

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 48

Docket ID OCC-2011-0021

RIN 1557-AD42

Retail Foreign Exchange Transactions

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

ACTION: Interim final rule with request for comment.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is adopting an interim final rule authorizing Federal savings associations and their operating subsidiaries to engage in off-exchange transactions in foreign currency with retail customers, subject to the requirements enumerated in the OCC's retail forex rule. The rule implements the provision in section 742(c) of the Dodd–Frank Wall Street Reform and Consumer Protection Act requiring that these transactions be conducted by national banks and Federal savings associations (and their respective operating subsidiaries) only pursuant to an authorizing regulation issued by the OCC. It is substantively the same as the rule the OCC has adopted with respect to national banks and their operating subsidiaries.

DATES:

Effective Date: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment Date: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Tena Alexander, Senior Counsel, or Roman Goldstein, Attorney, Securities and Corporate Practices Division, (202) 874-5120.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed into law the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act).¹ As amended by section 742(c) of the Dodd–Frank Act, the Commodity Exchange Act (CEA) provides that a United States financial institution² for which there is a Federal regulatory agency³ 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 customer⁴ 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 prescribe⁵ (a retail forex rule). A transaction described in 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)).”⁶

¹ Pub. L. 111-203, 124 Stat. 1376.

² The Commodity Exchange Act (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). Federal savings associations are depository institutions. See 12 U.S.C. 1813(c)(1).

³ For purposes of the retail forex rules, “Federal regulatory agency” includes “an appropriate Federal banking agency.” 7 U.S.C. 2(c)(2)(E)(i)(III).

⁴ A retail customer is a person that is not an eligible contract participant under the CEA. Eligible contract participants are generally sophisticated investors; they include individuals with discretionary investments exceeding \$10 million and businesses with assets exceeding \$10 million.

⁵ 7 U.S.C. 2(c)(2)(E)(ii)(I).

⁶ 7 U.S.C. 2(c)(2)(B)(i)(II).

A Federal regulatory agency's retail forex rule must treat similarly all such futures and options and all agreements, contracts, or transactions that are functionally or economically similar to such futures and options.⁷ Retail forex rules must prescribe appropriate requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, and documentation requirements and may include such other standards or requirements as the Federal regulatory agency determines to be necessary.⁸

The Dodd–Frank Act amendment to the CEA took effect on July 16, 2011.⁹ Prior to July 21, 2011, the Office of Thrift Supervision (OTS) was the appropriate Federal regulatory agency for Federal savings associations. The OTS did not issue a retail forex rule for Federal savings associations, and, accordingly, Federal savings associations were prohibited from offering or entering into retail forex futures and options as of July 16, 2011.¹⁰

On July 21, 2011, the OCC became the appropriate Federal banking agency for Federal savings associations.¹¹ On that date, the OCC also obtained authority to issue regulations, including regulations authorizing retail forex transactions, with respect to Federal savings associations. The OCC is issuing this interim final rule with request for public comment to expand the scope of its retail forex rule to cover Federal savings associations. Federal savings associations would thus be allowed to engage in retail forex transactions on the same terms as national banks.

⁷ 7 U.S.C. 2(c)(2)(E)(iii)(II).

⁸ 7 U.S.C. 2(c)(2)(E)(iii)(I).

⁹ See 12 U.S.C. 5411–12.

¹⁰ The CEA's prohibition on engaging in certain transactions does not, by its terms, extend to other transactions, nor does it prohibit a Federal savings association from keeping on its books a retail forex transaction entered into prior to July 16, 2011. See 7 U.S.C. 2(c)(e)(E)(ii)(I). For example, the CEA did not prohibit transactions described in 7 U.S.C. 2(c)(2)(C)(i) (leveraged, margined, or bank-financed forex transactions with retail customers).

¹¹ 12 U.S.C. 5412.

II. Overview of the Interim Final Rule and Related Actions

On September 10, 2010, the Commodity Futures Trading Commission (CFTC) issued a retail forex rule for persons subject to its jurisdiction.¹² On April 22, 2011, the OCC proposed a retail forex rule for national banks modeled on the CFTC's retail forex rule.¹³ The OCC decided to model its retail forex rule on the CFTC's rule to promote regulatory comparability and because the CFTC developed its retail forex rule with the benefit of over 9,100 comments from a range of commenters, including individuals who trade forex, intermediaries, CFTC registrants currently serving as counterparties in retail forex transactions, trade associations or coalitions of industry participants, one committee of a county lawyers' association, a registered futures association, and numerous law firms representing institutional clients. The OCC proposed to authorize national banks to engage in retail forex transactions and subject those transactions to requirements relating to disclosure, record keeping, capital and margin, reporting, business conduct, and documentation.¹⁴ After reviewing all comments received within the 30-day comment period, the OCC issued a final retail forex rule. The final rule regulating national bank retail forex transactions was published on July 14, 2011 and became effective on July 15, 2011.¹⁵

This interim final rule will extend the application of the OCC's existing retail forex rule to Federal savings associations. Specifically, the interim final rule revises part 48 to apply it to Federal savings associations and their operating subsidiaries on the same

¹² Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries, 75 FR 55409 (Sept. 10, 2010). 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).

¹³ Retail Foreign Exchange Transactions, 76 FR 22633 (Apr. 22, 2011).

¹⁴ Id.

¹⁵ Retail Foreign Exchange Transactions, 76 FR 41375 (July 14, 2011).

terms as national banks. This interim final rule makes technical changes to accommodate the application of the retail forex rule to Federal savings associations.

First, this interim final rule revises the disclosure statement required by §§ 48.6 and 48.16. The revisions are necessary because the disclosure statements were written only with national banks in mind; references to “your national bank” in the disclosure statement could be confusing to a customer of a Federal savings association. The revised disclosure statement requires the entity offering the retail forex transaction to insert its name at various places in the disclosure statement. A national bank, Federal savings association, or Federal branch or agency of a foreign bank may insert a shortened or trade name if doing so would not confuse retail forex customers or make the disclosure statement inaccurate. For example, a national bank offering a retail forex transaction may use its full legal name for the first insert, create a short name in parentheses following its full legal name, and use that short name in the remainder of the disclosure statement.

Second, this interim final rule amends § 48.4(c) and (d). As currently written, § 48.4(c) provides that a national bank engaged in a retail forex business on July 15, 2011 may continue to do so for a certain period if it requests a supervisory non-objection by August 14, 2011. Additionally, § 48.4(d) provides that a national bank that is engaged in a retail forex business on July 15, 2011 that complies with § 48.4(c) will be deemed, during the period described in § 48.4(c), to be acting pursuant to a rule or regulation described in section 2(c)(2)(E)(ii)(I) of the CEA. To afford Federal savings associations the same opportunity to request supervisory non-objection, the interim final rule replaces references to July 15, 2011 with references to the date on which the retail forex rule becomes applicable to a national bank or Federal savings association.

As described in the Regulatory Analysis section of this preamble, this interim final rule takes effect upon publication in the Federal Register. A Federal savings association that was offering or entering into retail forex transactions prior to the effective date should seek a supervisory non-objection from the OCC to continue its retail forex business. Federal savings associations that seek that supervisory non-objection within 30 days of the effective date of this interim final rule will be deemed to be operating under a rule or regulation described in section 2(c)(2)(E)(ii)(I) of the CEA for the six-month period beginning on that date.

III. Request for Comment on the Interim Final Rule

The OCC's notice of proposed rulemaking¹⁶ and final rule¹⁷ pertaining to national banks' retail forex transactions contained detailed descriptions of the substantive provisions of the retail forex rule and the bases for any changes between the proposed and final rules.

This interim final rule will only modify the scope of the retail forex final rule for national banks to extend coverage to Federal savings associations. The OCC seeks comment on all aspects of the interim final rule. Commenters are encouraged to review the OCC's previous notice of proposed rulemaking and final rule publications cited above, particularly the discussion of issues and changes made in the final rule, to inform their comments on this interim final rule and its impact on Federal savings associations. The OCC will review the comments received and may revise this rule before adopting it in final form.

IV. Regulatory Analysis

¹⁶ Retail Foreign Exchange Transactions, 76 FR 22633 (Apr. 22, 2011).

¹⁷ Retail Foreign Exchange Transactions, 76 FR 41375 (July 14, 2011).

A. Administrative Procedure Act and Effective Date

Under 5 U.S.C. 553(b)(1)(B) of the Administrative Procedure Act (APA), an agency may, for good cause, find (and incorporate the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. As discussed in the preamble, the Dodd-Frank Act established a prohibition on retail forex transactions by Federal savings associations until such time as the OCC issues a regulation concerning the conduct of those transactions. This interim final rule regulates the conduct of retail forex transactions and thus removes a restriction on conducting those transactions. For this reason, the OCC finds good cause to conclude that the notice procedures prescribed by the APA are unnecessary.

This interim final rule takes effect upon publication in the Federal Register. The APA, 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 in which the rule grants or recognizes an exemption or relieves a restriction. Section 2(c)(2)(E)(ii) of the CEA prohibits Federal savings associations from engaging in retail forex transactions absent an authorizing rule issued by the OCC. This interim final rule would relieve that restriction and allow Federal savings associations to engage in retail forex transactions without undue 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 OCC finds such good cause, as the 30-day delayed effective date is unnecessary under the provisions of the final rule. In 12 CFR § 48.4(c), the OCC allows Federal savings associations a 30-day grace period to inform the

OCC of its retail forex activity, along with up to a six-month window to comply with the provisions of the retail forex rule.

B. 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 OCC finds good cause that this interim final rule should become effective upon publication in the Federal Register, 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 Federal savings associations would not be able to provide retail forex transactions to customers to meet their financial needs.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq., generally requires an agency that is issuing a proposed rule to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. The RFA does not apply to a rulemaking where a general notice of proposed rulemaking is not required. See 5 U.S.C. 603 and 604. The OCC has determined, for good cause, that it is unnecessary to publish a notice of proposed rulemaking for this interim final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

D. Paperwork Reduction Act

The information collection requirements in 12 CFR part 48 are currently approved under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3520, and have been assigned OMB Control No. 1557-0250. The amendments adopted today do not introduce any new collections of information into the rules, nor do they amend the rules in a way that substantively modifies the collections of information that OMB has approved. Therefore, no PRA submission to OMB is required, with the exception of a non-substantive submission to OMB to adjust the number of respondents to reflect the number of affected savings associations.

E. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. The Unfunded Mandates Reform Act only applies when an agency issues a general notice of proposed rulemaking. Since this rule is published as an interim final rule, it is not subject to section 202 of the Unfunded Mandates Reform Act.

List of Subjects in 12 CFR Part 48

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

For the reasons stated in the preamble, the OCC amends 12 CFR part 48 as follows:

PART 48—Retail Forex Transactions

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

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

2. Revise § 48.1(a) to read as follows:

(a) Authority.

(1) National banks. A national bank may offer or enter into retail foreign exchange transactions. A national bank offering or entering into retail foreign exchange transactions must comply with the requirements of this part.

(2) Federal savings associations. A Federal savings association may offer or enter into retail foreign exchange transactions. A Federal savings association offering or entering into retail foreign exchange transactions must comply with the requirements of this part as if each reference to a national bank were a reference to a Federal savings association.

3. Add the following definition to § 48.2, keeping the definitions of § 48.2 in alphabetical order:

Federal savings association means a Federal savings association or Federal savings bank chartered under section 5 of the Home Owners' Loan Act (12 U.S.C. 1464) or an operating subsidiary thereof.

4. Revise § 48.6(d) to read as follows:

(d) Content of risk disclosure statement. The language set forth in the written disclosure statement required by paragraph (a) of this section is as follows:

Risk Disclosure Statement

Retail forex transactions involve the leveraged trading of contracts denominated in foreign currency with [insert name of entity] as your counterparty. Because of the leverage and the other risks disclosed here, you can rapidly lose all of the funds or property you pledge to [insert name of entity] as margin for retail forex trading. You may lose more than you pledge as margin.

If your margin falls below the required amount, and you fail to provide the required additional margin, [insert name of entity] is required to liquidate your retail forex transactions. [Insert name of entity] cannot apply your retail forex losses to any of your assets or liabilities at [insert name of entity] other than funds or property that you have pledged as margin for retail forex transactions. However, if you lose more money than you have pledged as margin, [insert name of entity] may seek to recover that deficiency in an appropriate forum, such as a court of law.

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

(1) Trading is not on a regulated market or exchange—[insert name of entity] 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 [insert name of entity] as the counterparty. When you sell, [insert name of entity] is the buyer. When you buy, [insert name of entity] is the seller. As a result, when you lose money

trading, [insert name of entity] is making money on such trades, in addition to any fees, commissions, or spreads [insert name of entity] may charge.

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

(3) You may be able to offset or liquidate any trading positions only through [insert name of national bank] because the transactions are not made on an exchange or regulated contract market, and [insert name of entity] may set its own prices. Your ability to close your transactions or offset positions is limited to what [insert name of entity] will offer to you, as there is no other market for these transactions. [Insert name of entity] may offer any prices it wishes, including prices derived from outside sources or not in its discretion. [Insert name of entity] 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. [Insert name of entity] 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 [insert name of entity] 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 [insert name of entity] 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. [Insert name of entity] 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 [insert name of entity] 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, [insert name of entity].

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

Finally, you should thoroughly investigate any statements by [insert name of entity] 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 [insert name of entity].

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

Date

Signature of Customer

5. Revise § 48.16(a)(5) to read as follows:

(5) The agreement must include the following language printed in large boldface type:

Two forums exist for the resolution of disputes related to retail forex transactions: civil court litigation and arbitration conducted by a private organization. The opportunity to settle disputes by arbitration may in some cases provide benefits to customers, including the ability to obtain an expeditious and final resolution of disputes without incurring substantial cost. Each customer must individually examine the relative merits of arbitration and consent to this arbitration agreement must be voluntary.

By signing this agreement, you: (1) may be waving your right to sue in a court of law; and (2) are agreeing to be bound by arbitration of any claims or counterclaims that you or [insert name of entity] may submit to arbitration under this agreement. In the event a dispute arises, you will be notified if [insert name of entity] intends to submit the dispute to arbitration.

You need not sign this agreement to open or maintain a retail forex account with [insert name of entity].

6. Amend § 48.4 as follows:

a. In paragraph (c), revise all references to “July 15, 2011,” to read “the date that this part becomes applicable to it”.

b. In paragraph (d), revise the reference to “July 15, 2011” to read “the date that this part becomes applicable to it”.

**[THIS SIGNATURE PAGE RELATES TO THE “RETAIL FOREIGN
EXCHANGE TRANSACTIONS” INTERIM FINAL RULE]**

Dated: September ____, 2011

John Walsh
Acting Comptroller of the Currency

BILLING CODE: 4810-33-P