

may result from errors or omissions in the services provided under the contract and compliance with all Federal, State, and local requirements effective on the contract execution date.

(iv) An evaluation of the contractor's performance on previous similar projects in which the contractor acted in a similar capacity.

(v) A detailed listing and cost estimate of equipment and supplies not included in the construction contract but which are necessary to properly operate the facility.

(vi) Evidence that a qualified construction inspector who is independent of the contractor has or will be hired.

(vii) Preliminary plans and outline specifications. However, final plans and specifications must be completed and reviewed by Rural Development prior to the start of construction.

(viii) The owner's attorney's opinion and comments regarding the legal adequacy of the proposed contract documents and evidence that the owner has the legal authority to enter into and fulfill the contract.

(2) The State Office may approve design/build or construction management/constructor projects if the contract amount is equal to or less than \$250,000.

(3) If the contract amount exceeds \$250,000, National Office prior concurrence must be obtained in accordance with § 1942.9(b) of this subpart. Only that information required under § 1942.9(b) of this subpart must be provided to National Office Program Support Staff for review. Additional information, such as plans and specifications, may be submitted by the State Office, if a review of those items is desired.

(4) The design/build method of construction is one in which the architectural and engineering services, normally provided by an independent consultant to the owner, are combined with those of the General Contractor under a single source contract. These services are commonly provided by a design/build firm, a joint venture between an architectural firm and a construction firm, or a company providing pre-engineered buildings and design services.

(5) The Construction Management/constructor (CMc), acts in the capacity of a General Contractor and is actually responsible for the construction. This type of construction management is also referred to as Construction Manager "At Risk". The construction contract is between the owner and the CMc. The CMc, in turn, may subcontract for some or all of the work.

(6) The National Office may approve other alternative contact methods, such as Construction Management/advisor (CMA), with a recommendation from the State Office. The recommendation shall indicate the circumstances which prove this method advantageous to the applicant and the government. A CMA acts in an advisory capacity to the owner, and the actual contract for construction is between the owner and a prime contractor or multiple prime contractors. When a contract for an architect and a CMA are being provided, care must be taken to assure that separate professionals are not being paid to provide similar services. Further, paragraph (e)(3) of this section discourages separate contracts for construction.

(7) All alternate contracting method projects must comply with the requirements for "maximum open and free competition" in paragraph (j)(2) of this section. Choosing an alternate contracting method is not a way to avoid competition. Further information on procurement methods, which must be followed, is provided in paragraph (k) of this section.

\* \* \* \* \*

Dated: April 1, 2011.

**Dallas Tonsager,**

*Under Secretary, Rural Development.*

Dated: April 11, 2011.

**Michael Scuse,**

*Acting Under Secretary, Farm and Foreign Agricultural Services.*

[FR Doc. 2011-9630 Filed 4-21-11; 8:45 am]

**BILLING CODE 3410-XV-P**

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### 12 CFR Part 48

[Docket ID OCC-2011-0007]

RIN 1557-AD42

### Retail Foreign Exchange Transactions

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

**ACTION:** Notice of proposed rulemaking.

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

agencies of foreign banks, and their operating subsidiaries must comply to conduct such transactions.

**DATES:** Comments on this notice of proposed rulemaking must be received by May 23, 2011.

**ADDRESSES:** Because paper mail in the Washington, DC, area is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or e-mail. Please use the title "Retail Foreign Exchange Transactions" to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- Federal eRulemaking Portal—“regulations.gov”: Go to <http://www.regulations.gov>. Select “Document Type” of “Proposed Rules,” and in “Enter Keyword or ID Box,” enter Docket ID “OCC-2011-0007,” and click “Search.” On “View By Relevance” tab at bottom of screen, in the “Agency” column, locate the proposed rule for the OCC, in the “Action” column, click on “Submit a Comment” or “Open Docket Folder” to submit or view public comments and to view supporting and related materials for this rulemaking action.

Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

- E-mail: [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).

- Mail: Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 2-3, Washington, DC 20219.

- Fax: (202) 874-5274.

- Hand Delivery/Courier: 250 E Street, SW., Mail Stop 2-3, Washington, DC 20219.

**Instructions:** You must include “OCC” as the agency name and “Docket ID OCC-2011-0007” in your comment. In general, the OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this

proposed rule by any of the following methods:

- *Viewing Comments Electronically:* Go to <http://www.regulations.gov>. Select “Document Type” of “Proposed Rules,” and in “Enter Keyword or ID Box,” enter Docket ID “OCC–2011–0007,” and click “Search.” Comments will be listed under “View By Relevance” tab at bottom of screen. If comments from more than one agency are listed, the “Agency” column will indicate which comments were received by the OCC.

- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC. 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 to submit to security screening in order to inspect and photocopy comments.

- *Docket:* You may also view or request available background documents and project summaries using the methods described above.

#### FOR FURTHER INFORMATION CONTACT:

Tena Alexander, Senior Counsel, or Roman Goldstein, Attorney, Securities and Corporate Practices Division, (202) 874–5120.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (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 all such futures and options and all agreements, contracts, or transactions that are functionally or economically similar to such futures and options similarly.<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 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 proposed 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 also cover Federal savings associations.

On September 10, 2010, the Commodity Futures Trading Commission (CFTC) adopted a retail forex rule for persons subject to its jurisdiction.<sup>12</sup> After studying and

considering the CFTC’s retail forex rule, and being mindful of the desirability of issuing comparable rules, the OCC is proposing to adopt a substantially similar rule for national banks wishing to engage in retail forex transactions. The Dodd-Frank Act does not require that retail forex rules be issued jointly, or on a coordinated basis, with any other Federal regulatory agency. The Federal banking agencies (the OCC, Federal Reserve Board, and Federal Deposit Insurance Corporation) are issuing separate proposed rules. However, the Federal banking agencies intend to coordinate their efforts.

For national banks, the requirements in this proposed rule could overlap with applicable expectations contained in the Interagency Statement on Retail Sales of Nondeposit Investment Products (NDIP Policy Statement).<sup>13</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. The OCC preliminarily views retail forex transactions as nondeposit investment products, but the terms “retail forex customer” in this proposed rule and “retail customer” in the NDIP Policy Statement are not necessarily co-extensive. After the effective date of the final version of this proposed rule, the OCC will expect national banks engaging in or offering retail forex transactions to also comply with the expectations set out in the NDIP Policy Statement to the extent such expectations do not conflict with the requirements of the OCC’s final retail forex rule.

*Question 1.1:* Does the proposed regulation create issues concerning application of the NDIP Policy Statement to retail forex transactions that the OCC should address?

##### II. Section-by-Section Description of the Rule

###### Structure and Approach

The OCC’s proposed retail forex rule is modeled on the CFTC’s retail forex rule to promote consistent treatment of retail forex transaction regardless of whether a retail forex customer’s dealer is a national bank or a CFTC registrant. The proposal includes various changes

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> See OCC Bulletin 94–13 (Feb. 24, 1994); see also OCC Bulletin 1995–52 (Sept. 22, 1995).

<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 will be the section where the provisions will be codified in the CEA.

<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 who 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.

<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

that reflect differences between OCC and CFTC supervisory regimes and differences between national banks and CFTC registrants. For example:

- The OCC's proposed retail forex rule leverages the OCC's existing comprehensive supervision of national banks. For example, the OCC's proposed retail forex rule does not include registration requirements, because national banks are already subject to comprehensive supervision by the OCC. Thus, instead of a registration requirement, national banks must receive a supervisory non-objection to conduct a retail forex business.

- Because national banks are already subject to various capital and other supervisory requirements,<sup>14</sup> the OCC's proposed retail forex rule generally requires national banks wishing to engage in retail forex transactions to be "well capitalized."

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

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

The OCC notes that some national banks may also engage in retail forex transactions through their foreign branches. The CEA does not clearly define whether foreign branches of national banks may be considered United States financial institutions that can be included in the scope of this proposed rule. Generally, the OCC defines a national bank to include all its branches, foreign and domestic. Using that definition, the proposed retail forex rule would include these branches, and all their transactions would be subject to the terms of this proposed rule.

**Question II.1.1:** The OCC requests comment on whether this rule should apply to national banks' foreign branches conducting retail forex transactions abroad, whether with U.S. or foreign customers.

#### 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>15</sup> (i) A future or option on such a future;<sup>16</sup> (ii) options not traded on a registered national securities

exchange;<sup>17</sup> and (iii) certain leveraged or margined transactions.<sup>18</sup> This definition has several important features.

First, certain transactions in foreign currency are not "retail forex transactions." For example, a "spot" forex transaction where one currency is bought for another and the two currencies are exchanged within two days would not meet the definition of a "retail forex transaction," since actual delivery occurs as soon as practicable.<sup>19</sup> Similarly, a "retail forex transaction" does not include a forward contract with a commercial entity that creates an enforceable obligation to make or take delivery, provided the commercial counterparty has the ability to make delivery and accept delivery in connection with its line of business.<sup>20</sup> In addition, the definition does not include transactions done through an exchange, because in those cases the exchange 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.

Second, rolling spot forex transactions (so-called *Zelener*<sup>21</sup> contracts), including without limitation such transactions traded on the Internet, through a mobile phone, or on an electronic platform, could fall within

the definition's third category; the OCC preliminarily believes that rolling spot transactions should be regulated as retail forex transactions.<sup>22</sup> 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>23</sup> Therefore, the contracts are economically more like futures than spot contracts, although courts have held them to be spot contracts in form.<sup>24</sup>

**Question II.2.1:** Should leveraged or margined forex transactions, including rolling spot forex transactions and functionally or economically similar transactions, be included in the definition of "retail forex transaction"? Would excluding such transactions create a regulatory gap for retail forex products?

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>25</sup>

<sup>17</sup> 7 U.S.C. 2(c)(2)(B)(i)(I).

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

<sup>19</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>20</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 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>21</sup> *CFTC v. Zelener*, 373 F.3d 861 (7th Cir. 2004); see also *CFTC v. Erskine*, 512 F.3d 309 (6th Cir. 2008).

<sup>22</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>23</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>24</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>25</sup> The term "eligible contract participant" is defined at 7 U.S.C. 1a(18), and for purposes most relevant to this proposed 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;

<sup>14</sup> See, e.g., 12 CFR parts 3, 6, and 28.

<sup>15</sup> The definition of "eligible contract participant" is found in the CEA and is discussed below.

<sup>16</sup> 7 U.S.C. 2(c)(2)(B)(i)(I).

*Question II.2.2:* Does the Commodity Exchange Act's definition of "eligible contract participant" appropriately capture who is not a retail customer for purposes of this proposed rule? Should the OCC expand the definition of retail forex customer to include persons who are eligible contract participants? If so, which eligible contract participants should be considered retail forex customers?

#### *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.

#### *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 who 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 the information requested by the OCC 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 Commodity Exchange Act, for such period.<sup>26</sup>

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

#### *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>27</sup> The OCC agrees with this concern. A national bank may offset retail forex transactions as instructed by the retail forex customer or the customer's agent if the instructions do not come from the national bank.

#### *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 disclosure statement would make clear that a national bank is prohibited from applying customer losses arising out of retail forex transactions against any property of a customer other than money or property specifically given as margin for retail forex transactions; the national bank may not use rights of set-off to collect margin for or cover losses arising out of retail forex transactions.

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>28</sup>

The CFTC initially 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>29</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>30</sup> The OCC generally agrees with the CFTC and this proposed rule requires this disclosure; however, the OCC invites comments regarding this approach.

*Question II.6.1:* Does this disclosure provide meaningful information to retail customers of national banks? Would alternative disclosures more effectively accomplish the objectives of the disclosure?

Similarly, the CFTC's retail forex rule requires a disclosure that when a retail customer loses money trading, the dealer makes money on such trades, in addition to any fees, commissions, or spreads.<sup>31</sup> The proposed rule includes this disclosure requirement.

*Question II.6.2:* Does this disclosure provide meaningful information to retail customers of national banks? Would alternative disclosures more effectively accomplish the objectives of the disclosure?

As proposed, the risk disclosure must be provided as a separate document.

*Question II.6.3:* Would it 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? Or would combining disclosures diminish the impact of the retail forex disclosure?

*Question II.6.4:* Should the rule require disclosure of the fees the national bank charges retail forex customers for retail forex transactions? What fees do national banks currently charge retail forex customers for retail forex transactions? Are there other costs to retail forex customers of engaging in retail forex transactions that national banks should disclose? If so, what are these costs?

#### *Section 48.7—Recordkeeping*

This section specifies which documents and records a national bank engaged in retail forex transactions must retain for examination by the OCC. This section also prescribes document maintenance standards.

(2) A multinational or supranational governmental entity; or

(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>26</sup> 7 U.S.C. 2(c)(2)(E)(ii)(I).

<sup>27</sup> Proposed CFTC Retail Forex Rule, 75 FR at 3287 n.54.

<sup>28</sup> 17 CFR 5.5(e)(1).

<sup>29</sup> Proposed CFTC Retail Forex Rule, 75 FR at 3289.

<sup>30</sup> Final CFTC Retail Forex Rule, 75 FR at 55412.

<sup>31</sup> 17 CFR 5.5(b).

*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>32</sup> or the national bank must obtain an exemption from the OCC. In addition, a national bank must continue to hold capital against retail forex transactions as provided in the OCC’s capital regulation.<sup>33</sup> This rule does not amend the OCC’s prompt corrective action regulation or capital regulation.

*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 two percent of the notional value of the retail forex transaction if the transaction is in a major currency pair, and at least five 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. A major currency pair is a currency pair with two major currencies. The 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>34</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>35</sup>

*Question II.9.1:* The OCC requests comment on whether it should explicitly define the major currencies or major currency pairs in the proposed rule and whether commenters have any other suggestions on how the OCC should identify a major currency or major currency pair.

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 inhere 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, non-bank 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.

*Question II.9.2:* The OCC believes that these margin requirements are appropriate to protect retail customers, but invites comments on whether the requirements should be adjusted.

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.

*Question II.9.3:* Should the OCC provide for haircuts for noncash margin posted for retail forex transactions? If so, what should those haircuts be?

Paragraph (c) requires a national bank to hold each retail forex customer’s retail forex transaction margin in a separate account that contains only that customer’s retail forex margin. 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.

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 requires 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.

*Question II.9.4:* How frequently do national banks currently mark retail forex customers’ open retail forex positions and the value of the customers’ margin to the market? Should the rule require marking customer positions and margin to the market daily, or would more frequent marks be more appropriate in light of the speed at which currency markets move? What is the most frequent mark to market requirement that is practical in light of the characteristics of the forex markets and the assets that retail forex customers may pledge as margin for retail forex transaction?

Paragraph (e) prohibits a national bank from applying a retail forex customer’s losses against any asset or liability of the retail forex customer other than money or property given as margin. 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 it is inappropriate to allow a national bank to leave trades open and allow additional losses to accrue that can be applied against a retail forex customer’s other assets or liabilities held by the national bank.

*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.

*Question II.10.1:* The OCC requests comment on whether this section provides for statements that would be meaningful and useful to retail customers, or whether, in light of the distinctive characteristics of retail forex transactions, other information would be more appropriate.

*Section 48.11—Unlawful Representations*

This section prohibits a national bank and its institutional-affiliated parties from representing that the Federal government, the OCC, or any other Federal agency has sponsored, recommended, or approved retail forex

<sup>32</sup> 12 CFR part 6.

<sup>33</sup> 12 CFR part 3.

<sup>34</sup> See National Futures Association, *Forex Transaction: A Regulatory Guide* 17 (Feb. 2011); New York Federal Reserve Bank, *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>35</sup> The Final CFTC Retail Forex Rule similarly does not define “major currency.”

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 section 48.9. This section does not prohibit a national bank from sharing in a loss resulting from error or mishandling of an order, and 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.

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

This section requires a national bank to have specific written authorization from a retail forex customer before effecting a retail forex transaction for that customer.

#### *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, in which transactions in accounts of the national bank or its related persons are executed before a similar customer order; (2) to establish settlement prices fairly and objectively; and (3) to record and maintain transaction records and make them available to customers.

Paragraph (b) prohibits a national bank engaging in retail forex transactions from disclosing that it holds another person's order unless disclosure is necessary for execution or is made at the OCC's request.

Paragraph (c) ensures that institution-affiliated parties 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 to which they are affiliated. Similarly, paragraph (d) ensures that institution-affiliated parties 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 to which they are affiliated.

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 they may submit a new order.

*Question II.13.1:* Does this requirement appropriately protect retail forex customers? If not, how it should be modified? Would it be simpler for the rule to simply prohibit requoting, because national banks may instead reject an order and accept new orders from their retail forex customers?

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.

*Question II.14.1:* Does this section impose any additional requirements not already encompassed by safety and soundness standards applicable to national banks and their agents, officers, and employees?

#### *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 section 6 and obtain each affected customer's written acknowledgement within 60 days.

#### *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.

### **III. Request for Comments**

The OCC requests comment on all aspects of the proposed rule, including the questions posed in the preamble. In addition, the OCC requests comments on the following questions:

- *Question III.1:* Does the proposed rule appropriately protect retail forex customers of national banks?
- *Question III.2:* Are the proposed rule's variations from the CFTC retail forex rule appropriately tailored to the differences between national banks and CFTC registrants and the regulatory regimes applicable to each?

To assist in the review of comments, the OCC requests that commenters identify their comments by question number.

### **IV. Regulatory Analysis**

#### *A. Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA) 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>36</sup> The proposed rule 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 certifies that this proposed rule will not have a significant economic impact on a substantial number of the small entities it supervises.

Accordingly, a regulatory flexibility analysis is not required. In making this determination, the OCC estimated that there are 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 the proposed rule.

Persons wishing to submit written comments regarding the OCC's certification under the RFA should refer to the instructions for submitting comments in the front of this release. Such comments will be considered and placed in the same public file as comments on the proposal itself.

#### *B. Paperwork Reduction Act*

##### *Request for Comment on Proposed Information Collection*

In accordance with section 3512 of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), 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 Office of Management and Budget (OMB) control number. The information collection requirements contained in this notice of proposed rulemaking have been submitted by the OCC to OMB for review and approval under section 3506 of the PRA and § 1320.11 of OMB's implementing regulations (5 CFR part 1320 *et seq.*). The information collection requirements are found in §§ 48.4–48.7, 48.9–48.10, 48.13, 48.15–48.16.

Comments are 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–NEW, 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 would 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 in 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*

Under § 48.5, regarding the application and closing out of offsetting long and short positions, would require 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 would provide specific written instructions on how the offsetting transaction should be applied.

Section 48.6 would require 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 would require a national bank to issue monthly statements to each retail forex customer and to send confirmation statements following transactions.

Section 48.13(b) would allow 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) would prohibit 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) would prohibit a related person of a national bank engaging in forex transactions from having an account with another retail forex counterparty unless it receives proper written authorization and copies of all statements and written records for such accounts are transmitted to the counterparty.

Section 48.15 would require 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 would also require a national bank to which retail forex accounts or positions are assigned or transferred to provide the affected customers with risk disclosure

<sup>36</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).



statements and forms of acknowledgment and receive the signed acknowledgments within 60 days.

The customer dispute resolution provisions in § 48.16 would require certain endorsements, acknowledgments, and signature language. It also would require that within 10 days after receipt of notice from the retail forex customer that they intend to submit a claim to arbitration, the national bank provide them with 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 would 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 would require that a national bank keep account, financial ledger, transaction and daily records, as well as memorandum orders, post-execution allocation of bunched orders, records regarding its ratio of profitable accounts, possible violations of law, records for noncash margin, and monthly statements and confirmations. Section 48.9 would require 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<sup>37</sup> (Unfunded Mandates Act), 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 proposed rule, if adopted as a final 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>38</sup> Accordingly, this proposed rule is not subject to section 202 of the Unfunded Mandates Act.

#### D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the OCC to use plain language in all proposed and final rules published after January 1, 2000. The OCC invites comment on how to make this proposed rule easier to understand. For example, the OCC requests comment on such questions as:

- Have we organized the material to suit your needs? If not, how could the material be better organized?
- Have we clearly stated the requirements of the rule? If not, how could the rule be more clearly stated?
- Does the rule contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

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

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

For the reasons stated in the preamble, the OCC proposes to add part 48 to Title 12, Chapter I of the Code of Federal Regulations 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.

<sup>38</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).

- 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.

**Authority:** 12 U.S.C. 1, 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 shall 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.* This part applies to national banks.

#### § 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”; “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.

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

*Introducing broker* means any person who 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 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 ten percent or more of the capital stock of the national bank;
- (2) An associated person or employee of the retail forex counterparty, if the retail forex counterparty is not a national bank;

<sup>37</sup> 2 U.S.C. 1532.



(3) An IAP, if the retail forex counterparty is a national bank; and

(4) Any relative or spouse of any of the foregoing persons, or any 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 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 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 ten 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 of any of the foregoing persons; or

(5) An affiliate of the national bank; *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 transaction* means an agreement, contract, or transaction in foreign currency 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.

#### § 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 shall 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 shall:

(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 shall 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 [EFFECTIVE DATE OF FINAL RULE] 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 [EFFECTIVE DATE OF FINAL RULE] 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 [EFFECTIVE DATE OF FINAL RULE] and complies with paragraph (c) of this section shall 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 shall:

(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 where 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 shall 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 paragraph (b) of this section, the offsetting transaction shall be applied as directed by a retail forex customer's specific written instructions. These instructions may not be made by the national bank or an IAP.

#### **§ 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) *Acknowledgement of risk disclosure statement required.* The national bank must receive from the retail forex customer a written acknowledgement 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 shall be 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 you give the national bank as margin for such trading and you may lose more than you pledge as margin.

Furthermore, you may lose funds in other accounts that you maintain at the national bank or its affiliates if you pledge those funds or other assets as collateral for your retail forex obligations. Your national bank is prohibited from applying losses that you experience on retail forex transactions on any funds or property of yours other than funds or property that you have given or pledged as margin for retail forex transactions.

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

(1) Trading is a 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) This transaction is not insured by the Federal Deposit Insurance Corporation.

(6) This transaction is not a deposit in, or guaranteed by, a national bank.

(7) This transaction is 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. Such 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 shall 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 shall include the following legend: "Past performance is not necessarily indicative of future results." Each national bank shall 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 shall include:

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

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

(iii) The circumstances under which the national bank may impose such fees, charges, 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 shall 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

shall 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 shall keep full, complete and systematic records, together with all pertinent data and memoranda, of all transactions relating to its retail forex business, including:

(1) *Retail forex account records* for each customer reflecting:

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

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

(iii) The establishment or termination of each retail forex account; and

(iv) For each retail forex account the records must also show the name of the person who has solicited and is responsible for the account or assign account numbers in such a manner as to identify that person.

(2) *Financial ledger records* that show separately for each retail forex customer all charges against and credits to such retail forex customer's account, including but not limited to retail forex customer funds deposited, withdrawn, or transferred, and charges or credits resulting from losses or gains on closed transactions.

(3) *Transaction records* that show separately for each retail forex account and each retail forex proprietary account:

(i) All retail forex transactions that are futures transactions executed for such account, including the date, price, quantity, market, currency pair, and delivery date;

(ii) All retail forex transactions that are option transactions executed for such account, including the date, whether the transaction involved 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

(iii) All other retail forex transactions that are executed for such account, including the date, price, quantity, and currency pair.

(4) *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.

(5) *Memorandum order (order ticket).* Except as provided in paragraph (a)(6) of this section, immediately upon the written or verbal receipt of a retail forex transaction order, a national bank shall prepare a separate written memorandum order (order ticket) for the order (whether unfulfilled, executed or canceled), including:

(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, the retail forex transaction order was received (as evidenced by timestamp or other timing device);

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

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

(6) *Post-execution allocation of bunched orders.* Specific customer account identifiers for accounts included in bunched orders need not be recorded at time of order placement or upon report of execution as required under paragraph (a)(5) 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 customers upon request:

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

(B) Whether the national bank has any interest in accounts which 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 its results with those of other comparable customers and, if applicable, any account in which the national bank has an interest.

(ii) A national bank must allocate orders eligible for post-execution allocation in accordance with the following:

(A) Allocations must be made as soon as practicable after the entire transaction is executed;

(B) Allocations must be fair and equitable; no account or group of accounts may receive consistently favorable or unfavorable treatment; and

(C) The allocation methodology must be sufficiently objective and specific to permit independent verification of the fairness of the allocations using that methodology by the OCC.

(7) *Other records.* Other records covered by this section include written acknowledgements of receipt of the risk disclosure statement required by § 48.6(b), 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 shall 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 shall 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, and 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 shall be considered a retail forex account that was not profitable. Computations that result in a positive number shall be considered a retail forex account that was profitable.

(3) A retail forex account shall 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 possible violations of law.* A national bank engaging in retail forex transactions shall 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 shall contain: The name of the complainant, if provided; the date of the communication; the relevant agreement, contract, or transaction; the substance of the communication; and the name of the person who received the communication.

(d) *Records for noncash margin.* A national bank shall maintain a record of all noncash margin collected pursuant to § 48.9. The record shall 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) *Record of monthly statements and confirmations.* A national bank shall retain a copy of each monthly statement and confirmation required by § 48.10.

(f) *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. Record maintenance may include the use of automated or electronic records provided that the records are easily retrievable, readily

available for inspection, and capable of being reproduced in hard copy.

(g) *Length of maintenance.* A national bank shall 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, unless specifically exempted by the OCC in writing.

#### § 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 in excess of the requirements of paragraph (a) of this section 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 shall 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 shall be placed into a separate account containing only such margin.

(d) *Margin calls; liquidation of position.* For each retail forex customer, at least once per day, a national bank shall:

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

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

(3) Determine if, based on the marks in paragraphs (c)(1) and (2) of this section, the national bank has collected margin from the retail forex customer sufficient to satisfy the requirements of this section; and

(4) Collect such margin from the retail forex customer as the national bank may require to satisfy the requirements of this section, or 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 losses on retail forex transactions against any funds or other asset of the retail forex customer other than margin in the retail forex customer's separate margin account described in paragraph (c) of this section;

(2) Apply a retail forex customer's losses on retail forex transactions 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, 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; 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 mark-up 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 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 shall 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 which resulted therefrom including, if applicable, the final trading date of the retail forex transaction underlying the option.

(c) Notwithstanding the provisions of paragraphs (b)(1) through (3) 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 shall 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 shall not be construed to 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 shall not affect any guarantee entered into prior to the effective date of this part, but this section shall 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 transaction occurs, the retail forex customer specifically authorized the national bank, in writing, 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 shall establish and implement internal rules, procedures, and controls designed, at a minimum, to:

(1) Ensure, to the extent reasonable, that each order received from a retail forex customer that is executable at or near the price that the national bank has quoted to the customer is entered for execution before any order in any retail forex transaction for any proprietary account, any other account in which a related person has an interest, or any account for which such a related person may originate orders without the prior specific consent of the account owner (if such related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account), an account in which such a related person has an interest, or an account in which such a related person may originate orders without the prior specific consent of the account owner;

(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;

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

(4) Record and maintain essential information regarding customer orders and account activity, and to provide such information to customers upon request. Such information shall include:

(i) Transaction records for the customer's account, including:

(A) The date and time each order is received by the national bank;

(B) The price at which each order is placed, or, in the case of an option, the premium paid;

(C) If the transaction was entered into by means of a trading platform, the price quoted on the trading platform when the order was placed, or, in the case of an option, the premium quoted;

(D) The customer account identification information;

(E) The currency pair;

(F) The size of the transaction;

(G) Whether the order was a buy or sell order;

(H) The type of order, if the order was not a market order;

(I) If a trading platform is used, the date and time the order is transmitted to the trading platform;

(J) If a trading platform is used, the date and time the order is executed;

(K) 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; and

(L) For options, whether the option is a put or call, the strike price, and expiration date.

(ii) Account records that contain the following information:

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

(B) The net profits and losses on open trades; and

(C) The funds in the account plus or minus the net profits and losses on open trades. (In the case of open option positions, the account balance should be adjusted for the net option value);

(iii) 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; and

(iv) 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.

(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 shall knowingly handle the retail forex account of any related person of another retail forex counterparty unless it:

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

(2) Prepares immediately upon receipt of an order for such account a written record of such 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 is received; and

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

(d) *Related person of national bank establishing account at another retail forex counterparty.* No related person of a national bank engaging in retail forex transactions may have an account, directly or indirectly, with another retail forex counterparty unless:

(1) It receives written authorization to maintain such an account from a person designated by the national bank of which it is a related person with responsibility for the surveillance over such account pursuant to paragraph (a)(2) of this section; and

(2) Copies of all statements for such account and of all written records prepared by such other retail forex counterparty upon receipt of orders for such account pursuant to paragraph (c)(2) of this section are transmitted on a regular basis to the retail forex counterparty of which it is a related person.

(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 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 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 shall 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 shall 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 sixty days of such assignments or transfers. This requirement shall 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 shall 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 must not be made 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 must separately endorse the clause or clauses.

(3) The agreement must advise 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:

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

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

(d) *Time limits for submission of claims.* The dispute settlement procedure used by the parties shall 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. Such a counterclaim may be permitted where it arises out of the transaction or occurrence that is the subject of the customer's claim or grievance and does



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

Dated: April 18, 2011.

**John Walsh,**

*Acting Comptroller of the Currency.*

[FR Doc. 2011-9821 Filed 4-21-11; 8:45 am]

**BILLING CODE 4810-33-P**

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 252

[Regulation YY; Docket No. R-1414]

**RIN 7100-AD73**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Part 381

**RIN 3064-AD77**

### Resolution Plans and Credit Exposure Reports Required

**AGENCIES:** Board of Governors of the Federal Reserve System (Board) and Federal Deposit Insurance Corporation (Corporation).

**ACTION:** Proposed rule; request for public comment.

**SUMMARY:** The Board and the Corporation request comment on this proposed rule that implements the requirements in section 165(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) regarding resolution plans and credit exposure reports. Section 165(d) requires each nonbank financial company supervised by the Board and each bank holding company with assets of \$50 billion or more to report periodically to the Board, the Corporation, and the Financial Stability Oversight Council (the “Council”) the plan of such company for rapid and orderly resolution in the event of material financial distress or failure, and the nature and extent of credit exposures of such company to significant bank holding companies and significant nonbank financial companies and the nature and extent of the credit exposures of significant bank holding companies and significant nonbank financial companies to such company. Section 165(d)(8) of the Dodd-Frank Act requires the Board and the Corporation to jointly issue final rules implementing section 165(d) by not later than January 21, 2012.

**DATES:** Comments should be received on or before June 10, 2011.

**ADDRESSES:** Comments should be directed to:

**Board:** You may submit comments, identified by Docket No. 1414 and RIN no. 7100-AD73, by any of the following methods:

- **Agency Web site:** <http://www.federalreserve.gov>. Follow the instructions for submitting comments at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

- **E-mail:** [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include docket number in the subject line of the message.
- **Fax:** (202) 452-3819 or (202) 452-3102.

- **Mail:** Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board’s Web site at <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm> as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP-500 of the Board’s Martin Building (20th and C Street, NW.) between 9 a.m. and 5 p.m. on weekdays.

**Corporation:** You may submit comments by any of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.

- **Agency Web site:** <http://www.FDIC.gov/regulations/laws/federal/propose.html>

- **Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.

- **Hand Delivered/Courier:** The guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

- **E-mail:** [comments@FDIC.gov](mailto:comments@FDIC.gov). Instructions: Comments submitted must include “FDIC” and “RIN 3064-AD77.” Comments received will be posted without change to <http://www.FDIC.gov/regulations/laws/federal/propose.html>, including any personal information provided.

### FOR FURTHER INFORMATION CONTACT:

**Board:** Barbara J. Bouchard, Senior Associate Director, (202) 452-3072, or Avery I. Belka, Counsel, (202) 736-5691,

Division of Banking Regulation and Supervision; or Ann E. Misback, Associate General Counsel, (202) 452-3788, or Dominic A. Labitzky, Senior Attorney, (202) 452-3428, Legal Division; Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. Users of Telecommunication Device for Deaf (TDD) only, call (202) 263-4869.

**Corporation:** Joseph Fellerman, Senior Program Analyst, (202) 898-6591, Office of Complex Financial Institutions, Richard T. Aboussie, Associate General Counsel, (703) 562-2452, David N. Wall, Assistant General Counsel, (703) 562-2440, Mark A. Thompson, Counsel, (703) 562-2529, or Mark G. Flanagan, Counsel, (202) 898-7426, Legal Division.

### SUPPLEMENTARY INFORMATION:

#### I. Background

To promote financial stability, section 165(d) of the Dodd-Frank Act requires each nonbank financial company supervised by the Board and each bank holding company with total consolidated assets of \$50 billion or more to periodically submit to the Board, the Corporation and the Council a plan for such company’s rapid and orderly resolution in the event of material financial distress or failure, and a report on the nature and extent of credit exposures of such company to significant bank holding companies and significant nonbank financial companies and the nature and extent of credit exposures of significant bank holding companies and significant nonbank financial companies to such company.<sup>1</sup> This proposed rule would implement the resolution plan and credit exposure reporting requirements set forth in section 165(d) of the Dodd-Frank Act.

Section 165(d) provides regulators with the ability to conduct advance resolution planning for a covered company. As demonstrated by the Corporation’s experience in failed bank resolutions, as well as the Board’s and the Corporation’s experience in the recent crisis, advance planning is critical for an efficient resolution of a company subject to the proposed rule.<sup>2</sup> Advance planning has long been a component of resiliency and recovery planning by financial companies. The Dodd-Frank Act requires that certain financial companies incorporate resolution planning into their overall

<sup>1</sup> See generally 12 U.S.C. 5365(d).

<sup>2</sup> The ability to undertake advance planning for the resolution of any financial institution, from small banks to globally active financial companies, is a precondition for effective crisis management and resolution.