

Board of Governors of the Federal Reserve System

Regulation EE Netting Eligibility for Financial Institutions

12 CFR 231; as amended effective March 29, 2021



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Section

- 231.1 Authority, purpose, and scope
- 231.2 Definitions
- 231.3 Qualification as a financial institution

AUTHORITY: 12 U.S.C. 4402(1)(B) and 4402(9).

of an entity in resolution. A bridge institution could include a bridge depository institution or a bridge financial company organized by the Federal Deposit Insurance Corporation in accordance with 12 U.S.C. 1821(n) or 5390(h), respectively, or a similar entity organized under foreign law.

9-1475

SECTION 231.1—Authority, Purpose, and Scope

(a) *Authority*. This part (Regulation EE; 12 CFR 231) is issued by the Board of Governors of the Federal Reserve System under the authority of sections 402(1)(B) and 402(9) of the Federal Deposit Insurance Corporation Improvement Act of 1991 (12 U.S.C. 4402(1)(B) and 4402(9)).

(b) *Purpose and scope*. The purpose of the act and this part is to enhance efficiency and reduce systemic risk in the financial markets. This part expands the act's definition of "financial institution" to allow more financial market participants to avail themselves of the netting provisions set forth in sections 401-407 of the act (12 U.S.C. 4401-4407). This part does not affect the status of those financial institutions specifically defined in the act.

(d) *Financial contract* means a qualified financial contract as defined in section 11(e)(8)(D) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D)), as amended, except that a forward contract includes a contract with a maturity date two days or less after the date the contract is entered into (i.e., a "spot" contract).

9-1477

(e) *Financial market* means a market for a financial contract.

(f) *Gross mark-to-market positions* in one or more financial contracts means the sum of the absolute values of positions in those contracts, adjusted to reflect the market values of those positions in accordance with the methods used by the parties to each contract to value the contract.

(g) *Person* means any legal entity, foreign or domestic, including a corporation, unincorporated company, partnership, government unit or instrumentality, trust, natural person, or any other entity or organization.

9-1476

SECTION 231.2—Definitions

As used in this part, unless the context requires otherwise:

(a) *Act* means the Federal Deposit Insurance Corporation Improvement Act of 1991 (Pub. L. 102-242, 105 Stat. 2236), as amended.

(b) *Affiliate*, with respect to a person, means any other person that controls, is controlled by, or is under common control with the person.

(c) *Bridge institution* means a legal entity that has been established by a governmental authority to take over, transfer, or continue operating critical functions and viable operations

9-1478

SECTION 231.3—Qualification as a Financial Institution

(a) A person qualifies as a financial institution for purposes of sections 401-407 of the Act if it represents, orally or in writing, that it will engage in financial contracts as a counterparty on both sides of one or more financial markets and either—

- (1) had one or more financial contracts of a total gross dollar value of at least \$1 billion in notional principal amount outstanding at such time or on any day during the previ-

ous 15-month period with counterparties that are not its affiliates; or

(2) had total gross mark-to-market positions of at least \$100 million (aggregated across counterparties) in one or more financial contracts at such time or on any day during the previous 15-month period with counterparties that are not its affiliates.

(b) After two or more persons consolidate, such as through a merger or acquisition, the surviving person meets the quantitative thresholds under paragraphs (a)(1) and (a)(2) if, on the same, single calendar day during the previous 15-month period, the aggregate financial contracts of the consolidated persons would have met such quantitative thresholds.

9-1479

(c) If a person qualifies as a financial institution under paragraph (a), that person will be considered a financial institution for the purposes of any contract entered into during the period it qualifies, even if the person subsequently fails to qualify.

(d) If a person qualifies as a financial institution under paragraph (a) on March 7, 1994, that person will be considered a financial institution for the purposes of any outstanding contract entered into prior to March 7, 1994.

(e) A person qualifies as a financial institution for purposes of sections 401-407 of the Act if it is—

(1) a swap dealer or major swap participant registered with the Commodity Futures Trading Commission pursuant to section 4s of the Commodity Exchange Act (7 U.S.C. 6s);

(2) a security-based swap dealer or major security-based swap participant registered with the U.S. Securities and Exchange

Commission pursuant to section 15F of the Securities Exchange Act of 1934 (15 U.S.C. 78o-10);

(3) a derivatives clearing organization registered with the Commodity Futures Trading Commission pursuant to section 5b(a) of the Commodity Exchange Act (7 U.S.C. 7a-1(a)) or a derivatives clearing organization that the Commodity Futures Trading Commission has exempted from registration by rule or order pursuant to section 5b(h) of the Commodity Exchange Act (7 U.S.C. 7a-1(h));

(4) a clearing agency registered with the U.S. Securities and Exchange Commission pursuant to section 17A(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1(b)) or a clearing agency that the U.S. Securities and Exchange Commission has exempted from registration by rule or order pursuant to section 17A(k) of the Securities Exchange Act of 1934 (15 U.S.C. 78q-1(k));

(5) a financial market utility that the Financial Stability Oversight Council has designated as, or as likely to become, systemically important pursuant to 12 U.S.C. 5463;

(6) a qualifying central counterparty under 12 CFR 217.2;

(7) a nonbank financial company that the Financial Stability Oversight Council has determined shall be supervised by the Board and subject to prudential standards, pursuant to 12 U.S.C. 5323;

(8) a foreign bank as defined in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101), including a foreign bridge bank;

(9) a bridge institution established for the purpose of resolving a financial institution;

(10) a Federal Reserve Bank or a foreign central bank; or

(11) the Bank for International Settlements.

Federal Deposit Insurance Corporation
Improvement Act of 1991
Title IV, Subtitle A, Chapter 1

12 USC 4401 et seq.; 105 Stat. 2371; Pub. L. 102-242 (December 19, 1991)

9-1500

TITLE IV, SUBTITLE A, CHAPTER
1—BILATERAL AND CLEARING
ORGANIZATION NETTING

SECTION 401—Findings and Purpose

The Congress finds that—

- (1) many financial institutions engage daily in thousands of transactions with other financial institutions directly and through clearing organizations;
- (2) the efficient processing of such transactions is essential to a smoothly functioning economy;
- (3) such transactions can be processed most efficiently if, consistent with applicable contractual terms, obligations among financial institutions are netted;
- (4) such netting procedures would reduce the systemic risk within the banking system and financial markets; and
- (5) the effectiveness of such netting procedures can be assured only if they are recognized as valid and legally binding in the event of the closing of a financial institution participating in the netting procedures.

[12 USC 4401.]

9-1501

SECTION 402—Definitions

For purposes of this chapter—

- (1) The term “broker or dealer” means—
 - (A) any company that is registered or licensed under Federal or State law to engage in the business of brokering, underwriting, or dealing in securities in the United States; and
 - (B) to the extent consistent with this title, as determined by the Board of Governors of the Federal Reserve System, any company that is an affiliate of a company described in subparagraph (A) and that is engaged in the business of entering into netting contracts.

(2) The term “clearing organization” means a clearinghouse, clearing association, clearing corporation, or similar organization—

- (A) that provides clearing, netting, or settlement services for its members and—
 - (i) in which all members other than the clearing organization itself are financial institutions or other clearing organizations, or
 - (ii) which is registered as a clearing agency under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq) or is exempt from such registration by order of the Securities and Exchange Commission; or
- (B) that is registered as a derivatives clearing organization under section 7a-1 of title 7, that has been granted an exemption under section 6(c)(1) of title 7, or that is a multilateral clearing organization (as defined in section 4421 of this title).

9-1502

(3) The term “covered clearing obligation” means an obligation of a member of a clearing organization to make payment to another member of a clearing organization, subject to a netting contract.

(4) The term “covered contractual payment entitlement” means—

- (A) an entitlement of a financial institution to receive a payment, subject to a netting contract from another financial institution; and
- (B) an entitlement of a member of a clearing organization to receive payment, subject to a netting contract, from another member of a clearing organization of a covered clearing obligation.

9-1503

(5) The term “covered contractual payment obligation” means—

- (A) an obligation of a financial institution to make payment, subject to a net-

ting contract to another financial institution; and

(B) a covered clearing obligation.

(6) The term “depository institution” means—

(A) a depository institution as defined in section 19(b)(1)(A) of the Federal Reserve Act (other than clause (vii));

(B) an uninsured national bank or an uninsured State bank that is a member of the Federal Reserve System, if the national bank or State member bank is not eligible to make application to become an insured bank under section 5 of the Federal Deposit Insurance Act;

(C) a branch or agency of a foreign bank, a foreign bank and any branch or agency of the foreign bank, or the foreign bank that established the branch or agency, as those terms are defined in section 1(b) of the International Banking Act of 1978;

(D) a corporation chartered under section 25(A) of the Federal Reserve Act; or

(E) a corporation having an agreement or undertaking with the Board of Governors of the Federal Reserve System under section 25 of the Federal Reserve Act.

9-1504

(7) The term “failed financial institution” means a financial institution that—

(A) fails to satisfy a covered contractual payment obligation when due;

(B) has commenced or had commenced against it insolvency, liquidation, reorganization, receivership (including the appointment of a receiver), conservatorship, or similar proceedings; or

(C) has generally ceased to meet its obligations when due.

(8) The term “failed member” means any member that—

(A) fails to satisfy a covered clearing obligation when due,

(B) has commenced or had commenced against it insolvency, liquidation, reorganization, receivership (including the appointment of a receiver), conservatorship, or similar proceedings, or

(C) has generally ceased to meet its obligations when due.

9-1505

(9) The term “financial institution” means a broker or dealer, a depository institution, a futures commission merchant, or any other institution as determined by the Board of Governors of the Federal Reserve System.

(10) The term “futures commission merchant” means a company that is registered or licensed under Federal law to engage in the business of selling futures and options in commodities.

(11) The term “member” means a member of or participant in a clearing organization, and includes the clearing organization and any other clearing organization with which such clearing organization has a netting contract.

(12) The term “net entitlement” means the amount by which the covered contractual payment entitlements of a financial institution or member exceed the covered contractual payment obligations of the institution or member after netting under a netting contract.

9-1506

(13) The term “net obligation” means the amount by which the covered contractual payment obligations of a financial institution or member exceed the covered contractual payment entitlements of the institution or member after netting under a netting contract.

(14) (A) The term “netting contract”—

(i) means a contract or agreement between 2 or more financial institutions, clearing organizations, or members that provides for netting present or future payment obligations or payment entitlements (including liquidation or close out values relating to such obligations or entitlements) among the parties to the agreement; and

(I) is governed by the laws of the United States, any State, or any political subdivision of any State and

(II) provides for netting present or future payment obligations or payment entitlements (including liquidation or close-out values relating to

the obligations or entitlements) among the parties to the agreement; and

(ii) includes the rules of a clearing organization.

(B) The term “netting contract” does not include any contract or agreement that is invalid under or precluded by Federal law.

(15) The term “payment” means a payment of United States dollars, another currency, or a composite currency, and a noncash delivery, including a payment or delivery to liquidate an unmatured obligation.

[12 USC 4402. As amended by acts of Oct. 28, 1992 (4087); Dec. 21, 2000 (114 Stat. 2763A-391, 411); and April 20, 2005 (119 Stat. 167).]

9-1507

SECTION 403—Bilateral Netting

(a) *General rule.* Notwithstanding any other provision of State or Federal law (other than section 11(e) of the Federal Deposit Insurance Act, section 210(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, section 1367 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4617(d)), section 207(c) of the Federal Credit Union Act, or any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements between any 2 financial institutions shall be terminated, liquidated, accelerated, and netted in accordance with, and subject to the conditions of, the terms of any applicable netting contract (except as provided in section 561(b)(2) of title 11, United States Code).

(b) *Limitation on obligation to make payment.* The only obligation, if any, of a financial institution to make payment with respect to covered contractual payment obligations to another financial institution shall be equal to its net obligation to such other financial institution, and no such obligation shall exist if there is no net obligation.

9-1508

(c) *Limitation on right to receive payment.* The only right, if any, of a financial institution to receive payments with respect to covered contractual payment entitlements from another financial institution shall be equal to its net entitlement with respect to such other financial institution, and no such right shall exist if there is no net entitlement.

(d) *Payment of net entitlement of failed financial institution.* The net entitlement of any failed financial institution, if any, shall be paid to the failed financial institution in accordance with, and subject to the conditions of, the applicable netting contract.

(e) *Effectiveness notwithstanding status as financial institution.* This section shall be given effect notwithstanding that a financial institution is a failed financial institution.

(f) *Enforceability of security agreements.* The provisions of any security agreement or arrangement or other credit enhancement related to one or more netting contracts between any 2 financial institutions shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of title 11, United States Code), and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than section 11(e) of the Federal Deposit Insurance Act, section 207(c) of the Federal Credit Union Act, and section 5(b)(2) of the Securities Investor Protection Act of 1970).

[12 USC 4403. As amended by acts of April 20, 2005 (119 Stat. 168); Dec. 12, 2006 (120 Stat. 2695); and July 21, 2010 (124 Stat. 1514).]

9-1509

SECTION 404—Clearing Organization Netting

(a) *General rule.* Notwithstanding any other provision of State or Federal law (other than section 11(e) of the Federal Deposit Insurance Act, section 207(c) of the Federal Credit Union Act, and any order authorized under section 5(b)(2) of the Securities Investor Protection Act of 1970), the covered contractual payment obligations and the covered contractual payment entitlements of a member of a

clearing organization to and from all other members of a clearing organization shall be terminated, liquidated, accelerated, and netted in accordance with and subject to the conditions of any applicable netting contract (except as provided in section 561(b)(2) of title 11, United States Code).

(b) *Limitation of obligation to make payment.* The only obligation, if any, of a member of a clearing organization to make payment with respect to covered contractual payment obligations arising under a single netting contract to any other member of a clearing organization shall be equal to its net obligation arising under that netting contract, and no such obligation shall exist if there is no net obligation.

9-1510

(c) *Limitation on right to receive payment.* The only right, if any, of a member of a clearing organization to receive payment with respect to a covered contractual payment entitlement arising under a single netting contract from other members of a clearing organization shall be equal to its net entitlement arising under that netting contract, and no such right shall exist if there is no net entitlement.

(d) *Entitlement of failed members.* The net entitlement, if any, of any failed member of a clearing organization shall be paid to the failed member in accordance with, and subject to the conditions of, the applicable netting contract.

(e) *Obligations of failed members.* The net obligation, if any, of any failed member of a clearing organization shall be determined in accordance with, and subject to the conditions of, the applicable netting contract.

9-1511

(f) *Limitation on claims for entitlement.* A failed member of a clearing organization shall have no recognizable claim against any member of a clearing organization for any amount based on such covered contractual payment entitlements other than its net entitlement.

(g) *Effectiveness notwithstanding status as*

member. This section shall be given effect notwithstanding that a member is a failed member.

(h) *Enforceability of security agreements.* The provisions of any security agreement or arrangement or other credit enhancement related to one or more netting contracts between any 2 members of a clearing organization shall be enforceable in accordance with their terms (except as provided in section 561(b)(2) of title 11, United States Code), and shall not be stayed, avoided, or otherwise limited by any State or Federal law (other than section 11(e) of the Federal Deposit Insurance Act, section 207(c) of the Federal Credit Union Act, and section 5(b)(2) of the Securities Investor Protection Act of 1970).

[12 USC 4404. As amended by acts of April 20, 2005 (119 Stat. 168) and Dec. 12, 2006 (120 Stat. 2695).]

9-1512

SECTION 405—Preemption

No stay, injunction, avoidance, moratorium, or similar proceeding or order, whether issued or granted by a court, administrative agency, or otherwise, shall limit or delay application of otherwise enforceable netting contracts in accordance with sections 403 and 404.

[12 USC 4405.]

9-1513

SECTION 406—Relationship to Other Payments Systems

This subtitle shall have no effect by implication or otherwise on the validity or legal enforceability of a netting arrangement of any payment system which is not subject to this subtitle.

[12 USC 4406.]

9-1513.1

SECTION 407—Treatment of Contracts with Uninsured National Banks, Uninsured Federal Branches and Agencies, Certain Uninsured State Member Banks, and Edge Act Corporations

(a) *In general.* Notwithstanding any other provision of law, paragraphs (8), (9), (10), and (11) of section 11(e) of the Federal Deposit Insurance Act shall apply to an uninsured national bank or uninsured Federal branch or Federal agency, a corporation chartered under section 25A of the Federal Reserve Act, or an uninsured State member bank which operates, or operates as, a multilateral clearing organization pursuant to section 409 of this Act, except that for such purpose—

(1) any reference to the “Corporation as receiver” or “the receiver or the Corporation” shall refer to the receiver appointed by the Comptroller of the Currency in the case of an uninsured national bank or uninsured Federal branch or agency, or to the receiver appointed by the Board of Governors of the Federal Reserve System in the case of a corporation chartered under section 25A of the Federal Reserve Act or an uninsured State member bank;

(2) any reference to the “Corporation” (other than in section 11(e)(8)(D) of such Act), the “Corporation, whether acting as such or as conservator or receiver”, a “receiver” or a “conservator” shall refer to the receiver or conservator appointed by the Comptroller of the Currency in the case of an uninsured national bank or uninsured Federal branch or agency, or to the receiver or conservator appointed by the Board of Governors of the Federal Reserve System in the case of a corporation chartered under section 25A of the Federal Reserve Act or an uninsured State member bank; and

(3) any reference to an “insured depository institution” or “depository institution” shall refer to an uninsured national bank, an uninsured Federal branch or Federal agency, a corporation chartered under section 25A of the Federal Reserve Act, or an uninsured State member bank which operates, or oper-

ates as, a multilateral clearing organization pursuant to section 409 of this Act.

(b) *Liability.* The liability of a receiver or conservator of an uninsured national bank, uninsured Federal branch or agency, a corporation chartered under section 25A of the Federal Reserve Act, or an uninsured State member bank which operates, or operates as, a multilateral clearing organization pursuant to section 409 of this Act, shall be determined in the same manner and subject to the same limitations that apply to receivers and conservators of insured depository institutions under section 11(e) of the Federal Deposit Insurance Act.

(c) *Regulatory authority.*

(1) The Comptroller of the Currency in the case of an uninsured national bank or uninsured Federal branch or agency and the Board of Governors of the Federal Reserve System in the case of a corporation chartered under section 25A of the Federal Reserve Act, or an uninsured State member bank that operates, or operates as, a multilateral clearing organization pursuant to section 409 of this Act, in consultation with the Federal Deposit Insurance Corporation, may each promulgate regulations solely to implement this section.

(2) In promulgating regulations, limited solely to implementing paragraphs (8), (9), (10), and (11) of section 11(e) of the Federal Deposit Insurance Act, the Comptroller of the Currency and the Board of Governors of the Federal Reserve System each shall ensure that the regulations generally are consistent with the regulations and policies of the Federal Deposit Insurance Corporation adopted pursuant to the Federal Deposit Insurance Act.

(d) *Definitions.* For purposes of this section, the terms “Federal branch”, “Federal agency”, and “foreign bank” have the same meanings as in section 1(b) of the International Banking Act of 1978.

[12 USC 4406a. As added by act of April 20, 2005 (119 Stat. 169).]

9-1514 (50 U.S.C. App. 1 et seq.) or the International
SECTION 407A—National Emergencies Emergency Economic Powers Act (50 U.S.C.
1701 et seq.).
The provisions of this subtitle may not be
construed to limit the authority of the Presi-
dent under the Trading With the Enemy Act [12 USC 4407.]