Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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 November 14, 2016.

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 email, 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 “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.
- View Comments Electronically: You may review comments 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.
- Viewing Comments Electronically: You may review comments and other supporting 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.
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- View Comments Electronically: You may personally inspect and photocopy comments at the OCC, 400 7th 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) 649–5597. 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.1

In Interpretive Letter 693,2 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.

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

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 coinage, not metal suitable for making wires. 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. By contrast, industrial and commercial metals markets trade base metals in quantities suitable for industrial or commercial use. The following table illustrates trading differences between bullion markets and industrial or commercial metal markets.

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<th>Industrial/Commercial Metal Markets</th>
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<td>LME physical copper</td>
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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.24 Instead, as noted in detail above, copper is generally traded as a base metal.25

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.26 But the significant differences between dealing in industrial or commercial metals and dealing in coin can 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.27 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. Nor is the OCC aware of any state-chartered banks dealing in or investing in industrial or commercial metal.28 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.29 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 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 the national banks to use capacity acquired for banking operations or otherwise avoid economic

24 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.”).

25 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).


27 Interpretive Letter 1071 (Sept. 6, 2006), 26 OCC Q.J., 46, 2807 WL 5122909 (citing Arnold Tours, Inc. v. Camp, 472 F.2d 427, 431–32 [1st Cir. 1972]).
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. National banks also have incidental authority to buy and sell nominal amounts of industrial or commercial metal to hedge customer-driven commodity derivatives. The proposed rule does not prohibit these purchases and sales because they are not dealing or investing.

The OCC views national banks’ lending authority 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. 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 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. 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 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. 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. The OCC concludes 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 metal.


30 Cf. First Nat’l Bank v. Nat’l Exch. Bank, 92 U.S. 122, 128 (1876) (in remiss 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.


33 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 21281155 (“[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.”)).


35 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).
title transfers to be dealing or investing in industrial or commercial metal for purposes of this proposal.\textsuperscript{36}

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.\textsuperscript{37}

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?

\textsuperscript{36} 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 (\textquotedbl{}[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.\textquotedbl{}); 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.

\textsuperscript{37} 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

\textbf{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.

\textbf{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.\textsuperscript{38} 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.

\textbf{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 subpart A to read as follows:

§ 7.1022 National bank 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 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. Federal savings associations may not buy or sell industrial or commercial metal if the purchase or sale is impermissible for a national bank.

Dated: September 7, 2016

Thomas J. Curry, Comptroller of the Currency.

[FR Doc. 2016–22017 Filed 9–14–16; 8:45 am] BILLING CODE 4810–33–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39


RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 787–8 and 787–9 airplanes. This proposed AD was prompted by a report indicating that a portion of the sealant above the engine pylon between the wing skin and the vapor barrier may have been omitted. This proposed AD would require an inspection for missing sealant in the seal on the outside and inside of the engine struts, and corrective actions if necessary. We are proposing this AD to detect and correct missing sealant above the engine pylon between the wing skin and the vapor barrier, which can create an unintended leak path for fuel, potentially draining onto the aft fairing heat shield above the engine and onto hot engine parts or brakes, which could lead to a major ground fire.

DATES: We must receive comments on this proposed AD by October 31, 2016.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

• Federal eRulemaking Portal: Go to http://www.regulations.gov. Follow the instructions for submitting comments.

• Fax: 202–493–2251.


• Hand Delivery: Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.


Examining the AD Docket

You may examine the AD docket on the Internet at http://www.regulations.gov by searching for and locating Docket No. FAA–2016–9075; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the ADDRESSES section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT:


SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about