Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 48

[Docket ID OCC–2012–0014]

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 to amend its retail foreign exchange rule for transactions with bank common trust funds, bank collective investment funds, and insurance company separate accounts and is making technical corrections to the rule.

DATES: Comments must be received by November 13, 2012.

FOR FURTHER INFORMATION CONTACT: Roman Goldstein, Senior Attorney, or Ted Dowd, Assistant Director, Securities and Corporate Practices Division, (202) 874–5210.

ADDRESSES: Because paper mail in the Washington, DC, area and at the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or email, if possible. Please use the title ''Retail Foreign Exchange Transactions'' to facilitate the organization and review of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—* ''Regulations.gov'': Go to *http://www.regulations.gov,* under the ''More Search Options'' tab click next to the ''Advanced Docket Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OCC–2012–XXXX'' to submit or view public comments and to view supporting and related materials for this proposed rule. The ''How to Use This Site'' link on the Regulations.gov home page provides 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.
- *Email: 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 Number OCC–2012–0014'' in your comment. In general, 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, email 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 rulemaking by any of the following methods:

- *Viewing Comments Electronically:* Go to *http://www.regulations.gov,* under the ''More Search Options'' tab click next to the ''Advanced Document Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OCC–2012–XXXX'' to view public comments for this rulemaking action.
- *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 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.

SUPPLEMENTARY INFORMATION:

I. Background

A. OCC's Retail Foreign Exchange Rulemaking

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[1] As amended by the Dodd-Frank Act, the Commodity Exchange Act (CEA) provides that a United States financial institution[2] for which there is a Federal regulatory agency[3] 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 person that is not an eligible contract participant[4] 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[5] (a retail foreign exchange (forex) rule). Transactions described in section 2(c)(2)(B)(i)(I) include foreign currency futures, options on foreign currency futures, and options on foreign currency (other than options executed or traded on a national securities exchange).[6] A Federal regulatory agency's retail forex rule must treat similarly all such futures and options and all agreements, contracts, or transactions that are functionally or economically similar to such futures and options.[7] Retail forex rules must prescribe appropriate requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, documentation, and such other

[1] Pub. L. 111–203, 124 Stat. 1376.

[2] 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, Federal savings associations, and Federal branches and agencies of foreign banks are depository institutions under the Federal Deposit Insurance Act.

[3] 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, Federal savings associations, and Federal branches and agencies of foreign banks. *See* 7 U.S.C. 1a(2); 12 U.S.C. 1813(q)(1), 5411–12.

[4] 7 U.S.C. 1a(18).

[5] 7 U.S.C. 2(c)(2)(E)(ii)(I).

[6] 7 U.S.C. 2(c)(2)(B)(i)(I).

[7] 7 U.S.C. 2(c)(2)(E)(iii)(II).

standards or requirements as the Federal regulatory agency determines to be necessary.[8] The OCC issued a final retail forex rule on July 14, 2011, which became effective on July 15, 2011.[9] On September 12, 2011, the OCC issued an interim final rule applying the retail forex rule to Federal savings associations on the same terms as national banks.[10]

B. Definition of Eligible Contract Participant

The CEA distinguishes retail customers from non-retail customers through the term *eligible contract participant* (ECP).[11] In many cases, the CEA provides fewer protections to ECPs than retail customers, *i.e.,* non-ECPs. For example, retail forex rules do not apply to transactions with ECPs and ECPs may enter into off-exchange swaps.[12] A person can qualify as an ECP by satisfying the requirements of one of the term's 14 prongs. Two of the prongs are relevant here: the prong for commodity pools and the prong for business entities.

Prior to enactment of the Dodd-Frank Act, a commodity pool [13] was an ECP if it (i) had total assets exceeding $5 million and (ii) was formed and operated by a person subject to regulation under the CEA or by a foreign person performing a similar role or function subject to foreign regulation.[14] The Dodd-Frank Act added a proviso to the second condition, which has become known as the *retail forex look-through:* for purposes of CEA sections [15] that provide the U.S. Commodity Futures Trading Commission (CFTC) with jurisdiction over certain accounts and pooled investment vehicles trading in retail forex, a commodity pool is not an ECP unless all of its participants are ECPs.[16]

Also prior to the Dodd-Frank Act, a corporation, partnership, proprietorship, organization, trust, or other business entity that had total assets exceeding $10 million was an ECP.[17] The Dodd-Frank Act left this provision unmodified. Many private investment vehicles, including certain commodity pools, availed themselves of this provision to be ECPs.[18]

On December 21, 2010, the CFTC and the U.S. Securities and Exchange Commission (SEC) jointly proposed a rule, as required by the Dodd-Frank Act,[19] to further define *eligible contract participant.*[20] The CFTC and SEC proposed to implement the retail forex look-through by excluding, for purposes of CEA section 2(c)(2)(B)(vi) and (C)(vii), a commodity pool with one or more direct or indirect participants that is not an ECP from the definition of *eligible contract participant.* The CFTC and SEC also proposed to prohibit a commodity pool from qualifying as an ECP as a business entity unless it had total assets exceeding $5 million and was operated by a person subject to regulation under the CEA.[21] The CFTC and SEC reasoned that allowing commodity pools to qualify as ECPs solely by having assets exceeding $10 million (as the test for business entities requires) would frustrate Congress' intent to subject commodity pools to the retail forex look-through.[22]

On April 18, 2012, the CFTC and SEC issued a final rule further defining *eligible contract participant.*[23] The definition took effect on July 23, 2012, except for certain provisions related to commodity pools, which take effect on December 31, 2012. The rule adopted a prohibition on a commodity pool qualifying as an ECP under the business entity prong [24] of the ECP definition solely by having assets exceeding $10 million.[25]

The final rule differed from the proposal in three material respects. First, the retail forex look-through generally only applies to a commodity pool that directly enters into a retail forex transaction. A commodity pool is not subject to the retail forex look-through simply because it invests in another commodity pool that enters into retail forex transactions.[26] (However, the retail forex look-through does apply to a commodity pool structured to evade subtitle A of Title VII of the Dodd–Frank Wall Street Reform and Consumer Protection Act by permitting non-ECPs to participate in retail forex transactions.[27]) For example, in a master/feeder fund structure in which the master fund enters into retail forex transactions, one would look through the master fund to the feeder fund but generally not through the feeder fund to its investors. Second, the final rule provides that, notwithstanding the look-through, a commodity pool is an ECP for retail forex purposes if it (i) is not formed for the purpose of evading regulation under the CFTC's retail forex regime, (ii) has total assets exceeding $10 million, and (iii) is formed and operated by a registered commodity pool operator (CPO) [28] or by a CPO exempt from registration under 17 CFR 4.13(a)(3).[29] Third, the rule applies the retail forex look-through only to the ECP prong for commodity pools and business entities—not to the other prongs.[30]

At the meeting adopting the final rule further defining *eligible contract participant,* the CFTC acknowledged that it was unclear if bank funds were ECPs.[31]

II. Overview of Proposed Amendments to the OCC's Retail Forex Rule

A. Treatment of Bank Funds and Insurance Company Separate Accounts

A bank fund is a bank-administered trust that holds commingled assets that meet specific criteria established by OCC regulation.[32] The bank acts as a fiduciary for the bank fund and holds

[8] 7 U.S.C. 2(c)(2)(E)(iii)(I).

[9] Retail Foreign Exchange Transactions, 76 FR 41375 (July 14, 2011).

[10] Retail Foreign Exchange Transactions, 76 FR 56094 (Sept. 12, 2011).

[11] 7 U.S.C. 1a(18).

[12] 7 U.S.C. 2(c)(2)(E)(ii)(I); 7 U.S.C. 2(e); 12 CFR 48.1 *et seq.*

[13] *Commodity pool* means any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including futures, swaps, options, retail forex transactions, retail commodity transactions, and leverage transactions. 7 U.S.C. 1a(10)(A).

[14] 7 U.S.C. 1a(18)(A)(iv).

[15] 7 U.S.C. 2(c)(2)(B)(vi) and (C)(vii).

[16] 7 U.S.C. 1a(18)(A)(iv)(II).

[17] 7 U.S.C. 1a(18)(A)(v)(I).

[18] *See* comment letter from James Kemp, Global Financial Exchange Division & Stuart J. Kaswell, Managed Funds Association, to the CFTC and SEC (Jan. 10, 2012), *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=50050.*

[19] 15 U.S.C. 8302(d), 8321(b).

[20] Swap Entities and ECPs, 75 FR 80174 (Dec. 21, 2010).

[21] *Id.* at 80185, 80212.

[22] *Id.* at 80185.

[23] Swap Entities and ECPs, 77 FR 30596 (May 23, 2012).

[24] 7 U.S.C. 1a(18)(A)(v).

[25] Swap Entities and ECPs, 77 FR 30596 (May 23, 2012).

[26] *Id.* at 30650.

[27] *Id.*

[28] A CPO is any person engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including futures, swaps, retail forex, and commodity options. 7 U.S.C. 1a(11). In general, CPOs must register with the CFTC. 7 U.S.C. 6m(1).

[29] The registration exemption under 17 CFR 4.13(a)(3) applies to private funds with de minimis commodity positions. *See* Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 FR 11252, 11261–63 (Feb. 24, 2012).

[30] *See* Swap Entities and ECPs, 77 FR 30596, 30651 & n.640 (May 23, 2012).

[31] *See* CFTC, Open Meeting on the 26th Series of Rulemakings Under Dodd–Frank Act (Apr. 18, 2012), *transcript available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission2_041812-trans.pdf* (colloquy between Commissioner Sommers and CFTC staff on p. 80 of the transcript).

[32] *See generally* OCC, Comptroller's Handbook: Collective Investment Funds 1 (Oct. 2005), *available at http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/_pdf/collective-investment-funds.pdf;* 12 CFR 9.18.

legal title to the fund's assets, but the fund's participants are the beneficial owners of the fund's assets. While each participant owns an undivided interest in the aggregate assets of the bank fund, a participant does not directly own any specific asset held by the fund nor does a participant hold any certificate or other document representing an interest in the fund.[33] Insurance company separate accounts share structural features with bank funds: they are not separate legal entities; they are not subject to claims from general creditors of the insurance company; and they divorce legal title to the assets from beneficial ownership.[34]

The legal structure of these funds presents interpretive challenges under the *eligible contract participant* definition. For this reason, the OCC wishes to provide clarity regarding how its retail forex rules will apply to transactions with these funds. The OCC preliminarily believes that treating bank funds as traditional retail customers for purposes of the retail forex rule is not appropriate. It is only bank funds' status as quasi-distinct from the bank that creates this regulatory uncertainty: were bank funds clearly identical to the bank, they would be ECPs as banks; were bank funds separate legal entities, they would be ECPs as bank subsidiaries or affiliates.[35]

The definition of *eligible contract participant* contains a list of entities substantively regulated under the CEA or other regulatory schemes—banks, insurance companies, investment companies, pension plans, registered broker-dealers, and futures commission merchants—suggesting that Congress did not see a need to further regulate already-regulated entities. Bank funds should be treated the same because they too are subject to substantive regulation.[36] Congress did not subject registered investment companies and similarly-regulated foreign entities to the retail forex rules[37] despite the fact that these companies cater to retail investors and are offered publicly, unlike bank funds.[38] Imposing the retail forex rule's requirements on forex transactions between Federal depository institutions and bank funds is inconsistent with the treatment of registered investment companies and similarly regulated foreign entities and creates unwarranted regulatory burden. The disparate treatment creates competitive inequalities that Congress may not have intended.[39]

Moreover, the new definition of *eligible contract participant* creates a paradoxical result: The retail forex rule will apply to transactions with funds that are prudentially regulated—bank funds and insurance company separate accounts—but not to transactions with funds that are not prudentially regulated—hedge funds. Hedge funds will qualify as ECPs under new 17 CFR 1.3(m)(8) because they generally (i) have assets exceeding $10 million and (ii) are operated by registered CPOs or CPOs exempt from registration. CFTC regulations, however, provide that banks and insurance companies are not CPOs when they manage bank funds and separate accounts, respectively.[40] The CPO exclusion comes from the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, which directed the CFTC to exclude from the definition of *commodity pool operator* banks acting in a fiduciary capacity, ERISA plans and their fiduciaries, registered investment companies, and insurance companies.[41] The rationale was that these entities do not need to be regulated under the CEA as CPOs because they are already regulated under other law.[42] It would be counterintuitive for regulatory relief—namely, the CPO exclusion for banks and insurance companies—to increase regulatory burden on these funds. The CEA requires the OCC to prescribe appropriate requirements in its retail forex rules[43] and affords the OCC with flexibility to tailor the requirements of its retail forex rule for certain classes of transactions. The OCC wrote its retail forex rule with individual consumers in mind and prescribed requirements that it deemed appropriate for retail forex transactions with individual consumers. The further definition of *eligible contract participant* raises the issue of how the retail forex rule should apply to entities that are materially different from individual consumers but that are, nonetheless, not ECPs.

The OCC preliminarily believes it appropriate to modify the requirements of the retail forex rule for retail forex transactions between Federal depository institutions[44] and bank funds. The OCC proposes to apply to these transactions only the rule's antifraud and general provisions, sections 48.1, 48.2, 48.3(a), and 48.17. The OCC preliminarily believes that the same requirements should apply to retail forex transactions between Federal depository institutions and insurance company separate accounts because the CFTC's CPO exclusions treat them equivalently. See proposed § 48.1(e).

In connection with this proposed modification, the OCC proposes to exclude retail forex transactions with bank funds and insurance company separate accounts from the profitability calculations required by § 48.7(b). That paragraph requires Federal depository institutions to calculate the percentage of retail forex accounts that are profitable and the percentage of retail forex accounts that are not profitable. The OCC is concerned that these ratios would be less informative to individual consumers of the realistic prospects of profitability if they included trades entered into by sophisticated customers

[33] 12 CFR 9.18(b)(11).

[34] The status of separate accounts as commodity pools is unclear. Commodity Pool Operators, 50 FR 15868, 15872 (Apr. 23, 1985) (''[T]he devoting of assets to commodity interest trading by an insurance company separate account could constitute the operation of a commodity pool.'')

[35] 7 U.S.C. 1a(18)(A)(i); 7 U.S.C. 1a(21)(I).

[36] *See, e.g.,* 12 U.S.C. 92a; 12 CFR 9.18. National banks' bank funds are subject to 12 CFR 9.18. State banks' bank funds may be subject to 12 CFR 9.18 because of the Internal Revenue Code, 26 U.S.C. 584(a)(2), or because of state law. State banks' bank funds may also be subject to state laws specifically regulating common trust funds and collective investment funds, such as the Michigan Collective Investment Funds Act, M.C.L. § 550.101 *et seq.*

[37] 7 U.S.C. 1a(18)(A)(iii).

[38] *See* 15 U.S.C. 80a–3(c)(3) (requiring bank common trust funds to be created and maintained for fiduciary purposes and generally forbidding advertising common trust funds or offering them for sale to the general public); 15 U.S.C. 80a–3(c)(11) (requiring bank collective investment funds to consist solely of assets of employee stock bonus, pension, or profit-sharing trusts or governmental plans).

[39] *See* 15 U.S.C. 8302 (instructing the CFTC and SEC, in adopting rules and orders defining *eligible contract participant,* to treat functionally or economically similar entities in a similar manner); S. Rep. No. 384, at 79–80 (1982) (directing the CFTC to exempt from the definition of CPO banks acting in a fiduciary capacity, ERISA plans and their fiduciaries, insurance companies, and registered investment companies).

[40] 17 CFR 4.5(a)(3). *But see* 7 U.S.C. 1A(11)(A)(ii) (defining *commodity pool operator* to include any person registered as a CPO with the CFTC).

[41] S. Rep. No. 384, at 79–80 (1982); *see also id.* (stating that registered investment companies, insurance companies, and banks and trust companies acting in a fiduciary capacity are not within the intent of the term *commodity pool operator*); Commodity Pool Operators, 50 FR 15868, 15868–69 (Apr. 23, 1985) (quoting S. Rep. No. 384).

[42] *See* S. Rep. No. 384 at 79–80 (1982). The CFTC originally proposed to exempt banks operating bank funds and insurance companies operating separate accounts from all of the requirements applicable to CPOs. The CFTC reasoned that these banks and insurance companies were sufficiently regulated under other regulatory schemes to warrant their complete exemption. Commodity Pool Operators and Commodity Trading Advisors, 49 FR 4778, 4783 (Feb. 8, 1984). The CFTC ultimately concluded that it was appropriate to provide relief even more extensive than it proposed: it created an exclusion from the definition of CPO for these banks and insurance companies. Commodity Pool Operators, 50 FR 15868 (Apr. 23, 1985).

[43] 7 U.S.C. 2(c)(2)(E)(iii).

[44] *Federal depository institution* means a national bank, a Federal savings association, or Federal branch of a foreign bank. 12 U.S.C. 1813(c)(2). In this proposal, it also includes a Federal agency of a foreign bank.

like bank funds and insurance company separate accounts.

B. Adoption of CFTC and SEC Interpretations

The OCC proposes to adopt the further definition of *eligible contract participant* in 17 CFR 1.3(m).[45] One of the OCC's objectives in promulgating its retail forex rule was ensuring regulatory comparability among retail forex counterparties. To that end, the OCC modeled its rule on the CFTC's. The OCC believes that adopting the further definition of *eligible contract participant* promotes regulatory comparability.

The CFTC and SEC rule further defining *eligible contract participant* contained two statutory interpretations regarding retail forex. First, the CFTC and SEC interpreted certain foreign funds to be ECPs for purposes of the retail forex rule.[46] Second, the CFTC and SEC explained that retail forex counterparties may rely (if reasonable) on a customer's written representation that it is an ECP.[47]

The OCC believes that the considerations that led the CFTC and SEC to consider certain foreign funds to be ECPs for purposes of the retail forex look-through [48] are equally applicable to the OCC's retail forex rule. The OCC therefore proposes to exempt from many of the retail forex rule's requirements retail forex transactions between a Federal depository institution and a foreign fund operated and managed by a foreign person and whose participants are foreign investors. These transactions will remain subject to applicable foreign law. In addition, a Federal depository institution must still obtain a supervisory non-objection to begin a retail forex business, even with foreign funds. See proposed § 48.1(d)(2).

The OCC also believes that a Federal depository institution should not be deemed in violation of the retail forex rule if it inadvertently violated one of the rule's requirements because it reasonably believed its counterparty was an ECP, bank fund, or insurance company separate account. Proposed § 48.18 provides a safe harbor for this situation. To rely on this safe harbor, a Federal depository institution must: have reasonable policies and procedures to verify the customer's status; follow these policies and procedures; and obtain a written representation from the counterparty that it is an ECP, bank fund, or insurance company separate account. Reliance on that representation must be reasonable. For this purpose, reliance would be reasonable if the representation specifies its status category—e.g., an investment company, a natural person with discretionary investments exceeding $10 million, a bank fund—unless the Federal depository institution has information that would cause a reasonable person to question the representation.

C. Additional Proposed Changes

The OCC also proposes to make additional clarifying and conforming changes to the retail forex rule.

First, the OCC proposes to clarify the capital requirements applicable to Federal branches and agencies of foreign banks that offer or enter into retail forex transactions. The current retail forex rule requires these Federal branches and agencies to be well capitalized under 12 CFR part 6. However, part 6 only applies to insured Federal branches and agencies.[49] The OCC proposes to amend the capital requirements in § 48.8 so that all Federal branches and agencies offering or entering into retail forex transactions must satisfy the requirements of 12 CFR 4.7(b)(1)(iii)(A) and (iv).[50] For purposes of determining whether a Federal branch or agency complies with these requirements, the Federal branch or agency would have to calculate capital ratios consistent with 12 CFR part 3.[51] The well capitalized requirement would continue to apply to insured Federal branches.

Second, the OCC proposes to revise the retail forex rule's prohibition on self dealing in 12 CFR 48.3(b) to be consistent with the CFTC's retail forex rule.[52] The CFTC's rule prohibits a person from entering into a retail forex transaction for an account over which it or its affiliate has investment discretion. The OCC's retail forex rule, however, prohibits a national bank or its affiliate from entering into a retail forex transaction with a customer if the national bank (but not its affiliate) has investment discretion over that customer's account. The OCC does not intend to regulate the conduct of national bank affiliates, which are subject to other agencies' retail forex rules.[53] Furthermore, the OCC believes it is inappropriate for a Federal depository institution to act as the counterparty for a retail forex transaction that its affiliate entered into using its investment discretion over a customer's account.

Third, the OCC proposes to clarify that instruments that Congress or the CFTC have excluded from regulation under the CEA [54] are not retail forex transactions. Because these instruments are excluded from regulation under the CEA, section 2(c)(2)(E) of the CEA, which prohibits retail forex transactions except under a retail forex rule, does not apply to them. Because this amendment refers to transactions that are already excluded from regulation under the CEA, it would simply clarify how the OCC's retail forex rule interacts with established law.

Finally, the OCC proposes a technical correction to a citation contained in the definition of *retail forex transaction.*

D. Interim Final Rule for Federal Savings Associations

On September 12, 2011, the OCC published an interim final rule amending part 48 to allow Federal savings associations to engage in retail forex transactions on the same terms as national banks.[55] The interim final rule requested comment, by November 14, 2011, on the application of the existing rule to Federal savings associations. The OCC received no comments on the interim final rule. The OCC plans to finalize the interim final rule, as published, at the same time as it finalizes the changes proposed in this NPR.

III. Request for Comment on the Proposed Rule

The OCC requests comments on all aspects of this proposed rule, including the following specific questions.

Question 1. Does the alternative treatment proposed for retail forex transactions with bank funds and insurance company separate accounts appropriately address those transactions? If not, please explain why

[45] The definition in 17 CFR 1.3(m) incorporates the statutory definition of *eligible contract participant.* The retail forex rule's definition of *eligible contract participant* therefore includes persons the CFTC has determined are ECPs. *See* 7 U.S.C. 1A(18)(C).

[46] Swap Entities and ECPs, 77 FR 30596 30654 (May 23, 2012).

[47] *Id.* at 30652–53.

[48] *See id.* at 30653 & n.666.

[49] 12 CFR 6.1(c), 6.20.

[50] To satisfy these requirements, the Federal branch or agency must not be subject to a formal enforcement order by the OCC, Federal Deposit Insurance Corporation, or the Board of Governors of the Federal Reserve System, and the foreign bank's most recently reported capital adequacy positions must consist of, or be equivalent to, Tier 1 and total risk-based capital ratios of at least 6 percent and 10 percent, respectively, on a consolidated basis.

[51] *See* 12 CFR 28.14.

[52] *See* 17 CFR 5.2(c).

[53] *Compare* 12 CFR 48.3(b) *with* Retail Foreign Exchange Transactions, 76 FR 41375, 41377 (July 14, 2011) (preamble description of 12 CFR 48.3(b)). The OCC does regulate a national bank affiliate if that affiliate is itself a national bank or Federal savings association.

[54] *See, e.g.,* 7 U.S.C. 2(f); 7 U.S.C. 27c; 17 CFR part 34; Statutory Interpretation Concerning Certain Hybrid Instruments, 55 FR 13582 (Apr. 11, 1990).

[55] Retail Foreign Exchange Transactions, 76 FR 56094 (Sept. 12, 2011).

not and describe the additional requirements the OCC should impose on transactions with bank funds and insurance company separate accounts. Please explain why those requirements are appropriate for transactions with bank funds and insurance company separate accounts but not for transactions with commodity pools that are ECPs under the CFTC's further definition.[56]

Question 2. Is the proposed definition of *bank fund* in § 48.2 appropriate? If not, how should it be defined? Do any bank funds not fall within the definition? Are there any bank funds that are not directly or indirectly subject to 12 CFR 9.18, such as a bank fund of a state bank? If so, how are those funds regulated?

Question 3. Is the proposed definition of *insurance company separate account* in § 48.2 appropriate? If not, how should it be defined?

Question 4. Is the exclusion of transactions with bank funds and insurance company separate accounts from the profitability calculations appropriate? If not, why not? What proportion of Federal depository institutions' forex trading is with bank funds or insurance company separate accounts?

Question 5. Should the OCC's retail forex rule adopt the CFTC's and SEC's further definition of *eligible contract participant*? Why or why not? Is the definition of *eligible contract participant* proposed in section 48.2 appropriate?

Question 6. Should the OCC's retail forex rule adopt the CFTC's and SEC's interpretation regarding how to treat foreign funds under the retail forex look-through? Why or why not? Is proposed § 48.1(d) an appropriate implementation of this interpretation? Why or why not? Does this approach properly construe the extraterritorial reach of CEA section 2(c)(2)(E)? Why or why not?

Question 7. Should the OCC adopt the CFTC's and SEC's approach to verifying ECP status? Why or why not? Is proposed § 48.18 an appropriate implementation of this approach? Why or why not?

IV. Regulatory Analysis

A. Paperwork Reduction Act

Under the Paperwork Reduction Act,[57] the OCC may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid Office of Management and Budget (OMB) control number. The amendments in this notice of proposed rulemaking do not introduce any new collections of information into the rules, nor do they amend the rules in a way that modifies the collection of information that OMB has previously approved for part 48.[58] Therefore, no Paperwork Reduction Act submission to OMB is required.

B. Regulatory Flexibility Act Analysis

Under section 605(b) of the Regulatory Flexibility Act, the regulatory flexibility analysis otherwise required under section 604 of the Regulatory Flexibility Act is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short explanatory statement in the **Federal Register** along with its rule.

The OCC supervises 772 small entities.[59] This proposal could affect approximately two of those small entities. The OCC estimates the cost to those small entities would be *de minimis.* Therefore, the OCC certifies that the rule will not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of $146 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Reform Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has determined that its proposed rule would not result in expenditures by state, local, and tribal governments, or by the private sector, of $146 million or more. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

[56] Swap Dealers and ECPs, 77 FR 30596 (May 23, 2012).

[57] 44 U.S.C. 3501–3520.

[58] OMB Control No. 1557–0250.

[59] A small entity is defined as a bank or savings association with assets up to $175 million or a trust company with assets up to $7 million. Data as of July 20, 2012.

List of Subjects in 12 CFR Part 48

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

For the reasons stated in the preamble, the OCC proposes to amend 12 CFR part 48 as follows:

PART 48—RETAIL FOREX TRANSACTIONS

1. The authority citation for part 48 continues to read as follows:

Authority: 7 U.S.C. 27 *et seq.;* 12 U.S.C. 1 *et seq.,* 24, 93a, 161, 1461 *et seq.,* 1462a, 1463, 1464, 1813(q), 1818, 1831o, 3101 *et seq.,* 3102, 3106a, 3108, and 5412.

2. Amend § 48.1 by revising paragraphs (c) and (d) and adding paragraph (e) to read as follows:

§ 48.1 Authority, purpose, and scope.

* * * * *

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

(d) *International applicability.* (1) *Foreign transactions.* Sections 48.3 and 48.5 through 48.16 do not apply to retail foreign exchange transactions between a foreign branch of a national bank and a non-U.S. person.

(2) *Foreign funds.* For purposes of paragraph (d)(1) of this section, a fund is a non-U.S. person if it is operated and managed by a non-U.S. person and all of its participants are non-U.S. persons. For purposes of this paragraph, if a participant is a fund, then the participant is a non-U.S. person only if all of its participants are non-U.S. persons.

(3) *Applicability of foreign law.* Transactions described in this paragraph (d) and foreign branches of national banks remain subject to applicable foreign law, including any disclosure, recordkeeping, capital, margin, reporting, business conduct, and documentation requirements.

(e) *Transactions with qualified forex customers.* Sections 48.3(b) and 48.4 through 48.16 do not apply to retail foreign exchange transactions between a national bank and a qualified forex customer.

3. Amend § 48.2 by:

a. In the introductory text, remove the phrase ''eligible contract participant;'';

b. Remove the definition of *identified banking product;*

c. Amend the definition of *retail forex transaction* by:

i. Removing, in the introductory text, ''other than an identified banking

product or a part of an identified banking product'' and adding in its place ''other than an excluded instrument or a part of an excluded instrument''; and

ii. Removing, in paragraphs (2) and (3)(iii)(B), the phrase ''15 U.S.C. 78(f)(a)'' and adding in its place the phrase ''15 U.S.C. 78f(a)''; and

d. Add the definitions for ''Bank fund,'' *''Eligible contract participant,'' ''Excluded instrument,'' ''Insurance company separate account,'' ''Insured branch,''* and *''Qualified forex customer''* in alphabetical order.

The additions read as follows:

§ 48.2 Definitions.

* * * * *

Bank fund means a fund described in 12 CFR 9.18(a)(1), (a)(2), or (c) that is subject to applicable requirements of 12 CFR 9.18.

* * * * *

Eligible contract participant has the same meaning as in 17 CFR 1.3(m).

Excluded instrument means an agreement, contract, or transaction that is exempt from regulation under the Commodity Exchange Act, including:

(1) An identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b));

(2) A banking product described in section 405(a) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27c(a));

(3) A hybrid instrument that is predominantly a security under section 2(f) of the Commodity Exchange Act (7 U.S.C. 2(f)); and

(4) A hybrid instrument that is exempt from the provisions of the Commodity Exchange Act under 17 CFR 34.3(a).

* * * * *

Insurance company separate account means a separate account established and maintained by an insurance company subject to regulation by a State insurance regulator or foreign insurance regulator.

Insured branch has the same meaning as in section 3(s)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)(3)).

* * * * *

Qualified forex customer means a bank fund or an insurance company separate account.

* * * * *

4. Revise § 48.3(b) to read as follows:

§ 48.3 Prohibited Transactions.

* * * * *

(b) If a national bank or an affiliate can cause retail forex transactions to be effected for a retail forex customer without the retail forex customer's specific authorization, then the national bank may not act as the counterparty for any retail forex transaction with that retail forex customer.

5. Revise the introductory text of § 48.7(b)(1) to read as follows:

§ 48.7 Recordkeeping.

* * * * *

(b) * * *

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

* * * * *

6. Revise § 48.8 to read as follows:

§ 48.8 Capital Requirements.

(a) A national bank, other than a Federal branch or agency of a foreign bank that is not an insured branch, offering or entering into retail forex transactions must be well capitalized under 12 CFR part 6.

(b) A Federal branch or agency of a foreign bank offering or entering into retail forex transactions must satisfy the requirements of 12 CFR 4.7(b)(1)(iii)(A) and (iv).

7. Add § 48.18 to read as follows:

§ 48.18 Counterparty Verification

The OCC will not deem a national bank to have violated this part by engaging in a retail forex transaction without complying with this part's requirements if:

(a) The national bank's counterparty represented in writing that it was an eligible contract participant or a qualified forex customer;

(b) The national bank reasonably relied on that representation;

(c) The national bank had reasonable policies and procedures in place to verify the counterparty's status as an eligible contract participant or a qualified forex customer; and

(d) The national bank followed those policies and procedures.

Dated: October 5, 2012.

Thomas J. Curry,

Comptroller of the Currency.

[FR Doc. 2012–25123 Filed 10–11–12; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1070; Directorate Identifier 2012–NM–099–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model A300 C4–605R Variant F airplanes (collectively called Model A300–600 series airplanes); and Airbus Model A310 series airplanes. This proposed AD was prompted by fuel system reviews conducted by the European Aviation Safety Agency (EASA). This proposed AD would require modifying the electrical control circuits of the inner, center, and trim tank pumps, as applicable. We are proposing this AD to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by November 26, 2012.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.com*. You may review copies of the referenced