



DEPARTMENT OF THE TREASURY

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Office of the Comptroller of the Currency

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Industrial and Commercial Metals

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

ACTION: Final rule.

SUMMARY: The OCC is finalizing a rule to prohibit national banks and federal savings associations from dealing or investing in industrial or commercial metals.

DATES: This final rule is effective April 1, 2017.

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SUPPLEMENTARY INFORMATION:

I. Background

In September 2016, the OCC issued a Notice of Proposed Rulemaking (NPRM) to prohibit national banks from dealing or investing in industrial or commercial metals.¹ The OCC proposed to: (i) exclude industrial and commercial metals from the terms “exchange,” “coin,” and “bullion” in the “powers clause” of the National Bank Act at 12 U.S.C. 24(Seventh); and (ii) provide that dealing or investing in industrial or commercial metal is not part of, or incidental to,

¹ 81 FR 63428 (Sept. 15, 2016).

the business of banking. The proposed prohibitions were generally consistent with recommendations made by the U.S. Senate Permanent Subcommittee on Investigations in 2014,² as well as recommendations described in a September 2016 report to the U.S. Congress and the Financial Stability Oversight Council (FSOC) prepared by the OCC, the Board of Governors of the Federal Reserve System (“Board”), and the Federal Deposit Insurance Corporation pursuant to section 620 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).³

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.⁴

² “Wall Street Bank Involvement with Physical Commodities,” U.S. Senate Permanent Subcommittee on Investigations, *available at*: <http://www.hsgac.senate.gov/download/report-wall-street-involvement-with-physical-commodities> (“PSI Report”).

³ “Report to Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act,” at 86-90 (September 2016), *available at*: <https://www.occ.gov/news-issuances/news-releases/2016/nr-ia-2016-107a.pdf> (“620 Study”). Section 620 of the Dodd-Frank Act required the federal banking agencies to conduct a study and prepare a report, including recommendations, on the types of activities and investments permissible for banking entities, the associated risks, and how banking entities mitigate those risks. In a parallel action, the Board also issued a proposed rule in September 2016. The proposed Board rule addressed the physical commodities activities and investments of banking holding companies and financial holding companies, including copper. *Risk-Based Capital and Other Regulatory Requirements for Activities of Financial Holding Companies Related to Physical Commodities and Risk-Based Capital Requirements for Merchant Banking Investments*, 81 FR 67220 (Sept. 30, 2016).

⁴ *NationsBank of N.C., N.A. v. Var. Ann. Life. Ins. Co. (VALIC)*, 513 U.S. 251, 258-59 (1995).

In Interpretive Letter 693,⁵ issued approximately twenty-one 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 the bank's trading of 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.

In the NPRM, the OCC proposed to reconsider the interpretation set forth in Interpretive Letter 693.

Now, the OCC is finalizing the NPRM and revising its regulations 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).⁶ The OCC has added a divestiture period to the final rule, provided clarifying language to the dealing and investing prohibition for national banks, and clarified federal savings associations' (FSA) authority to engage in activity that is not dealing or investing, but is otherwise finalizing the NPRM as proposed. The final rule: (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 industrial or commercial metal 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

⁵ 1995 WL 788816 (Nov. 14, 1995).

⁶ The OCC considers the definition of industrial or commercial metal to include a warehouse receipt for such metal.

use include copper cathodes, aluminum T-bars, and gold jewelry. For the reasons stated in this preamble, the OCC has concluded that dealing or investing in these metals is not appropriate for national banks. The final rule supersedes Interpretive Letter 693.⁷

The final rule also applies to FSAs. The Home Owners' Loan Act does not expressly authorize FSAs to buy or sell exchange, coin, and bullion.⁸ While FSAs 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, the OCC has not identified any precedent authorizing FSAs to buy and sell any industrial or commercial metal.⁹ The OCC does not interpret FSAs' powers to buy and sell metals to be broader than those of national banks.¹⁰ To avoid doubt, and to further integrate national bank and FSA regulations, the final rule prohibits FSAs from dealing or investing in industrial or commercial metal.¹¹

II. Summary of the Comments on the Notice of Proposed Rulemaking

The OCC received four comments on the NPRM. Two comments were from financial industry trade associations and two were from individuals. While the comments generally were

⁷ 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); *Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983) (“agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’”).

⁸ See 12 U.S.C. 1464(c).

⁹ 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).

¹⁰ See OTS Op. Ch. Couns. P-2006-1 (Mar. 6, 2006), 2006 WL 6195026 (permissibility of FSA metal activity is evaluated under a four-part test referencing the activities of national banks).

¹¹ The final 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 final rule also indirectly applies to insured state banks and state savings associations. See 12 U.S.C. 1831a, 1831e.

supportive of the NPRM, the trade association commenters requested that the OCC confirm the permissibility of certain lending and leasing transactions involving physical metals and expressed concern about the potential impact of the rulemaking on the liquidity of the copper market. A detailed discussion of the commenters' concerns and the OCC's response follows.

A. Prohibition on Dealing and Investing for Industrial and Commercial Metal (Including Copper)

Two commenters offered general views on the proposed dealing and investing prohibition for industrial and commercial metal, including copper, under the proposed rule. One was generally supportive of the NPRM's treatment of copper cathodes as an industrial and commercial metal. This commenter noted the proposal was consistent with banks' treatment of copper, as banks currently buy and sell copper based on its value for industrial and commercial purposes rather than as a store of value. The commenter also offered additional support for the rulemaking, noting that banks that own copper are exposed to large fluctuations in copper prices, encounter potential conflicts of interest between house positions and client positions, and may be able to manipulate copper markets through large physical positions. This commenter asserted that the proposed treatment is appropriate because bank copper trading activities more closely resemble commercial enterprises rather than a banking business. The commenter pointed to the PSI Report and 620 Study to support these comments.

The second commenter expressed concern that the OCC has not demonstrated a compelling reason to change its 1995 copper interpretation. The commenter argued that the reasons the OCC approved copper activities in Interpretive Letter 693 are still valid today and that the OCC should not pursue the rulemaking in the absence of a compelling need or corresponding regulatory benefit. After carefully considering these comments, the OCC continues to believe that dealing or investing in copper cathodes, and other industrial or

commercial metal, is not appropriate for national banks. As the OCC explained in the NPRM, events subsequent to Interpretive Letter 693 have confirmed copper is a base metal and thus, should be distinguished from precious metals that are not held in industrial or commercial form.¹² For example, in 2000, the London Metals Exchange (“LME”) introduced a futures contract on a base metal index containing copper, aluminum, and zinc.¹³ In 2006, the LME followed with “mini” futures for copper, aluminum and zinc. By contrast, 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. The OCC notes there are no copper ETFs. In addition, 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. Finally, the OCC considered the issues and risks identified in the PSI Report with respect to physical copper.¹⁴ The commenter’s observations do not negate the information provided in the NPRM and these facts demonstrate that the OCC has adequately described its reasons for changing its 1995 interpretation.

B. Physical Holdings

The preamble to the NPRM explained that the OCC did not consider the proposed rule to prohibit national banks from buying or selling metal through a transitory title transfer entered into as part of a customer-driven financial intermediation business.¹⁵ The OCC explained that 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

¹² 81 FR 63430, n.21.

¹³ The LME describes itself as “the world centre for industrial metals trading.” See <https://www.lme.com/>.

¹⁴ See, e.g., PSI Report at 362-396.

¹⁵ 81 FR 63431.

a moment in time. However, the OCC invited comment on whether transitory title transfers involving metals present risks that warrant treating such transactions as physical holdings.

Three commenters addressed transitory title transfers. Two commenters generally supported the OCC's proposed treatment of transitory title transfers. One of these commenters agreed with the assertion in the NPRM that there is no physical possession of the metal in transitory title transfers. This commenter noted that the risks of legal liability typically associated with physical commodity positions are not present in transitory title transfers and that these transactions more closely resemble customer-driven, cash-settled commodity derivatives than physical positions. Another commenter also supported the treatment of transitory title transfers, but suggested the final rule text should limit transitory title transfers to customer-driven financial intermediation transactions that are part of the business of banking. A third commenter disagreed that transitory title transfers are different from dealing and investing in physical metal just because the bank holds the metal for a legal instant. As discussed in detail below, the OCC continues to believe that transitory title transfers do not entail physical possession of industrial and commercial metals. The OCC also notes that relevant precedent already provides that transitory title transfers must be part of a customer-driven financial intermediation business.¹⁶ Therefore, the OCC is finalizing the rule as proposed.

In addition to addressing transitory title transfers, one of the commenters also requested that the OCC confirm that interests in unallocated metal accounts are not physical holdings under the final rule. The commenter identified various activities in which national banks are engaged that could involve an interest in an unallocated metals account. The OCC notes that these activities are fact specific, and determinations about fact-specific activities need to be evaluated

¹⁶ Interpretive Letter 1073, 26 OCC Q.J. 46, 2007 WL 5122911 (Oct. 19, 2006).

on a case-by-case basis. Therefore, the OCC believes it is appropriate to address the applicability of the final rule to these activities on a case-by-case basis. National banks with questions regarding the permissibility of transactions that involve unallocated metals accounts should discuss the issue with the OCC. The OCC is willing to entertain requests for such determinations, consistent with its historical practice of providing interpretive opinions in cases where there is doubt about the permissibility of particular activities.

C. Reverse Repurchase Agreements

The NPRM explained that the OCC views national banks' lending authority to include reverse repurchase agreements that are the functional and economic equivalent of secured loans.¹⁷ Banks may use commodity reverse repurchase agreements to finance customer inventory.¹⁸ Using a standard reverse repurchase agreement for metal to provide financing for a bank customer rather than a traditional bank loan ordinarily does not indicate dealing or investing in the metal. However, the NPRM noted that the facts and circumstances of a particular transaction may warrant a different conclusion. For example, if a bank incurs commodity price risk or pledges, sells, or rehypothecates metal acquired under reverse repurchase agreements, the NPRM provided that the OCC may view the transaction to be dealing or investing in the metal. The OCC invited comment on the treatment of reverse repurchase agreements under the proposed rule.

Two commenters addressed the treatment of reverse repurchase agreements. One suggested the OCC prohibit all reverse repurchase agreements where there is commodity market or liquidity risk. This commenter wrote that a prohibition is a better approach than a facts and circumstances review in light of limited OCC resources. The other commenter asserted that OCC

¹⁷ 81 FR 63431.

¹⁸ 12 CFR 211.4(a)(7).

should confirm that these types of reverse repurchase agreements are permissible activities not affected by the rule. This commenter noted that the reuse of the collateral is a long-standing practice in asset-based financing and therefore pledging, selling, or rehypothecating metal owned under a reverse repurchase agreement should not be viewed as indicia of dealing activity.

The OCC continues to have concerns that reverse repurchase agreements that involve commodity price risk or that involve pledging, selling, or rehypothecating metal could be structured in some circumstances in a manner that constitutes dealing or investing activity. The OCC recognizes, as a commenter suggested, that banks may enter into hedges to mitigate price risk that exists at the conclusion of certain reverse repurchase agreements and may pledge collateral for the purpose of funding its customer financing activities. Structuring a transaction in these ways could, in some circumstances, reduce indicia of investing or dealing activity. However, the OCC does not believe it is appropriate to conclude that all reverse repurchase agreements that involve commodity price risk or pledging, etc. of collateral are permissible. Therefore, the OCC continues to believe that it is appropriate to evaluate reverse repurchase agreements that involve commodity price risk or pledging, etc. of collateral on a facts and circumstances basis, as appropriate. This approach will allow the OCC an opportunity to evaluate transactions in context and to consider relevant facts before reaching a determination as to whether a transaction involves dealing or investing. The OCC is therefore declining to make the changes the commenters have requested.

D. Other Permissible Transactions

The proposed rule identified two incidental authorities under which acquiring and selling metal would remain permissible for national banks: first, collateral foreclosure activities

designed to mitigate loan losses;¹⁹ second, nominal physical hedges of customer-driven commodity derivatives. The OCC also explained in the preamble to the NPRM that a bank may buy and sell metal in conjunction with certain leasing authorities.²⁰

One commenter addressed the proposed treatment of nominal hedging activities. This commenter suggested that the OCC require banks to disclose hedging amounts to the OCC. This commenter also suggested that the OCC require the hedge be designed to reduce risk in order to prevent commodity speculation. The OCC notes that it monitors bank hedging activity through its regular course of bank supervision. Additionally, banks that engage in commodity hedging activities already must do so in accordance with applicable law, including requirements that the hedge be designed to reduce risk.²¹ For these reasons, the OCC does not believe that the changes this commenter suggested are necessary.

Another commenter asked that the OCC modify the final rule to expressly permit certain metals-based financing activities. The commenter described several metal leasing and metal consignment transactions. As explained in the NPRM and below, banks may not buy and sell industrial or commercial metal for the purposes of dealing or investing in that metal. However, banks may continue to buy and sell industrial or commercial metal under other incidental authorities that do not involve dealing or investing. To the extent a bank proposes to engage in a metals-based transaction that presents an interpretive issue(s) under the authorities provided for in 12 U.S.C. 24(Seventh), the OCC will address permissibility on a facts and circumstances basis. The OCC may issue interpretive analysis, as appropriate.

¹⁹ 81 FR 63433.

²⁰ 81 FR 63431.

²¹ See, e.g., Interpretive Letter 684 (Aug. 4, 1995) 1995 WL 550219; OCC Bulletin 2015-3 (Aug. 4, 2015); 12 CFR 44.3(b) and 44.5(a) (Volcker Rule requirement that hedges be designed to reduce or otherwise significantly mitigate one or more specific identifiable risks).

E. Existing Holdings

The OCC solicited comment in the NPRM on the treatment of existing holdings of industrial and commercial metals. Specifically, the OCC asked whether five years to divest non-conforming assets, with the possibility of a five-year extension, would be an appropriate period of time. The OCC also asked whether there were compelling reasons to grandfather existing industrial and commercial metal holdings indefinitely.²²

Two commenters addressed the issue of existing holdings of industrial and commercial metal. One commenter argued industrial and commercial metal held before the conformance date should be grandfathered because doing so would limit negative effects on copper markets and bank customers. This commenter also asked that the text of the rule include a minimum of five years to conform to the prohibition, arguing this would minimize the impact of the rule. Another commenter did not support allowing the banks additional time to divest their physical metals holdings.

National banks do not currently engage in significant dealing or investing activities in relation to physical industrial and commercial metal. Nor do national banks currently hold significant stores of industrial and commercial metal. Therefore, the OCC finds no compelling reason to grandfather existing activities. However, the OCC does believe that a short divestiture period would be appropriate. Given national banks' limited industrial and commercial metal activities, the OCC concludes that a full five-year divestiture period is not necessary. The OCC is therefore including a provision in the final rule that requires national banks to divest existing holdings of industrial and commercial metal acquired through dealing or investing activities as

²² 81 FR 63432.

soon as practicable, but not later than one year from the effective date of the rule.²³ This provision enables the OCC to grant up to four separate one-year extensions of this divestiture period if the bank has made a good faith effort to dispose of the metal and the bank's retention of the metal is not inconsistent with its safe and sound operation. The OCC notes that the approach of granting a divestiture period with the possibility of an extension is consistent with the OCC's treatment of other types of nonconforming assets.²⁴ This divestiture provision applies only to existing holdings; national banks may not acquire additional holdings of industrial and commercial metal through dealing or investing activities during, or after, the divestiture period.

F. Impact of the Rule

Three commenters discussed the impact of the proposed rule. Two commenters noted, very generally, that they expect the rule to increase cost for customers if finalized as proposed. One of these commenters also suggested the proposal would have a negative impact on the copper market as a whole, asserting that the costs of the rule will not be minimal. This commenter also argued there would be no regulatory benefit to this prohibition. Another commenter said the NPRM would reduce financial risk and conflicts of interests for banks while also allowing the OCC to impose limits on copper and other industrial and commercial metals.

As noted above, national banks do not currently engage in significant dealing or investing activities in relation to physical industrial and commercial metal. Because these markets tend to be highly competitive, we expect that the removal of OCC-supervised institutions as just one class of potential investors / dealers will not have a material effect on these markets.

Furthermore, as explained in more detail below, national banks may continue to buy and sell

²³ The final rule provides a divestiture period for both national banks and FSAs. The OCC does not expect that a divestiture period will be necessary for FSAs and most national banks. However, in order to ensure an orderly asset liquidation process for all institutions that hold metal subject to this prohibition, the divestiture provision is available to both national banks and FSAs.

²⁴ See, e.g., 12 U.S.C. § 29 (holding period for other real estate owned).

industrial and commercial metal under certain incidental authorities. The OCC expects these limited permissible activities will allow banks to continue to serve customers with interests in commercial and industrial metals in capacities that do not involve dealing or investing activities.

III. Description of the Final 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 final rule, the OCC is interpreting these terms to exclude metals in a form primarily suited to industrial or commercial use.

Banking Circular 58 (BC-58)²⁵ 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.²⁶ 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.”²⁷ That same letter prohibited dealing in platinum bars. However, in 1991, the OCC concluded that market developments warranted treating platinum

²⁵ BC-58 (Rev.) (Nov. 3, 1981). The OCC published the original version in 1974.

²⁶ 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).

²⁷ Letter from William J. Stolte, Chief National Bank Examiner (July 29, 1987), 1987 WL 149775.

bars as bullion.²⁸ The OCC also found trading in platinum bars to be incidental to trading in platinum coins.²⁹ For similar reasons, the OCC concluded palladium was coin and bullion and national banks could trade and deal in palladium as part of the business of banking.³⁰ 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.³¹

The OCC has long concluded 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.³² 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.³³ By contrast, industrial and commercial metals markets trade base metals in

²⁸ 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).

²⁹ Id.

³⁰ Interpretive Letter 685 (Aug. 4, 1995), 1995 WL 550220.

³¹ 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).

³² 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.”).

³³ 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; London Platinum &

quantities suitable for industrial or commercial use.³⁴ In general, gold, silver, platinum, and palladium are bullion today because they:

- Trade in troy ounces or grams rather than metric tons;³⁵
- Trade in pure forms;³⁶
- 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.³⁷

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

B. Dealing or 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 has determined that buying and selling

Palladium Market, “The London/Zurich Good Delivery List,” <http://www.lppm.com/good-delivery/> (visited July 19, 2016).

³⁴ The 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).

³⁵ See, e.g., Bloomberg, “Gold, Silver, and Industrial Metals Prices,” <http://www.bloomberg.com/markets/commodities/futures/metals>.

³⁶ 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).

³⁷ ISO 4217 (Aug. 1, 2015), available at http://www.currency-iso.org/dam/downloads/lists/list_one.xls.

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, or incidental to, the business of banking. However, copper markets have not increased in similarity to precious metal markets.³⁸ Instead, as noted in detail above, copper is generally traded as a base metal.³⁹

The OCC believes that dealing or investing in industrial or commercial metals, including base and precious metals in this form, is not the functional equivalent of dealing or investing in coin and bullion. The paradigmatic example of functional equivalence is that a lease is in economic substance a secured loan.⁴⁰ But the significant differences between dealing in industrial or commercial metals and 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.

³⁸ 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 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.

³⁹ See generally PSI Report at 364 (2014) (identifying banks, trading firms, analysts, and exchanges that treat copper as a base metal for trading and risk management purposes).

⁴⁰ See *M&M Leasing Corp. v. Seattle First Nat’l Bank*, 563 F.2d 1377 (9th Cir. 1977).

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.⁴¹ The OCC does not believe that analysis under these factors supports a conclusion 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.⁴² Nor is the OCC aware of any state-chartered banks dealing in or investing in industrial or commercial metal.⁴³ Indeed, the OCC has not identified any precedent authorizing that activity for state banks. Such activity would suggest dealing or investing in commercial metals may be part of the business of banking.

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.⁴⁴

The OCC believes that dealing or 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 business, it does not appear that dealing or investing in industrial or commercial metal significantly enhances national banks' ability to offer banking

⁴¹ 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.").

⁴² Currently, national banks' dealing and investments in industrial or commercial metal are limited, suggesting that the business needs of the U.S. 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).

⁴³ See *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41, 49-50 (1940).

⁴⁴ 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)).

products and services, including those related to precious metals. Moreover, dealing or 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.⁴⁵ National banks also have incidental authority to buy and sell nominal amounts of industrial or commercial metal to hedge customer-driven commodity derivatives.⁴⁶ The final rule does not prohibit these purchases and sales because they are not dealing or investing.⁴⁷

⁴⁵ *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).

⁴⁶ Interpretive Letter 684 (Aug. 4, 1995) (permitting physical delivery of commodities as hedges for customer-driven, non-speculative transactions), 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). The final rule explicitly provides that national banks may continue to buy and sell physical metal to hedge a derivative. A similar provision is not necessary for FSAs because they do not engage in this activity. See 620 Study at 88; OCC Bulletin 2015-35, n. 1.

⁴⁷ *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

In certain situations, national banks may buy and sell industrial and commercial metal as reverse repurchase agreements that are the functional and economic equivalent of secured loans.⁴⁸ 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.⁴⁹ 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 could suggest dealing or investing activity. So, too, could 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 could indicate dealing or investing activity: the bank is assuming the metal's price risk and, in some circumstances, could act to benefit from spot market price appreciation of the metal. On the 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 determination of

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.

⁴⁸ See 12 CFR 211.4(a)(7)

⁴⁹ 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). We note that Section 610 of the Dodd-Frank Act expanded the definition of "loans and extensions of credit" for purposes of lending limits to include credit exposure arising from repurchase agreements and reverse repurchase agreements, among other transactions. The OCC amended its lending limits regulation, 12 CFR 32, to implement the statutory change made by the Dodd-Frank Act.

whether a reverse repurchase agreement that varies from this secured loan structure is dealing or investing is highly dependent upon the facts of each transaction. National banks with questions regarding the permissibility of reverse repurchase agreements that involve characteristics identified in this discussion should discuss the issue with the OCC. The OCC is willing to entertain requests for such determinations, consistent with its historical practice of providing interpretive opinions in cases where there is doubt about the permissibility of particular activities.

The final rule 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.⁵⁰ Interpretive Letter 1073⁵¹ 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.⁵² The OCC's analysis in this letter noted that transitory title transfers do not involve the customary activities relating to, or risks attendant to, commodity ownership, such as storage costs, insurance, and environmental protection. For these reasons, OCC believes that transitory title transfers do not constitute physical possession of commodities and therefore

⁵⁰ For purposes of the final rule, 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.”)).

⁵¹ 26 OCC Q.J. 46, 2007 WL 5122911 (Oct. 19, 2006).

⁵² See also OCC Bulletin 2015-35 (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).

does not consider transitory title transfers to be dealing or investing in industrial or commercial metal for purposes of the final rule.⁵³ The OCC recognizes that banks may have questions about the permissibility of specific transitory title transfer transactions. The fact-specific nature of these issues merits a case-by-case review to determine the permissibility of the transaction. The OCC will continue to review requests for interpretive opinions on the permissibility of individual transactions proposed by a bank. Should the OCC become aware of additional risks that suggest transitory title transfer activity presents risks more closely akin to the risks of physical metal holdings, the OCC may reconsider the treatment of transitory title transfer transactions.

D. Divestiture period.

The final rule prohibits banks from dealing or investing in industrial or commercial metal. However, in response to a request from a commenter, the final rule provides a divestiture period for banks that acquired industrial or commercial metal through dealing or investing in that metal before the effective date of the rule.⁵⁴ Under the divestiture provision, banks must dispose of such metal as soon as practicable, but not later than one year from the effective date of the regulation. The OCC may grant up to four separate one-year extensions of this divestiture period for a national bank that makes a good faith effort to dispose of the metal and the bank's retention

⁵³ 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 2015-35 (“[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 (Aug. 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.”

⁵⁴ The final rule provides a divestiture period for both national banks and FSAs. The OCC does not expect that a divestiture period will be necessary for FSAs and most national banks. However, in order to ensure an orderly liquidation process for all institutions that hold metal subject to this prohibition, the divestiture provision is available to both national banks and FSAs.

of the metal is not inconsistent with its safe and sound operation. The divestiture provision applies only to existing holdings; national banks may not acquire additional holdings of industrial and commercial metal through dealing or investing activities during, or after, the divestiture period.

This divestiture period is generally consistent with the OCC's approach to other nonconforming assets. Banks with questions about the permissibility of activities or holdings involving industrial or commercial metal should ask the OCC for a review of the specific holding or activity.

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 final rule 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 final rule, to prepare a Final Regulatory Flexibility Analysis describing the impact of the 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 rule will 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.⁵⁵ 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 final rule will not have a significant economic impact on a substantial number of OCC-supervised small entities.

Unfunded Mandates Reform Act of 1995 Determination

The OCC analyzed the final 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 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 final 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 final rule may prevent OCC-supervised institutions from realizing potential gains from prohibited investments in physical metals, the 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

⁵⁵ 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 FSA 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.

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 final rule will be near zero.

The final 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. Given the divestiture period in the final rule, 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 final rule would recognize several business-of-banking incidental exceptions to the prohibition on buying and selling physical metal. These permissible activities should enable OCC-supervised institutions to continue to provide metals related services to bank customers that do not involve dealing or investing in commercial and industrial metals.

For the reasons described above, the OCC has determined that the final 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 final 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 amends 12 CFR part 7 as follows:

PART 7—ACTIVITIES AND OPERATIONS

1. The authority citation for part 7 is revised 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 subpart A 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). Accordingly, national banks may not acquire industrial or commercial metal for purposes of dealing or investing.

(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.

(e) Nonconforming holdings. National banks that hold industrial or commercial metal as a result of dealing or investing in that metal shall dispose of such metal as soon as practicable, but not later than one year from the effective date of this regulation. The OCC may grant up to four separate one-year extensions to dispose of industrial or commercial metal if a national bank makes a good faith effort to dispose of the metal and retention of the metal for an additional year is not inconsistent with the safe and sound operation of the bank.

3. Add § 7.1023 to subpart A 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.

(c) Other authorities not affected. This section shall not be construed to preclude a federal savings association from acquiring or selling metal in connection with its authority to foreclose

on loan collateral, compromise doubtful claims, or avoid loss in connection with a debt previously contracted.

(d) Nonconforming holdings. Federal savings associations that hold industrial or commercial metal as a result of dealing or investing in that metal shall dispose of such metal as soon as practicable, but not later than one year from the effective date of this regulation. The OCC may grant up to four separate one-year extensions to dispose of industrial or commercial metal if a federal savings association makes a good faith effort to dispose of the metal and retention of the metal for an additional year is not inconsistent with safe and sound operation of the association.

Dated: December 15, 2016

Thomas J. Curry, Comptroller of the Currency.

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