

**FEDERAL DEPOSIT INSURANCE CORPORATION**  
**12 CFR Part 349**  
**RIN 3064-AD81**

**Retail Foreign Exchange Transactions**

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The FDIC is proposing regulations that would impose requirements for foreign currency futures, options on futures, and options that an insured depository institution supervised by the Federal Deposit Insurance Corporation engages in with retail customers. Pursuant to section 742(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, such transactions will be prohibited as of July 16, 2011, in the absence of the proposed requirements. The proposed regulations would also impose requirements on other foreign currency transactions that are functionally or economically similar to futures, options on futures, or options. These similar transactions include so-called “rolling spot” transactions that an individual enters into with a foreign currency dealer, usually through the internet or other electronic platform, to transact in foreign currency. The regulations would not apply to traditional foreign currency forwards or spot transactions that a depository institution engages in with business customers to hedge foreign exchange risk.

**DATES:** Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

- *Agency Web Site:* <http://www.fdic.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the Agency Web Site.
- *E-mail:* [Comments@FDIC.gov](mailto:Comments@FDIC.gov). Include “Retail Foreign Exchange Transactions” in the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17<sup>th</sup> Street, NW, Washington, D.C. 20429.
- *Hand Delivery/Courier:* Guard station at the rear of the 550 17<sup>th</sup> Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. (EDT).
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Public Inspection:* All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal> including any personal information provided. Paper copies of public comments may be ordered from the Public Information Center by telephone at (877) 275-3342 or (703) 562-2200.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

**I. Background**

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act 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>

This Dodd-Frank Act amendment to the CEA takes effect 360 days from the enactment of the Act.<sup>9</sup> After that date an institution for which the FDIC is the “appropriate Federal banking agency” pursuant to § 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(q) (FDIC-supervised IDI) may not engage in off-exchange foreign currency futures and options with a customer who does not qualify as an eligible contract participant (ECP) under the CEA (ECP) except pursuant to a retail forex rule issued by the FDIC.<sup>10</sup> The restrictions in the Proposed Rule do not apply to (1) transactions with a customer who qualifies as an ECP, or (2) transactions that are spot contracts or forward contracts irrespective of whether the customer is or is not an ECP. The retail forex rule does, however, apply to “rolling spot” transactions in foreign currency. The discussion of

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<sup>1</sup> Pub. L. 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 to 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).

<sup>4</sup> Section 2(c)(2)(E)(i)(III) of the CEA, as amended by § 742(c), defines a “Federal regulatory agency” to mean the CFTC, the Securities and Exchange Commission, an appropriate Federal banking agency, the National Credit Union Association, and the Farm Credit Administration. Section 1a(2) of the CEA defines an “appropriate Federal banking agency” by incorporation of § 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1813(q)).

When the proposed rule is published in the Federal Register, the FDIC is the appropriate Federal banking agency for any State nonmember insured bank and any foreign bank having an insured branch. 12 U.S.C. § 1813(q)(3). When the powers of the Office of Thrift Supervision are transferred to the Office of Comptroller of the Currency, the FDIC and the Board of Governors of the Federal Reserve System, the FDIC will be the appropriate Federal banking agency for any State nonmember insured bank, any foreign bank having an insured branch and any State savings association. See Dodd-Frank Act § 312(c) (amending 12 U.S.C. § 1813(q) to redefine “appropriate Federal banking agency”).

<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> See Dodd-Frank Act 754.

<sup>10</sup> Under 12 U.S.C. 1813(q), the FDIC is the “appropriate Federal banking agency” for a foreign bank having an insured branch.

the definition of “retail forex transaction” below elaborates on the distinctions between rolling spot transactions and spot and forward contracts.

Any retail forex rule 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>11</sup>

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 FDIC is proposing to adopt a substantially similar rule for FDIC-supervised IDIs 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. While each Federal banking agency is issuing a separate proposed rule, the Federal banking agencies are coordinating their efforts. The FDIC’s notice of proposed rulemaking is substantially similar to the OCC’s notice of proposed rulemaking regarding retail foreign currency transactions published on April 22, 2011.<sup>13</sup>

The requirements in this proposed rule may overlap with applicable expectations contained in the Interagency Statement on Retail Sales of Nondeposit Investment Products (NDIP Policy Statement).<sup>14</sup> The NDIP Policy Statement describes the FDIC’s expectations for an FDIC-supervised IDI that 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 FDIC 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 FDIC will expect FDIC-supervised IDIs engaging in or offering retail forex transactions to also comply with the NDIP Policy Statement to the extent such compliance does not conflict with the requirements of the FDIC’s final retail forex rule.

Question I.1: Does the proposed rule create issues concerning application of the NDIP Policy Statement to retail forex transactions that the FDIC should address in this rule or through updates to the NDIP Policy Statement? Does the Agencies’ proposed method for developing retail forex rules create material confusion for the marketplace?

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

### Structure and Approach

The FDIC’s proposed retail forex rule is designed to promote consistent treatment of retail forex transactions regardless of whether a retail forex customer’s dealer is an FDIC-supervised IDI or a CFTC registrant. While the FDIC’s proposed rule is modeled on the CFTC’s retail forex rule, the FDIC has adapted the CFTC’s rule to reflect

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<sup>11</sup> 7 U.S.C. 2(c)(2)(E)(iii)(I).

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

<sup>13</sup> See Retail Foreign Exchange Transactions, 76 FR 22633 (Apr. 22, 2011).

<sup>14</sup> FDIC FIL-61-95 (Sept. 13, 1995).

differences between FDIC and CFTC supervisory regimes and differences between FDIC-supervised IDIs and CFTC registrants. For example:

- The FDIC’s proposed retail forex rule does not include registration requirements, because FDIC-supervised IDIs are already subject to comprehensive supervision by the FDIC. Instead of a registration requirement, the proposed rule would require an FDIC-supervised IDI to obtain the FDIC’s consent prior to conducting a retail forex business.
- Because FDIC-supervised IDIs are already subject to various capital and other supervisory requirements,<sup>15</sup> proposed § 349.8 would require institutions wishing to engage in retail forex transactions to be “well capitalized.”
- Proposed § 349.6 would require that the risk disclosure statement highlight that a retail forex transaction is not insured by the FDIC. The CFTC’s regulations do not address FDIC insurance because financial intermediaries under the CFTC’s jurisdiction are not insured depository institutions.
- Proposed § 349.9 would prohibit cross-collateralization or set-off against a retail customer’s other property or accounts held at the financial institution. This is consistent with the heightened customer protection provided to banking customers.

Proposed Rule 349.1—Authority, Purpose, and Scope

This section would provide that an FDIC-supervised IDI that engages in covered retail forex transactions with retail customers would be subject to requirements contained in part 349.

The FDIC notes that some FDIC-supervised IDIs may wish to engage in retail forex transactions through a foreign branch. The CEA does not clearly define whether foreign branches of FDIC-supervised IDIs may be considered United States financial institutions that can be included in the rule.<sup>16</sup>

Question II.1.1: Should foreign branches of FDIC-supervised IDIs that wish to conduct retail forex transactions abroad, whether with U.S. or foreign customers, be permitted to engage in the activity?

Proposed Rule 349.2—Definitions

This section proposes definitions of 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 an FDIC-supervised IDI and a person that is not an ECP:<sup>17</sup> (i) a future or option on such a future;<sup>18</sup> (ii) options not traded on a registered national securities exchange;<sup>19</sup> and (iii) certain leveraged or margined transactions.<sup>20</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

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<sup>15</sup> See 12 CFR part 325.

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

<sup>17</sup> The definition of “eligible contract participant” is found in CEA section 1a(18) and is discussed below.

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

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

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

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>21</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>22</sup> In addition, the definition does not include transactions executed on an exchange or designated contract market; those transactions are subject to CFTC regulation.

Second, rolling spot forex transactions (so-called Zelener<sup>23</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. This notice of proposed rulemaking proposes that rolling spot transactions with retail customers (non-ECPs) should be regulated as retail forex transactions.<sup>24</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>25</sup> Therefore, the FDIC believes that these contracts are better viewed as economically more like futures than spot contracts, although some courts have held them to be spot contracts in form.<sup>26</sup>

This section would also define several terms by reference to the CEA, the most important of which is “eligible contract participant.” Foreign currency transactions with ECPs are not considered retail forex transactions and are therefore not subject to this rule.

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<sup>21</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>22</sup> See generally CFTC v. Int’l Fin. Servs. (New York), Inc., 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (distinguishing between 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>23</sup> CFTC v. Zelener, 373 F.3d 861 (7th Cir. 2004); see also CFTC v. Erskine, 512 F.3d 309 (6th Cir. 2008).

<sup>24</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>25</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>26</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).

In addition to a variety of financial entities, certain governmental entities, businesses, and individuals may be ECPs.<sup>27</sup>

Question II.2.1: What types of customers engage in retail forex transactions, including rolling spot transactions? Should regulations governing retail forex transactions cover additional categories of retail customers, that is, those customers that are ECPs? If so, which eligible contract participants should be considered retail forex customers?

Proposed Rule 349.3—Prohibited Transactions

This section would prohibit an FDIC-supervised IDI and its institution-affiliated parties from engaging in fraudulent conduct in connection with retail forex transactions. This section would also prohibit an FDIC-supervised IDI from acting as a counterparty to a retail forex transaction if the institution or its affiliate exercises discretion over the customer's retail forex account because the FDIC views such self-dealing as inappropriate.

Proposed Rule 349.4—Filing Procedures

The proposed rule would require that, before engaging in a retail forex business, as defined in proposed § 349.2, an FDIC-supervised IDI shall provide prior written notice and obtain the FDIC's prior written consent. Under the proposed rule, the notice would be filed with the appropriate FDIC office and would include: (1) a brief description of the FDIC-supervised IDI's proposed retail forex business and the manner in which it will be conducted; (2) the amount of the institution's existing or proposed direct or indirect investment in the retail forex business as well as calculations sufficient to indicate compliance with all capital requirements in proposed § 349.8, discussed below, and all other applicable capital standards; (3) a copy of the institution's comprehensive business plan that includes a discussion of, among other things, conflict

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<sup>27</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;

(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.

of interest and how the operation of the retail forex business is consistent with the institution's overall strategy; (4) a description of the institution's target customers for its proposed retail forex business and related information, including without limitation credit evaluations, customer appropriateness, and "know your customer" documentation; (5) a resolution by the institution's board of directors that the proposed retail forex business is an appropriate activity for the institution and that the institution's written policies, procedures, and risk measurement and management systems and controls address conducting retail forex business in a safe and sound manner and in compliance with this part; and (6) sample disclosures sufficient to demonstrate compliance with proposed § 349.6, discussed below.

The FDIC may request additional information, as necessary.

Question: The FDIC invites comment on whether additional specific information should be required in the notice.

For FDIC-supervised IDIs that have an existing retail forex business, the proposed rule would allow the entity to continue to operate the business for up to six months if it provides the written notice and requests the FDIC's written consent within 30 days of the effective date of this rule.

Question IV.I.I: With respect to FDIC-supervised IDIs that have an existing retail forex business, does a 30-day time period provide adequate time to provide notification to the FDIC?

#### Proposed Rule 349.5—Application and Closing Out of Offsetting Long and Short Positions

This section would require an FDIC-supervised IDI to close out offsetting long and short positions in a retail forex account. The institution 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>28</sup> The FDIC agrees with this concern. Under the proposed rule, an FDIC-supervised IDI 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 institution.

#### Proposed Rule 349.6—Disclosure

This section would require an FDIC-supervised IDI 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 FDIC-supervised IDIs. The prescribed risk disclosure statement would describe the risks associated with retail forex transactions. The disclosure statement would make clear that an FDIC-supervised IDI is prohibited from applying customer losses arising out of retail forex transactions against any property of a customer other than money or property specifically transferred to the FDIC-supervised IDI as margin for retail forex

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<sup>28</sup> Proposed CFTC Retail Forex Rule, 75 FR at 3287 n.54.

transactions; the FDIC-supervised IDI may not use rights of set-off to collect margin against other assets it may hold for the retail forex customer to cover losses arising out of retail forex transactions. Under the proposed rule, the risk disclosure must be provided as a separate document and be signed by the retail forex customer.

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>29</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>30</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>31</sup> The FDIC generally agrees with the CFTC and this proposed rule requires this disclosure; however, the FDIC invites comments regarding this approach.

Question II.6.1: Would this disclosure provide meaningful information to retail customers of FDIC- IDIs? 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>32</sup> The proposed rule includes this disclosure requirement.

Question II.6.2: Would this disclosure provide meaningful information to retail customers of FDIC-supervised IDIs? Would alternative disclosures more effectively accomplish the objectives of the disclosure?

Question II.6.3: Should FDIC-supervised IDIs be allowed to combine the retail forex risk disclosure with other disclosures that institutions 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 FDIC-supervised IDI charges retail forex customers for retail forex transactions? What fees do FDIC-supervised IDIs currently charge retail forex customers for retail forex transactions? Are there other costs to retail forex customers of engaging in retail forex transactions that FDIC-supervised IDIs should disclose? If so, what are these costs?

#### Proposed Rule 349.7—Recordkeeping

This section would specify which documents and records an FDIC-supervised IDI engaged in retail forex transactions must retain for examination by the FDIC. This section would also prescribe document maintenance standards.

#### Proposed Rule 349.8—Capital Requirements

This section would require that an FDIC-supervised IDI that offers or enters into retail forex transactions must be “well capitalized” as defined in the FDIC’s prompt corrective action regulation<sup>33</sup> or the FDIC-supervised IDI must obtain an exemption from the FDIC. In addition, under the proposed rule, an FDIC-supervised IDI must continue to hold capital against retail forex transactions as provided in the FDIC’s capital

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<sup>29</sup> 17 CFR 5.5(e)(1).

<sup>30</sup> Proposed CFTC Retail Forex Rule, 75 FR at 3289.

<sup>31</sup> Final CFTC Retail Forex Rule, 75 FR at 55412.

<sup>32</sup> 17 CFR 5.5(b).

<sup>33</sup> 12 CFR part 325.

regulation.<sup>34</sup> This rule does not amend the FDIC's prompt corrective action regulation or capital regulation.

Proposed Rule 349.9—Margin Requirements

Under the proposed rule, paragraph (a) would require an FDIC-supervised IDI that engages in retail forex transactions, in advance of any such transaction, to collect from the retail forex customer margin equal to at least 2 percent of the notional value of the retail forex transaction if the transaction is in a major currency pair, and at least 5 percent of the notional value of the retail forex transaction otherwise. These margin requirements are identical to the requirements imposed by the CFTC's retail forex rule. 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>35</sup> An evolving market could change the major currencies, so the FDIC is not proposing to define the term "major currency," but rather expects that FDIC-supervised IDIs will adhere to standard market interpretations.<sup>36</sup>

Question II.9.1: The FDIC 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 FDIC should identify a major currency or major currency pair.

For retail forex transactions involving rolling spots, for example, higher margin requirements 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 with high leverage to greater risk of substantial losses. 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 involved in the trading of retail forex transactions by retail customers using high leverage, 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.

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<sup>34</sup> 12 CFR part 325.

<sup>35</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>36</sup> The Final CFTC Retail Forex Rule similarly does not define "major currency."

Question II.9.2: Will the proposed margin requirements provide adequate protection for retail customers engaged in this particular type of trade or should the requirements be adjusted and how?

Under the proposed rule, paragraph (b) would specify the acceptable forms of margin that customers may post. FDIC-supervised IDIs 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 FDIC-supervised IDIs to review and modify the size of the haircuts more frequently.

Question II.9.3: Should the FDIC provide for haircuts for noncash margin posted for retail forex transactions? If so, how should those haircuts be determined?

In proposed rule 349.9(c), the FDIC would require an FDIC-supervised IDI 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 an FDIC-supervised IDI 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) would require an FDIC-supervised IDI to collect additional margin from the customer or to liquidate the customer's position if the amount of margin held by the institution fails to meet the requirements of paragraph (a). The proposed rule would require the institution 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 FDIC-supervised IDIs 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) would prohibit an FDIC-supervised IDI 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. An FDIC-supervised IDI'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 an FDIC-supervised IDI 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 it is for a retail forex dealer regulated by the CFTC to hold such other assets. The FDIC believes it would be inappropriate to allow an FDIC-supervised IDI 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 FDIC-supervised IDI.

Question II.9.5: The FDIC requests comment on whether this section provides sufficient incentives for FDIC-supervised IDIs to liquidate a retail forex customer's losing position within a reasonably short period of time in an effort to minimize such losses. Do the proposed rules accomplish that objective? Are there more effective methods of achieving the objective?

Proposed Rule 349.10—Required reporting to customers

This section would require an FDIC-supervised IDI engaging in retail forex transactions to provide each retail forex customer a monthly statement and confirmation statements.

Question II.10.1: Does proposed § 349.10 provide meaningful statements that would be useful to retail customers, or, in light of the distinctive characteristics of retail forex transactions, would other information be more appropriate? If so, what information would be more appropriate?

Proposed Rule 349.11—Unlawful Representations

Under the proposed rule, this section would prohibit an FDIC-supervised IDI and its institutional-affiliated parties from representing that the Federal government, the FDIC, or any other Federal agency has sponsored, recommended, or approved retail forex transactions or products in any way. This section also would prohibit an FDIC-supervised IDI from implying or representing that it will guarantee against or limit retail forex customer losses or not collect margin as required by section 349.9. However, this section would not prohibit an FDIC-supervised IDI 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. Further, this section would not prohibit an FDIC-supervised IDI from hedging or otherwise mitigating its own exposure to retail forex transactions or any other foreign exchange risk.

Proposed Rule 349.12—Authorization to Trade

This section would require an FDIC-supervised IDI to have specific written authorization from a retail forex customer before effecting a retail forex transaction for that customer.

Proposed Rule 349.13—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) of the proposed rule, an FDIC-supervised IDI engaged in retail forex transactions would be required to establish and enforce internal rules, procedures and controls (1) to prevent front running, in which transactions in accounts of the FDIC-supervised IDI 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) would prohibit an FDIC-supervised IDI 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 FDIC's request.

As written, paragraph (c) would ensure that institution-affiliated parties of another retail forex counterparty do not open accounts with an FDIC-supervised IDI without the knowledge and authorization of the account surveillance personnel of the other retail forex counterparty to which they are affiliated. Similarly, paragraph (d) would ensure that institution-affiliated parties of an FDIC-supervised IDI do not open accounts with other retail forex counterparties without the knowledge and authorization of the account surveillance personnel of the FDIC-supervised IDI to which they are affiliated.

Paragraph (e) would prohibit an FDIC-supervised IDI 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 FDIC-supervised IDI 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 FDIC-supervised IDI holds one or more outstanding orders of other retail forex customers for the same currency pair at a comparable price.

However, paragraph (e)(3) would not prevent an FDIC-supervised IDI from changing the bid or ask prices of a retail forex transaction to respond to market events. The FDIC 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, an FDIC-supervised IDI could reject an order and advise customers they may submit a new order.

Question II.13.1: Would 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 FDIC-supervised IDIs may instead reject an order and accept new orders from their retail forex customers?

Paragraph (e)(4) would require an FDIC-supervised IDI engaging in retail forex transactions to execute similar orders in the order they are received. The prohibition would prevent an FDIC-supervised IDI from offering preferred execution to some of its retail forex customers but not others.

#### Proposed Rule 349.14—Supervision

This section would impose on an FDIC-supervised IDI and its agents, officers, and employees a duty to supervise subordinates with responsibility for retail forex transactions to ensure compliance with the FDIC's retail forex rule.

Question II.14.1: Would this section impose any additional requirements not already encompassed by safety and soundness standards applicable to FDIC-supervised IDIs and their agents, officers, and employees?

#### Proposed Rule 349.15—Notice of Transfers

This section describes the requirements for transferring a retail forex account. Generally, an FDIC-supervised IDI would be required to provide retail forex customers 30 days' prior notice before transferring or assigning their account. Affected customers may then instruct the FDIC-supervised IDI 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. An FDIC-supervised IDI that is the transferee of retail forex accounts generally would be required to provide the transferred customers with the risk disclosure statement of proposed § 349.6 and obtain each affected customer's written acknowledgement within 60 days.

#### Proposed Rule 349.16—Customer Dispute Resolution

This section would prohibit an FDIC-supervised IDI from entering 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 the claim or grievance to any settlement procedure.

This provision differs from the applicable CFTC dispute settlement procedures, which permit pre-dispute settlement procedures under certain conditions.<sup>37</sup> The substance of the CFTC dispute settlement resolution regulation, however, dates back to August 10, 2001. Since that time, concerns about predispute settlement resolution agreements have emerged. Congress addressed these concerns in seven provisions in the Dodd-Frank Act that prohibit, or give the agency involved the authority to prohibit, the use of predispute arbitration provisions.<sup>38</sup> Consonant with this demonstrated Congressional concern with such agreements, the FDIC is proposing, pursuant to its authority to adopt “such other standards or requirements as [it] shall determine to be necessary,” to prohibit a FDIC-supervised IDI from entering into a pre-dispute settlement dispute resolution agreement with a retail forex customer.

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

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

- Question III.1: Would the proposed rule appropriately protect retail forex customers of FDIC-supervised IDIs?
- Question III.2: Are the proposed rule’s variations from the CFTC retail forex rule appropriately tailored to the differences between FDIC-supervised IDIs and CFTC registrants and the regulatory regimes applicable to each?
- Question III.3: Should the proposed rule include further disclosure requirements with respect to whether or not retail forex transactions or margin for retail forex transactions are insured by the FDIC?
- Question III.4: Should the proposed rule limit the ability of an FDIC-supervised IDI to enter into speculative retail forex transactions, such as rolling spot transactions, with only certain retail forex customers? Do FDIC-supervised IDIs limit customer access to these transactions at this time? How do FDIC-supervised IDIs determine if these types of trades may be appropriate for those customers?

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

### **IV. Regulatory Analysis**

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<sup>37</sup> 17 CFR 166.5. The CFTC’s regulation permits predispute dispute settlement agreements with a customer with certain restrictions such as that signing the agreement must not be made a condition for the customer to utilize the services offered by the CFTC registrant.

<sup>38</sup> See Dodd-Frank Act section 748 (amending CEA section 23(n)(2) to provide: “No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”); section 921(a) (adding similar provisions to section 15(o) to the Securities Exchange Act of 1934 and section 205(f) to the Investment Advisers Act of 1940); section 922(c) (adding a similar provision to 18 U.S.C. 1514A, which provides employee protections, including a right to a jury trial to enforce such protections, to employees of publicly registered companies and nationally recognized statistical rating organizations); section 1028 (requiring the Consumer Financial Protection Bureau (CFPB) to conduct a study and report to Congress on the use of predispute arbitration agreements “between covered persons and consumers in connection with the offering or providing of consumer financial products or services” and giving the CFPB authority to adopt regulations prohibiting such agreements; section 1057(d) (prohibiting predispute arbitration agreements that affect the employee protection rights of a person that is employed by an entity subject to CFPB regulation; and section 1414 (amending section 129C of the Truth in Lending Act to prohibit predispute arbitration agreements with respect to residential mortgage loans and home equity loans).

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 an FDIC-supervised IDI with assets of \$175 million or less.<sup>39</sup> The proposed rule would impose recordkeeping and disclosure requirements on any FDIC-supervised IDI, including one that engages in retail forex transactions with their customers.

Pursuant to section 605(b) of the RFA, the FDIC 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 FDIC estimated that there are no small banks currently engaging in retail forex transactions with their customers. Therefore, the FDIC estimates that no small banks under its supervision would be affected by the proposed rule.

Persons wishing to submit written comments regarding the FDIC'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 FDIC 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 FDIC to OMB for review and approval under section 3506 of the PRA and § 1320.11 of OMB's implementing regulations (5 C.F.R. 1320 et seq.). The information collection requirements are found in §§ 349.4-349.7, 349.9-349.10, 349.13, 349.15-349.16. Comments are invited on:

- (a) Whether the collection of information is necessary for the proper performance of the FDIC'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

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<sup>39</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).

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

Proposed Information Collection

Title of Information Collection: Retail Foreign Exchange Transactions.

Frequency of Response: On Occasion.

Affected Public: Businesses or other for-profit.

Respondents: State nonmember insured banks and foreign banks having insured branches.

Filing Requirements

The filing requirements in proposed § 349.4 would require that, prior to initiating a retail forex business, an FDIC-supervised IDI provide the FDIC with prior notice, obtain the FDIC's prior written consent, and submit the documents provided for in proposed § 349.4(c). The FDIC-supervised IDI must also provide other information required by the FDIC, such as documentation of customer due diligence. An FDIC-supervised IDI already engaged in a retail forex business may continue to do so, provided it request the FDIC's written consent.

Disclosure Requirements

Proposed § 349.5, regarding the application and closing out of offsetting long and short positions, would require an FDIC-supervised IDI 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.

Proposed § 349.6 would require that an FDIC-supervised IDI 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 an FDIC-supervised IDI of its fees and other charges and its profitable accounts ratio.

Proposed § 349.10 would require an FDIC-supervised IDI to issue monthly statements to each retail forex customer and to send confirmation statements following transactions.

Proposed § 349.13(b) would allow disclosure by an FDIC-supervised IDI 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 FDIC. Proposed rule 349.13(c) would prohibit an FDIC-supervised IDI 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. Proposed Rule 349.13(d) would prohibit a related person of an FDIC-supervised IDI 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.

Proposed § 349.15 would require an FDIC-supervised IDI 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 an FDIC-supervised IDI to which retail forex accounts or positions are assigned or transferred to provide the affected

customers with risk disclosure statements and forms of acknowledgment and receive the signed acknowledgments within 60 days.

The customer dispute resolution provisions in § 349.16 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 FDIC-supervised IDI provide them with a list of persons qualified in the dispute resolution and that the customer must notify the FDIC-supervised IDI of the person selected within 45 days of receipt of such list.

Policies and Procedures; Recordkeeping

Proposed §§ 349.7 and 349.13 would require that an FDIC-supervised IDI engaging in retail forex transactions keep full, complete, and systematic records and establish and implement internal rules, procedures, and controls. Proposed § 349.7 also would require that an FDIC-supervised IDI 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. Proposed § 349.9 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: 3 FDIC-supervised IDIs; 1 service provider.

Total Reporting Burden: 48 hours.

Total Disclosure Burden: 5,326 hours.

Total Recordkeeping Burden: 664 hours.

Total Annual Burden: 6,038 hours.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the FDIC to use plain language in all proposed and final rules published after January 1, 2000. The FDIC invites comment on how to make this proposed rule easier to understand. For example, the FDIC 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 349**

Consumer protection, Definitions, Foreign currencies, Foreign exchange, State nonmember insured bank, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the FDIC proposes to add part 349 to Title 12, Chapter III of the Code of Federal Regulations to read as follows:

**PART 349—RETAIL FOREIGN EXCHANGE TRANSACTIONS**

Sec.

- 349.1 Authority, purpose, and scope.
- 349.2 Definitions.
- 349.3 Prohibited transactions.
- 349.4 Filing procedures.
- 349.5 Application and closing out of offsetting long and short positions.
- 349.6 Disclosure.
- 349.7 Recordkeeping.
- 349.8 Capital requirements.
- 349.9 Margin requirements.
- 349.10 Required reporting to customers.
- 349.11 Unlawful representations.
- 349.12 Authorization to trade.
- 349.13 Trading and operational standards.
- 349.14 Supervision.
- 349.15 Notice of transfers.
- 349.16 Customer dispute resolution.

**Authority:** 12 U.S.C. §§ 1813(q), 1818, 1819, and 3108; 7 U.S.C. § 2(c)(2)(E).

**§ 349.1 Authority, purpose and scope.**

(a) Authority. An FDIC-supervised insured depository institution that engages in retail forex transactions shall comply with the requirements of this part.

(b) Purpose. This part establishes rules applicable to retail forex transactions engaged in by FDIC-supervised insured depository institutions and applies on or after the effective date.

(c) Scope. This part applies to FDIC-supervised insured depository institutions.

**§ 349.2 Definitions.**

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.).

FDIC-supervised insured depository institution means any insured depository institution, or foreign bank having an insured branch for which the Federal Deposit Insurance Corporation is the appropriate Federal banking agency pursuant to § 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(q).

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).

Insured depository institution or IDI has the same meaning as in 12 U.S.C. 1813(c)(2).

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

Retail forex account means the account of a retail forex customer, established with an FDIC-supervised insured depository institution, in which retail forex transactions with the FDIC-supervised insured depository institution 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 an FDIC-supervised insured depository institution and a retail forex customer that contains the terms governing the customer's retail forex account with the FDIC-supervised insured depository institution.

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 an FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution;
- (2) An officer, director or owner of ten percent or more of the capital stock of the FDIC-supervised insured depository institution; or
- (3) An employee of the FDIC-supervised insured depository institution, whose duties include:
  - (i) The management of the FDIC-supervised insured depository institution's business;
  - (ii) The handling of the FDIC-supervised insured depository institution's retail forex transactions;
  - (iii) The keeping of records, including without limitation the software used to make or maintain those records, pertaining to the FDIC-supervised insured depository institution's retail forex transactions; or
  - (iv) The signing or co-signing of checks or drafts on behalf of the FDIC-supervised insured depository institution;
- (4) A spouse or minor dependent living in the same household as of any of the foregoing persons; or
- (5) An affiliate of the FDIC-supervised insured depository institution;

Retail forex counterparty includes, as appropriate:

- (1) An FDIC-supervised insured depository institution;
- (2) A retail foreign exchange dealer;
- (3) A futures commission merchant; and
- (4) An affiliated person of a futures commission merchant.

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

- (1) Any general partner, officer, director, or owner of 10 percent or more of the capital stock of the FDIC-supervised insured depository institution;
- (2) An associated person or employee of the retail forex counterparty, if the retail forex counterparty is not an FDIC-supervised insured depository institution;
- (3) An IAP, if the retail forex counterparty is an FDIC-supervised insured depository institution; 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 forex transaction means an agreement, contract, or transaction in foreign currency that is offered or entered into by an FDIC-supervised insured depository institution 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 an FDIC-supervised insured depository institution, its affiliate, or any person acting in concert with the FDIC-supervised insured depository institution 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.

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)).

### **§ 349.3 Prohibited transactions.**

(a) Fraudulent conduct prohibited. No FDIC-supervised insured depository institution 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 an FDIC-supervised insured depository institution can cause retail forex transactions to be effected for a retail forex customer without the retail forex customer's specific authorization, then neither the FDIC-supervised insured depository institution nor its affiliates may act as the counterparty for any retail forex transaction with that retail forex customer.

#### **§ 349.4 Filing procedures.**

(a) General. Before commencing a retail forex business, an FDIC-supervised insured depository institution shall provide the FDIC prior written notice and obtain the FDIC's prior written consent.

(b) Where to file. A notice required by this section shall be submitted in writing to the appropriate FDIC office.

(c) Contents of filing. A complete letter notice shall include the following information:

(1) Filings generally. (i) A brief description of the FDIC-supervised institution's proposed retail forex business and the manner in which it will be conducted;

(ii) The amount of the institution's existing or proposed direct or indirect investment in the retail forex business as well as calculations sufficient to indicate compliance with all capital requirements in § 349.8 and all other applicable capital standards;

(iii) A copy of the FDIC-supervised insured depository institution's comprehensive business plan that includes a discussion of, among other things, how the operation of the retail forex business is consistent with the institution's overall strategy;

(iv) A description of the FDIC-supervised insured depository institution's target customers for its proposed retail forex business and related information, including without limitation credit evaluations, customer appropriateness, and "know your customer" documentation;

(v) A resolution by the FDIC-supervised insured depository institution's board of directors that the proposed retail forex business is an appropriate activity for the institution and that the institution's written policies, procedures, and risk measurement and management systems and controls address conducting retail forex business in a safe and sound manner and in compliance with this part;

(vi) Sample risk disclosures sufficient to demonstrate compliance with § 349.6.

(2) Copy of application or notice filed with another agency. If an FDIC-supervised insured depository institution has filed an application or notice with another regulatory authority which contains all of the information required by subparagraph (c)(1) of this part, the institution may submit a copy to the FDIC in lieu of a separate filing.

(3) Additional information. The FDIC may request additional information to complete the processing of the notification.

(d) Treatment of Existing Retail Forex Business. Any FDIC-supervised insured depository institution that is engaged in retail forex business on the effective date of this part may continue to do so for up to six months, subject to an extension of time by the FDIC, provided that it notifies the FDIC of its retail forex business and requests the FDIC's written consent in accordance with paragraph (a).

(e) Compliance with the Commodities Exchange Act. Any FDIC-supervised insured depository institution that is engaged in retail forex business on the effective date of this part shall be deemed, during the six-month period (including any extension) provided in paragraph (e) 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)).

**§ 349.5 Application and closing out of offsetting long and short positions.**

(a) Application of purchases and sales. Any FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution or an IAP.

### **§ 349.6 Disclosure.**

(a) Risk disclosure statement required. No FDIC-supervised insured depository institution may open or maintain open an account that will engage in retail forex transactions for a retail forex customer unless the FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 an FDIC-supervised insured depository institution as your counterparty. Because of the leverage and the other risks disclosed here, you can rapidly lose all of the funds you give the FDIC-supervised insured depository institution as margin for such trading and you may lose more than you pledge as margin.**

**Your FDIC-supervised insured depository institution 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 not on a regulated market or exchange—your FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution as the counterparty. **When you sell, the FDIC-supervised insured depository institution is the buyer. When you buy, the FDIC-supervised insured depository institution is the seller.** As a result, when you lose money trading, your FDIC-supervised insured depository institution is making money on such trades, in addition to any fees, commissions, or spreads the FDIC-supervised insured depository institution may charge.

**(2) An electronic trading platform for retail foreign currency transactions is not an exchange. It is an electronic connection for accessing your FDIC-supervised insured depository institution. The terms of availability of such a platform are governed only by your contract with your FDIC-supervised insured depository institution.** Any trading platform that you may use to enter into off-exchange foreign currency transactions is only connected to your FDIC-supervised insured depository institution. You are accessing that trading platform only to transact with your FDIC-supervised insured depository institution. You are not trading with any other entities or customers of the FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution.

**(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 FDIC-supervised insured depository institution may set its own prices.** Your ability to close your transactions or offset positions is limited to what your FDIC-supervised insured depository institution will offer to you, as there is no other market for these transactions. Your FDIC-supervised insured depository institution may offer any prices it wishes, including prices derived from outside sources or not in its discretion. Your FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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, an FDIC-supervised insured depository institution.**

**(7) This transaction is subject to investment risks, including possible loss of all amounts invested.**

**Finally, you should thoroughly investigate any statements by any FDIC-supervised insured depository institution 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 an FDIC-supervised insured depository institution.**

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 FDIC-supervised insured depository institution maintained retail forex customer accounts:

(i) The total number of retail forex customer accounts maintained by the FDIC-supervised insured depository institution over which the FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution's statement of profitable trades shall include the following legend: **Past performance is not necessarily**

**indicative of future results.** Each FDIC-supervised insured depository institution shall provide, upon request, to any retail forex customer or prospective retail forex customer the total number of retail forex accounts maintained by the FDIC-supervised insured depository institution for which the FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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, commission, or spreads that the FDIC-supervised insured depository institution may impose on the retail forex customer in connection with a retail forex account or retail forex transaction;

(ii) An explanation of how the FDIC-supervised insured depository institution will determine the amount of such fees, charges, commissions, or spreads; and

(iii) The circumstances under which the FDIC-supervised insured depository institution may impose such fees, charges, commissions, or spreads.

(g) Future disclosure requirements. If, with regard to a retail forex customer, the FDIC-supervised insured depository institution changes any fee, charge, commission or spreads required to be disclosed under paragraph (f) of this section, then the FDIC-supervised insured depository institution 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 an FDIC-supervised insured depository institution from any other disclosure obligation it may have under applicable law.

### **§ 349.7 Recordkeeping.**

(a) General rule. An FDIC-supervised insured depository institution 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, an FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution will use;

(B) Whether the FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution has an interest.

(ii) An FDIC-supervised insured depository institution 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 FDIC.

(7) Other records. Other records covered by this section include written acknowledgements of receipt of the risk disclosure statement required by § 349.6(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 FDIC-supervised insured depository institution'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, an FDIC-supervised insured depository institution 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 (b)(1)(ii) of this section.

(2) In calculating whether a retail forex account was profitable or not profitable during the quarter, the FDIC-supervised insured depository institution 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. An FDIC-supervised insured depository institution engaging in retail forex transactions shall make a record of all communications, including customer complaints, received by the FDIC-supervised insured depository institution or its IAPs concerning facts giving rise to possible violations of law related to the FDIC-supervised insured depository institution’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; the name of the person who received the communication, and the final disposition of the matter.

(d) Records for noncash margin. An FDIC-supervised insured depository institution shall maintain a record of all noncash margin collected pursuant to § 349.9. 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 FDIC-supervised insured depository institution 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. An FDIC-supervised insured depository institution shall retain a copy of each monthly statement and confirmation required by § 349.10.

(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. An FDIC-supervised insured depository institution shall keep each record required by this section for at least five years from the date the record is created.

### **§ 349.8 Capital requirements.**

An FDIC-supervised insured depository institution offering or entering into retail forex transactions must be well capitalized as defined by 12 CFR part 325, unless specifically exempted by the FDIC in writing.

### **§ 349.9 Margin requirements**

(a) Margin required. An FDIC-supervised insured depository institution engaging, or offering to engage, in retail forex transactions must collect from each retail forex customer an amount of margin not less than:

(1) 2 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 FDIC-supervised insured depository institution.

(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 FDIC deems appropriate.

(2) Haircuts. An FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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, an FDIC-supervised insured depository institution 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 (c)(2) of this section, the FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution may require to satisfy the requirements of this section, or liquidate the retail forex customer's retail forex transactions.

(e) Set-off prohibited. An FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution under any loan; or

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

#### **§ 349.10 Required reporting to customers.**

(a) Monthly statements. Each FDIC-supervised insured depository institution 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 § 349.9(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, commissions, and spreads.

(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 § 349.9(c); and

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

(b) Confirmation statement. Each FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution was introduced by an introducing broker and the name of the introducing broker.

#### **§ 349.11 Unlawful representations.**

(a) No implication or representation of limiting losses. No FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC, the Federal government, or any agency thereof.

(d) Assuming or sharing of liability from bank error. This section shall not be construed to prevent an FDIC-supervised insured depository institution from assuming or sharing in the losses resulting from the FDIC-supervised insured depository institution'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.

#### **§ 349.12 Authorization to trade.**

(a) Specific authorization required. No FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution, in writing, to effect the retail forex transaction.

(b) 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.

**§ 349.13 Trading and operational standards.**

(a) Internal rules, procedures, and controls required. An FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution;

(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 premium and 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 FDIC-supervised insured depository institution engaging in retail forex transactions may disclose that an order of another person is being held by the FDIC-supervised insured depository institution, unless the disclosure is necessary to the effective execution of such order or the disclosure is made at the request of the FDIC.
- (c) Handling of retail forex accounts of related persons of retail forex counterparties. No FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution establishing account at another retail forex counterparty. No related person of an FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution;

(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 FDIC-supervised insured depository institution holds outstanding orders of other retail forex customers for the same currency pair at a comparable price.

#### **§ 349.14 Supervision.**

(a) Supervision by the FDIC-supervised insured depository institution. An FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 an FDIC-supervised insured depository institution must diligently supervise his or her subordinates' handling of all retail forex accounts at the FDIC-supervised insured depository institution and all the subordinates' activities relating to the FDIC-supervised insured depository institution's retail forex business.

#### **§ 349.15 Notice of transfers.**

(a) Prior notice generally required. Except as provided in paragraph (b) of this section, an FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution. An FDIC-supervised insured depository institution to which retail forex accounts or positions are assigned or transferred under paragraph (a) of this section must provide to the affected retail forex customers the risk disclosure statements and forms of acknowledgment required by this part and receive the required signed acknowledgments within 60 days of such assignments or transfers. This requirement shall not apply if the FDIC-supervised insured depository institution has clear written evidence that the retail forex customer has received and acknowledged receipt of the required disclosure statements.

#### **§ 349.16 Customer dispute resolution.**

(a) Prohibition on predispute arbitration agreements. No FDIC-supervised insured depository institution shall enter into any agreement with a retail forex customer in which the parties agree to arbitrate any future dispute between them arising related to the customer's retail forex account.

(b) Election of forum. (1) Where the parties agree to arbitrate a dispute after it has arisen, within ten business days of the agreement, the FDIC-supervised insured depository institution 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 FDIC-supervised insured depository institution of the person selected. The customer's failure to provide such notice shall give the FDIC-supervised insured depository institution the right to select a person from the list.

(c) Counterclaims. An agreement to arbitrate a customer's claim against an FDIC-supervised insured depository institution after the claim has arisen may permit the submission of a counterclaim in the arbitration 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.

**[THIS SIGNATURE PAGE RELATES TO THE PROPOSED RULE  
TITLED "RETAIL FOREIGN EXCHANGE TRANSACTIONS"]**

Dated at Washington, D.C., this \_\_\_ of May 2011.  
By order of the Board of Directors.  
Federal Deposit Insurance Corporation.

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Robert E. Feldman,  
Executive Secretary