

### § 349.15

its affiliate on a similar basis, other than:

(i) A security that is not a security futures product as defined in §1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)); or

(ii) A contract of sale that—

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

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

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

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

(B) An option, other than an option executed or traded on a national securities exchange registered pursuant to 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.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

### § 349.15 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

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retail forex transaction with that retail forex customer.

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### § 349.16 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 §349.20 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 §349.18.

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

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### § 349.17 Application and closing out of offsetting long and short positions.

(a) *Application of purchases and sales.* Any FDIC-supervised insured depository institution that—

(1) Engages in a retail forex transaction involving the purchase of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has an open retail forex transaction for the sale of the same currency;

(2) Engages in a retail forex transaction involving the sale of any currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has an open retail forex

transaction for the purchase of the same currency;

(3) Purchases a put or call option involving foreign currency for the account of any retail forex customer when the account of such retail forex customer at the time of such purchase has a short put or call option position with the same underlying currency, strike price, and expiration date as that purchased; or

(4) Sells a put or call option involving foreign currency for the account of any retail forex customer when the account of such retail forex customer at the time of such sale has a long put or call option position with the same underlying currency, strike price, and expiration date as that sold shall:

(i) Immediately apply such purchase or sale against such previously held opposite transaction; and

(ii) Promptly furnish such retail forex customer with a statement showing the financial result of the transactions involved and the name of any introducing broker to the account.

(b) *Close-out against oldest open position.* In all instances where the short or long position in a customer's retail forex account immediately prior to an offsetting purchase or sale is greater than the quantity purchased or sold, the FDIC-supervised insured depository institution shall apply such offsetting purchase or sale to the oldest portion of the previously held short or long position.

(c) *Transactions to be applied as directed by customer.* Notwithstanding paragraphs (a) and (b) of this section, the offsetting transaction shall be applied as directed by a retail forex customer's specific instructions. These instructions may not be made by the FDIC-supervised insured depository institution or an IAP.

[76 FR 40789, July 12, 2011. Redesignated at 80 FR 74912, Nov. 30, 2015]

### § 349.18 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