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By Electronic Mail

May 23, 2011

Mr. John Walsh
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
250 E Street SW
Washington DC 20219

Re: Retail Foreign Exchange Transactions, Docket ID OCC-2011-0007
76 Fed.Reg. 22633 (April 22, 2011)

Dear Mr. Walsh:

Citibank, N.A., a national banking association ("CBNA"), is pleased to submit these comments on the Office of the Comptroller of the Currency's ("OCC's") proposed rules authorizing national banks, federal branches or agencies of foreign banks and their operating subsidiaries to engage in foreign exchange ("forex") transactions with retail customers.[1] For the past several years, CBNA, through its CitiFX Pro business, has acted as a counterparty in over-the-counter forex transactions with retail customers. This experience informs our comments below. Subject to these comments, CBNA supports the proposed rules and believes they set forth a workable regulatory regime for retail forex transactions by national banks.

NDIP Policy Statement

The OCC notes that it would expect national banks engaging in retail forex transactions to comply with the Interagency Statement on Retail Sales of Nondeposit Investment Products ("NDIP Policy Statement") to the extent the requirements of the policy statement do not conflict with the proposed rules. The OCC asks whether the proposed rules create issues concerning application of the NDIP Policy Statement to retail forex transactions.[2]

CBNA respectfully disagrees with the OCC's suggestion that the NDIP Policy Statement should be applicable to retail forex transactions in addition to the detailed and specific requirements of the proposed regulations. As the OCC explains, the proposed rules are

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1 Retail customers are defined to mean customers that do not meet the definition of an "eligible contract participant" as defined in section 1a(18) of the Commodity Exchange Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

2 76 Fed.Reg. 22633, 22634 (April 22, 2011).

modeled after the rules that the Commodity Futures Trading Commission ("CFTC") promulgated in September 2010 and are intended to promote consistent treatment of retail forex transactions offered by counterparties described by what is now section 2(c)(2)(B) of the Commodity Exchange Act. As such, we submit that the proposed rules standing alone are sufficiently comprehensive and robust to protect retail customers. Requiring national banks to comply as well with the NDIP Policy Statement risks unnecessary confusion and ambiguity. The Dodd Frank Act requires a clear and consistent regulatory framework across all providers of retail forex that is specific and comprehensive as to the covered type of transactions and customers. Applying an additional overly of regulation beyond that applicable to CFTC-supervised entities creates potential disadvantages for national bank customers and inconsistent retail forex transaction frameworks.

Alternatively, if the OCC continues to believe that the proposed rules are not sufficient, notwithstanding the inconsistencies created, then we would respectfully suggest that the OCC could eliminate confusion by identifying any requirements or concepts from the NDIP Policy Statement that the OCC believes are required to make the proposed rules more complete, and consider including those requirements in final rules. In that way, the entire set of retail forex transaction rules would be codified in one place and national banks would be required to comply with one comprehensive set of rules.

Proposed Rule 48.1-Authority, purpose and scope

The OCC asks whether the proposed rules should apply to national banks' foreign branches conducting retail forex transactions. CBNA strongly believes that the proposed rules should not apply to forex transactions entered into by non-U.S. branches of national banks with non-U.S. residents.[3] There is no U.S. policy interest in applying U.S. consumer protection rules to transactions with non-U.S. residents conducted by non-US branches. Those transactions will be conducted subject to local regulatory requirements which generally establish consumer protection standards and which may be inconsistent with the proposed rules. The non-U.S. branches of national banks would be placed at a competitive disadvantage if they were required to comply with duplicative, and conflicting, rules to which their foreign competitors would not be subject. In addition, generally, retail/consumer protection measures, such as the proposed regulations, do not apply to transactions effected solely outside of the U.S.. To do so here would constitute a significant and unwarranted break with precedent.[4] Customers of the

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[3] CBNA does not believe that the proposed rules are intended to or would apply to activities of non-U.S. subsidiaries or affiliates of national banks dealing with non-U.S. residents.

[4] *See, e.g.,* Part 40 of the OCC's Rules (Privacy of Consumer Financial Information), 12 C.F.R. § 40.1(b), "This part applies to United States offices of entities for which the Office of the Comptroller of the Currency has primary supervisory authority."; Official Staff Commentary to Regulation M (Consumer Leasing), 12 C.F.R. §213.11, "[Regulation M] does not apply to a foreign branch of a U.S. bank"; Regulation Z (Truth in Lending), Official Staff Commentary, 12 C.F.R. §226.1(c), "*Coverage.* 1. *Foreign applicability.* [Regulation Z]

non-US branches do not have an expectation of receiving the benefits of U.S. consumer protection provisions, and look instead to protections afforded under the local jurisdiction's relevant rules.

Proposed Rule 48.2-Definitions

CBNA generally supports the proposed definition of a "retail forex transaction" in proposed Rule 48.2. However, we strongly believe that the transactions subject to the proposed rules should be limited to those off-exchange futures and "Zelener-like" transactions[5] that are the focus of §742(c)(2) of the Dodd-Frank Act. In particular, we urge the OCC to clarify that forex forward transactions that contemplate an actual exchange of currencies at maturity would not be covered, even if entered into by individuals or other customers that may not meet the test of "commercial entity . . . in connection with its line of business." CBNA believes the test for transactions that should be covered by the rule should be whether a transaction is leveraged or margined, does not normally result in a delivery or exchange of currencies at maturity, and is of a type typically used to gain speculative exposure to the forex markets. Transactions that convert or exchange actual currencies for any commercial or investment purpose are a traditional product offered by national banks, do not raise the customer protection issues associated with futures or "Zelener-like" transactions, and should not be covered.

We also request confirmation that bank demand or time deposit accounts and other existing banking products are outside the scope of the rule even if the product includes a feature that provides for some exposure to forex rates. For example, national banks (including their foreign branches) offer accounts that may allow the account holder to receive repayment in a currency other than the base currency of the deposit, or receive a return based on alternate currencies or the relative rates of two or more currencies. Banking products are specifically excluded from the scope of the Dodd-Frank Act,[6] and should continue to be regulated as

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does not apply to a foreign branch of a U.S. bank when the foreign branch extends credit to a U.S. citizen residing or visiting abroad or to a foreign national abroad."; Regulation DD (Truth in Savings), Official Staff Interpretation, 12 C.F.R. §230.1(c), "*Coverage* 1. *Foreign applicability.* Regulation DD applies to all depository institutions, except credit unions, that offer deposit accounts to residents (including resident aliens) of any state [meaning any state, the District of Columbia, the commonwealth of Puerto Rico, and any territory or possession of the United States]. Accounts held in an institution located in a state are covered, even if funds are transferred periodically to a location outside the United States. Accounts held in an institution located outside the United States are not covered, even if held by a U.S. resident."

5 *See C.F.T.C. v. Zelener*, 373 F.3rd 861 (7th Cir. 2004), and discussion at p. 22635 of the proposing release, 76 Fed. Reg. at 22635.

6 Dodd-Frank Act, § 742.

banking products, or, as appropriate, nondeposit investment products, and not as retail forex transactions, even if they may include embedded exposure to forex rates.

Proposed Rule 48.4-Supervisory non-objection. CBNA supports the provisions of proposed Rule 48.4, which would allow national banks that are currently engaged in forex transactions with retail customers to continue to conduct that business for a period of six months, provided the bank files a request for supervisory non-objection within 30 days after the effective date of final rules.

Proposed Rule 48.5-Application and closing out of offsetting long and short positions. CBNA agrees that, in general, any new customer positions should be applied against and close out the customer's oldest offsetting positions. However, we believe there are limited circumstances in which it would not be in the customer's best interest to apply an automatic close-out rule. Specifically, a customer should be permitted to provide instructions with respect to the manner in which the customer's retail forex transaction are offset when: (i) the customer maintains separate accounts managed by different advisors; (ii) the customer maintains separate accounts using different trading strategies; or (iii) the customer employs different trading strategies in one account and ties certain orders to risk-manage that exposure.[7]

We also ask the OCC to confirm that the customer's instruction can be either written or oral, and can be given on a blanket basis and need not be given separately for each pair of orders.

Proposed Rule 48.6-Disclosure. CBNA agrees that customers should be provided a robust and comprehensive risk disclosure statement. However, certain statements in the mandated disclosure statement included in the proposed rules are unclear. Further, we question the accuracy and usefulness of several of the prescribed disclosures, and believe that additional topics may be appropriate for inclusion.

At a high level, we believe that the text of the proposed risk disclosure statement could better serve customers if it were shorter, more direct, and less redundant. We would be pleased to work with OCC staff on specific suggestions. In addition, we are particularly concerned about the prescribed disclosure regarding customer losses and a bank's ability to apply other assets held by the bank to recoup such losses. The statement begins by advising the customer:

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7 For example, a customer may hold a long EUR/USD position with an attached stop-loss order for one strategy (*e.g.*, a longer term strategy) and short EUR/USD position with an attached limit order for another strategy (*e.g.*, a shorter term strategy). Under the proposed rule, the bank would be required to either: (i) cancel the orders which the customer had specifically authorized, or (ii) maintain open orders which are no longer related to the positions that the customer held, since the long and short position would have netted. The forced cancellation of orders by the bank would appear to violate proposed Rule 48.12, which does not allow the bank to effect a customer transaction unless specifically authorized.

> "[Y]ou can rapidly lose all funds that you ***give*** the national bank as margin for such trading and you may lose more than you ***pledge*** as margin. Further, you may lose funds in other accounts that you maintain at a national bank or its affiliates ***if you pledge*** those assets as collateral for your retail forex obligations. Your national bank is prohibited from applying losses that you experience on retail forex transactions on any funds or property other than funds or property that you have given or pledged as margin for retail forex transactions." [Emphasis supplied.]

The prescribed disclosure attempts to provide too much information in too few words and, consequently, is confusing. Importantly, the disclosure appears to conflict directly with the provisions of proposed Rule 48.9(e), which prohibits a national bank from "apply[ing] a retail forex customer's losses on retail forex transactions against any funds or other asset of the customer other than margin in the retail forex customer's separate margin account." This provision does not appear to allow a customer to pledge other assets to support the customer's forex transactions. This is just one example where the rule and disclosure require additional clarity.

Aside from the issues of inconsistency, in our view, the customer should be able to pledge assets in addition to those that are directly in the customer's margin account, provided that such assets are specifically pledged as margin toward forex transactions. As an example, a general right of setoff on deposit accounts would not be effective (other than potentially in the circumstances discussed in the next paragraph), but the customer could specifically designate a deposit account as containing margin for its forex trades, in addition to what is actually in the customer's "separate margin account."

Moreover, the proposed disclosure language may lead a customer to assume that a bank's recourse in the event the customer incurs losses is limited to the balance in the customer's forex margin account. We understand that this is not the case, and note that proposed rule 48.16 specifically governs pre-dispute arbitration provisions. Therefore, even if a customer does not specifically pledge additional assets beyond the customer's "separate" margin account, a bank should have the right of an unsecured creditor to recover the payable owed by the customer if the margin account is not sufficient to cover losses incurred in a client default. The disclosure statement should confirm that a bank retains the ability to seek recovery of losses from a customer's non-margin account assets through an appropriate dispute resolution forum.

We also submit that it is inaccurate to state in paragraph (1) of the disclosure statement that "when you lose money your national bank is making money." As a general matter, we would expect national banks (and it is CBNA's current practice) to immediately hedge retail forex transactions in the interbank forex market or net them with other customer transactions and manage the net exposure. As a result, the bank would neither profit nor lose from price fluctuations affecting the customer's forex transactions. The bank would earn its profit from a spread (e.g., a mark-up or mark down) on the transactions or commissions, and it would be more accurate to inform customers that the bank may or does mark-up/down transactions or apply commission rates to transactions that will result in income to the bank.

Further down in the disclosure, paragraphs (5), (6) and (7) of the prescribed disclosure statement refer to "This transaction." The apparent reference to a specific transaction could be misleading. We suggest that paragraphs (5) and (6) be revised to begin: "Your retail forex margin account". We suggest that paragraph (7) be revised to begin: "Retail forex transactions are." Although we believe the suggested changes to paragraphs (5) and (6) make the statements more clear, we are still uncertain about the scope and meaning of the statement in paragraph (5) that transactions are not insured by the Federal Deposit Insurance Corporation and the statement in paragraph (6) that the transaction is not a deposit. While we agree that retail forex transactions are not deposits and that customer losses on transactions themselves are not insured, we are not aware of any reason why customer margin balances cannot be held by a national bank in a manner that would qualify for FDIC insurance coverage. CBNA will address further comments on this topic to the FDIC in response to their proposed retail forex rules (*see* 76 Fed. Reg. 28358 (May 17, 2011)).

CBNA suggests that the proposed requirement in section 48.6(e) to disclose the percentage of profitable and non-profitable accounts is not useful information to most customers who are likely to trade forex under the rules. There may be many reasons for trading results (including the expertise of the customers themselves) and the implication through such disclosure that a greater ratio of profitable accounts makes one national bank "more attractive" than another is misleading. We suggest that a better and more meaningful disclosure would alert customers to the risk of loss, the fact that leverage will magnify the amount of losses or gains, and the fact that for trades to be profitable for the customer, market gains must exceed the amount of spreads and commissions charged on each trade. We believe this would serve to educate the customer in a more meaningful manner.

We ask the OCC to clarify the type of information that would be required to be disclosed under the proposed requirement that the bank disclose all fees in section 48.6(f). Although we agree that disclosure of fee sources and costs to the customer is appropriate, we believe that in the context of a standard, uniform risk disclosure statement banks should disclose the means by which it earns revenue, *e.g.*, bid/ask spreads, commissions, rollover charges, interest income. However, it is impractical to state numerically what that spread is, since it may vary from time to time based on market conditions and changing hedging costs. Moreover, banks should not be required to disclose income received from hedging of customer positions or other income streams not charged to the customer.

We also ask the OCC to confirm that the requirement that the mandated form or risk disclosure be provided in a separate document does not preclude banks from appending the disclosure statement to the account opening agreement or forms, and that a single signature by the customer on a combined account agreement and disclosure form can be used as long as the customer is directed to and acknowledges the risk disclosure statement immediately prior to the signature line.[8]

Finally, we ask the OCC to confirm that banks may add additional topics to the disclosure statement. Banks should be able to include additional language following the mandated disclosure language and present it in a single disclosure document.

Proposed Rule 48.9-Margin requirements. CBNA does not object to the proposed 2 percent (for major currencies) and 5 percent (for non-major currencies) minimum margin requirements. However, CBNA requests the OCC to confirm that the margin requirements apply to the initial margin that a national bank would collect to establish a customer forex position and not to a maintenance margin level. Banks should be able to set maintenance margin levels as a matter of the bank's credit and risk policies, and in a manner that balances protecting customers from a forced close-out of their positions as soon as an adverse market move erodes margin under the 2 or 5 percent minimum level with the need to promptly collect margin and close out positions when a customer fails to meet a margin call. We note that the proposed rules appear to contemplate such an interpretation in that proposed section 48.9(d) refers to positions being marked daily and brought above the 2 and 5 percent minimum. However, in the context of a daily margin mark, customers should have some reasonable time to meet margin calls before they are deemed to have defaulted and face a forced liquidation of their positions.

Further, CBNA agrees that national banks should be required to mark customer positions and margin to market not less that once a day. However, we believe that final rules should permit banks to mark to market on an intra-day basis if their systems and customer agreements permit.

CBNA also requests confirmation that the proposed requirement that a bank hold "each retail forex customer's . . . margin in a separate account" does not require the establishment of individual margin deposit accounts for each customer. Separate margin accounts would add unnecessary costs and operational burdens, with the costs ultimately passed on to customers. For operational convenience, the bank should be able to hold customer margin in an omnibus/commingled account for all retail forex customers, *provided* that the bank maintains records of each customer's individual margin balance. We believe the customers' interests are equally well protected through such an arrangement.

Proposed Rule 48.10: Required reporting to customers. We strongly support mandating that retail forex customers receive transaction confirmations and regular access to information about their open trades, positions, margin balances, and other pertinent information.

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[8] A similar practice is permitted under CFTC rules that mandate distribution of a standard risk disclosure statement to futures customers. See 17 C.F.R. §1.55(d)(1).

However, we are concerned that the wording of the proposed rules does not adequately reflect the fact that most banks will offer retail forex transactions over an electronic trading portal and customers will have ready access to information through a web site or other electronic interface. Initially, we recommend that the proposed rules be clarified to specifically authorize banks to provide confirmations and other account information electronically. In this regard, we refer the OCC to Commodity Futures Trading Commission Rule 1.33(g), which establishes the terms and conditions pursuant to which registrants may provide customer statements electronically. In addition, we would urge the OCC to consider allowing banks to dispense with formal month-end statements provided that the bank affords customers real-time access to account information that tracks what would otherwise be reflected on a month-end statement. We believe customers will be better served, and have access to more information in a more timely manner, if information is available on-line on a continuous basis rather than pushed out to customers on a once-a-month basis.

Section 48.12-Authorization to Trade. We believe the requirement for written authorization would be burdensome and would be generally detrimental to the customer's interest. There may be circumstances in which written authorization is simply impracticable. For example, a customer's technology infrastructure may not be working properly, and the customer may need to convey his instructions orally in order to effect timely execution. If the OCC concludes that a written authorization is nonetheless required, we ask the OCC to confirm that a separate authorization is not required for each transaction. Rather, the rules should permit a customer to provide a general authorization coupled with an authorization to provide oral instructions.

Section 48.13-Trading and operational standards. We believe several aspects of the proposed trading and operational standards should be clarified. In particular, we ask that the OCC make clear that the prohibition against front running customer orders applies only when the person entering orders for the bank's account or the account of related persons has knowledge of unexecuted retail customer orders. That is, an information barrier between the retail forex order book and the bank's non-retail forex trading desk(s) should be sufficient for compliance. National banks are typically large organizations that operate through multiple business lines and geographic locations, and typically transact in the forex markets continuously to hedge other activity of the bank or for other permissible reasons. It is impracticable and unnecessary to interpret the rules to prohibit bank personnel generally from placing forex trades ahead of retail forex orders if they are not part of the bank's retail forex business or do not otherwise have access to information about pending retail customer forex transactions

While we do not object to the requirement that banks have policies and procedures in place to control opening of accounts for affiliated persons of other retail forex counterparties, we ask the OCC to confirm that the bank can rely on a representation of potential customers that they are not affiliated with a retail forex counterparty. Further, we also request confirmation that this restriction is limited to employees of banks and CFTC-registered firms that offer retail forex, and, in the case of banks, only employees of the retail forex business and not any employee of a bank that offers retail forex.

Finally, the proposed rules would prohibit banks from 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 establishing a new position for a retail forex customer (except to offset an existing position), if the national bank holds one or more outstanding orders of other retail forex customers for the same currency pair at a comparable price. We believe that provision on new bid/offer prices is overly broad and should permit new bids or offers to reflect updated spreads. In the alternative, the OCC may wish to prohibit "re-quoting" and require that, in the event an order is not confirmed, the customer must submit a new order at the then-currently displayed price. Also, we do not understand the rationale for prohibiting a bank from establishing a new position for a retail forex customer (except to offset an existing position), if the national bank holds one or more outstanding orders of other retail forex customers for the same currency pair at a comparable price, and request clarification of the scope and purpose of the proposal (which appears intended to create a form of transaction priority).

Conclusion

CBNA appreciates the opportunity to submit these comments and stands ready to work with OCC and other regulators to develop and implement regulations that will foster effective risk disclosure, supervision, and oversight of retail forex business done by national banks.

Sincerely,

Citibank, N.A.

By: ____________________

Jeff Feig
Managing Director