

of the United States to enforce compliance with the Interlocks Act and this part. If an affiliate of an insured non-member bank is subject to the primary regulation of another federal depository organization supervisory agency, then the FDIC does not administer and enforce the Interlocks Act with respect to that affiliate.

PART 349—RETAIL FOREIGN EXCHANGE TRANSACTIONS

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AUTHORITY: 12 U.S.C.1813(q), 1818, 1819, and 3108; 7 U.S.C. 2(c)(2)(E), 27 *et seq.*

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§ 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, record-keeping, 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.

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.

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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 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.

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

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 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

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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 Section 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) of this section.

(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)(i)(I) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(E)(i)(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 un-

derlying 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 a 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.

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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.

Date

Signature of Customer

(e)(1) *Disclosure of profitable accounts ratio.* Immediately following the language set forth in paragraph (d) of this section, the statement required by paragraph (a) of this section shall include, for each of the most recent four calendar quarters during which the FDIC-supervised insured depository institution maintained retail forex customer accounts:

(i) The total number of retail forex customer accounts maintained by the FDIC-supervised insured depository institution over which the FDIC-supervised insured depository institution does not exercise investment discretion;

(ii) The percentage of such accounts that were profitable for retail forex customer accounts during the quarter; and

(iii) The percentage of such accounts that were not profitable for retail forex customer accounts during the quarter.

(2) The FDIC-supervised insured depository institution's statement of profitable trades shall include the following legend: "Past performance is not necessarily indicative of future results." Each FDIC-supervised insured depository institution shall provide, upon request, to any retail forex customer or prospective retail forex customer the total number of retail forex accounts maintained by the FDIC-supervised insured depository institution for which the FDIC-supervised insured depository institution does not exercise investment discretion, the percentage of such accounts that were profitable, and the percentage of such accounts that were not profitable for each calendar quarter during the most

recent five-year period during which the FDIC-supervised insured depository institution maintained such accounts.

(f) *Disclosure of fees and other charges.* Immediately following the language required by paragraph (e) of this section, the statement required by paragraph (a) of this section shall include:

(1) 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;

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

(3) 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:

(i) 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;

(ii) The customer account identification information;

(iii) The currency pair;

(iv) The size or quantity of the order;

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

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

(vii) 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;

(viii) For options, whether the option is a put or call, expiration date, quantity, underlying contract for future de-

livery or underlying physical, strike price, and details of the purchase price of the option, including premium, mark-up, commission, and fees; and

(ix) For futures, the delivery date; and

(x) 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 quar-

ter, 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

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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 consist-

ently 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 or 12 CFR part 324, as applicable, unless specifically exempted by the FDIC in writing.

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§ 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

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(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 op-

tion 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.

PART 350—DISCLOSURE OF FINANCIAL AND OTHER INFORMATION BY FDIC-INSURED STATE NON-MEMBER BANKS

Sec.

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AUTHORITY: 12 U.S.C. 1817(a)(1), 1819 "Seventh" and "Tenth".

SOURCE: 52 FR 49379, Dec. 31, 1987, unless otherwise noted.

§ 350.1 Scope.

This part applies to FDIC-insured state-chartered banks that are not members of the Federal Reserve System, and to FDIC-Insured state-licensed branches of foreign banks.

§ 350.2 Definitions.

(a) *Bank.* For purposes of this part, the term *bank* means an FDIC-insured state-chartered organization that is not a member of the Federal Reserve System, and an FDIC-insured state-licensed branch of a foreign bank.

(b) *Call Report.* For purposes of this part, the term *Call Report* means the report filed by a bank pursuant to 12 U.S.C. 1817(a)(1).

§ 350.3 Requirement for annual disclosure statement.

(a) *Contents.* Each bank shall prepare as of December 31 and make available on request an annual disclosure statement. The statement shall contain information required by § 350.4(a) and (b) and may include other information that bank management believes appropriate, as provided in § 350.4(c).

(b) *Availability.* A bank shall make its annual disclosure statement available to the public beginning not later than the following March 31 or, if the bank mails an annual report to its shareholders, beginning not later than five days after the mailing of such reports, whichever occurs first. A bank shall make a disclosure statement available continuously until the disclosure statement for the succeeding year becomes available.

[62 FR 10200, Mar. 6, 1997]

§ 350.4 Contents of annual disclosure statement.

(a) *Financial reports.* The annual disclosure statement for any year shall reflect a fair presentation of the bank's financial condition at the end of that year and the preceding year and, except for state-licensed branches of foreign banks, the results of operations for each such year. The annual disclosure statement may, at the option of bank management, consist of the bank's entire Call Report, or applicable portions thereof, for the relevant dates and periods. At a minimum, the statement must contain information comparable to that provided in the following Call Report schedules:

(1) For insured state-chartered organizations that are not members of the Federal Reserve System:

(i) Schedule RC (Balance Sheet);