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trading position, as those terms are respectively defined, without regard to whether the financial instrument is reported as a covered position or trading position on any applicable regulatory reporting forms:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(12) *Market risk capital rule* means the market risk capital rule that is contained in 12 CFR part 3, subpart F, with respect to a banking entity for which the OCC is the primary financial regulatory agency, 12 CFR part 217 with respect to a banking entity for which the Board is the primary financial regulatory agency, or 12 CFR part 324 with respect to a banking entity for which the FDIC is the primary financial regulatory agency.

(13) *Municipal security* means a security that is a direct obligation of or issued by, or an obligation guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States or political subdivisions thereof.

(14) *Trading desk* means a unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof that is:

(i)(A) Structured by the banking entity to implement a well-defined business strategy;

(B) Organized to ensure appropriate setting, monitoring, and management review of the desk's trading and hedging limits, current and potential future loss exposures, and strategies; and

(C) Characterized by a clearly defined unit that:

(1) Engages in coordinated trading activity with a unified approach to its key elements;

(2) Operates subject to a common and calibrated set of risk metrics, risk levels, and joint trading limits;

(3) Submits compliance reports and other information as a unit for monitoring by management; and

(4) Books its trades together; or

(ii) For a banking entity that calculates risk-based capital ratios under the market risk capital rule, or a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk-based capital ratios under the market risk capital rule, established by the banking entity or its affiliate for purposes of market risk capital calculations under the market risk capital rule.

[79 FR 5779, 5804, Jan. 31, 2014, as amended at 84 FR 62095, Nov. 14, 2019]

§ 44.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities*. The prohibition contained in § 44.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with this paragraph (a).

(2) *Requirements*. The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii)(A) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities; and

(B) Reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities;

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(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (a) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, in accordance with paragraph (a)(2)(ii)(A) of this section;

(C) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (a)(2)(iii)(B) and (C) of this section by complying with the requirements set forth in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (a) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in the activity described in this paragraph (a) in accordance with applicable law.

(3) *Definition of distribution.* For purposes of this paragraph (a), a distribution of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of this paragraph (a), *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of this paragraph (a), *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of this section, *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of this paragraph (a), the terms *client, customer, and counterparty*, on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities—*
(1) *Permitted market making-related activities.* The prohibition contained in § 44.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with this paragraph (b).

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

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(i) The trading desk that establishes and manages the financial exposure, routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The trading desk's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this paragraph (b), including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and positions; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, in accordance with paragraph (b)(2)(ii) of this section;

(D) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(E) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (b)(2)(iii)(C) and (D) by complying with the requirements set forth in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (b) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in this paragraph (b) in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of this paragraph (b), the terms *client, customer, and counterparty*, on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of \$50 billion or more as measured in accordance with the methodology described in § 44.2(ee) of this part, unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(ii) [Reserved]

(4) *Definition of financial exposure.* For purposes of this section, *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker positions.* For the purposes of this section, *market-maker positions* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section, that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

(c) *Rebuttable presumption of compliance*—(1) *Internal limits.* (i) A banking entity shall be presumed to meet the requirement in paragraph (a)(2)(ii)(A) or (b)(2)(ii) of this section with respect to the purchase or sale of a financial instrument if the banking entity has established and implements, maintains, and enforces the internal limits for the relevant trading desk as described in paragraph (c)(1)(ii) of this section.

(ii)(A) With respect to underwriting activities conducted pursuant to paragraph (a) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of securities and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's underwriting activities, on the:

(1) Amount, types, and risk of its underwriting position;

(2) Level of exposures to relevant risk factors arising from its underwriting position; and

(3) Period of time a security may be held.

(B) With respect to market making-related activities conducted pursuant to paragraph (b) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's market-making related activities, that address the:

(1) Amount, types, and risks of its market-maker positions;

(2) Amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(3) Level of exposures to relevant risk factors arising from its financial exposure; and

(4) Period of time a financial instrument may be held.

(2) *Supervisory review and oversight.* The limits described in paragraph (c)(1) of this section shall be subject to supervisory review and oversight by the OCC on an ongoing basis.

(3) *Limit breaches and increases.* (i) With respect to any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, a banking entity shall maintain and make available to the OCC upon request records regarding:

(A) Any limit that is exceeded; and

(B) Any temporary or permanent increase to any limit(s), in each case in the form and manner as directed by the OCC.

(ii) In the event of a breach or increase of any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, the presumption described in paragraph (c)(1)(i) of this section shall continue to be available only if the banking entity:

(A) Takes action as promptly as possible after a breach to bring the trading desk into compliance; and

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(B) Follows established written authorization procedures, including escalation procedures that require review and approval of any trade that exceeds a trading desk’s limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk’s limit(s), and independent review of such demonstrable analysis and approval.

(4) *Rebutting the presumption.* The presumption in paragraph (c)(1)(i) of this section may be rebutted by the OCC if the OCC determines, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and based on all relevant facts and circumstances, that a trading desk is engaging in activity that is not based on the reasonably expected near term demands of clients, customers, or counterparties. The OCC’s rebuttal of the presumption in paragraph (c)(1)(i) must be made in accordance with the notice and response procedures in subpart D of this part.

[84 FR 62096, Nov. 14, 2019]

§ 44.5 Permitted risk-mitigating hedging activities.

(a) *Permitted risk-mitigating hedging activities.* The prohibition contained in § 44.3(a) does not apply to the risk-mitigating hedging activities of a banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings of the banking entity and designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings.

(b) *Requirements.* (1) The risk-mitigating hedging activities of a banking entity that has significant trading assets and liabilities are permitted under paragraph (a) of this section only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity’s compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including doc-

umentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(C) The conduct of analysis and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged;

(ii) The risk-mitigating hedging activity:

(A) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(D) Is subject to continuing review, monitoring and management by the banking entity that:

(1) Is consistent with the written hedging policies and procedures required under paragraph (b)(1)(i) of this section;

(2) Is designed to reduce or otherwise significantly mitigate the specific, identifiable risks that develop over time from the risk-mitigating hedging