May 10, 2011

MEMORANDUM TO: The Board of Directors

FROM: Sandra L. Thompson
Director, Division of Risk Management Supervision

Michael H. Krimminger
General Counsel

SUBJECT: Notice of Proposed Rulemaking pursuant to § 742(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act for the purpose of adding 12 C.F.R. Pt. 349 to regulate FDIC-supervised entities engaged in retail forex transactions.

I. RECOMMENDATION

Staff recommends that the Board of Directors approve the issuance of a Notice of Proposed Rulemaking (the "Proposed Rule") with a period for public comment ending 30 days from the date of publication in the Federal Register to solicit comments on the proposed regulation which would impose requirements on insured depository institutions supervised by the FDIC that engage in certain retail off-exchange foreign currency transactions that otherwise will be prohibited by Section 2(c)(2)(E) of the Commodity Exchange Act ("CEA"), as added by Section 742(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The Proposed Rule would also cover other foreign currency transactions not subject to the prohibition but for which the staff recommends similar requirements. The Proposed Rule would add Part 349 of Title 12 of the Code of Federal Regulations.

II. EXECUTIVE SUMMARY

Section 742(c) of the Dodd-Frank Act prohibits a financial entity from engaging in retail futures and options in foreign currency except pursuant to rules and regulations promulgated by the appropriate Federal regulatory agency. Such transactions are considered "retail" if conducted with a counterparty that does not satisfy the definition of "eligible contract participant" under the CEA ("ECP"). An individual with $10 million or less, or in the case of certain risk mitigation transactions, $5 million invested on a discretionary basis would not qualify as an ECP.[1] In addition, § 742(c) requires that the rules and regulations governing retail futures and options in foreign currency treat in a similar manner all retail futures and options in foreign currency, and all agreements, contracts and transactions in foreign currency that are functionally and economically similar to retail futures and options in foreign currency.

Staff recommends that in addition to the futures and options, the requirements of the Proposed Rule should also apply to retail foreign exchange transactions that are so-called "rolling spot" contracts. Staff believes that these transactions are functionally and economically similar transactions to futures and options. However, staff believes that the requirements of the Proposed Rule would not apply to foreign exchange transactions that are spot contracts or forward contracts irrespective of whether the customer is or is not an ECP.

Section 742(c) requires that any rules and regulations under which retail foreign exchange transactions may be permitted must at a minimum include appropriate requirements concerning disclosure, recordkeeping, capital and margin, reporting,

[1] Certain commercial entities with $10 million or less in total assets or, in the case of certain risk mitigation transactions, $1 million or less in net worth would not qualify as eligible contract participants.

business conduct, and documentation, and may also include such other standards or requirements as the appropriate Federal regulatory agency determines to be necessary.

The Proposed Rule is modeled after the CFTC's final retail foreign exchange regulation published on September 10, 2010.[2] The Proposed Rule follows the CFTC's final regulation where practicable. For instance, the Proposed Rule generally has similar provisions regarding prohibited transactions, application and closing out of offsetting long and short positions, disclosure, margin percentage requirements, recordkeeping, requirements for monthly customer reports and confirmation statements, the definition of unlawful representations, prohibition of guarantees against loss, authorization to trade, trading and operational standards, supervision, notice of transfers and customer dispute resolution. However, the Proposed Rule diverges from the CFTC regulation with respect to areas in which the character of the FDIC's existing regulatory regime or the nature of the banking industry make such divergence appropriate. The Proposed Rule also would prohibit the use of predispute mandatory arbitration agreements, which the CFTC's rule permits.

While § 742 does not require joint rulemaking by the Federal regulatory agencies, Congress intended that the Federal regulatory agencies promulgate "comparable" rules.[3] On April 22, 2011, the Federal Register published the OCC's notice of proposed rulemaking,[4] and the Proposed Rule follows closely the OCC proposed rulemaking. Unlike the OCC's proposal, this Proposed Rule would prohibit predispute mandatory

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[2] See 75 Fed. Reg. 55410 (Sept. 10, 2010).

[3] See 111 Cong. Rec. S5924 (daily ed. Jul. 15, 2010) (statement of Senator Lincoln) (alteration in original): "Section 742 requires that the agencies regulating [broker-dealers, banks, future commission merchants, and retail foreign exchange dealers] have comparable regulations in place before their regulated entities are allowed to offer retail foreign currency trading. This will ensure that all domestic retail foreign currency trading is subject to similar protections."

[4] Retail Foreign Exchange Transactions, 76 FR 22633 (Apr. 22, 2011).

arbitration agreements. The staff believes that the two proposed rulemakings are comparable to each other and to the CFTC's regulation. Additionally, Federal Reserve staff have indicated that they plan to recommend that the Federal Reserve Board publish a notice of proposed rulemaking shortly. While the FDIC is currently reviewing possible retail foreign currency activity by insured depository institutions under the FDIC's supervision, we are currently aware of only one such institution that may be engaged in activity subject to the Proposed Rule. Staff recommends that the FDIC promulgate the Proposed Rule so that any insured depository institution under the FDIC's supervision would not experience a business disruption or competitive disadvantage by being subject to the prohibition yet would be required to follow appropriate guidelines when engaging in covered retail foreign currency transactions.

III. BACKGROUND

On July 21, 2010, President Obama signed into law the Dodd-Frank Act. As amended by the Dodd-Frank Act, the CEA provides that a United States financial institution for which there is a Federal regulatory agency shall not enter into, or offer to enter into, with a retail customer futures and options in foreign currency as described in section 2(c)(2)(B)(i)(I) of the CEA 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 prescribe (a "retail forex rule").[5] Section 2(c)(2)(B)(i)(I)

[5] See Dodd-Frank Act § 742(c)(to be codified at 7 U.S.C. § 2(c)(2)). In this preamble, citations to the retail forex statutory provisions will be to the section where the provisions will be codified in the CEA. For the purposes of this rule, a "financial institution" includes "a depository institution (as defined in § 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813))." 7 U.S.C. § 1a(21)(E). A "Federal regulatory agency" means the CFTC, the Securities and Exchange Commission, an appropriate Federal banking agency, the National Credit Union Association, and the Farm Credit Administration. Section 2(c)(2)(E)(i)(III) of the CEA, as amended by § 742(c). Finally, an "appropriate Federal banking agency" is defined by reference to § 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1813(q)), which includes, of course, the FDIC. Section 1a(2) of the CEA.

describes the specific transactions subject to this restriction as "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] Further, the CEA requires that a Federal regulatory agency's retail forex rule must treat all such futures and options, and all agreements, contracts, or transactions that are functionally or economically similar to such futures and options, similarly.[7]

The prohibition in section 742(c) takes effect 360 days from the enactment of the Dodd-Frank Act, i.e., on July 16, 2011.[8] After that date, an insured depository institution for which the FDIC is the "appropriate Federal banking agency" pursuant to § 3(q) of the

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When the proposed rule is published in the Federal Register, the FDIC will be the appropriate Federal banking agency for any State nonmember insured bank and any foreign bank having an insured branch. 12 U.S.C. § 1813(q)(3). When the powers of the Office of Thrift Supervision are transferred to the Office of Comptroller of the Currency, the FDIC and the Board of Governors of the Federal Reserve System, the FDIC will also be the appropriate Federal banking agency for any State savings association. See Dodd-Frank Act § 312(c) (amending 12 U.S.C. § 1813(q) to redefine "appropriate Federal banking agency").

[6] 7 U.S.C. § 2(c)(2)B(i)(II).

[7] See 7 U.S.C. § 2(c)(2)(E)(iii)(II). One example of a functionally or economically similar transaction is the rolling spot contract. In CFTC vs. Zelener, 373 F.3d 861 (7th Cir. 2004), reh'g and reh'g en banc denied, CFTC v. Zelener, 387 F.3d 624 (7th Cir. 2004), the Seventh Circuit held that rolling spot contracts in foreign currency are not futures contracts but may be economically equivalent to futures contracts. In CFTC vs. Erskine, 512 F.3d 309 (6th Cir. 2008), the Sixth Circuit held that spot contracts in foreign currency are forward contracts, not futures contracts. Although rolling spot contracts have been subject to judicial interpretation as to whether they are forwards or futures, there is a strong argument that the intent of § 742(c) of the Dodd-Frank Act was to require that these transactions be subject to the regulations promulgated thereunder. See 111 Cong. Rec. S5924 (daily ed. Jul. 15, 2010) (statement of Senator Lincoln):

"Section 742 includes several important provisions to enhance the protections afforded to customers in retail commodity transactions... First, Section 742 clarifies the prohibition on off-exchange retail futures contracts that has been at the heart of the Commodity Exchange Act (CEA) throughout its history. In recent years, there have been instances of fraudsters using what are known as "rolling spot contracts" with retail customers in order to evade the CFTC's jurisdiction over futures contracts. These contracts function just like futures, but the court of appeals in the Zelener case... based on the wording of the contract documents, held them to be spot contracts outside of CFTC jurisdiction. The CFTC Reauthorization Act of 2008, which was enacted as part of that year's Farm Bill, clarified that such transactions in foreign currency are subject to CFTC anti-fraud authority. ... Retail off-exchange transactions in foreign currency will continue to be covered by the "Zelener fraud fix" enacted in the Farm Bill."

[8] See Dodd-Frank Act § 754.

Federal Deposit Insurance Act (an "FDIC-supervised IDI") may not engage in foreign currency futures and options with a customer who does not qualify as an ECP under the CEA except pursuant to a rule issued by the FDIC.

The restrictions in the Proposed Rule do not apply to (1) transactions with a customer who qualifies as an ECP, or (2) transactions that are spot contracts or forward contracts irrespective of whether the customer is or is not an ECP. Staff believes that the Proposed Rule should apply to "rolling spot" transactions in foreign currency. See the discussion of the definition of "retail forex transaction" in the Section-by-Section Analysis of § 349.2 of the Proposed Rule regarding the distinctions between rolling spot transactions and spot and forward contracts. Collectively, the futures and options in foreign currency that are subject to the prohibition and those transactions that are not subject to the prohibition, but that are subject to the requirements of the Proposed Rule, are referred to herein as "retail forex transactions."

Finally, the statute requires that any regulation published under § 2(c)(2)(E) of the CEA address certain subjects. In particular, any such rule 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.[9]

On September 10, 2010, the CFTC adopted a retail forex rule for persons subject to its jurisdiction. The CFTC's regulation does not govern transactions by entities subject to prudential regulation by other Federal regulatory agencies including transactions entered into by insured depository institutions subject to the FDIC's supervision. As discussed above, the CEA, as amended by § 742, requires the appropriate Federal

[9] 7 U.S.C. § 2(c)(2)(E)(iii)(I).

regulatory agency to have a retail forex rule in place in order for the prohibition against retail foreign exchange futures, options on futures, and options to not take effect.

In the preamble to its final rule, the CFTC stated: "Given the principal-to-principal nature of retail forex transactions and the inherent conflicts of interest in the relationship between the retail customer and the dealer/counterparty, the lack of transparency in the pricing and execution of such transactions, and the volume of fraud the Commission has seen arising from such transactions, the Commission has determined to promulgate some regulations that are unique to, and tailored to, retail forex transactions."[10] In addition, the legislative history of § 742 indicates that retail forex rules are intended to be comparable.[11] On April 22, 2011, the OCC caused to be published in the Federal Register a notice of proposed rulemaking,[12] and the Proposed Rule follows closely the OCC proposed rulemaking. The staff believes that the two proposed rulemakings are comparable with each other and with the CFTC's regulation. Additionally, Federal Reserve Board staff has indicated that it plans to recommend that the Board publish a notice of proposed rulemaking shortly.

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[10] See 75 Fed. Reg. 55410 (Sept. 10, 2010). Since 2001, the CFTC has issued a number of foreign currency trading (forex) fraud advisories. In its current "Fraud Advisory from the CFTC: Foreign Currency Trading (Forex) Fraud," the CFTC highlights that there are two kinds of common fraud: (1) unregulated firms offering/selling foreign currency futures and options contracts to the public, and (2) forex fraud by registered firms and affiliates. See http://www.cftc.gov/ConsumerProtection/FraudAwarenessPrevention/CFTCFraudAdvisories/fraudadv_forex.html .

[11] See 111 Cong. Rec. S5924 (daily ed. Jul. 15, 2010) (statement of Senator Lincoln):

> "...Section 742 addresses the risk of regulatory arbitrage with respect to retail foreign currency transactions. Under the CEA, several types of regulated entities can provide retail foreign currency trading platforms--among them, broker-dealers, banks, futures commission merchants, and the category of "retail foreign exchange dealers" that was recognized by Congress in the Farm Bill in 2008. Section 742 requires that the agencies regulating these entities have comparable regulations in place before their regulated entities are allowed to offer retail foreign currency trading. This will ensure that all domestic retail foreign currency trading is subject to similar protections."

[12] Retail Foreign Exchange Transactions, 76 FR 22633 (Apr. 22, 2011).

While the FDIC is currently reviewing possible retail off-exchange foreign currency activity by FDIC-supervised IDIs, possible retail forex activity has been identified at only one FDIC-supervised IDI. However, staff recommends that the FDIC promulgate the Proposed Rule so that FDIC-supervised IDIs would not experience a business disruption or competitive disadvantage by virtue of the statute's prohibition, but if engaged in the covered activities, would be required to do so pursuant to policies, procedures, and risk management systems and controls that will ensure safe and sound operations and appropriate customer protections. Moreover, given the esoteric legal distinctions that cover these trades, publication of the Proposed Rule would limit unintended confusion and the possible curtailment of spot or forward currency transactions that are designed to hedge business risks. With respect to rolling spot transactions, which are not covered by the prohibition, promulgating rules would impose retail investor protections for such activities.

The requirements of the Proposed Rule would overlap with some portions of the 1994 Interagency Statement on Retail Sales of Nondeposit Investment Products (NDIP), which broadly govern insured depository institutions' sales of all nondeposit investment products to retail customers. As discussed in the preamble to the Proposed Rule, the banking agencies continue to expect their regulated entities to meet the expectations set out in the NDIP to the extent such expectations do not conflict with the requirements of the Proposed Rule. The Proposed Rule's "eligible contract participant" definition of retail customer does not interfere with and does not displace the definition of "retail" for purposes of the NDIP.

The Division of Depositor and Consumer Protection has reviewed and provided comments with respect to the Proposed Rule.

IV. SECTION-BY-SECTION DESCRIPTION OF THE PROPOSED RULE

Structure and Approach

The Proposed Rule is modeled on the CFTC's final rules. The Proposed Rule includes various changes that reflect differences between the Federal banking agencies' and the CFTC's supervisory regimes and the respective financial entities regulated by the agencies. For example:

- The Proposed Rule does not include registration requirements because FDIC-supervised IDIs are supervised by the FDIC. Instead of a registration requirement, the proposed rule would require an FDIC-supervised IDI to obtain the FDIC's consent prior to conducting a retail forex business.
- Because FDIC-supervised IDIs are already subject to various capital requirements under 12 CFR part 325, the Proposed Rule requires FDIC-supervised IDIs wishing to engage in retail forex transactions to be "well capitalized."
- The Proposed Rule requires that a risk disclosure statement that informs the retail forex customer that a retail forex transaction is not insured by the FDIC. The CFTC's regulation does not address FDIC insurance because financial intermediaries under the CFTC's jurisdiction are not insured depository institutions.
- The Proposed Rule prohibits cross-collateralization or set-off against a retail customer's other property or accounts held at the FDIC-supervised IDI. This

provision is designed to provide heightened customer protections for banking customers and is consistent with the OCC's proposed rule.

The preamble of the Proposed Rule includes a set of questions to elicit specific public comment on particular issues. The questions inquire, for instance, whether foreign branches of FDIC-supervised IDIs should be permitted to engage in retail forex transactions; what kind of customers engage in retail forex transactions and whether the Proposed Rule should cover additional categories of retail customers (ECPs); whether alternate risk disclosures should be required; and whether the FDIC should provide haircut requirements for non-cash collateral.

In addition, nothing in this Proposed Rule creates any private right of action or limits a right of action a person may have under another law.

Section 349.1—Authority, Purpose and Scope

This section authorizes an FDIC-supervised IDI to conduct retail forex transactions subject to compliance with this part. This section also determines the scope of FDIC-supervised IDIs subject to the Proposed Rule.

The financial institutions subject to the Proposed Rule include those insured depository institutions for which the FDIC is the appropriate Federal banking agency pursuant to § 3(q) of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(q). As of the abolishment of the Office of Thrift Supervision, state savings associations will be within the scope of institutions for which the FDIC is the appropriate Federal banking agency.

Section 349.2—Definitions

This section defines terms specific to retail forex transactions and to the regulatory requirements that apply to retail forex transactions. The term "retail forex

transaction" includes the following transactions in foreign currency between an FDIC-supervised IDI and persons that are not "eligible contract participants" (as defined in the CEA): (i) a contract of sale of a commodity for future delivery or an option on such contract; (ii) an option, other than an option executed or traded on a registered national securities exchange; and (iii) certain leveraged or margined transactions. As elaborated in the preamble to the Proposed Rule, rolling spot forex transactions (so-called Zelener contracts), but not traditional spot or cash forward transactions that involve delivery of currency, would fall within this definition.[13]

The Proposed Rule would apply to the above transactions between an FDIC-supervised IDI and an individual or entity that does not meet the definition of an "eligible contract participant" as that term is defined in the CEA as described above in Section III.

Section 349.3—Prohibited Transactions

This section prohibits an FDIC-supervised IDI from engaging in principal transactions with a customer if the FDIC-supervised IDI or an affiliate has discretionary control over the customer's retail forex account. This section also prohibits fraudulent conduct by an FDIC-supervised IDI or its institution-affiliated parties in connection with retail forex transactions.

Section 349.4—Filing Procedures

The Proposed Rule would require that, before an FDIC-supervised IDI engages in "retail forex business," as defined in Proposed Section 349.2, it shall file a written notice and obtain the FDIC prior written consent.

[13] See Section-by-Section Description for § 349.2 in the Proposed Rule.

Under the Proposed Rule, FDIC-supervised IDIs that are engaged in retail forex business as of the effective date of a final retail forex rule and that provide notice and request the FDIC's written consent within the 30-day time period would have six months from the effective date of the final rule, subject to an extension of time by the FDIC, to bring their operations into conformance with a final retail forex rule.

Section 349.5—Application and Closing Out of Offsetting Long and Short Positions

This section requires an FDIC-supervised IDI to close out offsetting long and short positions in a retail forex account. The FDIC-supervised IDI would have to offset such positions regardless of whether the customer has instructed otherwise. Under the Proposed Rule, an FDIC-supervised IDI may offset retail forex transactions as instructed by the retail forex customer or its agent if instructions do not come from the FDIC-supervised IDI.

Section 349.6—Disclosure

This section requires an FDIC-supervised IDI to provide retail forex customers with a prescribed risk disclosure statement similar to the one required by the CFTC's retail forex rule, but tailored to address certain unique characteristics of retail forex transactions with FDIC-supervised IDIs. In addition, proposed § 349.6 requires that the FDIC-supervised IDI provide disclosure regarding the profitability of retail forex accounts and its charges, fees and commissions.

Section 349.7—Recordkeeping

This section specifies which documents and records an FDIC-supervised IDI engaged in retail forex transactions must retain for examination by the FDIC. This section also prescribes document maintenance standards.

Section 349.8—Capital Requirements

This section requires that an FDIC-supervised IDI wishing to engage in retail forex transactions must be "well capitalized" as defined in the FDIC's prompt corrective action regulation or the FDIC-supervised IDI obtain an exemption from the FDIC. This rule does not amend any of the FDIC's prompt corrective action regulation or capital regulation.

Section 349.9—Margin Requirements

Like the CFTC's retail forex rule, subsection (a) requires an FDIC-supervised IDI that engages in covered retail forex transactions to require margin from the retail forex customer equal to at least 2 percent of the notional value of the retail forex transaction if the transaction is in a major currency pair, and at least 5 percent of the notional value of the retail forex transaction otherwise. Subsection (b) specifies the acceptable forms of margin that customers may post. Subsection (c) requires an FDIC-supervised IDI to hold customer margin in a separate account. Subsection (d) requires a daily mark-to-market and liquidation if margin requirements are unsatisfied. Subsection (e) prohibits cross-collateralization or set-off of a retail forex customer's losses against any asset of the retail forex customer held with the FDIC-supervised IDI other than money or property given as margin.[14] The restriction in subsection (e) is not in the CFTC's retail forex regulation;

[14] Banks may seek recovery of losses that exceed posted margin, but not directly attach deposits or other assets of the customer held by the bank or by any affiliated organization.

the same provision is, however, in the OCC's proposed rule and reflects the heightened customer protections provided for banking customers.

Section 349.10—Required reporting to customers

This section would require an FDIC-supervised IDI engaging in retail forex transactions to provide each retail forex customer a monthly statement and confirmation statements.

Section 349.11—Unlawful Representations

This section prohibits an FDIC-supervised IDI and its institutional-affiliated parties from representing that the Federal government, the FDIC, or any other Federal agency has sponsored, recommended, or approved retail forex transactions or products in any way. This section also prohibits an FDIC-supervised IDI from implying or representing that it will guarantee against or limit retail forex customer losses or not collect margin. This section would not prohibit an FDIC-supervised IDI from sharing in a loss resulting from error or mishandling of an order.

Section 349.12—Authorization to Trade

This section requires an FDIC-supervised IDI to have specific authorization from the customer before effecting a retail forex transaction.

Section 349.13—Trading and Operational Standards

This section largely follows the trading and operational standards of the CFTC's retail forex rules, which were developed to prevent some of the deceptive or unfair practices identified by the CFTC and the National Futures Association.

Under subsection (a), an FDIC-supervised IDI engaging in retail forex transactions is required to establish and enforce internal rules, procedures and controls.

Subsection (b) prohibits an FDIC-supervised IDI engaging in retail forex transactions from disclosing that it holds another person's order unless disclosure is necessary for execution or is made at the FDIC's request.

Subsection (c) would ensure that institution-affiliated parties of another retail forex counterparty do not open accounts with an FDIC-supervised IDI without the knowledge and authorization of the other retail forex counterparty.

Subsection (d) ensures that institution-affiliated parties of an FDIC-supervised IDI do not open accounts with other retail forex counterparties without the knowledge and authorization of the FDIC-supervised IDI.

Subsection (e) prohibits an FDIC-supervised IDI engaging in retail forex transactions from: (1) entering a retail forex transaction to be executed at a price that is not at or near prices at which other retail forex customers have executed materially similar transactions with the FDIC-supervised IDI during the same time period; (2) changing prices after confirmation; (3) providing a retail forex customer with a new bid price that is higher (or lower) than previously provided without providing a new ask price that is similarly higher (or lower) as well; and (4) establishing a new position for a retail forex customer (except to offset an existing position) if the FDIC-supervised IDI holds one or more outstanding orders of other retail forex customers for the same currency pair at a comparable price.

Section 349.14—Supervision

This section imposes on an FDIC-supervised IDI, and its agents, officers, and employees a duty to supervise subordinates with responsibility for retail forex transactions to ensure compliance with the Proposed Rule.

Section 349.15—Notice of Transfers

This section describes the requirements for transferring a retail forex account other than a transfer in connection with the receivership or conservatorship under the Federal Deposit Insurance Act. Generally, an FDIC-supervised IDI must provide retail forex customers 30 days' prior notice before transferring or assigning their account. Affected customers may then instruct the FDIC-supervised IDI to transfer the account to an institution of their choosing or liquidate the account. An FDIC-supervised IDI that is the transferee of retail forex accounts must generally provide the transferred customers with the risk disclosure statement of proposed § 349.6 and obtain each affected customer's written acknowledgement within 60 days.

Section 349.16—Customer Dispute Resolution

This section would prohibit an FDIC-supervised IDI from entering 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 the claim or grievance to any settlement procedure.

This provision differs from the applicable CFTC dispute settlement procedures, which permit predispute settlement procedures under certain conditions.[15] The substance of the CFTC dispute settlement resolution regulation, however, dates back to August 10, 2001. Since that time, concerns about predispute settlement resolution agreements have emerged. Congress addressed these concerns in seven provisions in the Dodd-Frank Act

[15] 17 CFR 166.5. The CFTC's regulation permits predispute dispute settlement agreements with a customer with certain restrictions such as that signing the agreement must not be made a condition for the customer to utilize the services offered by the CFTC registrant.

that prohibit the use of predispute arbitration provisions.[16] In light of this strong demonstration of a Congressional intent to prohibit such agreements, the FDIC is proposing, pursuant to its authority to adopt "such other standards or requirements as [it] shall determine to be necessary," to prohibit a FDIC-supervised IDI from entering into a predispute settlement dispute resolution agreement with a retail forex customer.

CONCLUSION

For the reasons set forth above, staff recommends that the Board of Directors adopt and authorize publication in the Federal Register the attached Notice of Proposed Rulemaking.

[16] See Dodd-Frank Act section 748 (amending CEA section 23(n)(2)) to provide: "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."); section 921(a) (adding similar provisions to section 15o to the Securities Exchange Act of 1934 and section 205(f) to the Investment Advisers Act of 1940); section 922(c) (adding a similar provision to 18 U.S.C. 1514A, which provides employee protections, including a right to a jury trial to enforce such protections, to employees of publicly registered companies and nationally recognized statistical rating organizations); section 1028(requiring the Consumer Financial Protection Bureau (CFPB) to conduct a study and report to Congress on the use of predispute arbitration agreements "between covered persons and consumers in connection with the offering or providing of consumer financial products or services" and giving the CFPB authority to adopt regulations prohibiting such agreements; section 1057(d) (prohibiting predispute arbitration agreements that affect the employee protection rights of a person that is employed by an entity subject to CFPB regulation; and section 1414 (amending section 129C of the Truth in Lending Act to prohibit predispute arbitration agreements with respect to residential mortgage loans and home equity loans).