That is, a CI can leverage the required contract language with all of its pass-through account holders and make the required disclosure to all pass-through account holders. Some CIs may elect this course to simplify implementation of Part 370 and because holders of accounts without transactional features may appreciate the opportunity to opt into a regimen that may expedite resolution of their accounts should the bank fail.

For the foregoing reasons, the CIs and Associations support the proposed amendments to §370.5. Moreover, we wish to express our appreciation for the FDIC managers who have been working collaboratively with bankers to support drafting of model language to satisfy the contract and disclosure requirements.

7. Expanded Exemption for Deposit Accounts from External Mortgage Servicers

For deposit accounts comprised of payments by mortgagors of principal, interest, taxes, and insurance for which information on the mortgagors is maintained by mortgage servicers (in a custodial or other fiduciary capacity) that are external to the CI, and the accounts have transactional features, a CI is currently exempted under 370.5(b)(1) from the 370.5(a) requirement to assure that the mortgage servicers would provide information to the FDIC on the mortgagors within 24 hours of the bank being placed in receivership. The Proposal would expand the exemption to all of the mortgagors' payments, not only those for principal, interest, taxes, and insurance.[16]

The Associations support the expanded exemption for deposit accounts from external mortgage servicers. The mortgage servicing systems employed by most CIs do not have the capability to identify depositor account-level information on the principal, interest, taxes, insurance, or related balances in those accounts, except at predetermined reporting dates. Therefore, for those accounts, relief is needed from the steps required in §370.5(a).

However, the Associations recommend that the exemption be broadened to also apply to mortgage servicing accounts maintained by CIs. Under the revised 370.5(b)(1), a CI would be permitted to treat a deposit account maintained by a mortgage servicer outside the bank using the "alternative recordkeeping" methodology per §370.4 without taking further steps for these accounts per the proposed §370.5(b). In contrast, in situations in which the CI is the mortgage servicer, it would be required to have processes in place to calculate deposit insurance associated with the account within 24 hours of being placed in resolution. We see no reason to treat mortgage servicing accounts differently depending on the servicer. Moreover, the costs that CIs must bear to maintain mortgage servicing accounts to comply with §370.4(a) could drive business away from CIs as servicers. We believe that this is not the FDIC's intent. Accordingly, we recommend that all mortgage servicing deposit accounts receive the same treatment under §370.5(b)(1), regardless of whether the account is maintained by a CI or an external mortgage servicer.

[16] Proposal, page 14820.

8. Exceptions for Certain Custodial Deposit Accounts

The Proposal would add additional types of fiduciary accounts to be exempt under §370.5(b)(4) from 370.5(a) (which requires CIs to assure that the account custodians would provide information to the FDIC on the beneficiaries within 24 hours of the bank being placed in receivership).[17] The added deposits account types would include trust accounts maintained for –

- formal revocable trusts per 12 CFR §330.10,
- irrevocable trusts per 12 CFR §330.12, and
- irrevocable trusts per 12 CFR §330.13.

Exemption of the three types of trust accounts from processing during the first 24 hours of resolution of a CI is a positive move. Although such an account may have transactions features, a CI may not be able to identify the beneficiary in advance because of various state laws governing trusts. Should the CI be taken into resolution, trying to process these accounts in the succeeding 24 hours would be difficult-to-impossible, given the number of agents and custodians that would be involved in the submission of information.

Delayed access of funds for these accounts with transactional features may impact the beneficiaries. However, the information needed by the FDIC to free up the funds would be straightforward and could be communicated quickly through the agent or custodian. For example, the information could be provided in an Excel spreadsheet that could easily be converted to a format needed to process the beneficiaries through deposit insurance calculation.

9. Elective Extension of the Compliance Date

Proposed new section §370.6(b)(2) would permit a CI that is currently subject to the rule to extend implementation to April 1, 2021, by notifying the FDIC.[18] The notification would need to disclose the number of, and amount of deposits in, accounts for which the bank's IT system will be unable to calculate FDIC insurance coverage as of April 1, 2020.

The CIs have expressed broad support for this modification. The Associations recommend that the option to extend implementation by a year should be available to all CIs. Ever since Part 370 went into effect two years ago, the CIs have worked diligently to fill gaps in deposit account data and upgrade IT systems to comply. Nonetheless, a number of interpretive issues and systems challenges have arisen despite the best efforts of the CIs.

When Part 370 was originally proposed, the Associations observed that the IT system enhancements required for compliance would involve major development projects at a time when key resources in the CIs were (and continue to be) under pressure to enhance data security systems

[17] Proposal, page 14820.
[18] Proposal, page 14815.

and make other changes to comply with a range of other new rules. We therefore requested at least four years to implement the rule and were disappointed when it provided only three years.[19]

Moreover, in developing processes to apply Part 370 and related expectations in subsequently issued guidance, the CIs have encountered many issues for which they requested clarifications and interpretations from the FDIC. We appreciate the diligence of FDIC staff in working with the bankers. However, this process has taken time, as that staff have been learning about the compliance challenges along with the CIs, and have been careful to present suitable answers. Nonetheless, CIs' progress in implementing the rule has been affected by these delays.

Further, the CIs gratefully appreciate the amendments proposed for Part 370, as well as those for 12 CFR §330. These refinements address some of the insurmountable challenges that have been the source of spirited discussion among the CIs and the FDIC ever since the rule became final. The significant amount of time it has taken to resolve these challenges, which the two proposals now aim to do, has significantly hindered progress in implementing the rule.

Even where challenges have been resolved, it may not be reasonably feasible for CIs to modify systems and operations to the point that their senior executives are comfortable certifying to compliance by April 1, 2020. Elective extension of the compliance date would give them time to bring systems and operations into compliance, eliminating the need for multiple requests for exceptions. Consequently, all CIs would value an option to extend the compliance deadline to April 1, 2021.

10. Amendments to the Definition of "Transactional Features"

The Proposal would amend §370.7 to provide that a deposit account has "transactional features" if –

- it "can be used to make transfers to parties other than the account holder, the beneficial owner of the deposits, or the CI itself, by use of a method that results in the transfer not being reflected in the close-of-business ledger balance for the account on the day the transfer is initiated," or
- "preauthorized or automatic transfer instructions provide for transfers to an account with transactional features at the same institution."[20]

The Associations appreciate the difficulty in defining "transactional features" precisely. CIs are in the best position to determine the scope and nature of various arrangements for which deposit accounts are treated under "alternative recordkeeping," and the resulting impact on their beneficial owners. We therefore believe that the revised definition better supports the FDIC's ability to determine deposit insurance coverage promptly. This definition, along with the proposed changes in §370.5, would enable CIs and the FDIC to make timely and accurate insurance determinations.

[19] See the Associations letter to Robert Feldman of June 27, 2016, regarding the "notice of proposed rulemaking regarding recordkeeping for timely deposit insurance determination" of February 26, 2016 (ww.fdic.gov/regulations/laws/federal/2016/2016_recordkeeping_3064-ae33_c-12.pdf).

[20] Proposal, page 14818.

The Proposal notes that the current definition of "transactional features" has fewer benefits and greater compliance burdens than expected, given the structure of various deposit broker and prepaid card programs. The Associations request that the FDIC confirm in writing that broker-dealer sweep arrangements are intended to be excluded, because they only involve transfers between accounts held in the name of the broker. Specifically, we request that the FDIC confirm that the term "transactional features" does not apply to deposit accounts maintained with a CI by a broker-dealer for the benefit of its customers as part of a program it offers whereby these customers may have transfer capabilities (such as check writing, debit card, *etc.*) in connection with their securities accounts, as long as –

- such transfers are not permitted directly from the deposit accounts with the CI; and
- debits in the customers' securities accounts created by their use of these transfers may be satisfied by transfers from their deposit accounts at the CI, as instructed by the broker-dealer, to separate deposit accounts maintained by the broker-dealer at the CI or elsewhere for purposes of satisfying such debits.

11. Simplification of Applications for Exceptions from Part 370 Deposit Account Processing

The Proposal would amend §370.8(b) to clarify the required elements of a request for an exception from treatment under Part 370 for a certain type of account, and expressly allow submission of a single request on behalf of multiple CIs.[21] Under a new §370.8(b)(2), the FDIC would publish in the *Federal Register* responses to exception requests, keeping private the identity of requestors and other information confidential to their institutions. A new §370.8(b)(3) would permit a CI to use a published exception immediately after notifying the FDIC that "substantially similar facts and the same circumstances" apply; the FDIC would have up to 120 days to deny that usage.

The Associations enthusiastically support these changes, which would clearly help CIs submit applications for exceptions and reduce the number of submissions needed. Perhaps more important, these provisions would help FDIC staff process applications expeditiously. All in all, these will help the FDIC and CIs address the inevitable special cases that arise in implementing such an involved and detailed program.

Representatives from the CIs report that they believe they will be able to interpret cases for which account types in their banks involve "substantially similar facts and the same circumstances" as those for which the FDIC provides public notice of granting exceptions. However, they feel that 120 days is too long a span for the FDIC to invalidate such an interpretation. They would be concerned with the cost and delay of progressing with Part 370 implementation for four months only then to have to backtrack to treat accounts understood to be excused. The Associations recommend that the FDIC should limit any delay in providing notice of denials to 60 days.

[21] Proposal, page 14823.

12. Senior Executive Certification to the Institution's Compliance with 12 CFR §370

The Proposal would amend §370.10(a)(1) to require a CI's chief executive officer or chief operating officer to certify that "testing indicates that the institution is in compliance" with Part 370 (not just "has successfully tested," as in the standing rule).[22] That testing must be completed "during the preceding twelve months" of the initial compliance date (rather than "during the preceding calendar year" in the standing rule). In a refinement, the certifying executive would be required to certify that he or she has taken reasonable steps to ensure and verify that the certification is accurate and complete "to the best of his or her knowledge and belief after due inquiry."[23]

As a general matter, the Associations continue to disagree with a requirement for a senior executive to certify to an institution's compliance with Part 370. Such certification is unnecessary to ensure that the institution will make compliance a priority. Compliance with laws and regulations – Part 370 and all others – is a priority for every banking organization, and senior executives are held responsible to ensure that compliance. Moreover, the standard bank supervision and examination process serves as an effective, efficient, and simpler way to ensure CI compliance with this rule. Layering an additional chief executive or operating officer certification requirement on top of the existing, already-sufficient regulatory and supervisory framework has no incremental value, though it does involve cost and complexity. Thus, our first recommendation is that the certification requirement be eliminated in its entirety in favor of the FDIC's existing supervisory review regime.

In the event the FDIC retains the certification requirement, the Associations support the "knowledge and belief" qualifier that would be amended by the Proposal. However, we recommend that the certification should take account of situations in which all capabilities may not be implemented fully or in which there may be areas of noncompliance or requiring improvement. The CIs have been assured repeatedly by FDIC managers that, when a CI is making a good faith effort to implement Part 370, they will be patient with elements of that implementation that have been identified and accepted by them as under construction. There is recognized risk that certifying executives could expose themselves to liability if they attest that "testing indicates that the institution is in compliance" when there are acknowledged deficiencies. The Associations therefore recommend that §370.10(a)(1) be further amended to provide for a qualified certification that identifies areas of noncompliance that require improvement.

[22] Proposal, page 14815.
[23] Proposal, page 14816.

13. Time Allowance Following a Change in Law, Acquisition or Merger to Return to Compliance with 12 CFR §370

As amended, new §370.10(d) would provide a grace period for CIs to come into compliance with Part 370 after any change in law that makes them noncompliant.[24] New §370.10(e) would provide up to a year for a CI to return to compliance with Part 370 following an acquisition or merger.[25]

Representatives from the CIs indicate that they would need at least 18 months to update data records and make system changes to return to compliance, should any legislation leave them non-compliant. The predecessor rule 12 CFR 360.9 provides for at least 18 months to re-achieve compliance following legislative change, so the more involved Part 370 rule warrants at least as long an adjustment period.

Based on their experience with mergers and acquisitions, including deposit assumption transactions, CIs recommend that one year is not enough time to return to compliances with Part 370. The first year after a consolidation, the surviving institution is focused on assuring its success. Simply merging systems of record takes a year or more. Only after that would there be time to devote to updating processes to incorporate the additional systems and data to comply with Part 370. This is especially true when the acquired bank or merger partner was not previously a CI. Accordingly, the Associations ask that CIs be allowed two years following completion of the deal to regain compliance with the rule.

We note that an inadequate regulatory adjustment period, threatening supervisory retaliation for noncompliance, would become an artificial barrier to beneficial consolidation transactions. Further, this would discourage CIs from acquiring troubled banks, raising the cost and time needed for the FDIC to resolve troubled institutions.

14. Potentially Problematic Fields in the Data File Templates

The Associations agree with the technical amendments and corrections listed in the Proposal.

In response to the request in the Proposal to identify "fields for which a null value is not permissible, but for which a CI does not maintain the relevant data,"[26] some CIs have reported that the following required fields per file as potentially problematic.

- CS Gov ID in the Customer File: The text of 12 CFR §330 and current Part 370 do not require CIs to maintain government ID numbers in their deposit recordkeeping systems. Part 370 requires a "unique identifier" that "may be, but is not required to be, a

[24] Proposal, page 14816.
[25] Proposal, page 14816.
[26] Proposal, page 14825.

government-issued identification number."[27] A backdoor requirement to maintain government ID numbers through the Part 370 output files defeats the point of adopting the "unique identifier" concept. As a practical matter, CIs likely do not have government ID numbers in their deposit systems for every single deposit account. Some customer records may date back decades or have been acquired by acquisition, in which case records may be missing government ID numbers. Further, while under "Know Your Customer" and Bank Secrecy Act Anti-Money Laundering requirements, CIs are expected to have a government ID number for almost all customers somewhere within the institution, this data may be held in paper or scanned documents or otherwise away from the deposit systems and cannot be linked to deposit systems without extensive manual review.

- DP Hold Amount in the Account File: The utility of this item is unclear; any account balance in the Account file is by definition complete so any hold amount should be nil. On the other hand, reporting this item involves unnecessary complexity for non-deposit systems that do not normally place holds.

- AP Gov ID in the Participant File: CIs may not have government ID numbers for all account participants. For example, when a customer opens a trust account, some do not request TIN's for beneficiaries that are not customers, and state law may not allow a bank to request such information.

- CS Unique ID in the Pending File: How is CS Unique ID different from the PT Parent Company ID for a record in the pending file? The PT Parent Company ID is, "This field contains the unique identifier of the parent customer ID who has the fiduciary responsibility at the CI". How do we use both these fields in the same record? For records in the pending file, only the parent company (fiduciary) would be known, and they are the account holder. Therefore, would not the CS Unique ID field be blank for pass-through accounts in the pending file?

- DP Hold Amount in the Pending File: The utility of this item is unclear; any account balance in the pending file should by definition have a hold amount for the balance shown in the DP Current Balance Field. However, reporting this item involves unnecessary complexity for non-deposit systems that do not normally place holds.

- Output Files Structure in Appendix B: A reference states that "[t]he unique identifier and government identification are required in all four tables so those tables can be linked where necessary."[28] However, current file requirements require Gov ID in only three files; Account file does not have a Gov ID field. Moreover, other references suggest that it is the Unique Identifier that is required in all four files for linking. As stated above, current Part 370 does not require CIs to maintain government ID numbers, and the preamble to the final

[27] FDIC, Final Rule: Recordkeeping for Timely Deposit Insurance Determination, 81 *Federal Register* 87734, December 5, 2016 (www.govinfo.gov/content/pkg/FR-2016-12-05/pdf/2016-28396.pdf), page 87738.

[28] Proposal, page 14834.

rule confirms that CIs need not use government ID numbers as unique identifiers.[29] The Associations request that this reference be corrected to remove any implication of an independent requirement to maintain government ID numbers.

15. A Proposal to Allow an Option to Employ Focused Part 370 Processing

As currently written, Part 370 does not promote a focused approach for situations in which CIs should devote the most effort and investment to those deposit accounts for which the rule creates the biggest challenges. Instead, it mandates treatment of all accounts. Consequently, CIs have been obliged to create priorities and allocate expenses across the entire enterprise, even to small accounts with balances that never approach the SMDIA. This does not comport with the stated intent of the proposed amendments, to limit the compliance burden of Part 370.

The Associations propose instead an amendment to Part 370 to permit an optional focused approach to compliance, which a CI could elect to employ by notifying the FDIC. In this approach, the FDIC would name a dollar threshold that is below the SMDIA, then all customers whose total relationship of deposit balances (TRDB) falls below that level would be excluded from Part 370 treatment.[30] The customer's TRDB would include all deposits, as defined in 12 CFR §1813(l), that are owned by that customer. The CIs would be required to track customer TRDBs quarterly, and any whose TRDB exceeds the threshold as of the initial compliance date would be subject to full Part 370 treatment. Subsequently, the CI would be allowed three months to bring into compliance any customer account for which the TRDB rises above the threshold, and simultaneously would need the ability to hold any and all balances if the CI failed.

This approach would recognize that the deposit accounts of customers with TRDBs below the threshold are completely insured, no matter the ORC categories. Accordingly, the proposed approach would allow electing CIs to forego all of the processing for these accounts. They could then focus on customers whose TRBDs may or do exceed the SMDIA. Moreover, this alternative could incentivize banks that are not CIs to comply voluntarily with Part 370. FDIC examinations would also benefit, in directing attention to the deposit accounts that actually matter to deposit insurance calculations.

The Associations understand that FDIC managers have accepted an approach adopted by some CIs to implementing Part 370 whereby total customer relationships above the SMDIA are addressed prior to the implementation date, then low-balance relationships are addressed through service contacts, and other accounts below the SMDIA may be remediated past the compliance date. We respectfully submit that the FDIC should codify such an approach in Part 370.

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[29] FDIC, Final Rule: Recordkeeping for Timely Deposit Insurance Determination, 81 *Federal Register* 87734, December 5, 2016 (www.govinfo.gov/content/pkg/FR-2016-12-05/pdf/2016-28396.pdf), page 87738.

[30] The Associations suggest that Part 370 could specify the TRBD threshold at "$50,000 below the SMDIA."

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

Very truly yours,

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Appendix

The Associations

The American Bankers Association. The American Bankers Association is the voice of the nation's $18 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard nearly $14 trillion in deposits, and extend more than $10 trillion in loans.

The Bank Policy Institute. 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.

The Consumer Bankers Association. Established in 1919, the Consumer Bankers Association is the voice of the retail banking industry whose products and services provide access to credit to millions of consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans and collectively hold two-thirds of the country's total depository assets.