



ADMINISTRATIVE RULES OF MONTANA

2.59.125 DEFINITIONS APPLICABLE TO DERIVATIVE TRANSACTIONS AND SECURITIES FINANCING TRANSACTIONS

The following definitions apply to rules within this subchapter:

- (1) "Bank" or "state bank" has the same meaning as "eligible state bank" in (10).
- (2) "Borrower" means:
 - (a) a person who is named as a borrower or debtor in a loan or extension of credit;
 - (b) a person to whom a bank has credit exposure arising from a derivative transaction or securities financing transaction entered by the bank; or
 - (c) any other person, including a drawer, endorser, or guarantor, who is deemed to be a borrower under the direct benefit or common enterprise tests in 12 CFR 32.5 and ARM 2.59.138 through 2.59.143.
- (3) "Contractual commitment to advance funds" means:
 - (a) a bank's obligation to:
 - (i) make payment directly or indirectly to a third person contingent upon default by a customer of the bank in performing an obligation and to make such payment in keeping with the agreed-upon terms of the customer's contract with the third person, or to make payments upon some other stated condition;
 - (ii) guarantee or act as surety for the benefit of a person;
 - (iii) advance funds under a qualifying commitment to lend, as defined in 12 CFR 32.2(t); or
 - (iv) advance funds under a standby letter of credit, as defined in 12 CFR 32.2(ee) and 12 CFR 208.24, a put, or other similar arrangement.
 - (b) The term does not include commercial letters of credit and similar instruments:
 - (i) under which the issuing bank expects the beneficiary to draw on the issuer;
 - (ii) that do not guarantee payment; and
 - (iii) that do not provide payment if a third party defaults.
- (4) "Credit derivative" means a financial contract executed under standard industry credit derivative documentation that allows one party (the protection purchaser) to transfer the credit risk of one or more exposures to another party (the protection provider).

- (5) "Derivative transaction" includes any transaction that is a contract, agreement, swap, warrant, note, or option that is based, in whole or in part, on the value of, any interest in, or any quantitative measure or the occurrence of any event relating to one or more commodities, securities, currencies, interest, or other rates, indices, or other assets. The term includes a securities financing transaction.
- (6) "Effective margining arrangement" means a master legal agreement governing derivative transactions between a bank and a counterparty that requires the counterparty to post, on a daily basis, variation margin to fully collateralize that amount of the bank's net credit exposure to the counterparty that exceeds \$25 million created by the derivative transactions covered by the agreement.
- (7) "Eligible credit derivative" means a single-name credit derivative or a standard, non-tranched index credit derivative provided that:
- (a) the derivative contract meets the requirements of an eligible guarantee as defined in (8) and has been confirmed by the protection purchaser and the protection provider;
 - (b) any assignment of the derivative contract has been confirmed by all relevant parties;
 - (c) if the credit derivative is a credit default swap, the derivative contract includes the following credit events:
 - (i) failure to pay any amount due under the terms of the reference exposure, subject to any applicable minimal payment threshold that is consistent with standard market practice and with a grace period that is closely in line with the grace period of the reference exposure; and
 - (ii) bankruptcy, insolvency, or inability of the obligor on the reference exposure to pay its debts, or its failure or admission in writing of its inability generally to pay its debts as they become due, and similar events;
 - (d) the terms and conditions dictating the manner in which the derivative contract is to be settled are incorporated into the contract;
 - (e) if the derivative contract allows for cash settlement, the contract incorporates a robust valuation process to reliably estimate loss with respect to the derivative and specifies a reasonable period for obtaining post-credit event valuations of the reference exposure;
 - (f) if the derivative contract requires the protection purchaser to transfer an exposure to the protection provider at settlement, the terms of at least one of the exposures that is permitted to be transferred under the contract provide that any required consent to transfer may not be unreasonably withheld; and
 - (g) if the credit derivative is a credit default swap, the derivative contract:
 - (i) identifies the parties responsible for determining whether a credit event has occurred;
 - (ii) specifies that the determination is not the sole responsibility of the protection provider; and
 - (iii) gives the protection purchaser the right to notify the protection provider of the occurrence of a credit event.
- (8) "Eligible guarantee" means a guarantee that:

- (a) is written and unconditional;
 - (b) covers all or a pro rata portion of all contractual payments of the obligor on the reference exposure;
 - (c) gives the beneficiary a direct claim against the protection provider;
 - (d) is not unilaterally cancelable by the protection provider for reasons other than the beneficiary's breach of contract;
 - (e) is legally enforceable against the protection provider in a jurisdiction where the protection provider has sufficient assets against which a judgment may be attached and enforced;
 - (f) requires the protection provider to make payment to the beneficiary on the occurrence of a default (as defined in the guarantee) of the obligor on the reference exposure in a timely manner without the beneficiary first having to take legal action to pursue the obligor for payment;
 - (g) does not increase the beneficiary's cost of credit protection on the guarantee in response to deterioration in the credit quality of the reference exposure; and
 - (h) is not provided by an affiliate of the bank, unless the affiliate is an insured depository institution, bank, securities broker or dealer, or insurance company that:
 - (i) does not control the bank; and
 - (ii) is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities broker-dealers, or insurance companies as applicable.
- (9) "Eligible protection provider" means:
- (a) a sovereign entity (a central government, including the U.S. government, an agency, department, ministry, or central bank);
 - (b) the Bank for International Settlements, the International Monetary Fund, the European Central Bank, the European Commission, or a multilateral development bank;
 - (c) a federal home loan bank;
 - (d) the Federal Agricultural Mortgage Corporation;
 - (e) a depository institution, as defined in section 3 of the Federal Deposit Insurance Act, 12 USC 1813(c);
 - (f) a bank holding company, as defined in section 2 of the Bank Holding Company Act, as amended, 12 USC 1841;
 - (g) a savings and loan holding company, as defined in section 10 of the Home Owners' Loan Act, 12 USC 1467a;
 - (h) a securities broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934, 15 USC 78o, et seq.;
 - (i) an insurance company that is subject to the supervision of a state insurance regulator;
 - (j) a foreign banking organization;

- (k) a non-U.S.-based securities firm or a non-U.S.-based insurance company that is subject to consolidated supervision and regulation comparable to that imposed on U.S. depository institutions, securities broker-dealers, or insurance companies; and
 - (l) a qualifying central counterparty.
- (10) "Eligible state bank" means a bank organized under Montana laws that:
- (a) is well-capitalized as defined in the prompt corrective action rules applicable to the bank; and
 - (b) has a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System in connection with the bank's most recent examination or subsequent review.
- (11) "Loans," "extensions of credit," or "obligations" have the meaning in 32-1-432, MCA, and any credit exposure determined under ARM 2.59.129 arising from a derivative transaction or a securities financing transaction.
- (a) The terms include:
- (i) a contractual commitment to advance funds;
 - (ii) a maker or endorser's obligation arising from a bank's discount of commercial paper;
 - (iii) a bank's purchase of third-party paper subject to an agreement that the seller will repurchase the paper upon default or at the end of a stated period. The amount of the bank's loan is the total unpaid balance of the paper owned by the bank less any applicable dealer reserves retained by the bank and held by the bank as collateral security. Where the seller's obligation to repurchase is limited, the bank's loan is measured by the total amount of the paper the seller may ultimately be obligated to repurchase. A bank's purchase of third-party paper without direct or indirect recourse to the seller is not a loan or extension of credit to the seller;
 - (iv) an overdraft, whether or not prearranged, but not an intraday overdraft for which payment is received before the close of business of the bank that makes the funds available;
 - (v) the sale of federal funds with a maturity of more than one business day, but not federal funds with a maturity of one day or less or federal funds sold under a continuing contract;
 - (vi) loans or extensions of credit that have been charged off on the books of the bank in whole or in part unless the loan or extension of credit is:
 - (A) unenforceable by reason of discharge in bankruptcy;
 - (B) no longer legally enforceable because of expiration of the statute of limitations or a judicial decision; or
 - (C) no longer legally enforceable for other reasons provided that the bank maintains sufficient records to demonstrate that the loan is unenforceable; and
 - (vii) a bank's purchase of securities subject to an agreement that the seller will repurchase the securities at the end of a stated period, but does not include a bank's purchase of Type I securities, as defined in (15), subject to a repurchase agreement, where the

purchasing bank has assured control over or has established its rights to the Type I securities as collateral.

(b) The terms do not include:

- (i) additional funds advanced for a borrower's benefit by a bank for payment of taxes, insurance, utilities, security, and maintenance and operating expenses necessary to preserve the value of real property securing the loan, consistent with safe and sound banking practices, but only if the advance is for the protection of the bank's interest in the collateral, and provided that such amounts must be treated as an extension of credit if a new loan or extension of credit is made to the borrower;
- (ii) accrued and discounted interest on an existing loan or extension of credit, including interest that has been capitalized from prior notes and interest that has been advanced under terms and conditions of a loan agreement;
- (iii) financed sales of a bank's own assets, including other real estate owned, if the financing does not put the bank in a worse position than when the bank held title to the assets;
- (iv) a renewal or restructuring of a loan as a new "loan or extension of credit," following the exercise by a bank of reasonable efforts, consistent with safe and sound banking practices, to bring the loan into conformance with the lending limit, unless new funds are advanced by the bank to the borrower (except in circumstances permitted under 12 CFR 32.3(b)(5)), a new borrower replaces the original borrower, or unless the department singly or in collaboration with the appropriate federal banking agency determines that a renewal or restructuring was undertaken as a means to evade the bank's lending limit;
- (v) amounts paid against uncollected funds in the normal process of collection;
- (vi) with regard to participations:
 - (A) that portion of a loan or extension of credit sold as a participation by a bank on a nonrecourse basis, provided that the participation results in a pro rata sharing of credit risk proportionate to the respective interests of the originating and participating lenders. Where a participation agreement provides that repayment must be applied first to the portions sold, a pro rata sharing will be deemed to exist only if the agreement also provides that, in the event of a default or comparable event defined in the agreement, participants must share in all subsequent repayments and collections in proportion to their percentage participation at the time of the occurrence of the event;
 - (B) when an originating bank funds the entire loan, it must receive funding from the participants before the close of business of its next business day. If the participating portions are not received within that period, then the portions funded will be treated as a loan by the originating bank to the borrower. If the portions so attributed to the borrower exceed the originating bank's lending limit, the loan may be treated as nonconforming subject to the circumstances included in 12 CFR 32.2(q)(2)(vi)(B) rather than a violation if:

- (I) the originating bank had a valid and unconditional participation agreement with one or more participants that was sufficient to reduce the loan to within the originating bank's lending limit;
 - (II) the participant reconfirmed its participation and the originating bank had no knowledge of information that would permit the participant to withhold its participation; and
 - (III) the participation was to be funded by close of business of the originating bank's next business day.
- (12) "Qualifying central counterparty" has the same meaning as the term has in 12 CFR Part 3, Appendix C, Section 2.
- (13) "Qualifying master netting agreement" means any written, legally enforceable bilateral agreement, provided that:
 - (a) the agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default, including bankruptcy, insolvency, or similar proceeding of the counterparty;
 - (b) the agreement provides the bank the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of default of the counterparty, including upon an event of bankruptcy, insolvency, or similar proceeding, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions;
 - (c) the bank has conducted sufficient legal review to conclude with a well-founded basis (and maintains sufficient documentation of that legal review) that:
 - (i) the agreement meets the requirements of (13)(b); and
 - (ii) in the event of a legal challenge (including one resulting from default or from bankruptcy, insolvency, or similar proceedings), the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions;
 - (d) the bank establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of this definition; and
 - (e) the agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it would make otherwise under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement).
- (14) "Securities financing transaction" means a repurchase agreement, reverse repurchase agreement, securities lending transaction, or securities borrowing transaction.
- (15) "Type I securities" means:
 - (a) obligations of the United States;

- (b) obligations issued, insured, or guaranteed by a department or an agency of the United States government, if the obligation, insurance, or guarantee commits the full faith and credit of the United States for the repayment of the obligation;
- (c) obligations issued by a department or agency of the United States government or an agency or political subdivision of a state of the United States, that represent an interest in a loan or a pool of loans made to third parties, if the full faith and credit of the United States have been validly pledged for the full and timely payment of interest on, and principal of, the loans in the event of nonpayment by the third party obligor(s); and
- (d) general obligations of a state of the United States or any political subdivision thereof; and
- (e) municipal bonds if the bank is well capitalized.

Authorizing statute(s): 32-1-211, 32-1-218, 32-1-432, MCA

Implementing statute(s): 32-1-211, 32-1-432, MCA

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