

**DEPARTMENT OF THE TREASURY**

**Office of the Comptroller of the Currency**

**12 CFR Part 7**

**Docket ID OCC–2016–0022**

**RIN 1557-AD93**

**Industrial and Commercial Metals**

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The OCC is proposing to prohibit national banks and federal savings associations from dealing and investing in industrial and commercial metal.

**DATES:** You must submit comments by [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments through the Federal eRulemaking Portal or e-mail, if possible. Please use the title “Industrial and Commercial Metals” to facilitate the organization and distribution of the comments.

You may submit comments by any of the following methods:

- **Federal eRulemaking Portal—“Regulations.gov”:** Go to *www.regulations.gov*. Enter “Docket ID OCC-2016-0022” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments.
- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting public comments.
- **E-mail:** *regs.comments@occ.treas.gov*.
- **Mail:** Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7<sup>th</sup> Street, SW., suite 3E-218, mail stop 9W-11, Washington, DC 20219.
- **Hand Delivery/Courier:** 400 7<sup>th</sup> Street, SW., suite 3E-218, mail stop 9W-11, Washington, DC 20219.

- **Fax:** (571) 465-4326.

Instructions: You must include “OCC” as the agency name and “Docket ID OCC-2016-0022” in your comment. In general, the OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- **Viewing Comments Electronically:** Go to *www.regulations.gov*. Enter “Docket ID OCC-2016-0022” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen and then “Comments.” Comments can be filtered by clicking on “View All” and then using the filtering tools on the left side of the screen.
- Click on the “Help” tab on the Regulations.gov home page to get information on using Regulations.gov. Supporting materials may be viewed by clicking on “Open Docket Folder” and then clicking on “Supporting Documents.” The docket may be viewed after the close of the comment period in the same manner as during the comment period.
- **Viewing Comments Personally:** You may personally inspect and photocopy comments at the OCC, 400 7<sup>th</sup> Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649-6700 or, for persons who are deaf or hard of hearing, TTY, (202) 649-5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

**FOR FURTHER INFORMATION CONTACT:** Casey Scott Laxton, Counsel, Beth Kirby, Assistant Director, or Ted Dowd, Director, Securities and Corporate Practices Division, (202) 649-5510; Carl Kaminski, Special Counsel, Legislative and Regulatory Activities Division, (202) 649-5490.

**SUPPLEMENTARY INFORMATION:**

I. Background

A national bank may engage in activities that are part of, or incidental to, the business of banking under 12 U.S.C. 24(Seventh). Section 24(Seventh) lists several activities that are part of the business of banking; for example, it expressly provides that national banks may buy and sell exchange, coin, and bullion.

In addition to these enumerated powers, section 24(Seventh) authorizes national banks to exercise all such incidental powers as shall be necessary to carry on the business of banking. National banks also are authorized to engage in any other activities not expressly enumerated in the statute that the Comptroller of the Currency reasonably determines are part of the business of banking.<sup>1</sup>

In Interpretive Letter 693,<sup>2</sup> issued approximately twenty years ago, the OCC authorized national banks to buy and sell copper on the grounds that trading copper was becoming increasingly similar to trading gold, silver, platinum, and palladium. The letter observed that copper was traded in liquid markets; that it was traded in a form standardized as to weight and purity; and that the bank seeking authority to engage in the activity traded copper under policies and procedures similar to those that governed trading precious metals. The letter concluded that national banks could buy and sell copper under the express authority to buy and sell coin and bullion and as part of or incidental to the business of banking. The scope of the authorization in Interpretive Letter 693 was sufficiently broad to permit national banks to buy and sell copper in the form of cathodes, which are used for industrial purposes.

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<sup>1</sup> NationsBank of N.C., N.A. v. Var. Ann. Life. Ins. Co., (VALIC) 513 U.S. 251, 258-59 (1995).

<sup>2</sup> 1995 WL 788816 (Nov. 14, 1995).

In this notice of proposed rulemaking, the OCC proposes to prohibit national banks from dealing and investing in a metal (or alloy), including copper, in a form primarily suited to industrial or commercial use (industrial or commercial metal).<sup>3</sup> The proposal: (i) excludes industrial and commercial metals from the terms “exchange,” “coin,” and “bullion” in 12 U.S.C. 24(Seventh); and (ii) provides that dealing or investing in them is not part of, or incidental to, the business of banking. Examples of metals and alloys in a form primarily suited for industrial or commercial use include copper cathodes, aluminum T-bars, and gold jewelry. The OCC does not believe that dealing or investing in these metals is appropriate for national banks. The proposed rule would supersede Interpretive Letter 693.<sup>4</sup>

The proposed rule also applies to federal savings associations (FSA). The Home Owners’ Loan Act does not expressly authorize FSAs to buy or sell exchange, coin, and bullion.<sup>5</sup> FSAs do have incidental authority to buy and sell precious metals in certain cases and to sell gold and silver coins minted by the U.S. Treasury.<sup>6</sup> However, the OCC is not aware of any precedent authorizing FSAs to buy and sell any industrial or commercial metal. The OCC does not interpret FSAs’ incidental powers to buy and sell metals to be broader than those of national banks. To avoid doubt, and to further integrate national bank and FSA regulations, the proposed rule prohibits FSAs from dealing and investing in industrial or commercial metal.<sup>7</sup>

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<sup>3</sup> The OCC considers the definition of industrial or commercial metal to include a warehouse receipt for such metal.

<sup>4</sup> See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005) (agency reconsiderations of prior interpretations entitled to judicial deference so long as the agency adequately explains the reasons for the change).

<sup>5</sup> See 12 U.S.C. 1464(c).

<sup>6</sup> See, e.g., OTS Op. Ch. Couns. P-2006-1 (Mar. 6, 2006), 2006 WL 6195026 (engaging in precious metal transactions on behalf of customers); Gold Bullion Coin Transactions, 51 FR 34950 (Oct. 1, 1986); Letter from Jack D. Smith, Deputy General Counsel, Federal Home Loan Bank Board, 1988 WL 1021651 (May 18, 1988). All precedents (orders, resolutions, determinations, agreements, regulations, interpretive rules, interpretations, guidelines, procedures, and other advisory materials) made, prescribed, or allowed to become effective by the former Office of Thrift Supervision or its Director that apply to FSAs remain effective until the OCC modifies, terminates, sets aside, or supersedes those precedents. 12 U.S.C. 5414(b).

<sup>7</sup> The proposed rule indirectly applies to federal branches and agencies of foreign banks because they operate with the same rights and privileges (and subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations) as national banks. 12 CFR 28.13(a)(1). The proposed rule also indirectly applies to insured state banks and state savings associations. See 12 U.S.C. 1831a, 1831e.

## II. Description of the Proposed Rule

### A. Industrial or commercial metal is not “exchange, coin, and bullion”

As noted above, the National Bank Act authorizes national banks to buy and sell exchange, coin, and bullion. In this notice of proposed rulemaking, the OCC is proposing to exclude from the scope of these terms metals in a form primarily suited to industrial or commercial use.

Banking Circular 58 (BC-58)<sup>8</sup> sets forth general guidelines that apply to national banks’ coin and bullion activities. It defines “coin” as “coins held for their metallic value which are minted by a government, or exact restrikes of such coins minted at a later date by or under the authority of the issuing government.” Contemporaneous OCC interpretive letters elaborated that “coin” referred only to media of exchange.<sup>9</sup> BC-58 defines “bullion” as “uncoined gold or silver in bar or ingot form.” These definitions do not encompass industrial or commercial metal.

Interpretive letters published after BC-58 interpreted national banks’ authority to buy coin and bullion to include other precious metals, namely platinum and palladium. Consistent with BC-58’s definition of “coin,” the OCC in 1987 found that legal tender platinum coins held for their metallic value were “coin.”<sup>10</sup> That same letter prohibited dealing in platinum bars. However, in 1991, the OCC concluded that market developments warranted treating platinum bars as bullion.<sup>11</sup> The OCC also found trading in platinum bars to be incidental to trading in platinum coins.<sup>12</sup> For similar reasons, the OCC

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<sup>8</sup> BC-58 (Rev.) (Nov. 3, 1981). The OCC published the original version in 1974.

<sup>9</sup> Interpretive Letter 326 (Jan. 17, 1985), 1985 WL 202590; Interpretive Letter 252 (Oct. 26, 1982), 1982 WL 54157; Letter from Peter Liebesman, Assistant Director, Legal Advisory Services Division (Feb. 18, 1982), 1982 WL 170844. But see Letter from Richard V. Fitzgerald, Deputy Chief Counsel (Nov. 4, 1983), 1983 WL 145720 (concluding that national banks could purchase and sell the Department of Treasury’s commemorative Olympic coins based on their metallic value even though it was unlikely that the coins would be used as a medium of exchange).

<sup>10</sup> Letter from William J. Stolte, Chief National Bank Examiner (July 29, 1987), 1987 WL 149775.

<sup>11</sup> Interpretive Letter 553 (May 2, 1991), 1991 WL 340660 (noting that (i) the financial press considered platinum coins and bars to be bullion and (ii) a state statute defined “bullion” to include platinum).

<sup>12</sup> Id.

concluded palladium was coin and bullion and national banks could trade and deal in palladium as part of the business of banking.<sup>13</sup> In support of its position, the OCC noted that the London Platinum and Palladium Market had linked platinum and palladium for market making and regulatory purposes and that most of the Market's members were banks.

However, other interpretive letters recognized that not every precious metal is coin or bullion. Jewelry, the OCC determined, is not.<sup>14</sup>

The OCC proposes to conclude that “exchange, coin, and bullion” does not encompass industrial or commercial metal. The OCC believes this conclusion is consistent with the National Bank Act and current market practice. For example, in the mid-19th century, when Congress passed the National Bank Act, “bullion” meant metal suitable for coining, not metal suitable for making wires.<sup>15</sup> The contemporary understanding of “bullion” is broader—most currency is no longer made of precious metal—but the contemporary understanding does distinguish bullion from industrial or commercial metal. For example, modern bullion markets trade precious metals by the kilogram.<sup>16</sup> By contrast, industrial and commercial metals markets trade base metals in quantities suitable for industrial or commercial use.<sup>17</sup> The following table illustrates trading differences between bullion markets and industrial or commercial metal markets.

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<sup>13</sup> Interpretive Letter 685 (Aug. 4, 1995), 1995 WL 550220.

<sup>14</sup> See No-Objection Letter 88-8 (May 26, 1988), 1988 WL 284872 (selling gold and silver jewelry is impermissible general merchandising); Letter from Madonna K. Starr, Attorney (Oct. 3, 1986), 1986 WL 144029 (limited design jewelry is not exchange, coin, or bullion).

<sup>15</sup> See Act of June 22, 1874, 18 Stat. 202 (authorizing the transfer from the U.S. bullion fund of refined gold bars bearing the United States stamp of fineness, weight, and value, or bars from any melt of foreign coin or bullion of standard equal to or above that of the United States); Act of Feb. 12, 1873 § 31, 17 Stat. 429 (The bullion thus placed in the hands of the melter and refiner shall be subjected to the several processes which may be necessary to form it into ingots of the legal standard, and of a quality suitable for coinage.)

<sup>16</sup> See, e.g., London Bullion Market Association, The Good Delivery Rules for Gold and Silver Bars 11 (Mar. 2015), available at [http://www.lbma.org.uk/assets/market/gdl/GD\\_Rules\\_15\\_Final%2020160512.pdf](http://www.lbma.org.uk/assets/market/gdl/GD_Rules_15_Final%2020160512.pdf); London Platinum & Palladium Market, “The London/Zurich Good Delivery List,” <http://www.lppm.com/good-delivery/> (visited July 19, 2016).

<sup>17</sup> The London Metal Exchange (LME) describes itself as the “world centre for the trading of industrial metals—more than three quarters of all non-ferrous metal futures business is transacted on [its] platforms.” LME, “About us,” <http://www.lme.com/about-us> (visited July 19, 2016). The LME trades aluminum, aluminum alloys, copper, lead, nickel, tin, and zinc. LME, “Metals,” <http://www.lme.com/metals> (visited July 19, 2016).

Industrial/Commercial Metal Markets		Bullion Markets	
Contract	Contract Size	Contract	Contract Size
LME physical copper	25,000 kg	LBMA physical gold	350–430 troy oz. (about 11–13 kg)
LME copper future	25,000 kg	LBMA physical silver	750–1100 troy oz. (about 23–34 kg)
COMEX copper future	25,000 lbs. (about 11,340 kg)	LPPM physical platinum	1–6 kg
SHFE copper future	5,000 kg	LPPM physical palladium	1–6 kg
LME physical aluminum	25,000 kg	<b>Key</b> LME: London Metals Exchange COMEX: Commodity Exchange SHFE: Shanghai Futures Exchange LBMA: London Bullion Market Association LPPM: London Platinum & Palladium Market	
LME aluminum future	25,000 kg		
COMEX aluminum future	25,000 kg		
SHFE aluminum future	5,000 kg		

In general, gold, silver, platinum, and palladium are bullion today because they:

- Trade in troy ounces or grams rather than metric tons;<sup>18</sup>
- Trade in pure forms;<sup>19</sup>
- Trade in a form suitable for coining;
- Trade as precious metals in the world’s major organized markets, including the London bullion markets; and
- Are considered currency by the International Organization for Standardization.<sup>20</sup>

Gold, silver, platinum, and palladium in industrial or commercial form are not exchange, coin, or bullion.

<sup>18</sup> See, e.g., Bloomberg, “Gold, Silver, and Industrial Metals Prices,” <http://www.bloomberg.com/markets/commodities/futures/metals>.

<sup>19</sup> See, e.g., London Bullion Market Association, *The Good Delivery Rules for Gold and Silver Bars* 6 (Mar. 2015) (minimum fineness for gold is 99.5 percent and for silver is 99.9 percent); London Platinum & Palladium Market, “The London/Zurich Good Delivery List,” <http://www.lppm.com/good-delivery/> (minimum fineness for platinum and palladium is 99.95 percent).

<sup>20</sup> ISO 4217 (Aug. 1, 2015), available at [http://www.currency-iso.org/dam/downloads/lists/list\\_one.xls](http://www.currency-iso.org/dam/downloads/lists/list_one.xls).

B. Dealing and investing in industrial or commercial metal is neither part of, nor incidental to, the business of banking.

Interpretive Letter 693 concluded that national banks could buy and sell copper (including industrial copper) as a part of or incidental to the business of banking. The OCC has reviewed the bases for the conclusion in Interpretive Letter 693 that buying and selling industrial copper is part of the business of banking, including developments in copper markets that followed this letter. For the following reasons, the OCC now believes that buying and selling copper—or any other metal—in industrial or commercial form for the purpose of dealing or investing in that metal is not part of the business of banking.

When the OCC issued Interpretive Letter 693 in 1995, the agency noted increasing similarity between transactions involving copper and those transactions already conducted by national banks with respect to gold, silver, platinum and palladium (precious metals). This increasing similarity informed the OCC's view at that time that buying and selling copper, including dealing and investing, was part of the business of banking. However, copper markets have not increased in similarity to precious metal markets.<sup>21</sup> Instead, as noted in detail above, copper is generally traded as a base metal.<sup>22</sup>

The OCC believes that dealing and investing in industrial or commercial metals, including base and precious metals in this form, is not the functional equivalent of dealing and investing in coin and bullion. The paradigmatic example of functional equivalence is that a lease is in economic substance a secured loan.<sup>23</sup> But the significant differences between dealing in industrial or commercial metals and

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<sup>21</sup> Events subsequent to Interpretive Letter 693 have confirmed copper's status as a base metal. In 2000, the LME introduced a future on a base metal index containing copper, aluminum, lead, nickel, tin, and zinc. Then, in 2006, it introduced "mini" futures for copper, aluminum, and zinc. Similarly, many firms have launched exchange-traded funds (ETFs) that invest solely in gold, silver, palladium, platinum, or some combination thereof, indicating a widespread belief that these metals are a store of value. However, there is no copper ETF. Finally, the OCC understands that national banks that trade copper treat it as a base metal and trade it alongside aluminum and zinc rather than gold and silver.

<sup>22</sup> See generally U.S. Senate Permanent Subcommittee on Investigations, Wall Street Bank Involvement with Physical Commodities 364 (2014) (identifying banks, trading firms, analysts, and exchanges that treat copper as a base metal for trading and risk management purposes).

<sup>23</sup> See M&M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377 (9th Cir. 1977).

dealing in coin and bullion demonstrate that the former is not, in economic substance, the same as the latter. Most importantly, industrial and commercial metals trade in base metal markets by the ton in cathode or other industrial form, while coin and bullion trade in precious metal markets by the troy ounce or kilogram in bar or ingot form. In addition, banks' risk management systems distinguish between precious metals and base metals.

The OCC has also considered other factors identified in relevant precedent for determining whether dealing in or investing in industrial or commercial metal is part of the business of banking.<sup>24</sup> The OCC does not believe that analysis under these factors supports a conclusion at this time that this activity is part of the business of banking. For example, the OCC has not seen evidence that this activity strengthens a bank by benefiting its customers or its business.<sup>25</sup> Nor is the OCC aware of any state-chartered banks dealing in or investing in industrial or commercial metal.<sup>26</sup> Indeed, the OCC has not identified any precedent authorizing that activity for state banks.

As described above, under 12 U.S.C. 24(Seventh), a national bank has the power to exercise all such incidental powers as shall be necessary to carry on the business of banking. An activity is incidental to the business of banking if it is convenient or useful to an activity that is part of the business of banking.<sup>27</sup>

The OCC believes that dealing and investing in industrial or commercial metal is not incidental to the business of banking. Some customers may wish to trade industrial or commercial metal with national banks. However, because few banks buy or sell industrial or commercial metal in the ordinary course of

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<sup>24</sup> See, e.g., *Merchants' Nat'l Bank v. State Nat'l Bank*, 77 U.S. 604, 648 (1871) (holding that national banks could certify checks because the activity had "grown out of the business needs of the country.").

<sup>25</sup> Currently, national banks' dealing and investments in industrial or commercial metal are limited, suggesting that the business needs of the United States economy are not meaningfully affected by national banks' dealing in industrial or commercial metal. Nor is there evidence that the amount of revenue from industrial or commercial metal dealing and investing meaningfully improve national banks' financial strength. In any case, the prospect for additional revenue alone is not sufficient to deem an activity to be part of the business of banking. See VALIC, 513 U.S. at 258 n.2. See also No-objection Letter 88-8 (May 26, 1988), 1988 WL 284872 (concluding that it is impermissible for a national bank to make substantial profits from the sale of merchandise).

<sup>26</sup> See *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41, 49-50 (1940).

<sup>27</sup> Interpretive Letter 1071 (Sept. 6, 2006), 26 OCC Q.J. 46, 2007 WL 5122909 (citing *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 431-32 (1st Cir. 1972)).

business, it does not appear that dealing or investing in industrial or commercial metal significantly enhances national banks' ability to offer banking products and services, including those related to precious metals. Moreover, dealing and investing in industrial or commercial metal does not appear to enable national banks to use capacity acquired for banking operations or otherwise avoid economic loss or waste. Therefore, the OCC concludes national banks may not deal or invest in industrial or commercial metal under their incidental powers.

C. Transactions in industrial or commercial metal that may be permissible.

National banks do have incidental authority to buy and sell industrial or commercial metal in limited cases. Buying or selling industrial or commercial metal could be incidental to lending activities. For example, a mining company could post a copper cathode as collateral for a loan. Pursuant to the national bank's authority to acquire property in satisfaction of debt previously contracted, the bank could seize and then sell the copper to mitigate loan losses if the borrower defaulted.<sup>28</sup> National banks also have incidental authority to buy and sell nominal amounts of industrial or commercial metal to hedge customer-driven commodity derivatives.<sup>29</sup> The proposed rule would not prohibit these purchases and sales because they are not dealing or investing.<sup>30</sup>

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<sup>28</sup> Cf. Cooper v. Hill, 94 F. 582 (8th Cir. 1899) (foreclosure of a mine); First Nat'l Bank of Parker v. Peavy Elevator Co., 10 S.D. 167, 170 (1897) (foreclosure of grain seed and subsequent sale).

<sup>29</sup> Interpretive Letter 684 (Aug. 4, 1995), 1995 WL 550219; OCC Bulletin 2015-35, Quantitative Limits on Physical Commodity Transactions (Aug. 4, 2015) (explaining that "nominal" means 5 percent of the bank's short positions in a particular commodity).

<sup>30</sup> Cf. First Nat'l Bank v. Nat'l Exch. Bank, 92 U.S. 122, 128 (1875) ("In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in Fleckner v. Bank U.S., 8 Wheat. 351 [22 U.S. 338 (1823)], where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions.").

Similarly, national banks may buy and sell industrial or commercial metal as part of their leasing business. 12 U.S.C. 24(Seventh); 12 U.S.C. 24(Tenth); 12 CFR 23.4. A car, for example, contains metal in a commercial form, but buying a car to lease it is not dealing or investing in commercial metal. Rather, a lease, like a reverse repurchase transaction, is a secured loan in a different form. National banks may also buy and sell industrial or commercial metals to install pipes and electrical wiring in their physical premises. 12 U.S.C. 29(First); 12 CFR 7.1000. This activity is clearly not dealing or investing in industrial or commercial metal.

The OCC views national banks' lending authority<sup>31</sup> as including buying and selling industrial or commercial metal under reverse repurchase agreements that are the functional and economic equivalent of secured loans. As described below, a standard reverse repurchase agreement for metal used to provide financing to a bank customer ordinarily does not indicate dealing or investing in the metal. However, the OCC notes that the facts and circumstances of a particular transaction may warrant a different conclusion. For example, to the extent a reverse repurchase agreement or related activity is structured in a way that causes a bank to incur commodity price risk or indicates market speculation, the OCC may view the transaction to be dealing or investing in the metal.

In a reverse repurchase agreement, a bank extends credit by simultaneously buying collateral from a client and agreeing to sell the collateral back to the client at a future date. The difference between the sale and purchase price is effectively the interest the client pays for the extension of credit. If the reverse repurchase agreement counterparty defaults, the bank can mitigate its losses by selling the collateral without first foreclosing on it. Financing customer inventory is a traditional bank activity; using reverse repurchase agreements rather than loans to provide the financing is merely a different way of providing financing.<sup>32</sup> Financing customer inventory using reverse repurchase agreements in itself does not indicate dealing or investing in the metal. However, pledging, selling, or rehypothecating metal acquired under reverse repurchase agreements suggests dealing or investing activity. So, too, does assuming commodity price risk. For example, an agreement in which the counterparty sells a metal at a certain price to the bank and then repurchases the metal at a price that depends on the metal's then-current market price indicates dealing or investing activity: the bank is assuming the metal's price risk. On the

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<sup>31</sup> See 12 U.S.C. 24(Seventh) (stating that discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt and loaning money on personal security are part of the business of banking).

<sup>32</sup> Under the National Bank Act, credit exposures from repurchase and reverse repurchase agreements are loans and extensions of credit subject to a national bank's lending limits. 12 U.S.C. 84(b)(1)(C). See also Letter from Charles F. Byrd, Assistant Director, Legal Advisory Services Division, [1978-1979 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,020 (Aug. 30, 1977) (repurchase and reverse repurchase agreements are extensions of credit subject to 12 U.S.C. 82 (repealed by Garn–St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, § 402)).

other hand, setting the repurchase price at the sale price plus a spread based on the time value of money is equivalent to a secured loan.

The OCC invites comment on the treatment of reverse repurchase agreements under the proposed rule. In particular, the OCC seeks comment on whether reverse repurchase agreements that do not present commodity price risk for a bank and do not indicate market speculation are appropriately viewed to not indicate dealing or investing in metal. The OCC also seeks comment on whether there are forms of reverse purchase agreements or related activities that warrant a determination that the activity is dealing or investing in metal. If so, should the OCC include such agreements in the final rule's dealing or investing prohibition?

The proposal does not prohibit national banks from buying and selling metal through transitory title transfers entered into as part of a customer-driven financial intermediation business.<sup>33</sup> Metal owned through a transitory title transfer typically does not entail physical possession of a commodity; the ownership occurs solely to facilitate the underlying transaction and lasts only for a moment in time. For these reasons, the OCC does not consider transitory title transfers to be dealing or investing in industrial or commercial metal for purposes of this proposal. Interpretive Letter 1073<sup>34</sup> provides that national banks may hedge metal derivative transactions on a portfolio basis with over-the-counter derivative transactions that settle in cash or transitory title transfer. Interpretive Letter 1073 also provides that a national bank may engage in transitory title transfers in metals for the accommodation of customers. The OCC concluded in Interpretive Letter 1073 that transitory title transfers involving metals do not entail the physical possession of commodities.<sup>35</sup> The OCC's analysis in this letter noted that transitory title transfers

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<sup>33</sup> For purposes of this proposal, the OCC considers a transitory title transfer to be back-to-back contracts providing for the receipt and immediate transfer of title to the metal. This means that a bank holds title to the metal for no more than a legal instant. See Interpretive Letter 962 (Apr. 21, 2003), 2003 WL 21283155 (“[T]ransitory title transfers preclude actual delivery by passing title down the chain from the initial seller to the ultimate buyer in a series of instantaneous back-to-back transactions. Each party in the chain has title for an instant but does not take actual physical delivery (other than the ultimate buyer which, in no case, will be the Bank.”)).

<sup>34</sup> 26 OCC Q.J. 46, 2007 WL 5122911 (Oct. 19, 2006).

<sup>35</sup> See also OCC Bulletin 2015-3 (Aug. 4, 2015) (noting that a physical commodity that a bank acquired and then immediately sold by transitory title transfer would not be included in the bank's physical inventory of that commodity).

do not involve the customary activities relating to, or risks attendant to, commodity ownership, such as storage costs, insurance, and environmental protection. The OCC continues to believe that transitory title transfers do not constitute physical possession of commodities and therefore does not consider transitory title transfers to be dealing or investing in industrial or commercial metal for purposes of this proposal.<sup>36</sup>

Notwithstanding the above, the OCC may consider alternative approaches for transitory title transfers in the final rule if it determines that these transactions present risks similar to holding physical metal. The OCC invites comment on whether it should continue to view transitory title transfers as transactions that do not entail physical possession of a commodity. In particular, the OCC seeks comment on whether transitory title transfers involving metals present risks that warrant treating such transactions as physical holdings. If so, then the prohibition on dealing and investing in industrial or commercial metal would apply to metals bought or sold by transitory title transfer.<sup>37</sup>

### III. Request for Comment

The OCC invites comment on all aspects of this proposal, including the questions in part II.C of this Supplementary Information.

In addition, the OCC requests comment on the appropriate treatment of existing holdings of industrial or commercial metal. In other contexts, the OCC provides five years to divest nonconforming assets, with the possibility of a five-year extension. Are there reasons a similar approach would not work here? Are there compelling reasons to grandfather existing holdings indefinitely?

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<sup>36</sup> In contrast to transitory title transfers, the OCC considers a commodity held by warehouse receipt for more than a legal instant to entail physical possession of the commodity. See OCC Bulletin 2015-3 (“[A] bank that satisfies certain conditions may engage in physical commodity transactions (for example, by buying or selling title to a commodity via a warehouse receipt or bill of lading) to manage the risks of commodity derivatives.”); Interpretive Letter 684 (August 4, 1995), 1995 WL 550219 (recognizing physical possession of a commodity by warehouse receipt). The OCC notes that the customary activities relating to, or risks attendant to, commodity ownership by warehouse receipt are distinguishable from those involving transitory title transfer. For example, Interpretive Letter 684 provides that the OCC expects a bank engaged in physical commodity hedging, either through warehouse receipt or “pass-through” delivery, to adopt and maintain “safeguards designed to manage the risks associated with storing, transporting, and disposing of commodities of which the bank has taken delivery, including policies and procedures designed to ensure that the bank has adequate levels of insurance (including insurance for environmental liabilities) which, after deductions, are commensurate with the risks assumed.”

<sup>37</sup> The OCC notes that even if it determines that a transitory title transfer entails physical possession of a commodity, national banks engaged in a customer-driven financial intermediation business could still enter into such transactions under the proposal, provided the transaction is a hedge and is nominal.

#### IV. Regulatory Analysis

##### **Paperwork Reduction Act**

Under the Paperwork Reduction Act, 44 U.S.C. 3501–3520, the OCC may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid Office of Management and Budget (OMB) control number. This notice of proposed rulemaking does not introduce any new collections of information, therefore, it does not require a submission to OMB.

##### **Regulatory Flexibility Act**

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), requires an agency, in connection with a proposed rule, to prepare an Initial Regulatory Flexibility Analysis describing the impact of the proposed rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include banking entities with total assets of \$550 million or less) or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities.

As of December 31, 2015, the OCC supervised 1,032 small entities.<sup>38</sup> Although the rule applies to all OCC-supervised small entities, and thus affects a substantial number of small entities, no small entities supervised by the OCC currently buy or sell metal in a physical form primarily suited to commercial or industrial use for the purpose of dealing or investing in that metal. Thus, the rule will not have a substantial impact on any OCC-supervised small entities.

Therefore, the OCC certifies that the proposed rule would not have a significant economic impact on a substantial number of OCC-supervised small entities.

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<sup>38</sup> The OCC calculated the number of small entities using the SBA’s size thresholds for commercial banks and savings institutions, and trust companies, which are \$550 million and \$38.5 million, respectively. Consistent with the General Principles of Affiliation, 13 CFR 121.103(a), the OCC counted the assets of affiliated financial institutions when determining whether to classify a national bank or federal savings association as a small entity. The OCC used December 31, 2015, to determine size because a “financial institution’s assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.” See footnote 8 of the SBA’s Table of Size Standards.

### **Unfunded Mandates Reform Act of 1995 Determination**

The OCC analyzed the proposed rule under the factors set forth in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532). Under this analysis, the OCC considered whether the proposed rule includes a federal mandate that may result in the expenditure by state, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (adjusted annually for inflation).

Although the proposed rule would apply to all OCC-supervised institutions, very few of these institutions are currently involved in activities involving dealing or investing in copper or other metals in a physical form primarily suited to commercial or industrial use.

While the proposed rule may prevent OCC-supervised institutions from realizing potential gains from prohibited investments in physical metals, the proposed rule also may protect them from realizing potential losses from investments in physical metals. The OCC is not able to estimate these potential gains or losses because they will depend on future fluctuations in the prices of the various physical metals. However, the OCC does expect OCC-supervised institutions to be able to achieve comparable returns in alternative non-prohibited investment opportunities. Thus, the OCC estimates that the opportunity cost of the proposed rule will be near zero.

The proposed rule may impose one-time costs on affected institutions with respect to the disposal of current physical metal inventory that a bank may not deal in or invest in under the rule. This cost will depend to some extent on the amount of physical metal inventory that affected institutions must dispose of. However, a gradual sell-off should not affect market prices and the affected institutions would receive fair value for their metals. Under these circumstances, the OCC estimates that the disposal costs will also be minimal.

Finally, by establishing that buying and selling physical metal in commercial or industrial form is generally not part of the business of banking, the rule implies that customers of OCC-supervised institutions will have to identify another reliable source of supply of physical metals and that OCC-supervised institutions will be less able to compete with non-bank metals dealers. Given how technology

has made the physical metals markets more accessible, the OCC expects bank customers will face minimal costs associated with identifying another supplier of physical metals. The OCC also expects that losing the ability to compete with non-bank metal dealers will not significantly detract from the strength of OCC-supervised institutions, especially given that the proposed rule would recognize several business-of-banking exceptions to the prohibition on buying and selling physical metal.

For the reasons described above, the OCC has determined that the proposed rule would not result in expenditures by state, local, and Tribal governments, or by the private sector, of \$100 million or more. Accordingly, the OCC has not prepared a written statement to accompany the proposed rule.

#### **List of subjects in 12 CFR Part 7**

Banks, banking, computer technology, credit, federal savings associations, insurance, investments, metals, national banks, reporting and recordkeeping requirements, securities, surety bonds.

For the reasons set forth in the preamble, OCC proposes to amend 12 CFR part 7 as follows:

#### **PART 7—BANK ACTIVITIES AND OPERATIONS**

1. The authority citation for part 7 is amended to read as follows:

**Authority:** 12 U.S.C. 1 et seq., 25b, 71, 71a, 92, 92a, 93, 93a, 371, 371a, 481, 484, 1463, 1464, 1818, and 5412(b)(2)(B).

2. Add § 7.1022 to read as follows:

#### **§ 7.1022 National banks' authority to buy and sell exchange, coin, and bullion.**

(a) In this section, industrial or commercial metal means metal (including an alloy) in a physical form primarily suited to industrial or commercial use, for example, copper cathodes.

(b) Scope of authorization. Section 24(Seventh) of the National Bank Act authorizes national banks to buy and sell exchange, coin, and bullion. Industrial or commercial metal is not exchange, coin, and bullion within the meaning of this authorization.

(c) Buying and selling metal as part of or incidental to the business of banking. Section 24(Seventh) authorizes national banks to engage in activities that are part of, or incidental to, the business

of banking. Buying and selling industrial or commercial metal for the purpose of dealing or investing in that metal is not part of or incidental to the business of banking pursuant to section 24(Seventh).

(d) Other authorities not affected. This section shall not be construed to preclude a national bank from acquiring or selling metal in connection with its incidental authority to foreclose on loan collateral, compromise doubtful claims, or avoid loss in connection with a debt previously contracted. This section also shall not be construed to preclude a national bank from buying and selling physical metal to hedge a derivative for which that metal is the reference asset so long as the amount of the physical metal used for hedging purposes is nominal.

3. Add § 7.1023 to read as follows:

**§ 7.1023 Federal savings associations, prohibition on industrial or commercial metal dealing or investing.**

(a) In this section, industrial or commercial metal means metal (including an alloy) in a physical form primarily suited to industrial or commercial use, for example, copper cathodes.

(b) Federal savings associations may not deal or invest in industrial or commercial metal. Federal savings associations may not buy or sell industrial or commercial metal if the purchase or sale is impermissible for a national bank.

[THIS SIGNATURE PAGE RELATES TO THE NOTICE OF PROPOSED RULEMAKING TITLED  
“INDUSTRIAL AND COMMERCIAL METALS.”]

**Dated:** September 7, 2016

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Thomas J. Curry, Comptroller of the Currency.