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## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### 12 CFR Part 48

[Docket ID OCC–2011–0010]

RIN 1557–AD42

#### Retail Foreign Exchange Transactions

**AGENCY:** Office of the Comptroller of the Currency, Department of the Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of the Comptroller of the Currency (OCC) is adopting a final rule authorizing national banks, Federal branches and agencies of foreign banks, and their operating subsidiaries to engage in off-exchange transactions in foreign currency with retail customers. The rule also describes various requirements with which national banks, Federal branches and agencies of foreign banks, and their operating subsidiaries must comply to conduct such transactions.

**DATES:** This rule is effective July 15, 2011.

#### FOR FURTHER INFORMATION CONTACT:

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#### SUPPLEMENTARY INFORMATION:

##### I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).<sup>1</sup> As amended by the Dodd-Frank Act,<sup>2</sup> the Commodity Exchange Act (CEA) provides that a

United States financial institution<sup>3</sup> for which there is a Federal regulatory agency<sup>4</sup> shall not enter into, or offer to enter into, a transaction described in section 2(c)(2)(B)(i)(I) of the CEA with a retail customer<sup>5</sup> except pursuant to a rule or regulation of a Federal regulatory agency allowing the transaction under such terms and conditions as the Federal regulatory agency shall prescribe<sup>6</sup> (a “retail forex rule”). Section 2(c)(2)(B)(i)(I) includes “an agreement, contract, or transaction in foreign currency that \* \* \* is a contract of sale of a commodity for future delivery (or an option on such a contract) or an option (other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78f(a)).”<sup>7</sup> A Federal regulatory agency’s retail forex rule must treat similarly all such futures and options and all agreements, contracts, or transactions that are functionally or economically similar to such futures and options.<sup>8</sup>

Retail forex rules must prescribe appropriate requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation requirements and may include such other standards or requirements as the Federal regulatory agency determines to be necessary.<sup>9</sup> This Dodd-Frank Act amendment to the CEA takes effect 360 days from the enactment of the Act.<sup>10</sup> Therefore, as of July 16, 2011, national banks, Federal branches and agencies of foreign banks, and operating subsidiaries of the foregoing (collectively, national banks) may not engage in a retail forex

<sup>3</sup> The CEA defines “financial institution” as including “a depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)).” 7 U.S.C. 1a(21)(E). National banks are depository institutions. See 12 U.S.C. 1813(a)(1) and (c)(1).

<sup>4</sup> For purposes of the retail forex rules, “Federal regulatory agency” includes “an appropriate Federal banking agency.” 7 U.S.C. 2(c)(2)(E)(i)(III). The OCC is the appropriate Federal banking agency for national banks and Federal branches and agencies of foreign banks. 12 U.S.C. 1813(q)(1); Dodd-Frank Act § 721(a)(2) (amending 7 U.S.C. 1a to define “appropriate Federal banking agency” by reference to 12 U.S.C. 1813).

<sup>5</sup> A retail customer is a person that is not an “eligible contract participant” under the CEA.

<sup>6</sup> 7 U.S.C. 2(c)(2)(E)(ii)(I).

<sup>7</sup> 7 U.S.C. 2(c)(2)(B)(i)(II).

<sup>8</sup> 7 U.S.C. 2(c)(2)(E)(iii)(II).

<sup>9</sup> 7 U.S.C. 2(c)(2)(E)(iii)(I).

<sup>10</sup> See Dodd-Frank Act § 754.

transaction except pursuant to retail forex rules issued by the OCC.

In addition, on July 21, 2011, the OCC will become the appropriate Federal banking agency for Federal savings associations.<sup>11</sup> The OCC plans to regulate retail forex transactions conducted by Federal savings associations under the same terms as in this rule. However, the OCC cannot issue regulations governing Federal savings associations until July 21, 2011. Therefore, the OCC anticipates issuing on that date an interim final rule with request for public comment that would expand the scope of this regulation to cover Federal savings associations.

##### II. Overview of the Proposed Rule and Related Actions

On September 10, 2010, the Commodity Futures Trading Commission (CFTC) issued a retail forex rule for persons subject to its jurisdiction.<sup>12</sup> On April 22, 2011, the OCC proposed a retail forex rule for national banks modeled on the CFTC’s retail forex rule.<sup>13</sup> The OCC decided to model its retail forex rule on the CFTC’s rule to promote regulatory comparability and because the CFTC developed its retail forex rule with the benefit of over 9,100 comments from a range of commenters, including individuals who trade forex, intermediaries, CFTC registrants currently serving as counterparties in retail forex transactions, trade associations or coalitions of industry participants, one committee of a county lawyers’ association, a registered futures association, and numerous law firms representing institutional clients. The OCC proposed to authorize national banks to engage in retail forex transactions and subject those transactions to requirements relating to disclosure, record keeping, capital and margin, reporting, business conduct, and documentation.

On May 17, 2011, the Federal Deposit Insurance Corporation (FDIC) proposed

<sup>11</sup> Dodd-Frank Act § 312.

<sup>12</sup> *Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries*, 75 FR 55409 (Sept. 10, 2010) (Final CFTC Retail Forex Rule). The CFTC proposed these rules prior to the enactment of the Dodd-Frank Act. *Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries*, 75 FR 3281 (Jan. 20, 2010) (Proposed CFTC Retail Forex Rule).

<sup>13</sup> *Retail Foreign Exchange Transactions*, 76 FR 22633 (Apr. 22, 2011) (Proposed OCC Retail Forex Rule).

<sup>1</sup> Public Law 111–203, 124 Stat. 1376.

<sup>2</sup> Dodd-Frank Act § 742(c)(2) (to be codified at 7 U.S.C. 2(c)(2)(E)). In this preamble, citations to the retail forex statutory provisions are to the sections in which the provisions will be codified in the CEA.

a retail forex rule for entities for which it is the appropriate Federal banking agency under the Federal Deposit Insurance Act.<sup>14</sup> The OCC's and the FDIC's proposals were substantially similar.

### III. Comments on the Proposed Rule

The comment period for the proposed OCC retail forex rule ended on May 23, 2011. The OCC received a total of three comments by that date. Of these, one was submitted by a large bank that engages in retail forex transactions (the commenter) and two were submitted by individuals. The latter two comments did not relate to the proposal. The commenter generally supported the OCC's proposed rule while requesting certain clarifications and changes. The commenter's comments to specific sections of the proposal are addressed in the Section-by-Section Analysis below. In light of the comments received, the final rule, for the most part, is similar to the proposed rule; the significant changes are described in the Section-by-Section analysis.

In the preamble to the proposal, the OCC indicated that retail forex transactions are subject to the Interagency Statement on Retail Sales of Nondeposit Investment Products (NDIP Policy Statement).<sup>15</sup> The NDIP Policy Statement sets out guidance regarding the OCC's expectations when a national bank engages in the sale of nondeposit investment products to retail customers. The NDIP Policy Statement addresses issues such as disclosure, suitability, sales practices, compensation, and compliance.

In the proposal, the OCC asked for comment on whether application of the NDIP Policy Statement created issues that the OCC should address.

The commenter said that the NDIP Policy Statement should not apply to retail forex transactions, asserting that the retail forex rule, alone, would be sufficient to protect retail customers, and the imposition of the NDIP Policy Statement on retail forex transactions would create confusion and ambiguity. No specific provisions were identified, however, that create confusion or ambiguity. The commenter further argued that because the NDIP Policy Statement does not apply to CFTC registrants, its application to retail forex transactions would not promote consistent regulatory treatment of retail forex transactions.

The OCC believes that it is appropriate to apply the NDIP Policy Statement to retail forex transactions. The consumer protections that the NDIP Policy Statement provides are no less important for retail forex transactions than for other nondeposit investment products. Moreover, there is no direct conflict between this rule and the NDIP Policy Statement because the statement requires national banks to develop policies and procedures to ensure that nondeposit investment product sales are conducted in compliance with applicable laws and regulations.<sup>16</sup> If a national bank has questions regarding how the NDIP Policy Statement applies to its retail forex business, it should seek clarification from its examiners.

### IV. Section-by-Section Analysis

#### *Section 48.1—Authority, Purpose, and Scope*

This section authorizes a national bank to conduct retail forex transactions.

The OCC requested comment on whether the retail forex rule should apply to national banks' foreign branches conducting retail forex transactions abroad, whether with U.S. or foreign customers.

The commenter responded that there is no U.S. policy interest in applying U.S. consumer protection rules to transactions with non-U.S. residents conducted by foreign branches. Those transactions are subject to foreign regulatory requirements that could be inconsistent with the retail forex rule. Subjecting those transactions to two sets of regulatory requirements would also place national banks at a competitive disadvantage abroad.

The OCC recognizes the concerns raised by the commenter.

Retail forex transactions between a foreign branch of a national bank and a non-U.S. customer are subject to any applicable disclosure, recordkeeping, capital, margin, reporting, business conduct, documentation, and other requirements of applicable foreign law. Therefore, those transactions are not subject to the requirements of §§ 48.3 and 48.5 to 48.16.

#### *Section 48.2—Definitions*

This section defines terms specific to retail forex transactions and to the regulatory requirements that apply to retail forex transactions.

The definition of "retail forex transaction" generally includes the following transactions in foreign currency between a national bank and a person that is not an eligible contract participant:<sup>17</sup> (i) A future or option on such a future;<sup>18</sup> (ii) options not traded on a registered national securities exchange;<sup>19</sup> and (iii) certain leveraged, margined, or bank-financed transactions,<sup>20</sup> including rolling spot forex transactions. The definition generally tracks the statutory language in section 2(c)(2)(B) and (C) of the CEA.<sup>21</sup>

Certain transactions in foreign currency are not "retail forex transactions." For example, a spot forex transaction in which one currency is bought for another and the two currencies are exchanged within two days would not meet the definition of "retail forex transaction."<sup>22</sup> Similarly, "retail forex transaction" does not include a forward contract that creates an enforceable obligation to make or take delivery, provided that each counterparty has the ability to deliver and accept delivery in connection with its line of business.<sup>23</sup> In addition, the definition does not include transactions conducted through an exchange, because in those cases the exchange

<sup>17</sup> The definition of "eligible contract participant" is found in the CEA and is discussed below.

<sup>18</sup> 7 U.S.C. 2(c)(2)(B)(i)(I).

<sup>19</sup> 7 U.S.C. 2(c)(2)(B)(i)(I).

<sup>20</sup> 7 U.S.C. 2(c)(2)(C).

<sup>21</sup> 7 U.S.C. 2(c)(2)(B) and (C).

<sup>22</sup> See generally *CFTC v. Int'l Fin. Servs. (New York, Inc.)*, 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (distinguishing between foreign exchange futures contracts and spot contracts in foreign exchange, and noting that foreign currency trades settled within two days are ordinarily spot transactions rather than futures contracts); see also *Bank Brussels Lambert v. Intermetals Corp.*, 779 F. Supp. 741, 748 (S.D.N.Y. 1991).

<sup>23</sup> See 7 U.S.C. 2(c)(2)(C)(i)(II)(bb)(BB); *CFTC v. Int'l Fin. Servs. (New York, Inc.)*, 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (distinguishing between forward contracts in foreign exchange and foreign exchange futures contracts); see also William L. Stein, *The Exchange-Trading Requirement of the Commodity Exchange Act*, 41 Vand. L. Rev. 473, 491 (1988). In contrast to forward contracts, futures contracts generally include several or all of the following characteristics: (i) Standardized nonnegotiable terms (other than price and quantity); (ii) parties are required to deposit initial margin to secure their obligations under the contract; (iii) parties are obligated and entitled to pay or receive variation margin in the amount of gain or loss on the position periodically over the period the contract is outstanding; (iv) purchasers and sellers are permitted to close out their positions by selling or purchasing offsetting contracts; and (v) settlement may be provided for by either (a) cash payment through a clearing entity that acts as the counterparty to both sides of the contract without delivery of the underlying commodity; or (b) physical delivery of the underlying commodity. See Edward F. Greene et al., *U.S. Regulation of International Securities and Derivatives Markets* § 14.08[2] (8th ed. 2006).

<sup>14</sup> Retail Foreign Exchange Transactions, 76 FR 28358 (May 17, 2011) (Proposed FDIC Retail Forex Rule).

<sup>15</sup> See OCC Bulletin 94-13 (Feb. 24, 1994); see also OCC Bulletin 1995-52 (Sept. 22, 1995).

<sup>16</sup> There are, of course, differences in the regulations that generally govern national banks versus those that govern CFTC registrants, such as capital rules. The NDIP Policy Statement, because it governs bank activities more generally, is similar to capital rules.

would be the counterparty to both the national bank and the retail forex customer, rather than the national bank directly facing the retail forex customer.

The proposed rule sought comment on whether leveraged, margined, or bank-financed forex transactions, including rolling spot forex transactions (so-called *Zelener*<sup>24</sup> contracts), should be regulated as retail forex transactions; the OCC preliminary believed that they should.<sup>25</sup>

The commenter supported the inclusion of rolling spot forex transactions in the definition of “retail forex transaction.” A rolling spot forex transaction nominally requires delivery of currency within two days, like spot transactions. However, in practice, the contracts are indefinitely renewed every other day and no currency is actually delivered until one party affirmatively closes out the position.<sup>26</sup> Therefore, the contracts are economically more like futures than spot contracts, although courts have held them to be spot contracts in form.<sup>27</sup> Like the CFTC’s retail forex rule and the FDIC’s proposed retail forex rule, the final rule’s definition of “retail forex transaction” includes leveraged, margined, or bank-financed rolling spot forex transactions, as well as certain other leveraged, margined, or bank-financed forex transactions.

The commenter sought clarification that forex forwards would not be included in the definition, because transactions that convert or exchange actual currencies for any commercial or investment purpose are a traditional product offered by national banks and do not raise the consumer protection issues associated with futures or rolling spot forex transactions.

The OCC agrees that a forex forward that is not leveraged, margined, or financed by the national bank does not meet the definition of “retail forex transaction.” However, a leveraged, margined, or bank-financed forex forward is a retail forex transaction unless it creates an enforceable

obligation to deliver between a seller and a buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business<sup>28</sup> or the OCC determines that the forward is not functionally or economically similar to a forex future or option, as described below.

The final rule contains a provision that allows the OCC to exempt specific transactions or kinds of transaction from the third prong of the “retail forex transaction” definition. The OCC is concerned that certain traditional banking products, which are distinguishable from speculative rolling spot forex transactions, may inadvertently fall within the definition of “retail forex transaction” as leveraged, margined, or bank-financed forex transactions. This result was not intended by the Dodd-Frank Act, which requires retail forex rules to treat similarly transactions that are functionally or economically similar to forex futures or options.<sup>29</sup> National banks may seek a determination that a given transaction or kind of transaction does not fall within the third prong of the “retail forex transaction” definition by submitting a written request to the OCC.

The commenter asked for confirmation that deposit accounts with foreign exchange features are outside the scope of the rule.

The Legal Certainty for Bank Products Act of 2000, as amended by the Dodd-Frank Act, generally exempts “identified banking products” from the CEA.<sup>30</sup> Identified banking products include: Deposit accounts, savings accounts, certificates of deposit, or other deposit instruments issued by a bank; banker’s acceptances; letters of credit issued or loans made by a bank; debit accounts at a bank arising from a credit card or similar arrangement; and certain loan participations.<sup>31</sup> Because identified banking products are not subject to the CEA, they are not prohibited by section 2(c)(2)(E)(ii) of the CEA. To provide clarity, the final rule excludes identified

banking products from the definition of “retail forex transaction.” Identified banking products that have embedded foreign exchange features, for example a deposit account in which the customer may deposit funds in one currency and withdraw funds in another, are not retail forex transactions.

This section defines several terms by reference to the CEA, the most important of which is “eligible contract participant.” Foreign currency transactions with eligible contract participants are not considered retail forex transactions and are therefore not subject to this rule. In addition to a variety of financial entities, certain governmental entities, businesses, and individuals may be eligible contract participants.<sup>32</sup>

#### Section 48.3—Prohibited Transactions

This section prohibits a national bank and its institution-affiliated parties from engaging in fraudulent conduct in connection with retail forex transactions. This section also prohibits a national bank from acting as a counterparty to a retail forex transaction if the national bank or its affiliate exercises discretion over the customer’s retail forex account because the OCC views such self-dealing as inappropriate.

The OCC received no comments to this section and adopts it as proposed.

<sup>32</sup> The term “eligible contract participant” is defined at 7 U.S.C. 1a(18), and for purposes most relevant to this rule generally includes:

- (a) A corporation, partnership, proprietorship, organization, trust, or other entity—
  - (1) That has total assets exceeding \$10,000,000;
  - (2) The obligations of which under an agreement, contract, or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by certain other eligible contract participants; or
  - (3) That—
    - (i) Has a net worth exceeding \$1,000,000; and
    - (ii) Enters into an agreement, contract, or transaction in connection with the conduct of the entity’s business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity’s business;
- (b) Subject to certain exclusions,
  - (1) A governmental entity (including the United States, a State, or a foreign government) or political subdivision of a governmental entity;
  - (2) A multinational or supranational governmental entity; and
  - (3) An instrumentality, agency, or department of an entity described in (b)(1) or (2); and
- (c) An individual who has amounts invested on a discretionary basis, the aggregate of which is in excess of—
  - (1) \$10,000,000; or
  - (2) \$5,000,000 and who enters into the agreement, contract, or transaction in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual.

<sup>24</sup> *CFTC v. Zelener*, 373 F.3d 861 (7th Cir. 2004); see also *CFTC v. Erskine*, 512 F.3d 309 (6th Cir. 2008).

<sup>25</sup> 7 U.S.C. 2(c)(2)(E)(iii) (requiring that retail forex rules treat all functionally or economically similar transactions similarly); see 17 CFR 5.1(m) (defining “retail forex transaction” for CFTC-registered retail forex dealers).

<sup>26</sup> For example, in *Zelener*, the retail forex dealer retained the right, at the date of delivery of the currency to deliver the currency, roll the transaction over, or offset all or a portion of the transaction with another open position held by the customer. See *CFTC v. Zelener*, 373 F.3d 861, 868 (7th Cir. 2004).

<sup>27</sup> See, e.g., *CFTC v. Erskine*, 512 F.3d 309, 326 (6th Cir. 2008); *CFTC v. Zelener*, 373 F.3d 861, 869 (7th Cir. 2004).

<sup>28</sup> See 7 U.S.C. 2(c)(2)(C)(i)(II)(bb)(BB).

<sup>29</sup> 7 U.S.C. 2(c)(2)(E)(iii)(II).

<sup>30</sup> 7 U.S.C. 27a(a)(1). An identified banking product offered by a national bank could become subject to the CEA if the OCC determines, in consultation with the CFTC and the Securities and Exchange Commission, that the product would meet the definition of a “swap” under the CEA or a “security-based swap” under Securities Exchange Act of 1934 and has become known to the trade as a swap or security-based swap, or otherwise has been structured as an identified banking product for the purpose of evading the provisions of the CEA, the Securities Act of 1933, or the Securities Exchange Act of 1934. 7 U.S.C. 27a(b).

<sup>31</sup> 7 U.S.C. 27(b) (citing Gramm-Leach-Bliley Act § 206(a)(1) to (5)).

#### Section 48.4—Supervisory Non-Objection

This section requires a national bank to obtain a written supervisory non-objection prior to engaging in a retail forex business. To obtain such non-objection, the national bank will have to provide such information as the OCC deems necessary to determine that the national bank would satisfy the requirements of the rule. This information will include information on: Customer due diligence (including credit evaluations, customer appropriateness, and “know your customer” documentation); new product approvals; haircuts for noncash margin; and conflicts of interest. In addition, the national bank must establish that it has adequate written policies, procedures, and risk measurement and management systems and controls.

National banks engaged in retail forex transactions as of the effective date of this rule that promptly request the OCC’s review of their retail forex business will have six months, or a longer period provided by the OCC, to bring their operations into conformance with the rule. Under this rule, a national bank that requests the OCC’s review within 30 days of the effective date of the final retail forex rule and submits such information as the OCC may request within the timeframe the OCC provides will be deemed to be operating its retail forex business pursuant to a rule or regulation of a Federal regulatory agency, as required under the CEA, for such period.<sup>33</sup>

A national bank need not join a futures self-regulatory organization as a condition of conducting a retail forex business.

The commenter supported the adoption of this section, and the OCC adopts it as proposed.

#### Section 48.5—Application and Closing Out of Offsetting Long and Short Positions

This section requires a national bank to close out offsetting long and short positions in a retail forex account. The national bank would have to offset such positions regardless of whether the customer has instructed otherwise. The CFTC concluded that keeping open long and short positions in a retail forex customer’s account removes the opportunity for the customer to profit on the transactions, increases the fees paid by the customer, and invites abuse.<sup>34</sup> The OCC agreed with this

concern in the notice of proposed rulemaking.

The commenter stated that a customer should be permitted to provide instructions with respect to the manner in which the customer’s retail forex transaction are offset when: (i) The customer maintains separate accounts managed by different advisors; (ii) the customer maintains separate accounts using different trading strategies; or (iii) the customer employs different trading strategies in one account and applies certain orders to risk-manage that exposure. The commenter also sought clarification that a customer could provide specific offset instructions in writing or orally, and that those instructions can be made on a blanket basis.

The OCC agrees that a customer should be able to offset retail forex transactions in a particular manner, if he or she so chooses. Paragraph (c) has been modified to provide that, notwithstanding the default offset rules in paragraphs (a) and (b), the national bank must offset retail forex transactions pursuant to a customer’s specific instructions. Blanket instructions are not sufficient for this purpose, as they could obviate the default rule. However, offset instructions need not be given separately for each pair of orders in order to be “specific.” Instructions that apply to sufficiently defined sets of transactions could be specific enough. Finally, consistent with the changes to § 48.12, retail forex customers may make offset instructions in writing or orally. The national bank must create and maintain a record of each offset instruction.<sup>35</sup>

#### Section 48.6—Disclosure

This section requires a national bank to provide retail forex customers with a risk disclosure statement similar to the one required by the CFTC’s retail forex rule but tailored to address certain unique characteristics of retail forex in national banks. The prescribed risk disclosure statement would describe the risks associated with retail forex transactions.

The commenter agreed with the need for a robust risk disclosure statement but suggested that a shorter, clearer, more direct, and less redundant statement would be more effective. The final rule incorporates several changes to the disclosures to eliminate redundancies, address ambiguities, and convey the information more clearly.

The proposal requested comment on whether the risk disclosure statement

should disclose the percentage of profitable retail forex accounts.

The commenter said that disclosing the ratio of profitable to nonprofitable retail forex accounts is not useful because those ratios depend on many factors (including the trading expertise of customers) and could suggest one national bank is a more attractive retail forex counterparty than another.

In its retail forex rule, the CFTC requires its registrants to disclose to retail customers the percentage of retail forex accounts that earned a profit and the percentage of such accounts that experienced a loss during each of the most recent four calendar quarters.<sup>36</sup> The CFTC explained that the vast majority of retail customers who enter these transactions do so solely for speculative purposes and that relatively few of these participants trade profitably.<sup>37</sup> In its final rule, the CFTC found this requirement appropriate to protect retail customers from inherent conflicts embedded in the operations of the retail over-the-counter forex industry.<sup>38</sup> The OCC agrees with the CFTC and the final rule requires this disclosure.

The proposal requested comment on whether the risk disclosure statement should include a disclosure that when a retail customer loses money trading, the dealer makes money.

The commenter said that this disclosure is inaccurate because the bank immediately hedges retail forex transactions or nets them with similar transactions and therefore does not profit from exchange rate fluctuations. The commenter argued it is more accurate to inform customers that the bank may or does mark-up (or mark-down) transactions or apply commission rates to transactions that will create income for the bank.

The OCC understands that the economic model of a retail forex business may be to profit from spreads, fees, and commissions. Nonetheless, because a national bank engaging in retail forex transactions is trading as principal, by definition, when the retail forex customer loses money on a retail forex transaction, the national bank makes money on that transaction. The OCC therefore believes that this disclosure is accurate and helps potential retail forex customers understand the nature of retail forex transactions. Similarly, the CFTC’s retail forex rule requires a disclosure that when a retail customer loses money

<sup>36</sup> 17 CFR 5.5(e)(1).

<sup>37</sup> Proposed CFTC Retail Forex Rule, 75 FR at 3289.

<sup>38</sup> Final CFTC Retail Forex Rule, 75 FR at 55412.

<sup>33</sup> 7 U.S.C. 2(c)(2)(E)(ii)(I).

<sup>34</sup> Proposed CFTC Retail Forex Rule, 75 FR at 3287 n.54.

<sup>35</sup> See § 48.7(a)(6) and (g).

trading, the dealer makes money on such trades, in addition to any fees, commissions, or spreads.<sup>39</sup> The final rule includes this disclosure requirement.

The proposal asked whether it would be convenient to national banks and retail forex customers to allow the retail forex risk disclosure to be combined with other disclosures that national banks make to their customers.

The commenter asked the OCC to confirm that national banks may add topics to the risk disclosure statement.

The OCC is concerned that the effectiveness of the disclosure could be diminished if surrounded by other topics. Therefore, the final rule requires the risk disclosure statement to be given to potential retail forex customers as set forth in the rule. National banks may describe and provide additional information on retail forex transactions in a separate document.

The commenter further asked the OCC to confirm that the risk disclosure statement may be appended to account opening agreements or forms and that a single signature by the customer on a combined account agreement and disclosure form can be used as long as the customer is directed to and acknowledges the risk disclosure statement immediately prior to the signature line.

The OCC believes that a separate risk disclosure document appropriately highlights the risks in retail forex transactions and that requiring a separate signature for the separate risk disclosure appropriately calls a potential retail forex customer's attention to the risk disclosure statement. However, a national bank may attach the risk disclosure to a related document, such as the account agreement.

The proposal requested comment on whether the risk disclosure statement should include a disclosure of fees that the national bank charges to retail forex customers.

The commenter agreed that the disclosure of fees is appropriate, but should not include income from hedging retail forex customers' positions or income streams not charged to the customer. Moreover, the commenter stated that it is impractical to numerically state the bid/ask spread given that it may vary.

The final rule, like the proposed rule, does not require national banks to disclose income streams not charged to the retail forex customer. However, a national bank must do more than simply describe the means by which it earns

revenue. To the extent practical, it must quantify the fees, charges, spreads, or commissions that the national bank may impose on the retail forex customer in connection with the customer's retail forex account or a retail forex transaction.<sup>40</sup> The OCC further believes that disclosure of the bid/ask spread is possible in a variety of ways. If a national bank bases its prices off of the prices provided by a third party, then the national bank may disclose the use of the third party's pricing and the markup charged to retail forex customers. Alternatively, the national bank may disclose the bid/ask spread by quoting both the bid and ask prices to retail forex customers prior to entering into a retail forex transaction. These quotes may be provided as part of an electronic trading platform or, after a retail forex customer calls the national bank for a retail forex transaction, by providing both a bid and ask price for the transaction.

The commenter read the disclosure to suggest that the national bank cannot seek to recover losses not covered by a customer's margin account via an appropriate dispute resolution forum and asked the OCC to confirm that this was not the case.

Section 48.9(d)(4) requires a national bank, in the event that a retail forex customer's margin falls below the amount needed to satisfy the margin requirement to either: (1) Collect sufficient margin from the retail forex customer; or (2) liquidate the retail forex customer's retail forex transactions. The final rule does not forbid a national bank from seeking to recover a deficiency from a retail forex customer in an appropriate venue. The disclosure has been revised to make this fact clear.

Finally, the commenter said that the disclosure regarding the availability of FDIC-insurance for retail forex transactions should be clarified.

The disclosure requires a national bank to state that retail forex transactions are not FDIC-insured. The commenter agreed with that statement. It noted, however, that margin funds may be insured deposits. The FDIC-insured status of funds held in a retail forex margin account will depend on whether such funds are held in a manner that meets the requirements of the Federal Deposit Insurance Act and its implementing regulations. National banks may accurately disclose the availability of FDIC insurance for retail forex margin accounts in a separate document as permitted by law.

#### *Section 48.7—Recordkeeping*

This section specifies which documents and records that a national bank engaged in retail forex transactions must retain for examination by the OCC. This section also prescribes document maintenance standards. The OCC notes that records may be kept electronically as permitted under the Electronic Signatures in Global and National Commerce Act.<sup>41</sup>

The OCC received no comments on this section. Recordkeeping requirements found in § 48.13(a)(3) of the proposed rule were moved into this section to centralize recordkeeping requirements in one section. Furthermore, the recordkeeping requirements have been modified to accommodate oral orders and offset instructions. A national bank must create an audio recording of oral orders and offset instructions.

#### *Section 48.8—Capital Requirements*

This section requires that a national bank that offers or enters into retail forex transactions must be "well capitalized" as defined in the OCC's prompt corrective action regulation.<sup>42</sup> In addition, a national bank must continue to hold capital against retail forex transactions as provided in the OCC's capital regulation.<sup>43</sup> This rule does not amend the OCC's prompt corrective action regulation or capital regulation.

The proposed rule contained a provision allowing the OCC to exempt a national bank from the well-capitalized requirement. This provision has been removed in light of the general reservation of authority in § 48.17.

#### *Section 48.9—Margin Requirements*

Paragraph (a) requires a national bank that engages in retail forex transactions, in advance of any such transaction, to collect from the retail forex customer margin equal to at least 2 percent of the notional value of the retail forex transaction if the transaction is in a major currency pair and at least 5 percent of the notional value of the retail forex transaction otherwise. These margin requirements are identical to the requirements imposed by the CFTC's retail forex rule.

The proposal requested comments on whether it should define the major currencies in the final rule but did not receive any. The final rule adopts the proposal's approach to identifying the major currencies.

A major currency pair is a currency pair with two major currencies. The

<sup>39</sup> 17 CFR 5.5(b).

<sup>40</sup> The final rule clarifies that a national bank must disclose spreads in addition to fees, commissions, and charges.

<sup>41</sup> 15 U.S.C. 7001(d).

<sup>42</sup> 12 CFR part 6.

<sup>43</sup> 12 CFR part 3.

major currencies currently are the U.S. Dollar (USD), Canadian Dollar (CAD), Euro (EUR), United Kingdom Pound (GBP), Japanese Yen (JPY), Swiss Franc (CHF), New Zealand Dollar (NZD), Australian Dollar (AUD), Swedish Kronor (SEK), Danish Kroner (DKK), and Norwegian Krone (NOK).<sup>44</sup> An evolving market could change the major currencies, so the OCC is not proposing to define the term “major currency,” but rather expects that national banks will obtain an interpretive letter from the OCC prior to treating any currency other than those listed above as a “major currency.”<sup>45</sup>

For retail forex transactions, margin protects the retail forex customer from the risks related to trading with excessive leverage. The volatility of the foreign currency markets exposes retail forex customers to substantial risk of loss. High leverage ratios can significantly increase a customer's losses and gains. Even a small move against a customer's position can result in a substantial loss. Even with required margin, losses can exceed the margin posted and, if the account is not closed out, and, depending on the specific circumstances, the customer could be liable for additional losses. Given the risks that are inherent in the trading of retail forex transactions by retail customers, the only funds that should be invested in such transactions are those that the customer can afford to lose.

Prior to the CFTC's rule, nonbank dealers routinely permitted customers to trade with 1 percent margin (leverage of 100:1) and sometimes with as little as 0.25 percent margin (leverage of 400:1). When the CFTC proposed its retail forex rule in January 2010, it proposed a margin requirement of 10 percent (leverage of 10:1). In response to comments, the CFTC reduced the required margin in the final rule to 2 percent (leverage of 50:1) for trades involving major currencies and 5 percent (leverage of 20:1) for trades involving non-major currencies.

The proposal requested comment on whether these margin requirements were appropriate to protect retail forex customers.

The commenter did not object to the amount of margin required. However, the commenter suggested that the

margin required by this paragraph should be initial margin rather than maintenance margin. The commenter also suggested that national banks be allowed to set maintenance margin levels as a matter of the banks' credit and risk policies in a manner that balances (i) protecting customers from a forced close-out of their positions as soon as an adverse market move erodes margin under the 2 or 5 percent minimum level with (ii) the need to promptly collect margin and close out positions when a customer fails to meet a margin call. The commenter also suggested that customers should have some reasonable time to meet margin calls before they are deemed to have defaulted and face a forced liquidation of their positions.

Subject to reasonable collection times as described below, a national bank must ensure that there is always sufficient margin in a retail forex customer's margin account for the customer's open retail forex transactions. If the amount of margin in a retail forex customer's margin account is insufficient to meet the requirements of paragraph (a), then § 48.9(d)(4) requires the national bank to make a margin call to replenish the margin account to an acceptable level and, if the customer does not comply with the margin call, to liquidate the retail forex customer's retail forex transactions. Retail forex customers should have a reasonable amount of time to post required margin for retail forex transactions. Market practice is for retail forex counterparties to make margin calls at the close of trading on a trading day based on margin levels at the end of that day or at the open of trading on the next trading day based on margin levels at the end of that prior day. If the retail forex customer does not post sufficient margin by the end of the next close of trading, then the retail forex counterparty liquidates the customer's retail forex account. In other words, by the close of business on a given trading day, the margin account must be sufficient to meet the margin requirements as at the end of the prior trading day.

Paragraph (b) specifies the acceptable forms of margin that customers may post. National banks must establish policies and procedures providing for haircuts for noncash margin collected from customers and must review these haircuts annually. It may be prudent for national banks to review and modify the size of the haircuts more frequently. The OCC requested comment on whether the final rule should specify haircuts for noncash margin. The OCC received no

comments on this paragraph and adopts this paragraph as proposed.

Paragraph (c) requires a national bank to hold each retail forex customer's retail forex transaction margin in a separate account. This paragraph is designed to work with the prohibition on set-off in paragraph (e), so that a national bank may not have an account agreement that treats all of a retail forex customer's assets held by a bank as margin for retail forex transactions.

The commenter requested clarification that this paragraph allows national banks to place margin into an omnibus or commingled account for operational convenience, provided that the bank keeps records of each customer's margin balance.

A national bank may place margin collected from retail forex customers into an omnibus or commingled account if the bank keeps records of each retail forex customer's margin balance. A “separate account” is one separate from the retail forex customer's other accounts at the bank. For example, margin for retail forex transactions cannot be held in a retail forex customer's savings account. Funds in a savings account pledged as retail forex margin must be transferred to a separate margin account, which could be an individual or an omnibus margin account. The final rule contains slightly modified language to clarify this intent. The FDIC-insured status of funds held in an omnibus account will depend on whether such funds are held in a manner that meets the requirements of the Federal Deposit Insurance Act and its implementing regulations.

Paragraph (d) requires a national bank to collect additional margin from the customer or to liquidate the customer's position if the amount of margin held by the national bank fails to meet the requirements of paragraph (a). The proposed rule would have required the national bank to mark the customer's open retail forex positions and the value of the customer's margin to the market daily to ensure that a retail forex customer does not accumulate substantial losses not covered by margin.

The proposal requested comment on how frequently retail forex customers' margin accounts should be marked to market.

The commenter asked that the final rules permit marking to market more frequently than daily if the national bank's systems and customer agreements permit. The final rule, like the proposed rule, requires marking to market at least once per day. Nothing in paragraph (d) forbids a more frequent schedule.

<sup>44</sup> See National Futures Association, *Forex Transactions: A Regulatory Guide* 17 (Feb. 2011); Federal Reserve Bank of New York, *Survey of North American Foreign Exchange Volume* tbl. 3e (Jan. 2011); Bank for International Settlements, *Report on Global Foreign Exchange Market Activity in 2010* at 15 tbl. B.6 (Dec. 2010).

<sup>45</sup> The Final CFTC Retail Forex Rule similarly does not define “major currency.”

Paragraph (e) prohibits a national bank from applying a retail forex customer's retail forex obligations against any asset or liability of the retail forex customer other than money or property pledged as margin.<sup>46</sup> A national bank's relationship with a retail forex customer may evolve out of a prior relationship of providing financial services or may evolve into such a relationship. Thus, it is more likely that a national bank acting as a retail forex counterparty will hold other assets or liabilities of a retail forex customer, for example a deposit account or mortgage, than a retail forex dealer regulated by the CFTC. The OCC believes that it is inappropriate to allow a national bank to leave trades open and allow additional obligations to accrue that can be applied against a retail forex customer's other assets or liabilities held by the national bank. However, should a retail forex customer's retail forex obligations exceed the amount of margin he or she has pledged, this rule does not forbid a national bank from seeking to recover the deficiency in an appropriate forum, such as a court of law. Paragraph (e) does not apply to debts a retail forex customer owes to a national bank as recognized in a judgment of a court of competent jurisdiction.

The commenter suggested that retail forex customers should be able to pledge assets other than those held in the customer's margin account. For example, a customer could nominate a deposit account as containing margin for its retail forex transactions.

Nothing in this rule prevents retail forex customers from pledging other assets they have at the bank as margin for retail forex transactions. However, once those assets are pledged as margin, the national bank must transfer them to the separate margin account. For example, if a retail forex customer pledges \$500 in her checking account as margin, then the bank must deduct \$500 from the checking account and place \$500 in the margin account. The OCC believes this transfer appropriately alerts retail forex customers to the nature of the pledge. A national bank may not evade this requirement by merely taking a security interest in assets pledged as margin: pledged assets must be placed in a separate margin account.

<sup>46</sup> The final rule clarifies that the prohibition on setting off retail forex "losses" in the proposed rule was meant to include costs related to retail forex transactions, such as fees, spreads, charges, and commissions.

#### *Section 48.10—Required Reporting to Customers*

This section requires a national bank engaging in retail forex transactions to provide each retail forex customer a monthly statement and confirmation statements.

The proposal sought comment on whether this section provides for statements that would be useful and meaningful to retail forex customers or whether other information would be more appropriate.

The commenter sought clarification that the statements may be provided electronically, and also suggested that retail forex customers would be better served with continuous online access to account information rather than monthly statements.

The OCC encourages national banks to provide real-time, continuous access to account information. This rule does not prevent national banks from doing so. However, the OCC believes it is valuable to require national banks to provide retail forex account information to retail forex customers at least once per month. Monthly statements may be provided electronically as permitted under the Electronic Signatures in Global and National Commerce Act.<sup>47</sup>

#### *Section 48.11—Unlawful Representations*

This section prohibits a national bank and its institution-affiliated parties from representing that the Federal government, the OCC, or any other Federal agency has sponsored, recommended, or approved retail forex transactions or products in any way. This section also prohibits a national bank from implying or representing that it will guarantee against or limit retail forex customer losses or not collect margin as required by § 48.9. This section does not prohibit a national bank from sharing in a loss resulting from error or mishandling of an order. Guaranties entered into prior to effectiveness of the prohibition would only be affected if an attempt is made to extend, modify, or renew them. This section also does not prohibit a national bank from hedging or otherwise mitigating its own exposure to retail forex transactions or any other foreign exchange risk.

The OCC received no comments to this section and adopts it as proposed.

#### *Section 48.12—Authorization to Trade*

The proposed rule required national banks to have specific written authorization from a retail forex

customer before effecting a retail forex transaction.

The commenter said that requiring specific written authorization from a retail forex customer before effecting a retail forex transaction for that customer would be burdensome and detrimental to the customer's interests, if, for example, the customer cannot convey written instructions because of technical difficulties.

The OCC agrees with this concern and further notes that the CFTC's retail forex rule does not require written authorization for each retail forex transaction. The final rule requires a national bank to obtain a retail forex customer's specific authorization (written or oral) to effect a particular trade. National banks must keep records of authorizations to trade pursuant to this rule.

#### *Section 48.13—Trading and Operational Standards*

This section largely follows the trading standards of the CFTC's retail forex rule, which were developed to prevent some of the deceptive or unfair practices identified by the CFTC and the National Futures Association.

Under paragraph (a), a national bank engaging in retail forex transactions is required to establish and enforce internal rules, procedures, and controls (1) to prevent front running, a practice in which transactions in accounts of the national bank or its related persons are executed before a similar customer order; and (2) to establish settlement prices fairly and objectively.

The commenter requested clarification that the prohibition on front running applies only when the person entering orders for the bank's account or the account of related persons has knowledge of unexecuted retail customer orders, and that a national bank may comply with this provision by erecting a firewall between the retail forex order book and other forex trading desks.

The final rule requires national banks to establish reasonable policies, procedures, and controls to address front running. This provision is designed to prevent the national banks from unfairly taking advantage of information they gain from customer trades. Effective firewalls and information barriers are reasonable policies, procedures, and controls to ensure that a national bank does not take unfair advantage of its retail forex customers. The final rule clarifies paragraph (a) accordingly.

Paragraph (b) prohibits a national bank engaging in retail forex transactions from disclosing that it

<sup>47</sup> 15 U.S.C. 7001(c).

holds another person's order unless disclosure is necessary for execution or is made at the OCC's request. The OCC received no comments on this paragraph and adopts this paragraph as proposed.

Paragraph (c) ensures that related persons of another retail forex counterparty do not open accounts with a national bank without the knowledge and authorization of the account surveillance personnel of the other retail forex counterparty with which they are affiliated. Similarly, paragraph (d) ensures that related persons of a national bank do not open accounts with other retail forex counterparties without the knowledge and authorization of the account surveillance personnel of the national bank with which they are affiliated.

The commenter requested confirmation that national banks may rely on a representation of potential customers that they are not affiliated with a retail forex counterparty. Paragraph (c) prohibits a national bank from knowingly handling the retail forex account of a related person of a retail forex counterparty. To the extent reasonable, national banks may rely on representations of potential retail forex customers. If, however, a national bank has actual knowledge that a retail forex customer is a related person of a retail forex counterparty, then no representation by the customer will allow the bank to handle that retail forex account. A national bank should inquire as to whether a potential retail forex customer is related to a retail forex counterparty to avoid violating paragraph (c) through willful ignorance.

The commenter also requested clarification that these paragraphs apply only to employees of firms that offer retail forex transactions, and, in the case of banks, only employees of the retail forex business and not any employee of the bank that offers retail forex transactions. The OCC agrees that the prohibitions in paragraph (c) and (d) should only apply to employees working in the retail forex business; paragraphs (c) and (d) are designed to prevent evasion of the prohibition against front running. The final rule clarifies this point.

Paragraph (e) prohibits a national bank engaging in retail forex transactions from (1) entering a retail forex transaction to be executed at a price that is not at or near prices at which other retail forex customers have executed materially similar transactions with the national bank during the same time period, (2) changing prices after confirmation, (3) providing a retail forex customer with a new bid price that is higher (or lower) than previously

provided without providing a new ask price that is similarly higher (or lower) as well, and (4) establishing a new position for a retail forex customer (except to offset an existing position) if the national bank holds one or more outstanding orders of other retail forex customers for the same currency pair at a comparable price.

Paragraph (e)(3) does not prevent a national bank from changing the bid or ask prices of a retail forex transaction to respond to market events. The OCC understands that market practice among CFTC-registrants is not to offer requotes but to simply reject orders and advise customers they may submit a new order (which the dealer may or may not accept). Similarly, a national bank may reject an order and advise customers that they may submit a new order.

The proposal sought comment on whether paragraph (e)(3) appropriately protected retail forex customers or whether a prohibition on re-quoting would be simpler.

The commenter argued that the prohibition on re-quoting in paragraph (e)(3) is overly broad and should permit new bids or offers to reflect updated spreads. In the alternative, the commenter suggested prohibiting re-quoting and requiring that, in the event an order is not confirmed, the customer must submit a new order at the then-currently displayed price. As stated above, rather than allowing requotes, a national bank may reject orders and request that customers submit a new order. Paragraph (e)(3) is consistent with the CFTC's retail forex rule and the OCC adopts it as proposed.

Paragraph (e)(4) requires a national bank engaging in retail forex transactions to execute similar orders in the order they are received. The prohibition prevents a national bank from offering preferred execution to some of its retail forex customers but not others.

#### *Section 48.14—Supervision*

This section imposes on a national bank and its agents, officers, and employees a duty to supervise subordinates with responsibility for retail forex transactions to ensure compliance with the OCC's retail forex rule.

The proposal requested comment on whether this section imposed requirements not already encompassed by safety and soundness standards. Having received no comments to this section, the OCC adopts it as proposed.

#### *Section 48.15—Notice of Transfers*

This section describes the requirements for transferring a retail

forex account. Generally, a national bank must provide retail forex customers 30 days' prior notice before transferring or assigning their account. Affected customers may then instruct the national bank to transfer the account to an institution of their choosing or liquidate the account. There are three exceptions to the above notice requirement: a transfer in connection with the receivership or conservatorship under the Federal Deposit Insurance Act; a transfer pursuant to a retail forex customer's specific request; and a transfer otherwise allowed by applicable law. A national bank that is the transferee of retail forex accounts must generally provide the transferred customers with the risk disclosure statement of § 48.6 and obtain each affected customer's written acknowledgement within 60 days.

The OCC received no comments to this section and adopts it as proposed.

#### *Section 48.16—Customer Dispute Resolution*

This section imposes limitations on how a national bank may handle disputes arising out of a retail forex transaction. For example, this section would restrict a national bank's ability to require mandatory arbitration for such disputes.

The OCC received no comments to this section and adopts it as proposed.

#### *Section 48.17—Reservation of Authority*

This section allows the OCC to modify certain requirements of this rule consistent with safety and soundness and the protection of retail forex customers. The OCC understands the need for flexibility as foreign exchange products or foreign exchange trading procedures develop and to ensure that such products or trading procedures are subject to appropriate customer protection and safety and soundness standards.

## **V. Regulatory Analysis**

### *A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, generally requires an agency that is issuing a proposed rule to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. The RFA provides that an agency is not required to prepare and publish an initial regulatory flexibility analysis if the agency certifies that the proposed rule will not, if promulgated as a final rule, have a significant economic impact on a substantial number of small entities. Under regulations issued by the

Small Business Administration, a small entity includes a commercial bank with assets of \$175 million or less.<sup>48</sup> This rule as proposed would impose recordkeeping and disclosure requirements on banks, including small banks, which engage in retail forex transactions with their customers.

Pursuant to section 605(b) of the RFA, the OCC certified that this rule, as proposed, would not have a significant economic impact on a substantial number of the small entities it supervises. Accordingly, a regulatory flexibility analysis was not required. In making this determination, the OCC estimated that there were no small banking organizations currently engaging in retail forex transactions with their customers. Therefore, the OCC estimates that no small banking organizations under its supervision would be affected by this final rule.

#### B. Paperwork Reduction Act

In conjunction with the Notice of Proposed Rulemaking (NPRM),<sup>49</sup> the OCC submitted the information collection requirements contained therein to OMB for review under the Paperwork Reduction Act (PRA). In response, the Office of Management and Budget (OMB) filed comments with the OCC in accordance with 5 CFR 1320.11(c). The comments indicated that OMB was withholding approval at that time. The Agencies were directed to examine public comment in response to the NPRM and include in the supporting statement of the information collection request (ICR) to be filed at the final rule stage a description of how the agency has responded to any public comments on the ICR, including comments maximizing the practical utility of the collection and minimizing the burden. The OCC received one comment addressing the substance and/or method of the disclosure and reporting requirements contained in the proposed rule. This comment and the OCC's response to the comment is included in the preamble discussion and in a revised Supporting Statement submitted to OMB.

The information collection requirements contained in this final rule have been submitted by the OCC to OMB for review and approval under 44 U.S.C. 3506 and 5 CFR part 1320. In accordance with section 3512 of the PRA, 44 U.S.C. 3512, the OCC may not conduct or sponsor, and a respondent is not required to respond to, an

information collection unless it displays a currently valid OMB control number. The information collection requirements are found in §§ 48.4–48.7, 48.9–48.10, 48.13, and 48.15–48.16.

Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the OCC's functions, including whether the information has practical utility;

(b) The accuracy of the estimate of the burden of the information collection, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments should be addressed to: Communications Division, Office of the Comptroller of the Currency, Public Information Room, Mailstop 2–3, *Attention:* 1557–0250, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to 202–874–5274, or by electronic mail to [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov). You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling 202–874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

Additionally, you should send a copy of your comments to the OMB Desk Officer, by mail to U.S. Office of Management and Budget, 725 17th Street, NW., 10235, Washington, DC 20503, or by fax to 202–395–6974.

#### Proposed Information Collection

*Title of Information Collection:* Retail Foreign Exchange Transactions.

*Frequency of Response:* On occasion.  
*Affected Public:* Businesses or other for-profit.

*Respondents:* National banks and Federal branches and agencies of foreign banks.

#### Reporting Requirements

The reporting requirements in § 48.4 require that, prior to initiating a retail

forex business, a national bank provide the OCC with prior notice and obtain a written supervisory non-objection letter. In order to obtain a supervisory non-objection letter, a national bank must have written policies and procedures and risk measurement and management systems and controls in place to ensure that retail forex transactions are conducted in a safe and sound manner. The national bank must also provide other information required by the OCC, such as documentation of customer due diligence, new product approvals, and haircuts applied to noncash margins. A national bank already engaging in a retail forex business may continue to do so, provided it requests an extension of time.

#### Disclosure Requirements

Section 48.5, regarding the application and closing out of offsetting long and short positions, requires a national bank to promptly provide the customer with a statement reflecting the financial result of the transactions and the name of the introducing broker to the account. The customer provides specific written instructions on how the offsetting transaction should be applied.

Section 48.6 requires that a national bank furnish a retail forex customer with a written disclosure before opening an account that will engage in retail forex transactions for a retail forex customer and receive an acknowledgment from the customer that it was received and understood. It also requires the disclosure by a national bank of its fees and other charges and its profitable accounts ratio.

Section 48.10 requires a national bank to issue monthly statements to each retail forex customer and to send confirmation statements following transactions.

Section 48.13(b) allows disclosure by a national bank that an order of another person is being held by them only when necessary to the effective execution of the order or when the disclosure is requested by the OCC. Section 48.13(c) prohibits a national bank engaging in retail forex transactions from knowingly handling the account of any related person of another retail forex counterparty unless it receives proper written authorization, promptly prepares a written record of the order, and transmits to the counterparty copies all statements and written records. Section 48.13(d) prohibits a related person of a national bank engaging in forex transactions from having an account with another retail forex counterparty unless the counterparty receives proper written authorization and transmits copies of all statements

<sup>48</sup> Small Business Administration regulations define "small entities" to include banks with a four-quarter average of total assets of \$175 million or less. 13 CFR 121.201.

<sup>49</sup> 76 FR 22633 (April 22, 2011).

and written records for the related person's retail forex accounts to the national bank.

Section 48.15 requires a national bank to provide a retail forex customer with 30 days' prior notice of any assignment of any position or transfer of any account of the retail forex customer. It also requires a national bank to which retail forex accounts or positions are assigned or transferred to provide the affected customers with risk disclosure statements and forms of acknowledgment and receive the signed acknowledgments within 60 days.

The customer dispute resolution provisions in § 48.16 requires certain endorsements, acknowledgments, and signature language. Section 48.16 also requires that within 10 days after receipt of notice from the retail forex customer that the customer intends to submit a claim to arbitration, the national bank provides to the customer a list of persons qualified in the dispute resolution, and that the customer must notify the national bank of the person selected within 45 days of receipt of such list.

#### *Policies and Procedures; Recordkeeping*

Sections 48.7 and 48.13(a) require that a national bank engaging in retail forex transactions keep full, complete, and systematic records and establish and implement internal rules, procedures, and controls. Section 48.7 also requires that a national bank keep account, financial ledger, transaction and daily records; price logs; records of methods used to determine bids or asked prices; memorandum orders; post-execution allocation of bunched orders; records regarding its ratio of profitable accounts and possible violations of law; records for noncash margin; order tickets; and monthly statements and confirmations. Section 48.9 requires policies and procedures for haircuts for noncash margin collected under the rule's margin requirements and annual evaluations and modifications of the haircuts.

#### Estimated PRA Burden

*Estimated Number of Respondents:* 42 national banks; 3 service providers.

*Total Reporting Burden:* 672 hours.

*Total Disclosure Burden:* 54,166 hours.

*Total Recordkeeping Burden:* 12,416 hours.

*Total Annual Burden:* 67,254 hours.

#### *C. Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), 2 U.S.C.

1532, requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that this rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year.<sup>50</sup> Accordingly, this final rule is not subject to section 202 of the Unfunded Mandates Act.

#### *D. Effective Date Under the Administrative Procedures Act*

This final rule takes effect on July 15, 2011. 5 U.S.C. 553(d)(1) requires publication of a substantive rule not less than 30 days before its effective date, except in cases in which the rule grants or recognizes an exemption or relieves a restriction. Section 2(c)(2)(E)(ii) of the CEA would prohibit national banks from engaging in retail forex transactions unless this final rule becomes effective on July 16, 2011. This final rule would relieve that restriction and allow national banks to continue to engage in retail forex transactions without delay. Furthermore, under 5 U.S.C. 553(d)(3), an agency may find good cause to publish a rule less than 30 days before its effective date. The OCC finds such good cause, as the 30-day delayed effective date is unnecessary under the provisions of the final rule. In § 48.4(c) of the final rule, the OCC allows national banks a 30-day grace period to inform the OCC of its retail forex activity, along with up to a six-month window to comply with the provisions of the retail forex rule.

#### *E. Effective Date Under the CDRI Act*

The Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act), 12 U.S.C. 4801 *et seq.*, provides that new regulations that impose additional reporting or disclosure requirements on insured depository institutions do not take effect until the first day of a calendar quarter after the regulation is published, unless the agency determines there is good cause for the regulation to become

effective at an earlier date. The OCC finds good cause that this final rule should become effective on July 15, 2011, as it would be in the public interest to require the disclosure and consumer protection provisions in this rule to take effect at this earlier date. If the rule did not become effective until October 1, 2011, then national banks would not be able to provide retail forex transactions to customers to meet their financial needs.

#### **List of Subjects in 12 CFR Part 48**

Banks, Consumer protection, Definitions, Federal branches and agencies, Foreign currencies, Foreign exchange, National banks, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, part 48 to Title 12, Chapter I of the Code of Federal Regulations is added to read as follows:

#### **PART 48—RETAIL FOREIGN EXCHANGE TRANSACTIONS**

##### Sec.

- 48.1 Authority, purpose, and scope.
- 48.2 Definitions.
- 48.3 Prohibited transactions.
- 48.4 Supervisory non-objection.
- 48.5 Application and closing out of offsetting long and short positions.
- 48.6 Disclosure.
- 48.7 Recordkeeping.
- 48.8 Capital requirements.
- 48.9 Margin requirements.
- 48.10 Required reporting to customers.
- 48.11 Unlawful representations.
- 48.12 Authorization to trade.
- 48.13 Trading and operational standards.
- 48.14 Supervision.
- 48.15 Notice of transfers.
- 48.16 Customer dispute resolution.
- 48.17 Reservation of authority.

**Authority:** 7 U.S.C. 27 *et seq.*; 12 U.S.C. 1 *et seq.*, 24, 93a, 161, 1813(q), 1818, 1831o, 3102, 3106a, 3108.

#### **§ 48.1 Authority, purpose, and scope.**

(a) *Authority.* A national bank may engage in retail foreign exchange transactions. A national bank engaging in such transactions must comply with the requirements of this part.

(b) *Purpose.* This part establishes rules applicable to retail foreign exchange transactions engaged in by national banks and applies on or after the effective date.

(c) *Scope.* Except as provided in paragraph (d) of this section, this part applies to national banks.

(d) *International applicability.* Sections 48.3 and 48.5 to 48.16 do not apply to retail foreign exchange transactions between a foreign branch of a national bank and a non-U.S. customer. With respect to those transactions, the foreign branch remains

<sup>50</sup>In particular, the OCC notes that forex transactions between national banks and governmental entities are not retail forex transactions subject to this rule, because governmental entities are eligible contract participants. See 7 U.S.C. 1a(18)(A)(vii).

subject to any disclosure, recordkeeping, capital, margin, reporting, business conduct, documentation, and other requirements of foreign law applicable to the branch.

#### § 48.2 Definitions.

In addition to the definitions in this section, for purposes of this part, the following terms have the same meaning as in the Commodity Exchange Act: “Affiliated person of a futures commission merchant”; “associated person”; “contract of sale”; “commodity”; “eligible contract participant”; “futures commission merchant”; “future delivery”; “option”; “security”; and “security futures product”.

*Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

*Commodity Exchange Act* means the Commodity Exchange Act (7 U.S.C. 1 *et seq.*).

*Forex* means foreign exchange.

*Identified banking product* has the same meaning as in section 401(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)).

*Institution-affiliated party* or *IAP* has the same meaning as in section 3(u)(1), (2), or (3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(u)(1), (2), or (3)).

*Introducing broker* means any person that solicits or accepts orders from a retail forex customer in connection with retail forex transactions.

*National bank* means:

- (1) A national bank;
- (2) A Federal branch or agency of a foreign bank, each as defined in 12 U.S.C. 3101; and
- (3) An operating subsidiary of a national bank or an operating subsidiary of a Federal branch or agency of a foreign bank.

*Related person*, when used in reference to a retail forex counterparty, means:

- (1) Any general partner, officer, director, or owner of 10 percent or more of the capital stock of the retail forex counterparty;
- (2) An associated person or employee of the retail forex counterparty, if the retail forex counterparty is not a national bank;
- (3) An IAP of the retail forex counterparty, if the retail forex counterparty is a national bank; and
- (4) A relative or spouse of any of the foregoing persons, or a relative of such spouse, who shares the same home as any of the foregoing persons.

*Retail foreign exchange dealer* means any person other than a retail forex

customer that is, or that offers to be, the counterparty to a retail forex transaction, except for a person described in item (aa), (bb), (cc)(AA), (dd), or (ff) of section 2(c)(2)(B)(i)(II) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(B)(i)(II)).

*Retail forex account* means the account of a retail forex customer, established with a national bank, in which retail forex transactions with the national bank as counterparty are undertaken, or the account of a retail forex customer that is established in order to enter into such transactions.

*Retail forex account agreement* means the contractual agreement between a national bank and a retail forex customer that contains the terms governing the customer's retail forex account with the national bank.

*Retail forex business* means engaging in one or more retail forex transactions with the intent to derive income from those transactions, either directly or indirectly.

*Retail forex counterparty* includes, as appropriate:

- (1) A national bank;
- (2) A retail foreign exchange dealer;
- (3) A futures commission merchant; and
- (4) An affiliated person of a futures commission merchant.

*Retail forex customer* means a customer that is not an eligible contract participant, acting on his, her, or its own behalf and engaging in retail forex transactions.

*Retail forex obligation* means an obligation of a retail forex customer with respect to a retail forex transaction, including trading losses, fees, spreads, charges, and commissions.

*Retail forex proprietary account* means: A retail forex account carried on the books of a national bank for one of the following persons; a retail forex account of which 10 percent or more is owned by one of the following persons; or a retail forex account of which an aggregate of 10 percent or more of which is owned by more than one of the following persons:

- (1) The national bank;
- (2) An officer, director, or owner of 10 percent or more of the capital stock of the national bank; or
- (3) An employee of the national bank, whose duties include:
  - (i) The management of the national bank's business;
  - (ii) The handling of the national bank's retail forex transactions;
  - (iii) The keeping of records, including without limitation the software used to make or maintain those records, pertaining to the national bank's retail forex transactions; or

(iv) The signing or co-signing of checks or drafts on behalf of the national bank;

(4) A spouse or minor dependent living in the same household as any of the foregoing persons; or

(5) An affiliate of the national bank.

*Retail forex transaction* means an agreement, contract, or transaction in foreign currency, other than an identified banking product or a part of an identified banking product, that is offered or entered into by a national bank with a person that is not an eligible contract participant and that is:

(1) A contract of sale of a commodity for future delivery or an option on such a contract;

(2) An option, other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78(f)(a)); or

(3) Offered or entered into on a leveraged or margined basis, or financed by a national bank, its affiliate, or any person acting in concert with the national bank or its affiliate on a similar basis, other than:

(i) A security that is not a security futures product as defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)); or

(ii) A contract of sale that:

(A) Results in actual delivery within two days; or

(B) Creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business; or

(iii) An agreement, contract, or transaction that the OCC determines is not functionally or economically similar to:

(A) A contract of sale of a commodity for future delivery or an option on such a contract; or

(B) An option, other than an option executed or traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78(f)(a)).

#### § 48.3 Prohibited transactions.

(a) *Fraudulent conduct prohibited.* No national bank or its IAPs may, directly or indirectly, in or in connection with any retail forex transaction:

(1) Cheat or defraud or attempt to cheat or defraud any person;

(2) Willfully make or cause to be made to any person any false report or statement or cause to be entered for any person any false record; or

(3) Willfully deceive or attempt to deceive any person by any means whatsoever.

(b) *Acting as counterparty and exercising discretion prohibited.* If a national bank can cause retail forex transactions to be effected for a retail forex customer without the retail forex customer's specific authorization, then neither the national bank nor its affiliates may act as the counterparty for any retail forex transaction with that retail forex customer.

#### § 48.4 Supervisory non-objection.

(a) *Supervisory non-objection required.* Before commencing a retail forex business, a national bank must provide the OCC with prior notice and obtain from the OCC a written supervisory non-objection.

(b) *Requirements for obtaining supervisory non-objection.*

(1) In order to obtain a written supervisory non-objection, a national bank must:

(i) Establish to the satisfaction of the OCC that the national bank has established and implemented written policies, procedures, and risk measurement and management systems and controls for the purpose of ensuring that it conducts retail forex transactions in a safe and sound manner and in compliance with this part; and

(ii) Provide such other information as the OCC may require.

(2) The information provided under paragraph (b)(1) of this section must include, without limitation, information regarding:

(i) Customer due diligence, including without limitation credit evaluations, customer appropriateness, and "know your customer" documentation;

(ii) New product approvals;

(iii) The haircuts that the national bank will apply to noncash margin as provided in § 48.9(b)(2); and

(iv) Conflicts of interest.

(c) *Treatment of existing retail forex businesses.* A national bank that is engaged in a retail forex business on July 15, 2011, may continue to do so for up to six months, subject to an extension of time by the OCC, if it requests the supervisory non-objection required by paragraph (a) of this section within 30 days of July 15, 2011, and submits the information required to be submitted under paragraph (b) of this section.

(d) *Compliance with the Commodity Exchange Act.* A national bank that is engaged in a retail forex business on July 15, 2011 and complies with paragraph (c) of this section will be deemed, during the six-month or extended period described in paragraph

(c) of this section, to be acting pursuant to a rule or regulation described in section 2(c)(2)(E)(ii)(I) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(E)(ii)(I)).

#### § 48.5 Application and closing out of offsetting long and short positions.

(a) *Application of purchases and sales.* Any national bank that—

(1) Engages in a retail forex transaction involving the purchase of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has an open retail forex transaction for the sale of the same currency;

(2) Engages in a retail forex transaction involving the sale of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has an open retail forex transaction for the purchase of the same currency;

(3) Purchases a put or call option involving foreign currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has a short put or call option position with the same underlying currency, strike price, and expiration date as that purchased; or

(4) Sells a put or call option involving foreign currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has a long put or call option position with the same underlying currency, strike price, and expiration date as that sold must:

(i) Immediately apply such purchase or sale against such previously held opposite transaction; and

(ii) Promptly furnish such retail forex customer with a statement showing the financial result of the transactions involved and the name of any introducing broker to the account.

(b) *Close-out against oldest open position.* In all instances in which the short or long position in a customer's retail forex account immediately prior to an offsetting purchase or sale is greater than the quantity purchased or sold, the national bank must apply such offsetting purchase or sale to the oldest portion of the previously held short or long position.

(c) *Transactions to be applied as directed by customer.* Notwithstanding paragraphs (a) and (b) of this section, to the extent the national bank allows retail forex customers to use other methods of offsetting retail forex transactions, the offsetting transaction must be applied as directed by a retail forex customer's specific instructions.

These instructions may not be made by the national bank or an IAP of the national bank.

#### § 48.6 Disclosure.

(a) *Risk disclosure statement required.* No national bank may open or maintain open an account that will engage in retail forex transactions for a retail forex customer unless the national bank has furnished the retail forex customer with a separate written disclosure statement containing only the language set forth in paragraph (d) of this section and the disclosures required by paragraphs (e) and (f) of this section.

(b) *Acknowledgment of risk disclosure statement required.* The national bank must receive from the retail forex customer a written acknowledgment signed and dated by the customer that the customer received and understood the written disclosure statement required by paragraph (a) of this section.

(c) *Placement of risk disclosure statement.* The disclosure statement may be attached to other documents as the initial page(s) of such documents and as the only material on such page(s).

(d) *Content of risk disclosure statement.* The language set forth in the written disclosure statement required by paragraph (a) of this section is as follows:

##### *Risk Disclosure Statement*

Retail forex transactions involve the leveraged trading of contracts denominated in foreign currency with a national bank as your counterparty. Because of the leverage and the other risks disclosed here, you can rapidly lose all of the funds or property you pledge to the national bank as margin for retail forex trading. You may lose more than you pledge as margin.

If your margin falls below the required amount, and you fail to provide the required additional margin, your national bank is required to liquidate your retail forex transactions. Your national bank cannot apply your retail forex losses to any of your assets or liabilities at the bank other than funds or property that you have pledged as margin for retail forex transactions. However, if you lose more money than you have pledged as margin, the bank may seek to recover that deficiency in an appropriate forum, such as a court of law.

You should be aware of and carefully consider the following points before determining whether retail forex trading is appropriate for you.

(1) Trading is not on a regulated market or exchange—your national bank is your trading counterparty and has conflicting interests. The retail forex transaction you are entering into is not conducted on an interbank market nor is it conducted on a futures exchange subject to regulation as a designated contract market by the Commodity Futures Trading Commission. The foreign currency trades you transact are trades with your national bank as

the counterparty. When you sell, the national bank is the buyer. When you buy, the national bank is the seller. As a result, when you lose money trading, your national bank is making money on such trades, in addition to any fees, commissions, or spreads the national bank may charge.

(2) An electronic trading platform for retail foreign currency transactions is not an exchange. It is an electronic connection for accessing your national bank. The terms of availability of such a platform are governed only by your contract with your national bank. Any trading platform that you may use to enter into off-exchange foreign currency transactions is only connected to your national bank. You are accessing that trading platform only to transact with your national bank. You are not trading with any other entities or customers of the national bank by accessing such platform. The availability and operation of any such platform, including the consequences of the unavailability of the trading platform for any reason, is governed only by the terms of your account agreement with the national bank.

(3) You may be able to offset or liquidate any trading positions only through your banking entity because the transactions are not made on an exchange or regulated contract market, and your national bank may set its own prices. Your ability to close your transactions or offset positions is limited to what your national bank will offer to you, as there is no other market for these transactions. Your national bank may offer any prices it wishes, including prices derived from outside sources or not in its discretion. Your national bank may establish its prices by offering spreads from third-party prices, but it is under no obligation to do so or to continue to do so. Your national bank may offer different prices to different customers at any point in time on its own terms. The terms of your account agreement alone govern the obligations your national bank has to you to offer prices and offer offset or liquidating transactions in your account and make any payments to you. The prices offered by your national bank may or may not reflect prices available elsewhere at any exchange, interbank, or other market for foreign currency.

(4) Paid solicitors may have undisclosed conflicts. The national bank may compensate introducing brokers for introducing your account in ways that are not disclosed to you. Such paid solicitors are not required to have, and may not have, any special expertise in trading and may have conflicts of interest based on the method by which they are compensated. You should thoroughly investigate the manner in which all such solicitors are compensated and be very cautious in granting any person or entity authority to trade on your behalf. You should always consider obtaining dated written confirmation of any information you are relying on from your national bank in making any trading or account decisions.

(5) Retail forex transactions are not insured by the Federal Deposit Insurance Corporation.

(6) Retail forex transactions are not a deposit in, or guaranteed by, a national bank.

(7) Retail forex transactions are subject to investment risks, including possible loss of all amounts invested.

Finally, you should thoroughly investigate any statements by any national bank that minimize the importance of, or contradict, any of the terms of this risk disclosure. These statements may indicate sales fraud.

This brief statement cannot, of course, disclose all the risks and other aspects of trading off-exchange foreign currency with a national bank.

I hereby acknowledge that I have received and understood this risk disclosure statement.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of Customer

(e)(1) *Disclosure of profitable accounts ratio.* Immediately following the language set forth in paragraph (d) of this section, the statement required by paragraph (a) of this section must include, for each of the most recent four calendar quarters during which the national bank maintained retail forex customer accounts:

(i) The total number of retail forex customer accounts maintained by the national bank over which the national bank does not exercise investment discretion;

(ii) The percentage of such accounts that were profitable for retail forex customer accounts during the quarter; and

(iii) The percentage of such accounts that were not profitable for retail forex customer accounts during the quarter.

(2) The national bank's statement of profitable trades must include the following legend: "Past performance is not necessarily indicative of future results." Each national bank must provide, upon request, to any retail forex customer or prospective retail forex customer the total number of retail forex accounts maintained by the national bank for which the national bank does not exercise investment discretion, the percentage of such accounts that were profitable, and the percentage of such accounts that were not profitable for each calendar quarter during the most recent five-year period during which the national bank maintained such accounts.

(f) *Disclosure of fees and other charges.* Immediately following the language required by paragraph (e) of this section, the statement required by paragraph (a) of this section must include:

(1) The amount of any fee, charge, spread, or commission that the national bank may impose on the retail forex customer in connection with a retail forex account or retail forex transaction;

(2) An explanation of how the national bank will determine the amount of such fees, charges, spreads, or commissions; and

(3) The circumstances under which the national bank may impose such fees, charges, spreads, or commissions.

(g) *Future disclosure requirements.* If, with regard to a retail forex customer, the national bank changes any fee, charge, or commission required to be disclosed under paragraph (f) of this section, then the national bank must mail or deliver to the retail forex customer a notice of the changes at least 15 days prior to the effective date of the change.

(h) *Form of disclosure requirements.* The disclosures required by this section must be clear and conspicuous and designed to call attention to the nature and significance of the information provided.

(i) *Other disclosure requirements unaffected.* This section does not relieve a national bank from any other disclosure obligation it may have under applicable law.

#### § 48.7 Recordkeeping.

(a) *General rule.* A national bank engaging in retail forex transactions must keep full, complete, and systematic records, together with all pertinent data and memoranda, pertaining to its retail forex business, including the following 6 types of records:

(1) *Retail forex account records.* For each retail forex account:

(i) The name and address of the person for whom the account is carried or introduced and the principal occupation or business of the person;

(ii) The name of any other person guaranteeing the account or exercising trading control with respect to the account;

(iii) The establishment or termination of the account;

(iv) A means to identify the person that has solicited and is responsible for the account;

(v) The funds in the account, net of any commissions and fees;

(vi) The account's net profits and losses on open trades;

(vii) The funds in the account plus or minus the net profits and losses on open trades, adjusted for the net option value in the case of open options positions;

(viii) Financial ledger records that show all charges against and credits to the account, including deposits, withdrawals, and transfers, and charges or credits resulting from losses or gains on closed transactions; and

(ix) A list of all retail forex transactions executed for the account,

with the details specified in paragraph (a)(2) of this section.

(2) *Retail forex transaction records.*

For each retail forex transaction:

- (i) The date and time the national bank received the order;
- (ii) The price at which the national bank placed the order, or, in the case of an option, the premium that the retail forex customer paid;
- (iii) The customer account identification information;
- (iv) The currency pair;
- (v) The size or quantity of the order;
- (vi) Whether the order was a buy or sell order;
- (vii) The type of order, if the order was not a market order;
- (viii) The size and price at which the order is executed, or in the case of an option, the amount of the premium paid for each option purchased, or the amount credited for each option sold;
- (ix) For options, whether the option is a put or call, expiration date, quantity, underlying contract for future delivery or underlying physical, strike price, and details of the purchase price of the option, including premium, mark-up, commission, and fees; and
- (x) For futures, the delivery date; and
- (xi) If the order was made on a trading platform:

(A) The price quoted on the trading platform when the order was placed, or, in the case of an option, the premium quoted;

(B) The date and time the order was transmitted to the trading platform; and

(C) The date and time the order was executed.

(3) *Price changes on a trading platform.* If a trading platform is used, daily logs showing each price change on the platform, the time of the change to the nearest second, and the trading volume at that time and price.

(4) *Methods or algorithms.* Any method or algorithm used to determine the bid or asked price for any retail forex transaction or the prices at which customer orders are executed, including, but not limited to, any markups, fees, commissions or other items which affect the profitability or risk of loss of a retail forex customer's transaction.

(5) *Daily records* which show for each business day complete details of:

(i) All retail forex transactions that are futures transactions executed on that day, including the date, price, quantity, market, currency pair, delivery date, and the person for whom such transaction was made;

(ii) All retail forex transactions that are option transactions executed on that day, including the date, whether the transaction involved a put or call, the

expiration date, quantity, currency pair, delivery date, strike price, details of the purchase price of the option, including premium, mark-up, commission and fees, and the person for whom the transaction was made; and

(iii) All other retail forex transactions executed on that day for such account, including the date, price, quantity, currency and the person for whom such transaction was made.

(6) *Other records.* Written acknowledgments of receipt of the risk disclosure statement required by § 48.6(b), offset instructions pursuant to § 48.5(c), records required under paragraphs (b) through (f) of this section, trading cards, signature cards, street books, journals, ledgers, payment records, copies of statements of purchase, and all other records, data, and memoranda that have been prepared in the course of the national bank's retail forex business.

(b) *Ratio of profitable accounts.*

(1) With respect to its active retail forex customer accounts over which it did not exercise investment discretion and that are not retail forex proprietary accounts open for any period of time during the quarter, a national bank must prepare and maintain on a quarterly basis (calendar quarter):

(i) A calculation of the percentage of such accounts that were profitable;

(ii) A calculation of the percentage of such accounts that were not profitable; and

(iii) Data supporting the calculations described in paragraphs (b)(1)(i) and (ii) of this section.

(2) In calculating whether a retail forex account was profitable or not profitable during the quarter, the national bank must compute the realized and unrealized gains or losses on all retail forex transactions carried in the retail forex account at any time during the quarter, subtract all fees, commissions, and any other charges posted to the retail forex account during the quarter, and add any interest income and other income or rebates credited to the retail forex account during the quarter. All deposits and withdrawals of funds made by the retail forex customer during the quarter must be excluded from the computation of whether the retail forex account was profitable or not profitable during the quarter. Computations that result in a zero or negative number must be considered a retail forex account that was not profitable. Computations that result in a positive number must be considered a retail forex account that was profitable.

(3) A retail forex account must be considered "active" for purposes of paragraph (b)(1) of this section if and

only if for the relevant calendar quarter a retail forex transaction was executed in that account or the retail forex account contained an open position resulting from a retail forex transaction.

(c) *Records related to violations of law.* A national bank engaging in retail forex transactions must make a record of all communications received by the national bank or its IAPs concerning facts giving rise to possible violations of law related to the national bank's retail forex business. The record must contain: The name of the complainant, if provided; the date of the communication; the relevant agreement, contract, or transaction; the substance of the communication; the name of the person that received the communication; and the final disposition of the matter.

(d) *Records for noncash margin.* A national bank must maintain a record of all noncash margin collected pursuant to § 48.9. The record must show separately for each retail forex customer:

(1) A description of the securities or property received;

(2) The name and address of such retail forex customer;

(3) The dates when the securities or property were received;

(4) The identity of the depositories or other places where such securities or property are segregated or held, if applicable;

(5) The dates in which the national bank placed or removed such securities or property into or from such depositories; and

(6) The dates of return of such securities or property to such retail forex customer, or other disposition thereof, together with the facts and circumstances of such other disposition.

(e) *Order Tickets.*

(1) Except as provided in paragraph (e)(2) of this section, immediately upon the receipt of a retail forex transaction order, a national bank must prepare an order ticket for the order (whether unfulfilled, executed, or canceled). The order ticket must include:

(i) Account identification (account or customer name with which the retail forex transaction was effected);

(ii) Order number;

(iii) Type of order (market order, limit order, or subject to special instructions);

(iv) Date and time, to the nearest minute, that the retail forex transaction order was received (as evidenced by time-stamp or other timing device);

(v) Time, to the nearest minute, that the retail forex transaction order was executed; and

(vi) Price at which the retail forex transaction was executed.

(2) *Post-execution allocation of bunched orders.* Specific identifiers for

retail forex accounts included in bunched orders need not be recorded at time of order placement or upon report of execution as required under paragraph (e)(1) of this section if the following requirements are met:

(i) The national bank placing and directing the allocation of an order eligible for post-execution allocation has been granted written investment discretion with regard to participating customer accounts and makes the following information available to retail forex customers upon request:

(A) The general nature of the post-execution allocation methodology the national bank will use;

(B) Whether the national bank has any interest in accounts that may be included with customer accounts in bunched orders eligible for post-execution allocation; and

(C) Summary or composite data sufficient for that customer to compare the customer's results with those of other comparable customers and, if applicable, any account in which the national bank has an interest.

(ii) Post-execution allocations are made as soon as practicable after the entire transaction is executed;

(iii) Post-execution allocations are fair and equitable, with no account or group of accounts receiving consistently favorable or unfavorable treatment; and

(iv) The post-execution allocation methodology is sufficiently objective and specific to permit the OCC to verify the fairness of the allocations using that methodology.

(f) *Record of monthly statements and confirmations.* A national bank must retain a copy of each monthly statement and confirmation required by § 48.10.

(g) *Form of record and manner of maintenance.* The records required by this section must clearly and accurately reflect the information required and provide an adequate basis for the audit of the information. A national bank must create and maintain audio recordings of oral orders and oral offset instructions. Record maintenance may include the use of automated or electronic records provided that the records are easily retrievable and readily available for inspection.

(h) *Length of maintenance.* A national bank must keep each record required by this section for at least five years from the date the record is created.

#### § 48.8 Capital requirements.

A national bank offering or entering into retail forex transactions must be well capitalized as defined by 12 CFR part 6.

#### § 48.9 Margin requirements.

(a) *Margin required.* A national bank engaging, or offering to engage, in retail forex transactions must collect from each retail forex customer an amount of margin not less than:

(1) Two percent of the notional value of the retail forex transaction for major currency pairs and 5 percent of the notional value of the retail forex transaction for all other currency pairs;

(2) For short options, 2 percent for major currency pairs and 5 percent for all other currency pairs of the notional value of the retail forex transaction, plus the premium received by the retail forex customer; or

(3) For long options, the full premium charged and received by the national bank.

(b)(1) *Form of margin.* Margin collected under paragraph (a) of this section or pledged by a retail forex customer for retail forex transactions must be in the form of cash or the following financial instruments:

(i) Obligations of the United States and obligations fully guaranteed as to principal and interest by the United States;

(ii) General obligations of any State or of any political subdivision thereof;

(iii) General obligations issued or guaranteed by any enterprise, as defined in 12 U.S.C. 4502(10);

(iv) Certificates of deposit issued by an insured depository institution, as defined in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(2));

(v) Commercial paper;

(vi) Corporate notes or bonds;

(vii) General obligations of a sovereign nation;

(viii) Interests in money market mutual funds; and

(ix) Such other financial instruments as the OCC deems appropriate.

(2) *Haircuts.* A national bank must establish written policies and procedures that include:

(i) Haircuts for noncash margin

collected under this section; and

(ii) Annual evaluation, and, if appropriate, modification, of the haircuts.

(c) *Separate margin account.* Margin collected by the national bank from a retail forex customer for retail forex transactions or pledged by a retail forex customer for retail forex transactions must be placed into a separate account.

(d) *Margin calls; liquidation of position.*

(1) For each retail forex customer, at least once per day, a national bank must:

(i) Mark the value of the retail forex customer's open retail forex positions to market;

(ii) Mark the value of the margin collected under this section from the retail forex customer to market; and

(iii) Determine whether, based on the marks in paragraphs (d)(1)(i) and (ii) of this section, the national bank has collected margin from the retail forex customer sufficient to satisfy the requirements of this section.

(2) If, pursuant to paragraph (d)(1)(iii) of this section, the national bank determines that it has not collected margin from the retail forex customer sufficient to satisfy the requirements of this section then, within a reasonable period of time, the national bank must either:

(i) Collect margin from the retail forex customer sufficient to satisfy the requirements of this section; or

(ii) Liquidate the retail forex customer's retail forex transactions.

(e) *Set-off prohibited.* A national bank may not:

(1) Apply a retail forex customer's retail forex obligations against any funds or other asset of the retail forex customer other than margin in the separate margin account described in paragraph (c) of this section;

(2) Apply a retail forex customer's retail forex obligations to increase the amount owed by the retail forex customer to the national bank under any loan; or

(3) Collect the margin required under this section by use of any right of set-off.

#### § 48.10 Required reporting to customers.

(a) *Monthly statements.* Each national bank must promptly furnish to each retail forex customer, as of the close of the last business day of each month or as of any regular monthly date selected, except for accounts in which there are neither open positions at the end of the statement period nor any changes to the account balance since the prior statement period but, in any event, not less frequently than once every three months, a statement that clearly shows:

(1) For each retail forex customer:

(i) The open retail forex transactions with prices at which acquired;

(ii) The net unrealized profits or losses in all open retail forex transactions marked to the market;

(iii) Any money, securities, or other property in the separate margin account required by § 48.9(c); and

(iv) A detailed accounting of all financial charges and credits to the retail forex customer's retail forex accounts during the monthly reporting period, including: Money, securities, or property received from or disbursed to such customer; realized profits and losses; and fees, charges, spreads, and commissions.

(2) For each retail forex customer engaging in retail forex transactions that are options:

(i) All such options purchased, sold, exercised, or expired during the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;

(ii) The open option positions carried for such customer and arising as of the end of the monthly reporting period, identified by underlying retail forex transaction or underlying currency, strike price, transaction date, and expiration date;

(iii) All such option positions marked to the market and the amount each position is in the money, if any;

(iv) Any money, securities, or other property in the separate margin account required by § 48.9(c); and

(v) A detailed accounting of all financial charges and credits to the retail forex customer's retail forex accounts during the monthly reporting period, including: Money, securities, or property received from or disbursed to such customer; realized profits and losses; premiums and mark-ups; and fees, charges, and commissions.

(b) *Confirmation statement.* Each national bank must, not later than the next business day after any retail forex transaction, send:

(1) To each retail forex customer, a written confirmation of each retail forex transaction caused to be executed by it for the customer, including offsetting transactions executed during the same business day and the rollover of an open retail forex transaction to the next business day;

(2) To each retail forex customer engaging in forex option transactions, a written confirmation of each forex option transaction, containing at least the following information:

(i) The retail forex customer's account identification number;

(ii) A separate listing of the actual amount of the premium, as well as each markup thereon, if applicable, and all other commissions, costs, fees, and other charges incurred in connection with the forex option transaction;

(iii) The strike price;

(iv) The underlying retail forex transaction or underlying currency;

(v) The final exercise date of the forex option purchased or sold; and

(vi) The date that the forex option transaction was executed.

(3) To each retail forex customer engaging in forex option transactions, upon the expiration or exercise of any option, a written confirmation statement thereof, which statement must include the date of such occurrence, a

description of the option involved, and, in the case of exercise, the details of the retail forex or physical currency position that resulted therefrom including, if applicable, the final trading date of the retail forex transaction underlying the option.

(c) Notwithstanding paragraph (b) of this section, a retail forex transaction that is caused to be executed for a pooled investment vehicle that engages in retail forex transactions need be confirmed only to the operator of such pooled investment vehicle.

(d) *Controlled accounts.* With respect to any account controlled by any person other than the retail forex customer for whom such account is carried, each national bank must promptly furnish in writing to such other person the information required by paragraphs (a) and (b) of this section.

(e) *Introduced accounts.* Each statement provided pursuant to the provisions of this section must, if applicable, show that the account for which the national bank was introduced by an introducing broker and the name of the introducing broker.

#### § 48.11 Unlawful representations.

(a) *No implication or representation of limiting losses.* No national bank engaged in retail foreign exchange transactions or its IAPs may imply or represent that it will, with respect to any retail customer forex account, for or on behalf of any person:

(1) Guarantee such person or account against loss;

(2) Limit the loss of such person or account; or

(3) Not call for or attempt to collect margin as established for retail forex customers.

(b) *No implication of representation of engaging in prohibited acts.* No national bank or its IAPs may in any way imply or represent that it will engage in any of the acts or practices described in paragraph (a) of this section.

(c) *No Federal government endorsement.* No national bank or its IAPs may represent or imply in any manner whatsoever that any retail forex transaction or retail forex product has been sponsored, recommended, or approved by the OCC, the Federal government, or any agency thereof.

(d) *Assuming or sharing of liability from bank error.* This section does not prevent a national bank from assuming or sharing in the losses resulting from the national bank's error or mishandling of a retail forex transaction.

(e) *Certain guaranties unaffected.* This section does not affect any guarantee entered into prior to the effective date of this part, but this section does apply

to any extension, modification, or renewal thereof entered into after such date.

#### § 48.12 Authorization to trade.

(a) *Specific authorization required.* No national bank may directly or indirectly effect a retail forex transaction for the account of any retail forex customer unless, before the retail forex transaction occurs, the retail forex customer specifically authorized the national bank to effect the retail forex transaction.

(b) *Requirements for specific authorization.* A retail forex transaction is "specifically authorized" for purposes of this section if the retail forex customer specifies:

(1) The precise retail forex transaction to be effected;

(2) The exact amount of the foreign currency to be purchased or sold; and

(3) In the case of an option, the identity of the foreign currency or contract that underlies the option.

#### § 48.13 Trading and operational standards.

(a) *Internal rules, procedures, and controls required.* A national bank engaging in retail forex transactions must establish and implement internal policies, procedures, and controls designed, at a minimum, to:

(1) Ensure, to the extent reasonable, that each retail forex transaction that is executable at or near the price that the national bank has quoted to the retail forex customer is entered for execution before any retail forex transaction for:

(i) A proprietary account;

(ii) An account for which a related person may originate orders without the prior specific consent of the account owner, if the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account;

(iii) An account in which a related person has an interest, if the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account; or

(iv) An account in which a related person may originate orders without the prior specific consent of the account owner, if the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account;

(2) Prevent national-bank related persons from placing orders, directly or indirectly, with another person in a manner designed to circumvent the provisions of paragraph (a)(1) of this section; and

(3) Fairly and objectively establish settlement prices for retail forex transactions.

(b) *Disclosure of retail forex transactions.* No national bank engaging in retail forex transactions may disclose that an order of another person is being held by the national bank, unless the disclosure is necessary to the effective execution of such order or the disclosure is made at the request of the OCC.

(c) *Handling of retail forex accounts of related persons of retail forex counterparties.* No national bank engaging in retail forex transactions may knowingly handle the retail forex account of an employee of another retail forex counterparty's retail forex business unless the national bank:

(1) Receives written authorization from a person designated by the other retail forex counterparty with responsibility for the surveillance over the account pursuant to paragraph (a)(2) of this section;

(2) Prepares immediately upon receipt of an order for the account a written record of the order, including the account identification and order number, and records thereon to the nearest minute, by time-stamp or other timing device, the date and time the order was received; and

(3) Transmits on a regular basis to the other retail forex counterparty copies of all statements for the account and of all written records prepared upon the receipt of orders for the account pursuant to paragraph (c)(2) of this section.

(d) *Related person of national bank establishing account at another retail forex counterparty.* No related person of a national bank working in the national bank's retail forex business may have an account, directly or indirectly, with another retail forex counterparty unless the other retail forex counterparty:

(1) Receives written authorization to open and maintain the account from a person designated by the national bank with responsibility for the surveillance over the account pursuant to paragraph (a)(2) of this section; and

(2) Transmits on a regular basis to the national bank copies of all statements for the account and of all written records prepared by the other retail forex counterparty upon receipt of orders for the account pursuant to paragraph (a)(2) of this section.

(e) *Prohibited trading practices.* No national bank engaging in retail forex transactions may:

(1) Enter into a retail forex transaction, to be executed pursuant to a market or limit order at a price that is not at or near the price at which other retail forex customers, during that same time period, have executed retail forex transactions with the national bank;

(2) Adjust or alter prices for a retail forex transaction after the transaction has been confirmed to the retail forex customer;

(3) Provide to a retail forex customer a new bid price for a retail forex transaction that is higher than its previous bid without providing a new asked price that is also higher than its previous asked price by a similar amount;

(4) Provide to a retail forex customer a new bid price for a retail forex transaction that is lower than its previous bid without providing a new asked price that is also lower than its previous asked price by a similar amount; or

(5) Establish a new position for a retail forex customer (except one that offsets an existing position for that retail forex customer) where the national bank holds outstanding orders of other retail forex customers for the same currency pair at a comparable price.

#### § 48.14 Supervision.

(a) *Supervision by the national bank.* A national bank engaging in retail forex transactions must diligently supervise the handling by its officers, employees, and agents (or persons occupying a similar status or performing a similar function) of all retail forex accounts carried, operated, or advised by at the national bank and all activities of its officers, employees, and agents (or persons occupying a similar status or performing a similar function) relating to its retail forex business.

(b) *Supervision by officers, employees, or agents.* An officer, employee, or agent of a national bank must diligently supervise his or her subordinates' handling of all retail forex accounts at the national bank and all the subordinates' activities relating to the national bank's retail forex business.

#### § 48.15 Notice of transfers.

(a) *Prior notice generally required.* Except as provided in paragraph (b) of this section, a national bank must provide a retail forex customer with 30 days' prior notice of any assignment of any position or transfer of any account of the retail forex customer. The notice must include a statement that the retail forex customer is not required to accept the proposed assignment or transfer and may direct the national bank to liquidate the positions of the retail forex customer or transfer the account to a retail forex counterparty of the retail forex customer's selection.

(b) *Exceptions.* The requirements of paragraph (a) of this section do not apply to transfers:

(1) Requested by the retail forex customer;

(2) Made by the Federal Deposit Insurance Corporation as receiver or conservator under the Federal Deposit Insurance Act; or

(3) Otherwise authorized by applicable law.

(c) *Obligations of transferee national bank.* A national bank to which retail forex accounts or positions are assigned or transferred under paragraph (a) of this section must provide to the affected retail forex customers the risk disclosure statements and forms of acknowledgment required by this part and receive the required signed acknowledgments within 60 days of such assignments or transfers. This requirement does not apply if the national bank has clear written evidence that the retail forex customer has received and acknowledged receipt of the required disclosure statements.

#### § 48.16 Customer dispute resolution.

(a) *Voluntary submission of claims to dispute or settlement procedures.* No national bank may enter into any agreement or understanding with a retail forex customer in which the customer agrees, prior to the time a claim or grievance arises, to submit such claim or grievance to any settlement procedure unless the following conditions are satisfied:

(1) Signing the agreement is not a condition for the customer to use the services offered by the national bank.

(2) If the agreement is contained as a clause or clauses of a broader agreement, the customer separately endorses the clause or clauses.

(3) The agreement advises the retail forex customer that, at such time as the customer notifies the national bank that the customer intends to submit a claim to arbitration, or at such time the national bank notifies the customer of its intent to submit a claim to arbitration, the customer will have the opportunity to choose a person qualified in dispute resolution to conduct the proceeding.

(4) The agreement must acknowledge that the national bank will pay any incremental fees that may be assessed in connection with the dispute resolution, unless it is determined in the proceeding that the retail forex customer has acted in bad faith in initiating the proceeding.

(5) The agreement must include the following language printed in large boldface type:

Two forums exist for the resolution of disputes related to retail forex transactions: Civil court litigation and arbitration conducted by a private

organization. The opportunity to settle disputes by arbitration may in some cases provide benefits to customers, including the ability to obtain an expeditious and final resolution of disputes without incurring substantial cost. Each customer must individually examine the relative merits of arbitration and consent to this arbitration agreement must be voluntary.

By signing this agreement, you: (1) May be waiving your right to sue in a court of law; and (2) are agreeing to be bound by arbitration of any claims or counterclaims that you or [insert name of national bank] may submit to arbitration under this agreement. In the event a dispute arises, you will be notified if [insert name of national bank] intends to submit the dispute to arbitration.

You need not sign this agreement to open or maintain a retail forex account with [insert name of national bank].

(b) *Election of forum.*

(1) Within 10 business days after receipt of notice from the retail forex customer that the customer intends to submit a claim to arbitration, the national bank must provide the customer with a list of persons qualified in dispute resolution.

(2) The customer must, within 45 days after receipt of such list, notify the national bank of the person selected. The customer's failure to provide such notice must give the national bank the right to select a person from the list.

(c) *Enforceability.* A dispute settlement procedure may require parties using the procedure to agree, under applicable state law, submission agreement, or otherwise, to be bound by an award rendered in the procedure if the agreement to submit the claim or grievance to the procedure complies with paragraph (a) of this section or the agreement to submit the claim or grievance to the procedure was made after the claim or grievance arose. Any award so rendered by the procedure will be enforceable in accordance with applicable law.

(d) *Time limits for submission of claims.* The dispute settlement procedure used by the parties may not include any unreasonably short limitation period foreclosing submission of a customer's claims or grievances or counterclaims.

(e) *Counterclaims.* A procedure for the settlement of a retail forex customer's claims or grievances against a national bank or employee thereof may permit the submission of a counterclaim in the procedure by a person against whom a claim or grievance is brought if the counterclaim:

(1) Arises out of the transaction or occurrence that is the subject of the retail forex customer's claim or grievance; and

(2) Does not require for adjudication the presence of essential witnesses, parties, or third persons over which the settlement process lacks jurisdiction.

**§ 48.17 Reservation of authority.**

The OCC may modify the disclosure, recordkeeping, capital and margin, reporting, business conduct, documentation, or other standards or requirements under this part for a specific retail forex transaction or a class of retail forex transactions if the OCC determines that the modification is consistent with safety and soundness and the protection of retail forex customers.

Dated: July 7, 2011.

**John Walsh,**

*Acting Comptroller of the Currency.*

[FR Doc. 2011-17514 Filed 7-13-11; 8:45 am]

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**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Parts 329 and 330**

**RIN 3064-AD78**

**Interest on Deposits; Deposit Insurance Coverage**

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule.

**SUMMARY:** The FDIC is issuing a final rule amending its regulations to reflect section 627 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the DFA),<sup>1</sup> repealing the prohibition against the payment of interest on demand deposit accounts effective July 21, 2011.

**DATES:** The final rule is effective July 21, 2011.

**FOR FURTHER INFORMATION CONTACT:** Martin Becker, Senior Consumer Affairs Specialist, Division of Consumer and Depositor Protection, (703) 254-2233, Mark Mellon, Counsel, Legal Division, (202) 898-3884, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 627 of the DFA repealed the statutory prohibition against the payment of interest on demand deposits, effective one year from the

date of the DFA's enactment, July 21, 2011. Section 343 of the DFA amended section 11(a)(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1821(a)(1), to provide full insurance coverage for depository institution noninterest-bearing transaction accounts from December 31, 2010, through December 31, 2012.

In light of the prospective repeal of the demand deposit interest prohibition, the FDIC proposed to rescind 12 CFR part 329, the regulation which implements that prohibition with respect to state-chartered, nonmember (SNM) banks to be effective on the same date as the statutory repeal, July 21, 2011. 76 FR 21265 (Apr. 15, 2011) (NPR). At the same time, however, a regulatory definition of the term "interest" would still be useful in interpreting the requirements of section 343 of the DFA providing temporary, unlimited deposit insurance coverage for noninterest-bearing transaction accounts. For this reason, in the NPR the FDIC also proposed to transfer the definition of "interest" found at 12 CFR 329.1(c) to Part 330, specifically the definitions section at 12 CFR 330.1. The FDIC also specifically solicited comment on whether other parts of Part 329 could also prove useful and therefore should be moved into Part 330 as well. In addition, the FDIC sought comment on every other aspect of the proposed rule.<sup>2</sup>

**II. Comment Summary and Discussion**

The FDIC received eight comments on the NPR. Three were from community banks, one was from a large depository institution, two were from depository institution trade groups, one from a financial consulting firm, and one was from a legal representative for a money market fund.

The chief points were:

1. The FDIC should stop or delay repeal of the prohibition (four commenters);
2. Community banks will be harmed by repeal of the prohibition (four commenters);
3. The FDIC should add the Part 329 section concerning premiums to Part 330 (three commenters); and
4. The FDIC should adopt or incorporate all Federal Reserve interpretations and advisory opinions

<sup>2</sup>In counterpart to this rulemaking, the Board of Governors of the Federal Reserve System (the Federal Reserve) have issued a notice of proposed rulemaking to repeal 12 CFR Part 217, Prohibition Against Payment of Interest on Demand Deposits (Regulation Q). See 76 **Federal Register** 20892 (Apr. 14, 2011). Regulation Q implements the prohibition against the payment of interest on demand deposits with respect to member banks.

<sup>1</sup>Public Law 111-203, 124 Stat. 1376.