

Supporting Statement
Retail Foreign Exchange Transactions
OMB Control No. 1557-0250

A. Justification.

1. Circumstances that make the collection necessary:

Section 742(c)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)¹ amended the Commodity Exchange Act (CEA) to provide that a U.S. financial institution for which there is a Federal regulatory agency 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 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 prescribe² (retail forex rule).

Section 2(c)(2)(B)(i)(I) of the CEA³ 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.”⁴ The OCC’s retail forex rule must treat all such futures and options and all agreements, contracts, or transactions that are functionally or economically similar to such futures and options in a similar manner.⁵ The OCC’s retail forex rules must prescribe appropriate requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation requirements, and may include such other standards or requirements as it determines to be necessary.⁶

2. Use of the information:

Reporting Requirements

The reporting requirements in § 48.4 would require that, prior to initiating a retail forex business, a national bank provide the OCC with prior notice and obtain a written supervisory no-objection letter. In order to obtain a supervisory no-objection letter, a national bank must have written policies and procedures, and risk measurement and management systems in place to ensure that retail forex transactions are conducted in a safe and sound manner. The national bank must also provide other information required by the OCC, such as documentation of customer due diligence, new product approvals, and haircuts applied to noncash margins. A

¹ Pub. L. 111-203, 124 Stat. 1376. (July 21, 2010) 7 U.S.C. 2(c)(2)(E).

² 7 U.S.C. 2(c)(2)(E)(ii)(I).

³ 7 U.S.C. 2(c)(2)(B)(i)(II).

⁴ 15 U.S.C. 78f(a)

⁵ 7 U.S.C. 2(c)(2)(E)(iii)(II).

⁶ 7 U.S.C. 2(c)(2)(E)(iii)(I).

national bank already engaging in a retail forex business may continue to do so, provided it requests an extension of time.

Disclosure Requirements

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

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

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

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

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

The customer dispute resolution provisions in § 48.16 would require certain endorsements, acknowledgments, and signature language. It also would require that within 10 days after receipt of notice from the retail forex customer that they intend to submit a claim to arbitration, the national bank provide them with a list of persons qualified in the dispute resolution and that the customer must notify the national bank of the person selected within 45 days of receipt of such list.

Policies and Procedures; Recordkeeping

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

3. Consideration of the use of improved information technology:

National banks may use any information technology that permits review by OCC examiners.

4. Efforts to identify duplication:

The information required is unique. It is not duplicated elsewhere.

5. Methods used to minimize burden if the collection has an impact on a substantial number of small entities:

Not applicable.

6. Consequences to the Federal program if the collection were conducted less frequently:

Conducting the collection less frequently would present safety and soundness risks and weaken protection of consumers engaging in retail foreign exchange transactions.

7. Special circumstances necessitating collection inconsistent with 5 CFR Part 1320:

None. The information collection is conducted in accordance with OMB guidelines in 5 CFR part 1320.

8. Efforts to consult with persons outside the agency:

The agencies published a notice of proposed rulemaking in the *Federal Register* for comment (NPRM). 76 FR 22633 (April 22, 2011).

In conjunction with the NPRM), the Office of the Comptroller of the Currency (OCC) submitted the information collection requirements contained therein to OMB for review under the Paperwork Reduction Act. In response, OMB filed comments with the OCC in accordance with 5 C.F.R. § 1320.11(c). The comments indicated that OMB was withholding approval at that time. The OCC was directed to examine public comment in response to the NPRM and include

in the supporting statement of the 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.

No comments were received addressing the ICR, however, one comment addressed the substance and/or method of the disclosure and reporting requirements in the proposed rule. These comments and the OCC's response to the comments are included in the preamble discussion to the final rule and discussed below.

Section 48.6—Disclosure

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

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

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

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

In its retail forex rule, the CFTC requires its registrants to disclose to retail customers the percentage of retail forex accounts that earned a profit, and the percentage of such accounts that experienced a loss, during each of the most recent four calendar quarters.⁷ 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.”⁸ In its final rule, the CFTC found this requirement appropriate to protect retail customers from “inherent conflicts embedded in the operations of the retail over-the-counter forex industry.”⁹ The OCC agrees with the CFTC and the final rule requires this disclosure.

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

The commenter said that this disclosure is inaccurate because the bank immediately

⁷ 17 CFR 5.5(e)(1).

⁸ Proposed CFTC Retail Forex Rule, 75 FR at 3289.

⁹ Final CFTC Retail Forex Rule, 75 FR at 55412.

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

The OCC understands that the economic model of a retail forex business may be to profit from spreads, fees, and commissions. Nonetheless, because a national bank engaging in retail forex transactions is trading as principal, by definition, when the retail forex customer loses money, the national bank makes money on that transaction. The OCC therefore believes that this disclosure is accurate and helps potential retail forex customers understand the nature of retail forex transactions. Similarly, the CFTC's retail forex rule requires a disclosure that when a retail customer loses money trading, the dealer makes money on such trades, in addition to any fees, commissions, or spreads.¹⁰ The final rule includes this disclosure requirement.

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

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

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

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

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

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

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

¹⁰ 17 CFR 5.5(b).

spread given that it may vary.

The final rule, like the proposed rule, does not require national banks to disclose income streams not charged to the retail forex customer. However, a national bank must do more than simply describe the means by which they earn revenue. To the extent practical, it must quantify the fees, commissions, spreads, and charges it charges the retail forex customer.¹¹ The OCC further believes that disclosure of the bid/ask spread is possible in a variety of ways. If a national bank bases its prices off of the prices provided by a third party, then the national bank may disclose the use of the third party's pricing and the markup charged to retail forex customers. Alternatively, the national bank may disclose the bid/ask spread by quoting both the bid and ask prices to retail forex customers prior to entering into a retail forex transaction. These quotes may be provided as part of an electronic trading platform or, after a retail forex customer calls the national bank for a retail forex transaction, by providing both a bid and ask price for the transaction.

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

The final rule does not forbid a national bank, as an unsecured creditor, from seeking to recover a deficiency from a retail forex customer in an appropriate venue. The disclosure has been revised to make this fact clear.

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

The disclosure requires a national bank to state that retail forex transactions are not FDIC-insured. The commenter agreed with that statement. It noted, however, that margin funds may be insured deposits. Whether a retail forex customer's margin account is FDIC-insured depends on many factors, including how the account is structured, and therefore the regulation does not mandate a standard disclosure regarding the availability of FDIC insurance for retail forex margin accounts. National banks may disclose the availability of FDIC insurance for retail forex margin accounts in a separate document if permitted by law.

9. Payment to respondents:

None.

10. Any assurance of confidentiality:

There is no assurance of confidentiality.

11. Justification for questions of a sensitive nature:

¹¹ The final rule clarifies that a national bank must disclose spreads in addition to fees, commissions, and charges.

There are no questions of a sensitive nature.

12. Burden estimate:

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

Total Reporting Burden: 672 hours.

Total Disclosure Burden: 54,166 hours.

Total Recordkeeping Burden: 12,416 hours.

Total Annual Burden: 67,254 hours.

13. Estimate of annualized costs to respondents (excluding cost of hour burden in Item #12):

None.

14. Estimate of annualized costs to the government:

None.

15. Changes in burden:

Former: 0 respondents; 0 hours

New: 45 respondents; 67,254 hours

Difference: + 45 respondents; + 67,254 hours

16. Information regarding collections whose results are planned to be published for statistical use:

No publication for statistical use is contemplated.

17. Display of expiration date:

Not applicable.

18. Exceptions to certification statement:

Not applicable.

B. Collections of Information Employing Statistical Methods.

Not applicable.