

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 349**

**RIN 3064-AD81**

**Retail Foreign Exchange Transactions**

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

**ACTION:** Final Rule.

**SUMMARY:** The FDIC is adopting a final rule that imposes requirements for foreign currency futures, options on futures, and options that an insured depository institution supervised by the FDIC engages in with retail customers. The final rule also imposes requirements on other foreign currency transactions that are functionally or economically similar, including 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 do not apply to traditional foreign currency forwards, spots, or swap transactions that an insured depository institution engages in with business customers to hedge foreign exchange risk. The final rule applies to all state nonmember banks and, as of July 21, 2011, also to all state savings associations.

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

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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 similarly all such futures and options and

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<sup>1</sup> Pub. L. 111-203, 124 Stat. 1376.

<sup>2</sup> Dodd-Frank Act sec. 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 section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)). See Dodd-Frank Act sec. 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).

all agreements, contracts, or transactions that are functionally or economically similar to such futures and options.<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 section 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. section 1813(q), hereafter referred to as an 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 under the CEA (ECP) except pursuant to a retail forex rule issued by the FDIC. The restrictions in the final rule do not apply to (1) transactions with a customer who qualifies as an ECP, (2) transactions that are spot contracts irrespective of whether the customer is or is not an ECP; or (3) forward contracts between a seller and a buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business. The retail forex rule does, however, apply to “rolling spot” transactions in foreign currency. The discussion of 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>10</sup>

## **II. Overview of the Final Rule and Related Action**

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

<sup>9</sup> See Dodd-Frank Act sec. 754.

<sup>10</sup> 7 U.S.C. 2(c)(2)(E)(iii)(I).

On September 10, 2010, the Commodity Futures Trading Commission (CFTC) adopted a retail forex rule for persons subject to its jurisdiction.<sup>11</sup> On April 22, 2011, the OCC proposed a retail forex rule for FDIC-supervised IDIs modeled on the CFTC's retail forex rule.<sup>12</sup> On May 11, 2011, the FDIC approved for publication a notice of proposed rulemaking. The NPR was published in the Federal Register on May 17, 2011 and the comment period closed on June 16, 2011. In response to NPR, the FDIC received six comments: two comments from banks; a comment from a banking trade association; and three comments from individuals.

The FDIC is now adopting the proposed rule text as a final rule with few modifications.

In the preamble to the proposal, the FDIC indicated that retail forex transactions are subject to the Interagency Statement on Retail Sales of Nondeposit Investment Products (NDIP Policy Statement).<sup>13</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.

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

One commenters said that the NDIP Policy Statement should not apply to retail forex transactions, asserting that the retail forex rule, alone, would be sufficient to protect

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<sup>11</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>12</sup> Retail Foreign Exchange Transactions, 76 FR 22633 (Apr. 22, 2011).

<sup>13</sup> See FDIC FIL-9-94 (Feb. 15, 1994); see also FDIC FIL-61-95 (Sept. 13, 1995).

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

The FDIC believes that it is appropriate to apply the NDIP Policy Statement to retail forex transactions. The consumer protections that the NDIP Policy Statement provides are no less important for retail forex transactions than for other nondeposit investment products. Moreover, there is no direct conflict between this rule and the NDIP Policy Statement because the Statement requires FDIC-supervised IDIs to develop policies and procedures to ensure that nondeposit investment product sales are conducted in compliance with applicable laws and regulations. If an FDIC-supervised IDI has questions regarding how the NDIP Policy Statement applies to its retail forex business, it should seek clarification from its examiners.

### **III. Section-by-Section Analysis**

#### Section 349.1—Authority, Purpose, and Scope

This section authorizes an FDIC-supervised IDI to conduct retail forex transactions. As mentioned in the proposed rule, the FDIC will become the “appropriate Federal banking agency” for State savings association upon the transfer of the powers of the Office of Thrift Supervision to the FDIC and other federal banking agencies. Accordingly, by virtue of this statutorily-mandated transfer of power, State savings

associations will become FDIC-supervised IDIs as of the transfer date (July 21, 2011) and thus will be subject to the FDIC's final retail forex rule.

The FDIC requested comment on whether the retail forex rule should apply to an FDIC-supervised IDI's foreign branches conducting retail forex transactions abroad, whether with U.S. or foreign customers. One commenter responded that there is no U.S. policy interest in applying U.S. consumer protection rules to transactions with non-U.S. residents conducted by foreign branches. Such transactions are subject to foreign regulatory requirements that could be inconsistent with the retail forex rule. Subjecting those transactions to two sets of regulatory requirements would also place FDIC-supervised IDIs at a competitive disadvantage abroad.

One commenter opposed applying the retail forex rule to any transaction conducted out of a foreign branch of a U.S. depository institution, whether with a U.S. or non-U.S. retail customer. The commenter argued that foreign customers and U.S. persons with accounts overseas will be unnecessarily confused by the reach of the U.S. rule, especially when similar accounts at non-U.S. banks may not be subject to margin rules that are part of the retail forex rule. The commenter also argues that, by including foreign branches in its scope, the rule may inadvertently apply to products that were never intended to be covered, because they are not available or offered in the United States.

The FDIC recognizes the concerns raised by the commenter. Retail forex transactions between a foreign branch of an FDIC-supervised IDI and a non-U.S. customer are subject to any applicable disclosure, recordkeeping, capital, margin, reporting, business conduct, documentation, and other requirements of applicable foreign

law. Therefore, those transactions are not subject to the requirements of §§ 349.3 and 349.5 to 349.16.

#### Section 349.2—Definitions

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

The definition of “retail forex transaction” generally includes the following transactions in foreign currency between an FDIC-supervised IDI and a person that is not an eligible contract participant:<sup>14</sup> (i) a future or option on such a future;<sup>15</sup> (ii) options not traded on a registered national securities exchange;<sup>16</sup> and (iii) certain leveraged, margined, or bank-financed transactions,<sup>17</sup> including rolling spot forex transactions. The definition generally tracks the statutory language in section 2(c)(2)(B) and (C) of the CEA.<sup>18</sup>

Certain transactions in foreign currency are not “retail forex transactions.” For example, a spot forex transaction where one currency is bought for another and the two currencies are exchanged within two days would not meet the definition of “retail forex transaction.”<sup>19</sup> Similarly, “retail forex transaction” does not include a forward contract that creates an enforceable obligation to make or take delivery, provided that each counterparty has the ability to deliver and accept delivery in connection with its line of

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<sup>14</sup> The definition of “eligible contract participant” is found in the CEA and is discussed below.

<sup>15</sup> 7 U.S.C. 2(c)(2)(B)(i)(I).

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

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

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

<sup>19</sup> See generally CFTC v. Int’l Fin. Servs. (New York), Inc., 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (distinguishing between foreign exchange futures contracts and spot contracts in foreign exchange, and noting that foreign currency trades settled within two days are ordinarily spot transactions rather than futures contracts); see also Bank Brussels Lambert v. Intermetals Corp., 779 F. Supp. 741, 748 (S.D.N.Y. 1991).

business.<sup>20</sup> In addition, the definition does not include transactions done through an exchange, because in those cases the exchange would be the counterparty to both the FDIC-supervised IDI and the retail forex customer, rather than the FDIC-supervised IDI directly facing the retail forex customer.

The proposed rule sought comment on whether leveraged, margined, or bank-financed forex transactions, including rolling spot forex transactions (so-called Zelener<sup>21</sup> contracts), should be regulated as retail forex transactions; the FDIC preliminarily believed that they should.<sup>22</sup>

One commenter supported the inclusion of rolling spot transactions in the definition of “retail forex transactions.” A rolling spot forex transaction nominally requires delivery of currency within two days, like spot transactions. However, in practice, the contracts are indefinitely renewed every other day and no currency is actually delivered until one party affirmatively closes out the position.<sup>23</sup> Therefore, the contracts are economically more like futures than spot contracts, although courts have

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<sup>20</sup> See 7 U.S.C. 2(c)(2)(C)(i)(II)(bb)(BB); CFTC v. Int’l Fin. Servs. (New York), Inc., 323 F. Supp. 2d 482, 495 (S.D.N.Y. 2004) (distinguishing between forward contracts in foreign exchange and foreign exchange futures contracts); see also William L. Stein, The Exchange-Trading Requirement of the Commodity Exchange Act, 41 Vand. L.Rev. 473, 491 (1988). In contrast to forward contracts, futures contracts generally include several or all of the following characteristics: (i) standardized nonnegotiable terms (other than price and quantity); (ii) parties are required to deposit initial margin to secure their obligations under the contract; (iii) parties are obligated and entitled to pay or receive variation margin in the amount of gain or loss on the position periodically over the period the contract is outstanding; (iv) purchasers and sellers are permitted to close out their positions by selling or purchasing offsetting contracts; and (v) settlement may be provided for by either (a) cash payment through a clearing entity that acts as the counterparty to both sides of the contract without delivery of the underlying commodity; or (b) physical delivery of the underlying commodity. See Edward F. Greene et al., U.S. Regulation of International Securities and Derivatives Markets § 14.08[2] (8th ed. 2006).

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

<sup>22</sup> 7 U.S.C. 2(c)(2)(E)(iii) (requiring that retail forex rules treat all functionally or economically similar transactions similarly); see 17 CFR 5.1(m) (defining “retail forex transaction” for CFTC-registered retail forex dealers)

<sup>23</sup> For example, in Zelener, the retail forex dealer retained the right, at the date of delivery of the currency to deliver the currency, roll the transaction over, or offset all or a portion of the transaction with another open position held by the customer. See CFTC v. Zelener, 373 F.3d 861, 868 (7th Cir. 2004).

held them to be spot contracts in form.<sup>24</sup> Like the CFTC’s retail forex rule and the OCC’s proposed retail forex rule, the final rule’s definition includes leveraged, margined, or bank-financed rolling spot forex transactions, as well as certain other leveraged, margined, or bank-financed transactions.

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

The FDIC agrees that a forex forward that is not leveraged, margined, or financed by the FDIC-supervised IDI does not meet the definition of “retail forex transaction.” However, a leveraged, margined, or bank-financed forex forward is a retail forex transaction unless it creates an enforceable obligation to deliver between a seller and buyer that have the ability to deliver and accept delivery, respectively, in connection with their line of business<sup>25</sup> or the FDIC determines that the forward is not functionally or economically similar to a forex future or option, as described below.

One commenter sought clarification whether the term “retail forex transaction” includes a product known as a non-deliverable forex forward (NDF). The commenter describes an NDF as a cash-settled forward in which contractual parties are obligated to settle on the settlement date. In an NDF, the commenter explained, instead of taking physical delivery of the underlying foreign currency upon settlement, settlement is made

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<sup>24</sup> See, e.g., CFTC v. Erskine, 512 F.3d 309, 326 (6th Cir. 2008); CFTC v. Zelener, 373 F.3d 861, 869 (7th Cir. 2004).

<sup>25</sup> See 7 U.S.C. 2(c)(2)(C)(i)(II)(bb)(BB).

in U.S. dollars based on the difference between the contractual forward rate and fixing rate.

An NDF would not be a covered transaction if a bank's customer were an ECP. Where the counterparty is a non-ECP, that is, a retail customer, an NDF would be a covered transactions if it were entered into on a leveraged or margined basis, or financed by the bank.

The final rule contains a provision that allows the FDIC to exempt specific transactions or types of transaction from the third prong of the "retail forex transaction" definition. The FDIC is concerned that certain traditional banking products, which are distinguishable from speculative rolling spot forex transactions, may inadvertently fall within the definition of "retail forex transaction" as leveraged, margined, or bank-financed forex transactions. This result was not intended by the Dodd-Frank Act, which requires retail forex rules to treat similarly transactions that are functionally or economically similar to forex futures or options.<sup>26</sup> FDIC-supervised IDIs may seek a determination that a given transaction or types of transaction does not fall within the third prong of the "retail forex transaction" definition by submitting a written request to the FDIC.

One commenter asked for confirmation that deposit accounts with foreign exchange features are outside the scope of the rule. The Legal Certainty for Bank Products Act of 2000, as amended by the Dodd-Frank Act, generally exempts "identified banking products" from the CEA.<sup>27</sup> Identified banking products include: deposit

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<sup>26</sup> 7 U.S.C. 2(c)(2)(E)(iii)(II).

<sup>27</sup> 7 U.S.C. 27a(a)(1). An identified banking product offered by an FDIC-supervised IDI could become subject to the CEA if the FDIC determines, in consultation with the CFTC and the Securities and Exchange Commission, that the product would meet the definition of a "swap" under the CEA or a "security-based

accounts, savings accounts, certificates of deposit, or other deposit instruments issued by a bank; banker's acceptances; letters of credit issued or loans made by a bank; debit accounts at a bank arising from a credit card or similar arrangement; and certain loan participations.<sup>28</sup> Because identified banking products are not subject to the CEA, they are not prohibited by section 2(c)(2)(E)(ii) of the CEA. To provide clarity, the final rule excludes identified banking products from the definition of "retail forex transaction." Identified banking products that have embedded foreign exchange features, for example a deposit account in which the customer may deposit funds in one currency and withdraw funds in another, are not retail forex transactions.

This section defines several terms by reference to the CEA, the most important of which is "eligible contract participant." Foreign currency transactions with eligible contract participants are not considered retail forex transactions and are therefore not subject to this rule. In addition to a variety of financial entities, certain governmental entities, businesses, and individuals may be eligible contract participants.<sup>29</sup>

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swap" under Securities Exchange Act of 1934 and has become known to the trade as a swap or security-based swap, or otherwise has been structured as an identified banking product for the purpose of evading the provisions of the CEA, the Securities Act of 1933, or the Securities Exchange Act of 1934. 7 U.S.C. 27a(b).

<sup>28</sup> 7 U.S.C. 27(b) (citing Gramm-Leach-Bliley Act sec. 206(a)(1) to– (5)).

<sup>29</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

### Section 349.3—Prohibited Transactions

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

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

### Section 349.4—Filing Procedures

This section requires that, before engaging in a retail forex business, as defined in section 349.2, an FDIC-supervised IDI shall provide prior written notice and obtain the FDIC's prior written consent. 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 section 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 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

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(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.

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 section 349.6, discussed below.

The FDIC may request additional information, as necessary, prior to issuing its consent.

For FDIC-supervised IDIs that have an existing retail forex business, the final rule will 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.

The FDIC received no comment on this section and adopts it as proposed.

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

This section requires an FDIC-supervised IDI to close out offsetting long and short positions in a retail forex account. The FDIC-supervised IDI 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>30</sup> The FDIC agreed with this concern in the notice of proposed rulemaking.

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

The FDIC agrees that a customer should be able to offset retail forex transactions in a particular manner, if he or she so chooses. Paragraph (c) has been modified to provide that, notwithstanding the default offset rules in paragraphs (a) and (b), the FDIC-supervised IDI must offset retail forex transactions pursuant to a customer’s specific instructions. Blanket instructions are not sufficient for this purpose, as they could obviate the default rule. However, offset instructions need not be given separately for each pair of orders in order to be “specific.” Instructions that apply to sufficiently defined sets of transactions could be specific enough. Finally, consistent with the changes to section 349.12, offset instructions may be provided in writing or orally provided that any oral instruction be captured by a recording mechanism.

#### Section 349.6—Disclosure

This section requires 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

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<sup>30</sup> Proposed CFTC Retail Forex Rule, 75 FR at 3287 n.54.

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.

Two commenters agreed with the need for a robust risk disclosure statement, but suggested that a shorter, clearer, more direct, and less redundant statement would be more effective. One commenter recommended that the proposed disclosure statement be a sample or safe harbor language for banks to use as they find appropriate.

After careful consideration, the final rule incorporates several changes to the disclosures to eliminate redundancies, address ambiguities, and convey the information more clearly.

The proposal requested comment on whether the risk disclosure statement should disclose the percentage of profitable retail forex accounts.

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

In its retail forex rule, the CFTC requires its registrants to disclose to retail customers the percentage of retail forex accounts that earned a profit, and the percentage of such accounts that experienced a loss, during each of the most recent four calendar quarters.<sup>31</sup> The CFTC explained that “the vast majority of retail customers who enter these transactions do so solely for speculative purposes, and that relatively few of these participants trade profitably.”<sup>32</sup> In its final rule, the CFTC found this requirement

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<sup>31</sup> 17 CFR 5.5(e)(1).

<sup>32</sup> Proposed CFTC Retail Forex Rule, 75 FR at 3289.

appropriate to protect retail customers from “inherent conflicts embedded in the operations of the retail over-the-counter forex industry.”<sup>33</sup> The FDIC agrees with the CFTC and thus the final rule requires this disclosure.

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

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

The FDIC understands that the economic model of a retail forex business may be to profit from spreads, fees, and commissions. Nonetheless, because any FDIC-supervised IDI engaging in retail forex transactions is trading as principal, by definition, when the retail forex customer loses money, the FDIC-supervised IDI makes money on that transaction. The FDIC therefore believes that this disclosure is accurate and helps potential retail forex customers understand the nature of retail forex transactions. Similarly, the CFTC’s retail forex rule requires a disclosure that when a retail customer loses money trading, the dealer makes money on such trades, in addition to any fees, commissions, or spreads.<sup>34</sup> The final rule includes this disclosure requirement.

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<sup>33</sup> Final CFTC Retail Forex Rule, 75 FR at 55412.

<sup>34</sup> 17 CFR 5.5(b).

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

One commenter asked the FDIC to confirm that banks may add topics to the risk disclosure statement.

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

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

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

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

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

The final rule, like the proposed rule, does not require FDIC-supervised IDIs to disclose income streams not charged to the retail forex customer. However, an FDIC-supervised IDI must do more than simply describe the means by which they earn revenue. To the extent practical, it must quantify the fees, commissions, spreads, and charges it charges the retail forex customer. The FDIC further believes that disclosure of the bid/ask spread is possible in a variety of ways. If an FDIC-supervised IDI bases its prices off of the prices provided by a third party, then the FDIC-supervised IDI may disclose the use of the third party's pricing and the markup charged to retail forex customers. Alternatively, the FDIC-supervised IDI may disclose the bid/ask spread by quoting both the bid and ask prices to retail forex customers prior to entering into a retail forex transaction. These quotes may be provided as part of an electronic trading platform or, after a retail forex customer calls the FDIC-supervised IDI for a retail forex transaction, by providing both a bid and ask price for the transaction.

One of the bank commenters read the proposed disclosure to suggest that a bank cannot seek to recover losses not covered by a customer's margin account via an appropriate dispute resolution forum, and asked the FDIC confirm that this was not the case.

It is not clear how common it will be for a retail forex customer to incur retail forex obligations, including losses, in excess of margin funds. Section 48.9(d)(4)

requires an FDIC-supervised IDI, in the event that a retail forex customer's margin falls below the amount needed to satisfy the margin requirement to either: (1) collect sufficient margin from the retail forex customer; or (2) liquidate the retail forex customer's retail forex transactions. This requirement precludes an FDIC-supervised IDI from allowing customer's retail forex transactions to remain open and continuing to accrue losses after it has determined that additional margin funds are required. The final rule does not forbid an FDIC-supervised IDI, from seeking to recover a deficiency from a retail forex customer by obtaining a money judgment or other enforceable order in an appropriate venue and then exercising its collection rights as a judgment creditor. The disclosure has been revised to make this fact clear.

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

In the final rule, the disclosure requires an FDIC-supervised IDI to state that retail forex transactions are not FDIC-insured. The commenter agreed with that statement. It noted, however, that margin funds may be insured deposits. The FDIC is charged with interpreting the deposit insurance provisions of the FDI Act, and the insured status of margin funds will turn on whether the funds are held in a way consistent with those provisions, as interpreted by the FDIC. Nevertheless, an FDIC-supervised IDI may disclose the availability of FDIC insurance for retail forex margin accounts in a separate document if permitted by law, including FDIC requirements related to such disclosure and applicable provisions of the NDIP Policy Statement.

#### Section 349.7—Recordkeeping

This section specifies which documents and records an FDIC-supervised IDI engaged in retail forex transactions must retain for examination by the FDIC. This section also prescribes document maintenance standards. The FDIC notes that records may be kept electronically as permitted under the Electronic Signatures in Global and National Commerce Act.<sup>35</sup>

One of the commenters, had a concern with proposed section 349.7(a)(5), which states that immediately upon the written or verbal receipt of a retail forex transactions order, an FDIC-supervised IDI shall prepare a written order memorandum, sometimes referred to as a trade confirmation, for the order. The commenter requested clarification about whether the use of a telephone recording system and the retention of telephone recordings would satisfy such recordkeeping requirements if details of the transaction are affirmed or confirmed with the customer over a recorded telephone line.

After considering this comment, the FDIC has amended section 349.7 to permit the use of oral phone orders provided they are recorded and customers are advised that they are speaking on a recorded line.

Recordkeeping requirements found in section 349.13(a)(4) of the proposed rule were moved into this section to centralize recordkeeping requirements in one section. Furthermore, the recordkeeping requirements for order tickets are now medium-neutral: an FDIC-supervised IDI may prepare an order ticket by recording an oral conversation, for example via a telephone recording system. This change reflects a change to section 349.12 that allows a retail customer to authorize a retail forex transaction orally.

#### Section 349.8—Capital Requirements

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<sup>35</sup> 15 U.S.C. 7001(d).

This section requires 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>36</sup> or the FDIC-supervised IDI must obtain an exemption from the FDIC. In addition, an FDIC-supervised IDI must continue to hold capital against retail forex transactions as provided in the FDIC’s capital regulation.<sup>37</sup> This rule does not amend the FDIC’s prompt corrective action regulation or capital regulation.

#### Section 349.9—Margin Requirements

Paragraph (a) requires 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.

The proposed rule requested comment on whether it should define the major currencies in the final rule, but no comments addressed this issue. The proposed approach to identifying major currencies is adopted in the final 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>38</sup> An evolving market could change the major currencies,

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<sup>36</sup> 12 CFR part 6.

<sup>37</sup> 12 CFR part 3.

<sup>38</sup> See National Futures Association, Forex Transactions: A Regulatory Guide 17 (Feb. 2011); Federal Reserve Bank of New York, Survey of North American Foreign Exchange Volume tbl. 3e (Jan. 2011);

so the FDIC is not proposing to define the term “major currency,” but rather expects that FDIC-supervised IDIs will obtain an interpretive letter from the FDIC prior to treating any currency other than those listed above as a “major currency.”<sup>39</sup>

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

Prior to the CFTC’s rule, 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.

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

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Bank for International Settlements, Report on Global Foreign Exchange Market Activity in 2010 at 15 tbl. B.6 (Dec. 2010).

<sup>39</sup> The Final CFTC Retail Forex Rule similarly does not define “major currency.”

One commenter, while not objecting to the amount of margin required, suggested that customers should have some reasonable time to meet margin calls before they are deemed to have defaulted and face a forced liquidation of their positions.

Subject to reasonable collection times as described below, an FDIC-supervised IDI must ensure that there is always sufficient margin in a retail forex customer's margin account for the customer's open retail forex transactions. If the amount of margin in a retail forex customer's margin account is insufficient to meet the requirements of paragraph (a), then the FDIC-supervised IDI must make a margin call to replenish the margin account to an acceptable level. Retail forex customers should have a reasonable amount of time to post required margin for retail forex transactions. The general market practice is for retail forex counterparties to make margin calls at the close of trading on a trading day based on margin levels at the end of that day or at the open of trading on the next trading day based on margin levels at the end of that prior day. If the retail forex customer does not post sufficient margin by the end of the next close of trading, then the retail forex counterparty liquidates the customer's retail forex account. In other words, by the close of business on a given trading day, the margin account must be sufficient to meet the margin requirements as at the end of the prior trading day.

Paragraph (b) specifies the acceptable forms of margin that customers may post. FDIC-supervised IDIs must establish policies and procedures providing for haircuts for noncash margin collected from customers and must review these haircuts annually. However, it may be prudent for FDIC-supervised IDIs to review and modify the size of the haircuts more frequently. The FDIC requested comment on whether the final rule

should specify haircuts for noncash margin. The FDIC received no comments on this paragraph and adopts this paragraph as proposed.

Paragraph (c) requires an FDIC-supervised IDI to hold each retail forex customer's retail forex transaction margin in a separate account. This paragraph is designed to work with the prohibition on set-off in paragraph (e), so that 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.

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

FDIC-supervised IDIs may place margin collected from retail forex customers into an omnibus or commingled account if the bank keeps records of each retail forex customer's margin balance. A "separate account" is one separate from the retail forex customer's other accounts at the bank. For example, margin for retail forex transactions cannot be held in a retail forex customer's savings account. Funds in a savings account pledged as retail forex margin must be transferred to a separate margin account, which could be an individual or an omnibus margin account. The final rule contains slightly modified language to clarify this intent.

Paragraph (d) requires 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 FDIC-supervised IDI fails to meet the requirements of paragraph (a). The proposed rule would have required the FDIC-supervised IDI to mark the customer's open retail forex

positions and the value of the customer's margin to the market daily to ensure that a retail forex customer does not accumulate substantial losses not covered by margin.

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

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

Paragraph (e) prohibits 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 pledged 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 a retail forex dealer regulated by the CFTC. The FDIC believes it is 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 or an affiliate. However, should a retail forex customer's losses exceed the amount of margin he or she has pledged, this rule does not forbid an FDIC-supervised IDI from seeking to recover the deficiency in an appropriate forum, such as a court of law. The FDIC-supervised IDI would be an unsecured creditor of the retail forex customer with respect to that claim.

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

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

#### Section 349.10—Required reporting to customers

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

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

One commenter sought clarification that the statements may be provided electronically, and also suggested that retail forex customers would be better served with continuous online access to account information rather than monthly statements. One commenter recommended that the customer should have the opportunity to opt out of

receiving monthly statements (whether paper or electronic) and confirmation statements for each retail forex transaction.

The FDIC encourages FDIC-supervised IDIs to provide real-time, continuous access to account information, and this rule does not prevent FDIC-supervised IDIs from doing so. However, the FDIC believes it is valuable to require FDIC-supervised IDIs to provide retail forex account information to retail forex customers at least once per month. Monthly statements may be provided electronically as permitted under the Electronic Signatures in Global and National Commerce Act.<sup>40</sup>

#### Section 349.11—Unlawful Representations

This section prohibits an FDIC-supervised IDI and its institution-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 prohibits 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. This section does 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. This section also does not prohibit an FDIC-supervised IDI from hedging or otherwise mitigating its own exposure to retail forex transactions or any other foreign exchange risk.

The FDIC received no comments on this section and adopts it as proposed.

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<sup>40</sup> 15 U.S.C. 7001(c).

### Section 349.12—Authorization to Trade

The proposed rule required FDIC-supervised IDIs to have specific written authorization from a retail forex customer before effecting a retail forex transaction. Three commenters said that requiring specific written authorization from a retail forex customer before effecting a retail forex transaction for that customer would be impractical. One of the commenters indicated that such a requirement could be burdensome and detrimental to the customer's interests, for example if the customer cannot, due to technical difficulties, convey written instructions.

The FDIC agrees with this concern, and further notes that the CFTC's retail forex rule does not require written authorization for each retail forex transaction. The final rule requires an FDIC-supervised IDI to obtain a retail forex customer's specific authorization to effect a particular trade. FDIC-supervised IDIs must keep records of authorizations to trade pursuant to this rule and if the customer conveys his or her authorization orally by telephone, the authorization must be preserved by recording.

### Section 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), an FDIC-supervised IDI engaging in retail forex transactions is required to establish and enforce internal rules, procedures and controls (1) to prevent front running, in which transactions in accounts of the FDIC-supervised IDI or its related persons are executed before a similar customer order; and (2) to establish settlement prices fairly and objectively.

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

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

Paragraph (b) prohibits 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. The FDIC received no comments on this paragraph and adopts this paragraph as proposed.

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

One commenter requested confirmation that FDIC-supervised IDIs may rely on a representation of potential customers that they are not affiliated with a retail forex counterparty. Paragraph (c) prohibits an FDIC-supervised IDI from knowingly handling the retail forex account of a related person of a retail forex counterparty. To the extent reasonable, FDIC-supervised IDIs may rely on representations of potential retail forex customers. However, if an FDIC-supervised IDI has actual knowledge that a retail forex customer is a related person of a retail forex counterparty, then no representation by the customer will allow the bank to handle that retail forex account. An FDIC-supervised IDI should inquire as to whether a potential retail forex customer is related to a retail forex counterparty to avoid violating paragraph (c) through willful ignorance.

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

Paragraph (e) prohibits 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.

Paragraph (e)(3) does 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 may reject an order and advise customers they may submit a new order.

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

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

Paragraph (e)(4) requires an FDIC-supervised IDI engaging in retail forex transactions to execute similar orders in the order they are received. The prohibition

prevents an FDIC-supervised IDI from offering preferred execution to some of its retail forex customers but not others.

#### Section 349.14—Supervision

This section imposes 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.

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

#### Section 349.15—Notice of Transfers

This section describes the requirements for transferring a retail forex account. Generally, an FDIC-supervised IDI must 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 must generally provide the transferred customers with the risk disclosure statement of section 6 and obtain each affected customer's written acknowledgement within 60 days.

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

#### Section 349.16—Customer Dispute Resolution

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

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

#### **IV. Regulatory Analysis**

##### **A. Regulatory Flexibility Act**

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (RFA), generally requires an agency that is issuing a final 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>41</sup> The 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 banks under \$1 billion in assets currently engaging in retail forex transactions with their customers. Therefore, the FDIC

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<sup>41</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).

estimates that no small banks under its supervision would be affected by the proposed rule.

Further, in response to the NPR, the FDIC received no comments with respect to RFA.

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 the notice of proposed rulemaking were submitted by the FDIC to OMB for review and approval under section 3506 of the PRA and section 1320.11 of OMB's implementing regulations (5 C.F.R. 1320 et seq.). In response, OMB filed comments with the FDIC in accordance with 5 CFR 1320.11(c). The comments indicated that OMB was withholding approval at that time. The FDIC was directed to examine public comment in response to the NPRM and include in the supporting statement of the Information Collection Request (ICR) to be filed at the final rule stage a description of how the agency has responded to any public comments on the ICR, including comments maximizing the practical utility of the collection and minimizing the burden. The FDIC did receive several comments addressing the substance and/or method of the disclosure and reporting requirements contained in the rule. These comments and the FDIC's response to the comments are included in the preamble discussion and in a revised Supporting Statement submitted to OMB. The information collection

requirements in the final rule are found in sections 349.4-349.7, 349.9-349.10, 349.13, 349.15-349.16.

The FDIC has a continuing interest in comments on its information collections.

Therefore, 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

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

#### 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 process in section 349.4 requires 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 section 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 requests the FDIC's written consent.

#### Disclosure Requirements

Section 349.5, regarding the application and closing out of offsetting long and short positions, requires 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 must provide specific written instructions on how the offsetting transaction should be applied.

Section 349.6 requires that an FDIC-supervised IDI furnish a retail forex customer with a written disclosure before opening an account 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.

Section 349.10 requires an FDIC-supervised IDI to issue monthly statements to each retail forex customer and to send confirmation statements following transactions.

Section 349.13(b) allows 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. Section 349.13(c) prohibits 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. Section 349.13(d) prohibits 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.

Section 349.15 requires 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 also requires 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 section 349.16 require certain endorsements, acknowledgments, and signature language. It also requires 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

Sections 349.7 and 349.13 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. Section 349.7 also requires 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. Section 349.9 requires policies and procedures for haircuts for noncash margin collected under the rule's margin requirements, and annual evaluations and modifications of the haircuts.

Estimated PRA Burden:

Estimated Number of Respondents: 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. Effective Date Under the Administrative Procedures Act

This final rule takes effect on July 15, 2011. 5 U.S.C. 553(d)(1) requires publication of a substantive rule not less than 30 days before its effective date, except in cases where the rule grants or recognizes an exemption or relieves a restriction. Section 2(c)(2)(E)(ii) of the CEA would prohibit FDIC-supervised IDIs from engaging in retail forex transactions unless this final rule becomes effective on July 16, 2011. This final rule would relieve that restriction and allow FDIC-supervised IDIs to continue to engage in retail forex transactions without delay. Furthermore, under 5 U.S.C. 553(d)(3), an agency may find good cause to publish a rule less than 30 days before its effective date. The FDIC finds such good cause, as the 30-day delayed effective date is unnecessary

under the provisions of the final rule. In Section 349.4(c) of the final rule, the FDIC allows FDIC-supervised IDIs a 30-day grace period to inform the FDIC of its retail forex activity, along with up to a six-month window to comply with the provisions of the retail forex rule.

D. Effective Date under the CDRI Act

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

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

E. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget (OMB) has determined that the Final Rule is not a "major rule" within the meaning of the relevant sections of the Small Business Regulatory Enforcement Act of 1996 (SBREFA), 5 U.S.C. 801 et seq.

F. Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106-102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. No commenters

suggested that the proposed rule was materially unclear, and the FDIC believes that the Final Rule is substantively similar to the proposed rule.

### **List of Subjects in 12 CFR part 349**

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

For the reasons stated in the preamble, the FDIC adds 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), 27 et seq.

#### **§ 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. Except as provided in paragraph (d) of this section, this part applies to FDIC-supervised insured depository institutions.

(d) International applicability. Sections 349.3 and 349.5 to 349.16 do not apply to retail foreign exchange transactions between a foreign branch of an FDIC-supervised IDI and a non-U.S. customer. With respect to those transactions, an FDIC-supervised IDI must comply with any disclosure, recordkeeping, capital, margin, reporting, business conduct, documentation, and other requirements of applicable foreign law.

### **§ 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 § 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 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 ten 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, other than an identified banking product or a part of an identified banking product, that is offered or entered into by 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 § 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 § 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)); or

(ii) A contract of sale that—

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

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

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

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

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

Retail forex obligations means obligations of a retail forex customer with respect to retail forex transactions, including, but not limited to, trading losses, fees, and commissions.

**§ 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 July 15, 2011 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 July 15, 2011 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 § 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 paragraphs (a) and (b) of this section, the offsetting transaction shall be applied as directed by a retail forex customer's specific 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 or property 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) Retail forex transactions are not insured by the Federal Deposit Insurance Corporation.**

**(6) Retail forex transactions are not a deposit in, or guaranteed by, an FDIC-supervised insured depository institution.**

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

**Finally, you should thoroughly investigate any statements by any FDIC-supervised insured depository institution that minimize the importance of, or contradict, any of the terms of this risk disclosure. These statements may indicate sales fraud.**

**This brief statement cannot, of course, disclose all the risks and other aspects of trading off-exchange foreign currency with an FDIC-supervised insured depository institution.**

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

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Date

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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, pertaining to its retail forex business, including:

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

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

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

(iii) The establishment or termination of the account; and

(iv) A means to identify the person who has solicited and is responsible for the account or assign account numbers in such a manner as to identify that person.

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

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

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

(viii) Financial ledger records that show separately for each retail forex customer all charges against and credits to such retail forex customer's account, including deposits, withdrawals, and transfers, and charges or credits resulting from losses or gains on closed transactions; and

(ix) A list of all retail forex transactions executed for the account, with the details specified in paragraph (a)(2) of this section;

(2) Retail forex transaction records. For each retail forex transaction:

(ii) The price at which the FDIC-supervised insured depository institution placed the order, or, in the case of an option, the premium that the retail forex customer paid;

(iii) The customer account identification information;

(iv) The currency pair;

(v) The size or quantity of the order;

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

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

(viii) The size and price at which the order is executed, or in the case of an option, the amount of the premium paid for each option purchased, or the amount credited for each option sold;

(ix) For options, whether the option is a put or call, expiration date, quantity, underlying contract for future delivery or underlying physical, strike price, and details of the purchase price of the option, including premium, mark-up, commission, and fees; and

(x) For futures, the delivery date; and

(xi) If the order was made on a trading platform:

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

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

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

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

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

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

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

(ii) All retail forex transactions that are option transactions executed on that day, including the date, whether the transaction involved a put or call, the expiration date, quantity, currency pair, delivery date, strike price, details of the purchase price of the option, including premium, mark-up, commission and fees, and the person for whom the transaction was made;

(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; and

(6) Other records. Written acknowledgements of receipt of the risk disclosure statement required by section 349.6(b), records required under paragraph (b) through (f) of this section, trading cards, signature cards, street books, journals, ledgers, payment records, copies of statements of purchase, and all other records, data and memoranda that have been prepared in the course of the 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 section 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) Order Tickets.

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

- (i) Account identification (account or customer name with which the retail forex transaction was effected);
- (ii) Order number;
- (iii) Type of order (market order, limit order, or subject to special instructions);

(iv) Date and time, to the nearest minute, 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.

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

(i) The 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 retail forex customers upon request:

(A) The general nature of the post-execution 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) Post-execution allocations are made as soon as practicable after the entire transaction is executed;

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

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

(f) Record of monthly statements and confirmations. An FDIC-supervised insured depository institution shall retain a copy of each monthly statement and confirmation required by section 349.10.

(g) 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.

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

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

(3) For long options, the full premium charged and received by the 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 for retail forex transactions 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 § 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 (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 retail forex obligations against any funds or other asset of the retail forex customer other than margin in the separate margin account described in paragraph (c) of this section;

(2) Apply a retail forex customer's retail forex obligations to increase the amount owed by the retail forex customer to the 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 to effect the retail forex transaction.

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

- (1) The precise retail forex transaction to be effected;
- (2) The exact amount of the foreign currency to be purchased or sold; and
- (3) In the case of an option, the identity of the foreign currency or contract that underlies the option.

### **§ 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 policies, procedures, and controls designed, at a minimum, to:

(1) Ensure, to the extent reasonable, that each order received from a retail forex transaction that is executable at or near the price that the FDIC-supervised insured depository institution has quoted to the retail forex customer is entered for execution before any order in any retail forex transaction for

- (i) A any proprietary account;

(ii) An 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 the related person has gained knowledge of the retail forex customer's order prior to the transmission of an order for a proprietary account;

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

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

(2) Prevent 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

(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 may knowingly handle the retail forex account of an employee of another retail forex counterparty's retail forex business unless the FDIC-supervised insured depository institution:

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

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

(3) Transmits on a regular basis to the other retail forex counterparty copies of all statements for the account and of all written records prepared upon the receipt of orders for 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 working in the institution's retail forex business may have an account, directly or indirectly, with another retail forex counterparty unless the other retail forex counterparty:

(1) Receives written authorization to open and maintain the 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 the account pursuant to paragraph (a)(2) of this section; and

(2) Transmits on a regular basis to the FDIC-supervised insured depository institution copies of all statements for such account and of all written records prepared by the other retail forex counterparty upon receipt of orders for the 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 sixty 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) Voluntary submission of claims to dispute or settlement procedures. No FDIC-supervised insured depository institution may enter into any agreement or understanding with a retail forex customer in which the customer agrees, prior to the time a claim or grievance arises, to submit such claim or grievance to any settlement procedure.

(b) Election of forum. (1) Within ten business days after receipt of notice from the retail forex customer that the customer intends to submit a claim to arbitration, the 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) Enforceability. A dispute settlement procedure may require parties using such procedure to agree, under applicable state law, submission agreement or otherwise, to be bound by an award rendered in the procedure, provided that the agreement to submit the claim or grievance to the voluntary procedure under paragraph (a) of this section or that agreement to submit the claim or grievance was made after the claim or grievance arose. Any award so rendered shall be enforceable in accordance with applicable law.

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

(e) Counterclaims. A procedure for the settlement of a retail forex customer's claims or grievances against an FDIC-supervised insured depository institution or

employee thereof may permit the submission of a counterclaim in the procedure by a person against whom a claim or grievance is brought. Such a counterclaim may be permitted where it arises out of the transaction or occurrence that is the subject of the customer's claim or grievance and does not require for adjudication the presence of essential witnesses, parties, or third persons over which the settlement process lacks jurisdiction.

Dated at Washington, D.C., this 6th of July 2011.  
By order of the Board of Directors.  
Federal Deposit Insurance Corporation.

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Robert E. Feldman,  
Executive Secretary